

Dated as of July 9, 2010

REGIONAL TRANSPORTATION DISTRICT

AND

DENVER TRANSIT PARTNERS, LLC

**CONCESSION AND LEASE
AGREEMENT**

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THIS CONCESSION AND LEASE AGREEMENT (this *Agreement*) is dated as of July 9, 2010 and made

BETWEEN:

- (1) **REGIONAL TRANSPORTATION DISTRICT**, a public body politic and corporate and political subdivision of the State of Colorado, organized and existing under the terms of the Regional Transportation District Act, Section 32-9-101 *et seq.*, Colorado Revised Statutes, as amended (*RTD*); and
- (2) **DENVER TRANSIT PARTNERS, LLC**, a limited liability company organized and existing under the laws of the State of Delaware (the *Concessionaire*).

RTD and the Concessionaire are hereinafter sometimes referred to individually as a *Party* and collectively as the *Parties*.

WHEREAS:

(A) RTD has developed a public transportation expansion plan for the Denver metropolitan area in the State of Colorado (the *FasTracks Plan*), including the construction and operation of certain commuter rail lines.

(B) RTD has determined that (i) the design and construction of the Commuter Rail Projects and the Commuter Rail Maintenance Facility, (ii) the procurement and installation of the DUS Systems, (iii) the procurement of the Rolling Stock, (iv) the operation of the Commuter Rail Services and the operation and maintenance of the Commuter Rail Network and the Rolling Stock and (v) from the later of the Actual DUS Access Date and the Guaranteed DUS Access Date, the dispatch of all Heavy Rail Movements (the *Eagle Project*) are to be carried out by a private sector party through the grant by RTD of a concession and lease in relation to the Eagle Project.

(C) RTD has determined that the Eagle Project furthers RTD's statutory purpose, which statutory purpose includes, pursuant to Section 32-9-101 *et seq.*, Colorado Revised Statutes, construction and operation of a fixed guideway mass transit system in the Denver metropolitan area, which is essential, a matter of statewide concern and is necessary for economic development, commerce and air pollution reduction priorities in the Denver metropolitan area and the wider region in the State of Colorado, and RTD further acknowledges its intent to take all steps necessary to effect the Eagle Project as an integral part of such development and other priorities.

(D) RTD further acknowledges that, subject to the prior liens described herein, all revenues available to RTD, including sales tax revenues in the amounts of 0.6% for RTD's general use and 0.4% for the FasTracks Plan and such other revenues as the Board may designate from time to time, constitute the source of funds for RTD's payment obligations hereunder.

(E) RTD issued Request for Proposals No. 18FH012 on September 30, 2009 (as subsequently amended by addenda thereto, the *RFP*) in relation to the Eagle Project, pursuant to which the Concessionaire submitted a final proposal to RTD (the *Concessionaire's Proposal*) attached hereto as Attachment 19 (*Concessionaire's Proposal*).

(F) The Concessionaire's Proposal was accepted by RTD pursuant to the terms and conditions set out in the RFP.

(G) This Agreement and the further agreements referred to herein set out or, as the case may be, will set out the terms and conditions pursuant to which the Concessionaire will implement the Eagle Project in consideration for the payments to be made by RTD to the Concessionaire under this Agreement.

NOW, THEREFORE, in consideration of their mutual undertakings and agreements hereunder, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties to this Agreement undertake and agree as follows:

PART 1 – DEFINITIONS AND INTERPRETATION

1. DEFINITIONS AND INTERPRETATION

Definitions

1.1 Except as otherwise specified herein or as the context may otherwise require, the following terms have the respective meanings set forth below for all purposes of this Agreement.

2004 Approval has the meaning given to it in Section 30.3 (*TABOR Portion*).

2006 FasTracks Indenture means the Indenture of Trust dated as of October 1, 2006, as amended, between RTD and the RTD Trustee.

2007 FasTracks Indenture means the Indenture of Trust dated as of May 1, 2007, as amended, between RTD and the RTD Trustee.

404 Permit means:

- (a) for the East Corridor, Department of the Army Permit No. NWO-2007-3750-DEN (404 Permit) dated February 16, 2010, a copy of which is attached as Annex 1 to Attachment 5 (*RTD Permits*);
- (b) for the Gold Line, the RTD FasTracks Gold Line Commuter Rail Project, Rail Alignment and Roadway Impacts Nationwide Permit No. 14 (Corps File No. 200680390) issued pursuant to a letter dated February 27, 2009 from the Department of the Army to RTD, a copy of which is attached as Annex 2 to Attachment 5 (*RTD Permits*); and
- (c) for the Northwest Rail Electrified Segment, the RTD FasTracks Northwest Rail (NWR) Project, Phase 1 Nationwide Permit No. 14, Department of the Army (DA) Permit #NWO-200-80771-DEN dated April 1, 2010, a copy of which is attached as Annex 4 to Attachment 5 (*RTD Permits*),

in each case (a), (b) and (c) as amended from time to time and issued by the Secretary of the Army acting through the Chief of Engineers for the USACE pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1334.

40th Avenue Grade Separation Project has the meaning given to it in Section 1 (*40th Avenue Grade Separation Project*) of Part F (*Third Party Options to the Design/Build Scope*) of Attachment 7 (*Design, Construction and Rolling Stock Requirements*).

AAA means the American Arbitration Association.

Achieved Traction Power Savings Amount means, for any Contract Year after all Commuter Rail Services have achieved the respective Revenue Service Commencement Dates then ended, the amount, expressed in megawatt-hours, equal to the Annual Allowable Amount for such Contract Year minus the Annual Traction Power Amount for such Contract Year.

Actual DUS Access Date means the date on which RTD provides the Concessionaire with Vacant Possession of the DUS Rail Segment Site in accordance with Section 24.4(b).

Actual Insurance Costs has the meaning given to it in Section 34.5(a).

Additional Electrical Power Used or $AEPU_n$ for Contract Year n shall be determined in accordance with the following formula:

$$AEPU_n = EPU_n \times \frac{H_{special}}{H_{scheduled}}$$

where:

EPU_n = the lesser of the Annual Traction Power Amount and the Adjusted Guaranteed Annual Maximum Megawatt-hours;

$H_{special}$ = the number of Car-hours operated or made available for Special Events service in accordance with the Special Events Timetable; and

$H_{scheduled}$ = the number of Car-hours operated or made available for revenue service (not including revenue service for Special Events) in accordance with the Service Plan,

in each case, excluding any Special Events Service provided in respect of a Commuter Rail Service for the period following the Revenue Service Commencement Date for such Commuter Rail Service through to the first January 1 to occur following such Revenue Service Commencement Date.

Additional Land has the meaning given to it in Section 11.4 (*Additional Land*).

Additional TABOR Portion means, for each calendar year, the amount in dollars identified as "Additional TABOR Portion" in the notice delivered by the Concessionaire to RTD pursuant to Section 42.4(c).

Additional TABOR Portion Notice means a notice delivered by the Concessionaire to RTD substantially in the form set out in Table 4 of Part H (*TABOR Secured Payments*) in Attachment 11 (*Service Payments*) which notice complies with the following requirements:

- (a) the column entitled "TABOR Portion" in Table 4 of Part H (*TABOR Secured Payments*) in Attachment 11 (*Service Payments*) shall be entitled "Additional TABOR Portion" in such notice, the column entitled "Secured Principal" in Table 4 of Part H (*TABOR Secured Payments*) in Attachment 11 (*Service Payments*) shall be entitled "Additional Secured Principal" in such notice and the column entitled "Secured Interest" in Table 4 of Part H (*TABOR Secured Payments*) in Attachment 11 (*Service Payments*) shall be entitled "Additional Secured Interest" in such notice;

- (b) the amounts set forth in the columns entitled Additional Secured Principal and Additional Secured Interest shall be such that:
- (i) the Net Effective Interest Rate for the TABOR Portions, the Additional TABOR Portions and all indebtedness issued pursuant to the 2004 Approval does not exceed 7%;
 - (ii) the Net Effective Interest Rate for the TABOR Portions, the Additional TABOR Portions and all indebtedness issued under the 2006 FasTracks Indenture and the 2007 FasTracks Indenture prior to the date hereof pursuant to the 2004 Approval does not exceed 7%;
 - (iii) RTD certifies in writing to the Concessionaire that RTD is able to comply with Section 3.4 of the DUSPA/RTD Funding Agreement at the time of delivery of the notice to RTD pursuant to Section 42.4(c);
 - (iv) each Additional TABOR Portion does not exceed the Maximum Additional TABOR Portion; and
 - (v) the amounts payable for the TABOR Portions, the Additional TABOR Portions and all other indebtedness issued by RTD pursuant to the 2004 Approval do not exceed a principal amount of U.S.\$3,477,000,000, a maximum total repayment cost of U.S.\$7,129,000,000 or a maximum annual repayment cost of U.S.\$309,738,000; and
- (c) the date from which interest referenced in such notice shall accrue shall be specified, which date shall be the date on which such notice is delivered to RTD.

Additional Tax means any sales tax, other than the Sales Tax, which shall have been (a) levied or imposed by the State of Colorado, or by RTD pursuant to state legislative authorization, and in effect at the time of the incurrence by RTD of any proposed additional Senior RTD Debt in accordance with Section 30.3(b)(i), (b) received by RTD or the RTD Trustee for at least 12 consecutive months immediately preceding the incurrence by RTD of such proposed additional Senior RTD Debt, (c) levied or imposed in the District Sales Tax Area on substantially the same transactions or other incidents as the Sales Tax for a period expiring no sooner than the Expiry Date and (d) pledged at RTD's sole discretion, as part of the security for the payment of Senior RTD Debt and included by RTD as part of the RTD Pledged Revenues prior to the certification described in Section 30.3(b).

Adjustable Base Service Payment has the meaning given to it in Section 2 of Part C (*Availability Adjusted Base Service Payment*) in Attachment 11 (*Service Payments*).

Adjusted Guaranteed Annual Maximum Megawatt-hours or **AGAMM_n** for Contract Year n shall be determined in accordance with the following formula:

$$AGAMM_n = (GAMM_{ECn} \times \frac{H_{ECactual}}{H_{ECschedule\ d}}) + (GAMM_{GLn} \times \frac{H_{GLactual}}{H_{GLschedule\ d}}) + (GAMM_{NWESn} \times \frac{H_{NWESactual}}{H_{NWESschedule\ d}})$$

where:

$GAMMh_{ECn}$ = the Guaranteed Annual Maximum Megawatt-hours (EC) multiplied by RS_{EC} ;

$GAMMh_{GLn}$ = the Guaranteed Annual Maximum Megawatt-hours (GL) multiplied by RS_{GL} ;

$GAMMh_{NWESn}$ = the Guaranteed Annual Maximum Megawatt-hours (NWES) multiplied by RS_{NWES} ;

RS_{EC} = for the East Corridor Service, the number of days scheduled for revenue service operation in accordance with, and as stated within, the Service Plan and the Operating Plan divided by 365;

RS_{GL} = for the Gold Line Service, the number of days scheduled for revenue service operation in accordance with, and as stated within, the Service Plan and the Operating Plan divided by 365;

RS_{NWES} = for the Northwest Rail Electrified Segment Service, the number of days scheduled for revenue service operation in accordance with, and as stated within, the Service Plan and the Operating Plan divided by 365;

$H_{ECactual}$ = for the East Corridor Service, the number of Car-hours actually operated or made available for revenue service;

$H_{ECscheduled}$ = for the East Corridor Service, (i) for each Contract Year 2015 through 2019, 101,980 Car-hours and (ii) for each Contract Year 2020 through 2056, 163,187 Car-hours, as such number of Car-hours scheduled for revenue service operation may be revised from time to time in accordance with the Service Plan and the Operating Plan;

$H_{GLactual}$ = for the Gold Line Service, the number of Car-hours actually operated or made available for revenue service;

$H_{GLscheduled}$ = for the Gold Line Service, for each Contract Year 2015 through 2056, 65,923 Car-hours, as such number of Car-hours scheduled for revenue service operation may be revised from time to time in accordance with the Service Plan and the Operating Plan;

$H_{NWESactual}$ = for the Northwest Rail Electrified Segment Service, the number of Car-hours actually operated or made available for revenue service; and

$H_{NWESscheduled}$ = for the Northwest Rail Electrified Segment Service, for each Contract Year 2015 through 2056, 11,479 Car-hours, as such number of Car-hours scheduled for revenue service operation may be revised from time to time in accordance with the Service Plan and the Operating Plan,

in each case, excluding, for each element of the formula set out above, any such element in connection with any Commuter Rail Service for the period following the Revenue Service Commencement Date for such Commuter Rail Service through to the first January 1 to occur following such Revenue Service Commencement Date.

Affected Party has the meaning given to it in Section 39.3 (*Notification and determination of the effect of a Force Majeure Event*).

Affected Portion has the meaning given to it in Section 40.1 (*Damage to the Concessionaire-Operated Components*).

Affiliate of any Person means any entity which directly, or indirectly through one or more intermediaries, Controls, is Controlled by or is under common Control with that Person. For the purposes of Section 45 (*Shareholders*), an Affiliate of a Shareholder will include any investment fund, trust, partnership or equivalent Person managed by an Affiliate of such Shareholder.

Agent Bank means the financial institution from time to time designated as such by the Lenders.

Aggregate Base Annual Service Payment or **ABASP** means, for each year during the Operating Period, the aggregate Base Annual Service Payments for such year, expressed in Base Rate Dollars.

Agreement has the meaning given to it in the Preamble.

Alternative Solution has the meaning given to it in Section 15.6(a)(ii).

Alternative Technical Concept means each alternative technical concept previously approved by RTD in accordance with Section 4.1(f) of Volume I of the RFP and subsequently incorporated in the Concessionaire's Proposal as set forth in Section E (*Alternative Technical Concepts*) of Volume 3 of the Technical Proposal contained in the Concessionaire's Proposal.

Annual Allowable Amount means, for any Contract Year, the Adjusted Guaranteed Annual Maximum Megawatt-hours plus the Additional Electrical Power Used.

Annual Traction Power Amount means, for any Contract Year, the total amount of Traction Power expressed in megawatt-hours.

Applicable Requirements means the requirements of any Law made or of any Permit issued by any Relevant Authority in each case to the extent that the same are applicable to the Concessionaire, the Work, the Concessionaire-operated Components or the Eagle Project, including the Specified Requirements.

Applicable Termination Amount means the Concessionaire Default Amount, RTD Default Amount or the FM Termination Amount, as applicable.

Archaeological Remains means antiquities, fossils, coins, articles of value, precious minerals, cultural artifacts, human burial sites and human remains and other similar remains of archaeological interest discovered on any part of the Sites.

As-Built Schedule has the meaning given to it in Section 2.6.3(f) of Attachment 9 (*Project and Construction Management*).

Asset Register has the meaning given to it in Section 29.10 (*Asset Registers*).

Automatic Passenger Counters has the meaning given to it in Attachment 7 (*Design, Construction and Rolling Stock Requirements*).

Availability Ratio means the "Availability Ratio (AR_{mn})" as determined in accordance with Part D (*Availability Ratio*) of Attachment 11 (*Service Payments*).

Avoidable Costs has the meaning given to it in Section 38.4(b)(b).

Base Annual Service Payment means, for each year during the Operating Period, the "Base Annual Service Payment ($BASP_n$)", expressed in Base Rate Dollars as determined in accordance with Part G (*Base Annual Service Payments*) of Attachment 11 (*Service Payments*).

Base Case Equity IRR means the nominal post-tax Equity IRR (i.e. post-tax with respect to the Concessionaire and pre-tax with respect to its Shareholders or other beneficial owners) set out in the Financial Model as at Financial Close (as updated from time to time to reflect any sharing of reductions in cost in accordance with Section 36.1(f)) and calculated over the period from Financial Close to the Expiry Date.

Base Insurance Costs has the meaning given to it in Section 34.5(a)

Baseline Schedule Rider means, with respect to each Third Party Option, the applicable rider to the Original Baseline Schedule set forth in Appendix C-1 of Section C of Volume 2 of the Technical Proposal contained in the Concessionaire's Proposal.

Base Rate Dollar means the value of Dollars as of the Base Date calculated in accordance with the CPI_{base} where Base Date and CPI_{base} are as defined in Part A (*Definitions*) of Attachment 11 (*Service Payments*).

Beneficial Occupancy has the meaning given to it in Attachment 3 (*The DUS Infrastructure*).

Beneficial Occupancy Requirements has the meaning given to it in Attachment 3 (*The DUS Infrastructure*).

Betterment has, in respect of any Utility, the meaning given to it in the relevant Utility Relocation Agreement.

Bid Insurance Cost means U.S.\$4,701,694.

BNSF Relocation Work means the Work identified in Section 3.5.3 (*Responsibility for BNSF Work on Northwest Rail Electrified Segment*) of Part B (*Infrastructure Requirements*) of Attachment 7 (*Design, Construction and Rolling Stock Requirements*) as Work to be performed by the Concessionaire in accordance with the Railroad Agreements and Sections 3.5.1 (*Design Related to Relocation of BNSF Track and Facilities*) and 3.5.2 (*General Construction Responsibility for BNSF Work*) of Part B (*Infrastructure Requirements*) of Attachment 7 (*Design, Construction and Rolling Stock Requirements*).

Board means the board of directors of RTD.

Bond Year means the 12 months commencing on the second day of November of any calendar year and ending on the first day of November of the next succeeding calendar year.

Business Day means any day that is not a Saturday, Sunday or other day on which commercial banks in Denver are authorized or required by law to remain closed.

Car means a car forming part of the Rolling Stock.

CCD Storm Sewer Drainage Project has the meaning given to it in Section 2 (*CCD Storm Sewer Drainage Project*) of Part F (*Third Party Options to the Design/Build Scope*) of Attachment 7 (*Design, Construction and Rolling Stock Requirements*).

Chairperson has the meaning given to it in Section 50.3(c)(iii).

Change means a change or variation required or proposed in accordance with Section 36 (*Changes*), and may include additions, amendments or reductions to the scope of the Eagle Project and includes any work carried out in connection with and as a result of any Concessionaire Proposed Change or RTD Proposed Change.

Change in Law means the introduction or repeal (in whole or in part) of or amendment, alteration or modification to or change in interpretation of (in each case including, to the extent applicable, by retroactive effect), any Law or standards, practices or guidelines issued or published by any Relevant Authority that are either binding on the Concessionaire or if non-binding on the Concessionaire are both typically complied with in the construction and/or railroad industries and are necessary in order to comply with Good Industry Practice, that occurs on or after 30 days before the Final Proposal Due Date; **provided** that the coming into effect or repeal (in whole or in part) of or amendment, alteration or modification to or change in interpretation of any Law or standards, practices or guidelines issued or published by any Relevant Authority that have been enacted and published as of the date falling 30 days before the Final Proposal Due Date but have not come into effect by such date, shall not constitute a Change in Law.

Change in Law Change has the meaning given to it in Section 37.2(a).

Change in Law Effect has the meaning given to it in Section 37.1(a)(iv).

Change in Law Notice has the meaning given to it in Section 37.1(a).

Claim means any claim, demand, action, proceeding or liability.

Chief Financial Officer means the Chief Financial Officer of RTD or any successor to the functions that are being performed by the Chief Financial Officer as of the date of this Agreement.

Colorado Basic Standards means Regulation No. 41 "The Basic Standards for Ground Water" issued by the Colorado Department of Public Health and Environment Water Quality Control Commission.

Commercial Paper Notes means any Securities that (a) have a stated maturity date which is not more than 270 days after the date of issuance thereof and (b) are designated as Commercial Paper Notes in the resolution authorizing their issuance, but does not include any Credit Facility Obligations relating to such Securities.

Commuter Rail Maintenance Facility or **CRMF** means the commuter rail maintenance facility to be situated on the CRMF Site as described in the Design, Construction and Rolling Stock Requirements.

Commuter Rail Network means the Commuter Rail Projects, the CRMF, the Existing Facilities and, following the Actual DUS Access Date, the DUS Rail Segment and, if the Phase 2 Effective Date fails to occur on or before the Phase 2 Condition Precedent Satisfaction Date, DUS to CRMF, including in each case, subject to Section 11 (*Land*), the Sites.

Commuter Rail Projects means the East Corridor Project and, following the Phase 2 Effective Date, the Gold Line Project and the Northwest Rail Electrified Segment Project.

Commuter Rail Services means the East Corridor Service and, from the Phase 2 Effective Date, the Gold Line Service and the Northwest Rail Electrified Segment Service.

Compensation Agreement means the Compensation Agreement dated May 13, 2010 between RTD, the Initial Fluor Shareholder and Macquarie Capital Group Limited, an Australian company.

Compliant Car has the meaning given to it in Attachment 10 (*O&M Specifications*).

Concessionaire has the meaning given to it in the Preamble.

Concessionaire Change Report has the meaning given to it in Section 36.1(c).

Concessionaire Change Summary has the meaning given to it in Section 36.1(b).

Concessionaire Conditions Precedent means the conditions precedent specified in Sections 5.6(a), 5.6(b), 5.6(c)(ii), 5.6(d), 5.6(f), 5.6(g), 5.6(h), 5.6(i), 5.6(k) and 5.6(m).

Concessionaire Content means all Work Products or components thereof (excluding Concessionaire Tools and Proprietary Designs) developed by the Concessionaire, the Project Contractors or any of their respective Subcontractors in connection with the performance of their obligations under this Agreement and/or the other Project Agreements to which they are a party, including newly developed applications and systems technology.

Concessionaire Default Amount has the meaning given to it in Part A (*Compensation Payable Following Concessionaire Termination Event*) of Attachment 13 (*Compensation Following Termination*).

Concessionaire Design Submittal means each drawing, design, specification, calculation, report, plan, procedure and other items and other information to be submitted in connection with the design of the Commuter Rail Projects and/or the Rolling Stock, including the Final Design Submittals, in accordance with Attachment 7 (*Design, Construction and Rolling Stock Requirements*), the Contract Data Requirements List and the Third Party Agreements.

Concessionaire Financing means the arrangements made or to be made by the Concessionaire for the provision of financing to support the Concessionaire's performance of its obligations in respect of the Eagle Project, including its obligations under this Agreement and the other Project Agreements.

Concessionaire-operated Components means the Commuter Rail Network and the Rolling Stock.

Concessionaire-operated Expansion has the meaning given to it in Section 36.3(a)(ii).

Concessionaire's Proposal has the meaning given to it in the Recitals.

Concessionaire Proposed Change has the meaning given to it in Section 36.1(b).

Concessionaire Relocated Utility means (a) any Utilities located on the Sites that are identified in the Utility Matrix as Utilities that are to be Relocated by the Concessionaire and (b) any Utility (including any Unidentified Utility, but not including any RTD Relocated Utility or any Owner Relocated Utility), the Relocation of which is necessary (i) for the performance of the Work or the operation of the Concessionaire-operated Components or (ii) to address a material hazard to the integrity of such Utility posed by the performance of the Work or the operation of the Concessionaire-operated Components.

Concessionaire's Sustainability Plan has the meaning given to it in Attachment 7 (*Design, Construction and Rolling Stock Requirements*).

Concessionaire's Utility Tracking Report has the meaning given to it in Attachment 20 (*Utilities*).

Concessionaire Termination Event means any of the events listed or described in Section 41.1 (*Concessionaire Termination Events*).

Concessionaire Tools means all business tools, methods or technology, including standardized application tools, system operating technology and software and related Intellectual Property Rights, in each case which are in existence and owned by the Concessionaire, the Project Contractors or any of their respective Subcontractors prior to the date of this Agreement and utilized by the Concessionaire in performing its obligations under this Agreement and the other Project Agreements to which it is a party.

Construction Payments means (a) following the Early Work Effective Date until the Phase 1 Effective Date, the Early Work Construction Payments and (b) following the Phase 1 Effective Date, the Phase 1 Construction Payments together with, following the Phase 2 Effective Date, the Phase 2 Construction Payments and the Phase 2 Financing Cost Payments.

Construction Security means a bond substantially in the form attached as Appendix G to Volume I of the RFP in favor of RTD (or in favor of RTD, the Concessionaire, the Agent Bank and the Design/Build Contractor as multiple obligees) or a letter of credit or other surety (in such form as may be reasonably required by RTD) in a penal amount equal to not less than the greater of (a) 50% of the total Earned Value of the Work scheduled under the Original Baseline Schedule (or, as the case may be, Revised Baseline Schedule) to be performed under the Design/Build Contract and any other contracts entered into by the Concessionaire for construction, erection, repair, maintenance or improvement of any building, road, viaduct, tunnel, excavation or other public works in any calendar year in which such contract is performed and (b) 5% of the total Earned Value for all Work not yet performed under the Design/Build Contract and any other contracts entered into by the Concessionaire for construction, erection, repair, maintenance or improvement of any building, road, viaduct, tunnel, excavation or other public works in any calendar year in which such contract is performed, in each case (x) calculated as of the first day of the calendar year, (y) not including the Phase 1 Work prior to the Phase 1 Effective Date or the Phase 2 Work prior to the Phase 2 Effective Date and (z) in compliance with Section 38-26-106, Colorado Revised Statutes.

Contract Data means all of the Concessionaire Design Submittals, any drawings not included in the foregoing, the O&M Submittals and other Work Products to be prepared by the Concessionaire pursuant to this Agreement and submitted to RTD and any Project Third Party, as the case may be, in accordance with the Contract Data Requirements List.

Contract Data Requirements List or **CDRL** means the requirements for the submission of the Contract Data and provisions relating to procedures and time periods for the review and agreement of Contract Data by RTD and the Project Third Parties set out in Attachment 6 (*Contract Data Requirements*), as such CDRL shall be modified from time to time as agreed between the Parties.

Contract Documents has the meaning given to it in Section 1.3(a).

Contract Year means:

- (a) for the first Contract Year, the period from the date of this Agreement to the last day of the calendar year in which this Agreement was signed;
- (b) for each Contract Year other than the first and last Contract Year, each period of 12 calendar months commencing on January 1; and
- (c) for the last Contract Year, the period from January 1 in the year in which the End Date occurs to the End Date.

Contracts Review Period has the meaning given to it in Section 6.1 (*Verification of Final Drafts of Design/Build Contract and Rolling Stock Supply Contract*).

Control means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a Person, whether through the ability to exercise voting power, by contract or otherwise, and **Controlling** and **Controlled by** have meanings correlative thereto.

CPI has the meaning given to it in Part A (*Definitions*) of Attachment 11 (*Service Payments*).

Credit Facility means any letter or line of credit, policy of bond insurance, surety bond or guarantee or similar instrument (other than a Reserve Fund Insurance Policy) issued by a financial, insurance or other institution and which specifically provides security and/or liquidity in respect of Securities payable from all or a portion of the Sales Tax Revenues.

Credit Facility Obligations means repayment or other obligations incurred by RTD in respect of draws or other payments or disbursements made under a Credit Facility.

Critical Path means, with respect to each Commuter Rail Project, the longest (in terms of time) unbroken chain or path of logically connected activities in the Original Baseline Schedule (or, as the case may be, Revised Baseline Schedule) ending with the Revenue Service Target Date, Revenue Service Deadline Date or Final Completion Deadline Date, as applicable, for such Commuter Rail Project.

CRMF Site means the land, spaces and surfaces as described in Part D (*CRMF Site*) of Attachment 2 (*Description of Sites and Schedules of Site Availability*), as modified or supplemented in accordance with Section 11.3(h).

Cumulative Affordability Limit has the meaning given to it in Volume 1 of the RFP.

Daily Operating Report has the meaning given to it in Attachment 10 (*O&M Specifications*).

day means any period of 24 hours beginning at 12:00 a.m. or as otherwise specified herein.

DBE Goals has the meaning given to it in Part B (*Disadvantaged and Small Business Enterprises Programs*) of Attachment 15 (*Specified Requirements*).

Debarment Regulations means (a) Federal Executive Order no. 12549 (Feb. 18, 1986), (b) Federal Executive Order no. 12689 (Aug. 16, 1989), (c) 31 U.S.C. § 6101 note (Section 2455, Pub. L. 103-355, 108 Stat. 3327) and (d) 49 CFR Part 29 "Governmentwide Debarment and Suspension (Nonprocurement)".

Debt Service Requirements means, for any period, the amount required to pay the principal of and interest on any designated Securities during such period; **provided** that the determination of the Debt Service Requirements of any Securities shall assume the redemption and payment of such Securities on any applicable mandatory redemption dates; and **provided further** that in any computation relating to the issuance of additional Senior RTD Debt required by Section 30.3(c) hereof, there shall be excluded from the computation of Debt Service Requirements any proceeds on deposit in a bond fund or similar fund or account for such Securities constituting capitalized interest.

Demand for Arbitration has the meaning given to it in Section 50.5(a).

Denver Union Station or **DUS** means the station known as "Denver Union Station", which is to serve as a transportation hub for light rail, bus and commuter rail services under the FasTracks Plan.

Department Program has the meaning given to it in Section 8-17.5-101, Colorado Revised Statutes.

Design/Build Contract means the contract for the performance of the Work verified by RTD in accordance with this Agreement and entered into between the Concessionaire and the Design/Build Contractor.

Design/Build Contractor means the design/build contractor (or any replacement or successor) appointed by the Concessionaire to carry out the Work in accordance with Section 22.5 (*Design/Build Contract*) or Section 46 (*Restrictions on Change in Control of the Project Contractors*).

Design/Build Period means the period commencing on the earlier of the Early Work Effective Date and the Phase 1 Effective Date and ending on the date immediately preceding the last Final Completion Date.

Design/Build Period Site Register has the meaning given to it in Section 11.3 (*Site Register and Site Surveys*).

Design/Build Subcontractor means any Subcontractor (of any tier) carrying out any part of the Work during the Design/Build Period.

Design, Construction and Rolling Stock Requirements means the requirements and provisions set out in Attachment 7 (*Design, Construction and Rolling Stock Requirements*).

Designated Credit Agreement means any agreement (excluding any agreement for the provision of Shareholder Loans or with any Equity Bridge Lenders but including Subordinated Debt) executed by the Concessionaire and any Lender under or pursuant to which any financing is or is to be provided to the Concessionaire in relation to the Eagle Project (whether by means of loans, issuance of bonds or other debt instruments, the provision of letters of credit, financial insurance, guarantees, leasehold mortgages, or any other means), and any hedging agreements and, in each case, any security agreements in connection therewith, in each case which is verified in writing by RTD as a Designated Credit Agreement in accordance with Section 6.2 (*Verification of Final Drafts of the Designated Credit Agreements*).

Designated Credit Agreement Event of Default means a default or event of default under a Designated Credit Agreement.

Designated Senior Representative means, in the case of RTD, the General Manager, and in the case of the Concessionaire, the chief executive officer (or equivalent) of the Concessionaire.

Directive Letter has the meaning given to it in Section 36.6 (*Directive Letters*).

Discriminatory Change in Law means:

- (a) a Change in Law, the terms of which apply to:
 - (i) the Eagle Project and either (A) do not apply to other similar private sector surface transportation infrastructure projects in the United States of America or (B) are not of general application;
 - (ii) the Concessionaire or any Project Contractor and do not apply to other Persons; and/or
 - (iii) private sector commuter rail operators or private sector commuter rail construction contractors in the State of Colorado and do not apply to other Persons;
- (b) a determination by the RRB or the STB that any employee of the Concessionaire or the O&M Contractor (other than any Dispatchers) constitutes an "employee" for purposes of either the Railroad Retirement Tax Act, 45 U.S.C. §231 et seq. or the Railroad Unemployment Insurance Act, 45 U.S.C. §351 et seq. (including (i) each such Law as it may be amended, modified or supplemented from time to time, (ii) all regulations and rules pertaining to or promulgated pursuant to each such Law, (iii) the successor to each Law resulting from recodification or similar reorganizing of Laws and (iv) all future Laws pertaining to the same or similar subject matter) **provided**, that the Concessionaire has complied with Section 2.4.7 (*Establishment of the Dispatcher Unit*) of Attachment 10 (*O&M Specifications*); and
- (c) any amendments, alterations, modifications, additions or replacements to or of the Railroad Safety Improvement Act of 2008 with respect to the provisions set forth at 49 USC 20157 and in regulations promulgated thereunder in Positive Train Control Systems, 75 Fed. Reg. 2598 (Jan. 15, 2010) (to be codified at 49 C.F.R. Parts 229, 234, 235 and

236), compliance with which results in additional costs with respect to the implementation of positive train control systems.

Dispatcher has the meaning given to it in Attachment 10 (*O&M Specifications*).

Dispute has the meaning given to it in Section 50.1(a).

Dispute Resolution Panel or **Panel** means the Financial Panel or the Technical Panel referred to in Section 50.3 (*Dispute Resolution Panel*).

Dispute Resolution Procedure means the procedure for the resolution of Disputes set out in Section 50 (*Dispute Resolution Procedure*).

Distribution means:

- (a) whether in cash or in kind, any:
 - (i) dividend or other distribution in respect of share capital;
 - (ii) reduction of capital, redemption or purchase of shares;
 - (iii) payments of any Shareholder Loans (whether of principal, interest, breakage costs or otherwise);
 - (iv) payment, loan, contractual arrangement or transfer of assets or rights to the extent (in each case) it was neither in the ordinary course of business nor on reasonable commercial terms (provided that payments under a Project Agreement shall not be included in the foregoing);
 - (v) the receipt of any other benefit which is not received in the ordinary course of business and on reasonable commercial terms (provided that payments under a Project Agreement shall not be included in the foregoing); or
- (b) the amount of any release of any contingent funding liabilities to Lenders or the Equity Bridge Lenders; **provided** that notwithstanding anything else in this Agreement, a Distribution shall not be a gain for the purposes of any Refinancing Gain to the extent that such Distribution constitutes the release or reduction of any amount, reserve account or contingency when such amount, reserve account or contingency was committed or funded to cover operating, construction or rehabilitation costs in connection with the Eagle Project or to cover the cost of any delay in construction or commencement of operations of the Commuter Rail Projects, including the release or reduction of any maintenance reserve account (or letter of credit established in lieu thereof) below the amount projected for major maintenance or rehabilitation of the Commuter Rail Projects as set forth in the Financial Model as at the Phase 1 Effective Date, or debt service reserve account (or letters of credit established in lieu thereof) below the amount equal to six months debt service payments on the Lenders' Liabilities as set forth in the Financial Model from time to time.

District has the meaning given to it in the Regional Transportation District Act, Section 32-9-101 *et seq.*, Colorado Revised Statutes, as amended.

District Sales Tax Area means the geographic area comprising RTD as described in the RTD Act within which RTD is authorized by Law to levy the Sales Tax.

Dollars or U.S.\$ means lawful money of the United States of America.

DUS As-Built Drawings means the "As-Built Drawings" (as such term is defined in the DUSPA/RTD Agreement) relating to the DUS Infrastructure and made available to RTD by DUSPA pursuant to Section 3.2(c) and Section 3.2(d) of the DUSPA/RTD Agreement.

DUS Claim means ongoing litigation between the Colorado Rail Passenger Association and the Federal Transit Administration regarding the development of Denver Union Station.

DUS Infrastructure has the meaning given to it in Attachment 3 (*The DUS Infrastructure*).

DUS Infrastructure Agreement means the Design-Build Agreement dated April 30, 2009 between DUSPA and the DUS Infrastructure Contractor for the design and/or construction of the DUS Infrastructure.

DUS Infrastructure Contractor means Kiewit Western Co., a Delaware corporation.

DUS Infrastructure Design Documents means the "Design Documents" (as such term is defined in the DUSPA/RTD Agreement) submitted by DUSPA to RTD pursuant to Section 3.2 (a) of the DUSPA/RTD Agreement in connection with the design and construction of the DUS Infrastructure.

DUS Infrastructure Documents means the DUS Infrastructure Design Documents, the DUS As-Built Drawings and the DUS Progress Reports.

DUS Infrastructure Warranties has the meaning given to it in Attachment 3 (*The DUS Infrastructure*).

DUS Progress Reports means the progress reports relating to the DUS Infrastructure and provided by DUSPA to RTD pursuant to Section 3.3(b) of the DUSPA/RTD Agreement.

DUSPA means the Denver Union Station Project Authority, a Colorado non-profit corporation.

DUSPA/RTD Agreement means the DUSPA/RTD Initial Funding, Reimbursement and Project Coordination Agreement dated April 30, 2009 between DUSPA and RTD pertaining to procurement by DUSPA of the design and construction of the DUS Infrastructure under the DUS Infrastructure Agreement, a copy of which is attached as Exhibit 2 to Attachment 3 (*The DUS Infrastructure*).

DUSPA/RTD Funding Agreement means the DUSPA/RTD Funding Agreement to be entered into between DUSPA and RTD, a draft copy of which is attached as Exhibit 3 to Attachment 3 (*The DUS Infrastructure*).

DUS Rail Segment means the heavy and commuter rail segment of Denver Union Station comprising the DUS Rail Segment Site, the DUS Infrastructure and the DUS Systems.

DUS Rail Segment Site means the land, spaces and surfaces on which the DUS Infrastructure is to be constructed, as described in Section 2 of and identified in Annex 1 to Attachment 3 (*The DUS Infrastructure*).

DUS Systems means the communications systems, signaling system and traction electrification system (and all Equipment forming part thereof) to be installed as part of the DUS Rail Segment in accordance with Attachment 7 (*Design, Construction and Rolling Stock Requirements*).

DUS to CRMF means the commuter rail line between the DUS Rail Segment and the CRMF, as described in Attachment 7 (*Design, Construction and Rolling Stock Requirements*).

Eagle Project has the meaning given to it in the Recitals.

Eagle Project Before and After Study Work Plan means the FFGA Before and After Study Work Plan required for the Eagle Project under 49 U.S.C. §5309(g)(i)(2)(c).

Early Work means the performance of all Work required for, carried out or executed in or in relation to or in connection with relocations to be performed by the Concessionaire in accordance with the plans set forth in Appendix 3 (*Final Design Documents for Work on Railroad Property*) of Attachment 7 (*Design, Construction and Rolling Stock Requirements*), such Work to be completed in accordance with such plans and the relevant Railroad Agreements.

Early Work Completion Date has the meaning given to it in Section 5.4(a)(iv).

Early Work Completion Deadline Date is the later of (a) December 31, 2012 and (b) the date 30 months after RTD's delivery of the Early Work Notice to Proceed.

Early Work Completion Requirements has the meaning given to it in Section 5.4(a)(iv).

Early Work Condition Precedent means the condition set out in Section 5.3(a).

Early Work Construction Payment has the meaning given to it in Section 26.1(a)(i)

Early Work Effective Date means the date on which the Early Work Condition Precedent is satisfied or waived in accordance with this Agreement.

Early Work Effective Provisions has the meaning given to it in Section 5.2(a).

Early Work Insurance Requirements means the insurance requirements set forth in Part B (*Early Work Insurance Requirements*) of Attachment 26 (*Early Work Provisions*).

Early Work Notice to Proceed means a written notice in which RTD notifies the Concessionaire that the Early Work Effective Date has occurred for purposes of this Agreement.

Early Work Warranties means the warranties provided by the Concessionaire with respect to the Early Work in accordance with Section 5.4(a)(i), as set forth in Part A (*Early Work Warranties*) of Attachment 26 (*Early Work Provisions*).

Earned Value means the Concessionaire's budgeted cost of work performed as set forth in the Original Baseline Schedule (or, as the case may be, the Revised Baseline Schedule) and the Schedule of Values.

East Corridor means the commuter rail line between the DUS Rail Segment and Denver International Airport, as described in Attachment 19 (*Concessionaire's Proposal*).

East Corridor Facilities means the stations and park-n-Ride facilities on the East Corridor, as described in Attachment 19 (*Concessionaire's Proposal*).

East Corridor Project means the East Corridor Facilities, the Equipment forming part of the East Corridor and the other Work to be designed, constructed, operated and maintained on the East Corridor Site as part of the East Corridor in accordance with the Project Requirements and otherwise pursuant to this Agreement.

East Corridor Service means the commuter rail service to be provided by the Concessionaire in accordance with the requirements of Attachment 10 (*O&M Specifications*) on the East Corridor.

East Corridor Site means the land, spaces and surfaces as described in Part A (*East Corridor Site*) of Attachment 2 (*Description of Sites and Schedules of Site Availability*), as modified or supplemented in accordance with Section 11.3(h).

Encumbrance means any mortgage or deed of trust, lien, pledge, hypothecation, assignment, deposit arrangement, security interest, charge, preference, easement or encumbrance or any other agreement or arrangement having substantially the same economic effect.

Endangered Species means any animal or plant wildlife listed as endangered under and subject to an endangered species Law.

End Date means the Expiry Date, or if earlier, the Termination Date.

Environment means the physical conditions which exist within the area which will be affected by a proposed project, including land, air (including that within the Concessionaire-operated Components or buildings or natural or man-made structures), water (including territorial, coastal and inland waters and ground water and drain and sewer water), minerals, flora, fauna, noise, and objects of historic or aesthetic significance, and **Environmental** has a meaning correlative thereto.

Environmental Clean-up Work has the meaning given to it in Section 12.2(c).

Environmental Condition means the presence, on, in or under any Site, of Hazardous Material (or environmental media contaminated with Hazardous Material) and/or the presence on, in or under any adjacent off-Site area of Hazardous Materials (or environmental media contaminated with Hazardous Material) that shall have migrated to or from the Site, at concentration levels:

- (a) at which a Relevant Authority requires investigation, removal, remedial action or off-site disposal or management of such Hazardous Material as a hazardous or solid waste;
- (b) which exceed Colorado Basic Standards for groundwater or residential risk-based soil or indoor air screening levels or screening levels protective of groundwater established or adopted by the Colorado Department of Public Health and Environment, the Colorado Department of Labor and Employment Division of Oil and Public Safety, or the United States Environmental Protection Agency, or exceed naturally-occurring or background concentrations, if such levels are greater than such standards or residential risk-based screening levels or screening levels protective of groundwater; or

- (c) which would require additional personnel protective equipment, medical monitoring, off-site disposal or training in excess of two hours to comply with applicable Law governing the management, remediation, or disposal of such Hazardous Material.

Environmental Condition Bid Report means a report with respect to any Environmental Condition requiring Environmental Clean-up Work in which the following is set out in a reasonable level of detail:

- (a) the Environmental Condition to which the report relates, including the quantity of materials that require Environmental Clean-up Work;
- (b) the exact nature of the Environmental Clean-up Work to be performed in the form of a remedial plan that has been prepared in accordance with Good Industry Practice; and
- (c) the time period within which such Environmental Clean-up Work must be completed.

Environmental Condition Clean-up Report means a report with respect to any Environmental Condition requiring Environmental Clean-up Work in which the following is set out in a reasonable level of detail:

- (a) the Environmental Condition to which the report relates, including the quantity of materials that require Environmental Clean-up Work;
- (b) the estimated not to exceed costs that the Concessionaire reasonably expects to incur (the labor, material and equipment elements of which have been estimated on the basis set out in the RTD Pricing Conditions, but without any additional margin or markup by the Concessionaire), and all necessary supporting calculations and information including detailed particulars of additional sums to be paid to the Subcontractors and professional advisers;
- (c) the completion date for such Environmental Clean-up Work;
- (d) any additional Permits required to be obtained; and
- (e) the identity of the Subcontractor(s) which the Concessionaire intends to engage for the purpose of implementing such Environmental Clean-up Work.

Environmental Reports means:

- (a) the East Corridor Phase I Environmental Site Assessment dated March 2007;
- (b) the Final Modified Phase I Environmental Site Assessment for Gold Line FEIS RTD FasTracks Program dated May 29, 2008;
- (c) the Summary of Phase I Environmental Site Assessments: RTD FasTracks Gold Line, Denver, Colorado, dated January 2010;
- (d) the Summary of Phase I Environmental Site Assessments: RTD FasTracks Commuter Rail Maintenance Facility, Denver, Colorado, dated January 6, 2010;

- (e) the East Corridor Phase II Environmental Site Assessment dated September 2009, as supplemented by the addendum thereto dated November 2009;
- (f) the Phase II Environmental Site Assessment, UPRR Right-of-Way Acquisition East Corridor, Denver and Adams Counties, Colorado, dated March 2009;
- (g) the Summary of Phase II Environmental Site Assessments: RTD FasTracks Gold Line Corridor dated March 2010;
- (h) the CRMF Phase II Environmental Site Assessment dated December 2009;
- (i) the Supplemental Summary of Recognized Environmental Conditions, East Corridor Commuter Rail Transit Alignment, Denver and Adams Counties, Colorado, dated December 18, 2009;
- (j) the Supplemental Summary of Recognized Environmental Conditions, FasTracks Gold Line Station Locations, dated January 27, 2010; and
- (k) the Supplemental Summary of Recognized Environmental Conditions, CRMF, dated January 11, 2010.

Environmental Requirements has the meaning given to it in Section 13.1 (*Environmental Requirements*).

Equipment means all equipment and software used in or forming part of the Concessionaire-operated Components, including:

- (a) all equipment and software set out in the Asset Registers;
- (b) all equipment (including test equipment) and tools used in the operation and maintenance of the Concessionaire-operated Components;
- (c) all cables, expendable parts, spare parts and materials; and
- (d) all Contract Data produced in connection with the design, construction, operation and/or maintenance of the Concessionaire-operated Components.

Equity Bridge Lenders means the credit or financial institutions which are from time to time parties to or have rights under any agreement pursuant to which they agree to provide finance facilities to be repaid from the proceeds of Equity Commitments or Shareholder Loans, repayment of which is otherwise guaranteed by the Shareholders.

Equity Commitments means unconditional commitments by the Initial Shareholders to subscribe for share capital in the Concessionaire or to provide Shareholder Loans to the Concessionaire.

Equity IRR means, as of any date of determination, where used for the purpose of calculating a Refinancing Gain, any adjustment to any Service Payment in accordance with Section 38.8 (*Adjustments to the Service Payment*) or the RTD Default Amount in the case of any termination in accordance with Sections 5.13(b) or 5.13(c)(iii), in respect of the Shareholders, the projected nominal rate of return on the Equity Commitment and any Shareholder Loans or other similar finance provided by the Shareholders, calculated as of such date by reference to the Financial

Model over the full term of this Agreement, having regard to Distributions made and projected to be made.

E-Verify Program has the meaning given to it in Section 8-17.5-101, Colorado Revised Statutes.

Existing Facilities means all fixtures, facilities and infrastructure existing on the CRMF Site, the East Corridor Site and, following the Phase 2 Effective Date, the Gold Line Site and the Northwest Rail Electrified Segment Site on the date RTD provides Vacant Possession to the Concessionaire pursuant to Section 11.1 (*Availability of Sites*), which fixtures, facilities and infrastructure have been retained and incorporated into the Commuter Rail Network in accordance with the Agreement.

Exempt Refinancing means:

- (a) a change in taxation or a change in accounting treatment;
- (b) the exercise of rights, waivers, consents and similar actions in respect of the Designated Credit Agreements which relate to day to day administrative and supervisory matters, and which are in respect of:
 - (i) a breach of representations and warranties or undertakings;
 - (ii) the movement of monies between project accounts in accordance with the terms of the Designated Credit Agreements;
 - (iii) late or non-provision of information, consents or licenses;
 - (iv) amendments to Subcontracts;
 - (v) restrictions imposed by the Lenders on the dates on which debt can be advanced to the Concessionaire for drawdown under the Designated Credit Agreements during the Design/Build Period and which are given as a result of any failure by the Concessionaire and/or the Project Contractors to ensure that the Work is performed in accordance with the agreed program;
 - (vi) approval of revised technical and economic assumptions for financial model runs (to the extent required for forecasts under the Designated Credit Agreements);
 - (vii) failure by the Concessionaire to obtain any consent by any Relevant Authority required by the Lenders under the Designated Credit Agreements; or
 - (viii) voting by the Lenders and the voting arrangements between the Lenders in respect of the levels of approval required by them under the Designated Credit Agreements;
- (c) any amendment, variation, or supplement of any Designated Credit Agreement in connection with the funding of a change pursuant to Section 36.4 (*Funding of Changes*);
- (d) a re-set of an interest rate pursuant to the express terms of any Designated Credit Agreement;

- (e) any sale of any shares of capital stock or securities of, or units, partnership, membership interests or other equity interests in, the Concessionaire by the Shareholders or securitization of the existing rights and/or interests attaching to any shares of capital stock or securities of, or units, partnership, membership interests or other equity interests in, the Concessionaire or its direct, 100% Shareholder, if any; or
- (f) any Qualifying Bank Transaction.

Expiry Date means December 31, 2056.

Extensive Force Majeure Event has the meaning given to it in Section 39.8 (*Extensive Force Majeure Event*).

Fare Revenue means all revenues charged and/or collected, whether through ticket sales or any other means of collecting fares (including in the form of cash, electronic money transfer, credit card, debit card and check transfers (or similar payments)), by or on behalf of RTD in respect of the use by Passengers of the Commuter Rail Network.

Fare System Equipment means the automated fare system equipment for the Commuter Rail Projects described further in Section 11 of Part B (*Infrastructure Requirements*) of Attachment 7 (*Design, Construction and Rolling Stock Requirements*).

FasTracks Plan has the meaning given to it in the Recitals.

Final Completion means, in respect of each Commuter Rail Project and associated Commuter Rail Service, the satisfaction of the Final Completion Requirements for such Commuter Rail Project and associated Commuter Rail Service in accordance with Section 28.4 (*Final Completion Certificates*).

Final Completion Certificate means the certificate to be issued in accordance with Section 28.4 (*Final Completion Certificates*).

Final Completion Date means, in respect of each Commuter Rail Project and associated Commuter Rail Service, the date on which Final Completion of such Commuter Rail Project and associated Commuter Rail Service occurs, as evidenced by the issuance of the Final Completion Certificate for such Commuter Rail Project and associated Commuter Rail Service.

Final Completion Deadline Date means the date falling 24 months after the last Revenue Service Commencement Date, as such Final Completion Deadline Date may be amended in accordance with the terms of this Agreement.

Final Completion Requirements has the meaning given to it in Section 28.4 (*Final Completion Certificates*).

Final Design Submittals means the 100% complete drawings, designs, specifications, calculations, reports, plans, procedures and other items and information evidencing the Final Project Design to be submitted by the Concessionaire to, and approved (or deemed approved) by, RTD and, as required, any relevant Project Third Parties.

Final Project Design means the 100% complete design of all elements of the Commuter Rail Projects, the CRMF, the Rolling Stock and the DUS Systems enabling the manufacturing and/or construction thereof (as evidenced by the Final Design Submittals).

Final Proposal Due Date means the date specified as the "Final Proposal Due Date" in the RFP, as such date may have been extended by RTD pursuant to an addendum to the RFP.

Final Threat and Vulnerability Analysis has the meaning given to it in Section 8.6 of Attachment 9 (*Project and Construction Management*).

Finance Agreement Review Period has the meaning given to it in Section 6.2(a).

Financial Close means the satisfaction or waiver of all conditions precedent to first utilization under the Designated Credit Agreement relating to the Concessionaire Financing (other than the condition as to the effectiveness of this Agreement).

Financial Model means the base case financial model provided by the Concessionaire and approved by RTD and attached hereto as Part B (*Financial Model*) of Attachment 1 (*Agreed Forms*), as such financial model may be adjusted from time to time in accordance with this Agreement.

Financial Model Adjustment has the meaning given to it in Section 10.3(b).

Financial Panel means the Financial Panel referred to in Section 50.3 (*Dispute Resolution Panel*).

Financial Products Agreement means an interest rate swap, cap, collar, floor, other hedging agreement, arrangement or security, however denominated, entered into by RTD with a Provider with respect to the specific Securities or as otherwise permitted by Colorado Law and providing that any payments by RTD thereunder are payable from a lien on all or a portion of the Sales Tax Revenues and for the purpose of (a) reducing or otherwise managing RTD's risk of interest rate changes or (b) effectively converting RTD's interest rate exposure, in whole or in part, from a fixed rate exposure to a variable rate exposure, or from a variable rate exposure to a fixed rate exposure.

Financial Products Payments means payments periodically required to be paid to a Provider by RTD pursuant to a Financial Products Agreement, but specifically excluding Financial Products Termination Payments.

Financial Products Receipts means amounts periodically required to be paid to RTD by a Provider pursuant to a Financial Products Agreement, but specifically excluding any Financial Products Termination Payment.

Financial Products Termination Payment means any termination, settlement or similar payments required to be paid upon an early termination of the Financial Products Agreement as a result of any event of default or termination event thereunder.

Financing Costs means, in relation to any calendar month during the Design/Build Period following the Phase 2 Effective Date:

- (a) interest, commission, fees, premia and any other costs or expenses payable by the Concessionaire under the Designated Credit Agreements (including scheduled payments under any hedging agreement);
- (b) amounts payable by the Concessionaire (other than with respect to principal) under the increased costs, taxes (including withholding taxes), market disruption, stamp duties and indemnities provisions of the Designated Credit Agreements; and
- (c) any value added or other taxes payable by the Concessionaire (including under gross-up obligations) in respect of the above,

in each case for such month.

First Increase Threshold has the meaning given to it in Section 34.5(d)(i).

Fiscal Year means the twelve months commencing on January 1 of any calendar year and ending on December 31 of such calendar year, or any other 12-month period which RTD designates as its Fiscal Year.

Fitch means Fitch Ratings, Inc.

FM Termination Amount has the meaning given to it in Part C (*Compensation Payable Following Extensive Force Majeure Event*) of Attachment 13 (*Compensation Following Termination*).

FM Termination Event means an Extensive Force Majeure Event that results in termination of this Agreement in accordance with Section 39.8 (*Extensive Force Majeure Event*).

Force Majeure Event has the meaning given to it in Section 39.1 (*Force Majeure Events*).

Force Majeure Notice has the meaning given to it in Section 39.3 (*Notification and determination of the effect of a Force Majeure Event*).

Fourth Increase Threshold has the meaning given to it in Section 34.5(d)(iv).

FRA means the Federal Railroad Administration, an agency of the United States Department of Transportation.

FTA means the Federal Transit Administration, an agency of the United States Department of Transportation.

Full Phase 1 Notice to Proceed means a written notice issued by RTD and delivered to the Concessionaire authorizing the Concessionaire to commence or to permit commencement of all of the Phase 1 Work.

GAAP means the Generally Accepted Accounting Principles approved and adopted by the American Institute of Certified Public Accountants.

General Manager means any individual holding the position of general manager of RTD or equivalent thereof from time to time.

Geological Obstructions means the geological make-up of any Site or the location and/or size of any natural foundations, infrastructures, or manmade obstructions on any Site which disrupt the progress of the Work.

Geotechnical Reports means:

- (a) the East Corridor EIS Basic Engineering Soils and Foundations, Volume 1 of 2, dated March 2007;
- (b) the East Corridor EIS Basic Engineering Soils and Foundations, Volume 2 of 2, dated March 2007;
- (c) the Gold Line Corridor – Denver, CO, Existing Condition Geology and Mineral Resources, dated October 2007;
- (d) the RTD ROW Plan of Proposed FasTracks Gold Line Corridor, dated November 2008; and
- (e) the Geotechnical Memorandum for Basic Engineering for the Proposed Fox North Commuter Rail Maintenance Facility Site, 48th Avenue and Fox Street, Denver, Colorado, RockSol Project Number RS-202.02, dated April 2, 2009.

Gold Line means the commuter rail line between Pecos Junction and Ward Road station in Wheat Ridge, Colorado, as described in Attachment 19 (*Concessionaire's Proposal*).

Gold Line Facilities means the stations and park-n-Ride facilities on the Gold Line and at the 41st and Fox Street and Pecos Street Stations, as described in Attachment 19 (*Concessionaire's Proposal*).

Gold Line Project means the Gold Line Facilities, the Equipment forming part of the Gold Line and the other Work to be designed, constructed, operated and maintained as part of the Gold Line in accordance with the Project Requirements and otherwise pursuant to this Agreement.

Gold Line Service means the commuter rail service to be provided by the Concessionaire in accordance with the requirements of Attachment 10 (*O&M Specifications*) on the Gold Line and DUS to Pecos Junction.

Gold Line Site means the land, spaces and surfaces as described in Part B (*Gold Line Site*) of Attachment 2 (*Description of Sites and Schedules of Site Availability*), as modified or supplemented in accordance with Section 11.3(h).

Good Industry Practice means the exercise of that degree of skill, diligence, prudence, foresight and operating practice which would reasonably and ordinarily be expected from a skilled and experienced contractor or, as the case may be, operator seeking in good faith to comply with its contractual obligations, complying with all Applicable Requirements and engaged in the same type of undertaking as the Concessionaire, the Project Contractors and/or the Subcontractors, as the case may be and under the same or similar circumstances and conditions, and using information reasonably available at the relevant time.

Guaranteed Annual Maximum Megawatt-hours (EC) means, for any Contract Year, the amount of Traction Power expressed in megawatt-hours scheduled to be used on the East Corridor in

Figure K-1 in Section K of Volume 4 of the Technical Proposal contained in the Concessionaire's Proposal.

Guaranteed Annual Maximum Megawatt-hours (GL) means, for any Contract Year, the amount of Traction Power expressed in megawatt-hours scheduled to be used on the Gold Line in Figure K-1 in Section K of Volume 4 of the Technical Proposal contained in the Concessionaire's Proposal.

Guaranteed Annual Maximum Megawatt-hours (NWES) means, for any Contract Year, the amount of Traction Power expressed in megawatt-hours scheduled to be used on the Northwest Rail Electrified Segment in Figure K-1 in Section K of Volume 4 of the Technical Proposal contained in the Concessionaire's Proposal.

Guaranteed DUS Access Date means May 1, 2014.

Handover means the procedure to be followed when the Concessionaire hands over the Concessionaire-operated Components to RTD on the End Date.

Handover and Reinstatement Work Procedures means the procedures to be carried out relating to the handover of the Concessionaire-operated Components on or prior to the End Date as set out in Attachment 14 (*Handover and Reinstatement Work Procedures*).

Handover and Reinstatement Work Requirements has the meaning given to it in Section 44.1 (*Handover and Reinstatement Work Requirements on the Expiry Date*).

Handover Escrow Account has the meaning given to it in Section 1.5 (*Handover Security*) of Attachment 14 (*Handover and Reinstatement Work Procedures*).

Handover Security has the meaning given to it in Attachment 14 (*Handover and Reinstatement Work Procedures*).

Hazardous and Contaminated Substance Health and Safety Plan has the meaning given to it in Section 8.6 (*Hazardous and Contaminated Substance Health and Safety Plan*) of Part A (*General Requirements for Design, Construction and Rolling Stock*) of Attachment 7 (*Design, Construction and Rolling Stock Requirements*).

Hazardous Material(s) means any and all substances, chemicals, wastes, or other materials now or from time to time hereafter:

- (a) defined as hazardous substances or hazardous wastes pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. § 9601 *et seq.*) (**CERCLA**), the Resource Conservation and Recovery Act (42 U.S.C. § 6901 *et seq.*) (**RCRA**), and/or the Colorado Hazardous Waste Act Sections 25-15-101 *et seq.*, Colorado Revised Statutes and the Colorado Hazardous Waste Regulations, 6 C.C.R. 1007-3;
- (b) characterized as hazardous or toxic materials, substances, chemicals, pollutants, contaminants or wastes that are regulated, subject to permitting or warning requirements, or for which removal, remediation or disposal is required or regulated, under any and all Laws for the protection of the environment, human health and safety, including without limitation CERCLA, RCRA, the Hazardous Materials Transportation Act (49 U.S.C. § 1801, *et seq.*), the Federal Water Pollution Control Act (33 U.S.C. § 1251, *et seq.*), the

Clean Air Act (42 U.S.C. § 7401 *et seq.*) and/or the Colorado Hazardous Waste Act (§ 25-15-311 *et seq.*, Colorado Revised Statutes); the Colorado Solid Waste Act (§ 30-20-100.5 *et seq.*, C.R.S.); the Colorado Water Quality Control Act (§ 25-8-101 *et seq.*, Colorado Revised Statutes), Colorado Air Pollution Prevention and Control Act (§ 25-7-101 *et seq.*, Colorado Revised Statutes), Title 8 Article 20.5, Colorado Revised Statutes and any federal, state or local regulations and associated guidance promulgated thereunder; or

- (c) otherwise posing a present or potential risk to human health, welfare or the environment,

including, without limitation, asbestos, flammable, explosive, corrosive or radioactive materials, gasoline, oil, motor oil, waste oil, petroleum (including without limitation, crude oil or any component thereof), and petroleum-based products, paints and solvents; lead, cyanide, DDT and other pesticides, and polychlorinated biphenyls.

Hazardous Materials Removal Process means the procedures and guidelines to be followed by the Concessionaire when carrying out any work relating to the removal, remediation and clean-up of Environmental Conditions as set out in the Voluntary Clean-Up Application and Materials Management Plans.

Health, Safety and Security Requirements means all Laws, rules, regulations, standards, practices and provisions of any Relevant Authority from time to time relating to health, safety and/or security applicable to the Work and/or the Concessionaire-operated Components and all requirements and provisions of a safety-related nature set out in any Permit or in this Agreement, including:

- (a) Section 8 (*Safety Management*) of Attachment 9 (*Project and Construction Management*);
- (b) Section 8 (*Security*) of Attachment 10 (*O&M Specifications*); and
- (c) the Safety and Security Management Plan, the System Safety Program Plan, the Hazardous and Contaminated Substances Health and Safety Plan, the System Security Plan and the Safety and Security Certification Plan (in each case, once approved by RTD).

Heavy Rail Movements means all movements of the Rolling Stock and any rolling stock owned by any Heavy Rail Operator on the Commuter Rail Network.

Heavy Rail Operators means the National Railroad Passenger Corporation (Amtrak), Burlington Northern Santa Fe Corporation (and its Affiliates) and Union Pacific Corporation (and its Affiliates) and any other operator of rolling stock licensed by RTD from time to time to operate on the Commuter Rail Network.

Holding Company means, in relation to a company or corporation, any other company or corporation in respect of which it is a Subsidiary.

IFRS means the International Financial Reporting Standards approved and adopted by the International Accounting Standards Board.

Immediately Effective Provisions has the meaning given to it in Section 5.1 (*Immediately Effective Provisions*).

Increased Insurance Cost has the meaning given to it in Section 34.5(a).

Incurred Costs means costs and expenses estimated or calculated in accordance with the RTD Pricing Conditions, and without double counting, which are incurred, estimated or calculated, as the case may be, in connection with an Incurred Cost Event.

Incurred Cost Event means (a) any Relief Event, Force Majeure Event or Discriminatory Change in Law as a result of which Incurred Costs are incurred by the Concessionaire and are due under this Agreement or (b) any other event in relation to which the Concessionaire's costs are estimated or calculated by reference to the RTD Pricing Conditions in accordance with the terms of this Agreement.

Independent Engineer means the Independent Engineer appointed by RTD and the Concessionaire pursuant to the Independent Engineer's Agreement in accordance with Section 22.8 (*Independent Engineer*), as replaced or succeeded from time to time.

Independent Engineer's Agreement means the agreement to be entered into among the Parties and the Independent Engineer substantially in the form attached hereto as Part D (*Form of Independent Engineer's Agreement*) of Attachment 1 (*Agreed Forms*).

Information has the meaning given to it in Section 55 (*Confidentiality*).

Initial Fluor Shareholder means Fluor Enterprises, Inc., a California corporation.

Initial Macquarie Shareholder means Macquarie Holdings, LLC, a Delaware limited liability company.

Initial Shareholder means any and each of the Initial Macquarie Shareholder and the Initial Fluor Shareholder together as Shareholders holding a 90% and 10% interest, respectively, as Shareholders in the Concessionaire including through any wholly-owned intermediate subsidiaries.

Initial Termination Notice has the meaning given to it in Section 41.5(b).

Intellectual Property Rights means patents, patent applications, inventions, trade marks, trade names, service marks, copyrights (including, but not limited to the copyrights relating to any constructional, technical and/or design plans, including the Final Design Submittals, relating to the Concessionaire-operated Components and/or any plans of a similar nature relating to the Concessionaire-operated Components and Final Project Design), topography rights, rights to extract information from a database, database rights, rights in drawings, design rights, trade secrets, proprietary information, know-how and rights of confidence, and all rights or forms of protection of a similar nature or having equivalent or similar effect to any of them which may subsist anywhere in the world, whether or not any of them are registered and including applications for registration of any of them.

Inter-Governmental Agreement means any agreement entered into between RTD and a Relevant Authority in relation to the Eagle Project, including (a) the agreement attached as Annex 2.4 to Attachment 21 (*Inter-Governmental Agreements*) and (b) the other agreements to be entered into

between RTD and a Relevant Authority copies of which are attached in draft form in Annexes 1, 2, 3 and 4 to Attachment 21 (*Inter-Governmental Agreements*).

Invoice has the meaning given to it in Section 30.2 (*Service Payments*).

Key Personnel means the key personnel identified in Figure E-1 in Section E of Volume 2 of the Technical Proposal contained in the Concessionaire's Proposal.

Labor Index has the meaning given to it in Part A (*Definitions*) of Attachment 11 (*Service Payments*).

Law means any federal, state, local and municipal laws, rules and regulations, orders, codes, directives, permits, approvals, decisions, decrees, ordinances or by-laws having the force of law and any common or civil law, whether adopted or enacted prior to or after the date of this Agreement including binding court and judicial decisions having the force of law, and includes any amendment, extension or re-enactment of any of the same in force from time to time and all other instruments, orders and regulations made pursuant to statute, including those made by any Relevant Authority.

Lease Period has the meaning given to it in Section 4.1 (*Lease Period*).

Lease Period Site Register has the meaning given to it in Section 11.3(e).

Lenders means the Persons, including financial insurers, financial institutions, and bondholders, which are from time to time parties to, or otherwise have rights under or pursuant to, any of the Designated Credit Agreements and/or who provide a financing facility or facilities (including any hedging arrangements, any financial insurance policies, lease financing, or tax benefit monetization financing) to the Concessionaire in accordance with such Designated Credit Agreements.

Lenders' Direct Agreement means the agreement to be entered into amongst the Parties and the Lenders (or an agent acting on their behalf) substantially in the form attached hereto as Part C (*Form of Lenders' Direct Agreement*) of Attachment 1 (*Agreed Forms*).

Lenders' Liabilities means, at the relevant time, the aggregate of:

- (a) all principal, interest (including default interest under the Designated Credit Agreements, but only that which has accrued prior to termination of this Agreement as a result of RTD making the payment later than it should have been made under the terms of this Agreement, or as a result of an RTD Termination Event, and excluding any default interest under the Designated Credit Agreements accruing from the date of the occurrence of any Force Majeure Event to the date of payment of any compensation under Section 42.3 (*Compensation Following Extensive Force Majeure Event*)), banking fees and premiums on financial insurance policies, costs and expenses properly incurred owing or outstanding to the Lenders by the Concessionaire under or pursuant to the Designated Credit Agreements on the Termination Date or on any other date pursuant to Section 42.4(g) under this Agreement, including any prepayment costs, make-whole amounts or breakage costs; **plus**
- (b) all amounts due from the Concessionaire to the Lenders by reason of the early termination of any interest rate hedging agreements (including breakage costs, call

premiums, make whole payments and commitment fees payable as a result thereof, **provided** such costs and fees have been certified as due and payable by the Agent Bank) which have been approved in writing by RTD as Designated Credit Agreements in accordance with Section 6.2 (*Verification of Final Drafts of the Designated Credit Agreements*) subject to the Concessionaire and Lenders mitigating all such amounts to the extent reasonably possible, **minus** the sum of:

- (i) the aggregate of all amounts (if any) payable by the Lenders to the Concessionaire by reason of the early termination of any interest rate hedging agreements which have been approved in writing or deemed approved by RTD as Designated Credit Agreements in accordance with Section 6.2 (*Verification of Final Drafts of the Designated Credit Agreements*); **plus**
- (ii) all amounts standing to the credit of any bank account held by or on behalf of the Concessionaire by any Lender or by the Agent Bank as at the Termination Date.

Limited Phase 1 Notice to Proceed means a written notice issued by RTD and delivered to the Concessionaire authorizing the Concessionaire to commence or to permit commencement of the Phase 1 Work (in all cases in accordance Section 5.13 (*Full Phase 1 Notice to Proceed*) and all other terms of this Agreement), except for any such Phase 1 Work (a) that requires the Concessionaire to enter onto or use the UP Sites or (b) that would, when taken together with all other work undertaken by the Concessionaire under the Limited Phase 1 Notice to Proceed, require expenditure or commitment by the Concessionaire of an amount in excess of the Maximum Limited Phase 1 Work Value.

Loss means any loss, damage, cost, expense, charge, fee or liability.

Material Amendment means, in respect of any agreement or the Financial Model, any proposed amendment, modification, variation or waiver which will, or may reasonably be expected to have, an adverse effect on the ability of the Concessionaire to perform its obligations under, or result in the Concessionaire breaching any provision of, such agreement or under this Agreement.

Material Design/Build Subcontractor means each of the Design/Build Subcontractors specified in Attachment 4 (*Material Subcontractors*) as a Material Design/Build Subcontractor.

Material O&M Subcontractor means each of the O&M Subcontractors specified in Attachment 4 (*Material Subcontractors*) as a Material O&M Subcontractor.

Material Subcontractor means each Material Design/Build Subcontractor and Material O&M Subcontractor.

Materials Index has the meaning given to it in Part A (*Definitions*) of Attachment 11 (*Service Payments*).

Maximum Additional TABOR Portion or $MATP_n$ means, for each calendar year, an amount equal to:

$$MATP_n = \min \left[ABAISP_n \times \left(d \times (1.01)^{n-t} \right) + ABANISP_n, TABOR_n^{\max} \right] - TP_n$$

where:

ABAISP_n, ABANISP_n, TP_n and CPI_{base} have the meanings given to them in Attachment 11 (*Service Payments*);

CPI_t is the most recently published value for CPI (as defined in Part A (*Definitions*) of Attachment 11 (*Service Payments*)) as at the Termination Date;

t is the Contract Year of the Termination Date; and

TABOR_n^{max} is the "Maximum Annual TABOR Portion" in year n as defined in Table 4 of Part H (*TABOR Secured Payments*) of Attachment 11 (*Service Payments*).

$$d = \frac{\left((CPI_t \times CPI_{weight}) + (Labor_t \times Labor_{weight}) + (MI_t \times MI_{weight}) \right)}{\left((CPI_{base} \times CPI_{weight}) + (Labor_{base} \times Labor_{weight}) + (MI_{base} \times MI_{weight}) \right)}$$

where all the terms in d have the meanings given to them in Attachment 11 (*Service Payments*).

Maximum Annual Debt Service Requirements means the maximum aggregate amount of Debt Service Requirements (excluding redemption premiums) due on the Securities for which such computation is being made in any Bond Year beginning with the Bond Year in which Debt Service Requirements of such Securities are first payable after the computation date and ending with the Bond Year in which the last of the Debt Service Requirements are payable.

Maximum Annual Early Work Construction Payment Amount has the meaning given to it in Attachment 8 (*Construction Payments*).

Maximum Annual Phase 1 and Phase 2 Construction Payment Amount has the meaning given to it in Attachment 8 (*Construction Payments*).

Maximum Annual Phase 1 Construction Payment Amount has the meaning given to it in Attachment 8 (*Construction Payments*).

Maximum Annual Phase 2 Construction Payment Amount has the meaning given to it in Attachment 8 (*Construction Payments*).

Maximum Annual Phase 2 Financing Cost Amount has the meaning given to it in Attachment 8 (*Construction Payments*).

Maximum Limited Phase 1 Work Value means U.S.\$150,000,000 (not including any amounts separately payable by RTD in respect of an RTD Proposed Change, Relief Event or Force Majeure Event), as such amount may be increased in accordance with Section 5.13(c)(i) or otherwise at RTD's sole discretion.

Memorandum of Lease has the meaning given to it in Section 2.6.

month is a reference to a period starting on one day in a calendar month and ending on the numerically corresponding day in the next succeeding calendar month except that, where any such period would otherwise end on a day which is not a Business Day, it will end on the next succeeding Business Day, unless that day falls in another calendar month, in which case it will end on the immediately preceding Business Day **provided** that, if a period starts on the last Business Day in a calendar month or if there is no numerically corresponding day in the month in

which that period ends, that period will end on the last Business Day in that later month (and references to *months* will be construed accordingly).

Monthly Operating Report has the meaning given to it in Attachment 10 (*O&M Specifications*).

Monthly Progress Report has the meaning given to it in Attachment 9 (*Project and Construction Management*).

Moody's means Moody's Investor Services Inc.

Municipal Swap Index means the "Municipal Swap Index" compiled by the Securities Industry and Financial Markets Association, or if such index is not published, then such other index selected by the Chief Financial Officer which reflects the yield of tax-exempt seven-day variable rate demand bonds.

National Transit Database means the FTA's national database of statistics for the transit industry.

NEPA means the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*

Net Effective Interest Rate means the Net Interest Cost of Securities issued pursuant to the 2004 Approval divided by the sum of the products derived by multiplying the principal amount of the Securities maturing on each maturity date by the number of years from their issue date to their respective maturities. In all cases, Net Effective Interest Rate shall be computed without regard to any option of redemption prior to the designated maturity dates of the Securities.

Net Interest Cost means the total amount of interest to accrue on Securities issued pursuant to the 2004 Approval from their issue date to their respective maturities, less the amount of any premium above par, or plus the amount of any discount below par, at which said Securities are being or have been sold. In all cases, Net Interest Cost shall be computed without regard to any option of redemption prior to the designated maturity dates of the Securities.

Northwest Rail Electrified Segment or **NWES** means the commuter rail line comprised of the line between the DUS Rail Segment and South Westminster Station, from which the Gold Line diverges at Pecos Junction, as described in Attachment 19 (*Concessionaire's Proposal*).

Northwest Rail Electrified Segment Facilities means the stations and park-n-Ride facilities at South Westminster Station, as described in Attachment 19 (*Concessionaire's Proposal*).

Northwest Rail Electrified Segment Project means the Northwest Rail Electrified Segment Facilities, the Equipment forming part of the Northwest Rail Electrified Segment and the other Work to be designed, constructed, operated and maintained as part of the Northwest Rail Electrified Segment in accordance with the Project Requirements and otherwise pursuant to this Agreement.

Northwest Rail Electrified Segment Service means the commuter rail service to be provided by the Concessionaire in accordance with the requirements of Attachment 10 (*O&M Specifications*) on the Northwest Rail Electrified Segment.

Northwest Rail Electrified Segment Site means the land, spaces and surfaces as described in Part C (*Northwest Rail Electrified Segment Site*) of Attachment 2 (*Description of Sites and Schedules of Site Availability*), as modified or supplemented in accordance with Section 11.3(h).

notice has the meaning given to it in Section 58.1.

Notifiable Refinancing means any Refinancing described in paragraph (a) or (c) of the definition of "Refinancing" or any other arrangement which has or would have a similar effect or would have the effect of limiting the Concessionaire's ability to carry out any such arrangement.

NWES Environmental Evaluation means the Northwest Rail Corridor Draft Environmental Evaluation dated February 2010 developed by RTD in connection with the environmental evaluation conducted by RTD pursuant to NEPA with respect to the Northwest Rail Electrified Segment.

O&M Contract means the contract between the Concessionaire and the O&M Contractor approved by RTD in accordance with this Agreement.

O&M Contractor means the operating contractor (or any replacement or successor) appointed by the Concessionaire to operate the Concessionaire-operated Components in accordance with Section 29.3 (*O&M Contract*) or Section 46 (*Restrictions on Change in Control of the Project Contractors*).

O&M Expert has the meaning given to it in Section 49.1(d).

O&M Review Period has the meaning given to it in Section 29.2(b).

O&M Specifications means the specifications and provisions set out in Attachment 10 (*O&M Specifications*).

O&M Standards has the meaning given to it in Section 29.1(a).

O&M Subcontractor means any Subcontractor (of any tier) party to a Subcontract entered into in connection with the operation and/or maintenance of the Concessionaire-operated Components.

O&M Submittals means the manuals, programs and plans referred to in this Agreement to be prepared, adopted, complied with and/or implemented by the Concessionaire setting out policies, instructions and procedures for the operation, inspection and maintenance of the Concessionaire-operated Components during the Operating Period, including the Quality Management Plan, the Safety and Security Management Plan, the System Safety Program Plan (with respect to the Operating Period), the System Security Plan (with respect to the Operating Period), the Concessionaire's Sustainability Plan, the Rolling Stock, Facility and Infrastructure Maintenance Plan, the Rolling Stock Fleet Management Plan and the other manuals, programs and plans prepared by the Concessionaire in accordance with Section 29 (*Operation and Maintenance*) and Attachment 10 (*O&M Specifications*).

OFAC has the meaning given to it in Section 45.2(c).

Operating Period means the period from (and including) the first Revenue Service Commencement Date to occur to (and including) the End Date.

Operating Plan has the meaning given to it in Section 2.4(a) of Attachment 10 (*O&M Specifications*).

Operating Rights Agreement has the meaning given to it in Attachment 20 (*Utilities*).

Original Baseline Schedule has the meaning given to it in Attachment 9 (*Project and Construction Management*).

Original Revenue Service Target Date means, with respect to each Commuter Rail Project and associated Commuter Rail Service, the Revenue Service Target Date for such Commuter Rail Project and associated Commuter Rail Service, without taking into account any extension or postponement thereof in accordance with Sections 38.4(a) or 39.5(a).

Other RTD Project means any rail line or other transportation facility that is constructed, operated and/or maintained by or on behalf of RTD (other than by the Concessionaire, but including any Concessionaire-operated Expansion) during the Lease Period.

Other RTD Project Procurement Material means any design brief, specification, information memorandum, request for qualification, request for proposal or other documentation issued or otherwise made available by RTD in connection with the tender or procurement of any Other RTD Project.

Outstanding when used with reference to Securities, means, as of any date of determination, all such Securities theretofore issued or incurred and not paid and discharged other than (a) Securities theretofore cancelled by a trustee or paying agent for such Securities or the holder of such Securities, (b) Securities deemed paid and no longer Outstanding as provided in the document pursuant to which the Securities were issued, (c) any Securities held by RTD and (d) Securities in lieu of which other Securities have been authenticated and delivered pursuant to the provisions of the document pursuant to which it was issued regarding transfer or exchange of the Securities or regarding mutilated, destroyed, lost or stolen Securities unless proof satisfactory to a trustee or paying agent for such Securities has been received that any such Securities are held by a bona fide purchaser.

Outstanding Completion Requirements Notice has the meaning given to it in Section 28.5(g).

Outstanding Requirements Notice has the meaning given to it in Section 28.5(c).

Owner Relocated Utility means any Utility located on a Site that (a) is identified in the Utility Matrix as a Utility to be Relocated by a Utility Owner within the time period specified in the Utility Matrix or (b) is an Unidentified Utility agreed by RTD, the Concessionaire and a Utility Owner in a Work Order to be relocated by such Utility Owner.

Party has the meaning given to it in the Preamble.

Passengers means members of the public lawfully present on or using any part of the Concessionaire-operated Components.

Peña Boulevard Base Bridge Project has the meaning given to it in Section 3 (*Peña Boulevard Bridge Projects*) of Part F (*Third Party Options to the Design/Build Scope*) of Attachment 7 (*Design, Construction and Rolling Stock Requirements*).

Peña Boulevard Bridge Projects means the Peña Boulevard Base Bridge Project and the Peña Boulevard DIA Bridge Project.

Peña Boulevard DIA Bridge Project has the meaning given to it in Section 3 (*Peña Boulevard Bridge Projects*) of Part F (*Third Party Options to the Design/Build Scope*) of Attachment 7 (*Design, Construction and Rolling Stock Requirements*).

Performance Deduction means the "Performance Deduction (PD_{mn})" as determined in accordance with Part E (*Performance Deduction*) of Attachment 11 (*Service Payments*).

Performance Deduction Percentage means the "Performance Deduction Percentage (PDP_{mn})" as determined in accordance with Part E (*Performance Deduction*) of Attachment 11 (*Service Payments*).

Permit means all approvals, permits, permissions, consents, licenses, certificates (including sales tax exemption certificates) and authorizations (whether statutory or otherwise) which are required from time to time in connection with the Eagle Project to be issued by RTD, any Relevant Authority, any Utility Owner or any Project Third Parties.

Permitted Encumbrances means the following encumbrances: (a) any Encumbrance for taxes, assessments or governmental charges or levies not yet due and payable or any Encumbrance for taxes, assessments or governmental charges or levies being contested in good faith and by appropriate proceedings for which adequate reserves have been established in accordance with GAAP; (b) any Encumbrance in respect of the Concessionaire-operated Components imposed by law which were incurred in the ordinary course of business and which have not arisen to secure indebtedness for borrowed money, such as carriers', materialmen's, warehousemen's and mechanics' liens, statutory and common law landlord's liens, and other similar Encumbrances arising in the ordinary course of business, and which do not in the aggregate materially detract from the value of the Concessionaire-operated Components or materially impair the use thereof by the Concessionaire in performing its obligations or exercising its rights under this Agreement or are being contested in good faith and by appropriate proceedings for which adequate reserves have been established in accordance with GAAP; (c) any Encumbrance created by or pursuant to this Agreement, the other Project Agreements, or the Designated Credit Agreements; (d) any Encumbrance incurred or deposits made in the ordinary course of business in connection with general insurance maintained pursuant to this Agreement; (e) licenses, sub-licenses, leases or subleases granted to third Persons in the ordinary course of business not interfering in any material respect with the Concessionaire's performance of its obligations or exercising its rights under this Agreement; (f) Encumbrances arising from or created by RTD; (g) Encumbrances of record on the Early Work Effective Date (other than those arising out of the acts or omissions of the Concessionaire, a Project Contractor, or a Subcontractor, except for any Subcontractor who is party to a contract with RTD and whose acts or omissions arise solely in relation to the work carried out by such Subcontractor under that contract); and (h) easements, zoning restrictions, rights-of-way and similar encumbrances on real property imposed by law or arising in the ordinary course of business that do not secure any monetary obligations and do not materially detract from the value of the affected property or interfere in any material respect with the Concessionaire's performance of its obligations or exercising its rights under this Agreement.

Person means an individual, partnership, corporation, limited liability company, association, trust, unincorporated organization, business entity, municipality, county, RTD or any other person having separate legal personality.

Phase 1 means (a) the Phase 1 Work, (b) the provision of the East Corridor Service, (c) the operation and maintenance of the East Corridor, DUS to CRMF, the Rolling Stock (excluding the Phase 2 Rolling Stock after delivery by RTD of a Phase 2 Rolling Stock Termination Notice), the CRMF and, from the Actual DUS Access Date, the DUS Rail Segment, (d) subject to Section 5.10(b), the maintenance of the Gold Line Sites and the Northwest Rail Electrified Segment Sites, and (e) from the later of the Actual DUS Access Date and the Guaranteed DUS Access Date, dispatch of the Heavy Rail Movements on the DUS Rail Segment.

Phase 1 Condition Precedent means each of the conditions set out in Section 5.6 (*Conditions Precedent to the Phase 1 Effective Date*).

Phase 1 Conditions Precedent Satisfaction Date means the date which is 60 days after the date of this Agreement, as such date may be extended in accordance with this Agreement, and, in each case, if such date is not a Business Day, the next following Business Day.

Phase 1 Construction Payment has the meaning given to it in Section 26.1(a)(ii).

Phase 1 Construction Payment Increase Notice has the meaning given to it in Section 5.10(d)(i).

Phase 1 Effective Date means the date on which all Phase 1 Conditions Precedent set out in Section 5.6 (*Conditions Precedent to the Phase 1 Effective Date*) are satisfied in accordance with this Agreement.

Phase 1 Excess Financing Amount means the amount of additional private financing required to fund the completion of the Phase 1 Work (calculated by reference to the Financial Model) and all incremental costs in the event that the Phase 2 Notice to Proceed is not issued, and the Maximum Annual Phase 1 Construction Payment Amounts are not increased in accordance with Section 5.10(d)(i), **provided** that the amount of such additional private financing may depend upon, amongst other factors, the actual cost of debt and equity finance achieved at the time the Phase 1 Excess Financing Amount is raised and the transaction and other costs incurred in connection with raising the Phase 1 Excess Financing Amount.

Phase 1 Excess Financing Request has the meaning given to it in Section 5.10(d)(ii).

Phase 1 Rolling Stock means rolling stock demonstrated in the Rolling Stock Fleet Management Plan by the Concessionaire to be necessary to support the service requirements for Commuter Rail Services on the East Corridor in accordance with Attachment 10 (*O&M Specifications*).

Phase 1 Work means all performance and work required for, carried out or executed in or in relation to or in connection with, the design, construction and completion of the East Corridor Project, DUS to CRMF, the Commuter Rail Maintenance Facility and the BNSF Relocation Work (including the Early Work), and, following the delivery of a Third Party Option Notice, the Third Party Option(s) set forth therein, the Final Project Design, the procurement and installation of the DUS Systems on the DUS Rail Segment Site and the procurement of the Rolling Stock by the Concessionaire and, in each case as described in the Design, Construction and Rolling Stock Requirements, including any applicable Temporary Work.

Phase 2 means (a) the Phase 2 Work, (b) the provision of the Gold Line Service and the Northwest Rail Electrified Segment Service and (c) the operation and maintenance of the Gold Line and the Northwest Rail Electrified Segment.

Phase 2 Condition Precedent means the condition set out in Section 5.9 (*Condition Precedent to the Phase 2 Effective Date*).

Phase 2 Condition Precedent Satisfaction Date means December 31, 2011, unless otherwise extended in accordance with this Agreement.

Phase 2 Construction Payment has the meaning given to it in Section 26.1(a)(ii).

Phase 2 Effective Date means the date on which each Phase 2 Condition Precedent set out in Section 5.9 (*Condition Precedent to the Phase 2 Effective Date*) is satisfied in accordance with this Agreement.

Phase 2 Financing Cost Payment has the meaning given to it in Section 26.1(a)(iii).

Phase 2 Notice to Proceed means a written notice in which (i) RTD notifies the Concessionaire that RTD has received commitments of or reasonably expects to receive funding in the form of federal grants or other state and/or local funds in an amount not less than the aggregate of all Maximum Annual Phase 2 Construction Payment Amounts, (ii) RTD states that the Phase 2 Effective Date has occurred for purposes of this Agreement and (iii) RTD specifies such date.

Phase 2 Rolling Stock means rolling stock demonstrated in the Rolling Stock Fleet Management Plan by the Concessionaire to be necessary to support the service requirements for Commuter Rail Services on the Gold Line and Northwest Rail Electrified Segment in accordance with Attachment 10 (*O&M Specifications*).

Phase 2 Rolling Stock Termination Notice has the meaning given to it in Section 5.11(a).

Phase 2 Work means all performance and work required for, carried out or executed in or in relation to or in connection with, the construction and completion of the Gold Line Project and the Northwest Rail Electrified Segment Project, in each case as described in the Design, Construction and Rolling Stock Requirements, including any related Temporary Work.

Power Network means the local electricity distribution network operated by Public Service Company of Colorado d/b/a/ Xcel Energy, Inc. or any successor thereto.

Pre-Refinancing Equity IRR means the nominal post-tax (i.e. post-tax with respect to the Concessionaire and pre-tax with respect to its Shareholders or other beneficial owners) Equity IRR calculated by reference to the rate identified in the Financial Model on the date immediately preceding the date on which the Refinancing is put into place.

Principal Limit has the meaning given to it in Section 30.3(g).

Project Agreements means:

- (a) this Agreement;
- (b) the Design/Build Contract;
- (c) the O&M Contract; and
- (d) the Rolling Stock Supply Contract.

Project Contractors means the Design/Build Contractor, the Rolling Stock Supplier and the O&M Contractor.

Project Implementation Costs has the meaning given to it in Section 1 (*Definitions*) of Part A of Attachment 13 (*Compensation Following Termination*).

Project Management Plan has the meaning given to it in Attachment 9 (*Project and Construction Management*).

Project Records has the meaning given to it in Section 32.1(a).

Project Requirements means the Final Project Design, the Design, Construction and Rolling Stock Requirements, the O&M Specifications, the O&M Standards, the Third Party Agreements, all Permits, the Environmental Requirements and the Health, Safety and Security Requirements, all Applicable Requirements, including the RTD Permits, and the other obligations of the Concessionaire set out herein.

Project Schedule means the schedule of Work prepared by the Concessionaire in accordance with, and revised pursuant to, Section 23.3 (*Project Schedule*).

Project Third Party means each counterparty to a Third Party Agreement.

Proposer's Security means (a) letter or letters of credit in the relevant form attached at Part D-1 of Appendix D to Volume 1 of the RFP (or otherwise in form and substance reasonably acceptable to RTD) and/or one or more bonds in form and substance reasonably acceptable to RTD, issued by a Qualifying Institution, (b) a cash deposit made to a segregated account established by a Qualifying Institution acting as an escrow agent and subject to the terms of an escrow agreement executed in the form attached at Part D-2 of Appendix D to Volume 1 of the RFP, or (c) any combination of (a) and (b), in each case in an aggregate amount equal to U.S.\$25,000,000 for the benefit of RTD in respect of the Concessionaire's obligations to satisfy the Concessionaire Conditions Precedent.

Proprietary Designs means proprietary products, components, subsystems and other items which are (a) in existence and owned by the Concessionaire, the Project Contractors or any of their respective Subcontractors prior to the date of this Agreement, (b) maintained as trade secrets by, or protected by patents (including patent applications filed prior to the date of this Agreement to the extent such patents are thereafter issued) or copyrights by, the Concessionaire, Project Contractors or any of their respective Subcontractors in each case as owners thereof and (c) incorporated in the Concessionaire-operated Components or otherwise utilized or required in connection with the Eagle Project.

Provider means any financial institution or insurance company which is a party to a Financial Products Agreement with RTD.

Public Utilities Commission means the Public Utilities Commission of Colorado or any successor thereto.

Punch List Items means Work of a minor nature which does not affect beneficial occupation or safe use of the Commuter Rail Network or part thereof by the Concessionaire or members of the public and, where agreed with RTD, any other Work in connection with or related to a Commuter

Rail Project which remains incomplete at the Revenue Service Commencement Date for such Commuter Rail Project and associated Commuter Rail Service.

Qualifying Bank Transaction means:

- (a) the syndication by a Lender, in the ordinary course of its business, of any of its rights or interests in the Designated Credit Agreements; and/or
- (b) (i) the grant by a Lender of any rights of participation, or the disposition by a Lender of any of its rights or interests (other than as specified in paragraph (a) above), in respect of the Designated Credit Agreements, or (ii) the grant by a Lender of any other form of benefit or interest in either the Designated Credit Agreements or the revenues or assets of the Concessionaire or its direct, 100% Shareholder, if any, whether by way of security or otherwise.

Qualifying Institution means any insurance company or financial institution lawfully operating in the State of Colorado with a minimum credit rating of "A" from Standard & Poor's, "A2" from Moody's and/or "A" from Fitch.

Qualifying Insurer means any insurer of recognized financial responsibility and admitted in Colorado which holds a current policyholders alphabetic and financial size category rating of "A:VIII" or higher according to Best's Insurance Reports (or if not rated by Best's Insurance Reports, with a claims paying ability rating from Standard & Poor's of "A" or higher).

Qualifying Refinancing means any Refinancing that will give rise to a Refinancing Gain greater than zero that is not an Exempt Refinancing.

Quality Management Plan has the meaning given to it in Section 22.3 (*Quality Management*).

Quarterly Operating Report has the meaning given to it in Attachment 10 (*O&M Specifications*).

Railroad Agreement means any agreement entered into between RTD and any Heavy Rail Operator in relation to the Eagle Project, including (a) the agreements attached as Annexes 1.1, 3.1 and 3.2 to Attachment 22 (*Railroad Agreements*), (b) the other agreements to be entered into between RTD and any Heavy Rail Operator copies of which are attached in draft form in Annexes 1.3, 2.1, 2.2 and 2.3 to Attachment 22 (*Railroad Agreements*) and (c) any other agreement identified in Sections 1.2, 1.3, 1.4, 1.6, 1.7, 1.8, 1.9, 1.10 or 1.11 of Attachment 22 (*Railroad Agreements*) as to be entered into between RTD and any Heavy Rail Operator on terms consistent with the terms of the agreement or draft form of agreement referenced therein.

Rating Agency means each of Moody's, Standard & Poor's and Fitch.

Rating Category means one of the generic rating categories of Moody's, if the Securities are rated by Moody's, or of Standard & Poor's, if the Securities are rated by Standard & Poor's, or Fitch, if the Securities are rated by Fitch, without regard to any refinement or gradation of such rating category by a numerical modifier or otherwise.

Rating Downgrade Event has the meaning given to it in Section 5.7(b).

Reasonable Efforts means all those steps in the power of the relevant Party that are capable of producing the desired result, being steps which a prudent, determined and reasonable person

desiring to achieve that result would take; **provided** that, subject to its other express obligations under this Agreement, the relevant Party shall not be required to expend funds except for those necessary to meet the reasonable costs reasonably incidental or ancillary to the steps to be taken by the relevant Party (including its reasonable travel expenses, correspondence costs and general overhead expenses).

Record Documents has the meaning given to it in Attachment 9 (*Project and Construction Management*).

Records of Decision or **ROD** means each of:

- (a) the Record of Decision for East Corridor and Commuter Rail Maintenance Facility Dated November 6, 2009, a copy of which is attached hereto as Part A of Attachment 18 (*Concessionaire's Records of Decision Obligations*); and
- (b) the Record of Decision for Gold Line and Commuter Rail Maintenance Facility Dated November 2, 2009, a copy of which is attached hereto as Part B of Attachment 18 (*Concessionaire's Records of Decision Obligations*).

Reference Data has the meaning given to it in Section 16.1 (*Reference Data*).

Reference Data List means the list set out in Attachment 23 (*Reference Data List*).

Refinancing means:

- (a) any amendment, variation, novation, supplement or replacement of any Designated Credit Agreement;
- (b) the grant of any waiver or consent, or the exercise of any similar right, under any Designated Credit Agreement;
- (c) the disposition of any rights or interests in, or the creation of any rights of participation in respect of, the Designated Credit Agreement; or the creation or granting of any other form of benefit or interest in either the Designated Credit Agreement; or the contracts, revenues or assets of the Concessionaire whether by way of security or otherwise but excluding any security agreements which constitute Designated Credit Agreements and any participations or transfers (whether by novation or otherwise) among Lenders only; or
- (d) any other arrangement put in place by the Concessionaire or another Person that has an effect that is similar to any of (a)-(c) above or that has the effect of limiting the Concessionaire's ability to carry out any of (a)-(c) above.

Refinancing Adjustment means an amount equal to 50% of any Refinancing Gain arising from a Qualifying Refinancing.

Refinancing Gain means an amount equal to the greater of (a) zero and (b) an amount equal to $(A - B - C - D)$, where:

A = the net present value of the Distributions to be made to each Relevant Person over the remaining term of this Agreement following the Refinancing, as projected immediately prior to the Refinancing (taking into account the effect of the Refinancing and using the Financial Model as updated (including as to the actual past performance of the Eagle Project) so as to be current immediately prior to the Refinancing);

B = the net present value of the Distributions to be made to each Relevant Person over the remaining term of this Agreement following the Refinancing, as projected immediately prior to the Refinancing (but without taking into account the effect of the Refinancing and using the Financial Model as updated (including as to the actual past performance of the Eagle Project) so as to be current immediately prior to the Refinancing);

C = any adjustment required to raise the Pre-Refinancing Equity IRR to the Base Case Equity IRR; and

D = the reasonable, documented and proper external professional costs, that each Party incurs directly and, in the case of the Concessionaire indirectly pursuant to the Designated Credit Agreements, in relation to the Qualifying Refinancing and which are to be agreed and capped by the Parties prior to any Qualifying Refinancing being put in place. Any disputes regarding such agreement shall be referred to the Financial Panel in accordance with Section 50.3 (*Dispute Resolution Panel*),

provided that the net present value of each of "A" and "B" above shall be calculated using the Base Case Equity IRR as the applicable discount rate.

Reinstatement Work has the meaning given to it in Section 44.1(b).

Relevant Authority means the government of the United States of America, the State of Colorado, the cities and counties within or forming part of the District and any other agency, or subdivision of any of the foregoing, including any federal, state, or municipal government, and any court, agency, special district, commission or other authority exercising executive, legislative, judicial, regulatory, administrative or taxing functions of, or pertaining to, the government of the United States of America, the State of Colorado or the cities and counties within or forming part of the District.

Relevant Incident has the meaning given to it in Section 40.1 (*Damage to the Concessionaire-operated Components*).

Relevant Person means a Shareholder and any of its Affiliates.

Relevant Proceeds has the meaning given to it in Section 40.3 (*Insurance Proceeds during the Design/Build Period*).

Relief Event has the meaning given to it in Section 38.1 (*Relief Events*).

Relief Notice has the meaning given to it in Section 38.2 (*Notification of Relief Event*).

Relocate and **Relocation** have, with respect to each Utility, the meaning given to them in the relevant Utility Relocation Agreement.

Rent has the meaning given to it in Section 3.1 (*Rent*).

Replaced Item has the meaning given to it in Section 29.1(c).

Replacement Item has the meaning given to it in Section 29.1(c).

Replacement Rolling Stock Supplier has the meaning given to it in Section 31.2(c).

Replacement Rolling Stock Supply Contract has the meaning given to it in Section 31.2(d)(ii).

Rescue Refinancing means a Refinancing by the Lenders upon the occurrence of a Designated Credit Agreement Event of Default.

Reserve Fund Insurance Policy means any insurance policy, surety bond, irrevocable letter of credit or similar instrument deposited in or credited to the Reserve Fund in lieu of or in partial substitution for moneys on deposit therein, issued by an entity having a rating at the time such policy is deposited in or credited to a reserve fund for Securities payable from all or a portion of the Sales Tax Revenues in the highest Rating Category and, if such entity is rated by A.M. Best & Company, having a rating in A.M. Best & Company's highest Rating Category.

Restoration Plan has the meaning given to it in Section 40.2(a).

Restoration Work has the meaning given to it in Section 40.2(a).

Revenue Service Commencement Certificate means the certificate to be issued in accordance with Section 28.2 (*Revenue Service Commencement Certificates*).

Revenue Service Commencement Date means, with respect to each Commuter Rail Service, the date on which the Revenue Service Commencement Requirements for such Commuter Rail Service and the relevant Commuter Rail Project have been satisfied by such Commuter Rail Service and the relevant Commuter Rail Project, as evidenced by the issuance of the Revenue Service Commencement Certificate for such Commuter Rail Service.

Revenue Service Commencement Requirements has the meaning given to it in Section 28.2 (*Revenue Service Commencement Certificates*).

Revenue Service Deadline Date means January 1, 2018, as such Revenue Service Deadline Date may be amended in accordance with the terms of this Agreement.

Revenue Service Target Date means:

- (a) with respect to the East Corridor Service, January 29, 2016;
- (b) following the Phase 2 Effective Date, with respect to the Gold Line Service, July 1, 2016;
and

- (c) following the Phase 2 Effective Date, with respect to the Northwest Rail Electrified Segment Service, March 31, 2016,

in each case as such Revenue Service Target Date may be amended in accordance with the terms of this Agreement.

Review Period means, with respect to each item of Contract Data, a period of 30 days (or such longer period for review of such item of Contract Data by RTD as may be set out in the CDRL) starting from the date on which such item of Contract Data is submitted to RTD in accordance with Section 19.1(a).

Reviewing Authorities has the meaning given to it in Section 32.1(b).

Revised Baseline Schedule has the meaning given to it in Attachment 9 (*Project and Construction Management*).

RFP has the meaning given to it in the Recitals.

Rolling Stock means the Phase 1 Rolling Stock and the Phase 2 Rolling Stock, collectively.

Rolling Stock, Facility and Infrastructure Maintenance Plan has the meaning given to it in Attachment 10 (*O&M Specifications*).

Rolling Stock Fleet Management Plan has the meaning given to it in Attachment 10 (*O&M Specifications*).

Rolling Stock Option has the meaning given to it in Section 31.1(b).

Rolling Stock Option Cars has the meaning given to it in Section 31.1(a).

Rolling Stock Option Notice has the meaning given to it in Section 31.1(a).

Rolling Stock Replacement Date means the date which is 30 years after the first Revenue Service Commencement Date.

Rolling Stock Replacement Report has the meaning given to it in Section 31.2(b).

Rolling Stock Replacement Report Exceptions has the meaning given to it in Section 31.2(b)(iv).

Rolling Stock Supplier means the supplier appointed by the Design/Build Contractor to supply the Rolling Stock or any replacement thereof or successor thereto appointed in accordance with Section 46 (*Restrictions on Change in Control of the Project Contractors*).

Rolling Stock Supply Contract means the contract for the supply of the Rolling Stock between the Design/Build Contractor and the Rolling Stock Supplier.

Rolling Stock Termination Date means the earlier of (a) the date on which RTD has paid the Applicable Termination Amount in full to the Concessionaire following a Termination Date or (b) the Expiry Date.

RRB means the United States Railroad Retirement Board, an independent agency in the executive branch of the United States federal government.

RTD has the meaning given to it in the Preamble.

RTD Act means the Regional Transportation District Act, constituting Section 32-9-101, *et seq.*, Colorado Revised Statutes.

RTD Appropriation Obligations means any and all payment obligations of RTD under and pursuant to this Agreement (except for the obligation to pay the TABOR Portion and any Additional TABOR Portion in accordance with each of Section 30.3 (*TABOR Portion*) and Section 42.4 (*Compensation Following Termination*)).

RTD Change Report has the meaning given to it in Section 36.3(e)

RTD Change Summary has the meaning given to it in Section 36.3(b)

RTD Change Summary Notice has the meaning given to it in Section 36.3(c).

RTD Conditions Precedent means the conditions precedent specified in Sections 5.6(b)(ii), 5.6(b)(iii), 5.6(c)(i), 5.6(e), 5.6(j) and 5.6(l).

RTD Content means all Reference Data, drawings, designs, specifications, manuals, reports, studies, surveys, models, and any other content, documents, materials, deliverables, data and products (in each case, other than software, source code and object code) provided by RTD, or by any other party on RTD's behalf in connection with the Eagle Project, in either case to the Concessionaire for incorporation in the Work Products or otherwise in connection with the Eagle Project.

RTD Default Amount has the meaning given to it in Part B (*Compensation Payable Following RTD Termination Event*) of Attachment 13 (*Compensation Following Termination*).

RTD Permit means each of the 404 Permits and the conditional letter of map revision and the letter of map revision, copies of which, or applications for which, are attached as Annexes 1, 2 and 3 to Attachment 5 (*RTD Permits*).

RTD Pledged Revenues means (a) any Sales Tax Revenues remaining on deposit each month in the Sales Tax (0.6%) Fund and the Sales Tax Increase (0.4%) Fund with the RTD Trustee pursuant to the Senior RTD Documents after all applications, deposits and payments required to be made from the Sales Tax (0.6%) Fund and the Sales Tax Increase (0.4%) Fund under the Senior RTD Documents, have been made, but prior to the distribution of any such remaining amounts by the RTD Trustee pursuant to the DUSPA/RTD Funding Agreement or to RTD and (b) Additional Tax revenues that have been pledged by RTD (in its sole discretion) to secure the payment of Senior RTD Debt in respect of which RTD has provided written notice to the Concessionaire and the RTD Trustee and that are available to RTD following the application of such revenues in accordance with the terms of any Senior RTD Documents pursuant to which such Additional Tax revenues are pledged to pay Senior RTD Debt, but prior to the distribution of such Additional Tax revenues by the RTD Trustee pursuant to the DUSPA/RTD Funding Agreement or to RTD.

RTD Pricing Conditions means the provisions set forth in Attachment 17 (*RTD Pricing Conditions*).

RTD Proposed Change has the meaning given to it in Section 36.3 (*RTD Proposed Changes*).

RTD Related Project means any RTD facility, project or works that is designed, constructed, operated or maintained by or on behalf of RTD to the extent such facility, project or works is integrated with or directly connected to the Eagle Project or any other part of the FasTracks Plan.

RTD Relocated Utility means any Utility located on a Site that is identified in the Utility Matrix as a Utility to be Relocated by RTD on or before the dates specified in the Utility Matrix.

RTD Retained Environmental Work has the meaning given to it in Section 12.2(i).

RTD's Representative has the meaning given to it in Section 8 (*RTD's Representative*).

RTD's Risk Manager means RTD's Risk Manager, as notified by RTD to the Concessionaire.

RTD Termination Events means any of the events or circumstances listed or described in Section 41.4 (*RTD Termination Events*).

RTD Trustee means The Bank of New York Mellon Trust Company, N.A., as trustee, or any successor trustee under the Senior RTD Documents.

Rules of Arbitration has the meaning given to it in Section 50.5(b).

Safety and Security Certification Plan has the meaning given to it in Attachment 9 (*Project and Construction Management*).

Safety and Security Management Plan has the meaning given to it in Attachment 9 (*Project and Construction Management*).

Sales Tax means the sales tax levied uniformly throughout the District Sales Tax Area at a rate of 1.0% (consisting of a sales tax levied at the rate of 0.6% and a sales tax increase levied at the rate of 0.4% that was approved at the 2004 election to finance the FasTracks Plan) upon every transaction or other incident with respect to which a sales tax is levied by the State of Colorado pursuant to the provisions of Section 39 26-101 *et seq.*, Colorado Revised Statutes, and pursuant to the RTD Act.

Sales Tax (0.6%) Fund means the "Regional Transportation District Sales Tax (0.6%) Fund" created in the 2006 FasTracks Indenture and maintained by the RTD Trustee.

Sales Tax Increase (0.4%) Fund means the "Regional Transportation District Sales Tax Increase (0.4%) Fund" created in the 2006 FasTracks Indenture and maintained by the RTD Trustee.

Sales Tax Revenues means the proceeds received by RTD, or by the RTD Trustee as assignee of RTD, from the levy and collection of the Sales Tax and any Additional Tax revenues pledged as RTD Pledged Revenues as referenced in Section 30.3(b) and the definition of Additional Tax.

SBE Goals has the meaning given to it in Part B (*Disadvantaged and Small Business Enterprises Programs*) of Attachment 15 (*Specified Requirements*).

Scheduled Maintenance means any repair or routine maintenance work necessary for the Concessionaire-operated Components in the ordinary course of operating the Concessionaire-operated Components, including all necessary work to keep the Concessionaire-operated Components in good and safe working order, in each case where the Concessionaire has given at least 20 days' written notice of such work and, if relevant, temporary closure of any part of the Concessionaire-operated Components to undertake such work, to RTD.

Schedule of Values means the list of items on the WBS Pricing Form with their individual budgets as provided in the Concessionaire's Proposal and as updated from time to time by the Concessionaire (a) to incorporate budget allocation details for sub-items identified in the Final Design Submittals and Revised Baseline Schedules (**provided** that no such update shall increase the total value of assets specified on the WBS Pricing Form or the total Earned Value for purpose of calculating Construction Payments under Section 26 (*Construction Payments*)), (b) in accordance with Sections 36.1(c)(iii), 36.3(e)(iii) and 38.11 or (c) as otherwise agreed between the Parties.

Second Increase Threshold has the meaning given to it in Section 34.5(d)(ii).

Second Termination Notice has the meaning given to it in Section 41.5(b).

Section 311 has the meaning given to it in Section 45.2(c).

Securities means bonds, notes, certificates, warrants, leases, contracts or other financial obligations or securities issued or executed by RTD and payable in whole or in part from a lien on the Sales Tax Revenues.

Senior Credit Facility Obligations means any Credit Facility Obligations payable from all or a portion of the Sales Tax Revenues on a parity with the Senior RTD Debt.

Senior Financial Products Agreement means any Financial Products Agreement pursuant to which (a) Financial Products Payments are payable from a lien on all or a portion of the Sales Tax Revenues on a parity with the Senior RTD Debt and (b) Financial Products Termination Payments are payable from a lien on all or a portion of the Sales Tax Revenues which is subordinate to the TABOR Portions and the Additional TABOR Portions.

Senior RTD Debt means all bonds, notes, certificates, warrants, leases, contracts or other financial obligations or securities issued or executed by RTD and secured in whole or in part by a lien on the Sales Tax Revenues that is senior or superior to the lien thereon created pursuant to Section 30.3 (*TABOR Portion*) or Section 42.4 (*Compensation Following Termination*).

Senior RTD Documents means, collectively: (a) Resolution No. 9, Series 1977 of RTD, as supplemented by the following resolutions of RTD: (i) Resolution No. 13, Series 1985, (ii) Resolution No. 2, Series 1988, (iii) Resolution No. 6, Series 1990, (iv) Resolution No. 5, Series of 1992, (v) Resolution No. 9, Series of 1993, (vi) Resolution No. 14, Series of 1997, (vii) Resolution No. 20, Series of 2000, (viii) Resolution No. 13, Series of 2001, (ix) Resolution No. 24, Series of 2001, (x) Resolution No. 26, Series of 2002, (xi) Resolution No. 6, Series of 2003, (xii) Resolution No. 04, Series of 2004, (xiii) Resolution No. 01, Series of 2005, (xiv) Resolution No. 003, Series of 2007, (xv) Resolution No. 04, Series of 2008; and (xvi) Resolution No. 28, Series of 2009; (b) an Indenture between RTD and the RTD Trustee, successor in interest to BNY Western Trust Company, as Trustee, dated August 1, 2001, as

amended, (c) the 2006 FasTracks Indenture and (d) the 2007 FasTracks Indenture, in each case (a), (b), (c) and (d) as such resolutions and indentures may be amended or supplemented from time to time, and any other resolutions, indentures of trust, leases, contracts, obligations or other agreements which may be entered into by RTD in the future to incur, issue or secure other Senior RTD Debt.

Service Payment means the "Service Payment (SP_{mn})" as determined in accordance with Part B (*Service Payment*) of Attachment 11 (*Service Payments*).

Service Payment Revision has the meaning given to it in Section 5.6(d)(ii).

Service Plan has the meaning given to it in Attachment 10 (*O&M Specifications*).

Shareholder means a holder of any membership interest, or any other security giving the right to subscribe for or convert into a membership interest, in the Concessionaire.

Shareholder Loans means, at any time, any subordinated debt instruments entered into by the Concessionaire with its Affiliates pursuant to a subordination agreement (or other agreement containing subordination terms).

Sites means, collectively, (a) the East Corridor Site and the CRMF Site, (b) the Gold Line Site and the Northwest Rail Electrified Segment Site and (c) following the Actual DUS Access Date, the DUS Rail Segment Site, and each of (a), (b) and (c) a **Site**.

Site Survey has the meaning given to it in Section 11.3(c).

Source Code means (a) the source code forming part of the Work Products and (b) any explanatory notes thereto necessary to enable RTD to perform the Work and/or to operate and maintain the Concessionaire-operated Components in accordance with the terms of this Agreement.

Special Event has the meaning given to it in Attachment 10 (*O&M Specifications*).

Special Events Timetable means the schedule agreed between RTD and the Concessionaire in accordance with Section 2.4.1(f) of Attachment 10 (*O&M Specifications*).

Specified Requirements means the requirements set out in Part A (*Specified Requirements*) of Attachment 15 (*Specified Requirements*), as such requirements are amended, modified and supplemented from time to time.

Stadium District means the Denver Metropolitan Major League Baseball Stadium District.

Standard & Poor's Standard & Poor's Rating Services, a Division of the McGraw-Hill Companies Inc.

Statement has the meaning given to it in Section 26.2(a).

STB means the Surface Transportation Board, an agency of the United States Department of Transportation.

Subcontract means any contract (at any tier) entered into by the Concessionaire, a Project Contractor or a Subcontractor with one or more third parties directly in connection with the carrying out of the Work or the operation or maintenance of the Concessionaire-operated Components or any of the Concessionaire's other obligations under this Agreement and the other Project Agreements, as amended or replaced from time to time in accordance with this Agreement.

Subcontractor means any third party, other than the Concessionaire or the Project Contractors, that enters into a Subcontract (including the Material Subcontractors).

Subordinate Credit Facility Obligations means any Credit Facility Obligations payable in whole or in part from the Sales Tax Revenues and having a lien on all or any portion of the Sales Tax Revenues which is subordinate to the lien thereon of the TABOR Portions and the Additional TABOR Portions.

Subordinate Financial Products Agreement means any Financial Products Agreement pursuant to which Financial Products Payments are payable from a lien on all or any portion of the Sales Tax Revenues that is subordinate to the lien thereon of the TABOR Portions and the Additional TABOR Portions. Any Financial Products Termination Payment required under any Subordinate Financial Products Agreement shall have a lien on all or any portion of the Sales Tax Revenues that is subordinate to the lien thereon of the TABOR Portions and the Additional TABOR Portions.

Subordinate Lien Bonds means any Securities payable in whole or in part from the Sales Tax Revenues and having a lien on all or any portion of the Sales Tax Revenues which is subordinate to the lien thereon of the TABOR Portions and the Additional TABOR Portions but does not include any Credit Facility Obligations or Financial Products Agreements relating to any such Subordinate Lien Bonds.

Subordinated Debt means at any time any subordinated debt instruments entered into by the Concessionaire (other than Shareholder Loans) pursuant to a subordination agreement (or other agreement containing subordination terms) and which have been verified in advance in writing by RTD in accordance with Section 6.2 (*Verification of the Final Drafts of the Designated Credit Agreements*) as consistent in all material respects with the Financial Model, including with respect to the assumptions related thereto.

Subsidiary means, as to any Person, any other Person in which shares possessing more than 50% of the voting power are owned directly or indirectly through one or more subsidiaries by the first Person.

System Performance Demonstration means the procedure for the demonstration of the operation of a Commuter Rail Project to be carried out in accordance with the procedure in Section 4 (*System Performance Demonstration*) of Part D (*Verification and Demonstration*) of Attachment 7 (*Design, Construction and Rolling Stock Requirements*).

System Performance Demonstration Reports means the progress reports required to be provided to RTD by the Concessionaire in accordance with Section 4.3 (*System Performance Demonstration Reports*) of Part D (*Verification and Demonstration*) of Attachment 7 (*Design, Construction and Rolling Stock Requirements*).

System Safety Program Plan has the meaning given to it in Attachment 9 (*Project and Construction Management*) and Attachment 10 (*O&M Specifications*).

System Security Plan has the meaning given to it in Attachment 9 (*Project and Construction Management*) and Attachment 10 (*O&M Specifications*).

System Testing and Commissioning Plan has the meaning given to it in Attachment 7 (*Design, Construction and Rolling Stock Requirements*).

TABOR Portion means, for each calendar year, the amount in Base Rate Dollars identified as "TABOR Portion TP_n" in Table 4 of Part H (*TABOR Secured Payments*) in Attachment 11 (*Service Payments*).

Technical Panel means the Technical Panel referred to in Section 50.3 (*Dispute Resolution Panel*).

Technical Proposal Due Date means date specified as the "Technical Proposal Due Date" in the RFP, as such date may have been extended by RTD pursuant to an addendum to the RFP.

Tender Bonds means any Securities payable from all or a portion of the Sales Tax Revenues which by their terms may be required to be tendered for purchase, or which may be tendered by and at the option of the owner thereof for purchase, prior to the stated maturity thereof.

Temporary Work means all temporary structures and installations required for the performance of the Work or the Early Work, including fences, roads, parking, buildings, staging, and storage areas.

Termination Date means the date on which this Agreement is terminated pursuant to Sections 5.13(b), 5.13(c)(iii), 41 (*Termination of the Agreement*) or 39.8 (*Extensive Force Majeure Event*).

Termination Notice means a written notice of termination of this Agreement.

Termination Payment Period has the meaning given to it in Section 42.4(b).

Third Increase Threshold has the meaning given to it in Section 34.5(d)(iii).

Third Party Agreements means:

- (a) the Inter-Governmental Agreements;
- (b) the Utility Relocation Agreements; and
- (c) the Railroad Agreements.

Third Party Materials means all materials, information, technology and methods owned by any party other than RTD, the Concessionaire, the Project Contractors and any of their respective Subcontractors, which are incorporated into the Work Products or are utilized in connection with the Concessionaire's performance of its obligations under this Agreement and the other Project Agreements to which it is a party, including pre-existing and newly developed standardized

application tools and system operating technology not specifically commissioned for the Eagle Project.

Third Party Option means the RTD option under Section 28.6 (*Third Party Option Exercise*) to include in the Phase 1 Work (i) the CCD Storm Sewer Drainage Project, (ii) the 40th Avenue Grade Separation Project and/or (iii) one (but not both) of the Peña Boulevard Bridge Projects.

Third Party Option Exercise Deadline means November 10, 2010.

Third Party Option Exercise Notice means a written notice in which RTD notifies the Concessionaire of the exercise of the Third Party Option(s) specified in such notice.

Total Limit has the meaning given to it in Section 30.3(g).

Traction Electrification System has the meaning given to it in Attachment 7 (*Design, Construction and Rolling Stock Requirements*).

Traction Power means power supplied by the traction substations to the Traction Electrification System for the Commuter Rail Network expressed in megawatt-hours.

Traction Power Cost Multiplier or **TPCM_n** for Contract Year n shall be determined in accordance with the following formula:

$$TPCM_n = PPM \times \frac{CPI_n}{CPI_{base}}$$

Where:

CPI_{base} = has the meaning given to it in Part A (*Definitions*) of Attachment 11 (*Service Payments*);

CPI_n = has the meaning given to it in Part A (*Definitions*) of Attachment 11 (*Service Payments*); and

PPM = means the base price per megawatt-hour of U.S.\$100 in Base Rate Dollars.

Traction Power Efficiency Incentive Amount means, beginning with the first full Contract Year after all Commuter Rail Services have achieved the respective Revenue Service Commencement Dates through the End Date:

(a) the result of the following calculation:

$$\min[0.1 \times AAA, ATPSA] \times 0.1 + \min[0.1 \times AAA, \max[ATPSA - 0.1 \times AAA, 0]] \times 0.2 + \max[ATPSA - 0.2 \times AAA, 0] \times 0.5$$

multiplied by

(b) the lesser of (i) the Traction Power Cost Multiplier and (ii) the actual average (mean) price per megawatt-hour of Traction Power paid by RTD with respect to the relevant Commuter Rail Service during such Contract Year,¹

where:

AAA means Annual Allowable Amount; and

ATPSA means Achieved Traction Power Savings Amount.

Traction Power Reimbursement Amount means, for any year in which the Annual Traction Power Amount for the Contract Year to date exceeds the Annual Allowable Amount, such excess amount of Traction Power for the year above the Annual Allowable Amount multiplied by the Traction Power Cost Multiplier.

Traction Power Service Payment Adjustment means, for any completed Contract Year, (a) the total of all Traction Power Efficiency Incentive Amounts for such Contract Year minus (b) the total of all Traction Power Reimbursement Amounts for such Contract Year.

Traction Power Usage Report has the meaning given to it in Section 29.15(d).

Traffic Management Plan has the meaning given to it in the Design, Construction and Rolling Stock Requirements.

Training Program means the procedure for the training and certification of operating and maintenance personnel and staff with respect to the operation and maintenance of the Concessionaire-operated Components set out in Sections 4.8.1 and 8.6.6 of Attachment 10 (*O&M Specifications*).

Trustee's Instructions has the meaning given to it in Section 30.3(e).

¹ As an example of this calculation only, and without affect on or modification to the definition of the Traction Power Efficiency Incentive Amount, if the AAA equaled 100 MWh, and the ATPSA equaled 25 MWh, and the Traction Power Cost Multiplier equaled \$10 and this was less than the actual average (mean) price per MWh of Traction Power paid by RTD with respect to the relevant Commuter Rail Service during such Contract Year then it would be calculated as follows:

$$((10 \text{ MWh} \times 0.1) + (10 \text{ MWh} \times 0.2) + (5 \text{ MWh} \times 0.5)) \times \$10 = \$55$$

Unidentified Archaeological Remains means any Archaeological Remains that existed on a Site prior to the Technical Proposal Due Date, excluding any such Archeological Remains that were known to the Concessionaire on the Final Proposal Due Date or that could reasonably have been identified by an appropriately qualified and experienced contractor or engineer exercising due care and skill and Good Industry Practice in the same or equivalent circumstances, including through review and analysis of the RODs and the NWES Environmental Evaluation and of the investigations and assumptions set forth therein.

Unidentified Endangered Species means any Endangered Species that is found on a Site the continual or habitual presence of which was not identified or described in the RODs and the NWES Environmental Evaluation, excluding in each case any such Endangered Species that was known by the Concessionaire to exist habitually and continuously on such Site on the Final Proposal Due Date or that could reasonably be expected to be found temporarily, continually or habitually on such Site based on the data reported in the RODs and the NWES Environmental Evaluation.

Unidentified Environmental Condition means any Environmental Condition that existed on a Site prior to the date on which RTD delivered Vacant Possession of such Site to the Concessionaire and that (a) was not identified or was incorrectly identified or described in the Environmental Reports or (b) manifests itself in a new location not identified or anticipated in the Environmental Reports, and in each case (a) and (b) excluding any such Environmental Condition that could reasonably have been identified or discovered (or anticipated in the case of such condition that manifested itself in a location not identified or anticipated in the Environmental Reports) by an appropriately qualified and experienced contractor or engineer exercising due care and skill and Good Industry Practice in the same or equivalent circumstances, including through review and analysis of the Environmental Reports and the investigations and assumptions on the basis of which the Environmental Reports were prepared.

Unidentified Geological Obstruction means any Geological Obstruction that existed prior to the Technical Proposal Due Date and that, with respect to subsurface or latent conditions at the boring holes that were identified in the Geotechnical Reports, differs in a material respect from the conditions for such holes described in the Geotechnical Reports, excluding any such Geological Obstruction that could reasonably have been identified or discovered by an appropriately qualified and experienced contractor or engineer exercising due care and skill and Good Industry Practice in the same or equivalent circumstances, including through review and analysis of the Geotechnical Reports and the investigations and assumptions on the basis of which the Geotechnical Reports were prepared.

Unidentified Utility means any Utility present on any Site that was not identified or was incorrectly shown, identified or described in the Utility Data, in each case excluding any Utility that:

- (a) is an RTD Relocated Utility;
- (b) was installed on a Site after the Concessionaire took Vacant Possession of such Site;
- (c) is a "service line", which for the purposes of this definition shall mean any Utility line, the function of which is to connect the common source of supply or service to an individual customer's service; or

- (d) could reasonably have been identified or discovered by an appropriately qualified and experienced contractor or engineer exercising due care and skill and Good Industry Practice in the same or equivalent circumstances, including through review and analysis of the Utility Data and the investigations and assumptions on the basis of which the Utility Data was prepared.

Uninsurable Risk means a risk in respect of which either:

- (a) insurance is not available to persons engaged in the same or substantially the same business as the Concessionaire in the insurance market of the United States of America from time to time; or
- (b) the premium payable for insuring that risk is at such a level that the risk is not generally being insured against by persons engaged in the same or substantially the same business to the Concessionaire in the insurance market in the United States of America from time to time.

UP Site means any Site or part thereof the rights to which RTD will acquire pursuant to the Railroad Agreements identified in Section 1 of Attachment 22 (*Railroad Agreements*) to be entered into by RTD and the Union Pacific Corporation (including its Affiliates) after the date of this Agreement.

USACE means the United States Army Corps of Engineers.

Use has the meaning given to it in Section 33.1.

Utility means any public or private utility and facility, including any facility relating to electrical energy, telephone and telecommunications, radio, television and public transit installations and the conveyance, distribution and supply of water, sewage, heat, gas, chemicals, steam, petroleum products and all piped installations, but excluding storm water facilities, traffic signals, and any street and station lighting and fire prevention measures to be installed in connection with the Eagle Project in accordance with the requirements of Attachment 7 (*Design, Construction and Rolling Stock Requirements*).

Utility Data has the meaning given to it in Attachment 20 (*Utilities*).

Utility Drawings has the meaning given to it in Attachment 20 (*Utilities*).

Utility Matrix has the meaning given to it in Attachment 20 (*Utilities*).

Utility Owner means the owner of any of the Utilities located in or under or crossing any Site.

Utility Relocation Agreement means any agreement entered into between RTD and a Utility Owner in relation to the Eagle Project, including (a) the agreements attached in Part A of Annex 1 to Attachment 20 (*Utilities*) and (b) the other agreements to be entered into between RTD and a Utility Owner copies of which are attached in draft form in Part B of Annex 1 to Attachment 20 (*Utilities*).

Vacant Possession means, in relation to any part of any Site, access to and possession thereof or making available to the Concessionaire the right to use therein in accordance with Section 2 (*Lease and Concession Rights*) in its then existing state and condition, subject to:

- (a) access rights of RTD and the Project Third Parties as set out in the Third Party Agreements, including with respect to Utility Work in connection with any RTD Relocated Utility;
- (b) access rights of the DUS Infrastructure Contractor pursuant to the DUS Infrastructure Agreement;
- (c) the rights of Relevant Authorities, Utility Owners or third parties to have access to such Site existing as of the Final Proposal Due Date;
- (d) the statutory rights or public franchise rights of Relevant Authorities and Utility Owners to have access to such Site existing as of the Technical Proposal Due Date;
- (e) the rights, including rights of access, granted to RTD and its employees, agents, consultants and contractors and to other Persons under this Agreement and the other Project Agreements;
- (f) restrictions of use set forth in easement deeds and/or right of entry permits applicable to the Sites as such restrictions are specified in Part E (*Limitations*) of Attachment 2 (*Description of Sites and Schedules of Site Availability*) as provided to the Concessionaire prior to the Technical Proposal Due Date; and
- (g) restrictions set forth in any title commitments related to the Sites attached in Part F (*Title Commitments*) to Attachment 2 (*Description of Sites and Schedules of Site Availability*).

Variable Rate Bonds means any Securities issued with a variable, adjustable, convertible or other similar interest rate which is not fixed in percentage for the entire term thereof at the date of issue.

Voluntary Clean-Up Application and Materials Management Plan means each of:

- (a) the Voluntary Clean-Up Application and Materials Management Plan for the East Corridor as approved by the Colorado Department of Public Health and Environment, a draft copy of which is attached as Exhibit 1(A) to Attachment 7 (*Design, Construction and Rolling Stock Requirements*); and
- (b) the Voluntary Clean-Up Application and Materials Management Plan for the Gold Line as approved by the Colorado Department of Public Health and Environment, a draft copy of which is attached as Exhibit 1(B) to Attachment 7 (*Design, Construction and Rolling Stock Requirements*).

WBS Pricing Form means the pricing form set out in Annex 2 (*WBS Pricing Form*) to Attachment 8 (*Construction Payments*).

WBS Pricing Form Rider means, with respect to each Third Party Option, the rider to the WBS Pricing Form set forth in Appendix F of Book 4 (*Financial Proposal Appendices*) of the Final Proposal contained in the Concessionaire's Proposal.

Work means (a) following the Early Work Effective Date until the Phase 1 Effective Date, the Early Work, (b) following the Phase 1 Effective Date, the Early Work and the Phase 1 Work, and (c) following the Phase 2 Effective Date, the Early Work, Phase 1 Work and Phase 2 Work.

Work Order has, in respect of any Utility, the meaning given to it in the relevant Utility Relocation Agreement.

Work Products means all Concessionaire Design Submittals, all Record Documents, the plans and programs to be prepared by the Concessionaire during the Design/Build Period (including the Concessionaire's Project Management Plan, the Quality Management Plan and the Concessionaire's Sustainability Plan), the O&M Submittals and all other drawings, designs, specifications, manuals, reports, studies, surveys, models, software (including Source Code and object code), documents, materials, deliverables, data, inventions, whether or not patentable, and products, including with respect to the Final Project Design, prepared, developed, acquired, used or intended to be used by the Concessionaire, any Project Contractor or any of their respective Subcontractors or suppliers in connection with the Eagle Project or which is otherwise necessary for the purposes of the carrying out the Work or operating the Concessionaire-operated Components in accordance with the terms of this Agreement.

Yearly Operating Report has the meaning given to it in Attachment 10 (*O&M Specifications*).

Interpretation

1.2 Unless the context otherwise clearly requires:

- (a) the definitions of terms herein shall apply equally to the singular and plural forms of the terms defined;
- (b) whenever the context may require, any pronoun shall include the corresponding masculine, feminine and neuter forms;
- (c) the words "include", "includes" and "including" shall be deemed to be followed by the phrase "without limitation";
- (d) the verb "will" shall be construed to have the same meaning and effect as the verb "shall";
- (e) any definition of or reference to any agreement, instrument or other document herein shall be construed as referring to such agreement, instrument or other document as from time to time amended, supplemented or otherwise modified (subject to any restrictions on such amendments, supplements or modifications set forth herein);
- (f) other than with respect to the definitions of Change in Law and Discriminatory Change in Law herein, any reference to a Law shall be construed as a reference to (i) such Law as it may be amended, modified or supplemented from time to time, (ii) all regulations and rules pertaining to or promulgated pursuant to such Law, (iii) the successor to the Law resulting from recodification or similar reorganizing of Laws and (iv) all future Laws pertaining to the same or similar subject matter;
- (g) any reference herein to any Person, or to any Person in a specified capacity, shall be construed to include such Person's successors and assigns or such Person's successors in such capacity, as the case may be;

- (h) the words "herein", "hereof" and "hereunder", and words of similar import, shall be construed to refer to this Agreement in its entirety and not to any particular provision hereof;
- (i) all references herein to Sections, Parts and Attachments shall be construed to refer to Sections and Parts of and Attachments to, this Agreement. The Attachments to this Agreement are an integral part hereof. The provisions of this Agreement shall prevail over the provisions of the Attachments to the extent of any inconsistency.
- (j) the headings used in this Agreement are for convenience of reference only and are not to affect the construction of or to be taken into consideration in interpreting this Agreement; and
- (k) references to this Agreement or to any other agreement or document relating to the Eagle Project include a reference to this Agreement, or, as the case may be, such other agreement or document as amended from time to time.

Conflict of Terms

- 1.3 (a) Other than as provided in Section 13.1 (*Environmental Requirements*) with respect to Environmental Requirements, in the event of any conflict between the terms or provisions of any Contract Documents, the order of precedence (in order from highest to lowest, where the terms or provisions of a higher precedence document shall govern in the event of a conflict with a lower precedence document) shall be as follows:
- (i) this Agreement;
 - (ii) the Alternative Technical Concepts;
 - (iii) the attachments to this Agreement, other than (A) Attachment 19 (*Concessionaire's Proposal*) (excluding such portions which are separately and directly incorporated into this Agreement or any other attachment to this Agreement or which constitute Alternative Technical Concepts) and (B) any Third Party Agreement (other than such portions which are separately and directly incorporated into this Agreement or any other attachment to this Agreement);
 - (iv) the Third Party Agreements (other than such portions which are separately and directly incorporated into this Agreement or any other attachment to this Agreement) incorporated herein by way of attachment; and
 - (v) Attachment 19 (*Concessionaire's Proposal*) (other than such portions which are separately and directly incorporated into this Agreement or any other attachment or which constitute Alternative Technical Concepts),
- (i) through (v) collectively, the ***Contract Documents***.
- (b) In the event of any conflict, ambiguity or inconsistency between or among any of the terms or provisions within this Agreement (other than as provided in Section 13.1 (*Environmental Requirements*) with respect to Environmental Requirements), or between

- two or more Contract Documents having the same precedence under Section 1.3(a), the most stringent requirement shall take precedence.
- (c) If the Concessionaire's Proposal includes statements, terms, concepts or designs that can reasonably be interpreted as offers to provide higher quality items or to adhere to more stringent requirements than otherwise required by the other Contract Documents, or to perform services or meet standards in addition to or better than those otherwise required, then the Concessionaire's obligations hereunder shall include compliance with all such statements, terms, concepts and designs.
 - (d) Additional or supplemental details or requirements in a lower priority Contract Document shall be given effect except to the extent they irreconcilably conflict with the terms or provisions contained in a higher priority Contract Document.

PART 2 – THE LEASE AND CONCESSION

2. LEASE AND CONCESSION RIGHTS

2.1 The Concessionaire hereby agrees, as and when required by this Agreement and, with respect to Phase 1, subject to the occurrence of the Phase 1 Effective Date on or before the Phase 1 Conditions Precedent Satisfaction Date and, with respect to Phase 2, subject to the occurrence of the Phase 2 Effective Date on or before the Phase 2 Condition Precedent Satisfaction Date, for the duration of the Lease Period, to:

- (a) design and construct the Commuter Rail Projects and the Commuter Rail Maintenance Facility;
- (b) design, procure and install the DUS Systems;
- (c) design and procure the Rolling Stock;
- (d) provide the Commuter Rail Services and operate and maintain the Commuter Rail Network and the Rolling Stock; and
- (e) commencing on and following the later of the Actual DUS Access Date and the Guaranteed DUS Access Date, dispatch the Heavy Rail Movements.

2.2 RTD hereby leases to the Concessionaire, as lessee, in consideration for the Rent, and the Concessionaire hereby leases from RTD:

- (a) all parts of the Commuter Rail Network (excluding the DUS Rail Segment) commencing on:
 - (i) in respect of each Site, the date on which such part of such Site is made available to the Concessionaire in accordance with Section 11.1(a); or
 - (ii) otherwise, the date on which title to such part of the Commuter Rail Network passes to RTD in accordance with Section 23.1(a),

and in each case until the End Date, for the purpose of constructing, operating and maintaining the Commuter Rail Network;

- (b) the Rolling Stock, commencing on the date on which title to such Rolling Stock passes to RTD in accordance with Section 23.1(b) and ending on the later of (i) the End Date and (ii) the Rolling Stock Termination Date, for the purpose of operating and maintaining such Rolling Stock, **provided** that if the Phase 2 Effective Date fails to occur on or before the Phase 2 Condition Precedent Satisfaction Date, no lease with respect to the Phase 2 Rolling Stock shall arise hereunder,

in each case, upon the terms, covenants and conditions of, this Agreement and the other Project Agreements.

2.3 RTD hereby grants to the Concessionaire, in consideration for the Rent, and the Concessionaire hereby accepts, a license to use and occupy all parts of the DUS Rail Segment Site and the DUS Rail Segment, commencing on the Actual DUS Access Date or, with respect to the DUS Systems, the date on which title to such part of the DUS Systems passes to RTD in accordance with Section 23.1(a) and ending on the End Date, for the purpose of operating and maintaining DUS Rail Segment, upon the terms, covenants and conditions of, this Agreement and the other Project Agreements.

2.4 RTD grants to the Concessionaire the leasehold interests and licenses provided by this Section 2 (*Lease and Concession Rights*) solely for the purpose of providing the Concessionaire the access necessary to construct, operate and maintain the Commuter Rail Network.

2.5 The Concessionaire shall perform its obligations under this Agreement and the other Project Agreements at its own risk and without recourse to or financial assistance or payment from RTD or any other department, office or agency of the State of Colorado or any other State of the United States of America or the United States of America, except as expressly provided, and subject to the conditions specified, in this Agreement.

2.6 Prior to the Phase 1 Effective Date, each Party shall execute and deliver a memorandum of lease (the *Memorandum of Lease*) in a form reasonably acceptable to the Parties, which may be recorded in the Office of the Clerk and Recorder of each of the City and County of Denver, Adams County and Jefferson County. If the Phase 2 Effective Date does not occur on or before the Phase 2 Condition Precedent Satisfaction Date, and otherwise to the extent that changes are made to this Agreement with respect to the Lease Period, leased property or other material matters set forth in the recorded Memorandum of Lease, the Parties shall execute, deliver and record an amendment to the recorded Memorandum of Lease reflecting the limitation of the Eagle Project to Phase 1 only or such other changes. The Parties agree not to record this Agreement itself.

3. PAYMENT OF RENT

Rent

3.1 Throughout the Lease Period, the Concessionaire shall pay annual rent (the *Rent*) of U.S.\$10 to RTD on the 10th Business Day of each Contract Year, **provided** that for the first Contract Year the Concessionaire shall pay the Rent on the 10th Business Day after the Phase 1 Effective Date.

Method of Payment

3.2 Each payment of Rent payable by the Concessionaire to RTD under this Agreement shall be made in Dollars in immediately available funds, no later than 12:00 p.m., Mountain Time, on the date such payment shall be due and payable hereunder to RTD at its address set forth in Section 58.1 (*Notices, Etc.; Language*).

4. LEASE PERIOD

Lease Period

4.1 The *Lease Period* will commence on the Phase 1 Effective Date and will end on the End Date provided, that with respect only to the Rolling Stock, the Lease Period will end on the later of (i) the End Date and (ii) the Rolling Stock Termination Date.

Quiet Enjoyment

4.2 (a) Without limiting any of RTD's remedies upon and during the continuance of a Concessionaire Termination Event, RTD agrees that the Concessionaire shall peaceably and quietly have, hold and enjoy, in each case for the period stipulated in Section 2.2 or, as the case may be, Section 2.3:

- (i) all parts of the Commuter Rail Network; and
- (ii) the Rolling Stock.

(b) Such right of quiet enjoyment is subject to, and shall not affect:

- (i) RTD's rights otherwise to enforce against the Concessionaire its obligations under this Agreement;
- (ii) access rights of RTD and the Project Third Parties as set out in the Third Party Agreements;
- (iii) access rights of the DUS Infrastructure Contractor pursuant to the DUS Infrastructure Agreement;
- (iv) the rights of Relevant Authorities, Utility Owners or third parties to have access to such Site;
- (v) the statutory, recorded property or public franchise rights of Relevant Authorities and Utility Owners to have access to any Site;
- (vi) the rights, including rights of access, granted to RTD and its employees, agents, consultants and contractors and to other Persons under this Agreement and the other Project Agreements;
- (vii) rights or claims of parties in possession not shown by the public records;

- (viii) restrictions of use set forth in easement deeds and/or right of entry permits applicable to the parcels as such restrictions are specified in Part E (*Limitations*) of Attachment 2 (*Description of Sites and Schedules of Site Availability*); and
- (ix) restrictions set forth in any title commitments related to the Sites.

PART 3 – PRE-COMMENCEMENT PERIOD

5. EFFECTIVENESS, EARLY WORK AND PHASING

Immediately Effective Provisions

5.1 Sections 1 (*Definitions, Interpretations and Appropriations*), 5 (*Effectiveness, Early Work and Phasing*), 6 (*RTD Verification Rights*), 7 (*Representations and Warranties*), 10 (*Financing*), 16 (*Reference Data*), 35 (*Indemnity*), 39 (*Force Majeure*) (but only for the purposes of Section 5.7 (*Achievement of or Failure to Achieve the Phase 1 Effective Date*)), 48 (*Assignment*), 49 (*Partnering*), 50 (*Dispute Resolution Procedure*), 52 (*No Partnership*), 55 (*Confidentiality*), 56 (*No Deemed Waivers; Remedies Cumulative*), 57 (*Amendments*), 58 (*Notices, Etc.; Language*), 59 (*Captions*), 60 (*Governing Law*), 61 (*Consent to Service of Process*), 62 (*Waiver of Consequential Damages*), 63 (*Execution in Counterparts*), 64 (*Binding Effect*), 65 (*Severability*) and 66 (*Entire Agreement*) and the Attachments referred to in such Sections (the ***Immediately Effective Provisions***) shall come into effect on and from the date of this Agreement.

Early Work Effective Date

- 5.2 (a) Sections 8 (*RTD's Representative*), 9 (*Key Personnel*), 11 (*Land*), 12 (*Site Conditions and Site Investigation*), 13 (*Environmental Requirements*), 14 (*Safety and Security*), 15 (*Utilities*), 17 (*Permits*), 18 (*Submission*), 19 (*RTD Review*), 20 (*Project Third Party Review*), 22 (*Construction and Procurement*) (other than Section 22.8 (*Independent Engineer*)), 23 (*Concessionaire's Obligations and RTD's Rights*), 25 (*Organization of the Worksite*), 26 (*Construction Payments*), 30.4 (*Appropriations*), 32 (*Audit and Records*), 34 (*Insurance*), 36 (*Changes*), 37 (*Change in Law*), 38 (*Relief Events*), 39 (*Force Majeure*), 41 (*Termination of the Agreement*) and 53 (*Illegal Aliens*) and the Attachments referred to in such Sections (the ***Early Work Effective Provisions***) shall come into effect on and from the Early Work Effective Date but solely with respect to and as necessary to implement the Early Work in accordance with this Agreement.
- (b) Following the Early Work Effective Date, the Concessionaire shall carry out and complete the Early Work in accordance with Attachment 7 (*Design, Construction and Rolling Stock Requirements*) and Attachment 9 (*Project and Construction Management*).

Condition Precedent to the Early Work Effective Date

- 5.3 (a) Subject to Section 5.3(b), the Early Work Effective Date shall occur upon the delivery by RTD to the Concessionaire of the Early Work Notice to Proceed at any time prior to the Phase 1 Effective Date. No later than 14 days prior to issuing the Early Work Notice to Proceed, RTD shall submit a written request to the Concessionaire to deliver (i) the Construction Security with respect to the Early Work only and (ii) to the extent not previously provided, a copy of the Design/Build Contract executed by the relevant parties thereto in form and substance acceptable to RTD in accordance with Section 6.1

- (Verification of Final Drafts of the Design/Build Contract and Rolling Stock Supply Contract), certified by the Concessionaire as being a true, complete and accurate copy, together with the applicable corporate documents otherwise required in accordance with Section 5.6(h) (*Corporate Documents*) with respect to the Design/Build Contract. The Concessionaire shall deliver to RTD such Construction Security with respect to the Early Work only and, to the extent not previously provided, a copy of the Design/Build Contract and the related corporate documents within 10 days after delivery of RTD's request.
- (b) The Early Work Notice to Proceed must attach evidence that the insurance requirements applicable to the Early Work, as set out in Section 34 (*Insurance*) and Attachment 12 (*Insurance*), with which RTD is responsible for complying on or prior to the Early Work Effective Date have been complied with in full and that the relevant premiums for the required insurance policies have been paid.
- (c) The Concessionaire shall confirm receipt of the Early Work Notice to Proceed and shall, promptly following such receipt, provide RTD with evidence that the insurance requirements applicable during the Design/Build Period, as set out in Section 34 (*Insurance*) and Attachment 12 (*Insurance*), with which the Concessionaire is responsible for complying on or prior to the Early Work Effective Date (other than with respect to marine insurance) have been complied with in full and that the relevant premiums for the required insurance policies have been paid.

Early Work following Failure to Achieve Phase 1 Effective Date

- 5.4 (a) If, following the Early Work Effective Date, the Phase 1 Effective Date fails to occur and either Party thereafter exercises its rights to terminate the Agreement pursuant to Section 5.7 (*Achievement of or Failure to Achieve the Phase 1 Effective Date*):
- (i) the Concessionaire shall ensure that the Design/Build Contractor assigns within 10 days of such date the Early Work Warranties under the Design/Build Contract with respect to all Early Work conducted before and after such date;
 - (ii) RTD may elect, with 30 days prior written notice to the Concessionaire, to terminate the insurance procured by RTD pursuant to Section 34 (*Insurance*) and Attachment 12 (*Insurance*) and may require that the Concessionaire, at RTD's cost and expense, procure insurance in accordance with the Early Work Insurance Requirements and thereafter provide evidence to RTD no later than 30 days after delivery of such notice that the Concessionaire has procured such insurance;
 - (iii) when the Concessionaire reasonably believes that it has completed the Early Work Completion Requirements, including following notification from RTD under Section 5.4(a)(v) that any such requirements were not previously satisfied, the Concessionaire may notify RTD to that effect and request that RTD certify the completion of the Early Work;
 - (iv) RTD shall issue a certificate to the Concessionaire in accordance with this Section 5.4(a)(iv) promptly following the Concessionaire's demonstration to RTD's reasonable satisfaction that the following requirements (the *Early Work*

Completion Requirements) have been satisfied or waived (the date of such certification, the **Early Work Completion Date**):

- (A) the Early Work has been completed in accordance with the provisions of this Agreement, the Project Requirements and Good Industry Practice;
 - (B) with respect to that portion of the Early Work identified in the plans set forth in Appendix 3 (*Final Design Documents for Work on Railroad Property*) of Attachment 7 (*Design, Construction and Rolling Stock Requirements*), such relocations have been completed in accordance with the plans and the relevant agreements;
 - (C) all required Concessionaire Design Submittals and Contract Data relating to the operation and maintenance of the Early Work have been submitted to, and, if required, approved by, as the case may be, RTD, the Project Third Parties and the Relevant Authorities (as applicable) in accordance with Part D (*Verification and Demonstration*) of Attachment 7 (*Design, Construction and Rolling Stock Requirements*) and Attachment 6 (*Contract Data Requirements*);
 - (D) all demobilization from the relevant Sites is complete (including removal of Temporary Works and equipment used in the performance of the Early Work);
 - (E) all deficiencies and non-compliance identified by RTD following any audit carried out pursuant to Section 22.3(c) have been corrected;
 - (F) the Concessionaire has submitted to RTD the As-Built Schedule for the Early Work;
 - (G) the Concessionaire has provided to RTD the Early Work Warranties in accordance with Section 5.4(a)(i) and has otherwise assigned to RTD all warranties under the Design/Build Contract in respect of the Early Work;
 - (H) the Concessionaire has certified to RTD in writing (and provided such documentary evidence as RTD may reasonably require) that (I) no amounts owing to the Design/Build Contractor and any of its Subcontractors remains unpaid with respect to the Early Work and (II) final settlement of the Design/Build Contract with respect to the Early Work has occurred in accordance with Section 38-26-107(1) *et seq.*, Colorado Revised Statutes; and
 - (I) all conditions to the return of the Construction Security with respect to the Early Work have been met in accordance with Section 38-26-101 *et seq.*, Colorado Revised Statutes, applicable Law and the terms of the Design/Build Contract; and
- (v) if, following delivery of a notice from the Concessionaire under Section 5.4(a)(iii), RTD determines that (A) the Concessionaire has not demonstrated to RTD's reasonable satisfaction that the Concessionaire has satisfied the Early Work Completion Requirements, then RTD shall promptly

and in any event no later than 10 days following such determination deliver to the Concessionaire a notice specifying those Early Work Completion Requirements that remain unsatisfied, **provided** that a failure to deliver such notice shall not be deemed a decision that the Early Work Completion Requirements are satisfied, or (B) the Concessionaire has demonstrated to RTD's reasonable satisfaction that the Concessionaire has satisfied the Early Work Completion Requirements, then RTD shall promptly and in any event within five days certify to the Concessionaire the completion of the Early Work in accordance with Section 5.4(a)(iv).

- (b) Recognizing that time is of the essence in completing the Early Work and that in the event of failure to complete the Early Work as specified in this Agreement it would be difficult to determine the exact amount of the Loss suffered by RTD due to the Concessionaire's failure to complete such work, if following the Early Work Effective Date the Phase 1 Effective Date fails to occur and either Party thereafter exercises its rights to terminate the Agreement pursuant to Section 5.7 (*Achievement of or Failure to Achieve the Phase 1 Effective Date*) and thereafter the Concessionaire fails to achieve the Early Work Completion Date by the Early Work Completion Deadline Date (as such date may be extended in accordance with this Agreement), the Concessionaire shall pay to RTD as liquidated damages and not as penalty an amount for each and every day of delay calculated by reference to a rate of 0.05% of the sum of the Maximum Annual Early Work Construction Payment Amounts (or part thereof); **provided** that such liquidated damages shall not exceed 5.0% of the sum of the Maximum Annual Early Work Construction Payment Amounts; **provided further** that, other than as provided for in this Agreement, any failure to perform due to shortages in personnel, materials and equipment will not be considered excusable and the Concessionaire, by accepting this Agreement, warrants that it has the necessary material, equipment, and personnel necessary to complete the Early Work. The Concessionaire shall assign all liquidated damages claims under the Design/Build Contract in respect of the Early Work to RTD immediately upon RTD's written request following termination of this Agreement pursuant to Section 5.7 (*Achievement of or Failure to Achieve the Phase 1 Effective Date*) for amounts up to the limits established in this Section 5.4(b). The obligations of the Concessionaire under this Section 5.4(b) are not intended to constitute a penalty, but are intended to be, and shall constitute, liquidated damages to compensate RTD for the cost of delay in completion of the Early Work and for other costs incurred by RTD in reliance upon the Concessionaire's agreement to perform such work in accordance with the terms herein. Nothing in this Section 5.4(b) shall be interpreted as limiting, in any way, RTD's right to proceed against the Concessionaire for Losses due to failure to perform herein and in accordance with Section 5.1.4 (*Set-off*) RTD reserves the right to deduct said liquidated damages from any amount due the Concessionaire under this Agreement or, at its option, to collect such liquidated damages directly from the Concessionaire or its surety.
- (c) Following certification of completion of the Early Work by RTD pursuant to Section 5.4(a)(iv), RTD shall return the Construction Security with respect to the Early Work to the Concessionaire.
- (d) For the avoidance of doubt, RTD shall only be liable to pay the Concessionaire amounts duly claimed by the Concessionaire in respect of the Early Work pursuant to Section 26 (*Construction Payments*).

Phase 1 Effective Date

5.5 Other than with respect to inclusion of Phase 2 as part of the Work and the Commuter Rail Services in accordance with Section 5.9 (*Conditions Precedent to the Phase 2 Effective Date*) and subject to the provisions of Section 5.13 (*Full Phase 1 Notice to Proceed*), all the provisions of this Agreement other than the Immediately Effective Provisions (and if the Early Work Effective Date has occurred, the Early Work Effective Provisions) shall come into effect on the Phase 1 Effective Date.

Conditions Precedent to the Phase 1 Effective Date

5.6 The occurrence of the Phase 1 Effective Date is subject to the fulfillment of the following conditions (provided that the Parties will use their Reasonable Efforts to ensure that all such conditions, other than the conditions specified in Sections 5.6(a), 5.6(b)(ii)-(iii), 5.6(d)(i)(A)-(B), 5.6(d)(ii) and 5.6(h) hereof, are fulfilled on the same day):

- (a) *Project Agreements.* Each of the following shall have been executed by the relevant parties thereto and be in form and substance acceptable to RTD in accordance with Sections 6 (*RTD Verification Rights*) and 29.2 (*Verification of the Final Draft of the O&M Contract*) and a copy of each such document, certified by the Concessionaire as being true, complete and accurate, shall have been delivered to RTD:
 - (i) the Design/Build Contract;
 - (ii) the O&M Contract;
 - (iii) the Rolling Stock Supply Contract; and
 - (iv) the Designated Credit Agreements.
- (b) *Other Agreements.* Each of the following shall have been executed by the relevant parties thereto and each shall have become unconditional in all respects (except for any condition relating to the Phase 1 Effective Date occurring under this Agreement):
 - (i) the Construction Security;
 - (ii) the Memorandum of Lease; and
 - (iii) the Lenders' Direct Agreement.
- (c) *Financial Close.*
 - (i) RTD shall have delivered to the Concessionaire a notice accepting the Financial Model and Service Payment Revision delivered by the Concessionaire to RTD immediately prior to Financial Close on the basis that the Financial Model and Service Payment Revision do not reflect, or RTD otherwise expressly waives its right to reject and accepts, any (A) adjustment to the Base Annual Service Payments that exceed the limits referenced in Sections 8.3(b)(iv) and 8.4(c) of Volume I of the RFP and (B) increase in credit spreads greater than 60 bps.

- (ii) Following delivery by RTD to the Concessionaire of a notice in accordance with Section 5.6(c)(i), Financial Close shall have occurred and the Concessionaire shall have delivered to RTD a certificate to that effect.
- (d) *Financial Model; Service Payment and TABOR Portion Revisions.*
- (i) The Concessionaire shall have delivered to RTD both paper and unrestricted electronic versions of the Financial Model in the form attached hereto as Part B (*Financial Model*) of Attachment 1 (*Agreed Forms*), which versions incorporate any amendments agreed between the Parties between the date of this Agreement and the date of delivery of the Financial Model, which date(s) shall be:
- (A) if the Concessionaire Financing includes bond financing, on each of the dates that is 10 days prior to, one day prior to, and immediately following the Actual Bond Pricing Date (as defined in Volume I of the RFP), if any;
- (B) if the Concessionaire Financing does not include bond financing, on the date that is 10 days prior to, and one day prior to, Financial Close; and
- (C) on the date of and immediately prior to Financial Close, incorporating final pricing for the Concessionaire Financing, the terms of which shall be fixed for purposes of Financial Close, and reflecting the adjustments, if any, to the Principal Limit and Total Limit in accordance with Section 30.3(g),
- in each case, together with the books and documents setting forth all assumptions, calculations and methodology used in the preparation of the Financial Model and any other documentation necessary or reasonably requested by RTD to operate the Financial Model.
- (ii) The Concessionaire shall have provided RTD with revisions (each a *Service Payment Revision*) to Tables 1, 2 and 3 of Appendix A of Book 4 (*Financial Proposal Appendices*) of the Final Proposal contained in the Concessionaire's Proposal together with each Financial Model delivered under Section 5.6(d)(i), which Service Payment Revisions will incorporate any adjustments or amendments made in accordance with Sections 8.3(b) (*Interest Rate Fluctuations*) and 8.4 (*Credit Spread Fluctuation Risk*) of Volume I of the RFP.
- (e) *RTD Insurance.* To the extent not previously provided under Section 5.3(b), RTD shall have provided the Concessionaire with evidence that the insurance requirements applicable during the Design/Build Period, as set out in Section 34 (*Insurance*) and Attachment 12 (*Insurance*), with which RTD is responsible for complying on or prior to Phase 1 Effective Date have been complied with in full and that the relevant premiums for the required insurance policies have been paid.
- (f) *Concessionaire Insurance.* To the extent not previously provided under Section 5.3(c), the Concessionaire shall have provided RTD with evidence that the insurance requirements applicable during the Design/Build Period, as set out in Section 34 (*Insurance*) and Attachment 12 (*Insurance*), with which the Concessionaire is responsible

- for complying on or prior to Phase 1 Effective Date have been complied with in full and that the relevant premiums for the required insurance policies have been paid.
- (g) *Equity Commitment.* The Concessionaire shall have delivered to RTD evidence that the Equity Commitments have been entered into, in a form satisfactory to RTD.
- (h) *Corporate Documents.* The Concessionaire shall have delivered to RTD such documents and certificates as RTD may reasonably request relating to the organization, existence and good standing of the Concessionaire, the authorization of the entry by the Concessionaire into the Project Agreements to which it is a party and any other legal matters relating to the Concessionaire, this Agreement, the other Project Agreements and the Eagle Project, all in form and substance satisfactory to RTD.
- (i) *Concessionaire Opinions.* The Concessionaire shall have provided to RTD legal opinions, addressed to RTD, from external legal counsel as to:
- (i) organization and existence of the Concessionaire;
 - (ii) due authorization and execution of this Agreement;
 - (iii) obtaining of all required consents and approvals with respect to commencing the Work;
 - (iv) enforceability of, and absence of conflicts with respect to, this Agreement and the other Project Agreements; and
 - (v) the absence of material litigation,
- in each case in form and substance reasonably satisfactory to RTD.
- (j) *RTD Opinions.* RTD shall have provided to the Concessionaire:
- (i) a legal opinion from the general counsel to RTD, addressed to the Concessionaire, the Lenders and the Initial Shareholders, in substantially the form attached hereto as Part A (*Form of RTD General Counsel Opinion*) of Attachment 24 (*Forms of RTD Legal Opinions*), and
 - (ii) a legal opinion from external legal counsel to RTD, addressed to the Concessionaire, the Lenders and the Initial Shareholders, in substantially the form attached hereto as Part B (*Form of RTD External Counsel Opinion*) of Attachment 24 (*Forms of RTD Legal Opinions*), as to compliance of this Agreement with Article X Section 20 and certain other relevant provisions of the Colorado Constitution.
- (k) *Representations and Warranties of the Concessionaire.* The representations and warranties of the Concessionaire set out in Section 7.1 (*Concessionaire Representations and Warranties*) of this Agreement shall be correct when made and at the Early Work Effective Date and the Phase 1 Effective Date.

- (l) *Representations and Warranties of RTD.* The representations and warranties of RTD set out in Section 7.2 (*RTD Representations and Warranties*) of this Agreement shall be correct when made and at the Early Work Effective Date and the Phase 1 Effective Date.
- (m) *Concessionaire Accounting Practices.* The Concessionaire shall have delivered to RTD a certificate signed by the chief financial officer of the Concessionaire, confirming that the accounting practices to be used by the Concessionaire are consistent with GAAP.

Achievement of or Failure to Achieve the Phase 1 Effective Date

- 5.7 (a) Upon the satisfaction of each of the Phase 1 Conditions Precedent (unless otherwise agreed by the Parties) (i) RTD and the Concessionaire shall sign a certificate specifying the Phase 1 Effective Date, (ii) RTD shall return the Proposer's Security to the Concessionaire within 10 days, (iii) the Financial Model accepted by RTD in accordance with Section 5.6(c)(i) shall amend and replace the Financial Model attached hereto as Part B (*Financial Model*) of Attachment 1 (*Agreed Forms*), (iv) the figures set forth in the Service Payment Revision accepted by RTD in accordance with Section 5.6(c)(i) shall amend and replace the corresponding figures in Tables 3 (*Base Annual Service Payments*) and 4 (*TABOR Secured Payments*) in Parts G and F, respectively, of Attachment 11 (*Service Payments*), (v) RTD shall deliver the Trustee's Instructions, and (vi) RTD shall deliver the Limited Phase 1 Notice to Proceed (provided that if RTD has not delivered the Limited Phase 1 Notice to Proceed within 15 days, then the Limited Phase 1 Notice to Proceed shall be deemed delivered).
- (b) If (i) the Concessionaire is delayed in or prevented from satisfying any of the Concessionaire Conditions Precedent (A) by the acts or omissions of RTD (or its agents, employees or subcontractors) (other than acts related to fulfillment or non-fulfillment by RTD of the RTD Conditions Precedent) or any Project Third Party (provided that such act or omission constitutes a breach of such Project Third Party's obligations under the applicable Third Party Agreement), or (B) by the occurrence of a Force Majeure Event prior to the Phase 1 Conditions Precedent Satisfaction Date, (ii) any downgrade by a Rating Agency of any Senior RTD Debt has occurred after the Final Proposal Due Date (a **Rating Downgrade Event**), and solely as a result of such Rating Downgrade Event the Concessionaire Financing has been downgraded by a Rating Agency or (iii) the Concessionaire has secured an outcome in the Concessionaire's favor pursuant to a claim brought by it under Section 50 (*Dispute Resolution Procedure*) with respect to RTD's determination that the Concessionaire has failed to satisfy any Concessionaire Condition Precedent, the Phase 1 Conditions Precedent Satisfaction Date shall be extended on a day-for-day basis, in the case of (i) and (iii), by the period during which the satisfaction of such Concessionaire Condition Precedent was so delayed, prevented or disputed and in the case of (ii), the Phase 1 Conditions Precedent Satisfaction Date shall be extended for 60 days; **provided** that the Phase 1 Conditions Precedent Satisfaction Date shall be extended only in respect of that Concessionaire Condition Precedent and not in respect of any other Concessionaire Condition Precedent, which must be satisfied by the original Phase 1 Conditions Precedent Satisfaction Date.

- (c) If any Concessionaire Condition Precedent is not satisfied or waived in writing by RTD on or before the Phase 1 Conditions Precedent Satisfaction Date (as extended, as the case may be), RTD shall have the right to:
- (A) terminate this Agreement in its entirety, other than as provided for in Section 5.7(f), by written notice to the Concessionaire with immediate effect; and
 - (B) draw and retain the full amount of the Proposer's Security as the sole remedy of RTD against the Concessionaire hereunder.
- (d) If the Financial Model and Service Payment Revision delivered immediately prior to Financial Close in accordance with Section 5.6(d) reflect:
- (A) adjustments to the Base Annual Service Payments that exceed the limits referenced in Sections 8.3(b)(iv) and 8.4(c) of Volume I of the RFP and the Concessionaire has not proposed an Alternate BASP Schedule in accordance with and as defined in Section 8.3(b)(v) of Volume I of the RFP; or
 - (B) unless the Concessionaire instructs RTD not to incorporate 100% of that portion of an increase in credit spreads greater than 60 bps as referenced in Section 8.4(b) of Volume I of the RFP, an increase in credit spreads greater than 60 bps as referenced in Section 8.4(b) of Volume I of the RFP,

RTD shall have the right to:

- (x) terminate this Agreement in its entirety, other than as provided for in Section 5.7(f), by written notice to the Concessionaire with immediate effect, in which case RTD shall pay to the Concessionaire an amount equal to U.S.\$2,500,000 and shall return the Proposer's Security to the Concessionaire within 10 days; or
- (y) with respect to an increase in credit spreads greater than 60 bps, as referenced in Section 8.4(b) of Volume I of the RFP, accept a Service Payment Revision that reflects an adjustment to the Base Annual Service Payments for 100% of that portion of the increase greater than 60 bps in accordance with Section 8.4(b) of Volume I of the RFP and deliver a notice under Section 5.6(c)(i).

The right of RTD to draw upon the Proposer's Security under Section 5.7(c)(B) above is not intended to constitute a penalty, but is intended to be, and shall constitute, liquidated damages to compensate RTD for the cost of foregoing alternative opportunities and for other costs incurred by RTD in reliance upon the Concessionaire's agreement to enter into the transactions contemplated hereby. The Parties acknowledge that it is difficult to ascertain the amount of actual damages that would be incurred by RTD in such circumstances, and that such liquidated damages are a reasonable estimate of the presumed actual damages that would be incurred by RTD.

- (e) If any RTD Condition Precedent is not satisfied (unless otherwise agreed by the Parties) on or before the Phase 1 Conditions Precedent Satisfaction Date, taking into account the extension of the Phase 1 Conditions Precedent Satisfaction Date in accordance with Section 5.7(b), the Concessionaire shall have the right to terminate this Agreement in its entirety (other than with respect to the Early Work pursuant to Section 5.4 (*Early Work following Failure to Achieve Phase 1 Effective Date*) if the Early Work Effective Date has occurred) by written notice to RTD with immediate effect. Within 10 days following receipt of such notice in accordance with this Agreement, and so long as RTD is not disputing pursuant to Section 50 (*Dispute Resolution Procedure*) whether the Concessionaire has the right to terminate this Agreement, RTD shall return the Proposer's Security to the Concessionaire.
- (f) If either Party exercises its right to terminate this Agreement pursuant to this Section 5.7, neither Party shall have any obligation or liability to the other Party, except:
- (i) if the Early Work Effective Date has occurred, with respect to the Early Work pursuant to Section 5.4 (*Early Work following Failure to Achieve Phase 1 Effective Date*);
 - (ii) as set forth in the Compensation Agreement;
 - (iii) if applicable, as set out in Section 5.7(c)(B);
 - (iv) if applicable, as set out in Section 5.7(d)(x);
 - (v) in respect of any antecedent breach of the Immediately Effective Provisions; or
 - (vi) in respect of Section 5.4 (*Early Work following Failure to Achieve Phase 1 Effective Date*) and Section 55 (*Confidentiality*), each of which shall remain in full force and effect notwithstanding the non-satisfaction of the Phase 1 Conditions Precedent.

Phase 2 Effective Date

5.8 The provisions of this Agreement relating to Phase 2 shall come into effect on the Phase 2 Effective Date. Notwithstanding any other provision of this Agreement, prior to the occurrence of the Phase 2 Effective Date, Phase 2 shall not constitute part of the Work or the Commuter Rail Services and RTD shall have no obligation for payment, including any Construction Payments and Service Payments, for any work performed by the Concessionaire on or in relation to Phase 2.

Condition Precedent to the Phase 2 Effective Date

5.9 The Phase 2 Effective Date shall occur upon the delivery by RTD of the Phase 2 Notice to Proceed to the Concessionaire prior to the Phase 2 Condition Precedent Satisfaction Date (as extended by the mutual agreement of the Parties). The Concessionaire shall confirm receipt of the Phase 2 Notice to Proceed.

Failure to Achieve the Phase 2 Effective Date

5.10 If the Phase 2 Condition Precedent is not satisfied on or before the Phase 2 Condition Precedent Satisfaction Date (as such date may be extended by mutual agreement between the Parties), then:

- (a) no elements of Phase 2 shall be included as part of the Work and the Commuter Rail Services under this Agreement and RTD shall have no obligation to the Concessionaire for any payment, including any Construction Payments and Service Payments, for any work performed by the Concessionaire on or in relation to Phase 2;
- (b) the lease granted pursuant to Section 2.2(a) shall automatically terminate with respect to the Gold Line Site and the Northwest Electrified Rail Segment Site, the maintenance of which shall thereafter not constitute part of the Work, and the Concessionaire shall promptly surrender such Sites and deliver such Sites back to RTD free of charge and the Gold Line Site and the Northwest Rail Electrified Segment Site shall thereupon cease to be included in the definition of Sites hereunder;
- (c) the provisions of Sections 5.11 (*Phase 2 Rolling Stock Termination*) shall apply;
- (d) subject to Section 5.10(f), RTD shall either:
 - (i) increase the Maximum Annual Phase 1 Construction Payment Amounts in accordance with clause (b) of Attachment 8 (*Construction Payments*), which increase shall be effective on the date specified in a notice by RTD to the Concessionaire setting out such increase (the ***Phase 1 Construction Payment Increase Notice***), which such date shall be no later than 180 days after the Phase 2 Condition Precedent Satisfaction Date; or
 - (ii) deliver a request to the Concessionaire (such request, a ***Phase 1 Excess Financing Request***), promptly following delivery of which the Concessionaire shall use Reasonable Efforts to secure debt financing from Lenders and equity support from the Shareholders equal to the Phase 1 Excess Financing Amount on terms consistent in all material respects with the Financial Model as at Financial Close (any such terms that are inconsistent in any material respect to be subject to RTD's approval in its sole discretion). If the Concessionaire secures funds to finance the Phase 1 Excess Financing Amount as described in Section 5.10(d)(ii), then:
 - (A) the Concessionaire shall notify RTD in writing of (I) the terms of such financing and (II) the Additional TABOR Portion capacity, if any, required to be made available under the 2004 Approval for the Concessionaire's exclusive use in accordance with the terms of this Agreement as necessary to achieve such financing, such amount to be expressed as required adjustments to the Principal Limit and Total Limit under Section 30.3(g) (it being acknowledged by RTD that if such required adjustments imply either a Principal Limit or Total Limit that is less than the aggregate of the Senior RTD Debt and Subordinate Lien Bonds issued prior to the date of such notice, the Concessionaire shall be deemed to have been unable to raise the Phase 1 Excess Financing

Amount) at least 14 days prior to the date on which such financing is scheduled to close and RTD shall have the right to verify the terms of such financing as consistent in all material respects with the Financial Model as at Financial Close, **provided** that if RTD fails to reject or otherwise comment on the terms of financing within 10 days after the Concessionaire has delivered them to RTD, then such terms shall be deemed verified; and

- (B) immediately after the Concessionaire has closed on the funding for the Phase 1 Excess Financing Amount on the terms verified by RTD in accordance with Section 5.10(d)(ii)(A) above, the Concessionaire shall notify RTD in writing of such closing and, upon delivery of such notice: (x) Table 4 (*TABOR Secured Payments*) in Part H (*TABOR Secured Payments*) of Attachment 11 (*Service Payments*) shall be deemed amended and replaced to reflect an increase in the "Secured Principal", "Secured Interest" and "TABOR Portion TPn" as defined therein (such amendment to be subject to, and revised to comply with, the limitations set forth in Section 42.4(b)(i)-(ii)), **provided** that (I) the timing and quantum of such increases with respect to both principal and interest shall be made in accordance with the terms of the Concessionaire's Phase 1 Excess Financing Amount financing and (II) the increased "TABOR Portion TPn" shall not exceed the "Maximum Annual TABOR Portion" (each as defined in Table 4 of Part H (*TABOR Secured Payments*) of Attachment 11 (*Service Payments*)) in any Contract Year; (y) the Base Annual Service Payments will be adjusted (upward or downward) to reflect the financial impact of the actual change, if any, in the cost of raising the Phase 1 Excess Financing Amount, on the ability to achieve the Base Case Equity IRR, the same debt service coverage ratio, the same Debt to Equity Ratio and other reasonable and customary financial ratios as set forth in the Financial Model; and (z) the Principal Limit and the Total Limit will be adjusted in accordance with Section 30.3(g);
- (e) notwithstanding the other provisions of this Section 5.10, if there is a voter approved Change in Law to the Law of the State of Colorado pursuant to which, or as a consequence of which, RTD is prohibited from issuing Senior RTD Debt, on the day immediately preceding the effectiveness of such Change in Law, Table 4 (*TABOR Secured Payments*) in Part H (*TABOR Secured Payments*) of Attachment 11 (*Service Payments*) shall be deemed amended and replaced to reflect that portion of the Concessionaire's Proposal delivered in the Financial Model as "Table 3B (*Updated TABOR Portion Table*)" in accordance with Section 3 of Annex 2 (*Financial Proposal Form*) of Part C (*Base Financial Model*) of Appendix C (*Financial Proposal*) to Volume I of the RFP (such amendment to be subject to, and revised to comply with, the limitations set forth in Section 42.4(b)(i)-(ii)); and
- (f) the Concessionaire may claim a Relief Event where permitted under Section 38.1(cc) (provided the other requirements of Section 38 (*Relief Events*) are satisfied) if (i) RTD does not increase the Maximum Annual Phase 1 Construction Payment Amounts in accordance with Section 5.10(d)(i) or (ii) the Concessionaire is unable to secure funds to

finance the Phase 1 Excess Financing Amount within 90 days after the delivery of a Phase 1 Excess Financing Request.

Phase 2 Rolling Stock Termination

5.11 If the Phase 2 Effective Date fails to occur on or before the Phase 2 Condition Precedent Satisfaction Date (as such date may be extended by mutual agreement between the Parties):

- (a) RTD shall deliver a notice (a *Phase 2 Rolling Stock Termination Notice*) to the Concessionaire prior to the scheduled delivery date of the first Phase 2 Rolling Stock under the Original Baseline Schedule (or, as the case may be, the Revised Baseline Schedule) notifying the Concessionaire of the location or locations for delivery of the Phase 2 Rolling Stock;
- (b) RTD shall bear any additional cost for delivery of such Cars to a location or locations other than within the District; and
- (c) the Concessionaire shall deliver the Phase 2 Rolling Stock to RTD at the location or locations specified in the Phase 2 Rolling Stock Termination Notice and the Concessionaire shall assign all warranties under the Rolling Stock Supply Contract in respect of the Phase 2 Rolling Stock to RTD immediately upon such delivery.

Cooperation on Other RTD Projects

- 5.12 (a) Following delivery by RTD to the Concessionaire of a written request for any Project Records, including the Contract Data and Work Products, or other information in the possession or under the control of the Concessionaire, the Project Contractors and their respective Subcontractors that is relevant or potentially relevant to any Other RTD Project, including for the purpose of preparing, including or making reference to such information in any Other RTD Project Procurement Materials, the Concessionaire shall, and shall require that the Project Contractors and their respective Subcontractors, promptly (and in any event within 45 days of delivery of RTD's request) deliver to RTD all such Project Records and other information, but only to the extent that RTD may otherwise require the Concessionaire to deliver or to procure the delivery of such records and information under the terms of this Agreement.
- (b) Following delivery by RTD to the Concessionaire of a written request, the Concessionaire shall inform RTD by written response within 30 days of RTD's request of all material facts or circumstances of which it is aware that might reasonably be expected to affect the design, construction, operation or maintenance of any Other RTD Project in the light of the details concerning such project that RTD has submitted to the Concessionaire or that are otherwise available to the Concessionaire, including the Final Project Designs.
- (c) If RTD is preparing to issue or has issued any Other RTD Project Procurement Materials or is otherwise seeking offers from any person or negotiating with any person in respect of any proposed Other RTD Project, then, in addition to those actions required under Sections 5.12(a) and 5.12(b), the Concessionaire shall use all Reasonable Efforts as RTD may reasonably request to assist such procurement, including, at reasonable times and upon reasonable notice, providing access to RTD and its designees to: (i) each part of the

Commuter Rail Network for the purpose of surveying, inspecting or investigating the relevant parts thereof (provided that RTD shall, and shall require that other parties requiring access at RTD's request, comply with all applicable Concessionaire policies and procedures while on Site) and (ii) Project Records, but only to the extent that RTD may otherwise require the Concessionaire to deliver or to procure the delivery of such records under the terms of this Agreement, including the Contract Data and Work Products, to the extent not previously provided in accordance with this Section 5.12, in each case (i) and (ii) solely and to the extent necessary to procure and award the relevant Other RTD Project.

- (d) If RTD awards or otherwise undertakes any Other RTD Project other than with the Concessionaire, then:
- (i) (A) the Concessionaire shall use all Reasonable Efforts to cooperate and liaise with RTD and all RTD designated contractors engaged in such Other RTD Project to the extent reasonably necessary to facilitate the Other RTD Project and (B) the Concessionaire shall not take any action which is calculated or intended to directly or indirectly prejudice or frustrate or make more difficult such Other RTD Project, **provided** that in either case (A) or (B) this obligation shall not require the Concessionaire to take, or refrain from taking, any action that would reasonably be anticipated to adversely affect the Work or the Concessionaire-operated Components, the provision of the Commuter Rail Services or the carrying out of the Concessionaire's other obligations under this Agreement;
 - (ii) the Concessionaire shall, at reasonable times and upon reasonable notice, allow access to RTD and its designees to each part of the Commuter Rail Network as is reasonably necessary to facilitate the efficient carrying out of and interface with the Other RTD Project (provided that RTD shall, and shall require that other parties requiring access at RTD's request, comply with all applicable Concessionaire policies and procedures while on Site), **provided** such access is not reasonably anticipated to adversely affect the Work or the Concessionaire-operated Components, the provision of the Commuter Rail Services or the carrying out of the Concessionaire's other obligations under this Agreement;
 - (iii) the Concessionaire shall use all Reasonable Efforts to minimize any adverse impact on the Work and the Concessionaire-operated Components, the disruption to Commuter Rail Service and any inconvenience to Passengers potentially caused by any Other RTD Project; and
 - (iv) RTD shall, and shall require any contractor implementing the Other RTD Project, to implement such project in accordance with Good Industry Practice and to cooperate and liaise with the Concessionaire and generally to use Reasonable Efforts to minimize any adverse impact on the Work and the Concessionaire-operated Components, the disruption to Commuter Rail Service or any inconvenience to Passengers caused by such Other RTD Project.

Full Phase 1 Notice to Proceed

- 5.13 (a) Notwithstanding any other provision of this Agreement to the contrary, prior to the date on which RTD has delivered the Full Phase 1 Notice Proceed, the Concessionaire shall carry out only that Phase 1 Work that (i) does not require the Concessionaire to enter onto or use the UP Sites and (ii) that does not, when taken together with all other Phase 1 Work carried out by the Concessionaire, require expenditure by the Concessionaire of an amount in excess of the Maximum Limited Phase 1 Work Value. Upon delivery by RTD of the Full Phase 1 Notice to Proceed, the Concessionaire shall carry out all Phase 1 Work in accordance with this Agreement.
- (b) If RTD has not delivered the Full Phase 1 Notice to Proceed by December 31, 2011, either Party may terminate this Agreement by written notice to the other Party (such termination to be effective 30 days from the date of receipt of such notice by the other Party), whereupon the provisions of Sections 42.2 (*Compensation Following RTD Termination Event or Failure to Deliver Full Phase 1 Notice to Proceed*) and 42.4 (*Compensation Following Termination*) shall apply.
- (c) At least 15 days prior to the date that the continuation of the Phase 1 Work by the Concessionaire would require expenditures in amounts exceeding the Maximum Limited Phase 1 Work Value, the Concessionaire shall notify RTD of such situation. In such notice the Concessionaire shall specify the amount of the increase in the Phase 1 Work Limitation that the Concessionaire estimates would allow continuation of Phase 1 Work without delay or increase in the aggregate cost of the Phase 1 Work for the succeeding one- and two-month periods (and for any other period(s) of time that RTD may request), and the basis for such estimate. Within 15 days after delivery of such notice RTD shall, in its sole discretion, by written notice to the Concessionaire (i) increase the Maximum Limited Phase 1 Work Value by an amount that would allow continuation of Phase 1 Work without delay or increase in the aggregate cost of the Phase 1 Work for not less than the succeeding one-month period, (ii) order a suspension of the Work (in which case the Concessionaire may claim a Relief Event where permitted under Section 38.1(q) (provided the other requirements of Section 38 (*Relief Events*) are satisfied), or (iii) terminate this Agreement (such termination to be effective 30 days from the date of receipt of such notice by the Concessionaire), whereupon the provisions of Sections 42.2 (*Compensation Following RTD Termination Event or Failure to Deliver Full Phase 1 Notice to Proceed*) and 42.4 (*Compensation Following Termination*) shall apply. Any failure of RTD to respond within 15 days following delivery of the Concessionaire's notice shall be deemed to be an order to suspend the Work in accordance with Section 5.13(c)(ii) unless and until RTD subsequently delivers a notice under this Section 5.13(c).

6. RTD VERIFICATION RIGHTS

Verification of Final Drafts of Design/Build Contract and Rolling Stock Supply Contract

6.1 The following provisions apply in respect of the requirement under Section 5.6(a) that the Design/Build Contract and the Rolling Stock Supply Contract be executed in a form acceptable to RTD:

- (a) Parts A(I) (*Design/Build Contract Term Sheet*) and A(II) (*Rolling Stock Supply Contract Term Sheet*) of Attachment 1 (*Agreed Forms*) contain indicative terms for the Design/Build Contract and the Rolling Stock Supply Contract. The Concessionaire shall notify RTD of any proposed departures from the indicative terms during subsequent negotiations with the Design/Build Contractor and the Rolling Stock Supplier.
- (b) Unless RTD has provided confirmation to the Concessionaire that it has verified the final drafts of the Design/Build Contract and/or the Rolling Stock Supply Contract as being consistent with the indicative terms for such contracts set forth in Parts A(I) (*Design/Build Contract Term Sheet*) and A(II) (*Rolling Stock Supply Contract Term Sheet*) of Attachment 1 (*Agreed Forms*) in accordance with the terms of the RFP and such final draft has not subsequently been amended (in which case the draft Design/Build Contract and/or draft Rolling Stock Supply Contract shall be deemed verified for purposes of this Section 6.1), the Concessionaire shall deliver to RTD the final drafts of the Design/Build Contract and the Rolling Stock Supply Contract, together with such information as RTD may reasonably require in respect of any proposed final draft submitted to RTD for its verification, 28 days prior to the date on which the Concessionaire proposes to enter into the Design/Build Contract or the Rolling Stock Supply Contract (as the case may be) (such 28-day period, the ***Contracts Review Period***).
- (c) Unless RTD has provided confirmation to the Concessionaire that it has verified the final draft(s) of the Design/Build Contract and/or the Rolling Stock Supply Contract as being consistent with the indicative terms for such contracts set forth in Parts A(I) and A(II) of Attachment 1 (*Agreed Forms*) in accordance with the terms of the RFP and such final draft(s) has not subsequently been amended, during the Contracts Review Period, RTD, acting reasonably, shall have the right to verify the consistency of the final drafts of the Design/Build Contract and/or the Rolling Stock Supply Contract with the indicative terms for such contracts set forth in Parts A(I) (*Design/Build Contract Term Sheet*) and A(II) (*Rolling Stock Supply Contract Term Sheet*) of Attachment 1 (*Agreed Forms*), **provided** that if the Concessionaire has previously submitted to RTD long form term sheets for the Design/Build Contract and/or the Rolling Stock Supply Contract, which term sheets RTD has verified as being consistent with the indicative terms for such contracts set forth in Parts A(I) (*Design/Build Contract Term Sheet*) and A(II) (*Rolling Stock Supply Contract Term Sheet*) of Attachment 1 (*Agreed Forms*), then RTD's verification of the final drafts of the Design/Build Contract and/or the Rolling Stock Supply Contract under this Section 6.1 (*Verification of Final Drafts of Design/Build Contract and Rolling Stock Supply Contract*) shall be limited to verification of such drafts' consistency with the terms for such contracts as set forth in the previously reviewed and verified long form term sheets.
- (d) If RTD determines that the final draft of the Design/Build Contract and/or the Rolling Stock Supply Contract is not consistent with the indicative terms for such contract set

- forth in Parts A(I) (*Design/Build Contract Term Sheet*) and A(II) (*Rolling Stock Supply Contract Term Sheet*) of Attachment 1 (*Agreed Forms*), or with the long form term sheets previously verified by RTD (if applicable), and RTD does not accept such inconsistency, RTD shall by written notice to the Concessionaire specify in reasonable detail the grounds on which it has determined that the final draft of the Design/Build Contract and/or the Rolling Stock Supply Contract is not consistent with the indicative terms for such contract set forth in Parts A(I) (*Design/Build Contract Term Sheet*) and A(II) (*Rolling Stock Supply Contract Term Sheet*) of Attachment 1 (*Agreed Forms*) or with the long form term sheets previously verified by RTD (if applicable), including identification of the specific provision(s) in the relevant draft that are not consistent with such terms, and why it does not accept such inconsistency.
- (e) If RTD determines that the final draft of the Design/Build Contract and/or the Rolling Stock Supply Contract is consistent with the indicative terms for such contracts set forth in Parts A(I) (*Design/Build Contract Term Sheet*) and A(II) (*Rolling Stock Supply Contract Term Sheet*) of Attachment 1 (*Agreed Forms*), as applicable, or with the long form term sheets previously verified by RTD (if applicable), then RTD shall deliver a written notice to the Concessionaire confirming such determination prior to the conclusion of the Contracts Review Period.
- (f) No later than 10 days following receipt by the Concessionaire of any notice from RTD pursuant to Section 6.1(d), the Concessionaire shall either:
- (i) resubmit to RTD final drafts of the Design/Build Contract and/or the Rolling Stock Supply Contract amended to resolve RTD's objections; or
 - (ii) to the extent that the Concessionaire disputes that RTD's objections are valid, promptly refer such matter for resolution in accordance with the Dispute Resolution Procedure, following which the Contracts Review Period shall be tolled pending resolution of such Dispute.
- (g) Where the final drafts of any disputed Design/Build Contract and/or Rolling Stock Supply Contract are resubmitted pursuant to Section 6.1(f)(i) above, RTD shall, within a reasonable period of time and in any event no later than five days following such resubmission:
- (i) notify the Concessionaire of those amendments proposed by the Concessionaire that it considers have satisfactorily resolved its objections under Section 6.1(d) above; and/or
 - (ii) refer such amendments that it considers do not satisfactorily resolve its objections made pursuant to Section 6.1(d) above, for resolution in accordance with the Dispute Resolution Procedure, following which the review period shall be tolled pending resolution of such Dispute.
- (h) Following the agreement or determination of any issues pursuant to the Dispute Resolution Procedure referred by either Party pursuant to Sections 6.1(f) or (g) above, the Concessionaire shall amend the final drafts of the Design/Build Contract and/or the Rolling Stock Supply Contract to reflect such agreement or determination.

- (i) If:
- (i) RTD has provided confirmation to the Concessionaire that it has verified the final draft(s) of the Design/Build Contract and/or the Rolling Stock Supply Contract as being consistent with the indicative terms for such contracts set forth in Parts A(I) and A(II) of Attachment 1 (*Agreed Forms*) in accordance with the terms of the RFP and such final draft has not subsequently been amended; and/or
 - (ii) RTD has delivered a notice of verification under Section 6.1(e) or otherwise has not delivered any notice under Sections 6.1(d) or 6.1(g) within the applicable review period;
 - (iii) RTD has delivered a notice under Section 6.1(i)(i) without referral to the Dispute Resolution Procedure; or
 - (iv) following the Concessionaire's amendment of the Design/Build Contract and/or the Rolling Stock Supply Contract to reflect the agreement or determination of any issues pursuant to the Dispute Resolution Procedure,
- the Concessionaire may sign the Design/Build Contract or Rolling Stock Supply Contract and allow the appointment of the Design/Build Contractor and/or the Rolling Stock Supplier to become effective.

Verification of Final Drafts of the Designated Credit Agreements

6.2 The following provisions apply in respect of RTD's rights to verify the Designated Credit Agreements under Section 5.6(a):

- (a) Unless RTD has provided confirmation to the Concessionaire that it has verified the final draft of any Designated Credit Agreement as consistent in all material respects with the Financial Model in accordance with the terms of the RFP and such final draft has not subsequently been amended (in which case such draft Designated Credit Agreement shall be deemed verified for purposes of this Section 6.2), the Concessionaire shall deliver to RTD the final drafts of the Designated Credit Agreements and such information as RTD may reasonably require in respect of any proposed final draft submitted to RTD for its verification at least 10 days prior to the anticipated date of Financial Close (such 10-day period, the *Finance Agreement Review Period*).
- (b) Unless RTD has provided confirmation to the Concessionaire that it has verified the final draft of any Designated Credit Agreement as being consistent in all material respects with the Financial Model in accordance with the terms of the RFP and such final draft has not subsequently been amended, during the Finance Agreement Review Period, RTD, acting reasonably, shall have the right to verify that the proposed Designated Credit Agreements or any provision thereof, is consistent with the Financial Model in all material respects, **provided** that if the Concessionaire has previously submitted to RTD a long form term sheet for a Designated Credit Agreement, which term sheet RTD has verified as being consistent with the Financial Model in all material respects, then RTD's verification of the final draft of such Designated Credit Agreement under this Section 6.2 (*Verification of Final Drafts of the Designated Credit Agreements*) shall be limited to verification of

- such draft's consistency with the terms for such agreement as set forth in the previously reviewed and verified long form term sheet.
- (c) If RTD determines that the proposed Designated Credit Agreements are not consistent in all material respects with the Financial Model, or with the long form term sheet previously verified by RTD (if applicable), RTD shall by written notice to the Concessionaire specify in reasonable detail the grounds on which it has determined that the final draft of any Designated Credit Agreement is not consistent in all material respects with the Financial Model or with the long form term sheet previously verified by RTD (if applicable), including identification of the specific provision(s) in the draft that are not consistent with such terms, and why it does not accept such inconsistency.
 - (d) If RTD determines that any Designated Credit Agreement is consistent in all material respects with the Financial Model or with the long form term sheet previously verified by RTD (if applicable), then RTD shall send a written notice to the Concessionaire confirming such determination prior to the conclusion of the Finance Agreement Period.
 - (e) No later than five days following receipt by the Concessionaire of any notice from RTD pursuant to Section 6.2(c), the Concessionaire shall either:
 - (i) resubmit to RTD final drafts of the relevant Designated Credit Agreement, amended to resolve RTD's objections; or
 - (ii) to the extent that the Concessionaire disputes that RTD's objections are valid, promptly refer such matter for resolution in accordance with the Dispute Resolution Procedure, following which the Finance Agreement Review Period shall be tolled pending resolution of such Dispute.
 - (f) Where the final drafts of any disputed Designated Credit Agreements are resubmitted pursuant to Section 6.2(e)(i), RTD shall within a reasonable period of time and in any event no later than five days following such resubmission:
 - (i) notify the Concessionaire of those amendments proposed by the Concessionaire that it considers have satisfactorily resolved its objections under Section 6.2(c); and/or
 - (ii) refer such amendments that it considers do not satisfactorily resolve its objections made pursuant to Section 6.2(c), for resolution in accordance with the Dispute Resolution Procedure, following which the review period shall be tolled pending resolution of such Dispute.
 - (g) Following the agreement or determination of any issues referred for resolution in accordance with the Dispute Resolution Procedure by either Party pursuant to Sections 6.2(e) or (f), the Concessionaire shall amend the final drafts of the Designated Credit Agreement to reflect such agreement or determination.
 - (h) If:
 - (i) RTD has provided confirmation to the Concessionaire that it has verified the final draft of any Designated Credit Agreement as being consistent in all material

respects with the Financial Model in accordance with the terms of the RFP and such final draft has not subsequently been amended;

- (ii) RTD has delivered a notice of verification under Section 6.2(d) or otherwise has not delivered any notice under Sections 6.2(c) or 6.2(f) within the applicable review period;
- (iii) RTD has delivered a notice under Section 6.2(f)(i) without referral to the Dispute Resolution Procedure; or
- (iv) following the Concessionaire's amendment of a Designated Credit Agreement to reflect the agreement or determination of any issues pursuant to the Dispute Resolution Procedure,

the Concessionaire may sign the Designated Credit Agreement and allow such Designated Credit Agreement to become effective.

- (i) RTD will be entitled to verify in writing, on the same basis, further financing arrangements as Designated Credit Agreements upon request from the Concessionaire. The Concessionaire shall not enter into any agreement relating to the Concessionaire Financing unless the agreement has been verified (or deemed verified) as a Designated Credit Agreement by RTD under this Section 6.2.
- (j) In connection with the financing of the Concessionaire-operated Components by the Concessionaire, RTD agrees to:
 - (i) provide the Concessionaire, the Lenders, and the rating agencies access to the information and senior management of RTD necessary to describe the operations of RTD and the Concessionaire-operated Components; and
 - (ii) provide a certification from a member of RTD's senior management as is customary in a public offering regarding the information included in offering documents for the financing.

7. REPRESENTATIONS AND WARRANTIES

Concessionaire Representations and Warranties

7.1 (a) The Concessionaire represents and warrants to RTD that, as at execution of this Agreement, and (except as specified below) again on the Phase 1 Effective Date:

- (i) *Organization; Power and Authority.* The Concessionaire is a limited liability company, duly organized, validly existing and, where legally applicable, in good standing under the laws of the State of Delaware, is authorized to do business in the State of Colorado and has the corporate power and authority to transact the business it transacts and proposes to transact, to execute and deliver this Agreement and the other Project Agreements to which it is a party and to perform the provisions hereof and thereof.
- (ii) *Authorization, Enforceability.* This Agreement and the other Project Agreements to which it is a party have been duly authorized by all necessary corporate action

on the part of the Concessionaire, and this Agreement constitutes a legal, valid and binding obligation of the Concessionaire enforceable against the Concessionaire in accordance with its terms, except as such enforceability may be limited by (A) applicable bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the enforcement of creditors' rights generally and (B) general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law).

- (iii) *No Conflicts.* The execution, delivery and performance by the Concessionaire of this Agreement and the other Project Agreements to which it is a party and the performance by the Concessionaire of its obligations hereunder and thereunder will not (A) contravene, result in any breach of, or constitute a default under, any agreement, contract, instrument or other undertaking to which the Concessionaire is a party or which is binding on the Concessionaire or any of its property or assets, (B) conflict with or result in a breach of the certificate of formation, organizational agreement, membership agreement or other governing documents of the Concessionaire or the Initial Shareholders or (C) violate any Applicable Requirement.
- (iv) *Consents and Approvals.* At the Phase 1 Effective Date, all Permits required to be in effect as at the Phase 1 Effective Date for the execution by the Concessionaire of, and the performance by the Concessionaire of its obligations under, this Agreement and the other Project Agreements to which it is a party have been obtained, are in full force and effect and not subject to appeal.
- (v) *Litigation; Observance of Agreements, Statutes and Orders.* There are no actions, suits, investigations or proceedings pending against the Concessionaire, the Initial Shareholders, any Project Contractor or any company which is a Holding Company of such Person or, to the knowledge of the Concessionaire, threatened against or affecting the Concessionaire, the Initial Shareholders, any Project Contractor or any company which is a Holding Company of such Person or any of their respective property in any court or before any arbitrator of any kind or before or by any Relevant Authority that, individually or in the aggregate, could reasonably be expected to have a material adverse effect on the business or condition (financial or otherwise) of the Concessionaire, the Initial Shareholders or the Project Contractors, as the case may be. None of the Concessionaire, the Initial Shareholders, the Project Contractors or any company which is a Holding Company of such Person, is in default under any term of any agreement or instrument to which it is a party or by which it is bound, or any order, judgment, decree or ruling of any court, arbitrator or Relevant Authority or is in violation of any Applicable Requirement (including Environmental Requirements), which default or violation, individually or in the aggregate, could reasonably be expected to have a material adverse effect on the business or condition (financial or otherwise) of the Concessionaire, the Initial Shareholders or any Project Contractor, as the case may be.

- (vi) *Termination Events.* No Concessionaire Termination Event, or event which, with the passage of time or provision of notice or both, would be a Concessionaire Termination Event, has occurred and is continuing nor will such a Concessionaire Termination Event result from the entry by the Concessionaire into this Agreement or the other Project Agreements to which it is a party or the exercise by the Concessionaire of its rights under, or the performance by the Concessionaire of any of its obligations under, this Agreement or the other Project Agreements to which it is a party.
- (vii) *Financial Statements.* At the date of execution of this Agreement, the audited consolidated financial statements of each of the Concessionaire (to the extent available), the Initial Shareholders (or the audited consolidated financial statements of the parent company of the Initial Macquarie Shareholder) or the Project Contractors (or the audited consolidated financial statements of the parent company of a Project Contractor, in the case of any Project Contractor that is a special purpose vehicle) for the most recent reporting year prior to submission of the Concessionaire's Proposal for which such audited statements are available have been prepared on a basis consistently applied and using GAAP (or, with respect to the Initial Macquarie Shareholder, IFRS) or equivalent accounting principles utilized and generally accepted in the country of incorporation of such party, and audited by an independent certified public accountant (applying GAAP or IFRS (as applicable), or equivalent auditing standards utilized and generally accepted in the country of incorporation of such party) and give a true and fair view of the consolidated financial condition of each such group and are unqualified for the accounting period in question; **provided** that in the case of the Concessionaire, such financial statements shall be on a pro forma basis.
- (viii) *No Change in Financial Condition.* At the date of execution of this Agreement, there has been no material adverse change in the financial condition of the Concessionaire, the Initial Shareholders, each Project Contractor or the parent company of any Project Contractor that is a special purpose vehicle since the date of their latest audited consolidated accounts that would have a material adverse effect on the Concessionaire's ability to perform its obligations under this Agreement and the other Project Agreements.
- (ix) *Accuracy of Concessionaire Documents.* All written information and certifications furnished by or on behalf of the Concessionaire to RTD, or any of its representatives or advisors, as part of or in connection with the Concessionaire's Proposal and the negotiation of this Agreement or the Project Agreements or delivered by or on behalf of the Concessionaire to RTD or any Person on its behalf pursuant to this Agreement has been and is true and accurate in all material respects when given and taken as a whole and there are no other facts or matters the omission of which would have made any statement or information contained in the written information provided to RTD or to any of its representatives or advisors that is misleading in any material respect and all expressions of opinion contained therein were honestly made on reasonable grounds after due and careful enquiry.
- (x) *Changes affecting RTD's decision to enter into this Agreement.* The Concessionaire is not aware of any material facts or circumstances that have not

been disclosed to RTD and that, if disclosed, would reasonably be expected to materially adversely affect the decision of a prudent person considering whether or not to enter into this Agreement with the Concessionaire.

- (xi) *Necessary Information.* Subject to Sections 11.1 (*Availability of the Sites*), 16.2 (*Deficiencies in Reference Data*) and 16.3 (*Concessionaire Acknowledgement with respect to Reference Data*), at the date of this Agreement, the Concessionaire has generally obtained for itself all necessary information regarding:
 - (A) the risks, contingencies and all other circumstances which may influence or affect the Concessionaire's ability to perform its obligation under this Agreement or the Eagle Project; and
 - (B) any other factors which would affect its decision to enter into this Agreement or the terms on which it would do so.
- (b) Notwithstanding that the statements in this Section 7.1 (*Concessionaire Representations and Warranties*) are represented only at particular times, the Concessionaire shall inform RTD as soon as it becomes aware that any (with the exception only of Sections 7.1(a)(ix), 7.1(a)(x) and 7.1(a)(xi)) of the statements set out in this Section 7.1 (*Concessionaire Representations and Warranties*) (disregarding the references in those subclauses to the times at which the statements are made) cease to be true and correct, or become misleading in any way, at any time.

RTD Representations and Warranties

7.2 (a) RTD represents to the Concessionaire that at the signature of this Agreement:

- (i) *Organization; Power and Authority.* RTD is a public agency organized under the laws of the State of Colorado, including the Regional Transportation District Act, Section 32-9-101 *et seq.*, Colorado Revised Statutes, validly existing under the laws of the State of Colorado and has the power and authority to transact the business it transacts and proposes to transact, to execute and deliver this Agreement and the other Project Agreements to which it is a party and to perform the provisions hereof and thereof.
- (ii) *Authorization; Enforceability.* This Agreement and the other Project Agreements to which it is a party have been duly authorized by RTD, and this Agreement constitutes a legal, valid and binding obligation of RTD enforceable against RTD in accordance with its terms, except as such enforceability may be limited by (i) applicable bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the enforcement of creditors' rights generally and (ii) general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law) and the principles set forth in Section 30.4(a).
- (iii) *No Conflicts.* The execution, delivery and performance by RTD of this Agreement and the performance by RTD of its obligations hereunder will not contravene, result in any breach of, or constitute a default under, any agreement,

contract, instrument or other undertaking which RTD is a party or which is binding on RTD or any of its property or assets.

- (iv) *Litigation; Observance of Applicable Requirements.* There are no actions, suits, investigations or proceedings pending against RTD or, to the knowledge of RTD, threatened against or affecting RTD in any court (other than the DUS Claim) or before any arbitrator of any kind or before or by any Relevant Authority that, individually or in the aggregate, could reasonably be expected to have a material adverse effect on the business or condition (financial or otherwise) of RTD. RTD is not in violation of any Applicable Requirement which default or violation, individually or in the aggregate, could reasonably be expected to have a material adverse effect on the business or condition (financial or otherwise) of RTD.
- (b) Notwithstanding that the statements in this Section 7.2 (*RTD Representations and Warranties*) are represented only at particular times, RTD shall inform the Concessionaire within a reasonable period after RTD becomes aware that any of the statements set out in this Section 7.2 (*RTD Representations and Warranties*) ceases to be true and correct, or becomes misleading, in each case in any material respect.

Reliance on Representations and Warranties

- 7.3 (a) The Concessionaire acknowledges that RTD has entered into this Agreement in reliance on the representations made by the Concessionaire contained in Section 7.1 (*Concessionaire Representations and Warranties*) of this Agreement.
- (b) RTD acknowledges that the Concessionaire has entered into this Agreement in reliance on the representations made by RTD contained in Section 7.2 (*RTD Representations and Warranties*) of this Agreement.

8. RTD'S REPRESENTATIVE

8.1 RTD shall designate a representative (*RTD's Representative*) who shall have authority to act for and on behalf of RTD in all matters connected with this Agreement.

8.2 Where this Agreement provides for RTD having any right including a right to take certain action, make any determination or give any instruction, RTD's Representative shall have the authority to exercise such rights on behalf of RTD and the Concessionaire, the Project Contractors and the Subcontractors shall be entitled to rely on RTD's Representative's exercise of such rights; **provided** that any amendment or Change to this Agreement shall be subject to the prior written approval of the General Manager or his/her delegate. RTD's Representative shall take actions, make determinations and give instructions in accordance with Section 58.1 (*Notices, Etc.; Language*) of this Agreement.

8.3 Failure of RTD's Representative or other personnel nominated by RTD to inspect or to call to the attention of the Concessionaire any particulars in which the carrying out and completion of Work or the operation of the Concessionaire-operated Components do not comply with this Agreement shall in no way relieve the Concessionaire of its obligations under this Agreement.

8.4 RTD may, from time to time, appoint any person to act in replacement of RTD's Representative, **provided** that written notice is provided reasonably in advance to the Concessionaire.

8.5 RTD's Representative may from time to time appoint representatives to assist RTD's Representative in the discharge of certain of the duties and authorities vested in it by RTD. RTD's Representative shall advise the Concessionaire of such delegation and the extent of the authority of the representative(s) so appointed. All appointments and revocations thereto as noted herein shall not require the consent of the Concessionaire.

8.6 RTD's Representative is not personally liable for compliance with RTD's obligations under this Agreement and the other Project Agreements.

9. KEY PERSONNEL

9.1 The Concessionaire shall ensure that, effective as of the relevant date set out in Section (e) of Volume 2 of Appendix B of Volume I of the RFP, each of the Key Personnel (a) is employed by or seconded to the Concessionaire or the relevant Project Contractor, as the case may be, for the exclusive purposes of the Eagle Project and (b) occupies the role and function identified for such person in the Concessionaire's Proposal.

9.2 Subject to Section 9.3, the Concessionaire shall not remove or replace any of the Key Personnel without RTD's prior written consent (such consent not to be unreasonably withheld or delayed).

9.3 If any of the Key Personnel (a) ceases to have the necessary or relevant experience or qualifications for his or her position as such position may reasonably require from time to time in accordance with this Agreement and applicable Law, (b) voluntarily terminates or (c) is physically incapable of continuing its employment with the Concessionaire or the relevant Project Contractor (or any relevant affiliate thereof), the Concessionaire shall propose a replacement to RTD as soon as practicable and shall provide RTD with such information about such replacement's relevant experience as RTD may reasonably require.

9.4 If the Concessionaire breaches its obligations under this Section 9, RTD shall be entitled to receive U.S.\$100,000 per breach. The right of RTD to receive such amount is not intended to constitute a penalty, but is intended to be, and shall constitute, liquidated damages. The Parties acknowledge that it is difficult to ascertain the amount of actual damages that would be incurred by RTD in such circumstances, and that such liquidated damages are a reasonable estimate of the presumed actual damages that would be incurred by RTD.

PART 4 – FINANCING OF THE EAGLE PROJECT

10. FINANCING

Concessionaire Financing

10.1 (a) The Concessionaire will be responsible for arranging the Concessionaire Financing at its sole risk and expense and in accordance with this Agreement will ensure that it maintains adequate financial resources for the performance of its obligations under this Agreement and the other Project Agreements.

- (b) The Concessionaire shall not arrange or obtain loans from or supported by the credit of the U.S. Federal government, including under the Transportation Infrastructure Finance and Innovation Act (23 U.S.C. §601 *et seq.*) and the Railroad Rehabilitation and Infrastructure Financing Program (45 U.S.C. §821 *et seq.*).
- (c) If so requested by the Concessionaire, RTD shall use Reasonable Efforts to assist the Concessionaire in obtaining federal credit assistance in the form of allocations by the United States Department of Transportation for private activity bonds and/or similar assistance under any other Federal program, but not including loans under the Transportation Infrastructure Finance and Innovation Act (23 U.S.C. §601 *et seq.*) or the Railroad Rehabilitation and Infrastructure Financing Program (45 U.S.C. §821 *et seq.*).
- (d) RTD shall, promptly upon the request of the Concessionaire or any Lender, execute, acknowledge and deliver to the Concessionaire, or any of the Persons specified by the Concessionaire, standard consents and estoppel certificates with respect to this Agreement which may be qualified to the best of the knowledge and belief of RTD's Representative.

Amendments to the Designated Credit Agreements

- 10.2 (a) No amendment, modification, variation or waiver of any provision of any Designated Credit Agreement (or other financial arrangement) will be made that is not consistent in all material respects with the Financial Model.
- (b) The Concessionaire shall notify RTD in writing of any proposed amendment, modification, variation or waiver of any provision of any Designated Credit Agreement (or other financial arrangement) at least 14 days prior to the date on which such amendment, modification, variation or waiver is intended to become effective.
 - (c) During such 14-day period, RTD, acting reasonably, shall have the right to verify that the proposed amendment, modification, variation or waiver is consistent in all material respects with the Financial Model.
 - (d) If RTD determines that the proposed amendment, modification, variation or waiver is not consistent in all material respects with the Financial Model, RTD shall by written notice to the Concessionaire specify in reasonable detail the grounds on which it has determined that the proposed amendment, modification, variation or waiver is not consistent in all material respects with the Financial Model, including identification of the specific provision(s) of the proposed amendment, modification, variation or waiver that is not consistent with such terms, and why it does not accept such inconsistency.
 - (e) If RTD determines that any draft amendment, modification, variation or waiver is consistent in all material respects with the Financial Model, then RTD shall send a written notice to the Concessionaire (or any subsequent period for review of a resubmission under this Section 10.2) confirming such determination prior to the conclusion of such 14-day period.
 - (f) No later than 10 days following receipt by the Concessionaire of any such written notice from RTD pursuant to Section 10.2(d), the Concessionaire shall either:

- (i) resubmit to RTD final drafts of the proposed amendment, modification, variation or waiver, amended to resolve RTD's objections; or
 - (ii) to the extent that the Concessionaire disputes that RTD's objections are valid, promptly refer such matter for resolution in accordance with the Dispute Resolution Procedure, following which the review period shall be tolled pending resolution of such Dispute.
- (g) Where the final drafts of the proposed amendment, modification, variation or waiver are resubmitted pursuant to Section 10.2(f)(i), RTD shall, within a reasonable period of time and in any event no later than five days following such resubmission:
 - (i) notify the Concessionaire of those amendments proposed by the Concessionaire that it considers have satisfactorily resolved its objections under Section 10.2(d), within a reasonable period of time; and/or
 - (ii) refer those amendments that it considers do not satisfactorily resolve its objections made pursuant to Section 10.2(d), for resolution in accordance with the Dispute Resolution Procedure, following which the review period shall be tolled pending resolution of such Dispute.
- (h) Following the agreement or determination of any issues referred for resolution in accordance with the Dispute Resolution Procedure by either Party pursuant to Sections 10.2(f) or (g), the Concessionaire shall amend the proposed amendment, modification, variation or waiver to reflect such agreement or determination.
- (i) If:
 - (i) RTD has delivered a notice of verification under Section 10.2(e) or otherwise not delivered any notice under Sections 10.2(d) or 10.2(g) within the applicable review period;
 - (ii) RTD has delivered a notice under Section 10.2(g)(i) without referral to the Dispute Resolution Procedure; or
 - (iii) following the Concessionaire's amendment of the proposed amendment, modification, variation or waiver to reflect such agreement or determination of any issues pursuant to the Dispute Resolution Procedure,the Concessionaire may proceed with such amendment, modification, variation or waiver.
- (j) Where any amendment, modification, variation or waiver of any provision of any Designated Credit Agreement is also a Qualifying Refinancing, Section 10.4 (*Refinancing*) shall apply instead of this Section 10.2.

Financial Model

- 10.3 (a) The Concessionaire shall mark all versions and copies of the Financial Model as "Confidential Commercial and Financial Data."
- (b) In each calendar year during the Lease Period (commencing in the second such calendar year) no later than 35 days after the deadline for submission of the Concessionaire's audited annual financial statements under Section 47.1(a) the Concessionaire shall submit to RTD (i) details of any proposed adjustment, amendment, modification or variation of the Financial Model (a *Financial Model Adjustment*) reflecting all adjustments, amendments, modifications or variations since the last Financial Model Adjustment (if any) or (ii) notice that no such Financial Model Adjustment is necessary.
- (c) Other than Financial Model Adjustments effected pursuant to Section 10.3(g), the Concessionaire shall not make or agree to any Financial Model Adjustment unless and until such Financial Model Adjustment has been approved (or deemed approved) by RTD under this Sections 10.3.
- (d) No later than 30 days following delivery by the Concessionaire to RTD of a proposed Financial Model Adjustment under Section 10.3(b), RTD shall deliver written notice to the Concessionaire either:
- (i) approving in RTD's discretion the proposed Financial Model Adjustment; or
 - (ii) rejecting such proposed Financial Model Adjustment and specifying in reasonable detail the basis of its rejection.
- (e) Following any rejection by RTD of a proposed Financial Model Adjustment under Section 10.3(d)(ii) (including following a prior resubmission under this Section 10.3(e)), the Concessionaire shall submit to RTD a revised Financial Model Adjustment no later than 10 days after delivery of such notice. No later than 10 days after delivery of such resubmission RTD shall deliver a written notice to the Concessionaire in accordance with Section 10.3(d)(i) or Section 10.3(d)(ii).
- (f) If RTD fails to provide written notice in response to any proposed Financial Model Adjustment when first submitted under Section 10.3(d) within the initial 30-day review period, such submission shall be deemed approved.
- (g) Where the Financial Model is updated by the Concessionaire subject to the provisions of Section 10.4 (*Refinancing*), on completion of a Qualifying Refinancing, or pursuant to and in accordance with Section 36.1(f) or Section 38.8 (*Adjustments to the Service Payment*), the updated Financial Model shall thereupon become the Financial Model for the purposes of this Agreement.
- (h) Where any Financial Model Adjustment has been made, whether with the approval (or deemed approval) of RTD or otherwise in accordance with Section 10.3(g), the Concessionaire will provide RTD with both paper and unrestricted electronic copies of the Financial Model, as adjusted or otherwise modified, together with the books and documents setting forth all assumptions, calculations and methodology used in the preparation of the Financial Model and any other documentation necessary or desirable to

operate the Financial Model, as adjusted or otherwise modified, no later than seven days following such adjustments or modifications being made.

Refinancing

- 10.4 (a) The Concessionaire shall notify RTD of any Qualifying Refinancing at least 45 days in advance before such Qualifying Refinancing is proposed to become effective; **provided** that where such Qualifying Refinancing is also a Rescue Refinancing, the Concessionaire shall so notify RTD at least 21 days in advance.
- (b) The notice to be provided by the Concessionaire referred to in Section 10.4(a) shall include details of any changes to the Concessionaire's obligations to the Lenders, details of the proposed Refinancing Gain, and details of changes or replacements to the Designated Credit Agreements, and shall also include a copy of the proposed Financial Model relating to the proposed Refinancing (if any) and the basis for the assumptions used in the proposed Financial Model to be used in connection with the Refinancing.
- (c) No later than 15 days (or seven days in the case of a Rescue Refinancing) after delivery of notice by the Concessionaire to RTD in accordance with Section 10.4(a) above, RTD shall notify the Concessionaire as to how RTD shall elect to receive any Refinancing Adjustments in accordance with Section 10.4(h). No later than 15 days (or seven days in the case of a Rescue Refinancing) after delivery of such notice to the Concessionaire, the Concessionaire shall deliver to RTD a detailed update to its original notice reflecting any adjustments to the proposed Financial Model necessary to account for RTD's election.
- (d) The Concessionaire shall not implement any Qualifying Refinancing without the written consent of RTD (such consent not to be unreasonably withheld or delayed).
- (e) RTD shall at any time (including before, during and at any time after any Refinancing) have unrestricted rights of audit over the Financial Model and related documentation (including any aspect of the calculation of the Refinancing Gain) used in connection with any Refinancing (whether the Refinancing is a Qualifying Refinancing or not).
- (f) The Refinancing Gain will be calculated by deducting, in accordance with the definition thereof, the documented and proper external professional costs that each Party incurs directly and, in the case of the Concessionaire indirectly pursuant to the Designated Credit Agreements, in relation to the Qualifying Refinancing and which shall be agreed and made subject to a cap agreed between the Parties prior to the Qualifying Refinancing being put in place, and no later than 28 days following any Qualifying Refinancing the Concessionaire will pay to RTD all reasonable and proper professional costs (including legal fees, but in all cases excluding costs incurred by RTD in unsuccessfully disputing the calculation of the Refinancing Gain) incurred by RTD.
- (g) In consideration of the rights granted by RTD to the Concessionaire under this Agreement and the other Project Agreements with respect to the performance by the Concessionaire of the Eagle Project, the Concessionaire shall, in accordance with Section 10.4(h), pay any Refinancing Adjustment to RTD.

- (h) RTD shall have the right to elect to receive any Refinancing Adjustment as:
- (i) to the extent the Concessionaire receives a lump sum payment as a result of the Qualifying Refinancing, a lump sum payment (not to exceed 50% of such lump sum payment received by the Concessionaire), to be paid no later than 10 days following the Distribution; or
 - (ii) a reduction in the Service Payments over the remaining term of this Agreement; or
 - (iii) a combination of the above.
- (i) Without prejudice to the other provisions of this Section 10.4, the Concessionaire shall:
- (i) notify RTD of any Notifiable Refinancing on becoming aware of the same and again when it is entered into and provide full details thereof; and
 - (ii) include in the Designated Credit Agreements a provision whereby RTD is entitled to receive notice of any proposals which the Lenders may have to refinance the Designated Credit Agreements.

PART 5 – LAND

11. LAND

Availability of the Sites

- 11.1 (a) RTD will, at its own cost, obtain and provide to the Concessionaire, and the Concessionaire will take, Vacant Possession of each part of each Site within the time periods set out in Attachment 2 (*Description of Sites and Schedules of Site Availability*), and otherwise subject to the restrictions of use set forth in and/or right of entry permits specified therein or in the definition of Vacant Possession; **provided**, that RTD will provide Vacant Possession of each UP Site by the later of (a) the date that is the earlier of (i) 30 days following issuance by RTD of the Full Phase 1 Notice to Proceed and (ii) September 30, 2010 and (b) within the time periods set out in Attachment 2 (*Description of Sites and Schedules of Site Availability*) applicable to such UP Site.
- (b) The Concessionaire may claim for a Relief Event where permitted under Section 38.1(a) (provided the other requirements of Section 38 (*Relief Events*) are satisfied) if RTD fails to grant to the Concessionaire Vacant Possession in respect of any portion of any Site within the time limits, or to the extent specified in Attachment 2 (*Description of Sites and Schedules of Site Availability*) or, in the case of any UP Site, on the earlier of (i) 30 days following issuance by RTD of the Full Phase 1 Notice to Proceed and (ii) September 30, 2010, if either such date occurs earlier than the time periods set out in Attachment 2 (*Description of Sites and Schedules of Site Availability*) applicable to such UP Site.

The Sites Generally

- 11.2 (a) The Concessionaire shall not use any Site for any purpose other than for the purposes of carrying out its obligations under this Agreement and the other Project Agreements with respect to the Eagle Project.

- (b) The Concessionaire agrees to occupy each Site in accordance with the rights and obligations of RTD under the relevant Third Party Agreements.
- (c) Following the provision by RTD of Vacant Possession of any part of any Site in accordance with Section 11.1 (*Availability of the Sites*) or Section 24.4(b)(i), as the case may be, the Concessionaire shall have sole responsibility for such part of such Site and the ongoing maintenance thereof (including cleaning and securing such Site and, to the extent necessary, moving or removing any construction thereon), subject only to the provisions of this Agreement, and any costs and expenses incurred in relation to such part of such Site, including all fees, all taxes (including any local tax, but excluding any ad valorem property tax or possessory interest property tax under the Laws of the State of Colorado imposed by any Relevant Authority on the Concessionaire's leasehold interest hereunder in either the Commuter Rail Network or the Rolling Stock) associated with such Site and costs and fees of an administrative nature (including the recordation costs in connection with the recordation of the Memorandum of Lease) shall be borne by the Concessionaire.

Site Registers and Site Surveys

- 11.3 (a) Beginning on the date on which Vacant Possession to the first part of each Site is granted to the Concessionaire and throughout the Design/Build Period, the Concessionaire shall keep, for each Site, a register (including maps and plans as appropriate) of all parts of each Site in respect of which RTD has provided the Concessionaire with Vacant Possession and details of Work and Temporary Work being carried out thereon (each, a ***Design/Build Period Site Register***).
- (b) During the Design/Build Period, the Concessionaire shall keep the Design/Build Period Site Registers periodically updated to take account of the changes to the area of each Site and Work carried out on each such Site.
- (c) No later than 90 days prior to the Revenue Service Commencement Date for each Commuter Rail Project, the Concessionaire and RTD shall inspect the Sites to be used in the operation and maintenance of such Commuter Rail Project in order to ascertain which parts of such Sites are required for the performance by the Concessionaire of its obligations with respect to the operation and maintenance of the relevant Commuter Rail Project during the Operating Period. Following such inspection, the Concessionaire shall carry out a survey of such Sites (a ***Site Survey***). If a Site Survey identifies land outside the relevant Sites required by the Concessionaire for the performance of its obligations during the Operating Period, Section 11.4 (*Additional Land*) shall apply.
- (d) The Concessionaire shall provide written notice to RTD if any parts of a Site are no longer required for the performance by the Concessionaire of its obligations with respect to the operation and maintenance of the Commuter Rail Network during the Operating Period. RTD may require the Concessionaire to deliver such parts back to RTD free of charge in compliance with Section 12.6 (*Reinstatement*) within a time-period to be agreed by the Concessionaire and RTD or, absent such agreement, otherwise upon reasonable notice from RTD to the Concessionaire, and such parts will thereupon cease to be part of the relevant Site, and the Concessionaire's lease hereunder will thereupon cease to exist over such part of such Site.

- (e) From the Revenue Service Commencement Date of each Commuter Rail Project and, in the case of the Commuter Rail Maintenance Facility and the DUS Rail Segment, from the Revenue Service Commencement Date of the first Commuter Rail Project to start revenue service and in each case until the end of the Lease Period, the Concessionaire shall keep, with respect to the relevant Sites, a register (including maps and plans as appropriate) of all parts of such Sites and details of the parts of the Commuter Rail Network thereon (each, a *Lease Period Site Register*) and shall ensure that the Lease Period Site Registers are updated throughout the Lease Period to take account of the changes to the area of any Site and any Commuter Rail Project or the Commuter Rail Maintenance Facility.
- (f) RTD shall be entitled, by giving reasonable written notice to the Concessionaire, to require the Concessionaire to provide reports in a form and within a time period as agreed between the Parties (each acting reasonably) on any aspect of any Design/Build Period Site Register or any Lease Period Site Register or to require access to such registers for inspection or copies thereof.
- (g) Upon the End Date, in accordance with the Handover and Reinstatement Work Procedures, the Concessionaire will surrender each Site to RTD free of charge in compliance with Section 12.6 (*Reinstatement*) and at the same time, the Concessionaire will deliver to RTD an updated Lease Period Site Register setting out the area of each Site and each part of the Commuter Rail Network thereon as of the End Date.
- (h) If (i) any part of any Site is surrendered by the Concessionaire pursuant to Section 11.3(d) or (ii) RTD obtains and provides to the Concessionaire Vacant Possession with respect to any Additional Land in accordance with Section 11.4 (*Additional Land*), the definition of the relevant Site as it is used in this Agreement shall be deemed to be modified to reflect the exclusion of such part of such Site surrendered to RTD or the inclusion of such Additional Land, as the case may be.

Additional Land

- 11.4 (a) If, during the Design/Build Period, the Concessionaire requires Vacant Possession to any land (other than temporary construction easements necessary only during the performance of the Work) additional to the Sites for the purposes of the construction and/or operation and maintenance of the Commuter Rail Network (*Additional Land*) and any related right to use such Additional Land, the Concessionaire shall notify RTD of its requirement as soon as it becomes aware of such requirement. As soon as reasonably practicable thereafter (and in any event, no later than 30 days following its initial notice) the Concessionaire shall submit to RTD a detailed description and plans of the Additional Land. If the Concessionaire demonstrates to RTD's reasonable satisfaction that:
- (i) the Additional Land is necessary for the construction and/or operation and maintenance of the Commuter Rail Network; and
 - (ii) there is no alternative design solution that would not require such Additional Land,

RTD will use its best efforts in accordance with applicable Law to obtain and provide to the Concessionaire Vacant Possession of such Additional Land and the right to use such

- Additional Land at the Concessionaire's sole risk. RTD shall provide updates to the Concessionaire of the schedule for obtaining the Additional Land, and RTD's progress towards acquisition of the same, at the request of the Concessionaire.
- (b) The Concessionaire shall, at its own cost and risk, procure any temporary construction easements it may require for the purposes of performing the Work. The Concessionaire shall provide to RTD copies of all temporary construction easement agreements and documentation prior to occupying or using any such easements.
 - (c) If the Concessionaire notifies RTD of its requirement for Vacant Possession of Additional Land pursuant to Section 11.4(a), any failure or delay by RTD to provide Vacant Possession of or the right to use the Additional Land will not constitute a Relief Event and will not otherwise entitle the Concessionaire to any compensation or relief from RTD.
 - (d) If RTD obtains and provides to the Concessionaire Vacant Possession with respect to any Additional Land, the Concessionaire will, following written demand by RTD supported by details of the Losses claimed, pay to RTD all Losses incurred and to be incurred by RTD or any Project Third Party in complying with this Section 11.4.

12. SITE CONDITIONS AND SITE INVESTIGATION

Archaeological Remains

- 12.1 (a) If the Concessionaire encounters any Archaeological Remains prior to or following commencement of the Work, it shall notify RTD as soon as possible. The Concessionaire will thereafter comply with the reasonable directions of RTD in relation to the activities to be taken in response to the discovery of such Archaeological Remains, and if so directed by RTD shall allow RTD to enter the relevant part of the relevant Site for the purposes of such activities.
- (b) Any such activities to be taken in response to the discovery of any Archaeological Remains will be undertaken as directed by RTD, without delay and at RTD's expense.
 - (c) The Concessionaire shall not knowingly attempt to remove or displace any Archaeological Remains without RTD's prior written approval and shall ensure that its employees, agents, consultants and contractors (including the Design/Build Contractor and the Design/Build Subcontractors) shall not knowingly remove or displace such Archaeological Remains. Further, the Concessionaire will exercise reasonable care to ensure that such Archaeological Remains are not damaged.
 - (d) RTD and any Person acting on behalf of RTD may access any Site for the purposes of investigating and, if necessary, removing or otherwise dealing with any Archaeological Remains, and the Concessionaire will provide all reasonable assistance to RTD and any Person acting on behalf of RTD, including making available its excavation labor and equipment.
 - (e) The Concessionaire may claim for a Relief Event where permitted under Section 38.1(g) (provided the other requirements of Section 38 (*Relief Events*) are satisfied) if the Concessionaire discovers any Unidentified Archaeological Remains within a Site, which

discovery delays, or increases the cost of, completion of the Work or causes the Concessionaire to undertake additional Work.

- (f) Ownership of all Archaeological Remains discovered within any Site will remain with, and shall be deemed to be the property of, RTD.

Environmental Conditions

12.2 (a) If either Party discovers any Environmental Condition prior to or following commencement of the Work, it shall notify the other Party as soon as possible.

(b) The Concessionaire shall carry out all work relating to the removal, remediation and clean-up of Environmental Conditions (other than any RTD Retained Environmental Work) in accordance with the Hazardous Materials Removal Process and otherwise in accordance with the provisions of this Agreement, the Project Requirements, Section 8 of Part A (*General Requirements for Design, Construction and Rolling Stock*) of Attachment 7 (*Design, Construction and Rolling Stock Requirements*), the procedures set out in the Concessionaire's Project Management Plan, the Quality Management Plan, the Voluntary Clean-Up Application and Materials Management Plans and Good Industry Practice.

(c) No later than 45 days (or such other time period as agreed by the Parties) prior to the proposed date of commencement by the Concessionaire of any work relating to the removal, remediation or clean-up of any Environmental Condition (***Environmental Clean-up Work***), the Concessionaire shall (i) deliver, or shall cause the delivery of, an Environmental Condition Bid Report to Subcontractors who are qualified to perform such Environmental Clean-up Work and to RTD and (ii) notify RTD as to the identity of the Subcontractors to which the Concessionaire has submitted such Environmental Condition Bid Report.

(d) No later than 20 days prior to the proposed date of commencement of such Environmental Clean-up Work as set forth in the Environmental Condition Bid Report, the Concessionaire shall deliver to RTD an Environmental Condition Clean-up Report relating to such Environmental Clean-up Work.

(e) RTD shall approve, reject or comment on the Environmental Condition Clean-up Report no later than 10 days following receipt thereof. If RTD fails to respond to the Concessionaire within such time period, RTD shall be deemed to have approved the Environmental Condition Clean-up Report.

(f) If RTD approves (or is deemed to have approved) the Environmental Condition Clean-up Report, the Concessionaire shall (i) proceed with performance of the relevant Environmental Clean-up Work in accordance with such Environmental Condition Clean-up Report and (ii) submit an invoice to RTD each month following the commencement of such Environmental Clean-up Work for reimbursement of costs incurred by the Concessionaire in respect of Environmental Clean-up Work performed during the prior month.

(g) Each invoice delivered in accordance with Section 12.2(f) must (i) specify in reasonable detail the costs claimed and the basis on which such costs have been incurred and

- calculated and certify that the aggregate amount of costs claimed by the Concessionaire with respect to such Environmental Clean-up Work does not exceed the not to exceed cost estimate set forth in the relevant Environmental Condition Clean-up Report (the labor, material and equipment elements of which must not exceed the costs permitted under the RTD Pricing Conditions) and (ii) be accompanied by a written confirmation from the Concessionaire that (x) all undisputed amounts due for payment for labor, materials and other services in connection with such Environmental Clean-up Work completed during prior months have been paid and (y) all undisputed amounts due for payment for labor, materials and other services in connection with the Work completed during the relevant period have been paid or, subject to Section 2.3 of Part B (*Disadvantaged and Small Business Enterprises Programs*) of Attachment 15 (*Specified Requirements*) will be paid within seven calendar days of receipt of the relevant payment to be paid with the proceeds of such payment.
- (h) RTD shall pay amounts to the Concessionaire in respect of such invoices in accordance with the payment procedures for Statements set forth in Section 26.4 (*Payment*).
- (i) If RTD rejects the Environmental Condition Clean-up Report, RTD shall (i) carry out the relevant Environmental Clean-up Work (such work thereafter constituting ***RTD Retained Environmental Work***), or engage one or more third party contractors to carry out such RTD Retained Environmental Work and the Concessionaire shall give RTD all reasonable assistance to permit RTD or RTD's third party contractors to carry out such RTD Retained Environmental Work including providing access to the relevant Sites, (ii) reimburse the Concessionaire for the Concessionaire's reasonable, documented and proper professional costs incurred to third parties and other direct design and engineering Incurred Costs in each case incurred in preparing the relevant Environmental Condition Bid Report and relevant Environmental Condition Clean-up Report and (iii) upon completion of the relevant RTD Retained Environmental Work, deliver to the Concessionaire a notice of completion together with a statement of the costs incurred by RTD in relation thereto.
- (j) The Concessionaire is responsible for any delay to the Original Baseline Schedule or Revised Baseline Schedule (as applicable), including any impact on the achievement of any Revenue Service Commencement Date and/or Final Completion Date, caused by the removal, remediation or clean-up of all Environmental Conditions, except with respect to (i) Unidentified Environmental Conditions and (ii) any Environmental Conditions in respect of which the Environmental Clean-up Work to be performed is RTD Retained Environmental Work.
- (k) The Concessionaire may claim for a Relief Event where permitted under (i) Section 38.1(h) (provided the other requirements of Section 38 (*Relief Events*) are satisfied) if the Concessionaire encounters any Unidentified Environmental Condition at a Site, which delays, or increases the cost of, completion of the Work or causes the Concessionaire to undertake additional Work and (ii) Section 38.1(aa) (provided the other requirements of Section 38 (*Relief Events*) are satisfied) if RTD carries out, or engages third party contractors to carry out, RTD Retained Environmental Work and (i) fails to complete any such RTD Retained Environmental Work by the completion date for such work set forth in the relevant Environmental Condition Clean-up Report delivered by the Concessionaire to RTD or (ii) materially interrupts or interferes with the Concessionaire's performance of its obligations under this Agreement.

- (l) If, on the last Final Completion Date, the total cost of Environmental Clean-up Work performed by the Concessionaire and RTD under this Section 12.2 (*Environmental Conditions*) (**provided** for purposes of the calculation of such total cost (i) the cost of any work performed by the Concessionaire or any Subcontractor shall be deemed not to exceed the not to exceed cost estimate set forth in the relevant Environmental Condition Clean-up Report and (ii) the cost of work performed by RTD or any third party contractor on behalf of RTD shall be deemed to be the lesser of the actual cost and the not to exceed cost estimate set forth in the relevant Environmental Condition Clean-up Report) is less than U.S.\$18,500,000, RTD shall pay to the Concessionaire as a lump sum an amount equal to 50% of the difference between such total cost and U.S.\$18,500,000 within 30 days following the last Final Completion Date.

Geological Obstructions

- 12.3 (a) If the Concessionaire discovers any Geological Obstructions prior to or following commencement of the Work, it shall notify RTD as soon as possible.
- (b) The Concessionaire shall carry out all Work notwithstanding the discovery of any Geological Obstructions, in accordance with the Project Requirements, Attachment 7 (*Design, Construction and Rolling Stock Requirements*), the procedures set out in the Concessionaire's Project Management Plan, the Quality Management Plan, Good Industry Practice and otherwise in accordance with the provisions of this Agreement.
- (c) The Concessionaire is responsible for all costs and delays caused by the presence of any Geological Obstructions, except with respect to Unidentified Geological Obstructions.
- (d) The Concessionaire may claim for a Relief Event where permitted under Section 38.1(i) (provided the other requirements of Section 38 (*Relief Events*) are satisfied) if the Concessionaire encounters any Unidentified Geological Obstructions at a Site, which delays, or increases the cost of, completion of the Work or causes the Concessionaire to undertake additional Work.

Endangered Species

- 12.4 (a) If the Concessionaire encounters any Endangered Species prior to or following commencement of the Work, it shall notify RTD as soon as possible.
- (b) The Concessionaire shall carry out all Work notwithstanding the discovery of any Endangered Species, in accordance with the Project Requirements, Attachment 7 (*Design, Construction and Rolling Stock Requirements*), the procedures set out in the Concessionaire's Project Management Plan, the Quality Management Plan, Good Industry Practice and otherwise in accordance with the provisions of this Agreement.
- (c) The Concessionaire is responsible for all costs and delays caused by the presence of any Endangered Species, except with respect to Unidentified Endangered Species.
- (d) The Concessionaire may claim for a Relief Event where permitted under Section 38.1(j); (provided the other requirements of Section 38 (*Relief Events*) are satisfied) if the Concessionaire encounters any Unidentified Endangered Species at a Site, which delays, or increases the cost of, completion of the Work or causes the Concessionaire to undertake additional Work.

Concessionaire Acknowledgement as to the Condition of the Sites

12.5 Subject to Sections 12.1 (*Archaeological Remains*), 12.2 (*Environmental Conditions*), 12.3 (*Geological Obstructions*), 12.4 (*Endangered Species*), 15 (*Utilities*), 16 (*Reference Data*), and without prejudice to the Concessionaire's rights under Section 11.1 (*Availability of the Sites*), the Concessionaire agrees and acknowledges that it has:

- (a) inspected and examined to its satisfaction the Sites and their surroundings and, where applicable, any existing structures, Utilities or work on, over or under each such Site;
- (b) satisfied itself as to the nature of the geotechnical, climatic, hydrological, ecological, environmental and general conditions of the Sites, the nature of the ground and subsoil, the form and nature of such Site, the risk of injury or damage to property near to or affecting each such Site and to occupiers of such property, the nature of the materials (whether natural or otherwise) to be excavated, and the nature of the design, work, plant and materials necessary for the Eagle Project; and
- (c) satisfied itself as to:
 - (i) the access to and through the Sites and the adequacy of the Vacant Possession in respect thereof for the purpose of carrying out its obligations under this Agreement and the other Project Agreements;
 - (ii) the precautions and times and methods of working necessary to prevent any nuisance or interference, whether public or private, being caused to any third parties, including the Project Third Parties;
 - (iii) the scope of the Environmental Reports and the Geotechnical Reports; and
 - (iv) the completeness and accuracy of the identification and description of Utilities on the Sites as set forth on the Utility Drawings, the Utility Matrix and in the Utility Data.

Reinstatement

12.6 At any time when the Concessionaire surrenders all or any part of any Site to RTD, whether at the End Date in accordance with the Handover and Reinstatement Work Procedures or pursuant to Section 11.3(d) or otherwise, the Concessionaire will reinstate (and ensure that each of the Project Contractors and their respective Subcontractors reinstates) such part of such Site as the Concessionaire is surrendering to RTD:

- (a) in the form specified in the Project Requirements; or
- (b) if the reinstatement requirements are not specified in the Project Requirements in respect of any part of such Site, with all construction-related materials and Equipment and Temporary Work removed and otherwise in a condition consistent with the conditions of the immediately adjacent reinstated Sites or reinstated parts thereof,

and, in each case, free from occupation and Encumbrances (other than Permitted Encumbrances) and in a clean, safe and orderly state. Prior to reinstating any Site or part thereof under

Section 12.6(b), the Concessionaire shall submit a reinstatement plan to RTD for approval (such approval not to be unreasonably withheld or delayed).

13. ENVIRONMENTAL REQUIREMENTS

Environmental Requirements

13.1 The Concessionaire will, from the earlier of the Early Work Effective Date and the Phase 1 Effective Date to the End Date, carry out each aspect of the Eagle Project and ensure that the Project Contractors and each of their respective Subcontractors performs its obligations, in each case, to fully comply with the following (*Environmental Requirements*):

- (a) all Project Requirements of an Environmental nature;
- (b) all the requirements and provisions of the RODs, other than the requirements and provisions specifically identified as obligations to be retained by RTD in, for the East Corridor, the "East Corridor EIS Mitigation Responsibilities Matrix ROD" in Part A of Attachment 18 (*Concessionaire's Records of Decision Obligations*), for the Gold Line, the "Gold Line EIS Mitigation Responsibilities Matrix ROD" in Part B of Attachment 18 (*Concessionaire's Records of Decision Obligations*) and for the Northwest Rail Electrified Segment, the "Mitigation Requirements for Northwest Rail Electrified Segment" in Part C of Attachment 18 (*Concessionaire's Records of Decision Obligations*);
- (c) the requirements and provisions of the 404 Permits, other than the requirement to purchase any wetland mitigation credits which RTD shall pay for and obtain in accordance with Section 17.2 (*RTD Permits*);
- (d) the requirements and provisions of any other Permits relating to the Environment;
- (e) the requirements and provisions of the mitigation measures in the NWES Environmental Evaluation;
- (f) the requirements and provisions of the Voluntary Clean-Up Application and Materials Management Plans; and
- (g) any permission, declaration, instruction or consent of an Environmental nature issued by any Relevant Authority relating to the Eagle Project (or any part thereof).

If any of the requirements and provisions set out in paragraph (a) of this Section 13.1 (*Environmental Requirements*) conflict with any of the requirements and provisions set out in paragraphs (b), (c), (d), (e), (f) or (g) of this Section 13.1, the requirements and provisions set out in paragraphs (b), (c), (d), (e), (f) or (g) shall take precedence. If any of the requirements and provisions set out in paragraphs (b), (c), (d), (e), (f) or (g) of this Section 13.1 (*Environmental Requirements*) conflict with one another, the most stringent requirement or provision shall take precedence.

Sustainability

13.2 The Concessionaire shall at all times comply with, and shall ensure that each of the Project Contractors and their respective Subcontractors at all times complies with, the Concessionaire's Sustainability Plan.

14. SAFETY AND SECURITY

The Concessionaire shall at all times comply with, and shall ensure that each of the Project Contractors and their respective Subcontractors at all times complies with, the Health, Safety and Security Requirements.

15. UTILITIES

15.1 The Concessionaire shall use Good Industry Practice to design the Eagle Project to minimize the impact on Utilities to the extent practicable.

Concessionaire Relocated Utilities

15.2 (a) The Concessionaire shall Relocate each Concessionaire Relocated Utility in accordance with the requirements of Attachment 20 (*Utilities*), the applicable Work Order and the Design, Construction and Rolling Stock Requirements.

(b) Other than as provided for in Section 15.3 (*Unidentified Utilities*) with respect to the acquisition of replacement property (which is not considered Additional Land) necessitated by the discovery of any Unidentified Utility, the Concessionaire shall obtain Vacant Possession of any Additional Land required for the relocation of any Concessionaire Relocated Utility in accordance with Section 11.4 (*Additional Land*).

Unidentified Utilities

15.3 (a) If the Concessionaire discovers any Unidentified Utility, then it shall notify RTD and the relevant Utility Owners of such Unidentified Utility as soon as practicable.

(b) The Concessionaire may claim for a Relief Event where permitted under Section 38.1(o) (provided the other requirements of Section 38 (*Relief Events*) are satisfied) if the Concessionaire discovers any Unidentified Utility over, on or under any Site, which delays completion of the Work, or increases the cost of completion of the Work, or causes the Concessionaire to undertake additional work, including in each case by necessitating the acquisition of replacement property (which shall not be considered Additional Land) in accordance with the terms of the relevant Utility Relocation Agreement.

RTD Relocated Utilities

15.4 (a) RTD shall ensure that, on the date on which any part of a Site is made available to the Concessionaire in accordance with Section 11.1(a), any RTD Relocated Utility present on such part of such Site either (i) has been Relocated to the extent and in the manner shown on the Utility Drawings or (ii) following such date shall be Relocated to the extent and in the manner shown on the Utility Drawings on or prior to the completion date specified for such RTD Relocated Utility in the Utility Matrix.

- (b) The Concessionaire may claim for a Relief Event where permitted under Section 38.1(c) (provided the other requirements of Section 38 (*Relief Events*) are satisfied) if RTD has not Relocated any RTD Relocated Utility from any part of a Site to the extent and in the manner shown on the Utility Drawings on or prior to the completion date specified for such RTD Relocated Utility in the Utility Matrix.

Owner Relocated Utilities

- 15.5 (a) The Concessionaire shall, as part of the Concessionaire's Utility Tracking Report, provide a schedule of design interface dates identifying when the appropriate Eagle Project design plans will be provided to the Utility Owners to allow each Owner Relocated Utility to be designed. The Concessionaire shall coordinate and schedule the Relocation of each Owner Relocated Utility by the relevant Utility Owner in accordance with the requirements of Attachment 20 (*Utilities*) and the applicable Work Order.
- (b) The Concessionaire may claim a Relief Event where permitted under Section 38.1(b) (provided the other requirements of Section 38 (*Relief Events*) are satisfied) if any Utility Owner fails to Relocate any Owner Relocated Utility to the extent and in the manner shown on the Work Order within the time period set out in the applicable Work Order and the Concessionaire has given RTD timely notice in accordance with Section 6 of Attachment 20 (*Utilities*).

Betterments and Alternative Solutions

- 15.6 (a) If any Utility Owner requests that the Concessionaire:
- (i) implement a Betterment in respect of any Utility that is to be Relocated by the Concessionaire in accordance with Section 15.2 (*Concessionaire Responsibility for Utility Relocation*) (including any Unidentified Utility); or
 - (ii) implement an alternative design and construction solution for Relocation of any Owner Relocated Utility that is different to the solution envisaged by the Utility Drawings (an *Alternative Solution*),

prior to implementing any such Betterment or Alternative Solution, the Concessionaire, RTD and the relevant Utility Owner shall prepare and execute a Work Order with respect to such Betterment or Alternative Solution in accordance with the requirements set out in Section 4 (*Work Orders*) of Attachment 20 (*Utilities*).

- (b) The Concessionaire may claim a Relief Event where permitted under Section 38.1(k) (provided the other requirements of Section 38 (*Relief Events*) are satisfied); **provided** that the Concessionaire shall only be entitled to claim costs and/or an extension of time in accordance with Section 38.8 (*Relief for Work Orders*) to the extent set out in the applicable Work Order.

16. REFERENCE DATA

Reference Data

16.1 RTD has made available to the Concessionaire, before the date of this Agreement, certain materials, documents and data related to RTD's operations, the Eagle Project, the Sites, Passenger

forecasts and other matters which are or may be relevant to the Eagle Project (such materials, documents and data listed on the Reference Data List, the **Reference Data**).

Deficiencies in Reference Data

16.2 The Concessionaire acknowledges that the Reference Data has been provided to the Concessionaire for the convenience of the Concessionaire only. RTD makes no representations or guarantees as to the accuracy, adequacy, completeness or fitness for purpose of the Reference Data. None of RTD, the Project Third Parties, DUSPA, the FTA and their respective advisers, consultants, servants, contractors and/or agents, shall be liable to the Shareholders, the Concessionaire, any of the Project Contractors, their Subcontractors or their respective Affiliates, agents or consultants:

- (a) (whether in contract, tort, by statute or otherwise howsoever and whether or not arising out of any negligence on the part of RTD, the Project Third Parties, DUSPA, the FTA and their respective advisers, consultants, servants, contractors and/or agents) in respect of any inaccuracy, error, omission, lack of fitness for purpose, defect or inadequacy in the Reference Data;
- (b) in respect of any failure to disclose or make available to the Concessionaire any information, documents or data;
- (c) in respect of not keeping the Reference Data up to date; or
- (d) in respect of not informing the Concessionaire of any inaccuracy, error, omission, lack of fitness for purpose, defect or inadequacy in the Reference Data,

except to the extent that RTD, the Project Third Parties, DUSPA, the FTA or their respective advisers, consultants, servants, contractors and/or agents, as the case may be, has or have, at the time of disclosure of the Reference Data, willfully misled the Concessionaire in respect of the Reference Data in a formal written communication issued and signed by RTD. If the Concessionaire has been willfully misled in respect of the Reference Data as described in this Section 16.2 (*Deficiencies in Reference Data*), the Concessionaire may (as its sole and exclusive remedy) claim for a Relief Event under Section 38.1(l) (provided the other requirements of Section 38 (*Relief Events*) are satisfied).

Concessionaire Acknowledgement with respect to Reference Data

16.3 The Concessionaire acknowledges and confirms that:

- (a) it has conducted its own analysis and review of the Reference Data to its satisfaction; and
- (b) except as and to the extent specifically provided in Sections 16.2 (*Deficiencies in Reference Data*) and 38 (*Relief Events*) (including with respect to any Reference Data identified in the description or necessary to determine the occurrence of any Relief Event), it shall not be entitled to make any claim against RTD, the Project Third Parties, DUSPA, the FTA or their respective advisers, consultants, servants, contractors and/or agents whether in damages or for extensions of time or additional payments under this Agreement on the grounds of any inaccuracy, error or mistake in the Reference Data or any misunderstanding or misapprehension in respect of the Reference Data, or on the grounds that incorrect or insufficient information relating thereto or to the Sites or the

Eagle Project was given to it by any Person, whether or not in the employ of RTD, the Project Third Parties, DUSPA, the FTA and their respective advisers, consultants, servants, contractors and/or agents.

17. PERMITS

Responsibility

17.1 The Concessionaire shall apply for, obtain, renew, replace, extend the validity of and arrange necessary amendments to, all Permits legally required in connection with its performance of this Agreement except for RTD Permits, which RTD will obtain to the extent provided in Section 17.2 (*RTD Permits*), and any delay to or increase in the costs of the completion of the Work or any interruption or impairment of the operation of the Concessionaire-operated Components caused by the failure of or delay by the Concessionaire to apply for, obtain, renew, replace, extend the validity of or arrange necessary amendments to, any such Permit shall not constitute a Relief Event. RTD will cooperate with the Concessionaire in applying for the Permits and will, at the reasonable request of the Concessionaire and at the Concessionaire's cost, and where necessary to obtain, renew, replace, extend the validity of, or arrange necessary amendments to the Permits:

- (a) execute such documents as can only be executed by RTD;
- (b) make such applications, either in its own name or jointly with the Concessionaire as can only be made by RTD or in the joint names of the Concessionaire and RTD, as the case may be; and
- (c) attend meetings with appropriately qualified staff and cooperate with approval bodies as reasonably requested by the Concessionaire.

RTD Permits

- 17.2 (a) RTD shall obtain for the Concessionaire the benefit of the RTD Permits.
- (b) RTD shall ensure that the Concessionaire (and, where applicable, the Project Contractors and their respective Subcontractors) shall have the use and benefit of RTD Permits at the time at which such RTD Permits are required for carrying out the Work.
 - (c) The Concessionaire shall take all necessary steps and acts to facilitate the application by RTD at the times and in the manner reasonably requested by RTD, including providing supporting drawings, data and technical information and the filing by the Concessionaire of appropriate applications with the Relevant Authorities.
 - (d) The Concessionaire may claim for a Relief Event where permitted under Section 38.1(n) (*Relief Events*) (provided the other requirements of Section 38.1(n) are satisfied) to the extent that RTD's failure to obtain the benefit for the Concessionaire of any RTD Permit, based on the same or equivalent designs and assumptions as RTD used as the basis for its initial application for such RTD Permits as was filed prior to the Technical Proposal Due Date, causes a delay or suspension of Work; **provided** that such delay in obtaining such benefit is not caused by an act or omission of the Concessionaire including failure to take all necessary steps and acts to facilitate the application by RTD.

PART 6 – CONTRACT DATA

18. SUBMISSION

Contract Data Generally

18.1 The Concessionaire shall prepare and submit all Contract Data to RTD and/or the Project Third Parties, as the case may be, at its sole cost in accordance with the requirements of this Agreement and the Third Party Agreements. All Contract Data shall be consistent with the Concessionaire's Proposal, unless RTD approves a deviation therefrom (such approval not to be unreasonably withheld or delayed).

Concessionaire Design Submittals

18.2 All Concessionaire Design Submittals shall comply with the Design, Construction and Rolling Stock Requirements, the Third Party Agreements, all Permits, the Applicable Requirements and Good Industry Practice and shall be prepared so as to ensure that the Commuter Rail Network, when commissioned, is capable of operating in compliance with the O&M Standards and submitted in accordance with the Contract Data Requirements List. Each Concessionaire Design Submittal shall be accompanied by a certificate signed by the Concessionaire's third-party reviewer certifying that such Concessionaire Design Submittal does comply with the requirements referred to in this Section 18.2, in accordance with Section 3 of Attachment 9 (*Project and Construction Management*).

19. RTD REVIEW

RTD Review

- 19.1 (a) The Concessionaire shall submit each item of Contract Data to RTD within the time period set out in the Contract Data Requirements List for such item of Contract Data.
- (b) On or before the last day of the Review Period for such item of Contract Data, RTD shall notify the Concessionaire in writing of its opinion in relation to whether such Contract Data submitted by the Concessionaire complies with the applicable requirements of this Agreement and of any comments it has or amendments it wishes the Concessionaire to make. The Concessionaire shall give due consideration to RTD's amendments and comments, but the Concessionaire shall not be obligated to incorporate RTD's amendments or comments unless such comments are necessary for such Contract Data to comply with the applicable requirements of this Agreement. To the extent required hereby, the Concessionaire shall revise the Contract Data and re-submit the revised Contract Data to RTD for review of such revisions and any other portion of such Contract Data upon which RTD previously commented in accordance with this Section 19.1 or Section 2.4(c) of Attachment 6 (*Contract Data Requirements*).
- (c) If RTD has not provided notice of its opinion or any amendments or comments to the Concessionaire prior to the expiry of the Review Period, or in the case of resubmissions no later than five days following such resubmission, in respect of any item of Contract Data, such item of Contract Data shall be deemed to be approved by RTD, with such approval taking effect on the last day of such Review Period, or in the case of resubmissions on the day immediately following RTD's extended review period.

- (d) If the Parties cannot agree whether RTD's proposed amendments and/or comments are necessary for an item of Contract Data to comply with the applicable requirements of this Agreement, the matters in dispute may be referred by either Party for resolution in accordance with the Dispute Resolution Procedure.
- (e) The Concessionaire's Proposal is, and each Concessionaire Design Submittal shall be, a commitment to the design as shown in the Concessionaire's Proposal or such Concessionaire Design Submittal, as the case may be, such that the design or information as depicted therein shall be a requirement of this Agreement from the date of approval of such Concessionaire Design Submittal; **provided** that (i) if the design depicted in the Concessionaire's Proposal does not comply or is in conflict with any other requirement of this Agreement, such other requirement of this Agreement shall prevail and (ii) if the design depicted in any Concessionaire Design Submittal does not comply or is in conflict with any pre-existing requirement of this Agreement (including the Concessionaire's Proposal), such pre-existing requirement of this Agreement shall prevail.

Amendments

- 19.2 (a) The Concessionaire will not amend, modify or vary any item of Contract Data that has been approved (or deemed approved) by RTD without the prior written approval of RTD. In seeking RTD's approval under this Section 19.2(a) the Concessionaire shall, and in providing such approval RTD shall, comply with the requirements for submission, review and approval of Contract Data as set forth in Section 19.1 (*RTD Review*).
- (b) The implementation of any design changes that are not consistent with previously approved Concessionaire Design Submittals shall be subject to:
- (i) prior certification by the Concessionaire's engineer of record that such design change is consistent with the requirements of Section 18.2 (*Concessionaire Design Submittals*); and
 - (ii) prior written approval by RTD.

Disputes

19.3 Any dispute arising between RTD and the Concessionaire in relation to the compliance of any item of Contract Data with the requirements of this Agreement may be referred by either Party for resolution in accordance with the Dispute Resolution Procedure.

20. PROJECT THIRD PARTY REVIEW

Project Third Party Review of Concessionaire Design Submittals

- 20.1 (a) Upon submission to RTD of any Concessionaire Design Submittal that is required to be submitted to a Project Third Party, the Concessionaire may concurrently submit such Concessionaire Design Submittal to each relevant Project Third Party.
- (b) RTD will use its Reasonable Efforts to ensure that Project Third Parties shall review and comment on each Concessionaire Design Submittal submitted by the Concessionaire in accordance with Attachment 7 (*Design, Construction and Rolling Stock Requirements*), the Contract Data Requirements List and the Third Party Agreements, as applicable.

- (c) The Concessionaire may claim for a Relief Event where permitted under Section 38.1(f) (provided the other requirements of Section 38 (*Relief Events*) are satisfied) if any Project Third Party fails to review and comment on any Concessionaire Design Submittal within 45 days following the date on which such Concessionaire Design Submittal is submitted to the relevant Project Third Party in accordance with Section 20.1(a) (or such longer time period as may be set out in the Contract Data Requirements List or any relevant Third Party Agreement), and such failure causes a delay or suspension of Work (provided that such delay is not caused by an act or omission of the Concessionaire including failure by the Concessionaire to comply with the requirements for such Concessionaire Design Submittal referred to in Section 18.2 (*Concessionaire Design Submittals*)); **provided** that, where any relevant Third Party Agreement or any Applicable Requirement provides for deemed approval by the relevant Project Third Party of any Concessionaire Design Submittal upon the expiry of the review period available to such Project Third Party in accordance with the Contract Data Requirements List or the relevant Third Party Agreement, the Concessionaire shall treat such Concessionaire Design Submittal as having been approved and the Concessionaire shall not be entitled to a Relief Event.

Disputes with Project Third Parties Relating to the Concessionaire Design Submittals

- 20.2 (a) If any Project Third Party alleges that any Concessionaire Design Submittal submitted to that Project Third Party does not comply with the requirements for such Concessionaire Design Submittal as set out in the Third Party Agreements and RTD agrees with the Concessionaire that there is a reasonable basis for challenging the Project Third Party's allegation (or it has been determined pursuant to the Dispute Resolution Procedure that there is a reasonable basis), RTD shall either:
- (i) dispute such allegation in accordance with the appropriate dispute resolution procedures set out in the applicable Third Party Agreement following consultation with the Concessionaire to the extent reasonably practicable under the circumstances; or
 - (ii) implement an RTD Proposed Change instructing the Concessionaire to comply with the requirements of the relevant Project Third Party, in which case the provisions of Section 36.3 (*RTD Proposed Changes*) shall apply.
- (b) The Concessionaire will cooperate with RTD and take all necessary steps and acts to assist RTD in such procedures, including providing supporting drawings, data and technical information at the times and in the manner reasonably requested by RTD.
- (c) The Concessionaire agrees that it shall comply with the resolution of each dispute regarding compliance of the Concessionaire Design Submittals with the requirements of each Third Party Agreement determined in accordance with the procedures set out in the applicable Third Party Agreement. To the extent that it is determined, in accordance with the procedures set out in the applicable Third Party Agreement, that any Concessionaire Design Submittal submitted to that Project Third Party:
- (i) does not comply with the requirements of the Third Party Agreements, the Concessionaire shall resubmit such noncompliant Concessionaire Design Submittal to remedy such noncompliance and any delay or additional cost caused

to the Concessionaire will not constitute a Relief Event, the Concessionaire will not be entitled to any compensation or relief from RTD and the Concessionaire shall reimburse and indemnify RTD for any Loss RTD incurs in connection with the dispute; and

- (ii) complies with the requirements of the applicable Third Party Agreements, the Concessionaire may claim for a Relief Event where permitted under Section 38 (*Relief Events*) (provided the other requirements of Section 38 (*Relief Events*) are satisfied) in respect of the delay caused to the Concessionaire in respect of such Concessionaire Design Submittal.

PART 7 – DESIGN, CONSTRUCTION AND PROCUREMENT

21. FINAL PROJECT DESIGN

Subject to Section 1.3 (*Conflict of Terms*), the Concessionaire shall ensure that the Final Project Design complies with the Design, Construction and Rolling Stock Requirements, the Third Party Agreements, all Permits, the Applicable Requirements and Good Industry Practice notwithstanding any comments of, or failure to comment by, RTD or the Project Third Parties.

22. CONSTRUCTION AND PROCUREMENT

The Work

22.1 The Concessionaire will carry out and complete the Work:

- (a) in accordance with the provisions of this Agreement, the Project Requirements and Good Industry Practice to ensure that the Work and each part of the Commuter Rail Projects and the Commuter Rail Maintenance Facility are in compliance with the Project Requirements and Good Industry Practice;
- (b) materially in accordance with the contents of the Concessionaire's Proposal; **provided** that if the contents of the Concessionaire's Proposal conflict with or do not comply with any of the requirements referred to in Section 22.1(a), the requirements and provisions set out in Section 22.1(a) shall take precedence;
- (c) ensuring that the Project Contractors and their respective Subcontractors perform their obligations in a manner consistent with the Third Party Agreements;
- (d) taking all necessary steps and acts to perform and discharge RTD's obligations on RTD's behalf under the Third Party Agreements, other than as identified in Section 2(e) of Attachment 20 (*Utilities*), Attachment 21 (*Inter-Governmental Agreements*) and Attachment 22 (*Railroad Agreements*);
- (e) in accordance with the provisions of Attachment 9 (*Project and Construction Management*) and the procedures set out in the Concessionaire's Project Management Plan and the Quality Management Plan;
- (f) using Reasonable Efforts to ensure that the Revenue Service Commencement Date for each Commuter Rail Project occurs on or before the Revenue Service Target Date for such Commuter Rail Project;

- (g) to obtain the Revenue Service Commencement Certificate for each Commuter Rail Project on or before the Revenue Service Deadline Date (as such date may be extended in accordance with the terms of this Agreement);
- (h) using Reasonable Efforts to ensure that Final Completion for each Commuter Rail Project occurs on or before the date falling six months after the Revenue Service Commencement Date for such Commuter Rail Project;
- (i) to obtain the Final Completion Certificate for each Commuter Rail Project on or before the Final Completion Deadline Date (as such date may be extended in accordance with the terms of this Agreement);
- (j) to ensure that each Commuter Rail Project, when commissioned, operates so as to comply with the O&M Standards; and
- (k) to maintain appropriate Construction Security in each calendar year prior to and including the year in which the final Revenue Service Commencement Certificate is issued and substantial completion of the Work occurs in accordance with the terms of the Design/Build Contract, and otherwise as required by applicable Law.

Concessionaire's Project Management Plan

22.2 The Concessionaire shall comply with and monitor and enforce compliance with, and shall ensure that the Design/Build Contractor and each of the Design/Build Subcontractors complies with and monitors and enforces compliance by each of their respective Subcontractors with the Concessionaire's Project Management Plan.

Quality Management

- 22.3 (a) The Concessionaire shall develop appropriate quality management systems and procedures to ensure the consistent quality in the performance of the Work and the operation and maintenance of the Concessionaire-operated Components and shall document these systems and procedures in a plan (the *Quality Management Plan*) in accordance with Section 7 of Attachment 9 (*Project and Construction Management*).
- (b) The Concessionaire shall comply with and monitor and enforce compliance with, and shall ensure that the Project Contractors and each of the Subcontractors complies with, and monitors and enforces compliance by each of their respective Subcontractors with, the Quality Management Plan.
 - (c) RTD shall be entitled to audit compliance by the Concessionaire, the Project Contractors and the Subcontractors with the Quality Management Plan from time to time on providing reasonable notice in advance to the Concessionaire and at such times as are reasonably required by RTD. Any such audit may involve the examination or inspection of Work or other activities (including operation and maintenance activities) on or off any Site or any part of the Commuter Rail Network, as the case may be. The Concessionaire shall ensure that the representatives of RTD carrying out any such audit shall be provided with all such assistance and access to facilities and records (including the provision of copies of documents) as they may reasonably require in order to discharge their audit function in a proper manner. The Concessionaire shall present to RTD a plan outlining the steps it intends to take to correct any non-compliance identified in any such audit no

later than 21 days following notice from RTD to the Concessionaire of such non-compliance. The Concessionaire shall, and shall ensure that the Project Contractors and the Subcontractors shall, diligently proceed to implement such plan to RTD's satisfaction.

DBE/SBE Requirements

22.4 During the Design/Build Period, the Concessionaire shall comply with and shall ensure that the Project Contractors and each of their Subcontractors complies with the requirements of Sections 2 and 3 of Part B (*Disadvantaged and Small Business Enterprises Programs*) of Attachment 15 (*Specified Requirements*); **provided** that the Concessionaire shall not be in breach of this requirement if the Concessionaire can demonstrate to RTD's reasonable satisfaction that the Concessionaire, and the Project Contractors and each of their Subcontractors, has exercised good faith efforts, as determined in accordance with 49 CFR Part 26, including appendices, to comply with such requirements.

Design/Build Contract

- 22.5 (a) The Concessionaire shall subcontract the performance of the Work to the Design/Build Contractor pursuant to the terms of the Design/Build Contract. The Concessionaire shall not remove or replace the Design/Build Contractor without the prior approval of RTD (such approval not to be unreasonably withheld or delayed), and in any event RTD shall notify the Concessionaire of its decision in writing within 30 days following receipt by RTD of a request from the Concessionaire for such approval, **provided** that a failure to deliver such notice within 30 days following the Concessionaire's request shall be deemed rejection by RTD of such request.
- (b) The Concessionaire shall not implement or agree to any amendment, modification, variation or waiver of any provision of the Design/Build Contract without the prior submission of details of the proposed amendment, modification, variation or waiver to RTD:
- (i) in the case of a Material Amendment, at least 35 days before such Material Amendment will become effective (or, in the event of an emergency that creates an immediate and serious threat to public health, safety, security or the Environment, such shorter period as is reasonable under the circumstances); or
 - (ii) in the case of any proposed amendment, modification, variation or waiver of any provision of the Design/Build Contract that the Concessionaire determines is not a Material Amendment, at least five days before the proposed amendment, modification, variation or waiver will become effective, together with a certification by the Concessionaire that such amendment, modification, variation or waiver is not a Material Amendment.
- (c) If RTD considers that a proposed amendment, modification, variation or waiver of any provision of the Design/Build Contract of which it is notified in accordance with Section 22.5(b)(ii) is in fact a Material Amendment, RTD shall so notify the Concessionaire and the Concessionaire shall not, and shall ensure that the Design/Build Contractor shall not, enter into such amendment, modification, variation or waiver of any provision of the Design/Build Contract until the issue of whether such amendment,

- modification, variation or waiver is a Material Amendment has been resolved in accordance with the Dispute Resolution Procedure.
- (d) If it is determined in accordance with the Dispute Resolution Procedure that such amendment, modification, variation or waiver is a Material Amendment, the provisions of this Section 22.5 (*Design/Build Contract*) shall apply to such Material Amendment as if details of such Material Amendment were submitted to RTD on the date of such determination.
 - (e) The Concessionaire shall not agree to or execute any Material Amendment to the Design/Build Contract until RTD has consented to (or is deemed, pursuant to Section 22.5(f), to have consented to) such Material Amendment (such consent not to be unreasonably withheld or delayed).
 - (f) If RTD has not indicated within 30 days following the date on which the Concessionaire delivered the proposed Material Amendment to RTD that it has consented to or rejected the proposed Material Amendment, then RTD shall be deemed to have consented to the proposed Material Amendment, with such consent taking effect on the 30th day following submission to RTD.

Design/Build Subcontractors

- 22.6 (a) The Concessionaire will not be relieved of any of its obligations, liabilities or responsibilities under this Agreement by reason of its obligations being carried out by the Design/Build Contractor or any Design/Build Subcontractor, nor will RTD be in any way liable to the Design/Build Contractor or any Design/Build Subcontractor or be in any way bound by the terms of the Design/Build Contract or any Subcontract thereunder.
- (b) Neither the provision of consent by RTD to the appointment of the Design/Build Contractor or any Design/Build Subcontractor (if such consent is required) nor the review or approval of the terms of the Design/Build Contract or any Subcontract thereunder (or, in each case, of any amendment, modification, variation or waiver thereof) will relieve the Concessionaire of any of its obligations, liabilities or responsibilities under this Agreement nor render RTD in any way liable to any such Person or in any way bound by the terms of the Design/Build Contract or any Subcontract thereunder.
 - (c) The Concessionaire shall not replace, and shall ensure that the Design/Build Contractor shall not replace, any Material Design/Build Subcontractor without the prior written approval of RTD (such approval not to be unreasonably withheld or delayed), and in any event RTD shall notify the Concessionaire of its decision in writing within 14 days following receipt by RTD of a request from the Concessionaire for such approval, **provided** that a failure to deliver such notice within 14 days following the Concessionaire's request shall be deemed a rejection by RTD of such request.
 - (d) Promptly upon request by RTD, the Concessionaire shall provide to RTD copies of all Subcontracts entered into by the Concessionaire or the Design/Build Contractor with any Material Design/Build Subcontractor in connection with the carrying out of the Work within a reasonable period of time of each such Subcontract being entered into.

- (e) The Concessionaire will be responsible for all payments, and any other liabilities, to the Design/Build Contractor, and RTD will have no responsibility for such amounts.
- (f) The Concessionaire shall require the Design/Build Contractor and each Design/Build Subcontractor to agree in the Design/Build Contract or relevant Subcontract, as the case may be:
 - (i) to comply, where applicable, with the Design, Construction and Rolling Stock Requirements, the provisions of Attachment 9 (*Project and Construction Management*), the Concessionaire's Project Management Plan, the Quality Management Plan, the Health, Safety and Security Requirements, the Specified Requirements and Applicable Requirements;
 - (ii) not to impair, in the case of the Design/Build Contractor, the performance by the Concessionaire of its obligations under this Agreement and the other Project Agreements or, in the case of a Design/Build Subcontractor, the performance by the Design/Build Contractor of its obligations under the Design/Build Contract;
 - (iii) that the Design/Build Contractor is liable for such obligations under the Design/Build Contract and is not relieved of any of its obligations, liabilities or responsibilities under the Design/Build Contract by reason of part of its obligations being carried out by a Design/Build Subcontractor; and
 - (iv) that in the event of termination of this Agreement, RTD will be entitled to replace the Design/Build Contract or, as the case may be, the Subcontract, with a contract on substantially similar terms as the Design/Build Contract or, as the case may be, the Subcontract (including, in each case, by way of assignment) (subject to such amendments as may be necessary to reflect any legal requirements or limitations applicable to RTD) between the Design/Build Contractor or Design/Build Subcontractor, as the case may be, and RTD.
- (g) The Concessionaire shall monitor and enforce the compliance by the Design/Build Contractor, and shall ensure that the Design/Build Contractor monitors and enforces compliance by each Design/Build Subcontractor, with the requirements referred to in Section 22.6(f) and shall, if necessary, remove and replace the Design/Build Contractor (subject to RTD's approval in accordance with Section 22.5(a)) or require the replacement of any Design/Build Subcontractor (or any of their respective personnel) to the extent the Design/Build Contractor or any Design/Build Subcontractor does not comply with the requirements referred to in Section 22.6(f).

Reports During the Design/Build Period

22.7 The Concessionaire shall submit to RTD (a) no later than the fifth day of the month following the month to which it relates, the Monthly Progress Report and (b) any other information that RTD requires to be submitted, in each case in accordance with Section 2.4 (*Monthly Progress Reports*) of Attachment 9 (*Project and Construction Management*).

Independent Engineer

- 22.8 (a) The Parties agree that no later than 60 days after the Phase 1 Effective Date, RTD and the Concessionaire shall appoint the Independent Engineer pursuant to the Independent Engineer's Agreement following an open market procurement process conducted by the Concessionaire in cooperation with RTD and in compliance with the Applicable Requirements and FTA Circular 4220.1F. The Parties agree that the Independent Engineer may be the same Person as is appointed by the Lenders and the Concessionaire as the Lenders' technical advisor under the Designated Credit Agreements.
- (b) The Parties agree that the Independent Engineer is not the agent of any Party and neither RTD nor the Concessionaire is responsible or liable for its actions or omissions.
- (c) RTD and the Concessionaire shall bear the costs and expenses relating to the appointment and instruction of the Independent Engineer with respect to the performance of the Independent Engineer's duties as described in Sections 26.3(c), 28.2 (*Revenue Service Commencement Certificates*), 28.4 (*Final Completion Certificates*), 28.5 (*Issuance of Revenue Service Commencement Certificates and Final Completion Certificates*) and Sections 2.1(a) and 2.3(a)(i) of Part A of Attachment 13 (*Compensation Following Termination*) in equal amounts; **provided** that (i) the Concessionaire shall pay 100% of all additional fees, costs and expenses of the Independent Engineer incurred (x) following the delivery of an Outstanding Requirements Notice or an Outstanding Completion Requirements Notice and in connection with any services provided by the Independent Engineer required as a result of the Concessionaire's rectification of the defects identified in such notices in accordance with Sections 28.5(d) or 28.5(h), as applicable, or (y) as a result of any Dispute regarding any amount in a Statement under Section 26.3(c) resolved by the Independent Engineer entirely in favor of RTD; and (ii) RTD shall not bear the costs and expenses of the Independent Engineer for any other services procured by the Concessionaire and the Lenders from the Independent Engineer, which costs and expenses shall be borne by the Concessionaire and the Lenders in such manner as they may determine. The Parties agree to cooperate with each other generally in relation to all matters relating to the duties of the Independent Engineer.
- (d) All instructions and representations with respect to the matters described in Sections 26.3(c), 28.2 (*Revenue Service Commencement Certificates*), 28.4 (*Final Completion Certificates*), 28.5 (*Issuance of Revenue Service Commencement Certificates and Final Completion Certificates*) and Sections 2.1(a) and 2.3(a)(i) of Part A of Attachment 13 (*Compensation Following Termination*) issued or made by either of the Parties, or the Lenders, to the Independent Engineer shall be simultaneously copied to the others, and both Parties and the Lenders shall be entitled to attend all inspections undertaken by, or meetings involving, the Independent Engineer.
- (e) Unless otherwise agreed between RTD and the Concessionaire, the appointment of the initial Independent Engineer shall automatically terminate (unless previously terminated by either Party in accordance with this Section 22.8(e) of this Agreement and Section 21.1 (*Termination by the Appointers*) of the Independent Engineer's Agreement) upon the earlier of the issuance of the last Final Completion Certificate and the End Date. Without prejudice to the foregoing sentence, either Party may terminate the appointment of the initial Independent Engineer or any replacement or successor Independent

- Engineer in accordance with the terms of the Independent Engineer's Agreement, **provided** that:
- (i) the Party wishing to terminate the appointment of the Independent Engineer shall serve written notice on the other Parties to the Independent Engineer's Agreement specifying its grounds for such termination;
 - (ii) RTD and the Concessionaire shall consult on whether such termination is necessary in the circumstances; and
 - (iii) following such consultation, the party wishing to terminate the appointment of the Independent Engineer may do so by giving at least 28 days' written notice to the Independent Engineer and the other parties to the Independent Engineer's Agreement, specifying the grounds for termination.
- (f) Upon the termination of the appointment of the Independent Engineer in accordance with the above clause (e) and Section 21.1 (*Termination by the Appointers*) of the Independent Engineer's Agreement, prior to the effectiveness of termination of such Independent Engineer, the Concessionaire shall conduct, in cooperation with RTD and the Lenders, a proposal procedure in compliance with Applicable Requirements and FTA Circular 4220.1F, for the appointment of a replacement Independent Engineer to perform the scope of services set out in the Independent Engineer's Agreement. The Concessionaire shall, in cooperation with RTD, request proposals. The proposals shall be assessed by a committee consisting of one representative of each Party and one representative of the Lenders in order to select a replacement Independent Engineer, such selection to be based on unanimous agreement.
- (g) The appointment of the then-current Independent Engineer shall, in accordance with the provisions of the Independent Engineer's Agreement, expire at the latest on the date that the appointment of the replacement Independent Engineer, agreed by the parties to the Independent Engineer's Agreement, becomes effective; **provided** that the Independent Engineer's appointment shall continue for a period of not less than 15 days to the extent necessary to ensure an orderly handover from the then-current Independent Engineer to the replacement Independent Engineer. If, notwithstanding the requirements of the above clause (f), the appointment of the current Independent Engineer is terminated prior to the selection of a replacement Independent Engineer, RTD and the Concessionaire may, in order to avoid any delays caused by termination of the appointment of the current Independent Engineer, acting jointly, appoint a temporary Independent Engineer (which shall have all of the rights and obligations of the current Independent Engineer under the Independent Engineer's Agreement and shall be obligated to comply with the terms of this Agreement) to carry out the role of Independent Engineer until a replacement Independent Engineer is selected pursuant to clause (f) above. Any certification of an Independent Engineer made during such Independent Engineer's appointment (including any temporary Independent Engineer) shall have full force and effect for the purposes of this Agreement, notwithstanding the subsequent termination of the Independent Engineer's Agreement related to such Independent Engineer.
- (h) The Parties agree that prior to the Independent Engineer issuing any certificate with its determination or opinion, the Independent Engineer shall be required to permit the Parties

and the Lenders a reasonable opportunity to express their views with respect to the subject matter of the Independent Engineer's certificate.

23. CONCESSIONAIRE'S OBLIGATIONS AND RTD'S RIGHTS WITH RESPECT TO THE WORK

Ownership of Concessionaire-operated Components

- 23.1 (a) Subject to Section 2.6, upon the incorporation into the Commuter Rail Network of each part of the Commuter Rail Network (excluding the Sites and the DUS Infrastructure, but including the DUS Systems) and completion of all Work related to such part in accordance with Section 22.1 (*The Work*), ownership of and title to such part of the Commuter Rail Network shall immediately and automatically vest in RTD free from all Encumbrances. For the avoidance of doubt, with respect to the completion of the Early Work, ownership of and title to all grade crossing warning equipment installed on the side of the grade crossing on which the commuter rail track shall be installed shall immediately and automatically vest in RTD free of all Encumbrances upon installation thereof.
- (b) Subject to Section 2.6, ownership of and title to each part of the Rolling Stock (including any Rolling Stock Option Cars) shall immediately and automatically vest in RTD free from all Encumbrances upon delivery of any element of the Rolling Stock to a Site or, following delivery of a Phase 2 Rolling Stock Termination Notice in accordance with Section 5.11 (*Phase 2 Rolling Stock Termination*), with respect to the Phase 2 Rolling Stock, to the location or locations designated by RTD in such notice.
- (c) Notwithstanding Sections 23.1(a) and 23.1(b):
- (i) the passage of ownership of and title to any part of the Concessionaire-operated Components to RTD shall not imply acceptance of such part of the Concessionaire-operated Components by RTD as to the compliance of such part of the Concessionaire-operated Components with the requirements set out in this Agreement nor shall the Concessionaire be relieved of its obligation to comply with any of its obligations under this Agreement and the other Project Agreements;
 - (ii) without limiting RTD's obligations under Section 40 (*Damage to the Concessionaire-Operated Components*), the risk of loss or damage to the Concessionaire-operated Components shall remain with the Concessionaire until the End Date.
- (d) The Concessionaire shall not do any act or thing that will create any Encumbrance (other than a Permitted Encumbrance) against any Commuter Rail Project, the Commuter Rail Maintenance Facility, any Rolling Stock or any Site and shall promptly remove any Encumbrance (other than a Permitted Encumbrance) against such Commuter Rail Project, Commuter Rail Maintenance Facility, Rolling Stock or Site, unless the Encumbrance came into existence as a result of an act of or omission by RTD or a Person claiming through it which in turn was not caused by an act or omission of the Concessionaire.

Suspension of Work

- 23.2 (a) Without limitation to any other rights of RTD under this Agreement, RTD shall be entitled to order the suspension of any part of the Work:
- (i) in the event of an emergency that creates an immediate need and serious threat to public health, safety, security or the Environment;
 - (ii) where it has reasonable grounds for concluding that damage to any part of RTD's existing system, any Site, or any assets owned by any party on any part of any Site or personal injury to the employees or contractors of RTD or any Project Third Party or Passengers or third parties is likely to result from the continuation of the Work;
 - (iii) if RTD is notified by a Project Third Party that the Work does not comply with the requirements of a Third Party Agreement and RTD has reasonable grounds for concluding that the basis for such notice's assertions is well founded; or
 - (iv) if RTD is notified by any Relevant Authority that the Work is in breach of any Applicable Requirement and RTD has reasonable grounds for concluding that the basis for such notice's assertions is well founded.
- (b) Any suspension required by RTD under Section 23.2(a) shall last for the duration of such event or for so long as such grounds exist or until either the Concessionaire or RTD has undertaken appropriate remedial action to prevent such damage or injury or to otherwise remedy such non-compliance or breach in each case to the reasonable satisfaction of RTD.
- (c) Any delay to or increase in the costs of the completion of the Work caused by the suspension of the Work by RTD pursuant to Sections 23.2(a) shall not, in itself, constitute a Relief Event, without prejudice to the Concessionaire's right to claim a Relief Event or Force Majeure Event in respect of such event where grounds for a Relief Event or Force Majeure Event are expressly provided elsewhere in this Agreement; **provided** that the Concessionaire may claim a Relief Event where permitted under Section 38.1(q) (provided the other requirements of Section 38 (*Relief Events*) are satisfied).

Project Schedules

23.3 The Concessionaire will prepare and keep updated (or ensure the preparation and updating of) the Project Schedules in accordance with the requirements set out in Section 2.6 (*Schedule Management*) of Attachment 9 (*Project and Construction Management*); **provided** that, notwithstanding any other provision of this Agreement, the submission by the Concessionaire of a revised Project Schedule does not constitute the grant of, and shall not result in, an extension to any Revenue Service Target Date, the Revenue Service Deadline Date, or the Final Completion Deadline Date.

RTD's Additional Rights

23.4 In addition to the other rights granted to RTD under this Agreement, during the course of the Design/Build Period:

- (a) RTD shall:
 - (i) be provided with copies of all notices of force majeure or default between the Concessionaire and/or any Project Contractor and/or any Subcontractor;
 - (ii) receive, no later than three months following the issue of each Final Completion Certificate, the applicable Asset Register referred to in Section 29.10 (*Asset Registers*);
 - (iii) receive, no later than five Business Days following their production, or such other period of time as is reasonable in the circumstances, copies of any claims relating to the Eagle Project exceeding U.S.\$100,000 in value by any Project Contractor or any Material Subcontractor and any further material documents and material communications related thereto; **provided** that the Concessionaire is under no obligation to disclose any document where such disclosure would constitute a waiver of attorney/client privilege. Where the Parties agree that disclosure of any such document would be in their common interest, the Parties shall negotiate in good faith and enter into a joint defense agreement covering disclosure of such document; and
 - (iv) receive promptly any other material documents agreed by RTD and the Concessionaire in advance and/or as notified from time to time by RTD.
- (b) RTD and its consultants, agents and contractors shall have access to the Sites, the Work and the Commuter Rail Network (including the Temporary Work) and all workshops, factories, and other locations on or off the Sites where materials and interim and permanent items are being produced, manufactured, fabricated or stored for the purpose of monitoring the quality and progress of the Work, attending the execution of any phases and tests of the Work and otherwise for the purpose of exercising the rights of RTD under Attachment 9 (*Project and Construction Management*), **provided** that RTD shall give the Concessionaire at least seven days' notice of any such access it requires where the location to be accessed is outside the State of Colorado.

Interface with Heavy Rail Operators

23.5 (a) The Concessionaire shall carry out all Work, including the scheduling of all Work, in accordance with the requirements of the Railroad Agreements and without impairing, disrupting, interfering with, or otherwise having an adverse impact on the activities or operations of any Heavy Rail Operator; **provided** that the Concessionaire shall not be in breach of this Section 23.5(a) in respect of any such interruption that has been agreed in advance with the relevant Heavy Rail Operator for the purposes of carrying out any of the Work or that does not constitute a breach of any Railroad Agreement.

- (b) To the extent that the Concessionaire causes any impairment or disruption to, or interference with or impact on the activities or operations of any Heavy Rail Operator, the Concessionaire shall, to the fullest extent permitted by Law, fully and effectively indemnify and hold harmless RTD for all Losses and or Claims arising out of 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 RTD or any RTD agent, servant, consultant or employee.
- (c) All Losses payable by the Concessionaire under this Section 23.5 (*Interface with Heavy Rail Operators*) shall be deemed a debt due and payable within 30 days after receipt by the Concessionaire of RTD's demand or, at RTD's election, paid by the Concessionaire by way of a deduction from the Service Payment, without prejudice to RTD's rights under Section 35.1 (*Concessionaire Indemnity*).

Operations and Maintenance Obligations During the Design/Build Period

23.6 During the Design/Build Period, the Concessionaire shall perform the operations and maintenance activities set out in Part E (*Operations and Maintenance Responsibilities During the Design/Build Period*) of Attachment 7 (*Design, Construction and Rolling Stock Requirements*).

24. THE DUS INFRASTRUCTURE

Construction of the DUS Infrastructure

24.1 RTD will ensure the procurement of the DUS Infrastructure by the DUS Infrastructure Contractor in accordance with Attachment 3 (*The DUS Infrastructure*) and the DUS Infrastructure Agreement.

DUS Infrastructure Documents

24.2 RTD will provide a copy of the DUS Infrastructure Documents to the Concessionaire and afford the Concessionaire the opportunity to provide comments thereon, in accordance with Attachment 3 (*The DUS Infrastructure*).

Review of DUS Infrastructure

24.3 RTD will provide the Concessionaire a reasonable opportunity to review progress of construction and completion of the DUS Infrastructure in accordance with Attachment 3 (*The DUS Infrastructure*).

Beneficial Occupancy of the DUS Infrastructure

- 24.4 (a) RTD shall use Reasonable Efforts to ensure that Beneficial Occupancy of the DUS Infrastructure is achieved on or before the Guaranteed DUS Access Date.
- (b) Within a reasonable period of time following the achievement of Beneficial Occupancy of the DUS Infrastructure, RTD will:
- (i) provide the Concessionaire with Vacant Possession of the DUS Rail Segment Site; and

- (ii) assign all DUS Infrastructure Warranties in respect of the DUS Infrastructure to the Concessionaire.
- (c) The Concessionaire may claim a Relief Event where permitted under Section 38.1(d) (provided the other requirements of Section 38 (*Relief Events*) are satisfied) if (i) RTD fails to provide the Concessionaire with Vacant Possession of the DUS Rail Segment Site in accordance with Section 24.4(b)(i) by the Guaranteed DUS Access Date, (ii) RTD agrees to or acknowledges the occurrence of Beneficial Occupancy pursuant to the DUS Infrastructure Agreement prior to satisfaction of the Beneficial Occupancy Requirements or (iii) the Beneficial Occupancy Requirements are not satisfied by the Guaranteed DUS Access Date.

Disputes

24.5 Any matters in dispute in connection with the DUS Infrastructure may be referred by either Party for resolution in accordance with the Dispute Resolution Procedure.

25. ORGANIZATION OF THE WORKSITE

Cooperation with other Contractors

25.1 The Concessionaire will not interfere with the work of or cause any delay to any other contractors which may be carrying out work in the land adjoining or near any Site for RTD, any Project Third Party or any Relevant Authority and will allow them reasonable access to any Site and any part of the Commuter Rail Network and otherwise comply with the provisions of the Third Party Agreements in respect of such work; **provided** that the Concessionaire shall not be in breach of this Section 25.1 for any temporary interruption to the work of any such contractors that has been agreed in advance between the Concessionaire, such contractor, RTD, or any relevant Project Third Party, as the case may be, or which is reasonably necessary in accordance with Law and Good Industry Practice to respond to emergencies that create an immediate and serious threat to public health, safety, security or the Environment.

Traffic Management

25.2 The Concessionaire will, during the Design/Build Period, at its own expense and with the necessary assistance of any Relevant Authority, take all necessary measures requested or required by any Relevant Authority for the management and facilitation of traffic or the use of routes which will be obstructed or hindered by the Work, including preparing and implementing the Traffic Management Plans in accordance with the Design, Construction and Rolling Stock Requirements.

Utilities

25.3 The Concessionaire shall ensure that adequate Utilities are available on the Sites to facilitate its performance of the Work and the operation of the Concessionaire-operated Components, and the Concessionaire shall bear the cost of the supply of such Utilities (subject to Section 29.15 (*Electrical Energy*)) required for the performance of the Work and the operation of the Concessionaire-operated Components and any interruption to the Work or the operation of the Concessionaire-operated Components or additional costs incurred by the Concessionaire, in each case, due to a failure of such supply shall not be a Relief Event unless such failure otherwise qualifies as a Relief Event.

Office Space and Facilities

25.4 From the date that is 30 days after the Phase 1 Effective Date until the end of the Design/Build Period, the Concessionaire shall make available to RTD and other persons acting on its behalf (including RTD's Representative) or otherwise designated by RTD, the office space, facilities, storage space and parking areas referred to in Section 10 (*Facilities*) of Attachment 9 (*Project and Construction Management*).

Inspections and Audits During the Design/Build Period

25.5 The Concessionaire shall permit and facilitate, and shall ensure that the Design/Build Contractor and the Design/Build Subcontractors permit and facilitate, audit, review and inspection of the Work and any element of the Commuter Rail Network during the Design/Build Period in accordance with Sections 5.12 (*Cooperation on Other RTD Projects*) and 32 (*Audit and Records*), the Design, Construction and Rolling Stock Requirements and Attachment 9 (*Project and Construction Management*).

26. CONSTRUCTION PAYMENTS

Construction Payments

26.1 (a) RTD shall pay to the Concessionaire an aggregate amount equal to:

- (i) following the Early Work Effective Date and prior to the Phase 1 Effective Date, the sum of the Maximum Annual Early Work Construction Payment Amounts (each installment, an ***Early Work Construction Payment***);
- (ii) following the Phase 1 Effective Date and prior to the Phase 2 Effective Date, the sum of the Maximum Annual Phase 1 Construction Payment Amounts, with respect to Phase 1 (each installment, a ***Phase 1 Construction Payment***); and
- (iii) following the Phase 2 Effective Date, the sum of (A) the sum of the Maximum Annual Phase 1 and Phase 2 Construction Payment Amounts (each such installment, a ***Phase 2 Construction Payment***), and (B) the sum of the Maximum Annual Phase 2 Financing Cost Amounts (each installment, a ***Phase 2 Financing Cost Payment***).

in each case (i), (ii) and (iii) in accordance with Attachment 8 (*Construction Payments*), subject to the terms and conditions of this Section 26 (*Construction Payments*).

- (b) Subject to Section 26.1(a), (i) the amount of each Construction Payment (including, for the avoidance of doubt, the Phase 2 Financing Cost Payments) shall equal (A) the total Earned Value of Work as determined by reference to the Original Baseline Schedule (or, as the case may be, the Revised Baseline Schedule) and the Schedule of Values based on the Concessionaire's progress on the Work calculated by multiplying the percentage of the Work on the relevant element that has been performed or completed as of the end of the period to which such Construction Payment relates by the total potential Earned Value of such element, minus (B) the amount of any Construction Payments previously claimed by the Concessionaire for Work on such element and (ii) the amount of each Phase 2 Financing Cost Payment shall equal the lesser of (x) the Financing Costs accrued

to that date under the Designated Credit Agreements and (y) one-twelfth of the Maximum Annual Phase 2 Financing Cost Amount.

Application for Construction Payment

- 26.2 (a) The Concessionaire shall, commencing no earlier than 30 days after the earlier of the Early Work Effective Date and the Phase 1 Effective Date and thereafter on a monthly basis, submit a statement (a *Statement*) to RTD in respect of the relevant Work carried out in the previous applicable period, in the form attached as Annex 1 (*Form of Construction Payment Statement*) to Attachment 8 (*Construction Payments*) showing in detail the amounts and information specified in Section 26.2(b). The Statement shall be accompanied by, with respect to any application for payment of a Phase 2 Financing Cost Payment, documentation evidencing the Financing Cost payable for the applicable month, and such other supporting documents as RTD may reasonably request.
- (b) The Concessionaire shall include the following items in, or together with, each Statement as applicable:
- (i) the relevant items in the Schedule of Values for each line item set forth in the Statement and the budget for such items;
 - (ii) the Earned Value of each item on the Schedule of Values, carried out in the period to which the Statement relates;
 - (iii) the cumulative total Earned Value of the Work completed for each item on the Schedule of Values up to the end of the period to which the Statement relates;
 - (iv) the percentage of the Work and of each item of the Schedule of Values which has been completed as of the end of the period to which such Statement relates;
 - (v) the Construction Payment claimed by the Concessionaire;
 - (vi) amounts added or deducted as a result of a Relief Event and as calculated in accordance with Section 38 (*Relief Events*);
 - (vii) any other additions or deductions not already paid pursuant to the terms of this Agreement which may have become due under this Agreement or otherwise, including those determined in accordance with the Dispute Resolution Procedure; and
 - (viii) a copy of the most recent Monthly Progress Report.
- (c) Each Statement shall be accompanied by a written confirmation from the Concessionaire that (i) all undisputed amounts due for payment for labor, materials and other services in connection with the Work completed during all prior periods have been paid, (ii) all undisputed amounts due for payment for labor, materials and other services in connection with the Work completed during the relevant period have been paid or, subject to Section 2.3 of Part B (*Disadvantaged and Small Business Enterprises Programs*) of Attachment 15 (*Specified Requirements*), will within seven calendar days of receipt of the relevant Construction Payment be paid with the proceeds of such Construction Payment.

- (d) Any Statement that includes an application for payment of a Phase 2 Financing Cost Payment shall be accompanied by a written certificate from the Concessionaire that the applicable Financing Costs have been duly accrued.

Statement Audit

- 26.3 (a) RTD shall, on receipt of a Statement submitted by the Concessionaire pursuant to Section 26.2 (*Application for Construction Payment*), audit such Statement and verify that the completion of the percentage of the Work corresponding to the Construction Payment claimed by the Concessionaire in the Statement has been completed in accordance with the Project Requirements and that the amounts and information set out in the Statement are true and correct.
- (b) If RTD disagrees with any amount in the Statement claimed by the Concessionaire, RTD shall notify the Concessionaire of such disagreement no later than 30 days after delivery of such Statement.
- (c) RTD and the Concessionaire shall use their respective Reasonable Efforts to resolve the disagreement as described in Section 26.3(b) no later than 10 days after delivery by RTD to the Concessionaire of a notice referred to in Section 26.3(b). If RTD and the Concessionaire are unable to resolve such disagreement within such time period, either Party may submit the dispute (except with respect to disputes regarding Financing Costs, which disputes shall be resolved in accordance with the Dispute Resolution Procedures) to the Independent Engineer, together with a copy of the relevant Statement and such additional supporting documents as the Independent Engineer may reasonably request from the Concessionaire. The Parties agree that the Independent Engineer shall, within 10 days, determine the amount of the Statement for which payment must be made by RTD.

Payment

- 26.4 (a) RTD shall, no later than 30 days after the Concessionaire's delivery of a Statement, pay to the Concessionaire any undisputed amount claimed by the Concessionaire in such Statement together with 50% of any disputed amount.
- (b) Upon determination by the Independent Engineer under Section 26.3(c) (or, with respect to disputes regarding Financing Costs, a final and binding determination in accordance with the Dispute Resolution Procedures) regarding a disputed amount in any Statement, RTD shall no later than 10 days following such determination pay to the Concessionaire any previously disputed and unpaid amounts now due, if any.
- (c) If the Independent Engineer under Section 26.3(c) determines (or, with respect to disputes regarding Financing Costs, following a final and binding determination in accordance with the Dispute Resolution Procedures) that RTD previously paid a disputed amount of the Statement that was not due at the time of delivery of the relevant Statement, such amount shall be considered an amount of money recoverable from or payable by the Concessionaire under this Agreement for purposes of set-off under Section 51.4 (*Set-off*).

- (d) The Concessionaire shall not be, nor shall it be entitled to be, paid by RTD for the amount of any difference that may exist between the actual cost of the things supplied or work done in respect of which the Statement is issued and the amount payable by RTD in respect of such Statements.

Limitation of RTD's Liability

26.5 RTD shall not be liable to the Concessionaire for any amount under or in connection with the execution of the Work during the Design/Build Period, except for amounts payable in accordance with Sections 26.4 (*Payment*) and 50 (*Dispute Resolution Procedures*).

Discharge

26.6 Upon payment by RTD in accordance with this Section 26 (*Construction Payments*) of the last installment of the Maximum Annual Early Work Construction Payment Amount, the Maximum Annual Phase 1 Construction Payment Amount, the Maximum Annual Phase 1 and Phase 2 Construction Payment Amount or the Maximum Annual Phase 2 Financing Cost Amount, whichever is latest, the Concessionaire shall provide to RTD a written discharge which confirms that such amount represents full and final settlement of RTD's obligations to the Concessionaire in respect of any Construction Payment.

27. FARE SYSTEM EQUIPMENT

Procurement, Installation and Integration of Fare System Equipment

27.1 RTD shall, at its own cost, procure and install the Fare System Equipment and shall be responsible for integrating the Fare System Equipment to interface with RTD's existing systems.

Access

- 27.2 (a) The Parties shall coordinate the design and installation of foundations, electrical conduits, connections to, and locations of the Fare System Equipment in accordance with Section 11 (*Fare System Equipment*) of Part B (*Infrastructure Requirements*) of Attachment 7 (*Design, Construction and Rolling Stock Requirements*).
- (b) Upon reasonable notice and so long as RTD complies with all applicable Concessionaire policies and procedures while on Site, the Concessionaire shall provide RTD with access to the areas in which the Fare System Equipment is to be installed to the extent, and at such times, as is reasonably necessary for RTD to carry out the installation of the Fare System Equipment.

28. COMPLETION

Revenue Service Commencement Dates

28.1 The Revenue Service Commencement Date for each Commuter Rail Project and the associated Commuter Rail Service shall be the date on which the Revenue Service Commencement Requirements for such Commuter Rail Project and Commuter Rail Service set forth in Section 28.2 (*Revenue Service Commencement Certificates*) have been satisfied, as certified by the Independent Engineer in the relevant Revenue Service Commencement Certificate pursuant to and in accordance with this Section 28 (*Completion*).

Revenue Service Commencement Certificates

28.2 (a) The Parties agree that the Independent Engineer shall issue the Revenue Service Commencement Certificate to the Parties in respect of a Commuter Rail Project and the associated Commuter Rail Service when the Concessionaire has demonstrated to the Independent Engineer's satisfaction in the relevant System Performance Demonstration that the following requirements (the *Revenue Service Commencement Requirements*) have been satisfied:

- (i) except with respect to the Punch List Items identified pursuant to Section 28.2(b), such Commuter Rail Project (excluding, for purposes of this Section 28.2, any Fare System Equipment related thereto) has been completed in accordance with the provisions of this Agreement, the Project Requirements and Good Industry Practice to ensure that the Work, such Commuter Rail Project and each part of them are completed and operate in compliance with the Project Requirements;
- (ii) the process and procedures set out in Section 1 (*Verification Program*) of Part D (*Verification and Demonstration*) of Attachment 7 (*Design, Construction and Rolling Stock Requirements*) for the testing, inspection and verification of the Work has been carried out (including demonstrating that each element of the Equipment forming part of such Commuter Rail Project operates as intended) have been carried out;
- (iii) the System Performance Demonstration for the relevant Commuter Rail Service has been fully carried out;
- (iv) during the System Performance Demonstration, the Availability Ratio (calculated on a daily basis for the duration of the relevant period) for such Commuter Rail Service is at least 95% for a consecutive 21-day period and at least 97% for a consecutive seven-day period within such 21-day period;
- (v) all Permits required for the operation of such Commuter Rail Project and such Commuter Rail Service have been obtained in final form and are not subject to appeal;
- (vi) all required Concessionaire Design Submittals and Contract Data relating to the operation and maintenance of such Commuter Rail Project have been submitted to, and, if required, approved by, as the case may be, RTD, the Project Third Parties and the Relevant Authorities (as applicable) in accordance with Part D

(*Verification and Demonstration*) of Attachment 7 (*Design, Construction and Rolling Stock Requirements*) and Attachment 6 (*Contract Data Requirements*);

- (vii) the Training Program has been completed in accordance with the requirements set out in Attachment 10 (*O&M Specifications*);
 - (viii) the Concessionaire has fully implemented the Safety and Security Certification Plan with respect to such Commuter Rail Project and has submitted to RTD and the appropriate Relevant Authorities, in form and substance satisfactory to RTD and such Relevant Authorities, the relevant certificates of compliance and all other safety and security certification certificates or assessments with respect to such Commuter Rail Project (including the FHLA (as defined in Attachment 9 (*Project and Construction Management*))), together with all supporting documents;
 - (ix) the Final Threat and Vulnerability Analysis has been completed by the Concessionaire and approved by the FTA and the FRA;
 - (x) all deficiencies or non-compliance (other than Punch List Items) identified by RTD following any audit carried out pursuant to Section 22.3(c) have been corrected; and
 - (xi) if RTD has delivered a Phase 2 Rolling Stock Termination Notice in accordance with Section 5.11(a), the Concessionaire has performed its obligations pursuant to Section 5.11(c).
- (b) The Parties agree that the Independent Engineer shall set out in an attachment to each Revenue Service Commencement Certificate the Punch List Items which have not been completed in full and shall specify a reasonable time period in which they are to be so completed (such period to be agreed between the Concessionaire, RTD and the Independent Engineer).

Final Completion Dates

28.3 The Final Completion Date for each Commuter Rail Project shall be the date on which the Final Completion Requirements for such Commuter Rail Project set forth in Section 28.4 (*Final Completion Certificates*) have been satisfied, as certified by the Independent Engineer in the relevant Final Completion Certificate pursuant to and in accordance with this Section 28 (*Completion*).

Final Completion Certificates

28.4 The Parties agree that the Independent Engineer shall issue the Final Completion Certificate to the Parties for each Commuter Rail Project when the Concessionaire has demonstrated to the Independent Engineer's satisfaction that the following requirements (the *Final Completion Requirements*) have been achieved by such Commuter Rail Project and/or the relevant Commuter Rail Service:

- (a) the relevant Revenue Service Commencement Certificate has been issued;

- (b) the Concessionaire has demonstrated that the Availability Ratio on such Commuter Rail Service is an average of at least 94% for a period of any six consecutive calendar months commencing after the Revenue Service Commencement Date for such Commuter Rail Service and ending prior to the Final Completion Deadline Date;
- (c) the Availability Ratio for such Commuter Rail Service has not fallen below 80% in more than one calendar month (or, if a single, continuous event lasting no more than 30 days extends across two calendar months and directly causes the Availability Ratio in both such months to fall below 80%, two calendar months) following (and including) the calendar month in which the Revenue Service Commencement Date occurred and the last calendar month of the six calendar month period referred to in clause (b) above;
- (d) all Contract Data relating to the operation and maintenance of such Commuter Rail Project and Commuter Rail Service has been submitted to or approved by, as the case may be, RTD and the Project Third Parties (as applicable) in accordance with the Contract Data Requirements List;
- (e) the System Performance Demonstration Reports for such Commuter Rail Service have been completed by the Concessionaire;
- (f) the System Testing and Commissioning Plan – Final Revision has been submitted to and accepted by RTD;
- (g) all of the Punch List Items set out in the schedule to the Revenue Service Commencement Certificate for such Commuter Rail Project shall have been carried out;
- (h) all demobilization from the relevant Sites is complete (including removal of Temporary Works and equipment used in the performance of the Work and not required for the operation of such Commuter Rail Project);
- (i) if the Phase 2 Effective Date does not occur on or before the Phase 2 Condition Precedent Satisfaction Date, with respect to the Final Completion Certificate for the East Corridor Project the Concessionaire shall have delivered all Final Design Submittals to RTD; and
- (j) with respect to the last Final Completion Certificate only,
 - (i) the Concessionaire has submitted the As-Built Schedule to RTD;
 - (ii) the Concessionaire has certified to RTD in writing (and provided such documentary evidence as RTD may reasonably require) that (A) no amounts owing to the Design/Build Contractor, the Rolling Stock Supplier, and any of their respective Subcontractors remains unpaid (except disputed amounts for which the Concessionaire has established adequate reserves in accordance with GAAP) and (B) final settlement of the Design/Build Contract has occurred in accordance with Section 38-26-107(1) *et seq.*, Colorado Revised Statutes; and
 - (iii) all conditions to the return of the Construction Security have been met in accordance with Section 38-26-101 *et seq.*, Colorado Revised Statutes, applicable Law and the terms of the Design/Build Contract.

Issuance of Revenue Service Commencement Certificates and Final Completion Certificates

- 28.5 (a) When the Concessionaire reasonably believes that it is prepared to complete the Revenue Service Commencement Requirements in respect of a Commuter Rail Project and the associated Commuter Rail Service, the Concessionaire may notify RTD and the Independent Engineer to that effect.
- (b) Upon receipt of a notice referred to in Section 28.5(a), RTD, the Independent Engineer, the Concessionaire, the Design/Build Contractor, the Rolling Stock Supplier, relevant Design/Build Subcontractors and any Project Third Party, as invited, shall participate in the relevant System Performance Demonstration as described in Section 4 (*System Performance Demonstration*) of Part D (*Verification and Demonstration*) of Attachment 7 (*Design, Construction and Rolling Stock Requirements*).
- (c) The Parties agree that if, following any System Performance Demonstration, the Independent Engineer has not determined that all of the Revenue Service Commencement Requirements for that Commuter Rail Project and Commuter Rail Service have been achieved, the Independent Engineer shall promptly and in any event no later than five Business Days following such demonstration issue a notice (the ***Outstanding Requirements Notice***) to the Concessionaire, specifying those Revenue Service Commencement Requirements that are still outstanding or require rectification by the Concessionaire.
- (d) Promptly upon receipt of the Outstanding Requirements Notice under Section 28.5(c), the Concessionaire will rectify such Revenue Service Commencement Requirements as are specified in the Outstanding Requirements Notice, and promptly upon completing such rectification, will notify the Independent Engineer, who the Parties agree shall:
- (i) issue the relevant Revenue Service Commencement Certificate to the Parties if the Concessionaire has demonstrated that it has satisfied the outstanding Revenue Service Commencement Requirements; or
 - (ii) issue a further Outstanding Requirements Notice if the Concessionaire has failed to achieve each of the outstanding Revenue Service Commencement Requirements.
- (e) When the Concessionaire reasonably believes that it has completed the Final Completion Requirements for a Commuter Rail Project and the associated Commuter Rail Service, the Concessionaire may request that the Independent Engineer issue the Final Completion Certificate for such Commuter Rail Project in accordance with this Section 28.5 (*Issuance of Revenue Service Commencement Certificates and Final Completion Certificates*).
- (f) For each Commuter Rail Project and associated Commuter Rail Service, once the Concessionaire has demonstrated that the Final Completion Requirements for such Commuter Rail Project and Commuter Rail Service have been achieved, the Parties agree that the Independent Engineer shall issue the Final Completion Certificate to the Parties in respect of such Commuter Rail Project and Commuter Rail Service no later than 30 days following the Concessionaire's request to the Independent Engineer under Section 28.5(e) to issue the Final Completion Certificate.

- (g) The Parties agree that where the Independent Engineer has not determined that all of the Final Completion Requirements have been achieved in respect of a Commuter Rail Project and associated Commuter Rail Service, the Independent Engineer shall promptly, and in any event no later than 10 days following such determination, issue a notice (an ***Outstanding Completion Requirements Notice***) in respect of such Commuter Rail Project and such Commuter Rail Service to the Concessionaire, specifying those Final Completion Requirements for such Commuter Rail Project and such Commuter Rail Service that are still outstanding or require rectification by the Concessionaire before the Independent Engineer shall issue the Final Completion Certificate for such Commuter Rail Project and such Commuter Rail Service.
- (h) Promptly upon receipt of an Outstanding Completion Requirements Notice for any Commuter Rail Project and Commuter Rail Service, the Concessionaire will rectify such Final Completion Requirements in respect of such Commuter Rail Project and such Commuter Rail Service as are specified in the Outstanding Completion Requirements Notice, and promptly upon completing such rectification, will notify the Independent Engineer, who the Parties agree shall:
- (i) issue the Final Completion Certificate for such Commuter Rail Project and such Commuter Rail Service if the Concessionaire has demonstrated that it has satisfied the outstanding Final Completion Requirements for such Commuter Rail Project and such Commuter Rail Service; or
 - (ii) issue a further Outstanding Completion Requirements Notice if the Concessionaire has failed to satisfy each of the outstanding Final Completion Requirements in respect of such Commuter Rail Project and such Commuter Rail Service.
- (i) Following issuance of the last Final Completion Certificate, RTD shall return the Construction Security to the Concessionaire.

Third Party Option Exercise

- 28.6 (a) RTD (i) may exercise a Third Party Option (other than for the Peña Boulevard Bridge Projects) and (ii) shall exercise a Third Party Option for one but not both of the Peña Boulevard Bridge Projects, in either case (i) or (ii) by delivery of a Third Party Option Exercise Notice to the Concessionaire on or before the Third Party Option Exercise Deadline (as such date may be extended by the mutual agreement of the Parties). The Concessionaire shall confirm receipt of such Third Party Option Exercise Notice.
- (b) Following delivery of a Third Party Option Exercise Notice by RTD thereafter:
- (i) the Third Party Project specified in such notice shall thereafter constitute part of the Phase 1 Work;
 - (ii) the Maximum Annual Phase 1 Construction Payment Amount and the Maximum Annual Phase 1 and Phase 2 Construction Payment Amounts shall be adjusted in accordance with Attachment 8 (*Construction Payments*) to reflect the exercise of the relevant Third Party Option;

- (iii) the WBS Pricing Form shall be deemed amended to incorporate the applicable WBS Pricing Form Rider; and
 - (iv) the Original Baseline Schedule or Revised Baseline Schedule (as applicable) shall be automatically amended to incorporate the applicable Baseline Schedule Rider.
- (c) Subject to Section 28.6(d) below, if RTD does not deliver a Third Party Option Exercise Notice by the Third Party Option Exercise Deadline (as such date may be extended by mutual agreement between the Parties) with respect to any of the Third Party Options, no element of such Third Party Option shall be included as part of the Work or the Commuter Rail Services under this Agreement and RTD shall have no obligation to the Concessionaire for any payment, including Construction Payments and Service Payments, for any work performed by the Concessionaire on or in relation to such Third Party Option.
- (d) If RTD has not provided a Third Party Option Exercise Notice to the Concessionaire with respect to either Peña Boulevard Bridge Project by the date that is 30 days before the Third Party Option Exercise Deadline, then the Concessionaire shall provide RTD with a written request for such notice no later than 15 days before the Third Party Option Exercise Deadline. If the Concessionaire fails to provide the written request by such date, the Third Party Option Exercise Deadline shall be deemed to be extended to 15 days after receipt of such written request days with respect to the Peña Boulevard Bridge Projects. If RTD does not deliver a Third Party Option Exercise Notice to the Concessionaire by the Third Party Option Exercise Deadline (as extended) with respect to either Peña Boulevard Bridge Project, then RTD shall be deemed to have delivered to the Concessionaire a Third Party Option Exercise Notice with respect to the Peña Boulevard Base Bridge Project.

PART 8 – OPERATION

29. OPERATION AND MAINTENANCE

Operating Period

29.1 The Concessionaire shall begin operation of each Commuter Rail Service on the Revenue Service Commencement Date for that Commuter Rail Service or on such later date as RTD may require; **provided** that the Service Payment shall not be reduced to reflect any impact to the Availability Ratio or the accrual of any Performance Deductions arising solely as a result of RTD's requirement for operation by the Concessionaire of a Commuter Rail Service to begin after the Revenue Service Commencement Date for such Commuter Rail Service.

- (a) The Concessionaire will operate the Commuter Rail Services and operate and maintain the Concessionaire-operated Components throughout the Operating Period in compliance with:
 - (i) the provisions of this Agreement;
 - (ii) the existing Third Party Agreements, and shall take all necessary steps and acts to facilitate the discharge by RTD of its obligations to the Project Third Parties under any Third Party Agreement;

- (iii) the O&M Specifications;
 - (iv) the O&M Submittals (including the Quality Management Plan);
 - (v) all Permits;
 - (vi) all Applicable Requirements;
 - (vii) all Environmental Requirements;
 - (viii) the Health, Safety and Security Requirements;
 - (ix) the requirements of Sections 2 and 4 of Part B (*Disadvantaged and Small Business Enterprises Programs*) of Attachment 15 (*Specified Requirements*); and
 - (x) Good Industry Practice,
- (collectively, the *O&M Standards*).
- (b) The Concessionaire will take, and will ensure that the O&M Contractor and the O&M Subcontractors and their respective personnel take, all necessary action in accordance with Good Industry Practice, this Agreement and applicable Law to ensure:
- (i) the uninterrupted and safe operation of the Commuter Rail Services and operation and maintenance of the Concessionaire-operated Components subject to and in accordance with the O&M Standards; and
 - (ii) that the operation of the Commuter Rail Services and the operation and maintenance of the Concessionaire-operated Components does not impair, disrupt, interfere with or otherwise have an adverse impact on the operation of RTD's light rail or bus operations.
- (c) The Concessionaire shall have the right to replace any item of Rolling Stock or Equipment (in each case, a *Replaced Item*) with other items of Rolling Stock or Equipment (in each case, a *Replacement Item*) so long as the Replacement Item has a value, utility and useful life at least equal to the value, utility and useful life of the Replaced Item immediately prior to the replacement.

Verification of the Final Draft of the O&M Contract

29.2 Prior to the Phase 1 Effective Date, the O&M Contract shall have been executed by all relevant parties thereto and shall be in form and substance acceptable to RTD in accordance with this Section 29.2, and a copy of the O&M Contract, certified by the Concessionaire as being true, complete and accurate shall have been delivered to RTD. The following provisions apply in respect of the requirement under this Section 29.2 that the O&M Contract be executed in a form acceptable to RTD:

- (a) Part A (III) (*O&M Contract Term Sheet*) of Attachment 1 (*Agreed Forms*) contains indicative terms for the O&M Contract. The Concessionaire shall notify RTD of any proposed departures from the indicative terms during subsequent negotiations with the O&M Contractor.

- (b) Unless RTD has provided confirmation to the Concessionaire that it has verified the final draft of the O&M Contract as being consistent with the indicative terms for such contract set forth in Part A (III) (*O&M Contract Term Sheet*) of Attachment 1 (*Agreed Forms*) in accordance with the terms of the RFP and such final draft has not subsequently been amended (in which case such draft O&M Contract shall be deemed verified for purposes of this Section 29.2), the Concessionaire shall deliver to RTD the final draft of the O&M Contract, together with such information as RTD may reasonably require in respect of any proposed final draft submitted to RTD for its verification, 28 days prior to the date on which the Concessionaire proposes to enter into the O&M Contract (such 28-day period, the *O&M Review Period*).
- (c) Unless RTD has provided confirmation to the Concessionaire that it has verified the final draft of the O&M Contract as being consistent with the indicative terms for such contract set forth in Part A (III) (*O&M Contract Term Sheet*) of Attachment 1 (*Agreed Forms*) in accordance with the terms of the RFP and such final draft has not subsequently been amended, during the O&M Review Period, RTD, acting reasonably, shall have the right to verify the consistency of the final draft of the O&M Contract with the indicative terms for such contract set forth in Part A (III) (*O&M Contract Term Sheet*) of Attachment 1 (*Agreed Forms*), **provided** that if the Concessionaire has previously submitted to RTD a long form term sheet for the O&M Contract, which term sheet RTD has verified as being consistent with Part A (III) (*O&M Contract Term Sheet*) of Attachment 1 (*Agreed Forms*), then RTD's verification of the final draft of the O&M Contract under this Section 29.2 (*Verification of the Final Draft of the O&M Contract*) shall be limited to verification of such draft's consistency with the terms for such contract as set forth in the previously reviewed and verified long form term sheet.
- (d) If RTD determines that the final draft of the O&M Contract is not consistent with the indicative terms for such contract set forth in Part A (III) (*O&M Contract Term Sheet*) Attachment 1 (*Agreed Forms*), or with the long form term sheet previously verified by RTD (if applicable), and RTD does not accept such inconsistency, RTD shall by written notice to the Concessionaire specify in reasonable detail the grounds on which it has determined that the final draft of the O&M Contract is not consistent with the indicative terms for such contract set forth in Part A (III) (*O&M Contract Term Sheet*) of Attachment 1 (*Agreed Forms*) or with the long form term sheet previously verified by RTD (if applicable), including identification of the specific provision(s) in the relevant draft that are not consistent with such terms, and why it does not accept such inconsistency.
- (e) If RTD determines that the O&M Contract is consistent with the indicative terms for such contracts set forth in Part A (III) (*O&M Contract Term Sheet*) of Attachment 1 (*Agreed Forms*) or with the long form term sheet previously verified by RTD (if applicable), then RTD shall send a written notice to the Concessionaire confirming such determination prior to the conclusion of the O&M Review Period.
- (f) No later than 10 days following receipt by the Concessionaire of any notice from RTD pursuant to Section 29.2(d), the Concessionaire shall either:
- (i) resubmit to RTD final drafts of the O&M Contract amended to resolve RTD's objections; or

- (ii) where and to the extent that the Concessionaire disputes that RTD's objections are valid, promptly refer such matter for resolution in accordance with the Dispute Resolution Procedure, following which the O&M Review Period shall be tolled pending resolution of such Dispute.
- (g) Where the final drafts of any disputed O&M Contract are resubmitted pursuant to Section 29.2(f)(i) above, RTD shall within a reasonable period of time and in any event no later than five days following such resubmission:
 - (i) notify the Concessionaire of those amendments proposed by the Concessionaire that it considers have satisfactorily resolved its objections under Section 29.2(d) above; and/or
 - (ii) refer such amendments that it considers do not satisfactorily resolve its objections made pursuant to Section 29.2(d) above, for resolution in accordance with the Dispute Resolution Procedure, following which the review period shall be tolled pending resolution of such Dispute.
- (h) Following the agreement or determination of any issues pursuant to the Dispute Resolution Procedure referred by either Party pursuant to Sections 29.2(f) or (g) above, the Concessionaire shall amend the O&M Contract to reflect such agreement or determination.
- (i) If:
 - (i) RTD has provided confirmation to the Concessionaire that it has verified the final draft of the O&M Contract as being consistent with the indicative terms for such contract set forth in Part A (III) (*O&M Contract Term Sheet*) of Attachment 1 (*Agreed Forms*) in accordance with the terms of the RFP and such final draft has not subsequently been amended;
 - (ii) RTD has delivered a notice of verification under Section 29.2(e) or otherwise not delivered any notice under Sections 29.2(d) or 29.2(g) within the applicable period;
 - (iii) RTD has delivered a notice under Section 29.2(g)(i) without referral to the Dispute Resolution Procedure; or
 - (iv) following the Concessionaire's amendment of the O&M Contract to reflect such agreement or determination of any issues pursuant to the Dispute Resolution Procedure,

the Concessionaire may sign the O&M Contract or allow the appointment of the O&M Contractor to become effective.

O&M Contract

- 29.3 (a) The Concessionaire shall subcontract the operation of the Commuter Rail Services and the operation and maintenance of the Concessionaire-operated Components to the O&M Contractor pursuant to the terms of the O&M Contract. The Concessionaire shall not

- remove or replace the O&M Contractor without the prior written approval of RTD (such approval not to be unreasonably withheld or delayed).
- (b) The Concessionaire shall not implement or agree to any amendment, modification, variation or waiver of any provision of the O&M Contract without the prior submission of details of the proposed amendment, modification, variation or waiver to RTD:
- (i) in the case of a Material Amendment, at least 35 days before such Material Amendment will become effective (or, in the event of an emergency that creates an immediate need and serious threat to public health, safety, security or the Environment, such shorter period as is reasonably necessary under the circumstances); or
 - (ii) in the case of any proposed amendment, modification, variation or waiver of any provision of the O&M Contract that the Concessionaire determines is not a Material Amendment, at least five days before the proposed amendment, modification, variation or waiver will become effective, together with a certification by the Concessionaire that such amendment, modification, variation or waiver is not a Material Amendment.
- (c) If RTD considers that a proposed amendment, modification, variation or waiver of any provision of the O&M Contract of which it is notified in accordance with Section 29.3(b)(ii) is in fact a Material Amendment, RTD shall so notify the Concessionaire and the Concessionaire shall not, and shall ensure that the O&M Contractor shall not, enter into such amendment, modification, variation or waiver of any provision of the O&M Contract until the issue of whether such amendment, modification, variation or waiver is a Material Amendment has been resolved in accordance with the Dispute Resolution Procedure.
- (d) If it is determined in accordance with the Dispute Resolution Procedure that such amendment, modification, variation or waiver is a Material Amendment, the provisions of this Section 29.3 (*O&M Contract*) shall apply to such Material Amendment as if details of such Material Amendment were submitted to RTD on the date of such determination.
- (e) The Concessionaire shall not agree to or execute any Material Amendment to the O&M Contract until RTD has consented to (or is deemed, pursuant to Section 29.3(f), to have consented to) such Material Amendment (such consent not to be unreasonably withheld or delayed).
- (f) If RTD has not indicated no later than 30 days following the date on which the Concessionaire delivered to RTD the proposed Material Amendment that it has consented to or rejected the proposed Material Amendment, then RTD shall be deemed to have consented to the proposed Material Amendment, with such consent taking effect on the 30th day following submission to RTD.

O&M Subcontractors

- 29.4 (a) The Concessionaire will not be relieved of any of its obligations, liabilities or responsibilities under this Agreement by reason of its obligations being carried out by the

- O&M Contractor or any O&M Subcontractor nor will RTD be in any way liable to the O&M Contractor or any O&M Subcontractor or be in any way bound by the terms of the O&M Contract or any Subcontract thereunder.
- (b) Neither the provision of consent by RTD to the appointment of the O&M Contractor or any O&M Subcontractor (if such consent is required) nor the review or approval of the terms of the O&M Contract or any Subcontract thereunder (or, in each case, of any amendment, modification, variation or waiver thereof) will relieve the Concessionaire of any of its obligations, liabilities or responsibilities under this Agreement nor render RTD in any way liable to any such Person or in any way bound by the terms of the O&M Contract or any Subcontract thereunder.
 - (c) The Concessionaire shall not replace, and shall ensure that the O&M Contractor shall not replace, any Material O&M Subcontractor without the prior written approval of RTD (such consent not to be unreasonably withheld or delayed).
 - (d) The Concessionaire shall provide to RTD copies of all Subcontracts entered into by the Concessionaire and the O&M Contractor with any Material O&M Subcontractor in connection with the operation and maintenance of the Concessionaire-operated Components.
 - (e) The Concessionaire will, in respect of the O&M Contractor and any Material O&M Subcontractors, at least 60 days before the anticipated Revenue Service Commencement Date, provide RTD with a list of the members of their personnel holding managerial or supervisory positions and their respective qualifications. This list will be updated as and when changes are made or as required by RTD.
 - (f) The Concessionaire will be responsible for all payments, and any other liabilities, to the O&M Contractor, and RTD will have no responsibility for such amounts.
 - (g) The Concessionaire shall require the O&M Contractor and each O&M Subcontractor to agree in the O&M Contract or relevant Subcontract, as the case may be:
 - (i) to comply, where applicable, with the Specified Requirements, the O&M Specifications, the O&M Submittals, the Health, Safety and Security Requirements and Applicable Requirements;
 - (ii) not to impair, in the case of the O&M Contractor, the performance by the Concessionaire of its obligations under this Agreement and the other Project Agreements or, in the case of an O&M Subcontractor, the performance by the O&M Contractor of its obligations under the Subcontract;
 - (iii) that the O&M Contractor is liable for its obligations under the O&M Contract, including as described in clauses (i) – (ii) above, and is not relieved of any of its obligations, liabilities or responsibilities under the O&M Contract by reason of part of its obligations being carried out by an O&M Subcontractor;
 - (iv) that in the event of termination of this Agreement, RTD will be entitled to replace the O&M Contract or, as the case may be, the Subcontract with a contract on substantially similar terms as the O&M Contract or, as the case may be, the Subcontract (including, in each case, by way of assignment) (subject to such

amendments as may be necessary to reflect any legal requirements or limitations applicable to RTD) between the O&M Contractor or such O&M Subcontractor, as the case may be, and RTD; and

- (v) to have appropriately qualified operation and maintenance employees trained and proficient in the required skills, with wages and benefits competitive with the industry.
- (h) The Concessionaire shall monitor and enforce the compliance by the O&M Contractor, and shall ensure that the O&M Contractor monitors and enforces compliance by each O&M Subcontractor, with the requirements referred to in Section 29.4(g) and shall, if necessary, remove and replace the O&M Contractor (subject to RTD's approval in accordance with Section 29.3(a)) or require the replacement of any O&M Subcontractor (or any of their respective personnel) to the extent the O&M Contractor or any O&M Subcontractor does not comply with the requirements referred to in Section 29.4(g).

Maintenance and Repairs

- 29.5 (a) The Concessionaire will at all times comply with the O&M Submittals and maintain, keep in good operating repair and condition and renew, replace and upgrade to the extent reasonably necessary, the Concessionaire-operated Components and any part thereof, subject to the provisions of Section 31.2 (*Rolling Stock Replacement*).
- (b) The Concessionaire shall carry out all maintenance and repairs to the Concessionaire-operated Components at the Concessionaire's own cost and:
 - (i) in accordance with Good Industry Practice and to a standard that restores the failed or damaged item to a condition which meets the requirements of the O&M Specifications and the O&M Submittals;
 - (ii) in a manner that causes the minimum amount of disruption to the operation of the Concessionaire-operated Components, to RTD and to the Project Third Parties; and
 - (iii) so that, at the Expiry Date, the Concessionaire-operated Components (including the Rolling Stock and the Equipment) have the residual life specified in Section 1.2 (*Reinstatement Work*) of Attachment 14 (*Handover and Reinstatement Work Procedures*).
 - (c) The Concessionaire shall plan Scheduled Maintenance so as to minimize the disruption to the operation of the Concessionaire-operated Components.
 - (d) If at any time it appears likely to the Concessionaire that any maintenance or repair work to be carried out by the Concessionaire, whether for Scheduled Maintenance or otherwise, will necessitate an interruption to or restriction of Passenger services on the Concessionaire-operated Components such as to result in Passenger services on the Concessionaire-operated Components not being provided in accordance with the O&M Specifications for a continuous period of two hours or more, the Concessionaire shall:

- (i) notify RTD (as soon as is reasonably practicable in the circumstances) in advance of the carrying out of such work, of the nature of such work and the likely disruption to services;
 - (ii) take all steps reasonably practicable to notify Passengers at least ten days in advance of any disruption (or otherwise as soon as is reasonably practicable under the circumstances) in accordance with the procedures for Passenger notification notified by RTD to the Concessionaire from time to time; and
 - (iii) take all steps which are reasonably practicable to minimize the adverse consequences of such work to Passengers.
- (e) The Concessionaire shall comply with the requirements of Attachment 9 (*Project and Construction Management*) when carrying out any construction work to repair and/or replace any part of the Commuter Rail Network.

Emergencies and Disruptions; RTD Intervention

- 29.6 (a) The Concessionaire will, at all times, including in accordance with Attachment 9 (*Project and Construction Management*):
- (i) respond as soon as possible to accidents, emergencies or other incidents;
 - (ii) provide prompt notice to RTD of any accidents, emergencies or other similar incidents;
 - (iii) minimize the adverse effects of any accidents, emergencies or other incidents; and
 - (iv) react promptly and efficiently in the event of any incident or emergency necessitating the evacuation of any part of the Commuter Rail Network.
- (b) Notwithstanding any other provision of this Agreement and without prejudice to any other right or remedy of RTD:
- (i) if RTD considers that a breach by the Concessionaire of an obligation under this Agreement creates an immediate and serious threat to public health, safety, security or the Environment;
 - (ii) in the event of an emergency that creates an immediate need and serious threat to public health, safety, security or the Environment and the Concessionaire has not taken steps to remedy or mitigate the effects of the emergency; or
 - (iii) where RTD has reasonable grounds for concluding that damage to, or a threat to the safety or security on, RTD's commuter rail (excluding the Commuter Rail Network), light rail or bus operations is likely to result from the continuation of the Concessionaire's operation and maintenance of the Concessionaire-operated Components,

RTD may immediately intervene in the operation and maintenance of the Concessionaire-operated Components and take such reasonable action as it considers necessary, including

- issuing directions to the O&M Contractor, in order to prevent, mitigate or eliminate an immediate and serious risk to health, safety, security or the Environment or otherwise to ensure the safety of the Passengers. RTD may for this purpose enter into any part of the Concessionaire-operated Components or the Site, for such period as is necessary and take over all or any part of the operation and maintenance of the Concessionaire-operated Components.
- (c) The Concessionaire shall cooperate fully with any action RTD deems appropriate to take for the purposes of Section 29.6(b) and shall provide all reasonable assistance to RTD for that purpose. RTD shall restore the operation and maintenance of the Concessionaire-operated Components to the Concessionaire as soon as the events giving rise to RTD's action cease to exist or have been cured.
- (d) To the extent that the events giving rise to RTD's action are attributable to any breach by the Concessionaire of its obligations under this Agreement or the other Project Agreements, the Concessionaire shall reimburse all reasonable costs (including the relevant administrative expenses of RTD, including an appropriate sum in respect of general staff costs and overheads) of RTD arising from or in connection with RTD's action and any interruption or impairment of the operation of the Concessionaire-operated Components caused by RTD's action referred to in Section 29.6(b) shall not constitute a Relief Event; **provided** that none of the foregoing shall limit the right of the Concessionaire to submit a claim that a Force Majeure Event shall have occurred with respect to the circumstances giving rise to RTD's exercise of its rights.
- (e) To the extent that the events giving rise to RTD's action are determined in accordance with the Dispute Resolution Procedure to be attributable to or necessitated by any breach by RTD of its obligations under this Agreement, the Concessionaire may claim a Relief Event where permitted under Section 38.1(t) (provided the other requirements of Section 38 (*Relief Events*) are satisfied).

Access and Facilities

- 29.7 (a) The Concessionaire will grant to RTD, the Independent Engineer, the Project Third Parties and any other Relevant Authority (including all relevant police departments) such access to the Concessionaire-operated Components and the Sites (including other locations on or off the Sites where materials are stored and facilities are located) as is reasonable in the circumstances for the purposes of carrying out their obligations under this Agreement and the other Project Agreements and monitoring the performance by the Concessionaire of its obligations under this Agreement and the other Project Agreements and as required by applicable law. In addition, the Concessionaire shall grant to RTD such access to the Commuter Rail Network as RTD requires in order to operate RTD's bus and light rail services and, in accordance with Section 5.12 (*Cooperation on Other RTD Projects*), to procure, construct, update and maintain any Other RTD Project, **provided** that RTD shall use Reasonable Efforts to mitigate any material impairment, interference, disruption or other adverse impact from RTD's bus and light rail services on the operation and maintenance of the Commuter Rail Network (other than such Reasonable Efforts as would impair RTD's ability to operate such bus and light rail services).

- (b) During the Operating Period, upon seven days prior notice identifying Persons to whom access is to be granted under this Section 29.7(b) (or such shorter period as may be reasonable under the circumstances) the Concessionaire shall make available to RTD, other persons acting on its behalf (including RTD's Representative) and any other Relevant Authority, the office space, facilities, storage space and parking areas specified in Section 10 (*Facilities*) of Attachment 9 (*Project and Construction Management*) for the exercise of their rights and obligations relating to the Concessionaire-operated Components.

Inspections and Audits During the Operating Period

29.8 The Concessionaire shall permit and facilitate, and shall ensure that each of the O&M Contractor and the O&M Subcontractors permit and facilitate, audit, review and inspection of the Concessionaire-operated Components, the operation and maintenance activities and any element of the Concessionaire-operated Components in accordance with Section 32 (*Audit and Records*) and Section 5.12 (*Cooperation on Other RTD Projects*) during the Operating Period.

Concessionaire's Responsibility During the Operating Period

- 29.9 (a) If any results of any inspection in accordance with Sections 29.7 (*Access and Facilities*) and 29.8 (*Inspection and Audits during the Operating Period*) reveal any defect, breach and/or non-compliance as referred to therein, the Concessionaire will, as soon as practicable and in any event within such reasonable period as may be notified to the Concessionaire or within the timeframe as agreed between the Parties or as determined in accordance with the Dispute Resolution Procedure, remedy such defect(s), breach(es) and/or non-compliance(s) to the standard as required by the terms of this Agreement.
- (b) If the Concessionaire does not, within the agreed or determined timeframe, so remedy any such defect(s), breach(es) and/or non-compliance(s) (or such inspection takes place, or such remedial work is to be carried out, after termination or expiry of this Agreement (subject as otherwise provided in Section 44 (*Handover and Reinstatement Work Requirements on the Expiry Date*)), RTD will be entitled to carry out, or arrange to be carried out, the necessary work itself at the cost and expense of the Concessionaire.
- (c) RTD will be entitled to claim such costs and expenses, at its election, by way of a deduction from the Service Payment which would otherwise be payable to the Concessionaire, or from any amount payable upon termination of this Agreement.
- (d) The inspection or approval of the operation and or maintenance of the Concessionaire-operated Components by RTD or any other Person on its behalf will not relieve the Concessionaire in any way from any of its obligations, liabilities or responsibilities under this Agreement.

Asset Registers

- 29.10 (a) From the date which is at least six months before the Revenue Service Commencement Date with respect to a Commuter Rail Project and in the case of the Commuter Rail Maintenance Facility, from the date which is at least six months before the first Revenue Service Commencement Date with respect to a Commuter Rail Project, the Concessionaire shall keep a register of all Work and the Equipment then in existence in

- connection with the design, construction, operation and/or maintenance of such Commuter Rail Project or, as the case may be, the Commuter Rail Maintenance Facility (each, an *Asset Register*).
- (b) The Concessionaire shall, on each Revenue Service Commencement Date, complete the relevant Asset Register in consultation with RTD and provide RTD with both paper and unrestricted electronic versions of such Asset Register. No later than three months following the issue of each Final Completion Certificate, the Concessionaire will update the relevant Asset Register.
 - (c) The Concessionaire shall keep the Asset Registers updated throughout the Lease Period to take account of the work carried out on and other changes to the Concessionaire-operated Components.
 - (d) RTD shall be entitled, by giving reasonable prior written notice to the Concessionaire, to require the Concessionaire to provide reports in a form and within a time period as agreed between the Parties (each acting reasonably) on any aspect of any Asset Register.

Passenger Information

29.11 Without prejudice to Section 29.5(d), the Concessionaire will, except in the event of an emergency, give Passengers adequate information and forewarning of any events affecting the Passengers' use of the Concessionaire-operated Components in accordance with the procedures for Passenger notification provided by RTD to the Concessionaire from time to time. Without limiting the Concessionaire's obligation to comply with such procedures, the Concessionaire may propose alternate procedures to RTD which shall become the applicable procedures upon RTD's approval (such approval not to be unreasonably withheld or delayed).

Recording of Passenger Data

29.12 The Concessionaire shall measure the number and frequency of Passengers through the Automatic Passenger Counters and keep records of all relevant data. The Concessionaire shall set out the Passenger data and related information collected and transferred by the Automatic Passenger Counters in accordance with Section 4.6.3 of Part C (*Rolling Stock Requirements*) of Attachment 7 (*Design, Construction and Rolling Stock Requirements*) as requested by RTD from time to time in the Daily Operating Report and the Monthly Operating Report.

Operation of Fare System Equipment; Collection and Determination of Fares

- 29.13 (a) RTD shall be responsible for, and shall have all necessary rights to effect, the supply, installation, testing, operation and maintenance of the Fare System Equipment and for the collection of all fares; **provided** that, if Fare System Equipment is required to be carried by Concessionaire personnel for the enforcement of fares in accordance with the O&M Specifications, RTD shall provide, maintain, repair and replace (when obsolete) such Fare System Equipment and the Concessionaire shall replace such Fare System Equipment (if lost or damaged beyond repair).
- (b) RTD will determine in its sole discretion the level and structure of fares, ticketing and all other aspects of generating Fare Revenue. The Concessionaire shall accept as valid for travel on the Concessionaire-operated Components the passes and tickets specified in the

- Project Requirements and such additional tickets and passes as are specified by RTD from time to time.
- (c) RTD shall have all rights, title and interest in all Fare Revenue collected in respect of the use of the Concessionaire-operated Components.
 - (d) RTD will bear all costs associated with printing and providing tickets and fare media to Passengers.

Reports during the Operating Period

29.14 (a) The Concessionaire shall submit the following documents to RTD:

- (i) by 8:00 am on the day following the day to which it relates, a Daily Operating Report;
 - (ii) no later than 10 days following the last day of the period to which the report relates:
 - (A) a Monthly Operating Report; and
 - (B) a Quarterly Operating Report;
 - (iii) no later than 30 days following the last day of the period to which it relates, a Yearly Operating Report; and
 - (iv) at least 30 days in advance of the date on which RTD is required to submit such information, all reports, documents and information required by RTD in order for RTD to comply with the prevailing reporting requirements of the National Transit Database from time to time.
- (b) Failure to submit any report specified in this Section 29.14 shall be a material breach of this Agreement, but such failure shall be considered capable of remedy including following service of a notice of default under Section 41.2(a)(i) by the submission of such report.

Electrical Energy

29.15 (a) The Concessionaire shall ensure the connection of the Commuter Rail Network to the Power Network in accordance with the Design, Construction and Rolling Stock Requirements and shall ensure the supply of any electrical power required for:

- (i) the performance of the Work; and
 - (ii) the operations and maintenance of the Commuter Rail Network and the Rolling Stock.
- (b) The Concessionaire shall pay (i) for all electrical power used in the performance of the Work and (ii) except with respect to Traction Power otherwise paid for by RTD in accordance with this Section 29.15 (*Electrical Energy*), for all electrical power used for operations and maintenance of the Commuter Rail Network and the Rolling Stock.

- (c) Following the Revenue Service Commencement Date for each Commuter Rail Service, RTD shall pay the supplier of Traction Power for all Traction Power. The Concessionaire shall undertake, at the request of RTD and at no charge to RTD, to execute all documents and to do all acts which may be reasonably required by RTD to enable RTD to make such payments directly to the supplier of Traction Power.
- (d) For each month in which RTD makes payments under Section 29.15(c), the Concessionaire shall deliver to RTD a completed report in the form attached as Annex 2 to Attachment 11 (*Service Payments*) (the ***Traction Power Usage Report***) together with such other related information as RTD may reasonably request, no later than five Business Days after delivery of the monthly Traction Power invoice from the supplier of Traction Power.
- (e) RTD shall increase or decrease, as applicable, the first Service Payment (and if necessary with respect to any deduction, subsequent Service Payments) payable by RTD following January 1 of each Contract Year by an amount equal to the Traction Power Service Payment Adjustment for the prior Contract Year.
- (f) With respect to the last Contract Year ending on the Expiry Date, the Concessionaire shall arrange for the supplier of Traction Power to deliver the final Traction Power invoice directly to RTD following the Expiry Date. Thereafter (i) any Traction Power Service Payment Adjustment that is a negative amount for the Contract Year to the End Date as calculated by RTD shall be considered an amount recoverable from or payable by the Concessionaire under this Agreement for purposes of set-off under Section 51.4 (*Set-off*) and RTD may, at its discretion, deduct from the Handover Security an amount equal to the Traction Power Reimbursement Amount, if any, as calculated by RTD and (ii) any Traction Power Service Payment Adjustment that is a positive amount for the Contract Year to the End Date as calculated by RTD shall be considered an amount due and payable by RTD under this Agreement and shall be paid as an increase to the last Service Payment or, if such payment has already been made, within 30 days after the Expiry Date.
- (g) If RTD is required to pay the Concessionaire Default Amount, the RTD Default Amount or the FM Termination Amount in accordance with Section 42.4 (*Compensation Following Termination*) then immediately following delivery of a Termination Notice by either Party the Concessionaire shall arrange for the supplier of Traction Power to deliver the final Traction Power invoice directly to RTD following the Termination Date. Thereafter (i) any Traction Power Service Payment Adjustment that is a negative amount for the Contract Year to the End Date as calculated by RTD shall be considered an amount recoverable from or payable by the Concessionaire under this Agreement for purposes of set-off under Section 51.4 (*Set-off*) and (ii) any Traction Power Service Payment Adjustment that is a positive amount for the Contract Year to the End Date as calculated by RTD shall be considered an amount due and payable by RTD under this Agreement for purposes of calculating the Applicable Termination Amount under Attachment 13 (*Compensation Following Termination*).
- (h) Any disputes with respect to any Traction Power Reimbursement Amount or any Traction Power Efficiency Incentive Amount shall be resolved in accordance with Section 51.2 (*Disputed Amounts*).

- (i) Nothing contained in this Section 29.15 (*Electrical Energy*) shall limit the right of the Concessionaire to submit a claim that any interruption to the Work or operation of the Concessionaire-operated Components caused by a failure of the power supply constitutes a Force Majeure Event, **provided** that the other requirements of Section 39 (*Force Majeure*) are satisfied.

Physical Security

29.16 During the Operating Period, the Concessionaire shall provide the necessary security and fare inspection services and make all necessary arrangements to ensure:

- (a) the protection of the Concessionaire-operated Components from damage; and
- (b) the protection of the safety and security of all Passengers and staff on the Concessionaire-operated Components,

in each case in accordance with the requirements of the O&M Specifications and all Applicable Requirements.

Advertising and non-Passenger Derived Revenue

29.17 (a) RTD shall have all rights relating to advertising on the Concessionaire-operated Components (including the right to sell advertising space on the Rolling Stock and elsewhere on the Concessionaire-operated Components) and the Concessionaire shall cooperate and grant all necessary access to RTD and any third party authorized by RTD in connection with RTD's exercise of its rights relating to advertising. RTD shall pay to the Concessionaire the reasonable costs and expenses which are incurred directly by the Concessionaire in installing and/or maintaining the said advertising (other than routine maintenance).

- (b) The Concessionaire will not engage in any business other than the performance of its obligations under this Agreement or, except as may be necessary to enable the Concessionaire to comply with its obligations under this Agreement, permit anyone else to operate any business on the Concessionaire-operated Components, any Site or any adjacent area, 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 Concessionaire-operated Components.

Promotion of the Commuter Rail Services

29.18 RTD shall be responsible for the promotion of the Commuter Rail Services, including the design, production and distribution of any promotional materials. The Concessionaire shall be entitled to make suggestions and proposals to RTD with respect to the promotion of the Commuter Rail Services; **provided** that RTD shall be entitled to accept or reject such suggestions and proposals at its sole discretion.

Community Relations

29.19 The Concessionaire shall liaise with RTD with respect to community relations and public information in accordance with Section 4.6 (*Marketing and Public Relations*) of Attachment 10 (*O&M Specifications*).

Dispatch of Heavy Rail Movements

29.20 The Concessionaire shall be responsible for the dispatch of all Heavy Rail Movements, in accordance with the requirements of Section 2.4.6 of Attachment 10 (*O&M Specifications*).

Interface with Heavy Rail Operators

29.21 The Concessionaire shall operate and maintain the Concessionaire-operated Components in accordance with the requirements of the Railroad Agreements and without impairing, disrupting, interfering with, or otherwise having an adverse impact on the activities or operations of any Heavy Rail Operator; **provided** that the Concessionaire shall not be in breach of this Section 29.21 in respect of any such interruption that has been agreed by the Concessionaire in advance with the relevant Heavy Rail Operator or that does not constitute a breach of any Railroad Agreement.

- (a) To the extent that the Concessionaire causes any impairment or disruption to, or interference with or impact on the activities or operations of any Heavy Rail Operator, the Concessionaire shall, to the fullest extent permitted by Law, fully and effectively indemnify and hold harmless RTD for all Losses and or Claims arising out of 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 RTD or any RTD agent, servant, consultant or employee.
- (b) All Losses payable by the Concessionaire under this Section 29.21 (*Interface with Heavy Rail Operators*) shall be deemed a debt due and payable within 30 days after receipt by the Concessionaire of RTD's demand or, at RTD's election, paid by the Concessionaire by way of a deduction from the Service Payment, without prejudice to RTD's rights under Section 35.1 (*Concessionaire Indemnity*).

Record Documents

29.22 During the Operating Period, the Concessionaire shall update and maintain the Record Documents such that they reflect the current configuration and as-built design of the Commuter Rail Network at all times and from time to time.

SBE Requirements

29.23 During the Operating Period, the Concessionaire shall comply with and shall ensure that the Project Contractors, and each of their Subcontractors, complies with the requirements of Sections 2 and 4 of Part B (*Disadvantaged and Small Business Enterprises Programs*) of Attachment 15 (*Specified Requirements*); **provided** that the Concessionaire shall not be in breach of this requirement if the Concessionaire can demonstrate to RTD's reasonable satisfaction that the Concessionaire, and the Project Contractors, and each of their Subcontractors, has exercised good faith efforts to comply with such requirements.

30. SERVICE PAYMENTS

Commencement of Service Payments

30.1 From the first Revenue Service Commencement Date, the Concessionaire shall become entitled to payment of the Service Payment on a calendar monthly basis calculated in accordance with and subject to Attachment 11 (*Service Payments*). For this purpose, the Concessionaire shall be entitled to submit its first Invoice immediately following the last day of the calendar month in which the first Revenue Service Commencement Date occurred, and then monthly thereafter.

Service Payments

30.2 Within 30 days following the last date of each calendar month, the Concessionaire shall submit an invoice (an **Invoice**) to RTD for the Service Payment in respect of such calendar month, in the form attached hereto as Annex 1 (*Form of Invoice*) of Attachment 11 (*Service Payments*). Each Invoice shall be accompanied by such supporting documents as RTD may reasonably request, including a copy of the Monthly Operating Report for the immediately preceding calendar month. RTD shall (a) no later than 30 days after receipt of each Invoice, pay to the Concessionaire the undisputed portion of the Service Payment (other than the TABOR Portion) as shown in the relevant Invoice and (b) on the fifth Business Day following the last date of each calendar month ensure the payment to the Concessionaire by the RTD Trustee of the TABOR Portion of the Service Payment (taking into account any deductions or set offs which RTD is entitled under this Agreement) for the immediately preceding calendar month in accordance with the Trustee's Instructions. Any dispute relating to the payment of any amount of the Service Payment claimed by the Concessionaire in an Invoice will be resolved in accordance with Section 51.2 (*Disputed Amounts*).

TABOR Portion

30.3 (a) The obligation of RTD to pay the TABOR Portions hereunder is entered into pursuant to the ballot question approved by the voters of RTD on November 4, 2004 (the **2004 Approval**). RTD hereby pledges to the Concessionaire the RTD Pledged Revenues to the extent such revenues are available, to secure the payment of the TABOR Portions. RTD agrees that if RTD elects in its sole discretion to pledge any Additional Tax revenues to secure the payment of Senior RTD Debt, such Additional Tax revenues shall constitute "RTD Pledged Revenues" hereunder. Pursuant to Sections 4-9-109(e) and 11-57-208(2), Colorado Revised Statutes, the RTD Pledged Revenues shall be immediately subject to the lien of such pledge without any physical delivery, filing or further act. Pursuant to Sections 4-9-109(e), and 11-57-208(2), Colorado Revised Statutes, the obligation to pay the TABOR Portion from the RTD Pledged Revenues hereunder shall have priority over any or all other obligations and liabilities of RTD to the extent provided herein, and the lien of such pledge shall be valid and binding as against all parties having claims of any kind in tort, contract or otherwise against RTD irrespective of whether such parties have notice thereof. RTD's obligation to pay the TABOR Portions shall be a special and limited obligation of RTD secured by an irrevocable pledge of, and payable from, the RTD Pledged Revenues. RTD's obligation to pay the TABOR Portions shall be subordinate to all Senior RTD Debt, whether currently outstanding or incurred or issued in the future by RTD in accordance with the provisions hereof. RTD's obligation to pay the TABOR Portions shall not be secured by any encumbrance, mortgage, or other pledge of property of RTD, other than the RTD Pledged Revenues. No property of RTD, other

- than the RTD Pledged Revenues, shall be liable to be forfeited or taken in payment of the obligation of RTD to pay the TABOR Portions. RTD's obligation to pay the TABOR Portions shall not in any way create or constitute any indebtedness, liability, or obligation of the State of Colorado or of any political subdivision thereof, except RTD, and nothing in this Agreement shall be construed to authorize RTD to incur any indebtedness on behalf of, or in any way to obligate, the State of Colorado any political subdivision thereof, except RTD. RTD agrees that RTD, in accordance with the provisions of the RTD Act: (i) shall impose, administer and enforce, or shall cause to be imposed, administered or enforced, the Sales Tax and any Additional Tax that is part of RTD Pledged Revenues, (ii) shall collect or cause to be collected the Sales Tax Revenues and (iii) shall not take any action or omit to take any action to reduce, impair, repeal or otherwise adversely impact the imposition, administration, enforceability and collectability of the Sales Tax, any Additional Tax that is part of RTD Pledged Revenues, and the Sales Tax Revenues.
- (b) Except as provided in Section 30.3(d) below, RTD may issue or incur additional Senior RTD Debt that is payable from or secured by and that has a lien on all or a portion of the Sales Tax Revenues and any Additional Tax which has been included by RTD as part of RTD Pledged Revenues that is superior and senior to the lien thereon of the TABOR Portions and any Additional TABOR Portion if RTD has issued a certificate to the Concessionaire signed by RTD's Representative stating:
- (i) the total amount of Sales Tax Revenues from the District Sales Tax Area and revenues received by RTD or the RTD Trustee from any Additional Tax during 12 consecutive calendar months of the 18 calendar months immediately preceding the incurrence of the proposed additional Senior RTD Debt;
 - (ii) the estimated receipts, if any, for the 12-month period in Section 30.3(b)(i), which would have been received by RTD or the RTD Trustee during such 12-month period from any Additional Tax collected in the District Sales Tax Area had such Additional Tax been in effect throughout said period, but not including any receipts from such Additional Tax included within the amount set forth in Section 30.3(b)(i);
 - (iii) the interest received on moneys or securities in the Sales Tax Increase (0.4%) Fund and the Sales Tax (0.6%) Fund during such 12-month period;
 - (iv) the sum of the amounts in Sections 30.3(b)(i), 30.3(b)(ii) and 30.3(b)(iii);
 - (v) the combined Maximum Annual Debt Service Requirements for all Senior RTD Debt, the TABOR Portion, any Additional TABOR Portion which has been identified pursuant to Section 42.4 (*Compensation Following Termination*) hereof at the time of delivery of the certificate, and the proposed additional Senior RTD Debt which will be outstanding immediately after the authentication and delivery of such proposed additional Senior RTD Debt;
 - (vi) the percentage derived by dividing the amount in Section 30.3(b)(iv) by the amount in Section 30.3(b)(v); and

- (vii) the percentage derived pursuant to Section 30.3(b)(vi) and shown in such certificate is not less than 150%.
- (c) For the purposes of making the computations required in Section 30.3(b):
- (i) it shall be assumed that (A) Variable Rate Bonds Outstanding at the time of such determination will bear interest during any period (I) if the interest rate such Variable Rate Bonds bear or shall bear during such period has not been determined, and such Variable Rate Bonds are in a daily or weekly interest rate mode, at an interest rate equal to the 10 year average of the Municipal Swap Index, or (II) if the interest rate such Variable Rate Bonds bear or shall bear during such period has not been determined, and such Variable Rate Bonds are in an interest rate mode that is longer than a weekly interest rate mode, at an interest rate equal to the fixed interest rate estimated by the remarketing agent for such Variable Rate Bonds and approved by the Chief Financial Officer or, if there is no such remarketing agent, by the Chief Financial Officer that, having due regard for prevailing financial market conditions, is necessary, but does not exceed the interest rate necessary, to sell such Variable Rate Bonds at 100% of the principal amount thereof in an open market transaction, assuming the Variable Rate Bonds had a term equal to the then remaining term of the Variable Rate Bonds (taking into account any mandatory redemption for such Variable Rate Bonds) or (III) if the interest rate such Variable Rate Bonds bear or shall bear during such period has been determined and is not subject to fluctuation, at such interest rate thus determined, and (B) Tender Bonds Outstanding at the time of such determination shall mature on the stated maturity or mandatory redemption date or dates thereof;
 - (ii) if a Financial Products Agreement has been entered into by RTD with respect to any Securities listed in Section 30.3(b)(v) hereof, interest on such Securities shall be included in the calculation of such principal and interest by including for each Fiscal Year an amount equal to the amount of interest payable on such Securities in such Fiscal Year during such period determined as provided above plus any Financial Products Payments payable in any such Fiscal Year minus any Financial Products Receipts receivable in any such Fiscal Year; **provided** that in no event shall any calculation made pursuant to this sentence result in a number less than zero being included in the calculation of such interest;
 - (iii) in determining the amount of any Financial Products Payments or Financial Products Receipts on any interest rate swaps or other similar Financial Products Agreement which Financial Products Payments or Financial Products Receipts are based on interest rates which are not fixed in percentage for the entire term of the Financial Products Agreement, such amount shall be calculated by assuming such variable interest rate is a fixed interest rate equal to (A) if the Financial Products Agreement relates to Variable Rate Bonds, the fixed rate of interest estimated for such Variable Rate Bonds as provided above or (B) if the Financial Products Agreement relates to the Securities which bear interest at a fixed interest rate, the average of the daily interest rate for such Financial Products Payments or Financial Products Receipts under such Financial Products Agreement during the twelve months preceding the calculation or during the time the Financial Products Agreement has been in effect if less than twelve months

and if such Financial Products Agreement is not then in effect, the variable interest rate shall be deemed to be a fixed interest rate equal to the average daily interest rate for such Financial Products Payments or Financial Products Receipts which would have been applicable if such Financial Products Agreement had been in effect for the preceding twelve-month period, which average daily interest rate shall be set forth in a certificate of the Chief Financial Officer;

- (iv) in determining the amount of any Financial Products Payments or Financial Products Receipts on any interest rate swap, cap, floor, collar or other similar Financial Products Agreement with respect to Securities which are Variable Rate Bonds, such amount shall be calculated by assuming the interest rate on the related Variable Rate Bonds will be a fixed interest rate equal to the average of the daily interest rate on such Variable Rate Bonds during the twelve months preceding the calculation or during the time the Variable Rate Bonds are Outstanding if less than twelve months and if such Variable Rate Bonds are not at the time of calculation Outstanding, the variable interest rate shall be deemed to be a fixed interest rate equal to the average daily interest rate which such Variable Rate Bonds would have borne if they had been Outstanding for the preceding twelve-month period as estimated by the Chief Financial Officer, all as set forth in a certificate of the Chief Financial Officer. In determining the amount of any Financial Products Payments or Financial Products Receipts on any interest rate swap, cap, floor, collar or other similar Financial Products Agreement with respect to Securities bearing interest at a fixed rate, such amount shall be the amount payable or receivable annually determined as of the date of issuance of the Securities as set forth in a certificate of the Chief Financial Officer; and
 - (v) if Commercial Paper Notes are then Outstanding or are the additional Senior RTD Debt proposed to be issued, it shall be assumed that (A) the principal amount of any Commercial Paper Notes Outstanding or proposed to be issued is the maximum authorized principal amount of the Commercial Paper Notes, (B) the Commercial Paper Notes will mature in accordance with the amortization schedule established in connection with the issuance of the Commercial Paper Notes, and (C) the Commercial Paper Notes will bear interest on the unpaid principal amount thereof at the fixed rate of interest equal to the Bond Buyer 30 Year Revenue Index of 25 Revenue Bonds as published in the most recent issues of "The Bond Buyer" (or any successor thereto) preceding the date of such determination or if such Index is no longer published, of a comparable index selected by the Chief Financial Officer and will be payable on a level annual debt service basis, all as set forth in a certificate of the Chief Financial Officer.
- (d) Notwithstanding the foregoing Sections 30.3(a), (b) and (c) or any other provisions in this Agreement to the contrary, in the case of Senior RTD Debt issued for the purpose of refunding outstanding Senior RTD Debt, compliance with Section 30.3(b) shall not be required so long as the Debt Service Requirements on all Senior RTD Debt outstanding after the issuance of such additional refunding Senior RTD Debt in each Bond Year does not exceed the Debt Service Requirements on all Senior RTD Debt outstanding prior to the issuance of such additional refunding Senior RTD Debt in each Bond Year.

- (e) In accordance with Section 3.05(g) of the 2006 FasTracks Indenture and the 2007 FasTracks Indenture and Section 5.7(a) of this Agreement, RTD shall provide written instructions (the **Trustee's Instructions**) to the RTD Trustee (with a copy to the Concessionaire) in the form attached hereto as Attachment 25 (**Trustee's Instructions**) reflecting in Exhibit A thereto the TABOR Portions of the Service Payment as revised in accordance with the Service Payment Revision accepted by RTD in accordance with Section 5.6(c)(i). RTD shall not materially amend the Instructions without the Concessionaire's prior written consent.
- (f) RTD may enter into such Senior Credit Facility Obligations and Senior Financial Products Agreements relating to the Senior RTD Debt as is determined by the Board to be in the best interest of RTD. RTD may not issue any Securities with a lien on the RTD Pledged Revenues which is on a parity with the lien thereon of the TABOR Portions and Additional TABOR Portions. RTD may issue at any time such Subordinate Lien Bonds and enter into such Subordinate Financial Products Agreements and Subordinate Credit Facility Obligations as is determined by the Board to be in the best interest of RTD.
- (g) RTD may issue additional Senior RTD Debt, subject to compliance by RTD with Section 30.3(b), and Subordinate Lien Bonds pursuant to the 2004 Approval so long as the principal amount of such Senior RTD Debt and Subordinate Lien Bonds does not exceed U.S.\$2,165,816,738 (the **Principal Limit**) (adjusted (i) at Financial Close in accordance with the Financial Model to reflect interest rate fluctuation during the period of time with respect to which the updated Financial Model and Service Payment Adjustment accepted by RTD in accordance with Section 5.6(c)(i) have been prepared, provided that the Net Effective Interest rate of all indebtedness issued under the 2006 FasTracks Indenture and the 2007 FasTracks Indenture prior to the date hereof, the TABOR Portions, and any Additional TABOR Portions that could be issued pursuant to the 2004 Approval and the terms of this Agreement (as determined by reference to the conditions set forth in subclauses (b)(i)-(ii) and (b)(iv)-(v) of the definition of Additional TABOR Portion Notice) does not exceed 7% and (ii) immediately following the Concessionaire closing on funding for the Phase 1 Excess Financing Amount in accordance with Section 5.10(d)(ii)(B), by the amount specified by the Concessionaire in its notice delivered pursuant to Section 5.10(d)(ii)(A)), the total repayment costs of such Senior RTD Debt and Subordinate Lien Bonds does not exceed U.S.\$3,417,921,970 (the **Total Limit**) (adjusted (i) at Financial Close in accordance with the Financial Model to reflect interest rate fluctuation during the period of time with respect to which the updated Financial Model and Service Payment Adjustment accepted by RTD in accordance with Section 5.6(c)(i) have been prepared, provided that the Net Effective Interest rate of all indebtedness issued under the 2006 FasTracks Indenture and the 2007 FasTracks Indenture prior to the date hereof, the TABOR Portions, and any Additional TABOR Portions that could be issued pursuant to the 2004 Approval and the terms of this Agreement (as determined by reference to the conditions set forth in subclauses (b)(i)-(ii) and (b)(iv)-(v) of the definition of Additional TABOR Portion Notice) does not exceed 7% and (ii) immediately following the Concessionaire closing on funding for the Phase 1 Excess Financing Amount in accordance with Section 5.10(d)(ii)(B), by the amount specified by the Concessionaire in its notice delivered pursuant to Section 5.10(d)(ii)(A)), the annual repayment costs of all indebtedness issued or expected to be issued pursuant to the 2004 Approval, including the TABOR Portion and the Maximum Additional TABOR Portion, does not exceed U.S.\$309,738,000 and the Net Effective Interest Rate of all additional Senior RTD Debt and Subordinate Lien Bonds is

- not in the aggregate higher than 7%. For the avoidance of doubt, RTD agrees that it will not issue additional indebtedness on terms which would result in the annual repayment cost capacity under the 2004 Approval remaining after such issuance to be an amount less than the Maximum Additional TABOR Portion.
- (h) The Concessionaire may deliver an Additional TABOR Portion Notice to RTD at any time prior to the Expiry Date.
 - (i) RTD agrees, within five Business Days of receipt of written notice from the Concessionaire that the Concessionaire intends to deliver an Additional TABOR Portion Notice, that RTD shall deliver a detailed schedule to the Concessionaire with sufficient information with respect to indebtedness issued by RTD pursuant to the 2004 Approval to permit the Concessionaire to verify that the Net Effective Interest Rate for the TABOR Portions, the Additional TABOR Portions and all indebtedness issued pursuant to the 2004 Approval does not exceed 7%.

Appropriations

- 30.4 (a) All RTD obligations to pay amounts under this Agreement (other than the TABOR Portions and the Additional TABOR Portions) constitute RTD Appropriation Obligations, notwithstanding any other provision of this Agreement to the contrary, **provided** that any portion of a TABOR Portion and Additional TABOR Portion that remains unpaid when payable by RTD under this Agreement shall also constitute an RTD Appropriation Obligation (without double-counting as to amounts payable by RTD under this Agreement). The RTD Appropriation Obligations are subject to the Board expressly making prior annual appropriations of monies for the purposes of this Agreement. No RTD Appropriation Obligation which requires funding in any Fiscal Year is legally enforceable against RTD without an appropriation by the Board for the relevant amount of funding in such Fiscal Year. This Section 30.4 (*Appropriations*) shall survive termination of this Agreement.
- (b) RTD agrees to provide (i) a copy of the budget that is required to be submitted to the Board pursuant to Section 29-1-105, Colorado Revised Statutes, for the following Fiscal Year to the Concessionaire no later than five Business Days after such submission and (ii) a notice to the Concessionaire of all budget allocations and appropriations made by the Board in respect of any and all RTD Appropriation Obligations for such Fiscal Year.
 - (c) RTD agrees that the RTD Appropriation Obligations which require funding and are payable or expected to be payable during the following Fiscal Year shall be included in RTD's annual budget for consideration by the Board for appropriation. RTD agrees that any and all such RTD Appropriation Obligations shall be given priority (to the extent permitted by Law and subject to RTD's other contractual obligations) within RTD's annual budget for consideration by the Board for appropriation, and RTD shall use best efforts to ensure the availability of funds to meet such RTD Appropriation Obligations.
 - (d) Except as provided in Section 30.3 (*TABOR Portion*) and Section 42.4(c), no provision of this Agreement shall be construed or interpreted as:

- (i) creating a general obligation, multiple Fiscal Year direct or indirect financial obligation, or other indebtedness of RTD within the meaning of any constitutional or statutory debt limitation;
 - (ii) pledging, or creating a lien on, any class or source of RTD monies or assets; or
 - (iii) restricting or limiting any future issuance of RTD bonds or obligations payable from any class or source of RTD moneys.
- (e) RTD agrees to use best efforts to allocate funds available to it and to raise debt or other financing in accordance with Law to fund any RTD Appropriation Obligations arising under Section 42.4 (*Compensation Following Termination*), including the expenditure of customary financing fees and costs as well as related transaction costs related to such financing, to the extent RTD is permitted to do so pursuant to the Law of the State of Colorado.
- (f) The Parties acknowledge that (i) portions of the Eagle Project have been designated a part of the FTA's Public-Private Partnership Pilot Program (Penta-P) (as described in 72 Fed. Reg. 2583 (January 10, 2007)) based in part on private investment paying a portion of the construction costs of the Eagle Project, and (ii) federal funds are anticipated to be used to pay a portion of the Construction Payments, thereby exempting this Agreement, or certain provisions hereof, from Section 24-91-101, *et seq.*, Colorado Revised Statutes, pursuant to Section 24-91-110 thereof. Notwithstanding the foregoing, prior to the Phase 1 Effective Date RTD intends to appropriate the Construction Payments due for the first year of construction and intends to appropriate Construction Payments due for each subsequent year of construction in accordance with Section 30.4(c).

Suspension of Service

- 30.5 (a) If RTD reasonably anticipates that the Board will not include any RTD Appropriation Obligations that are payable or expected to be payable during the following Fiscal Year in RTD's annual budget for such Fiscal Year (and to the extent RTD has not initiated an RTD Proposed Change the effect of which is to suspend or partially suspend, as applicable, performance by the Concessionaire of the Work and/or operation of the Concessionaire-operated Components in respect of such shortfall of RTD Appropriation Obligations), RTD shall notify the Concessionaire no later than 45 days prior to the start of such Fiscal Year of the amount of such shortfall. As soon as is reasonably practicable under the circumstances, and until the Concessionaire is notified by RTD that such shortfall of RTD Appropriation Obligations has been included in RTD's annual budget for such Fiscal Year, the Concessionaire (i) shall suspend the Work or, in the case of a partial shortfall of RTD Appropriation Obligations, may suspend the Work and/or (ii) shall suspend or partially suspend operation of the Concessionaire-operated Components from the date of such notice to the extent and in the manner directed by RTD, and in either case (i) or (ii) such suspension, subject to Section 30.5(b), shall be treated as an RTD Proposed Change.
- (b) If the Board fails to include any RTD Appropriation Obligations that are payable or expected to be payable pursuant to this Agreement for the following Fiscal Year in its annual budget for such Fiscal Year, the Concessionaire shall suspend (in the manner directed by RTD) or may partially suspend, as applicable, performance by the

- Concessionaire of the Work and/or shall suspend or partially suspend, as applicable, operation of the Concessionaire-operated Components on January 1 of the Fiscal Year for which adequate funds to meet such RTD Appropriation Obligations have not been included in such annual budget and such suspension, subject to the following sentence, shall be treated as an RTD Proposed Change. Any suspension or partial suspension initiated under Section 30.5(a) or (b) shall terminate, and the Concessionaire shall commence resumption of its obligation to perform the Work and to operate the Concessionaire-operated Components under this Agreement upon appropriation by the Board of adequate funds to meet such RTD Appropriation Obligations, taking into account any additional RTD Appropriation Obligations for the relevant Fiscal Year that have accrued or arisen since the Board's original failure to include RTD Appropriation Obligations in its annual budget as described in this Section 30.5(b), including as a consequence of any RTD Proposed Change resulting from such failure, in an amended annual budget, with such resumption to be completed (i) in accordance with the terms of the RTD Proposed Change or (ii) to the extent not established by the RTD Proposed Change, as soon as reasonably practicable under the circumstances and in any event no later than six months after the date of the Board's appropriation of adequate funds to meet such RTD Appropriation Obligations.
- (c) Notwithstanding the foregoing, during any period of suspension or partial suspension under this Section 30.5 (*Suspension of Service*), the Concessionaire may continue to submit Invoices to RTD pursuant to Section 30.2 (*Service Payments*) with respect to the TABOR Portion up to a maximum amount equal to the Service Payment that would have been payable in the absence of such suspension minus the Avoidable Costs which are not being incurred by the Concessionaire during such period of suspension and, in the event of a partial suspension only, any other portion of the Service Payment that remains payable and for which the Board has included funds in RTD's annual budget for such Fiscal Year.

31. ROLLING STOCK

Rolling Stock Option

- 31.1 (a) RTD may require the Concessionaire to purchase from the Rolling Stock Supplier and deliver to and commission for RTD no less than eight and no more than 24 additional Cars (the **Rolling Stock Option Cars**) by delivery of written notice to the Concessionaire (the **Rolling Stock Option Notice**). RTD may only deliver one Rolling Stock Option Notice.
- (b) RTD may deliver the Rolling Stock Option Notice at any time prior to 24 months before the Rolling Stock Supplier's scheduled delivery date of the final Car (other than the Rolling Stock Option Cars) under the Original Baseline Schedule (or, as the case may be, the Revised Baseline Schedule) (but in any event no later than the fifth anniversary of this Agreement) (the **Rolling Stock Option**).
- (c) The Concessionaire shall not use or otherwise operate and maintain the Rolling Stock Option Cars, if any, as part of the Commuter Rail Services unless otherwise agreed by RTD.

- (d) RTD shall pay U.S.\$3,938,790.50 to the Concessionaire for each Rolling Stock Option Car in accordance with Section 31.1(i) below.
- (e) RTD shall specify in the Rolling Stock Option Notice (i) the number of Rolling Stock Option Cars it is requiring the Concessionaire to purchase and (ii) the location for delivery of such Cars. RTD shall bear any additional cost for delivery of such Rolling Stock Option Cars to a location or locations other than within the District.
- (f) Following delivery by RTD to the Concessionaire of the Rolling Stock Option Notice, the Concessionaire shall procure the Rolling Stock Option Cars for delivery and commissioning which delivery and commissioning shall be completed no later than twelve months after the scheduled delivery date of the final Car (other than the Rolling Stock Option Cars) under the Original Baseline Schedule (or, as the case may be, Revised Baseline Schedule).
- (g) The Concessionaire shall ensure that each Rolling Stock Option Car is (i) manufactured in accordance with the requirements of Part C (*Rolling Stock Requirements*) of Attachment 7 (*Design, Construction and Rolling Stock Requirements*) and to the specifications applicable to the Rolling Stock originally procured by the Concessionaire for the Eagle Project, (ii) tested as part of the manufacturing and commissioning process in accordance with the requirements of Part D (*Verification and Demonstration*) of Attachment 7 (*Design, Construction and Rolling Stock Requirements*) that pertain to Rolling Stock and (iii) procured pursuant to the Rolling Stock Supply Contract.
- (h) The Concessionaire shall assign all warranties under the Rolling Stock Supply Contract in respect of a Rolling Stock Option Car to RTD immediately upon delivery of such Car to the location for delivery of such Car as specified by RTD.
- (i) Payment for each Rolling Stock Option Car shall be made by RTD to the Concessionaire in accordance with the following payment schedule:

Milestone	% Payment
The earlier of the execution of the contract or execution of the purchase order for the Car's bodyshell steel	10%
Delivery of the Car's bodyshell steel to the final assembly site	15%
Delivery of trucks to the final assembly site	10%
Entry of the Car into the pre-delivery testing in accordance with Section 2.5.4 of Part D (<i>Verification and Demonstration</i>) Attachment 7 (<i>Design, Construction and Rolling Stock Requirements</i>)	20%
Delivery to the location determined by RTD in accordance with	20%

Section 31.1(e)

Completion of 500 miles of test running under Section 4.4 of Part D (*Verification and Demonstration*) Attachment 7 (*Design, Construction and Rolling Stock Requirements*) 20%

Resolution of all punch list items and completion of 3,000 miles in revenue service with no more than two failures that cause a delay of service lasting no more than five minutes each 5%

- (j) RTD shall pay any amount due under Section 31.1(i) within 30 days of receipt of an invoice from the Concessionaire accompanied by written confirmation from the Rolling Stock Supplier that the relevant milestone has been achieved and by such other supporting documents as RTD may reasonably request.
- (k) If the Concessionaire fails to deliver and commission any Rolling Stock Option Car within the delivery and commissioning period specified in Section 31.1(f), the Concessionaire shall pay to RTD liquidated damages for delay at a rate of 0.5% of the price per delayed Car per week of delay (or part thereof); **provided** that such liquidated damages shall not exceed 7.5% of the aggregate value of the total number of Rolling Stock Option Cars ordered by RTD under Section 31.1(a). The Concessionaire shall assign all liquidated damages claims under the Rolling Stock Supply Contract in respect of a Rolling Stock Option Car to RTD immediately upon delivery of such Car to the location for delivery of such Car as specified by RTD for amounts up to the limits established in this Section 31.1(k). The obligations of the Concessionaire under this Section 31.1(k) are not intended to constitute a penalty, but are intended to be, and shall constitute, liquidated damages to compensate RTD for the cost of delays in delivery of the relevant Rolling Stock Option Cars and for other costs incurred by RTD in reliance upon the Concessionaire's agreement to deliver such Cars in accordance with this Section 31.1 (*Rolling Stock Option*).

Rolling Stock Replacement

- 31.2 (a) The Concessionaire shall maintain, repair and replace consumable and life-expired items for and appropriately rehabilitate or overhaul the Rolling Stock throughout the duration of the Operating Period, except to the extent set out in this Section 31.2.
- (b) Not later than five years prior to the Rolling Stock Replacement Date (or earlier as directed by RTD), the Parties shall jointly prepare (each at its own cost) a detailed report (the ***Rolling Stock Replacement Report***) setting out:
- (i) the condition and state of repair of each Car;
 - (ii) an estimate of the remaining useful life of each Car assuming continuance of the existing maintenance regime described in the Rolling Stock, Facility and Infrastructure Maintenance Plan;

- (iii) any measures that could reasonably be taken in order to extend the useful life of any Car beyond the Rolling Stock Replacement Date, the amendments (if any) to the maintenance regime described in the Rolling Stock, Facility and Infrastructure Maintenance Plan that would be necessary in order to achieve such an extension and the cost of implementing any such amendments; and
 - (iv) where the Parties are unable to agree with respect to any of the issues set out in paragraphs (i) to (iii) above, details of each Party's position on the relevant issue and the extent of the disagreement (the ***Rolling Stock Replacement Report Exceptions***).
- (c) RTD shall elect, no later than 54 months prior to the Rolling Stock Replacement Date, acting in its sole discretion and implementing such election as an RTD Proposed Change in accordance with Section 36.3 (***RTD Proposed Changes***), (i) to postpone the Rolling Stock Replacement Date in respect of some or all of the Cars and implement measures in order to extend the useful life of the relevant Cars for the period of such postponement; or (ii) to require the Concessionaire to conduct an openly advertised competitive procurement process consistent with the Specified Requirements to select the replacement Rolling Stock and the Supplier thereof (the ***Replacement Rolling Stock Supplier***); **provided** that no later than 54 months prior to the expiry of any period of postponement pursuant to Section 31.2(c)(i) prior to the End Date, RTD shall make a further election pursuant to this Section 31.2(c).
- (d) If RTD elects to require the Concessionaire to conduct an openly advertised competitive procurement process in accordance with Section 31.2(c), RTD shall (i) bear the cost of the replacement Rolling Stock, including commissioning and testing of the replacement Rolling Stock, and any costs associated with the decommissioning, disposal and removal from the Commuter Rail Network of the existing Rolling Stock and (ii) replace each Car with a Car having a functional level of performance equivalent to the level of performance the Car being replaced had at the time of the first Revenue Service Commencement Date. The Concessionaire will implement such procurement process in accordance with the requirements set forth in the following Section 31.2(d)(i)-(iv) and otherwise as an RTD Proposed Change, including to reflect any impact on the Concessionaire that results from the unavailability of Rolling Stock with a functional level of performance equivalent to the level of performance of the Cars being replaced had at the time of the Revenue Service Commencement Date.
 - (i) the Parties will meet as often as is necessary to agree to the procurement requirements, including to ensure that the replacement Cars have a functional level of performance equivalent to the level of performance the Cars being replaced had at the time of the first Revenue Service Commencement Date;
 - (ii) the Concessionaire will rank the bids for the Replacement Rolling Stock Supply Contract on the basis of the best value to RTD as determined by reference to the whole life cost (capital cost plus maintenance) of the replacement Rolling Stock which ranking shall take into account (A) the cost of the proposed supply contract for the replacement Rolling Stock (the ***Replacement Rolling Stock Supply Contract***), (B) any adjustments to the Concessionaire's maintenance and operating costs, (C) the adjustments to Service Payment to which the Concessionaire is entitled as a result of the procurement, operation and

maintenance of the replacement Rolling Stock and (D) any evaluation criteria established by the Parties pursuant to Section 31.2(d)(i). Upon determining the preferred bidder for the Replacement Rolling Stock Supply Contract on the basis of these rankings, the Concessionaire shall provide to RTD an RTD Change Report, appending as a supplement a copy of the Concessionaire's bid evaluation and rankings, including documentation of the costs, adjustments and other criteria referenced in (A)-(D) above, which documentation shall be deemed to constitute part of the RTD Change Report for purposes of Section 31.2(d)(iii), together with sufficient supporting information concerning the bid evaluation to enable RTD to analyze and understand the basis for the Concessionaire's determination;

- (iii) if RTD agrees with the Concessionaire's determination, including as to the costs, adjustments and other criteria referenced in Section 31.2(d)(ii), (A) RTD, the Concessionaire and the Replacement Rolling Stock Supplier will enter into the Replacement Rolling Stock Supply Contract and (B) the Replacement Rolling Stock Supply Contract will otherwise be implemented in accordance with Section 36.3 (*RTD Proposed Changes*) as an RTD Proposed Change, including to take account of the costs, adjustments and other criteria referenced in Section 31.2(d)(ii)(A)-(D); and
- (iv) the Concessionaire will be responsible for the timely completion of the procurement process for the replacement Rolling Stock and the delivery and commissioning/entry into service of the replacement Rolling Stock on or before the Rolling Stock Replacement Date; **provided** that the Concessionaire will not be responsible for, and may claim for a Relief Event where permitted under Section 38.1(v) (provided the other requirements of Section 38 (*Relief Events*) are satisfied) if the delivery and/or commissioning of the replacement Rolling Stock is delayed as a result of a failure by RTD to comply with its obligations under the Replacement Rolling Stock Supply Contract. Except as set forth in the preceding sentence, the Concessionaire shall not be entitled to a Relief Event in respect of the late delivery of, or any issues resulting from defects with, the Rolling Stock, and its sole recourse in respect thereof will be against the Replacement Rolling Stock Supplier pursuant to the Replacement Rolling Stock Supply Contract.
- (e) Cars in use for the provision of Commuter Rail Services as of the Rolling Stock Replacement Date shall remain available for use by the Concessionaire until such Cars are replaced pursuant to this Section 31.2 (*Rolling Stock Replacement*), whether such replacement occurs before or after the Rolling Stock Replacement Date and the Concessionaire shall remove the Cars and deliver them to a location specified by RTD. RTD shall bear any additional cost for delivery of such Cars to a location or locations off-Site.

**PART 9 – AUDIT AND RECORDS, INTELLECTUAL PROPERTY RIGHTS,
INSURANCE AND INDEMNITY**

32. AUDIT AND RECORDS

32.1 (a) The Concessionaire will keep, and shall require that each of the Project Contractors and their respective Subcontractors keeps, full and complete books, documents, papers and records in respect of:

- (i) the construction, financing, commissioning, completion, maintenance and operation (as applicable) of the Concessionaire-operated Components, including the replacement or disposal of any material part thereof; and
- (ii) the performance of the Concessionaire's obligations under this Agreement, including records of actual operations and maintenance performance during the Operating Period and personnel records,

including evidence of all prices, costs or rates negotiated and invoiced by the Concessionaire in connection with the performance of this Agreement (the *Project Records*) and otherwise in accordance with Applicable Requirements.

- (b) The Concessionaire shall permit and facilitate, and shall require that each of the Project Contractors and their respective Subcontractors permits and facilitates, access, at any time, for audit, examination, review and inspection of the Project Records, including for the purposes of making excerpts and transcriptions. Such access shall be granted to RTD, any Relevant Authority, any Project Third Party (to the extent provided in the Third Party Agreements), or any of their respective authorized representatives or advisers (collectively the *Reviewing Authorities*) (each at its own cost). Any Reviewing Authority may at its own cost inspect (which inspection right shall include the right to take photographs; **provided** that as a condition to taking photographs, each Reviewing Authority must agree that such photographs may be used solely for the purpose of preparing reports for use by such Reviewing Authority and under no circumstances shall such photographs be used for any other purpose or otherwise disseminated outside of such Reviewing Authority except as required by Law) any elements of the Work or the Concessionaire-operated Components in order to monitor the performance by the Concessionaire of its obligations and responsibilities under this Agreement.
- (c) RTD shall provide the Concessionaire with the opportunity to attend audits and inspections referred to above on any Site by giving notice (including notice of the identity of the relevant person) to the Concessionaire as soon as is reasonably practicable in the circumstances.
- (d) Following any audit or inspection by RTD or any Relevant Authority of the Project Records, the Work or the Concessionaire-operated Components, RTD or any Relevant Authority carrying out such audit or inspection may direct the Concessionaire to remedy any noncompliance with the terms of this Agreement or the Applicable Requirements.
- (e) If the Concessionaire disputes the conclusions of any audit or inspection or any claim of noncompliance by the Concessionaire of its obligations hereunder or under the Applicable Requirements, the Concessionaire may refer the Dispute for resolution in

- accordance with the Dispute Resolution Procedure no later than seven days following receipt of the audit or inspection results. If the Concessionaire does not refer such Dispute to the Dispute Resolution Procedure within such period, then it is deemed that the Concessionaire accepts the audit or inspection results and it shall remedy any noncompliance as directed by RTD or any Relevant Authority as soon as practicable.
- (f) The Concessionaire acknowledges and agrees that in accordance with 49 CFR 633.15 it shall provide the FTA with access to the Project Records and the Sites, as reasonably required by the FTA or RTD.
 - (g) The Concessionaire shall make available all Project Records and other records relating to appeals under Section 50 (*Dispute Resolution Procedure*) or to the litigation or the settlement of Claims arising under or relating to this Agreement until such appeals, litigation, or Claims are finally resolved, in each case unless (i) such records are exempt from disclosure under the applicable Dispute Resolution Procedure or (ii) disclosure of such records would breach attorney-client privilege.
 - (h) The Concessionaire's obligations under this Section 32 (*Audit and Records*) (i) with respect to the Design/Build Contractor and the Rolling Stock Supplier shall continue for three years following the date of termination or expiry of, respectively, the Design/Build Contract and the Rolling Stock Supply Contract and (ii) with respect to the Work generally in the event that this Agreement is completely or partially terminated shall continue for three years ending on the third anniversary of the Termination Date and payment in full of all amounts required to be paid hereunder.

33. INTELLECTUAL PROPERTY RIGHTS

Work Products

- 33.1 (a) The Concessionaire shall provide the Work Products to RTD in accordance with the terms of this Agreement and the time periods set out in the Contract Data Requirements List. As part of the Handover and Reinstatement Work Procedures before the End Date, the Concessionaire shall provide RTD with copies of all Work Products and related documentation prepared in connection with the Eagle Project (i) in native format, which is the original format in which materials were developed and maintained, including, if available, in electronic or digital format, and (ii) as RTD may reasonably request, in another format suitable for future Use as anticipated by this Agreement. The Concessionaire shall preserve any and all Work Products, including Source Code (subject to Section 33.1(h)), prior to provision of such Work Product to RTD as part of the Handover and Reinstatement Work Procedures, and the Concessionaire shall replace any such Work Products that are lost, destroyed or damaged prior to completion of Handover on the End Date to the extent practicable without additional cost to RTD.
- (b) For the purposes of this Section 33, the term *Use* means the right to use, make, import, reproduce, publish, display, modify, create derivative works from, or otherwise exploit the items identified below and Intellectual Property Rights in or to all or any part of such items. RTD shall have the right to, and the Concessionaire acknowledges RTD's right to, Use all or any part of the Work Products, Concessionaire Content, Third Party Materials, Concessionaire Tools, and Proprietary Designs in accordance with and subject to Sections 33.1(c) to (h) and Section 33.4 (*Warranty*). The Concessionaire shall provide all

- documentation and licenses, information, materials and assistance reasonably required by RTD to exercise the rights and licenses granted herein, including (i) any additional licenses needed for new developments or additions, and (ii) subject to Section 33.1(h), all information and Source Code necessary to fully access and create derivative works based on software.
- (c) The Concessionaire hereby grants to RTD, for the benefit of RTD and the FTA, a fully paid-up, royalty-free, non-exclusive, irrevocable, perpetual license, with the right to sublicense, limited to the territory of the United States of America, to Use the Concessionaire Content (not including the Financial Model) for the Eagle Project, any RTD Related Project, and direct purposes of the United States federal government as required by the FTA.
- (d) The Concessionaire shall obtain, on RTD's behalf, all necessary rights and licenses for the Third Party Materials in accordance with this Section 33.1(d). The Concessionaire shall provide to or obtain for RTD all rights and licenses necessary for RTD and its sublicensees and contractors to Use the Third Party Materials for the purposes of the Eagle Project, **provided** that such right to Use shall not include the right to create derivative works from Third Party Materials comprised of software or Source Code. The Concessionaire shall (i) assign or transfer to RTD such rights and licenses in and to the Third Party Materials as may validly be assigned or transferred by the Concessionaire to RTD, (ii) acquire for RTD a direct grant of rights or a license to RTD in and to the Third Party Materials, (iii) sublicense to RTD rights and licenses in and to the Third Party Materials, or (iv) take such other action as may be necessary for RTD and its sublicensees and contractors to have the rights and licenses to Use the Third Party Materials for the purposes of the Eagle Project in accordance with the immediately preceding sentence. All actions by the Concessionaire under this Section 33.1(d) shall be at the cost and expense of the Concessionaire (other than the cost for any additional sublicenses required by RTD other than for RTD itself, the cost and expense of which shall be borne by RTD) and all grants and licenses, and actions taken by the Concessionaire hereunder shall be in form and substance reasonably acceptable to RTD.
- (e) Upon the Phase 1 Effective Date, the Concessionaire shall furnish a list to RTD of all Concessionaire Tools and a list of all Proprietary Designs expected to be utilized in performance of this Agreement, in each case containing sufficient descriptive information and supporting evidence to support the classification of such tools and designs as Concessionaire Tools and Proprietary Designs. To the extent not previously identified to RTD and sufficiently described in such lists, the Concessionaire shall clearly and specifically identify the Concessionaire Tools and/or Proprietary Designs in each of its submittals, in each case providing sufficient descriptive information and supporting evidence to support the classification of such tools and designs as Concessionaire Tools and Proprietary Designs. Work Products shall not be considered reclassified as Concessionaire Tools and/or Proprietary Designs on the basis of such submittals until RTD has either confirmed such reclassification in writing or failed to respond to the Concessionaire within 30 days of the relevant submission. In accordance with Section 55.3, to the extent the Concessionaire considers any descriptions or materials provided under this clause (e) to contain information exempt from public disclosure, it must indicate to RTD the provision of the Colorado Open Records Act that exempts such document from public disclosure and otherwise comply with Section 55.3.

- (f) The Concessionaire hereby grants to RTD a fully paid-up, royalty-free, non-exclusive, irrevocable, perpetual license, with the right to sub-license, limited to the territory of the United States of America, to Use the Concessionaire Tools and the Proprietary Designs (in both cases not including the Financial Model) for the purposes of the Eagle Project and any RTD Related Project that is a commuter rail project, but only to the extent reasonably necessary to effect systems integration with the Eagle Project.
- (g) The Concessionaire shall obtain from the Project Contractors, and shall ensure that the Project Contractors and their respective Subcontractors obtain from all of their respective Subcontractors and suppliers, written assignments or licenses as necessary to effect the rights and licenses granted to RTD herein (including for the benefit of the FTA), at no additional cost to RTD, and shall provide copies of such documents to RTD upon request.
- (h) Subject to compliance with this Section 33.1(h) and otherwise applicable Law, the Concessionaire may fulfill its obligations with respect to Source Code under this Section 33.1 (*Work Products*) under and subject to the terms of a software escrow agreement. At any time either Party may propose to the other Party to enter into a source code escrow agreement with respect to any Source Code by initiating a Change, **provided** that at all times the Concessionaire shall be required, at its own cost and expense, to enter into, and pay all costs associated with the maintenance of, a source code escrow agreement in form and substance reasonably acceptable to RTD with respect to the Source Code for any software that is not otherwise readily commercially available to RTD as reasonably determined by RTD. Each Source Code escrow agreement entered into under this Section 33.1(h) shall include provisions for the deposit and updating of deposits of Source Code, verification of Source Code deposits, release of the Source Code, and any other provisions as are considered customary for such agreements from time to time. Unless otherwise expressly provided for in this Agreement, RTD shall not acquire ownership of the copyright in the Source Code deposited in accordance with such a software escrow agreement, but RTD shall be the owner of the copies of the Source Code it receives under the terms of a source code escrow agreement.

RTD Content

33.2 RTD (or its assigns or licensors as applicable) shall at all times retain sole ownership of RTD Content and the Intellectual Property Rights therein. RTD hereby grants to the Concessionaire a non-exclusive, royalty-free license, with the right to sub-license to the Project Contractors and their respective Subcontractors solely in connection with the Eagle Project, to use, make, import, reproduce, display and create derivative works from RTD Content solely for the purpose of performing the Concessionaire's obligations under this Agreement and the other Project Agreements, which licenses shall terminate with immediate effect on the End Date. The Concessionaire acknowledges RTD's unrestricted right to Use RTD Content, and to obtain and hold in its own name patents, copyright and/or trademark registrations for Work Products owned by RTD and any derivative works or developments created by RTD based on the Work Products.

Restrictions on Disclosure

33.3 Except for its own internal use, the Concessionaire shall not and shall not authorize any other Person, and shall ensure that the Project Contractors and their respective Subcontractors shall not, publish or reproduce Concessionaire Content in whole or in part, or in any manner or

form, without the prior written consent of RTD, until such time as RTD has either released or approved the release of such Concessionaire Content to the public.

Warranty

33.4 The Concessionaire warrants and represents that:

- (a) the Concessionaire Content, the Concessionaire Tools, the Proprietary Designs and any Third Party Materials are original to the Concessionaire, the Project Contractors or their respective Subcontractors or suppliers, and do not infringe the Intellectual Property Rights or proprietary rights of any third party;
- (b) RTD's Use of the Concessionaire Content, the Concessionaire Tools, the Proprietary Designs and any Third Party Materials shall not infringe the Intellectual Property Rights or proprietary rights of any third party (excluding any modification or creation of derivative works by RTD that constitutes the sole cause of such infringement); and
- (c) the performance by the Concessionaire (including its agents, consultants and contractors) of its responsibilities under, pursuant to, or arising from this Agreement and the other Project Agreements and/or the provision or operation of the Concessionaire-operated Components shall not infringe the Intellectual Property Rights or proprietary rights of each other or any third party,

Indemnity

- 33.5 (a) The Concessionaire shall be liable for and shall indemnify RTD (and its directors, officers, agents, consultants or employees) to the maximum extent permitted by law from and against all Loss, whether direct or indirect, and Claims that RTD (or any of its directors, officers, agents, consultants or employees) may suffer or incur (i) arising out of a breach of the Concessionaire's warranties set out in Section 33.4 (*Warranty*) or otherwise out of any Claim of an infringement of Intellectual Property Rights or other proprietary rights as described in Section 33.4 (*Warranty*), or (ii) if RTD's rights and interests provided under this Agreement with respect to the Concessionaire Content, the Concessionaire Tools, the Proprietary Designs and any Third Party Materials and the Intellectual Property Rights therein are at any time determined by a court of law or other competent authority to be invalid, ineffective or impaired in any material respect.
- (b) The Concessionaire shall, at its own cost, provide such cooperation and assistance and take such action and institute such proceedings as RTD requests in the event of any Claim as described under Section 33.5(a) and shall assist RTD in resolving queries concerning the ownership and licensing of the Concessionaire Content, the Concessionaire Tools, the Proprietary Designs and any Third Party Materials and the Intellectual Property Rights therein.
- (c) The Concessionaire shall require each of the Project Contractors and their respective Subcontractors to indemnify RTD in the same manner and to the same extent as provided for in Section 33.5(a).

Survival

33.6 The warranties set out in Section 33.4 (*Warranty*) and the indemnity set out in Section 33.5 (*Indemnity*) shall survive the expiration or termination of this Agreement.

Further Assurance

33.7 RTD and the Concessionaire each undertake at the request of the other and at no charge to execute all documents and to do all acts which may be reasonably required by the other to bring into effect the provisions of this Section 33 (*Intellectual Property Rights*).

34. INSURANCE

Responsibility for insurance

- 34.1 (a) From the Early Work Effective Date, if applicable, or the Phase 1 Effective Date until the end of the Design/Build Period (or such shorter or, in the case of Railroad Protective Liability insurance, longer period as is specified in Part A (*Design/Build Period Insurances*) of Attachment 12 (*Insurance*)):
- (i) RTD shall at its own cost take out and maintain or cause to be maintained policies of insurance which provide cover on the basis set out in this Section 34 (*Insurance*) and in Part A(I) (*RTD Design/Build Period Insurances*) of Attachment 12 (*Insurance*); and
 - (ii) the Concessionaire shall at its own cost take out and maintain or cause to be maintained policies of insurance which provide cover on the basis set out in this Section 34 (*Insurance*), and in Part A(II) (*Concessionaire Design/Build Period Insurances*) of Attachment 12 (*Insurance*) and otherwise as required by RTD in accordance with Section 34.1(c).
- (b) From the date on which each Commuter Rail Project achieves its Revenue Service Commencement Date, and with respect to the Commuter Rail Maintenance Facility the date on which the first Commuter Rail Project achieves its Revenue Service Commencement Date, until the End Date, the Concessionaire shall at its own cost take out and maintain or cause to be maintained, in respect of the Concessionaire-operated Components, policies of insurance which provide cover on the basis set out in this Section 34 (*Insurance*) and in Part B (*Operating Period Insurances*) of Attachment 12 (*Insurance*).
- (c) If RTD is unable to take out and maintain or cause to be maintained policies of insurance in accordance with Section 34.1(a)(i) or otherwise elects to cancel or modify any such policies, then RTD shall give to the Concessionaire written notice either (i) promptly after RTD becomes aware of an Uninsurable Risk or (ii) otherwise no later than 60 days prior to any elective cancellation or modification. In such written notice RTD shall inform the Concessionaire whether RTD will elect to (x) procure alternative insurance coverage, including by way of self-insurance by RTD and/or (y) require the Concessionaire to obtain replacement insurance coverages. If RTD requires the Concessionaire to obtain replacement insurance coverages, then RTD will reimburse the Concessionaire for the actual net cost for any such required replacement insurance and

the risk financing costs of a self-insured or large deductible program prorated for the balance of the Design/Build Period.

Deductibles

34.2 The Concessionaire shall be responsible for all deductibles or self-insured retentions in respect of each insurance policy unless expressly specified otherwise in Attachment 12 (*Insurance*).

Named Insureds; Continuity of Insurance

34.3 Each insurance policy required to be taken out and maintained or caused to be maintained by the Concessionaire in accordance with this Section 34 (*Insurance*) and Attachment 12 (*Insurance*) shall:

- (a) insure the Concessionaire, RTD (and, with respect to liability policies only, RTD's consultants, agents, and contractors, as disclosed to the Concessionaire upon the Concessionaire's request), the Lenders, the Project Third Parties and:
 - (i) during the Design/Build Period, the Design/Build Contractor and, as set out in Part A(I) (*RTD Design/Build Period Insurances*) of Attachment 12 (*Insurance*), relevant Design/Build Subcontractors;
 - (ii) during the Operating Period, the O&M Contractor and relevant O&M Subcontractors; and
 - (iii) subject to the prior written approval of RTD, others nominated by the Concessionaire; and
- (b) entitle RTD to maintain the all-risk policies specific to the Eagle Project in force after termination of this Agreement.

Uninsurable Risks

- 34.4 (a) The Concessionaire shall notify RTD immediately on becoming aware that any risk to be insured by the Concessionaire in accordance with Section 34.1 (*Responsibility for insurance*) has become an Uninsurable Risk. The Concessionaire shall in any such notice, make proposals as to the manner in which such Uninsurable Risk may be mitigated, managed or controlled including any proposals as to changing the terms of the insurances or taking out of any substitute insurances at reasonable commercial rates. The Concessionaire and RTD shall, together with their respective insurance advisers, consult on the Concessionaire's proposals, and the Concessionaire shall effect any amended or new insurances as may be agreed by the Concessionaire and RTD to be appropriate in the circumstances.
- (b) The Concessionaire shall review the availability of insurance(s) relating to the Uninsurable Risk at intervals of not longer than three months. Should insurance become available in respect of a previously Uninsurable Risk at reasonable commercial rates, the Concessionaire shall effect such insurance and such risk shall no longer be deemed to be an Uninsurable Risk.

- (c) RTD shall assume the risk of the occurrence of an Uninsurable Risk on the same basis as such Uninsurable Risk would have been insured by the Concessionaire in accordance with Section 34.1 (*Responsibility for insurance*) and covered by the insurance coverages set out in Part A(II) (*Concessionaire Design/Build Period Insurances*) or Part B (*Operating Period Insurances*) of Attachment 12 (*Insurance*), subject to the limitations, conditions and exclusions set out in the certificates and policies of insurance relating to such coverage provided by RTD to the Concessionaire pursuant to Section 34.6(b); **provided** that the Concessionaire shall remain responsible for the deductibles referred to in Part B (*Operating Period Insurances*) of Attachment 12 (*Insurance*).
- (d) To the extent RTD assumes any Uninsurable Risk in accordance with this Section 34.4 (*Uninsurable Risks*), RTD shall provide a full waiver of subrogation to the Concessionaire.
- (e) RTD's obligation to make any payment to the Concessionaire in respect of RTD's assumption of Uninsurable Risks shall be subject to the following limitations:
- (i) in the case of the insurance described in Section 1.1 (*Railroad General Liability Insurance*) of Part B (*Operating Period Insurances*) of Attachment 12 (*Insurance*), RTD's obligations with respect to any Uninsurable Risk shall be limited to the insurance coverages provided under the then-current edition of ISO Commercial General Liability Coverage Form CG 00 01 (with the exclusion for work within 50 feet of a railroad removed); and
 - (ii) in the case of the insurance described in Section 1.4 (*Property Insurance*) of Part B (*Operating Period Insurances*) of Attachment 12 (*Insurance*), RTD's obligations with respect to any Uninsurable Risk shall be limited to the insurance coverages provided under the then-current edition of the ISO Causes of Loss – Special Form CP1030.

Insurance Cost Sharing

- 34.5 (a) If at any time the annual costs of insurance premia incurred by the Concessionaire in maintaining the terms of the insurance cover which it is required to maintain in accordance with Section 34.1(b) (for the purposes of this Section 34.5, the **Actual Insurance Costs**) less any increases in such costs which are not due solely to circumstances generally prevailing in the insurance market of the United States of America exceed the Bid Insurance Cost but adjusted to take account of any parts of the Concessionaire-operated Components that have been included within the scope of such insurance since the first year of the Operating Period indexed by the CPI increase since the first year of the Operating Period (the **Base Insurance Costs**), after deducting from the Actual Insurance Costs, then an **Increased Insurance Cost** equal to this excess will have arisen.
- (b) The Concessionaire shall provide RTD with written notice of the Actual Insurance Costs for all relevant insurances broken down by category of insurance for each year, as soon as practicable after it becomes aware of the same and prior to the renewal of such insurances. A copy of the premium offer and any other relevant information from the insurers shall be provided with such notice.

- (c) If an Increased Insurance Cost arises, then the Concessionaire may, on the first day of the Operating Period and any anniversary thereof, notify RTD thereof.
- (d) RTD will compensate the Concessionaire in respect of Increased Insurance Costs as follows:
- (i) if the Increased Insurance Cost is less than or equal to an amount being 50% of the Base Insurance Costs (the **First Increase Threshold**) then the Concessionaire shall be responsible for the whole of the Actual Insurance Costs until the next anniversary of the start of the Operating Period, when the Concessionaire may give another notice under Section 34.5(c) requiring re-calculation of the Increased Insurance Cost, if any;
 - (ii) if the Increased Insurance Cost is greater than the First Increase Threshold but less than an amount being 100% of the Base Insurance Costs (the **Second Increase Threshold**), then:
 - (A) the Concessionaire shall be responsible for the whole of the Increased Insurance Cost up to and including the First Increase Threshold; and
 - (B) RTD and the Concessionaire shall share on a 50:50 basis any amount of the Increased Insurance Cost that exceeds the First Increase Threshold (with RTD compensating the Concessionaire for any amount for which it is liable) until the next anniversary of the start of the Operating Period, when the Increased Insurance Cost shall be re-calculated;
 - (iii) if the Increased Insurance Cost is greater than or equal to the Second Increase Threshold but less than an amount being 150% of the Base Insurance Costs (the **Third Increase Threshold**) then:
 - (A) the Concessionaire shall be responsible for the whole of the Increased Insurance Cost up to and including the First Increase Threshold;
 - (B) RTD and the Concessionaire shall share on a 50:50 basis any amount of the Increased Insurance Cost which is greater than the First Increase Threshold but less than or equal to the Second Increase Threshold (with RTD compensating the Concessionaire for any amount for which it is liable); and
 - (C) RTD shall compensate the Concessionaire for 75% of any amount of the Increased Insurance Cost which is greater than the Second Increase Threshold but less than or equal to the Third Increase Threshold and the Concessionaire shall be responsible for 25% of any amount of the Increased Insurance Cost which is greater than the Second Increase Threshold but less or equal to the Third Increase Threshold,
- until the next anniversary of the start of the Operating Period, when either the Concessionaire or RTD may give a notice under Section 34.5(c) requiring re-calculation of the Increased Insurance Cost, if any;

(iv) if the Increased Insurance Cost is greater than the Third Increase Threshold but less than an amount being 250% of the Base Insurance Costs (the ***Fourth Increase Threshold***), then:

- (A) the Concessionaire shall be responsible for the whole of the Increased Insurance Cost up to and including the First Increase Threshold;
- (B) RTD and the Concessionaire shall share on a 50:50 basis any amount of the Increased Insurance Cost which is greater than the First Increase Threshold but less than or equal to the Second Increase Threshold (with RTD compensating the Concessionaire for any amount for which it is liable);
- (C) RTD shall compensate the Concessionaire for 75% of any amount of the Increased Insurance Cost which is greater than the Second Increase Threshold but less than or equal to the Third Increase Threshold and the Concessionaire shall be responsible for 25% of any amount of the Increased Insurance Cost which is greater than the Second Increase Threshold but less than or equal to the Third Increase Threshold; and
- (D) RTD shall compensate the Concessionaire for 90% of any amount of the Increased Insurance Cost which is greater than the Third Increase Threshold but less than or equal to the Fourth Increase Threshold and the Concessionaire shall, be responsible for 10% of any amount of the Increased Insurance Cost which is greater than the Third Increase Threshold but less than or equal to the Fourth Increase Threshold,

until the next anniversary of the start of the Operating Period, when either the Concessionaire or RTD may give a notice under Section 34.5(c) requiring re-calculation of the Increased Insurance Cost, if any; and

(v) if the Increased Insurance Cost is greater than or equal to 250% of the Base Insurance Costs then:

- (A) RTD will meet with the Concessionaire to discuss possible alternative arrangements, including, without limitation, any possible reduction in the scope of the relevant insurances so as to decrease the projected Actual Insurance Costs below this threshold; and
- (B) in the event the Parties fail to agree any such alternative arrangements, RTD shall either:
 - (I) compensate the Concessionaire for the entire of the excess over 250% of the Base Insurance Costs, in which case:
 - (aa) the Concessionaire shall be responsible for the whole of the Increased Insurance Cost up to and including the First Increase Threshold;
 - (bb) RTD and the Concessionaire shall share on a 50:50 basis any amount of the Increased Insurance Cost which is

greater than the First Increase Threshold but less than or equal to the Second Increase Threshold (with RTD compensating the Concessionaire for any amount for which it is liable);

- (cc) RTD shall compensate the Concessionaire for 75% of any amount of the Increased Insurance Cost which is greater than the Second Increase Threshold but less than or equal to the Third Increase Threshold and the Concessionaire shall be responsible for 25% of any amount of the Increased Insurance Cost which is greater than the Second Increase Threshold but less than or equal to the Third Increase Threshold; and
- (dd) RTD shall compensate the Concessionaire for 90% of any amount of the Increased Insurance Cost which is greater than the Third Increase Threshold but less than or equal to the Fourth Increase Threshold and the Concessionaire shall be responsible for 10% of any amount of the Increased Insurance Cost which is greater than the Third Increase Threshold but less than or equal to the Fourth Increase Threshold; or

(II) treat all or part of the relevant insurances as an Uninsurable Risk.

Insurance Requirements

- 34.6 (a) Each Party shall ensure that at all times the companies issuing the insurance policies referred to in Attachment 12 (*Insurance*) are Qualifying Insurers.
- (b) The Concessionaire and RTD shall deliver to each other (and, in the case of deliveries by RTD, directly to the Design/Build Contractor and each Design/Build Subcontractor in accordance with Part I.A. of Annex 1 (*RTD Eagle Project OCIP Insurance Manual*) of Attachment 12 (*Insurances*)) certificate(s) of insurance (and all required endorsements thereto) executed by an authorized representative of the insurer (or, if RTD is assuming any Uninsurable Risk in accordance with Section 34.4 (*Uninsurable Risks*), executed by RTD's Risk Manager) evidencing such Party's compliance with the requirements set out in this Section 34 (*Insurance*) and Attachment 12 (*Insurance*), prior to the date on which such insurance is required to be maintained. The Concessionaire shall deliver such documents to RTD's Risk Manager.
 - (c) Such certificate shall reference this Agreement (and RTD's contract number and title for this Agreement) and the insurance cover to which such certificate applies. Each Party shall provide to the other Party copies of all policies of insurance taken out by such Party in accordance with this Section 34 (*Insurance*) and Attachment 12 (*Insurance*) no later than 90 days after taking out such policy. The Concessionaire shall at all times maintain on file current certificates of insurance evidencing proof of the coverage required under this Section 34 (*Insurance*) and Attachment 12 (*Insurance*).

- (d) The Concessionaire and RTD shall ensure that all policies required to be taken out by this Section 34 (*Insurance*) and Attachment 12 (*Insurance*) shall be endorsed to provide RTD with 60 days' prior written notice of any cancellation, reduction, or material change in the insurance coverage relating thereto.
- (e) At least once in each 12-month period, the Concessionaire and RTD will deliver to each other (and, in the case of insurance taken out by the Concessionaire, to RTD's Risk Manager):
- (i) certificates for the renewal or replacement of the insurance cover which such Party takes out pursuant to this Section 34 (*Insurance*) and Attachment 12 (*Insurance*); and
 - (ii) a certificate of an appropriate officer of such Party:
 - (A) confirming that all insurance policies taken out pursuant to this Section 34 (*Insurance*) and Attachment 12 (*Insurance*) are in force on the date thereof;
 - (B) confirming the amounts and expiration date or dates of such policies and the names of the Qualifying Insurers issuing such policies;
 - (C) including certificates evidencing payment of any premiums then due, in a form reasonably satisfactory to the other Party; and
 - (D) stating that such policies comply with the requirements of this Section 34 (*Insurance*) and the relevant provisions of Attachment 12 (*Insurance*), to the extent applicable.
- (f) Each Party shall ensure that all insurances which such Party is required to take out and maintain or cause to be maintained in accordance with this Section 34 (*Insurance*) and Attachment 12 (*Insurance*) and any other policies taken out by that Party, or (in the case of the Concessionaire) the Project Contractors or their respective Subcontractors in connection with the Eagle Project (including umbrella/excess liability insurance) contain (i) a term to the effect that the companies issuing the insurance policies have agreed to waive all rights of subrogation against the other Party and (ii) only with respect to the insurance which RTD is required to take out and maintain or cause to be maintained in accordance with this Section 34 (*Insurance*) and Sections 2.2 (*Builder's Risk Insurance*) and 2.4 (*Rolling Stock Insurance*) of Part A(I) (*RTD Design/Build Period Insurances*) of Attachment 12 (*Insurance*), a term to the effect that the companies issuing the insurance policies have agreed to waive all rights of subrogation against the Project Contractors and Subcontractors.
- (g) The original copy of all notices, reports and other communications relating to insurance matters to which RTD is entitled shall be sent to RTD to the attention of RTD's Risk Manager with a copy of such communications to be sent to RTD at its address set out in Section 58 (*Notices, Etc.; Language*).

35. INDEMNITY

Concessionaire Indemnity

35.1 The Concessionaire will, to the fullest extent permitted by law, fully and effectively indemnify and hold harmless RTD and RTD's agents, servants, consultants and employees and, to the extent required by the Project Agreements, the Project Third Parties and their respective agents, servants, consultants and employees from and against all Losses and/or Claims (excluding any Losses of, or Claims for, lost revenue to RTD resulting from a failure to collect passenger fares for the Commuter Rail Services through the Fare System Equipment, other than any such failure arising from theft or fraud by the Concessionaire or its agents, servants, consultants or employees) arising out of or in connection with any act or omission of the Concessionaire or its agents, servants, consultants or employees in connection with this Agreement and the other Project Agreements or breach thereof or any willful misconduct of the Concessionaire or its agents, servants, consultants or employees, including any suffered or incurred in respect of:

- (a) personal injury (including injury resulting in death), including to an employee of RTD, the Concessionaire, any Project Contractor or Subcontractor or any Project Third Party;
- (b) any loss of or damage to any real or personal property of RTD, any Project Third Party, or any other Person, including loss of use thereof; and/or
- (c) any fines or penalties imposed on RTD by Relevant Authorities arising as a result of the Concessionaire's breach of or failure to comply with Applicable Requirements or its obligations under this Agreement and/or the other Project Agreements,

but only to the extent that such Loss and/or Claim does not arise as a result of the negligent acts, omissions or willful misconduct of RTD, the Project Third Parties or their respective agents, servants, consultants and employees. The Parties acknowledge that the indemnity set forth in this Section 35.1 (*Concessionaire Indemnity*) is not intended to create any third party beneficiary rights for any Person not a Party to this Agreement and agree that this Section 35.1 does not and shall not be construed to create a contractual relationship between the Concessionaire and a Person other than RTD.

Concessionaire Indemnified Claims

35.2 (a) If RTD receives notice of the commencement or assertion of any Claim as described under Sections 20.2(c), 23.5(b), 33.5 (*Indemnity*) or 35.1 (*Concessionaire Indemnity*), RTD shall give the Concessionaire reasonably prompt notice thereof, but in any event no later than 30 days after receipt of notice of such Claim. RTD's notice to the Concessionaire shall describe the Claim in reasonable detail (and include a copy of any complaint or related documents) and shall indicate, if reasonably practicable, the estimated amount of the Loss that has been or may be sustained by RTD. If RTD fails to provide timely notice of any Claim (of which the Concessionaire was otherwise unaware) in accordance with this Section 35.2(a), then the Concessionaire's indemnification obligations under Sections 20.2(c), 23.5(b), 33.5 (*Indemnity*) and 35.1 (*Concessionaire Indemnity*), as applicable, shall be reduced by an amount equal to the lesser of (i) the Losses actually incurred by the Concessionaire as a result of RTD's failure to provide such timely notice and (ii) the maximum Losses RTD could have incurred, taking into

- account any statutory limits on liability, as a result of such Claim in the absence of an indemnification from the Concessionaire.
- (b) The Concessionaire may participate in or assume, and in the case of Section 35.1 (*Concessionaire Indemnity*) shall assume, the defense of any Claim as described under Sections 20.2(c), 23.5(b), 33.5 (*Indemnity*) or 35.1 (*Concessionaire Indemnity*) by giving notice to that effect to RTD not later than 30 days after receiving notice of such Claim; **provided** that the Concessionaire shall not be permitted to assume the defense of such Claim described under Sections 20.2(c), 23.5(b) or 33.5 (*Indemnity*) to the extent such assumption would adversely impact any defense asserted by RTD; **provided further** that in participating in or assuming the defense of any such Claim the Concessionaire may also assert against the relevant third party any and all cross claims and counterclaims that the Concessionaire may have. The Concessionaire's right to do so shall be subject to the rights of any insurer or other Person who has potential responsibility with respect to that Claim. The Concessionaire agrees to pay all of its own expenses of participating in or assuming each defense. RTD shall cooperate in good faith in the defense of each Claim, even if the defense has been assumed by the Concessionaire and may participate in such defense assisted by counsel of its own choice at its own expense. If RTD has not received notice within the notice period referenced above that the Concessionaire has elected to assume the defense of such Claim, RTD may assume such defense, assisted by counsel of its own choosing and the Concessionaire shall be responsible for all reasonable costs and expenses paid or incurred in connection therewith and any Loss suffered or incurred by RTD with respect to such Claim.
- (c) Each Party will use all reasonable efforts to make available to that Party which is undertaking and controlling the defense of any Claim under Section 35.2(b) above, (i) those employees whose assistance, testimony and presence is necessary to assist the defending Party in evaluating and in defending any relevant Claim, and (ii) to the extent permitted by Law, all documents, records and other materials in the possession of such Party reasonably required by the defending Party for its use in defending any relevant Claim, and shall otherwise cooperate with the defending Party. The Concessionaire shall reimburse all reasonable expenses associated with making such documents, records and materials available and for all expenses of any employees made available by RTD to the Concessionaire hereunder, which expense shall not exceed the actual cost to RTD associated with such employees.
- (d) If the Concessionaire elects to assume the defense of any Claim in accordance with Section 35.2(b), the Concessionaire shall not be responsible for any legal expenses subsequently incurred by RTD in connection with the defense of such Claim. However, if the Concessionaire fails to take reasonable steps necessary to defend diligently such Claim no later than 30 days after receiving notice from RTD that RTD reasonably believes that the Concessionaire has failed to take such steps, RTD may, at its option, elect to assume the defense of and to compromise or settle the Claim assisted by counsel of its own choosing and the Concessionaire shall be responsible for all reasonable costs and expenses paid or incurred in connection therewith; **provided** that RTD shall not settle or compromise any such Claim without obtaining the prior written consent of the Concessionaire unless such settlement or compromise is made without any responsibility to, and does not require any action on the part of, the Concessionaire and does not in any way adversely affect the Concessionaire.

Insurance

35.3 The Concessionaire will not be liable to indemnify RTD or, as the case may be, the Project Third Parties or their agents, servants, consultants or employees under or pursuant to this Section 35 (*Indemnity*) for any Losses and/or Claims, to the extent that they have been fully and effectively indemnified in respect thereof pursuant to (a) the insurances maintained under Section 34 (*Insurance*) including, to the extent RTD has assumed an Uninsurable Risk pursuant to Section 34.4 (*Uninsurable Risks*), except to the extent of any deductibles or expenses applicable to such insurance for which the Concessionaire shall be liable or (b) otherwise in accordance with the terms of any Third Party Agreement or other agreement between the Concessionaire and, as the case may be, the relevant Project Third Party or any of their agents, servants, consultants or employees.

PART 10 – CHANGES, RELIEF EVENTS AND FORCE MAJEURE

36. CHANGES

Concessionaire Proposed Changes

- 36.1 (a) The Concessionaire shall not make any changes to, or deviate in any way from, the Project Requirements in the carrying out of the Eagle Project, except as permitted under this Section 36.
- (b) If the Concessionaire wishes to suggest at any time during the Design/Build Period or the Operating Period any variation to the Final Project Design, the Design, Construction and Rolling Stock Requirements or the O&M Specifications which in its opinion would reduce the cost of constructing, maintaining or operating the Commuter Rail Network, improve the efficiency or value to RTD of the completed Commuter Rail Network, enable the Concessionaire to better manage the risks assumed by the Concessionaire under this Agreement in respect of the Work and/or the Commuter Rail Network, or otherwise be of benefit to RTD, (a *Concessionaire Proposed Change*), the Concessionaire may submit, at its own cost, to RTD an executive summary of such Concessionaire Proposed Change (the *Concessionaire Change Summary*) setting out the nature of the Concessionaire Proposed Change and the impact of such Concessionaire Proposed Change on the Concessionaire's and RTD's rights and obligations under this Agreement. No later than 15 days following receipt of the Concessionaire Change Summary, RTD shall respond to the Concessionaire in writing, indicating either:
- (i) that it is not prepared to consider the Concessionaire Proposed Change, in which case RTD and the Concessionaire shall take no further action in respect of such change; or
 - (ii) that it is prepared to consider such Concessionaire Proposed Change further, in which case the Concessionaire shall submit a Concessionaire Change Report in accordance with Section 36.1(c) below.
- (c) If RTD indicates that it is willing to consider the Concessionaire Proposed Change further, the Concessionaire may, at its own cost, submit to RTD a report (a *Concessionaire Change Report*) clearly setting out in a reasonable level of detail:

- (i) the exact nature of the proposed improvements, the specific changes which would be required to the Final Project Design, the Design, Construction and Rolling Stock Requirements or the O&M Specifications (as applicable), and the reason for the Concessionaire Proposed Change;
 - (ii) full details of how the Concessionaire Proposed Change will impact the Eagle Project; and
 - (iii) the matters referred to in Sections 36.3(e)(ii) through (x) (inclusive) with respect to the Concessionaire Proposed Change.
- (d) The Concessionaire Proposed Change shall not be implemented without the agreement of RTD. RTD may, in its discretion, reject the Concessionaire Proposed Change or agree to the Concessionaire Proposed Change, which agreement, if granted, may be subject to such conditions, including conditions as to consequential financial adjustments between the Parties, as RTD may at its absolute discretion specify, by giving written notice no later than 28 days following receipt of the Concessionaire Change Report.
- (e) If RTD gives no response to the Concessionaire within 30 days following receipt of the Concessionaire Change Report, RTD shall be deemed to have rejected the Concessionaire Proposed Change.
- (f) If RTD agrees to any Concessionaire Proposed Change, and the Parties agree on the cost and time relief consequences of such Concessionaire Proposed Change to which the Concessionaire would be entitled under Section 38 (*Relief Events*), then (subject to the right of the Concessionaire at any time after the issuance of the Concessionaire Change Report to withdraw the request to proceed with the Concessionaire Proposed Change, subject however to reimbursement to RTD of the reasonable documented and proper external professional costs incurred to third parties in responding to the Concessionaire's request up to that time), RTD shall, no later than 14 days following reaching agreement with the Concessionaire on the cost and time relief consequences of the Concessionaire Proposed Change, issue a written instruction to the Concessionaire to proceed with the Concessionaire Proposed Change and the Concessionaire, subject to Section 36.4 (*Funding of Changes*), shall implement such change or alteration as soon as practicable in accordance with Section 36.5 (*Implementation of Changes*) and the Concessionaire may claim for a Relief Event under Section 38.1(k) (provided the other requirements of Section 38 (*Relief Events*) are satisfied). If a Concessionaire Proposed Change results in a reduction in the cost of the Eagle Project to RTD, RTD and the Concessionaire shall be entitled to share in such cost reduction in the following percentages: 45% for RTD and 55% for the Concessionaire (or such other proportions as the Parties may agree).
- (g) The Concessionaire shall, and shall ensure that the Design/Build Contractor and the O&M Contractor and their respective Subcontractors shall, use all Reasonable Efforts to mitigate costs, changes to the Service Payment and extension of the period for completion of the Work as necessary (by reorganizing the Project Schedule or otherwise) as a result of any such Concessionaire Proposed Change.
- (h) At all times notwithstanding any submission of Concessionaire Proposed Change, or the ongoing consideration or any dispute regarding such Concessionaire Proposed Change, the Concessionaire shall continue to comply without delay with all of its obligations

under this Agreement and the other Project Agreements including continuing to perform all other Work.

Limitation on Relief of Concessionaire's Obligations

36.2 None of the submission of any Concessionaire Proposed Change pursuant to Section 36.1 (*Concessionaire Proposed Changes*), any approval or refusal by RTD or the submission of comments or objections by RTD will relieve the Concessionaire in any way from any of its obligations, liabilities and responsibilities under this Agreement and the other Project Agreements, except to the extent RTD agrees to amend or relieve any such obligation, liability or responsibility pursuant to an approved Concessionaire Proposed Change.

RTD Proposed Changes

36.3 (a) If RTD wishes to initiate at any time during the Design/Build Period or the Operating Period any change or alteration to:

- (i) the Final Project Design, the Design, Construction and Rolling Stock Requirements or the O&M Specifications;
- (ii) require the Concessionaire to operate and maintain any Other RTD Project, to the extent such project constitutes a rail line connected to, or fixtures, facilities or infrastructure incorporated into, the Commuter Rail Network, as an additional element of the Eagle Project (such project, a *Concessionaire-operated Expansion*);
- (iii) require the Concessionaire as part of a regularly scheduled or occurring service to dispatch Heavy Rail Movements on a portion of the Commuter Rail Network other than the DUS Rail Segment; or
- (iv) during the Design/Build Period only, accelerate elements of the Work, including as determined by reference to the Original Baseline Schedule (or, as the case may be, the Revised Baseline Schedule),

RTD shall be entitled to submit a written request in respect of such change or alteration (an *RTD Proposed Change*) to the Concessionaire at RTD's own cost, which request shall specify whether RTD shall, or reserves the right to, require the Concessionaire to seek funding for such RTD Proposed Change in accordance with Section 36.4 (*Funding of Changes*).

(b) No later than 30 days following receipt of an RTD Proposed Change, the Concessionaire shall respond to RTD in writing, at its own cost, (an *RTD Change Summary*) indicating:

- (i) whether it has any objection to carrying out the RTD Proposed Change on the grounds of safety of either construction of the relevant Commuter Rail Project or operation of the relevant Commuter Rail Service or Concessionaire-operated Expansion, and upon what basis it makes such objection;
- (ii) the estimated not to exceed cost to be incurred or, as the case may be, saved by the Concessionaire in implementing the RTD Proposed Change, which not to exceed cost shall be estimated by reference to the same criteria as are required to

be used to determine the additional costs in the RTD Change Report pursuant to Section 36.3(e)(ii);

- (iii) the expected not to exceed impact of the RTD Proposed Change on the Current Baseline Schedule for the Work (including the length of any extension of any Revenue Service Target Date, the Revenue Service Deadline Date or the Final Completion Date) or on operation and maintenance activities, in each case estimated on a fixed time basis, and the method by which the Concessionaire has projected such expected impact; and
- (iv) preliminary identification or estimates of any other information to be included in the RTD Change Report in accordance with Section 36.3(e), to the extent reasonably identifiable or estimable under the circumstances and as reasonably requested by RTD,

in each case in substance sufficient to allow for implementation of the RTD Proposed Change on the basis of such RTD Change Summary in accordance with Section 36.3(d).

- (c) No later than 15 days following receipt of an RTD Change Summary RTD shall notify the Concessionaire as to:
 - (i) whether RTD will continue to pursue the RTD Proposed Change on the basis of such RTD Change Summary;
 - (ii) if RTD elects to continue to pursue such RTD Proposed Change, whether it will require the Concessionaire to begin to implement such RTD Proposed Change on the basis of the RTD Change Summary in accordance with Section 36.3(d); and
 - (iii) whether RTD intends to provide funding, if necessary, for such RTD Proposed Change,

(collectively, an *RTD Change Summary Notice*).

- (d) RTD may instruct the Concessionaire, by including such instruction in an RTD Change Summary Notice, to begin to implement such RTD Proposed Change in accordance with the RTD Change Summary pending preparation and approval of an RTD Change Report (as defined below), in which case the Concessionaire shall so implement such RTD Proposed Change and the Concessionaire may claim for a Relief Event under Section 38.1(k) (provided that the other requirements of Section 38 (*Relief Events*) are satisfied), **provided** that subject to the terms of the related RTD Change Report (as defined below) or the withdrawal of the RTD Proposed Change (i) RTD shall not compensate the Concessionaire for expenses incurred in relation to such RTD Proposed Change in an amount exceeding the amount set forth in the RTD Change Summary pursuant to Section 36.3(b)(ii) and (ii) any extension of time shall not exceed, or in the case of a request to accelerate the Work, reduction in time be less than, the fixed period set forth in the RTD Change Summary pursuant to Section 36.3(b)(iii). RTD may at any time by written notice direct the Concessionaire to cease implementation of an RTD Proposed Change initiated pursuant to an RTD Change Summary Notice.
- (e) No later than 30 days (or, (x) with respect to the operation and maintenance of a Concessionaire-operated Expansion, 60 days or (y) with respect to all other RTD

Proposed Changes, such other period (not to exceed 60 days) as reasonably necessary under the circumstances subject to RTD approval (such approval not to be unreasonably withheld or delayed)) following receipt of an RTD Change Summary Notice the Concessionaire shall indicate in a written report to RTD (an **RTD Change Report**):

- (i) full details of how the proposed implementation of such RTD Proposed Change will impact the Eagle Project;
- (ii) the additional costs (including financing costs as applicable) which the Concessionaire reasonably expects to incur (the labor, material and equipment elements of which shall be estimated on the basis set out in the RTD Pricing Conditions) and/or any cost savings which could be made by the Concessionaire should such RTD Proposed Change be implemented (providing with such estimate all necessary supporting calculations and information including detailed particulars of additional sums to be paid to the Subcontractors, Lenders and professional advisers) and any changes to the Service Payment that are required:
 - (A) to reflect any projected increases or decreases in the costs of operation of the relevant Commuter Rail Service and/or, operation and/or maintenance of the relevant Commuter Rail Project or Concessionaire-operated Expansion;
 - (B) to maintain the Equity IRR;
 - (C) to reflect any changes to the Designated Credit Agreements; and
 - (D) to reflect a change in the risk profile of the Eagle Project arising from such RTD Proposed Change;
- (iii) any adjustments to the WBS Pricing Form or the Schedule of Values which the Concessionaire reasonably requires;
- (iv) any impact upon the time (estimated on a fixed time basis) for achievement of any relevant Revenue Service Commencement Date or Final Completion Date and the length of any extension of the dates for any Revenue Service Target Date, the Revenue Service Deadline Date and/or the Final Completion Deadline Date to which the Concessionaire considers itself entitled should such RTD Proposed Change be implemented (including details of any corresponding extensions of time sought by the Design/Build Contractor under the Design/Build Contract) and any adjustments to the Original Baseline Schedule (or, as the case may be, Revised Baseline Schedule) which the Concessionaire reasonably requires;
- (v) any additional Permits required to be obtained;
- (vi) any impact on the obligations of the Concessionaire under the Project Agreements, including any necessary amendments thereto;
- (vii) the identity of the Subcontractors which the Concessionaire intends to engage for the purposes of effecting such RTD Proposed Change;

- (viii) an estimate of the reasonable likelihood of a long-term increase or decrease in the Availability Ratio or Performance Deductions expected to result from such RTD Proposed Change;
- (ix) any further effects (including benefits) which, after careful consideration, the Concessionaire foresees as being likely to result from such RTD Proposed Change, if implemented; and
- (x) any impact on the achievement of the DBE Goals and/or the SBE Goals,

provided that the RTD Change Report shall be consistent with the RTD Change Summary.

- (f) The Concessionaire shall, and shall ensure that the Project Contractors and their respective Subcontractors shall, use all Reasonable Efforts to mitigate any additional costs, changes to the Service Payment or extension of the period for completion of the Work as necessary (by reorganizing the Project Schedule or otherwise) and to maximize any cost savings, in each case as a result of any such RTD Proposed Change.
- (g) No later than 15 days following RTD receiving the RTD Change Report, the Parties shall meet to discuss the contents thereof and any amendments thereto that RTD considers appropriate.
- (h) RTD shall, no later than 15 days following the meetings held in accordance with Section 36.3(g), confirm in writing to the Concessionaire whether it agrees to the additional costs, cost savings, Project Agreement amendments, changes to the Service Payment and/or the extension of the dates for any Revenue Service Target Date, the Revenue Service Deadline Date set out in the RTD Change Report (as amended or varied pursuant to the meetings held in accordance with Section 36.3(g)) and/or the Final Completion Deadline Date or accepts the objections of the Concessionaire on safety grounds. By such notice RTD may require the Concessionaire to implement the RTD Proposed Change (in accordance with the RTD Change Report subject to any conditions or adjustments imposed by RTD) with any dispute regarding such conditions or adjustments to be determined in accordance with Section 36.3(i), in which case the Concessionaire may claim a Relief Event under Section 38.1(k) (provided that the other requirements of Section 38 (*Relief Events*) are satisfied).
- (i) If RTD does not agree with the Concessionaire's proposal, or if there is disagreement regarding any of the matters set out in the RTD Change Report, then RTD may notify the Concessionaire of the conditions or adjustments (to the proposed amendments or the estimated additional cost, cost savings or impact on time) to the RTD Change Report it considers reasonably applicable to the implementation of the RTD Proposed Change or RTD may (unless RTD has already directed the Concessionaire to implement such RTD Proposed Change under Sections 36.3(d) or 36.3(h) without subsequently directing the Concessionaire to cease implementation) elect to implement the RTD Proposed Change or engage one or more third party contractors to implement such RTD Proposed Change at its own cost and the Concessionaire shall give RTD all reasonable assistance to permit RTD to carry out such work including providing any necessary access to RTD and its contractors; **provided** that RTD shall reimburse the Concessionaire for reasonable, documented and proper professional costs incurred to third parties and other direct design

- and engineering Incurred Costs in each case incurred in preparing the RTD Change Report. To the extent that the Concessionaire is unable to perform its obligations under this Agreement or incurs any Incurred Costs or delay as a result of the actions or omissions of such third party contractors employed by RTD to implement an RTD Proposed Change under this Section 36.3(i), the Concessionaire may claim for a Relief Event under Section 38.1(k) (provided that the other requirements of Section 38 (*Relief Events*) are satisfied).
- (j) If the Concessionaire does not accept the conditions or adjustments to the RTD Change Report proposed by RTD, the Concessionaire may refer such dispute for resolution in accordance with the Dispute Resolution Procedure, which shall refer to the RTD Pricing Conditions in determining whether the Concessionaire's proposal was reasonable in the circumstances, **provided** that RTD shall be entitled to require the Concessionaire to implement the RTD Proposed Change (in accordance with the RTD Change Report subject to the conditions or adjustments imposed by RTD) pending resolution of such Dispute, in which case the Concessionaire may claim for a Relief Event under Section 38.1(k) (provided that the other requirements of Section 38 (*Relief Events*) are satisfied).
- (k) Once the Parties agree or a determination has been made in accordance with the Dispute Resolution Procedure with respect to either the Concessionaire's proposal or RTD's conditions or adjustments under this Section 36.3 (*RTD Proposed Changes*), without prejudice to the right of RTD at any time after submission of an RTD Proposed Change to withdraw the request to proceed with RTD Proposed Change (subject however to reimbursement to the Concessionaire of the reasonable documented and proper professional costs incurred to third parties in responding to RTD's request up to that time), RTD shall, if it has not already done so in accordance with Section 36.3(j) and no later than 14 days after such agreement or determination, issue a written instruction to the Concessionaire to proceed with the RTD Proposed Change, and in the case of a Concessionaire-operated Expansion, together with the Concessionaire execute such amendments to this Agreement as are necessary to effect such Change, and the Concessionaire, subject to Section 36.4 (*Funding of Changes*), shall implement such change or alteration as soon as practicable in accordance with Section 36.5 (*Implementation of Changes*) and the Concessionaire may claim for a Relief Event under Section 38.1(k) (provided that the other requirements of Section 38 (*Relief Events*) are satisfied).

Funding of Changes

- 36.4 (a) Subject to Section 36.4(d), if RTD does not elect to provide funding for any Concessionaire Proposed Change or RTD Proposed Change then where requested by RTD, the Concessionaire shall request from the Lenders or other third party funders or financial institutions the provision of funds to finance the changes required by any Concessionaire Proposed Change or RTD Proposed Change, it being understood that the Lenders may refuse the provision of any such funding in their sole discretion and that the Concessionaire shall be under no additional obligation (and shall not be in breach of any undertaking) in connection with the provision of any funding for implementing any Concessionaire Proposed Change or RTD Proposed Change.

- (b) The Concessionaire shall use its Reasonable Efforts to comply with any conditions to funding placed by the Lenders including requesting equity support from the Shareholders, it being understood that the Shareholders may refuse the provision of any such funding in their sole discretion and that in such a case the Concessionaire shall be under no additional obligation (and shall not be in breach of any undertaking) in connection with the provision of any funding for implementing any Concessionaire Proposed Change or RTD Proposed Change.
- (c) If in accordance with Section 36.4(a) and 36.4(b) the Lenders or the Shareholders refuse to provide any funding for the implementation of any Concessionaire Proposed Change or RTD Proposed Change, the Concessionaire shall only be obligated to carry out or implement a Concessionaire Proposed Change or RTD Proposed Change to the extent and in the manner and at the times that RTD provides funding for the implementation of such Concessionaire Proposed Change or RTD Proposed Change on terms to be agreed between the Parties.
- (d) RTD shall make any reimbursement to the Concessionaire for Incurred Costs resulting from an RTD Proposed Change during the Design/Build Period to accelerate the Work such that the Concessionaire shall not be required to pursue or secure funding for the implementation of such RTD Proposed Change under this Section 36.4 (*Funding of Changes*).

Implementation of Changes

- 36.5 (a) Unless otherwise agreed between RTD and the Concessionaire, each Change shall be implemented by the Concessionaire on a fixed price, fixed time basis (as agreed by the Parties pursuant to Section 36.1(f) or as agreed or determined in accordance with the Dispute Resolution Procedure pursuant to or change order or instruction issued order Section 36.3(k)) unless RTD specifies otherwise, by means of an amendment to the Design/Build Contract, the O&M Contract and/or, in the case of a Concessionaire-operated Expansion, this Agreement (in each case as appropriate), or by contractors, subcontractors and consultants reasonably acceptable to RTD (provided that during the Design/Build Period, only if such selected Person is not a Project Contractor or any Material Subcontractor, each of which is deemed approved by RTD to carry out a Change).
- (b) If RTD does not agree with the contractors, subcontractors and consultants selected by the Concessionaire to carry out a Change (provided that during the Design/Build Period, only if such selected Person is not a Project Contractor or any Material Subcontractor, each of which is deemed approved by RTD to carry out a Change) or with the contract price or time period submitted by the such contractors, subcontractors and consultants, the Concessionaire shall conduct a procurement process to select such contractors, subcontractors or consultants, with the approval of RTD in respect of:
 - (i) the form and requirements of the proposed procurement documents (including the proposed form of contract between the Concessionaire and the relevant contractor and guarantees and other security for performance thereof);
 - (ii) the procurement process itself; and

- (iii) the selection of, and qualifying criteria for, contractors or subcontractors to be invited to participate in such tendering process.
- (c) Any Change implemented after the Revenue Service Commencement Date shall, if appropriate, be reflected in the O&M Contract by means of a modification or change to thereto.
- (d) Upon the Concessionaire Proposed Change or RTD Proposed Change under this Section 36 (*Changes*) being agreed or any dispute relating thereto being resolved or determined in accordance with the Dispute Resolution Procedure, as the case may be, the provisions of this Agreement (including the undertakings of the Concessionaire concerning the Work and the operation of the Concessionaire-operated Components set out in this Agreement) will continue to apply to the Concessionaire's obligations under this Agreement, as such obligations are amended or varied by such Change. The Parties will implement any amendments or supplements to this Agreement as are necessary to reflect such Change.
- (e) If a Change results in the Concessionaire being required to comply with modified or additional performance requirements that are outside the scope of those previously reflected in this Agreement and in the calculation of the Performance Deduction, the Parties shall negotiate in good faith to amend the mechanism for the calculation of Performance Deduction to include deductions resulting from a failure by the Concessionaire to adhere to such modified or additional performance requirements.
- (f) The Concessionaire shall keep RTD informed of the progress of work carried out in connection with the implementation of each Change (and the associated cost) and will notify RTD when such work is, in the opinion of the Concessionaire, complete.

Directive Letters

- 36.6 (a) In the event of any Dispute regarding the scope of the Concessionaire's obligations or whether the Concessionaire has performed or is performing its obligations in accordance with this Agreement, RTD may issue a letter (a ***Directive Letter***) to the Concessionaire. The Directive Letter will state that it is issued under this Section 36.6 and will describe the work that RTD requires the Concessionaire to perform. The Concessionaire shall proceed immediately to carry out the work identified in the Directive Letter, pending resolution of the relevant Dispute in accordance with the Dispute Resolution Procedure.
- (b) If it is determined, in accordance with the Dispute Resolution Procedure, that the Concessionaire was not required to perform the work identified in the Directive Letter pursuant to this Agreement, such Directive Letter shall constitute an RTD Proposed Change and the Concessionaire may claim for a Relief Event under Section 38.1(k) (provided that the other requirements of 38 (*Relief Events*) are satisfied).
 - (c) The fact that a Directive Letter was issued by RTD shall not be considered evidence that in fact an RTD Proposed Change occurred. The determination whether an RTD Proposed Change in fact occurred shall be based on an analysis of the original requirements of this Agreement and a determination as to whether the Directive Letter in fact constituted a change in those requirements.

37. CHANGE IN LAW

Notice of Change in Law

37.1 (a) Where a Change in Law occurs, either Party may (provided it does so no later than 30 days after becoming aware of the occurrence of such Change in Law) notify the other Party in writing (a ***Change in Law Notice***) of its opinion (and the basis and supporting details for such opinion, including advice of advisers, in particular with respect to the matters set out in Section 38.8(b)(i) and Section 38.8(b)(ii)(A) to (C)) as to whether such Change in Law:

- (i) constitutes a Discriminatory Change in Law;
- (ii) will result in a material delay or increase in the cost of the carrying out the Work during the Design/Build Period;
- (iii) will result in an increase in costs of performing the Concessionaire's obligations under this Agreement with respect to the Concessionaire-operated Components during the Operating Period; and/or
- (iv) will have an adverse effect on the financial position of the Concessionaire as established in the Financial Model immediately prior to the occurrence of such Change in Law, taking into account each of the factors set out in Section 38.8(b)(i) and Section 38.8(b)(ii)(A) to (C) inclusive (together with the results and effects set forth in Sections 37.1(a)(ii) and 37.1(a)(iii), each a ***Change in Law Effect***).

(b) No later than 30 days following the date of receipt of the Change in Law Notice, the Party that received the Change in Law Notice shall notify the Party that sent the Change in Law Notice that either:

- (i) it agrees with the matters in the Change in Law Notice; or
- (ii) it does not agree with the matters in the Change in Law Notice, in which case it will set out in its notice the grounds of objection.

(c) If the Party that received the Change in Law Notice:

- (i) agrees with the matters in the Change in Law Notice; or
- (ii) does not respond within the period specified in Section 37.1(b),

then the provisions of Section 37.2 (*Change in Law Change*) shall apply.

(d) If the Party that received the Change in Law Notice does not agree with the Change in Law Notice, the Parties' Designated Senior Representative shall in accordance with Section 50.2(c), and as soon as practicable after receipt of the notice pursuant to Section 37.1(a) (and in any event within 10 days), discuss in good faith in order to agree the disputed matters contained in the Change in Law Notice and any ways in which the effects of the Change in Law may be mitigated or avoided. If the Parties cannot agree on the disputed matters contained in the Change in Law Notice, the dispute shall be

determined by the Technical Panel, the Financial Panel or arbitration, as appropriate, in accordance with the Dispute Resolution Procedure to determine whether a Change is necessary.

Change in Law Change

- 37.2 (a) If the Parties agree, or it is determined in accordance with the Dispute Resolution Procedure, that a Change in Law constitutes a Discriminatory Change in Law or has a Change in Law Effect (a ***Change in Law Change***), the extent to which the cost of carrying out the Change in Law Change is to be borne by RTD and/or the effects of the Change in Law Change on the carrying out of the Work during the Design/Build Period and/or the effects of the Change in Law Change on the operations and maintenance of the Concessionaire-operated Components during the Operating Period shall be determined in accordance with Section 37.2(b).
- (b) RTD and the Concessionaire shall discuss and agree whether an extension of the dates for any Revenue Service Target Dates, the Revenue Service Deadline Date and/or the Final Completion Deadline Date is necessary as a result of a Change in Law Change. RTD shall pay to the Concessionaire:
- (i) the Incurred Costs incurred by the Concessionaire in respect of a Discriminatory Change in Law;
 - (ii) during the Design/Build Period, the Incurred Costs (if any) required to implement a Change in Law Change that is not a Discriminatory Change in Law to the extent such costs, as stated in the Change in Law Notice or determined in accordance with Section 37.1(d), exceed U.S.\$100,000 per occurrence or, taken together with all previous amounts determined to qualify under this Section 37.2(b)(ii), exceed U.S.\$3,000,000 in aggregate; and
 - (iii) during the Operating Period, the Incurred Costs (if any) required to implement a Change in Law Change that is not a Discriminatory Change in Law to the extent such costs, as stated in the Change in Law Notice or determined in accordance with Section 37.1(d), exceed U.S.\$100,000 annually (calculated from the first Revenue Service Commencement Date) or, taken together with all previous amounts determined to qualify under this Section 37.2(b)(iii), exceed U.S.\$3,000,000 in aggregate.
- (c) Any decrease in the cost of the Work or cost of operating and maintaining the Concessionaire-operated Components or increase in the amount of gross income calculated pre-tax received by the Concessionaire resulting from any Change in Law that constitutes a Discriminatory Change in Law or has a Change in Law Effect shall be retained by the Concessionaire up to the thresholds referred to above and all amounts of benefit resulting from any Change in Law beyond those thresholds shall be reflected by a reduction commensurate with the amount of such benefit, in the Service Payment so that the Concessionaire does not receive a benefit where the benefit is above those thresholds.
- (d) If a payment is to be made by RTD for a Change in Law Change such payment shall become due and payable by the date 60 days after the date set in accordance with the agreement or determination described in this Section 37.2 (***Change in Law Change***) or

- the Service Payment shall be adjusted in accordance with Section 38.8 (*Adjustments to the Service Payment*) as soon as possible but shall be limited to an amount or amounts necessary so as to put the Concessionaire in the same economic position in which it would have been had the Change in Law not been made, taking into account each of the factors set out in Section 38.8(b)(i) and Section 38.8(b)(ii)(A) to (C) inclusive; **provided** that the amount and timing of such adjustment shall be determined by reference to the Financial Model so as to maintain the debt service coverage ratios (and/or other financial ratios) required to be maintained under the Designated Credit Agreements.
- (e) In accordance with Section 37.2(d) RTD may elect to require the Concessionaire to provide funding for any Change in Law Change. If RTD makes such election, the Concessionaire shall request from the Lenders or other third party funders or financial institutions the provision of funds to finance the changes required by any Change in Law Change, it being understood that the Lenders may refuse the provision of any such funding in their sole discretion and that the Concessionaire shall be under no additional obligation (and shall not be in breach of any undertaking) in connection with the provision of any funding for implementing any Change in Law Change.
 - (f) The Concessionaire shall use its Reasonable Efforts to comply with any conditions to funding placed by the Lenders including requesting equity support from the Shareholders, it being understood that the Shareholders may refuse the provision of any such funding in their sole discretion and that in such a case the Concessionaire shall be under no additional obligation (and shall not be in breach of any undertaking) in connection with the provision of any funding for implementing any Change in Law Change.
 - (g) If in accordance with Sections 37.2(e) and 37.2(f) the Lenders or the Shareholders refuse to provide any funding for the implementation of any Change in Law Change, RTD shall provide funding for the implementation of such Change in Law Change or otherwise adjust the manner of payment under Section 37.2(d) such that it is no longer necessary for the Concessionaire to secure additional funding.
 - (h) The Concessionaire agrees that its right to relief in respect of a Change in Law Change shall be limited to the relief agreed or determined in accordance with this Section 37.2 and that it shall not pursue, and hereby waives, any claims that it may have in respect of any additional cost or time relief consequences of such Change in Law Change whatsoever.
 - (i) Following a determination pursuant to the Dispute Resolution Procedure relating to the payment obligation of RTD, RTD shall have the right to terminate this Agreement and pay compensation to the Concessionaire in accordance with Part C (*Compensation Payable Following Extensive Force Majeure Event*) of Attachment 13 (*Compensation Following Termination*) instead of the compensation or Service Payment adjustment calculated in accordance with Section 38.8 (*Adjustments to the Service Payment*).
 - (j) If a Change in Law Change results in the Concessionaire being required to comply with modified or additional performance requirements that are outside the scope of those previously reflected in this Agreement and in the calculation of the Performance Deduction, the Parties shall negotiate in good faith to amend the mechanism for the calculation of the Performance Deduction to include deductions resulting from a failure

by the Concessionaire to adhere to such modified or additional performance requirements.

38. RELIEF EVENTS

Relief Events

38.1 For the purposes of this Agreement, the term **Relief Event** means any of the following events or circumstances or any combination of such events or circumstances:

- (a) any delay in granting Vacant Possession of any part of any Site beyond the time limits specified in Section 11.1 (*Availability of the Sites*) (but not including any delay in the provision of Additional Land), or granting of Vacant Possession subject to restrictions of use and/or right of entry permits in either case not specified in the description of Vacant Possession.
- (b) any failure by a Utility Owner to (i) complete design work related to any Utility Relocation for which the Utility Owner is responsible under and in accordance with the applicable Utility Relocation Agreement, (ii) cooperate in accordance with the applicable Utility Relocation Agreement as necessary to agree and execute a Work Order or (iii) remove and/or Relocate any Owner Relocated Utility to the extent and in the manner shown on the Utilities Drawing within the designated time period for such Owner Relocated Utility work, removal or Relocation as set forth in the relevant Work Order, **provided** that in each case the Concessionaire has complied with the requirements set forth in Section 6 of Attachment 20 (*Utilities*);
- (c) any failure by RTD to remove and/or Relocate any RTD Relocated Utility to the extent and in the manner shown on the Utility Drawings on or prior to the completion date for such RTD Relocated Utility specified in the Utility Matrix;
- (d) (i) any failure by RTD to provide the Concessionaire with Vacant Possession of the DUS Rail Segment Site in accordance with Section 24.4(b)(i) by the Guaranteed DUS Access Date, (ii) any agreement by RTD to or acknowledgment by RTD of the occurrence of Beneficial Occupancy pursuant to the DUS Infrastructure Agreement prior to satisfaction of the Beneficial Occupancy Requirements or (iii) the Beneficial Occupancy Requirements are not satisfied by the Guaranteed DUS Access Date;
- (e) a dispute raised by a Project Third Party relating to the compliance of a Concessionaire Design Submittal with the requirements for such Concessionaire Design Submittal as set out in the Third Party Agreements to the extent that it is subsequently determined, in accordance with the procedures set out in the applicable Third Party Agreement, that the Concessionaire Design Submittals submitted to that Project Third Party does comply with the requirements for such Concessionaire Design Submittal as set out in the Third Party Agreements; **provided** that the Concessionaire shall only be entitled to relief in respect of the delay caused by such dispute to the extent such delay directly relates to the Concessionaire's obligations with respect to Concessionaire Design Submittals;
- (f) a failure by a Project Third Party to review and comment on any Concessionaire Design Submittal submitted by the Concessionaire in accordance with the time periods referred to in Section 20.1(c); **provided** that the extension of time to which the Concessionaire

- shall be entitled shall be limited to the delay directly caused by the failure of such Project Third Party to review and comment in accordance with the time periods set out in the Contract Data Requirements List and the Third Party Agreements to the extent such delay directly relates to the Concessionaire's obligations with respect to Concessionaire Design Submittals;
- (g) any Unidentified Archaeological Remains discovered by the Concessionaire at any Site;
 - (h) any Unidentified Environmental Condition encountered by the Concessionaire at any Site;
 - (i) any Unidentified Geological Obstruction encountered by the Concessionaire at any Site;
 - (j) any Unidentified Endangered Species encountered by the Concessionaire at any Site;
 - (k) the implementation of a Change in accordance with Section 36 (*Changes*) or a Change in Law Change to the extent provided in Section 37.2(b) or the implementation by the Concessionaire of any Betterment or Alternative Solution pursuant to a Work Order in accordance with Section 15.6 (*Betterments and Alternative Solutions*);
 - (l) any willful misleading of the Concessionaire as described in Section 16.2 (*Deficiencies in Reference Data*);
 - (m) a violation of Applicable Requirements by RTD as agreed by RTD or, if RTD disputes the occurrence of a violation of Applicable Requirements by RTD, as evidenced by a final unappealable ruling of court of law in a competent jurisdiction or of an arbitral tribunal in a binding arbitration (as the case may be), or otherwise than as contemplated in this Agreement and/or required by the Applicable Requirements;
 - (n) a failure of RTD to obtain for the Concessionaire the benefit of RTD Permits in accordance with the timetable agreed between RTD and the Concessionaire in accordance with the procedures set out in Attachment 9 (*Project and Construction Management*); but only to the extent that such failure is not caused by the Concessionaire's failure to make timely or proper applications, or the breach of or failure to comply with Applicable Requirements or the conditions attached to such RTD Permits;
 - (o) the discovery of any Unidentified Utility as described in Section 15.3 (*Unidentified Utilities*);
 - (p) any change in voltage of the primary power supply drawn from the Utility transmission network as set forth in Section 12 (*Traction Electrification System*) of Part B (*Infrastructure Requirements*) of Attachment 7 (*Design, Construction and Rolling Stock Requirements*);
 - (q) (i) RTD has ordered or deemed to have ordered the suspension of any part of the Work in accordance with Section 5.13(c)(ii), (ii) RTD has ordered the suspension of any part of the Work in accordance with Section 23.2(a)(i) (other than as a result of the Concessionaire's failure to comply with this Agreement) or (iii) a determination in accordance with the Dispute Resolution Procedures that RTD has ordered the suspension of any part of the Work in violation of the requirements of Sections 23.2(a)(ii), 23.2(a)(iii) or 23.2(a)(iv);

- (r) a determination in accordance with the Dispute Resolution Procedures relating to a Dispute under Section 19.1 (*RTD Review*) that RTD conditioned approval (including by way of rejection) of the Contract Data on comments and/or amendments that were not necessary for the Contract Data to comply with the applicable requirements of this Agreement;
- (s) a determination in accordance with the Dispute Resolution Procedures relating to a dispute under Sections 22.5 (*Design/Build Contract*) or 29.3 (*O&M Contract*) that a proposed amendment, modification, variation or waiver to the Design/Build Contract or the O&M Contract, as applicable, was not a Material Amendment;
- (t) a determination in accordance with the Dispute Resolution Procedures, relating to a Dispute under Section 29.6 (*Emergencies and Disruptions; RTD Intervention*) that RTD's actions under Section 29.6 were attributable to or necessitated by any breach by RTD of its obligations under this Agreement;
- (u) (i) the imposition by any Relevant Authority on the Concessionaire's possessory interest in the Eagle Project of any ad valorem property tax or possessory interest property tax under the Laws of the State of Colorado or (ii) the imposition by any Relevant Authority of any sales or use tax on construction and building materials, equipment, improvements and other property (including tangible personal property), that will be integrated into the Eagle Project and owned by RTD (as, or as part of, without exclusion, the Commuter Rail Projects, DUS Systems, the Commuter Rail Maintenance Facility and the Rolling Stock); but specifically excluding materials, equipment, improvements and other property (including tangible personal property) relating to the Eagle Project that will be (A) owned by the Concessionaire, the Project Contractors or Subcontractors or (B) leased by the Concessionaire, the Project Contractors or Subcontractors from Persons other than RTD;
- (v) any failure by RTD to comply with its obligations under any Replacement Rolling Stock Supply Contract or with its obligations under Section 31.1 (*Rolling Stock Option*);
- (w) any interruption or interference to the Work or the Commuter Rail Services caused by the procurement, design, construction, operation or maintenance of any Other RTD Project, including the procurement, design and construction of any Concessionaire-operated Expansion, in each case undertaken by or on behalf of RTD (but only to the extent not undertaken by the Concessionaire), otherwise than as contemplated in this Agreement and/or required by the Applicable Requirements;
- (x) the issuance of any preliminary or permanent injunction or temporary restraining order or other similar order, legal restraint or prohibition by a Relevant Authority of competent jurisdiction under applicable Law which issuance is solely as a result of RTD's actions or omissions (and not the Concessionaire's actions or omissions), which injunction, order, restraint or prohibition materially affects RTD's or the Concessionaire's performance under this Agreement;
- (y) the execution by RTD of (i)(A) any Utility Relocation Agreement after the Technical Proposal Due Date on terms not consistent with the copy of such agreement attached in draft form in Part B of Annex 1 to Attachment 20 (*Utilities*); (B) any Inter-Governmental Agreement after the Technical Proposal Due Date on terms not consistent with the copy of such agreement attached in draft form in Annexes 1, 2 (other than Annex 2.4), 3 and 4

- to Attachment 21 (*Inter-Governmental Agreements*); (C) any Railroad Agreement after the Technical Proposal Due Date on terms not consistent with the copy of such Railroad Agreement attached in draft form in Annexes 1.3, 2.1, 2.2 and 2.3 to Attachment 22 (*Railroad Agreements*); or (D) any Railroad Agreement identified in Sections 1.2, 1.3, 1.4, 1.6, 1.7, 1.8, 1.9, 1.10 or 1.11 of Attachment 22 (*Railroad Agreements*) after the Technical Proposal Due Date on terms not consistent with the terms of the agreement or draft form of agreement referenced therein, as applicable; or (ii) any Third Party Agreement after the Technical Proposal Due Date other than the agreements (including the agreements in draft form) attached in Annex 1 to Attachment 20 (*Utilities*), Annexes 1, 2, 3 and 4 to Attachment 21 (*Inter-Governmental Agreements*) and Annexes 1, 2 and 3 to Attachment 22 (*Railroad Agreements*) or otherwise identified in Sections 1.2, 1.3, 1.4, 1.6, 1.7, 1.8, 1.9, 1.10 or 1.11 of Attachment 22 (*Railroad Agreements*);
- (z) the DUS As-Built Drawings reflect a design for the DUS Infrastructure that is materially different to the design set forth in the Existing DUS Infrastructure Design Documents, provided that such difference does not result from (i) any Concessionaire Proposed Change or (ii) any DUS Infrastructure Design Documents accepted or deemed accepted by the Concessionaire in accordance with Section 24.2 (*DUS Infrastructure Documents*);
- (aa) any failure by RTD or any third party contractor acting on RTD's behalf to complete any RTD Retained Environmental Work by the completion date for such Environmental Clean-up Work set forth in the relevant Environmental Condition Clean-up Report delivered by the Concessionaire to RTD or (ii) any material interruption or interference with the Concessionaire's performance of its obligations under this Agreement caused by RTD or any third party contractor acting on RTD's behalf in performing any RTD Retained Environmental Work;
- (bb) the approval of a Voluntary Clean-Up Application and Materials Management Plan by the Colorado Department of Public Health and Environment in form and substance materially different from the draft copy of such plan attached at Exhibit 1 to Attachment 7 (*Design, Construction and Rolling Stock Requirements*); and
- (cc) (i) RTD does not increase the Maximum Annual Phase 1 Construction Payment Amounts in accordance with Section 5.10(d) or (ii) the Concessionaire is unable to secure funds to finance the Phase 1 Excess Financing Amount within 90 days after the delivery of a Phase 1 Excess Financing Request,

but, in each case, only to the extent that:

- (i) such event or circumstance (and/or its effects and consequences on the Concessionaire) does not result from and is not contributed to by any breach by the Concessionaire of its obligations under this Agreement or any of the other Project Agreements or any negligent act or omission of the Concessionaire;
- (ii) such event or circumstance has arisen notwithstanding the Concessionaire complying with its obligations under this Agreement, and in accordance with its obligations under Attachment 9 (*Project and Construction Management*) and the O&M Submittals; and

- (iii) the Concessionaire has complied with its obligations under Section 38.3 (*Mitigation in Case of a Relief Event*).

Notification of Relief Event

- 38.2 (a) Subject to compliance by the Concessionaire with the requirements of this Section 38 (*Relief Events*), the Concessionaire shall be entitled to relief from performance of its obligations under this Agreement to the extent that the Concessionaire is prevented from complying with its obligations under this Agreement by any Relief Event or the Concessionaire's ability to perform its obligations under this Agreement is adversely affected by any Relief Event.
- (b) Except in the case of a Relief Event under Section 38.1(k) (to which the provisions of Section 38.7 (*Relief for Changes and Work Orders*) shall apply), the Concessionaire will give written notice to RTD as soon as practicable (and in any event, within 10 days after the Concessionaire becomes aware of the occurrence of a Relief Event (a **Relief Notice**). The Concessionaire shall not be entitled to any relief if a Relief Notice is not submitted within this time period after the Concessionaire became aware of the occurrence of the Relief Event.
 - (c) The Relief Notice will include, to the extent reasonably ascertainable at the date of such Relief Notice:
 - (i) details of the nature of the Relief Event and its duration (or the Concessionaire's estimate of its likely continued duration);
 - (ii) an estimate of its likely impact on the Eagle Project, details of the steps taken or to be taken by the Concessionaire to avoid the Relief Event, and reasons why the Relief Event could not be avoided by the Concessionaire;
 - (iii) an estimate of the extension of time the Concessionaire requires to fulfill the relevant obligations under this Agreement; and
 - (iv) an estimate of the reasonable likelihood of a long-term increase or decrease in the Availability Ratio or Performance Deductions expected to result from such Relief Event or payment.
 - (d) If and for as long as the Relief Event is continuing, the Concessionaire will provide RTD periodically (and at least on a weekly basis) with updates of the Relief Notice.
 - (e) During the continuance of any Relief Event, the Concessionaire will grant RTD such access to any Site and/or the Concessionaire-operated Components and provide such information as required for the purposes of establishing the accuracy of the Relief Notice.

Mitigation in Case of a Relief Event

38.3 The Concessionaire will use its Reasonable Efforts to anticipate the effect of any Relief Event and will use, and will require each of the Design/Build Contractor, the Design/Build Subcontractors, the O&M Contractor and the O&M Subcontractors to use Reasonable Efforts to minimize and/or mitigate the consequences of any Relief Event (both in terms of delay and cost) which measures shall include:

- (a) rearranging the order in which the Work is scheduled to be performed under the Project Schedule;
- (b) procuring that the Work be divided (or further divided) into components that can be undertaken separately and/or concurrently; and
- (c) minimizing the costs of operation and maintenance (including overhead and variable costs) that are incurred during the continuance of the Relief Event.

Extension of Time and Other Relief for Relief Events Occurring During the Design/Build Period

38.4 (a) Where the carrying out of the Work has been delayed as a result of the occurrence of a Relief Event during the Design/Build Period, the dates for any Revenue Service Target Date, the Revenue Service Deadline Date and/or the Final Completion Deadline Date shall, to the extent necessary, be extended as agreed in writing by the Parties, or as determined in accordance with the Dispute Resolution Procedure (as the case may be), to reflect the impact of the Relief Event on the Critical Path of the Work. Such impact shall be determined:

- (i) taking into account the Concessionaire's representations in its Relief Notice as such notice may be amended from time to time in accordance with Section 38.2(d);
- (ii) on the basis that the Concessionaire and the Design/Build Contractor will use Reasonable Efforts to minimize and mitigate the effects of the Relief Event in accordance with Section 38.3 (*Mitigation in Case of a Relief Event*); and
- (iii) after taking into account any requirement by RTD for the Concessionaire to accelerate the relevant Work as an RTD Proposed Change.

provided that with respect to a Relief Event under Section 38.1(k), such extension shall be determined in accordance with Section 38.7(a)(i).

- (b) If the occurrence of a Relief Event or Relief Events during the Design/Build Period prevents the Concessionaire from achieving the Revenue Service Commencement Date in respect of a Commuter Rail Service, then the Revenue Service Commencement Date for such Commuter Rail Service shall be deemed to have occurred for the purposes of the payment of the Service Payment, but for no other purposes, on the date on which the Revenue Service Commencement Date would have occurred but for the Relief Event or Relief Events, as applicable, for such Commuter Rail Service (but for this purpose, no earlier than the Original Revenue Service Target Date for such Commuter Rail Service), and to the extent only of the extension of the Revenue Service Target Date for such Commuter Rail Service in accordance with Section 38.4(a); **provided** that RTD shall be entitled to deduct the avoidable costs of operation and maintenance (the ***Avoidable Costs***) which are not being incurred by the Concessionaire from the Service Payment which RTD is required to pay the Concessionaire following the deemed occurrence of such Revenue Service Commencement Date. If the Concessionaire disputes any portion of the Avoidable Costs and it is later determined or agreed pursuant to the Dispute Resolution Procedure that the Concessionaire is entitled to such disputed portion of Avoidable Costs, RTD shall pay such disputed portion to the Concessionaire.

- (c) The Concessionaire shall be entitled to claim, and be paid by RTD, the Incurred Costs actually incurred by it as a result of the impact to the Concessionaire's performance of this Agreement caused by any Relief Event, including, for the avoidance of doubt, any increase in costs as a result of such Relief Event, (other than a Relief Event under Section 38.1(k), to which Section 38.7 (*Relief for Changes and Work Orders*) shall apply) occurring during the Design/Build Period, subject to Section 38.3 (*Mitigation in Case of a Relief Event*).
- (d) Any claim by the Concessionaire under Section 38.4(c) shall be accompanied by supporting details of the Incurred Costs claimed (the elements of which shall be calculated on the basis set out in the RTD Pricing Conditions).

Relief for Relief Events Occurring During the Operating Period

- 38.5 (a) Subject to compliance by the Concessionaire with this Section 38.5, if a Relief Event (other than a Relief Event under Section 38.1(k), to which Section 38.7 (*Relief for Changes and Work Orders*) shall apply) occurs during the Operating Period:
- (i) the Concessionaire shall be entitled to claim, and be paid by RTD, the Incurred Costs actually incurred by it as a result of the impact to the Concessionaire's performance of this Agreement, and any additional work it is required to carry out as a result of any of the Relief Events listed in paragraphs (g), (h), (i), (j), (k), (m), (n), (o), (q), (s), (t), (u), (v), (w), (x), (y), or (z) of Section 38.1 (*Relief Events*), including, for the avoidance of doubt, any increase in costs as a result of such Relief Event, (less any Avoidable Costs which are not being incurred by the Concessionaire), **provided** that the Concessionaire uses all Reasonable Efforts to mitigate such Incurred Costs; and
 - (ii) the Concessionaire shall not suffer any impact to the Availability Ratio or accrue any Performance Deductions as a result of the Relief Event where the events giving rise to the Relief Event would, absent a Relief Event, have caused such impact to the Availability Ratio to arise or such Performance Deductions to accrue.
- (b) Any claim by the Concessionaire under this Section 38.5 shall be accompanied by supporting details of the Incurred Costs claimed (the elements of which shall be calculated on the basis set out in the RTD Pricing Conditions).

Reductions for Contributory Acts of Concessionaire and Failure to Mitigate

- 38.6 The Incurred Costs payable by RTD as a result of any Relief Event shall be reduced by the portion of such Incurred Costs that directly resulted from:
- (a) any breach by the Concessionaire of its obligations under this Agreement or any of the other Project Agreements or any negligent act or omission of the Concessionaire; or
 - (b) any failure by the Concessionaire to comply with Section 38.3 (*Mitigation in Case of a Relief Event*).

Relief for Changes and Work Orders

- 38.7 (a) In the event of the occurrence of a Relief Event under Section 38.1(k), subject to Section 37.2 (*Change in Law Change*) in respect of Change in Law Changes, the Concessionaire shall be entitled to the following relief, as applicable:
- (i) an extension of time equal to the fixed period of time agreed between the Parties in respect of such Change in accordance with Section 36.1 (*Concessionaire Proposed Changes*) or Section 36.3 (*RTD Proposed Changes*) or as set out in the relevant Work Order in accordance with Section 15.6 (*Betterments and Alternative Solutions*), as applicable;
 - (ii) compensation equal to the fixed price agreed between the Parties in respect of such Change in accordance with Section 36.1 (*Concessionaire Proposed Changes*) or Section 36.3 (*RTD Proposed Changes*) or as set out in the relevant Work Order in accordance with Section 15.6 (*Betterments and Alternative Solutions*), as applicable;
 - (iii) compensation equal to the Concessionaire's Incurred Costs in connection with a Directive Letter to the extent that the Concessionaire was not required to perform the work identified in the Directive Letter as determined in accordance with Section 36.6(b); and
 - (iv) an adjustment to the Service Payment calculated in accordance with Section 38.8 (*Adjustments to the Service Payment*).
- (b) The Concessionaire agrees that its right to relief in respect of a Relief Event under Section 38.1(k), subject to Section 37.2 (*Change in Law Change*) in respect of Change in Law Changes, shall be limited to the relief referred to in Section 38.7(a) and that it shall not pursue, and hereby waives, any claims that it may have in respect of any additional cost or time relief consequences of such Relief Event whatsoever.

Adjustments to the Service Payment

- 38.8 (a) Following the occurrence of any Relief Event that results in the Concessionaire incurring additional capital expenditure or funding in accordance with Section 36.4 (*Funding of Changes*), an adjustment to the Service Payment for such Commuter Rail Service will be made in order to restore the respective economic position of the Parties as set out in the Financial Model immediately prior to such occurrence or payment, as the case may be, and, in the case of a Change, to ensure that the Concessionaire suffers no reduction in revenue or net income as a result of carrying out such Change.
- (b) In determining the adjustment to the Service Payment for such Commuter Rail Service to be made pursuant to Section 38.8(a), the following factors shall be taken into account:
- (i) the Equity IRR in respect of the aggregate of the share capital of the Concessionaire paid in to the Concessionaire and the principal of the Shareholder Loans advanced to the Concessionaire, projected immediately prior to the adjustment made pursuant to Section 38.8(a), will be unchanged following the adjustment; and

- (ii) where such adjustment is made following the occurrence of a Relief Event:
 - (A) any Incurred Costs resulting from such Relief Event, without double-counting of any direct lump sum payments of Incurred Costs made by RTD in accordance with Section 38.9 (*Payment of Incurred Costs*);
 - (B) any increase or decrease in the Concessionaire's operation and maintenance costs, including any increase or decrease in amounts payable by the Concessionaire to O&M Contractor under the O&M Contract; and
 - (C) any costs savings resulting from such Relief Event or payment.

Payment of Incurred Costs

- 38.9 (a) Any Incurred Costs payable by RTD in accordance with this Section 38 (*Relief Events*) shall be paid by RTD by direct lump sum payment in accordance with Section 51.1 (*Payments other than Construction Payments, Service Payments and Termination Payments*) or by an adjustment to the Service Payment in accordance with Section 38.8 (*Adjustments to the Service Payment*) as soon as possible following the occurrence of the Relief Event; **provided** that the amount and timing of such adjustment shall be determined by reference to the Financial Model so as to maintain the debt service coverage ratios (and/or other financial ratios) required to be maintained under the Designated Credit Agreements.
- (b) In accordance with Section 38.9(a) RTD may elect to require the Concessionaire to provide funding for any Incurred Costs payable by RTD in accordance with this Section 38 (*Relief Events*). If RTD makes such election, the Concessionaire shall request from the Lenders or other third party funders or financial institutions the provision of funds to finance the Incurred Costs payable by RTD in accordance with this Section 38 (*Relief Events*), it being understood that the Lenders may refuse the provision of any such funding in their sole discretion and that the Concessionaire shall be under no additional obligation (and shall not be in breach of any undertaking) in connection with the provision of any funding for any Incurred Costs payable by RTD in accordance with this Section 38 (*Relief Events*).
 - (c) The Concessionaire shall use its Reasonable Efforts to comply with any conditions to funding placed by the Lenders including requesting equity support from the Shareholders, it being understood that the Shareholders may refuse the provision of any such funding in their sole discretion and that in such a case the Concessionaire shall be under no additional obligation (and shall not be in breach of any undertaking) in connection with the provision of any funding for any Incurred Costs payable by RTD in accordance with this Section 38 (*Relief Events*).
 - (d) If in accordance with Sections 38.9(b) and 38.9(c) the Lenders or the Shareholders refuse to provide any funding for the implementation of any Incurred Costs payable by RTD in accordance with this Section 38 (*Relief Events*), RTD shall provide funding for the implementation of such Incurred Costs or otherwise adjust the manner of payment under Section 38.9(a) such that it is no longer necessary for the Concessionaire to secure additional funding.

Dispute as to Relief Event

38.10 Any Dispute between the Parties regarding the existence, duration or effect of any Relief Event may be referred by either Party for resolution in accordance with the Dispute Resolution Procedure.

Memorandum of Relief

38.11 Upon agreement between the Parties (or, as the case may be, upon determination in accordance with the Dispute Resolution Procedure) as to the scope of the relief to which the Concessionaire is entitled in respect of any Relief Event, the Parties shall execute a written memorandum setting out the details of such agreement (or, as the case may be, determination), including any necessary adjustments to the WBS Pricing Form or the Schedule of Values resulting from such Relief Event, which memorandum with respect to any Relief Event under Section 38.1(k) shall comply with and not alter the Parties obligations under Section 38.7 (*Relief for Changes and Work Orders*).

Exclusive Remedies

38.12 The Concessionaire agrees that, except as otherwise provided in this Agreement, the remedies set out in Sections 38.4 (*Extension of Time and Other Relief for Relief Events Occurring During the Design/Build Period*) and 38.5 (*Relief for Relief Events Occurring During the Operating Period*) or, as the case may be, Section 38.7 (*Relief for Changes and Work Orders*) will be its sole and exclusive remedies as against RTD for any Loss suffered or costs incurred by the Concessionaire arising out of or in connection with the Relief Event or the delay or disruption caused by the Relief Event.

39. FORCE MAJEURE

Force Majeure Events

39.1 For the purposes of this Agreement, the term ***Force Majeure Event*** means any of the following events or circumstances or any combination of such events or circumstances:

- (a) act of war (whether declared or undeclared), invasion, armed conflict, or act of foreign enemy, in each case involving, imminently threatened within or directly affecting the United States of America, **provided** that where only threatened, the actions taken by the Concessionaire must be reasonable in view of and proportionate to the threat;
- (b) the occurrence of force majeure under any Third Party Agreement or action (including a Change in Law) taken by any Project Third Party (or their respective agents or contractors) or any other Relevant Authority, including the Transportation Security Administration, the United States Department of Homeland Security, FRA, FTA or Federal Aviation Administration (or any successor entity of the foregoing agencies) in response to a threat to, or event affecting, the public health, safety, security or the Environment, in each case, the effect of which is to suspend, delay or disrupt the performance by the Concessionaire of any of its obligations under this Agreement;
- (c) revolution, riot, insurrection, civil commotion, sabotage or terrorism, **provided** that where only threatened, the actions taken by the Concessionaire must be reasonable in view of and proportionate to the threat;

- (d) strikes or industrial action unless they are solely restricted to employees of the Concessionaire, any Project Contractor and/or their respective Subcontractors;
- (e) nuclear explosion, radioactive or chemical contamination or ionizing radiation or electromagnetic pulse, biological contamination of any Site, unless the source or cause of the explosion, contamination, radiation, pulse or hazardous material is brought to or near such Site by the Concessionaire, the Design/Build Contractor or any Design/Build Subcontractor or any of their employees, servants, agents or consultants;
- (f) fire, explosion, sonic boom, storm, flood, earthquakes, landslide or severe weather but only where it causes material and unavoidable damage to all or any material part of any Site, the Work (including materials procured for use therein) or the Concessionaire-operated Components or otherwise causes the Concessionaire-operated Components to be unusable or substantially unusable;
- (g) any failure, shortage, or outage of power supplied by the Power Network;
- (h) a legally imposed quarantine, against which the Affected Party (as defined below) could not reasonably have been expected to take precautions, and which prevents or delays the performance by the Affected Party of its obligations under this Agreement;
- (i) embargo or trade sanctions having an adverse effect on the performance of this Agreement;
- (j) any other event outside the reasonable control of the Affected Party, and which was not reasonably foreseeable by the Affected Party as at the date of this Agreement, where such event materially and unavoidably prevents or delays the Affected Party from performing any of its obligations under this Agreement; **provided** that:
 - (i) the term "reasonably foreseeable" means any event or circumstance or category of events or circumstances specifically described in this Agreement or which the Affected Party knew, or should have known, may occur, and which is of a type that a construction contractor or operator, acting in accordance with Good Industry Practice and this Agreement, would have taken steps to avoid or protect itself against; and
 - (ii) an event shall not qualify as a Force Majeure Event under this Section 39.1(j) where:
 - (A) such event is a Force Majeure Event under paragraphs (a) to (i) above; or
 - (B) such event is an event of the same type as an event which is classified as a Relief Event,

but in each case only to the extent that:

- (I) the same is outside of the Concessionaire's control and does not arise from and is not contributed to by any breach by the Concessionaire of its obligations under this Agreement or the other Project Agreements or any other neglect, default, act or omission of the Concessionaire;

- (II) such events or circumstances have arisen notwithstanding the Concessionaire complying with its obligations under this Agreement, and in accordance with its obligations under Attachment 9 (*Project and Construction Management*) or the O&M Submittals;
- (III) the Concessionaire has at all times complied with its obligations under Section 39.7 (*Mitigation in Case of a Force Majeure Event*) with respect to minimizing and/or mitigating the consequences of the Force Majeure Event.

Relief from Liability

39.2 None of RTD, anyone acting on behalf of RTD, the Concessionaire or anyone acting on behalf of the Concessionaire will be liable for any failure to comply, or delay in complying, with any obligation under or pursuant to this Agreement to the extent that such failure or delay is caused directly by a Force Majeure Event, **provided** that no such relief may be claimed in respect of any obligation to pay any amounts that may from time to time become owing hereunder.

Notification and determination of the effect of a Force Majeure Event

- 39.3 (a) If either Party claims that it, or anyone acting on its behalf, has been prevented or delayed from or in performing any of its obligations under this Agreement by a Force Majeure Event, such Party (the *Affected Party*) shall give written notice to the other Party as soon as practicable (and in any event, within 10 days upon the Affected Party becoming aware of such Force Majeure Event (a *Force Majeure Notice*)).
- (b) The Force Majeure Notice will specify the circumstances constituting the Force Majeure Event, its likely duration and consequences (to the extent then reasonably ascertainable) and the Affected Party's obligations under this Agreement which is delayed or prevented.
 - (c) During a period of 30 days commencing from the receipt of a Force Majeure Notice by the relevant Party, RTD and the Concessionaire will meet to discuss the Force Majeure Event and its consequences and, to the extent then possible, to determine the most effective way of proceeding with the Affected Party's obligations, and with the Work or the operation of the Concessionaire-operated Components and will use all Reasonable Efforts to minimize the adverse effects of the Force Majeure Event.
 - (d) If RTD and the Concessionaire cannot agree on a way of proceeding with the Affected Party's obligations, and with the Work or the operation of the Concessionaire-operated Components during such 30-day period, either of the Parties may, within 10 days following such 30-day period, refer the Dispute for resolution in accordance with the Dispute Resolution Procedure or, if the Force Majeure Notice is not so contested, both RTD and the Concessionaire will be deemed to have accepted the validity of the claim.
 - (e) The Affected Party will keep the other Party informed of any further information it receives relating to the Force Majeure Event or any failure or delay in complying with its obligations under this Agreement.

Financial Responsibility

39.4 Subject to Section 39.8 (*Extensive Force Majeure Event*), so long as a Force Majeure Event is, or its consequences are, continuing, except as otherwise provided in this Agreement, the following shall apply in respect of a Force Majeure Event:

- (a) subject to Section 40 (*Damage to the Concessionaire-Operated Components*) and to the provision of funds by RTD where the Force Majeure Event is included in any Uninsurable Risk that RTD has assumed pursuant to Section 34.4 (*Uninsurable Risks*) or where Relevant Proceeds are not available pursuant to Section 40.3 (*Insurance Proceeds*) or are insufficient to fund the total costs of performing the Restoration Plan, the Concessionaire shall pay all the costs of rectifying any damage caused by a Force Majeure Event, and shall not be entitled to claim any Incurred Costs resulting from the Force Majeure Event;
- (b) the Concessionaire shall not be entitled to compensation for any loss of income or consequential loss; and
- (c) if occurring during the Operating Period, RTD shall continue to pay the Service Payment without deduction in respect of the effects of the Force Majeure Event.

Extension of Time for Force Majeure Events Occurring During the Design/Build Period

39.5 (a) Where the carrying out of the Work has been delayed as a result of the occurrence of a Force Majeure Event during the Design/Build Period, the dates for any Revenue Service Target Date, the Revenue Service Deadline Date and/or the Final Completion Deadline Date shall, to the extent necessary, be extended as agreed by the Parties, or as determined in accordance with the Dispute Resolution Procedure (as the case may be), to reflect the impact of the Force Majeure Event on the Critical Path of the Work. Such impact shall be determined:

- (i) taking into account the Concessionaire's representations in its Force Majeure Notice;
 - (ii) on the basis that the Concessionaire and the Design/Build Contractor will use Reasonable Efforts to minimize or mitigate the effects of the Force Majeure Event in accordance with Section 39.7 (*Mitigation in Case of a Force Majeure Event*); and
 - (iii) after taking into account any requirement by RTD for the Concessionaire to accelerate the relevant Work as an RTD Proposed Change.
- (b) If the occurrence of a Force Majeure Event or Force Majeure Events during the Design/Build Period prevents the Concessionaire from achieving the Revenue Service Commencement Date for a Commuter Rail Service, then the relevant Revenue Service Commencement Date shall be deemed to have occurred for the purposes of the payment of the Service Payment, but for no other purposes, on the date on which the Revenue Service Commencement Date would have occurred but for the Force Majeure Event or Force Majeure Events, as applicable, for such Commuter Rail Service (but for this purpose, no earlier than the Original Revenue Service Target Date for such Commuter Rail Service), and to the extent only of the extension of the relevant Revenue Service

Target Date in accordance with Section 39.5(a); **provided** that RTD shall be entitled to deduct the Avoidable Costs which are not being incurred by the Concessionaire from the Service Payment which RTD is required to pay the Concessionaire following the deemed occurrence of the relevant Revenue Service Commencement Date. If the Concessionaire disputes any portion of the Avoidable Costs and such dispute is later resolved in the Concessionaire's favor, RTD shall repay to the Concessionaire an amount equal to the disputed amount.

No Deductions from Service Payment for Force Majeure Events Occurring During the Operating Period

39.6 If a Force Majeure Event occurs during the Operating Period, the Concessionaire shall not suffer any impact to the Availability Ratio or accrue any Performance Deductions as a result of the Force Majeure Event, where the events giving rise to the Force Majeure Event would, absent a Force Majeure Event, have caused such impact to the Availability Ratio to arise or such Performance Deductions to accrue.

Mitigation in Case of a Force Majeure Event

39.7 The Parties will use their Reasonable Efforts to anticipate the effect of any Force Majeure Event and will use, and (so far as the Concessionaire is concerned) will require each of the Project Contractors and the Subcontractors to use, their Reasonable Efforts to minimize and/or mitigate the consequences of any Force Majeure Event (both in terms of delay and cost) which measures shall include:

- (a) rearranging the order in which the Work is scheduled to be performed under the Project Schedule;
- (b) procuring that the Work be divided (or further divided) into components that can be undertaken separately and/or concurrently; and
- (c) minimizing the costs of operation and maintenance (including overhead and variable costs) which are incurred during the continuance of the Force Majeure Event.

Extensive Force Majeure Event

39.8 (a) Without prejudice to any other provision of this Agreement, but subject to Section 39.8(c), where a Force Majeure Event has occurred and either:

- (i) the consequences thereof are continuing for a period of 180 consecutive days or more or have materially prevented or delayed a Party from performing a substantial proportion of its obligations under this Agreement for a period of 180 days or more in aggregate within a period of 360 consecutive days; or
- (ii) RTD has determined that the relevant Restoration Plan is unfeasible, in accordance with Section 40.2(e)(i),

(in either case, an **Extensive Force Majeure Event**) either Party may at its discretion, so long as such circumstance continues, terminate this Agreement by written notice to the other Party subject to Sections 39.8(b)

- (b) Where either Party, following an Extensive Force Majeure Event, has served a Termination Notice and the other Party has no later than seven days following receipt of such notice referred the question of whether or not the purported termination is wrongful for resolution in accordance with the Dispute Resolution Procedure, termination of this Agreement pursuant to Section 43.1 (*Handover and Reinstatement Work Procedures Following Termination*) will not take effect (but RTD may exercise its step-in rights under Section 41.2(b)(iii)) unless and until it is agreed by the Parties or finally determined in accordance with the Dispute Resolution Procedure that such termination is valid and the FM Termination Amount has been paid in full in accordance with Sections 42.3 (*Compensation Following Extensive Force Majeure Event*).
- (c) If RTD determines to proceed with the Restoration Plan in accordance with Section 40.2 (*Restoration*), without prejudice to any other right to terminate this Agreement set out in this Agreement, neither Party shall have the termination right referred to in Section 39.8(a).

Dispute

39.9 Any Dispute between the Parties regarding the existence, duration or effect of any Force Majeure Event may be referred for resolution in accordance with the Dispute Resolution Procedure.

Memorandum of Relief

39.10 Upon agreement between the Parties (or, as the case may be, upon determination in accordance with the Dispute Resolution Procedure) as to the scope of the relief to which the Concessionaire is entitled in respect of any Force Majeure Event, the Parties shall execute a written memorandum setting out the details of such agreement (or, as the case may be, determination).

40. DAMAGE TO THE CONCESSIONAIRE-OPERATED COMPONENTS

Damage to the Concessionaire-operated Components

40.1 If any part of the Concessionaire-operated Components shall be damaged or partially destroyed (a *Relevant Incident*, and such part of the Concessionaire-operated Components, the *Affected Portion*), the provisions of this Section 40 shall apply, irrespective of whether such Relevant Incident results from a Relief Event, a Concessionaire Termination Event or a Force Majeure Event.

Restoration

40.2 (a) Unless RTD agrees otherwise, upon the occurrence of a Relevant Incident where the cost of repairing the Affected Portion is in excess of either:

- (i) U.S.\$5,000,000; or
- (ii) the likely amount of the Relevant Proceeds in respect of the Relevant Incident,

the Concessionaire shall prepare and deliver to RTD as soon as practicable a plan (the *Restoration Plan*) prepared by the Concessionaire for the carrying out of the work

- necessary to repair, reinstate or replace the parts of the Affected Portion which have been damaged or destroyed (the **Restoration Work**) for the Affected Portion to be restored to a condition to satisfy the applicable Design, Construction and Rolling Stock Requirements and/or the applicable O&M Standards.
- (b) Upon the occurrence of a Relevant Incident to which the provisions of Section 40.2(a) do not apply, the Concessionaire shall proceed to restore or replace the Affected Portion promptly. To the extent required in accordance therewith, the Concessionaire shall provide to RTD a bond, letter of credit or other surety in compliance with §38-26-101 *et seq.* of the Colorado Revised Statutes, in a form substantially similar to the form of the Construction Security. The Concessionaire shall be entitled to use the Relevant Proceeds to fund such restoration or replacement.
- (c) The Restoration Plan shall set out:
- (i) a detailed breakdown of the costs of the Restoration Work;
 - (ii) the length of time estimated to carry out the Restoration Work and the period during which the Affected Portion (or any part thereof) will cease to operate;
 - (iii) the proposed terms and timetable upon which the Restoration Work is to be effected (including the date that the Affected Portion will become fully operational), the final terms of which shall be subject to the prior written approval of RTD; and
 - (iv) the identity of the Person proposed to effect the Restoration Work, which shall be subject to the prior written approval of RTD, unless such Person is the Design/Build Contractor, the O&M Contractor or any Material Design/Build Subcontractor and the Restoration Work is to be carried out during the Design/Build Period.
- (d) Upon receipt of the Restoration Plan, RTD shall consider the feasibility of carrying out the Restoration Work, taking into consideration the following factors:
- (i) the scope and extent of the Restoration Plan and the length of time projected in the Restoration Plan during which the Affected Portion (or any part thereof) will cease to operate;
 - (ii) the extent to which insurance proceeds will be available to fund the total cost of the Restoration Work or, to the extent that RTD has assumed any Uninsurable Risk pursuant to Section 34.4 (*Uninsurable Risk*), the extent to which RTD would be required to advance funds to finance the performance of the Restoration Plan;
 - (iii) the projected length of time (if any) during which RTD shall be required to continue to pay the Service Payment for the Affected Portion to the Concessionaire while the operation of the Affected Portion (or any part thereof) is suspended; and
 - (iv) whether, following the completion of the Restoration Work, the Service Payment will be sufficient to maintain the Base Case Equity IRR in respect of the

aggregate of the share capital of the Concessionaire paid in to the Concessionaire and the principal of the Shareholder Loans advanced to the Concessionaire, and any additional capital required to be invested as a result of the Restoration Work.

- (e) If, taking into consideration the factors set out in Section 40.2(d), acting reasonably, RTD determines that the Restoration Plan is not feasible and the Relevant Incident constitutes or results from:
- (i) a Force Majeure Event, either Party may at its discretion terminate this Agreement in its entirety by written notice to the other Party pursuant to Section 39.8 (*Extensive Force Majeure Event*) (provided the other requirements of Section 39.8 are satisfied); or
 - (ii) a Concessionaire Termination Event, RTD may terminate this Agreement pursuant to Section 41.2(b); **provided** that RTD shall not be required to serve notice of default on the Concessionaire requiring the Concessionaire to remedy the breach or to propose a reasonable plan for the remedying of the breach pursuant to Section 41.2(a)(i).
- (f) If RTD determines that the Restoration Plan is feasible:
- (i) the Parties agree and undertake that, subject to compliance by the other Party with its obligations under this Section 40.2 (*Restoration*), neither Party shall exercise any right which it might otherwise have to terminate this Agreement by virtue of the Relevant Incident;
 - (ii) the Restoration Plan will be adopted; **provided** that if RTD disagrees with any part of the Restoration Plan, either Party may refer the matters in dispute for resolution in accordance with the Dispute Resolution Procedure;
 - (iii) the Concessionaire shall enter into contractual arrangements to effect the Restoration Work with the Person and on the basis specified in the Restoration Plan and approved by RTD or as determined in accordance with the Dispute Resolution Procedure;
 - (iv) the Concessionaire shall provide to RTD a bond, letter of credit or other surety in compliance with Section 38-26-101 *et seq.*, Colorado Revised Statutes, in a form substantially similar to the form of the Construction Security;
 - (v) the cost of performing the Restoration Plan shall be funded by:
 - (A) to the extent Relevant Proceeds are available pursuant to Section 40.3 (*Insurance Proceeds*), the Relevant Proceeds; and
 - (B) to the extent Relevant Proceeds are not available pursuant to Section 40.3 (*Insurance Proceeds*) or are insufficient to fund the total costs of performing the Restoration Plan, RTD;
 - (vi) RTD undertakes to use Reasonable Efforts to assist the Concessionaire in the carrying out of the Restoration Plan; and

- (vii) the Concessionaire shall ensure the Restoration Work is carried out in accordance with Section 22.1 (*The Work*) as if Section 22.1 applied to the Restoration Work in the same manner as such provisions apply to the Concessionaire's performance of the Work. To the extent that RTD and the Concessionaire agree that any Restoration Work shall not be carried out in accordance with the Design, Construction and Rolling Stock Requirements, the Restoration Work shall be carried out in accordance with drawings and specifications which shall first be submitted for review and comment and in writing by RTD and, as applicable, the Project Third Parties.

Insurance Proceeds

40.3 If any part of the Concessionaire-operated Components in respect of which the Concessionaire or RTD, as the case may be, is obligated to maintain insurance pursuant to Section 34 (*Insurance*) shall be damaged or destroyed, the Concessionaire or RTD, as the case may be, shall (and, in the case of the Concessionaire, if applicable, shall ensure that the Project Contractors and their respective Subcontractors shall) pay all proceeds in respect of such loss or damage received under any insurance maintained or required under Section 34 (*Insurance*) (the **Relevant Proceeds**) into an escrow account in the joint names of RTD and the Concessionaire at a bank to be nominated by RTD (and advised to the insurers accordingly) and, subject to Section 40.2 (*Restoration*), such proceeds shall be released as required to enable the Concessionaire to make payments (i) for the cost of Restoration Work in circumstances where a Restoration Plan is not required under Section 40.2(b), (ii) in accordance with the contractual arrangements referred to in Section 40.2(f)(iii) and (iii) to meet any other reasonable costs and expenses of the Concessionaire (provided that such costs and expenses are recoverable or have been recovered from insurers) for the sole purpose of funding the Restoration Work. The foregoing obligation to pay, and ensure payment of, proceeds in respect of such loss and damage into an escrow account shall not apply to the proceeds of any insurances that the Concessionaire, the Project Contractors or their respective Subcontractors obtain that are additional to the insurances that they are obligated to maintain pursuant to Section 34 (*Insurance*). The Concessionaire shall provide to RTD from time to time such information as it may reasonably require in relation to the release of funds pursuant to this Section 40.3. If Section 40.2(a) applies and RTD (acting reasonably taking into account all circumstances including the amount of the Relevant Proceeds) determines that the Restoration Plan is not feasible and this Agreement is terminated pursuant to Section 40.2(e) or if any Relevant Proceeds held in the escrow account have not been utilized to fund the cost of performing the Restoration Plan (after such Restoration Plan has been fully carried out), in each case, such Relevant Proceeds shall be released to RTD.

PART 11 – TERMINATION AND HANDOVER

41. TERMINATION OF THE AGREEMENT

Concessionaire Termination Events

41.1 (a) Subject to Section 41.1(b), the following are Concessionaire Termination Events:

- (i) the Concessionaire fails to commence the Work within four months after the Phase 1 Effective Date;

- (ii) the Revenue Service Commencement Certificate in respect of any Commuter Rail Service is not, or there is no reasonable prospect of it being, issued on or before the Revenue Service Deadline Date (any Dispute as to what constitutes "no reasonable prospect" shall be determined by the Technical Panel in accordance with the Dispute Resolution Procedure), **provided** that, with respect to the Gold Line Service and the Northwest Rail Electrified Segment Service, no such Concessionaire Termination Event may arise if the Phase 2 Effective Date has not occurred;
- (iii) the Final Completion Certificate in respect of any Commuter Rail Project is not, or there is no reasonable prospect of it being, issued on or before the Final Completion Deadline Date (any Dispute as to what constitutes "no reasonable prospect" shall be determined by the Technical Panel in accordance with the Dispute Resolution Procedure), **provided** that, with respect to the Gold Line Project and the Northwest Rail Electrified Segment Project, no such Concessionaire Termination Event may arise if the Phase 2 Effective Date has not occurred;
- (iv) the Concessionaire abandons the Work and (A) the Concessionaire expressly declares in writing that it will not resume the Work or (B) such abandonment continues for 90 consecutive days without prior written consent of RTD;
- (v) an involuntary proceeding shall be commenced or an involuntary petition shall be filed seeking (A) liquidation, reorganization or other relief in respect of any of the Concessionaire, the Shareholders, the Design/Build Contractor (during the Design/Build Period), the Rolling Stock Supplier (during the Design/Build Period) or the O&M Contractor (during the Operating Period) or any of their debts, or of a substantial part of their assets, under any Federal, state or foreign bankruptcy, insolvency, receivership or similar law now or hereafter in effect or (B) the appointment of a receiver, trustee, custodian, sequestrator, conservator or similar official for any of the Concessionaire, the Shareholders, the Design/Build Contractor (during the Design/Build Period), the Rolling Stock Supplier (during the Design/Build Period or the Operating Period) or the O&M Contractor (during the Operating Period) or for a substantial part of any of their assets, and, in any such case, such proceeding or petition shall continue undismissed for a period of 60 or more days or an order or decree approving or ordering any of the foregoing shall be entered; **provided** that no such Concessionaire Termination Event shall have occurred: (x) in the case of insolvency of a Shareholder, where such insolvent Shareholder has transferred its ownership in the Concessionaire and its equity funding obligations to any other existing solvent Shareholder no later than 60 days following such insolvency; and (y) in the case of insolvency of any Project Contractor, the Concessionaire has entered into a replacement Design/Build Contract or O&M Contract or, as the case may be, the Design/Build Contractor has entered into a Replacement Rolling Stock Supply Contract, in any such case, with a reputable counterparty reasonably acceptable to RTD no later than 60 days following the date of termination of the Design/Build Contract, the O&M Contract and/or the Rolling Stock Supply Contract (as applicable);

- (vi) any of the Concessionaire, the Shareholders, the Design/Build Contractor (during the Design/Build Period), the Rolling Stock Supplier (during the Design/Build Period or the Operating Period) or the O&M Contractor (during the Operating Period) shall (A) voluntarily commence any proceeding or file any petition seeking liquidation, reorganization or other relief under any Federal, state or foreign bankruptcy, insolvency, receivership or similar law now or hereafter in effect, (B) consent to the institution of, or fail to contest in a timely and appropriate manner, any proceeding or petition described in paragraph (v) above, (C) apply for or consent to the appointment of a receiver, trustee, custodian, sequestrator, conservator or similar official for itself or for a substantial part of its assets, (D) file an answer admitting the material allegations of a petition filed against it in any such proceeding, (E) make a general assignment for the benefit of creditors or (F) take any action for the purpose of effecting any of the foregoing; **provided** that no such Concessionaire Termination Event shall have occurred: (x) in the case of insolvency of a Shareholder, where such insolvent Shareholder has transferred its ownership in the Concessionaire to any other existing solvent Shareholder no later than 60 days following such insolvency; and (y) in the case of insolvency of any Project Contractor, the Concessionaire has entered into a replacement Design/Build Contract or O&M Contract or, as the case may be, the Design/Build Contractor has entered into a Replacement Rolling Stock Supply Contract, in any such case, with a reputable counterparty reasonably acceptable to RTD no later than 60 days following the date of termination of the Design/Build Contract, the O&M Contract and/or the Rolling Stock Supply Contract (as applicable);
- (vii) the operation of the Concessionaire-operated Components by the Concessionaire in a manner violating the Applicable Requirements or this Agreement and endangering the safety of Passengers following a written notice from RTD outlining such safety concerns;
- (viii) any failure by the Concessionaire to obtain and maintain sufficient committed funding for the Eagle Project (A) during the Design/Build Period or (B) after the last Final Completion Date, in the event there are any material cost overruns for which the Concessionaire is required to secure funding which failure to obtain and maintain sufficient committed funding would, with the passage of time, reasonably be expected to result in a Concessionaire Termination Event (other than under this Section 41.1(a)(viii)), in either case (A) or (B), which failure has not been remedied by the Concessionaire within a period of 90 days following its occurrence;
- (ix) the Design/Build Contract is terminated during the Design/Build Period, the Rolling Stock Supply Contract is terminated during the Design/Build Period or the Operating Period and/or the O&M Contract is terminated during the Operating Period and the Concessionaire has not entered into a replacement O&M Contract or Design/Build Contract or, as the case may be, the Design/Build Contractor has not entered into a Replacement Rolling Stock Supply Contract, in any such case, with a reputable counterparty reasonably acceptable to RTD within 90 days following the date of termination of Design/Build Contract and/or the O&M Contract and/or within 60 days following the termination of the Rolling Stock Supply Contract (as applicable);

- (x) the Concessionaire sells, transfers, leases or otherwise disposes of all or any part (which has a material adverse effect in the Concessionaire's ability to carry out its obligations under this Agreement) of its undertakings, properties or assets by a single transaction or a number of transactions (whether related or not and whether at the same time or over a period of time and other than in respect of the grant of security pursuant to Section 48.2 (*Security*)) without the prior consent of RTD (such consent not to be unreasonably withheld or delayed);
- (xi) the Concessionaire fails to provide the Handover Security required by the time specified in Section 44 (*Handover and Reinstatement Work Requirements on the Expiry Date*) and RTD is unable to cover the amount of the Handover Security by deductions from the Service Payment transferred into the Handover Escrow Account as set out in Section 1.5 (*Handover Security*) of Attachment 14 (*Handover and Reinstatement Work Procedures*);
- (xii) the non-compliance with any share transfer restrictions or any change in control limitation as contemplated by Section 45 (*Shareholders*);
- (xiii) the Concessionaire fails to comply in any material respect with any Specified Requirement or any Applicable Requirement;
- (xiv) the Concessionaire fails to comply with any material requirement of Section 34 (*Insurance*) and Attachment 12 (*Insurance*);
- (xv) any of the representations or warranties referred to in Section 7.1 (*Concessionaire Representations and Warranties*) prove to have been materially untrue or incorrect when made to the extent that such breach of representation or warranty has a material adverse effect on the Eagle Project as a whole or the interests of RTD;
- (xvi) any breach by the Concessionaire of its obligations under Section 48 (*Assignment*);
- (xvii) any material breach by the Concessionaire of its obligations in respect of subcontracting, including the provisions of Part B (*Disadvantaged and Small Business Enterprises Programs*) of Attachment 15 (*Specified Requirements*);
- (xviii) any of the Project Agreements other than this Agreement:
 - (A) ceases to be in full force and effect or no longer constitutes the valid, binding and enforceable obligations of the Parties thereto other than RTD (other than due to the termination of such Project Agreement, or an involuntary bankruptcy event or a voluntary bankruptcy event, in each case as defined in such Project Agreement, which shall be governed by Sections 41.1(a)(v) and 41.1(a)(vi)); or
 - (B) is materially amended, varied or departed from (other than in accordance with this Agreement),

and this materially adversely affects the ability of the Concessionaire to perform its obligations under this Agreement, or any right of RTD under this Agreement

or its ability to enforce any such right, or to perform its obligations under this Agreement;

- (xix) the Availability Ratio of any Commuter Rail Service (treating the Gold Line Service and the Northwest Rail Electrified Segment Service as a single Commuter Rail Service for purposes of clause (B) hereof) is less than (A) 80% in two or more months between the applicable Revenue Service Commencement Date and the applicable Final Completion Date or (B) 85% in six or more months of any eight-month period, **provided** in each case (A) and (B) that a single, continuous event lasting no more than 30 days extends across two calendar months and directly causing the Availability Ratio in both such months to fall below 80% or 85%, as applicable, shall be deemed to have resulted in an Availability Ratio less than 80% or 85%, as applicable, in the first such month only;
 - (xx) the Performance Deduction Percentage exceeds 3% of the Adjustable Base Service Payment for the relevant month in six or more months of any eight-month period; and
 - (xxi) without limitation to paragraphs (i) to (xx) above, any breach of any other material obligations of the Concessionaire under this Agreement (but only to the extent such breach (A) is not the subject of Performance Deductions, (B) has not resulted in any impact on the Availability Ratio and (C) is not otherwise the subject of penalties or deductions under this Agreement) or any written repudiation of this Agreement by the Concessionaire.
- (b) Notwithstanding Section 41.1(a), no Concessionaire Termination Event shall arise where a default by the Concessionaire under this Agreement arises as a result of:
- (i) actions or omissions by RTD where the Concessionaire is otherwise in compliance with its obligations under this Agreement in respect of which the Concessionaire Termination Event has arisen; or
 - (ii) a Relief Event or a Force Majeure Event (other than to the extent another Concessionaire Termination Event has occurred notwithstanding the occurrence of such Relief Event or Force Majeure Event).

Consequences of a Concessionaire Termination Event

41.2 (a) Subject to the terms of the Lenders' Direct Agreement, upon the occurrence of a Concessionaire Termination Event and so long as such event is continuing:

- (i) in the case of a Concessionaire Termination Event other than those referred to in paragraphs (v), (vi), (xix) or (xx) of Section 41.1(a), RTD shall serve notice of default on the Concessionaire requiring the Concessionaire, at the Concessionaire's option, to either:
 - (A) remedy the breach or breaches referred to in such notice of default no later than 30 days following such notice (or 60 days in the case of a Concessionaire Termination Event referred to in paragraph (xviii) of

Section 41.1(a), or otherwise such longer period as may be agreed by RTD in its absolute discretion); or

- (B) propose no later than 20 days following such notice a reasonable plan for the remedying of the breach or breaches, such plan to specify in reasonable detail the manner in which such breach or breaches is or are proposed to be remedied or prevented and, if applicable, the latest date by which it is proposed that such breach or all such breaches shall be remedied,

during which period RTD may not, in either case, exercise any rights to terminate this Agreement, but (subject to Section 41.3 (*Remedial Plan*)) following which RTD may terminate this Agreement with immediate effect; and

- (ii) in the case of the Concessionaire Termination Events referred to in paragraphs (v), (vi), (xix) or (xx) of Section 41.1(a), RTD may terminate this Agreement by notice in writing having immediate effect subject to Section 41.6 (*Disputed Termination*).

- (b) Subject to compliance with Sections 41.2(a) and 41.3 (*Remedial Plan*) and the terms of the Lenders' Direct Agreement, and so long as the Concessionaire Termination Event is continuing, RTD may at its option and without prejudice to any of its other rights or remedies and to any rights of action which shall accrue or shall have already accrued to RTD, do any or all of the following:

- (i) require the Concessionaire to participate in and carry out such of the handover procedures set out in Section 1.7 (*Handover Procedures at the end of the term*) of Attachment 14 as RTD considers necessary in order for RTD to take over the operation and maintenance of the Concessionaire-operated Components during the period in which RTD exercises its step-in rights in accordance with Section 41.2(b)(iii);
- (ii) suspend payment of the Construction Payments and/or Service Payments (as the case may be) and any other payments otherwise due hereunder, but only during the period in which RTD exercises its step-in rights in accordance with Section 41.2(b)(iii); and
- (iii) without terminating this Agreement, by notice in writing having immediate effect, following the conclusion of any applicable Cure Period or Step-in Period (each as defined in the Lenders' Direct Agreement), RTD may suspend performance by the Concessionaire of the Work or operation by the Concessionaire of the Concessionaire-operated Components or any system comprising the Concessionaire-operated Components, remove the Concessionaire from any Site and the Concessionaire-operated Components and take over the performance of the Eagle Project or any part thereof (in which case the Concessionaire shall reimburse RTD for all reasonable costs incurred by it in performing or engaging others to perform the functions of the Concessionaire (including the relevant administrative expenses of RTD)); **provided** that, notwithstanding the suspension or removal of the Concessionaire, the Concessionaire is not released from its obligations, liabilities or responsibilities

under this Agreement (except during the continuance of such suspension and removal with respect to such obligations, liabilities or responsibilities that are in fact suspended) and this Agreement shall remain in full force and effect for a period of 180 days from the date on which RTD first exercised its rights under this Section 41.2(b)(iii). After such period has elapsed, RTD shall terminate this Agreement in its entirety by notice in writing, having immediate effect subject to Section 41.6 (*Disputed Termination*).

Remedial Plan

41.3 (a) Where the Concessionaire proposes a plan in accordance with Section 41.2(a)(i)(B), RTD shall notify the Concessionaire no later than 20 days following receipt of such plan if it does not accept such plan as being reasonable and provide reasons in respect thereof, failing which RTD shall be deemed to have accepted such plan. Where RTD notifies the Concessionaire that it does not accept such plan as being reasonable, the Parties shall meet no later than the following five days in order to agree any necessary amendments to the plan proposed. If the Parties fail to agree no later than such five-day period, the question of whether or not the plan (as the same may have been amended by agreement) is reasonable may be referred by either Party for resolution in accordance with the Dispute Resolution Procedure.

(b) If:

- (i) the breach or breaches notified in a notice of default served under Section 41.2(a)(i) is or are not remedied or rectified:
 - (A) before the expiry of the period referred to in Section 41.2(a)(i)(A) (if applicable); or
 - (B) where the Concessionaire proposes a plan pursuant to Section 41.2(a)(i)(B) which has been accepted by RTD or determined in accordance with the Dispute Resolution Procedure as being reasonable, but the Concessionaire has subsequently not acted in accordance with such plan; or
- (ii) a plan proposed by the Concessionaire pursuant to Section 41.2(a)(i)(B) is rejected by RTD as not being reasonable, and, where referred for resolution in accordance with the Dispute Resolution Procedure, RTD's rejection of such plan is not reversed as a result of such reference to the Dispute Resolution Procedure,

RTD may, if the Concessionaire Termination Event is continuing unremedied and unwaived, and subject to compliance with Sections 41.2(a) (*Consequences of a Concessionaire Termination Event*) and the Lender's Direct Agreement, terminate this Agreement in its entirety by notice in writing having immediate effect subject to Section 41.6 (*Disputed Termination*).

RTD Termination Events

41.4 The following are RTD Termination Events:

- (a) other than as a result of any failure to appropriate (by inclusion in its annual or any interim budget) monies for the purposes of RTD Appropriation Obligations as described in Section 41.4(b), RTD fails to pay any undisputed amount within 10 days after the due date;
- (b) the Board fails, by the end of a Fiscal Year, to make an appropriation (by inclusion in its annual or any interim budget) of monies for the purposes of RTD Appropriation Obligations (other than any Applicable Termination Amount) pursuant to this Agreement in an amount sufficient to fund the RTD Appropriation Obligations (other than any Applicable Termination Amount) estimated to fall due, or that have fallen due, during such Fiscal Year.
- (c) a Discriminatory Change in Law or a Change in Law exceeding any of the thresholds set out in Section 37.2(b), but only where RTD is not providing compensation to the Concessionaire to compensate it for the effects of the Discriminatory Change in Law or Change in Law, as required by the terms of this Agreement; and
- (d) the obligations of RTD under this Agreement are or become illegal, unenforceable, void or voidable, and as a result, RTD is or becomes unable to perform its material obligations under this Agreement.

Consequences of an RTD Termination Event

- 41.5 (a) Upon the occurrence of an event which, in the opinion of the Concessionaire, is or could become an RTD Termination Event, the Concessionaire shall serve notice on RTD of the occurrence of such RTD Termination Event.
- (b) Upon the occurrence of an RTD Termination Event and so long as such RTD Termination Event is continuing, the Concessionaire may, at its option, serve notice on RTD requiring RTD to rectify or remedy the RTD Termination Event (the ***Initial Termination Notice***). If the relevant matter or circumstance has not been rectified or remedied by RTD or otherwise no later than 10 days following the receipt of the Initial Termination Notice (in the case of an RTD Termination Event under paragraph (a) of Section 41.4 (*RTD Termination Events*)) or 45 days (in the case of all other RTD Termination Events), the Concessionaire may serve a further notice to the General Manager (the ***Second Termination Notice***). If the relevant matter or circumstance has not been rectified or remedied by RTD or otherwise no later than five days following the receipt of the Second Termination Notice (in the case of an RTD Termination Event under paragraph (a) of Section 41.4 (*RTD Termination Events*)) or 45 days (in the case of all other RTD Termination Events), the Concessionaire may serve a final notice on RTD terminating this Agreement in its entirety subject to Sections 41.6 (*Disputed Termination*).
- (c) The Concessionaire may only give notice to RTD terminating this Agreement in accordance with the provisions of this Section 41.5.

Disputed Termination

41.6 Where either Party has served a Termination Notice (including a Termination Notice expressed in this Section 41 to have immediate effect) and the other Party has within seven days of receipt of such notice referred the question of whether or not the termination which is claimed to have occurred is wrongful for resolution in accordance with the Dispute Resolution Procedure, termination of this Agreement pursuant to Section 43.1 (*Handover and Reinstatement Work Procedures*) (*Following Termination*) will not take effect (but RTD may exercise its step-in rights under Section 41.2(b)(iii)) unless and until it is agreed by the Parties or finally determined in accordance with the Dispute Resolution Procedure that such termination is valid.

Continuation of Obligation until End Date

41.7 Subject to the exercise by RTD of its step-in rights under Section 41.2(b)(iii), the Parties will continue to perform their obligations under this Agreement, notwithstanding the provision of any Termination Notice, until the termination becomes final and effective in accordance with the provisions of this Section 41 (*Termination*) and the Lenders' Direct Agreement.

42. COMPENSATION FOLLOWING TERMINATION

Compensation Following Concessionaire Termination Event

42.1 If this Agreement is terminated following delivery of a Termination Notice by RTD pursuant to Section 41.2 (*Consequences of a Concessionaire Termination Event*), RTD shall pay to the Concessionaire, in accordance with Section 42.4 (*Compensation Following Termination*), an amount equal to the Concessionaire Default Amount, as defined, and in accordance with the procedures set forth, in Part A (*Compensation Payable Following Concessionaire Termination Event*) of Attachment 13 (*Compensation Following Termination*).

Compensation Following RTD Termination Event or Failure to Deliver Full Phase 1 Notice to Proceed

42.2 If this Agreement is terminated following delivery of a Termination Notice by (a) either Party pursuant to Section 5.13(b), (b) RTD pursuant to Section 5.13(c)(iii) or (c) by the Concessionaire pursuant to Section 41.5 (*Consequences of an RTD Termination Event*), RTD shall pay to the Concessionaire, in accordance with Section 42.4 (*Compensation Following Termination*), the RTD Default Amount as defined in Part B (*Compensation Payable Following RTD Termination Event or Failure to Deliver Full Phase 1 Notice to Proceed*) of Attachment 13 (*Compensation Following Termination*).

Compensation Following Extensive Force Majeure Event

42.3 If this Agreement is terminated following delivery of a Termination Notice by either Party pursuant to Section 39.8 (*Extensive Force Majeure Event*), RTD shall pay to the Concessionaire, in accordance with Section 42.4 (*Compensation Following Termination*), the FM Termination Amount as defined in Part C (*Compensation Payable Following Extensive Force Majeure Event*) of Attachment 13 (*Compensation Following Termination*).

Compensation Following Termination

- 42.4 (a) Any Applicable Termination Amount shall be due and payable by RTD 60 days after the Termination Date. If RTD pays the RTD Default Amount on or before 60 days after the Termination Date, then the applicable RTD Termination Event will be deemed to have not occurred (other than for purposes of having required payment of the RTD Default Amount); **provided** that this Agreement shall thereafter terminate in accordance with its terms.
- (b) From the Termination Date and until the Expiry Date (such period, the *Termination Payment Period*), RTD shall pay to the Concessionaire in respect of the Applicable Termination Amount the TABOR Portion in accordance with the Trustee's Instructions during the applicable calendar year for which TABOR Portion amounts are set forth in Table 4 of Part H (*TABOR Secured Payments*) in Attachment 11 (*Service Payments*), pro rata on a monthly basis during such calendar year on the fifth Business Day of each month during such calendar year in an aggregate amount (together with any Additional TABOR Portion amounts or other amounts paid by RTD to the Concessionaire in respect of the Applicable Termination Amount) not to exceed the Applicable Termination Amount. Following the Expiry Date (if RTD has not paid the Applicable Termination Amount in full to the Concessionaire) and only until RTD has paid the Applicable Termination Amount in full to the Concessionaire, the payment of such Applicable Termination Amount shall continue to be secured by the pledge of RTD Pledged Revenues pursuant to Section 30.3 (*TABOR Portion*) hereof and the Trustee's Instructions and RTD shall continue to pay to the Concessionaire that portion of the Applicable Termination Amount which on the Expiry Date was secured as the TABOR Portion and any Additional TABOR Portion in accordance with the terms of this Agreement and the Trustee's Instructions, provided that such pledge and payment pursuant to the Trustee's Instructions after the Expiry Date shall cease when any such payment by RTD would cause:
- (i) the Net Effective Interest Rate for the TABOR Portions, the Additional TABOR Portions and all indebtedness issued pursuant to the 2004 Approval to exceed 7%; or
 - (ii) the aggregate amounts paid by RTD for the TABOR Portions, the Additional TABOR Portions, pursuant to this Section 42.4(b), and all other indebtedness issued by RTD pursuant to the 2004 Approval to exceed a principal amount of U.S.\$3,477,000,000, a maximum total repayment cost of U.S.\$7,129,000,000 or a maximum annual repayment cost of U.S.\$309,738,000.

Any portion of the Applicable Termination Amount that then remains unpaid shall also constitute an RTD Appropriation Obligation.

- (c) If the Applicable Termination Amount has not been fully paid by RTD and if the Concessionaire has delivered an Additional TABOR Portion Notice to RTD, RTD shall pay to the Concessionaire the Additional TABOR Portion in accordance with the Trustee's Instructions during the applicable calendar year for which Additional TABOR Portion amounts are set forth in the Additional TABOR Portion Notice (and commencing no earlier than the date on which interest (as specified in the Additional TABOR Portion Notice) begins to accrue), pro rata on a monthly basis during such calendar year on the

- fifth Business Day of each month during such calendar year in an aggregate amount (together with any TABOR Portion amounts or other amounts paid by RTD to the Concessionaire in respect of the Applicable Termination Amount) not to exceed the Applicable Termination Amount.
- (d) The obligation of RTD to pay the Additional TABOR Portions pursuant to Section 42.4(c) is entered into pursuant to the 2004 Approval. RTD hereby pledges to the Concessionaire the RTD Pledged Revenues to the extent such revenues are available, to secure the payment of the Additional TABOR Portions. Pursuant to Sections 4-9-109(e) and 11-57-208(2), Colorado Revised Statutes, the RTD Pledged Revenues shall be immediately subject to the lien of such pledge without any physical delivery, filing or further act. Pursuant to Sections 4-9-109(e), and 11-57-208(2), Colorado Revised Statutes, the obligation to pay the Additional TABOR Portion from the RTD Pledged Revenues hereunder shall have priority over any or all other obligations and liabilities of RTD to the extent provided herein, and the lien of such pledge shall be valid and binding as against all parties having claims of any kind in tort, contract or otherwise against RTD irrespective of whether such parties have notice thereof. RTD's obligation to pay the Additional TABOR Portions shall be a special and limited obligation of RTD secured by an irrevocable pledge of, and payable from, the RTD Pledged Revenues. RTD's obligation to pay the Additional TABOR Portions shall be subordinate to all Senior RTD Debt, whether currently outstanding or incurred or issued in the future by RTD in accordance with the provisions hereof. RTD's obligation to pay the Additional TABOR Portions shall not be secured by any encumbrance, mortgage, or other pledge of property of RTD, other than the RTD Pledged Revenues. No property of RTD, other than the RTD Pledged Revenues, shall be liable to be forfeited or taken in payment of the obligation of RTD to pay the Additional TABOR Portions. RTD's obligation to pay the Additional TABOR Portions shall not in any way create or constitute any indebtedness, liability, or obligation of the State of Colorado or of any political subdivision thereof, except RTD, and nothing in this Agreement shall be construed to authorize RTD to incur any indebtedness on behalf of, or in any way to obligate, the State of Colorado any political subdivision thereof, except RTD.
- (e) For the avoidance of doubt, (A) Section 30.3 (*TABOR Portion*) shall continue to apply to RTD's obligation to pay the TABOR Portions pursuant to this Section 42.4, and (B) RTD's obligation to pay at any time an amount equal to (x) the Applicable Termination Amount, minus (y) the TABOR Portion plus the Additional TABOR Portion for the applicable calendar year shall constitute an RTD Appropriation Obligation.
- (f) RTD shall, from time to time, use its best efforts, including the expenditure of reasonable costs and financing fees related to such financing, to effect a "refinancing" of the TABOR Portions and Additional TABOR Portions payable by RTD under this Agreement to the extent RTD is permitted to do so pursuant to the Law of the State of Colorado including Article X Section 20 of the Colorado Constitution, **provided** that RTD applies the proceeds of any such refinancing (i) plus any amounts that the Board has appropriated specifically for this purpose to pay all (but not part) of the outstanding Applicable Termination Amount to the Concessionaire or (ii) with the consent of the Concessionaire, to pay part of the outstanding Applicable Termination Amount to the Concessionaire. RTD may, in its sole discretion, at any time, appropriate funds and pay any or all of the outstanding Applicable Termination Amount to the Concessionaire. In making such a partial payment with respect to any RTD Default Amount due as a result of a termination

- in accordance with Sections 5.13(b) or 5.13(c)(iii) RTD may, in its sole discretion, direct that such partial payment be made or credited against components of the RTD Default Amount other than the Lenders' Liabilities as determined in accordance with Section 2 (*Calculation of RTD Default Amount*) of Part B (*Compensation Payable following RTD Termination Event*) of Attachment 13 (*Compensation Following Termination*).
- (g) On each anniversary of the Termination Date during the Termination Payment Period and immediately prior to any payment by RTD of all of the outstanding Applicable Termination Amount pursuant to Section 42.4(f), if the Applicable Termination Amount is:
- (i) an RTD Default Amount, the Applicable Termination Amount shall be recalculated in accordance with Part B (*Compensation Payable Following RTD Termination Event*) of Attachment 13 (*Compensation Following Termination*) (but as at such anniversary and not at the Termination Date), **provided** that the Equity Market Value component of the RTD Default Amount initially determined in accordance with Section 2(b) of Part B (*Compensation Payable Following RTD Termination Event*) of Attachment 13 (*Compensation Following Termination*) shall not be recalculated but any unpaid amount of such Equity Market Value shall instead accrue interest at a rate equal to the discount rate utilized in the calculation of the Equity Market Value pursuant to the definition thereof set forth in Attachment 13 (*Compensation Following Termination*),
 - (ii) a Concessionaire Default Amount, the Applicable Termination Amount shall be recalculated in accordance with Part A (*Compensation Payable Following Concessionaire Termination Event*) of Attachment 13 (*Compensation Following Termination*) (but as at such anniversary and not at the Termination Date), **provided** that the Project Implementation Costs component of the Concessionaire Default Amount initially determined in accordance with Section 2.1(a) or Section 2.3(a) of Part A (*Compensation Payable Following Concessionaire Termination Event*) of Attachment 13 (*Compensation Following Termination*) shall not be recalculated but instead any unpaid amount of such Project Implementation Costs shall accrue interest in accordance with Section 42.4(h) or
 - (iii) an FM Termination Amount, the Applicable Termination Amount shall be recalculated in accordance with Part C (*Compensation Payable Following Extensive Force Majeure Event*) of Attachment 13 (*Compensation Following Termination*) (but as at such anniversary and not at the Termination Date), **provided** that the equity component of the FM Termination Amount initially determined in accordance with Section 2(b) of Part C (*Compensation Payable Following Extensive Force Majeure Event*) of Attachment 13 (*Compensation Following Termination*) shall not be recalculated but instead any unpaid amount of such equity component shall accrue interest in accordance with Section 42.4(h)),

and in each case (i), (ii) and (iii) above, thereafter, the Applicable Termination Amount hereunder shall be such Applicable Termination Amount less all amounts previously paid by RTD to the Concessionaire pursuant to Sections 42.4(b), 42.4(c) and 42.4(f) to the extent not otherwise deducted in calculating the Termination

Amount pursuant to Attachment 13 (*Compensation Following Termination*) as specified in Section 42.4(g)(iii).

- (h) No default interest shall accrue on any RTD Default Amount, Concessionaire Default Amount (other than on the Project Implementation Costs component of any Concessionaire Default Amount initially determined in accordance with Section 2.1(a) or Section 2.3(a) of Part A (*Compensation Payable Following Concessionaire Termination Event*) of Attachment 13 (*Compensation Following Termination*) as specified in Section 42.4(g)(ii) above) or FM Termination Amount (other than on the equity component of any FM Termination Amount initially determined in accordance with Section 2(b) of Part C (*Compensation Payable Following Extensive Force Majeure Event*) of Attachment 13 (*Compensation Following Termination*) as specified in Section 42.4(g)(iii) above).

Full and Final Settlement and Acknowledgement of Applicable Termination Amounts

42.5 RTD acknowledges and agrees that the Concessionaire may incur Losses following the occurrence of a Concessionaire Termination Event, RTD Termination Event or FM Termination Event. The Parties acknowledge that it is difficult to ascertain in advance the extent of the Losses resulting from a Concessionaire Termination Event, RTD Termination Event or FM Termination Event, and therefore intend to liquidate damages for a Concessionaire Termination Event, RTD Termination Event or FM Termination Event through payment of the Applicable Termination Amount. The Parties acknowledge that the Applicable Termination Amount is a reasonable estimate, and not a penalty, of the presumed actual Losses that a Concessionaire Termination Event, RTD Termination Event or FM Termination Event would cause the Concessionaire, and that the calculation of any such reasonably estimated Applicable Termination Amount includes consideration of the Concessionaire's Work-related costs (direct and indirect), Equity Commitments and any Shareholder Loans, costs relating to debt repayment and costs relating to any Concessionaire Termination Event, RTD Termination Event or FM Termination Event. Notwithstanding anything in this Agreement (including in Section 50 (*Dispute Resolution Procedure*) hereof) to the contrary, subject to the last sentence of this Section 42.5, payment of the Applicable Termination Amount shall be the sole and exclusive remedy available to the Concessionaire for the occurrence of a Concessionaire Termination Event, RTD Termination Event or FM Termination Event. The Concessionaire acknowledges that it is waiving its rights to seek an alternative remedy at law or at equity for the occurrence of a Concessionaire Termination Event, RTD Termination Event or FM Termination Event. Indefeasible payment by RTD to the Concessionaire of all amounts payable by RTD in respect of the Applicable Termination Amount pursuant to and in accordance with Section 42.4 (*Compensation Following Termination*) following a Concessionaire Termination Event, FM Termination Event or RTD Termination Event, shall constitute full and final settlement of any Claim against RTD of the Concessionaire, the Project Contractors, their respective Subcontractors, the Shareholders and/or the Lenders in relation to such Concessionaire Termination Event, RTD Termination Event or FM Termination Event and shall be the sole remedy against RTD in respect of any such termination.

43. EFFECT OF TERMINATION

Handover and Reinstatement Work Procedures Following Termination

- 43.1 (a) Upon the effectiveness of the termination of the Lease Period, the remaining rights of the Concessionaire under this Agreement (other than the leases referred to in

Sections 2.2(b) with respect to the Rolling Stock but only to the extent that the Rolling Stock Termination Date occurs after the End Date) will immediately and automatically terminate and the Concessionaire will handover, and, to the extent not already owned by RTD, transfer to RTD ownership of title, free from all Encumbrances, to all of the Concessionaire-operated Components; **provided** that the Concessionaire is not obligated to handover personal property not used for the maintenance, operation and exploitation of the Concessionaire-operated Components, cash, cash equivalents or investments.

- (b) As soon as reasonably practicable upon the effectiveness of the termination of this Agreement, RTD and the Concessionaire shall participate in and carry out the handover procedures in accordance with Section 1.7 (*Handover Procedure at the end of the term*) of Attachment 14.

RTD's Rights

43.2 Upon the effectiveness of the termination of this Agreement, to the extent that the Lenders' Liabilities have been paid in full, RTD will have the benefit of all security held by the Lenders or the Concessionaire under, pursuant to or in connection with the Designated Credit Agreements (other than any security interest over bank accounts or the credit balances therein to the extent that the amount of such credit balances has been deducted from the amount of the Lenders' Liabilities), or the performance of the Concessionaire, any Project Contractor or their respective Subcontractors or the Initial Shareholders in relation to the Project, and the Concessionaire will, and will require that all other relevant Persons, execute or ensure the execution of such documents and do all such things as may be necessary and/or reasonably requested by RTD to give effect to the provisions of this Section 43.2 (*RTD's Rights*).

Survival of Rights and Obligations After Termination or Expiry

43.3 (a) Except as otherwise expressly provided in this Agreement:

- (i) expiry or termination of the Lease Period and this Agreement will not affect any accrued rights and obligations under this Agreement as at the End Date (including the right of RTD to recover damages or compensation from the Concessionaire where the termination has arisen as a result of a Concessionaire Termination Event);
- (ii) expiry or termination of this Agreement will not affect the continuing rights and obligations of the Concessionaire and RTD under Sections 2.2(b) (*Lease and Concession Rights*) (but only with respect to the Rolling Stock and only to the extent that the Rolling Stock Termination Date occurs after the End Date, for such period), Sections 30.3 (*TABOR Portion*) (but only with respect to payment of the Applicable Termination Amount), 30.4 (*Appropriations*) (but only with respect to payment of the Applicable Termination Amount), 33 (*Intellectual Property Rights*), 35 (*Indemnity*), 42.4 (*Compensation Following Termination*), 42.5 (*Full and Final Settlement and Acknowledgement of Applicable Termination Amounts*), 50 (*Dispute Resolution Procedure*), 55 (*Confidentiality*), 60 (*Governing Law*), 61 (*Consent to Service of Process*) and 62 (*Waiver of Consequential Damages*) or under any other Section which is expressed to survive expiry or termination or which is required to give effect to such expiry or termination or the consequences of such expiry or termination; and

- (iii) from the End Date until the Rolling Stock Termination Date: (A) the Concessionaire shall store the Rolling Stock in the CRMF; (B) RTD shall have the right, upon reasonable notice to the Concessionaire, to access such Rolling Stock to perform maintenance at RTD's sole cost and expense; (C) the Concessionaire shall have the right at all times, and without the requirement for prior notice to RTD, to access and inspect the Rolling Stock at the Concessionaire's sole cost and expense; and (D) RTD shall provide security for and insure the Rolling Stock against loss at RTD's sole cost and expense.
- (b) Except as provided in Section 43.3(a), all rights and obligations of RTD and the Concessionaire under this Agreement will cease and be of no further force and effect upon expiry or termination of this Agreement and following the Rolling Stock Termination Date.

44. HANDOVER AND REINSTATEMENT WORK REQUIREMENTS ON THE EXPIRY DATE

44.1 (a) The Concessionaire shall, on the Expiry Date, hand over and, to the extent not already owned by RTD, transfer ownership of title to the Concessionaire-operated Components free of all Encumbrances and free of charge to RTD in a condition which:

- (i) could reasonably be expected of an equivalent commuter rail system which has been in existence and operated for a period equal to the period during which the relevant Commuter Rail Project has been operated and which has been maintained in accordance with the O&M Standards during that period; and
- (ii) is capable of complying with the O&M Standards (as amended pursuant to the terms of this Agreement) for a period of not less than three years from the Expiry Date,

(collectively, the *Handover and Reinstatement Work Requirements*).

- (b) The maintenance or other work of renewal, reconstruction, repair or reinstatement to be carried out by the Concessionaire in respect of the Concessionaire-operated Components prior to the Expiry Date in order to satisfy the Handover and Reinstatement Work Requirements, shall be referred to as the *Reinstatement Work* and agreed pursuant to Sections 1.2 (*Reinstatement Work*) and 1.3 (*Reinstatement Proposal*) of Attachment 14 (*Handover and Reinstatement Work Procedures*). Reinstatement Work shall not include those items which RTD elects in writing to defer in accordance with the procedure defined in Section 1.4(b) (*Implementation of the Reinstatement Work*) of Attachment 14 (*Handover and Reinstatement Work Procedures*).
- (c) The Concessionaire and RTD shall participate in and carry out the Handover and Reinstatement Work Procedures in accordance with Attachment 14 (*Handover and Reinstatement Work Procedures*).
- (d) The Concessionaire shall ensure that provision is made in all applicable contracts that they have entered into to ensure that it will be in a position to carry out the Handover and Reinstatement Work Procedures.
- (e) The Concessionaire shall ensure that the Handover and Reinstatement Work Procedures are fully completed on or prior to the Expiry Date. If the Handover and Reinstatement

Work Procedures are not completed in any material respect on or before the Expiry Date as a result of an act or omission of the Concessionaire, the Concessionaire shall operate the Concessionaire-operated Components until the handover is completed without being entitled to payment of any Service Payment.

- (f) Any dispute between the Parties relating to the carrying out and participation in the Handover and Reinstatement Work Procedures may be referred by either Party for resolution in accordance with the Dispute Resolution Procedure.

PART 12 – SHAREHOLDERS, ASSIGNMENT AND SECURITY

45. SHAREHOLDERS

Constitutional Documents

45.1 The Concessionaire may not modify its constitutional documents (including any shareholders' agreement) in any material respect that would have a material adverse effect on RTD or on the amounts to be paid by RTD under this Agreement without the prior written consent of RTD (such consent not to be unreasonably withheld or delayed).

Share Transfers

45.2 (a) The Concessionaire will not issue any shares to any Person (other than the shares representing the initial share capital issued to the Initial Shareholders before the date hereof or shares representing increases in share capital issued to the Initial Shareholders after the date hereof) without the prior written consent of RTD (such consent not to be unreasonably withheld or delayed) or as otherwise permitted pursuant to in Section 45.2(c).

(b) Except as provided in Section 45.2(c), or with the prior written consent of RTD (such consent not to be unreasonably withheld or delayed), the Concessionaire will ensure that no Person will:

- (i) grant any Encumbrance over its direct or indirect ownership interest in the Concessionaire;
- (ii) sell, transfer or otherwise dispose of any direct or indirect ownership interest in the Concessionaire;
- (iii) enter into any agreement in respect of any direct or indirect ownership interest in the Concessionaire or in respect of any votes attached to any such shares held by such Person in the Concessionaire in each case other than customary shareholder, partnership or organizational agreements among the Initial Shareholders solely with respect to the governance and management of the Concessionaire (as such agreements may be amended or modified to reflect the addition of other Shareholders in accordance with this Section 45.2 (*Share Transfers*)); or
- (iv) agree, whether or not subject to any condition precedent or subsequent, to do any of the foregoing.

(c) Notwithstanding Section 45.2(b):

- (i) a Person may grant an Encumbrance over its direct or indirect ownership interest in the Concessionaire in favor of the Lenders in respect of any indebtedness pursuant to any Designated Credit Agreement;
- (ii) a direct or indirect ownership interest in the Concessionaire may be transferred, or shares may be issued by the Concessionaire,:
 - (A) to any Affiliate of a Shareholder;
 - (B) to any Person, where the interest in question is in a publicly traded fund or company that is an indirect owner of the Concessionaire; or
 - (C) to any Person, following the last Final Completion Date; **provided** that such transfer would not result in a material increase in the risk of the Concessionaire being unable to perform its obligations under this Agreement, which determination shall be based upon and take into account the following factors:
 - (I) the financial strength and integrity of the proposed transferee as compared to the relevant experience of the transferor; and
 - (II) the background and reputation of the proposed transferee, its direct and indirect beneficial owners (other than as specified in Section 45.2(c)(ii)(B)), any proposed managers or operating partners, each of their respective officers, directors and employees and each of their respective Affiliates (including the absence of criminal civil or regulatory claims or actions against such Person and the quality of any such Person's past or present performance on other projects),

provided that no direct or indirect ownership interest in the Concessionaire shall be transferred to any Person (other than as specified in Section 45.2(c)(ii)(B)) who is, or whose officers and directors are, (1) debarred, suspended, proposed for debarment with a final determination still pending, declared ineligible or voluntarily excluded (as such terms are defined in any of the Debarment Regulations) from participating in procurement or nonprocurement transactions with the United States federal government or any department, agency or instrumentality thereof pursuant to any of the Debarment Regulations, (2) indicted, convicted or had a civil or administrative judgment rendered against such Person for any of the offenses listed in any of the Debarment Regulations and no event has occurred and no condition exists that is likely to result in the debarment or suspension of such Person from contracting with the United States federal government or any department, agency or instrumentality thereof, (3) listed on the "Lists of Parties Excluded from Federal Procurement and Nonprocurement Programs" issued by the US General Services Administration, (4) located within, or doing business or operating from, a country or other territory subject to a general embargo administered by the United States Office of Foreign Assets Control (**OFAC**), (5) designated on the OFAC list of Specially Designated Nationals, (6) otherwise targeted under economic or financial sanctions administered by the United Nations, OFAC or any other national economic sanctions authority or any divestment or sanctions program of the State of Colorado (including Section 24-54.8-101 *et seq.*, Colorado Revised Statutes), (7) a banking

institution chartered or licensed in a jurisdiction against which the United States Secretary of the Treasury has imposed special measures under Section 311 of the USA PATRIOT Act (**Section 311**), (8) located within or is operating from a jurisdiction that has been designated as non-cooperative with international anti-money laundering principles by the Financial Action Task Force on Money Laundering, (9) a financial institution against which the United States Secretary of the Treasury has imposed special measures under Section 311, (10) a "senior foreign political figure" or a prohibited "foreign shell bank" within the meaning of 31 C.F.R. Section 103.175, or (11) any Person with whom RTD is engaged in litigation relating to performance of contract or business practices (unless RTD has first waived (in RTD's sole discretion) by written notice to the transferring Shareholder, with a copy to the Concessionaire, the prohibition on a transfer to such Person during the continuance of the relevant litigation).

- (d) The Concessionaire shall provide RTD with 15 days' prior written notice of any transfer of a direct or indirect ownership interest in the Concessionaire, including those transfers which do not require the consent of RTD above, but excluding transfers of indirect ownership interests in the Concessionaire in accordance with Section 45.2(c)(ii)(B).

46. RESTRICTIONS ON CHANGE IN CONTROL OF THE PROJECT CONTRACTORS

46.1 In the event of any proposed change in Control of any Project Contractor (other than any such change resulting from a bona fide open market transaction in securities effected on a recognized public stock exchange), the Concessionaire shall inform RTD upon being given notice under the Design/Build Contract or O&M Contract or upon the Design/Build Contractor receiving notice under the Rolling Stock Supply Contract, as the case may be, of such change in Control, and shall consult with RTD regarding the action the Concessionaire should take. After such consultation, if the Parties agree that, or following a determination that, such change in Control materially adversely affects the Concessionaire's ability to carry out its obligations under this Agreement and RTD so requests in writing, then the Concessionaire shall terminate the Design/Build Contract, the O&M Contract or cause the Design/Build Contractor to terminate the Rolling Stock Supply Contract, as the case may be, and replace or cause the replacement of the relevant Project Contractor, as the case may be, with a replacement contractor or supplier mutually acceptable to RTD and the Concessionaire, on substantially the same terms as contained in the Design/Build Contract, the O&M Contract or the Rolling Stock Supply Contract.

46.2 If the Parties fail to agree whether the change in Control in question materially adversely affects the Concessionaire's ability to carry out its obligations under the Project Agreements, then the issue may be referred by either Party for resolution in accordance with the Dispute Resolution Procedure, during which period, the Concessionaire shall not be required to take any action in connection with the Project Agreements.

47. FINANCIAL REPORTING AND RECORDS

Information

47.1 The Concessionaire will deliver to RTD:

- (a) no later than 120 days following the end of each financial year of the Concessionaire:

- (i) (A) its audited annual financial statements, including its balance sheet and related audited statements of income, changes in equity and cash flows for such financial year (including in each case the notes thereto) and (B) the Concessionaire's independent certified public accountants' report and comments on the financial statements, in each case, in a manner and containing information consistent with the Concessionaire's current practices and certified by the Concessionaire's chief financial officer that such financial statements fairly present the financial condition and the results of operations, changes in equity and cash flows of the Concessionaire as at the respective dates of and for the periods referred to in such financial statements;
 - (ii) a statement of sources and application of funds in the format used by the Concessionaire; and
 - (iii) any other reports required to be produced under the Applicable Requirements;
- (b) no later than 10 days following acceptance by its management, each financial and business budget of the Concessionaire;
 - (c) within the time periods set out therein, the information which RTD is required to provide to the Project Third Parties in accordance with the Third Party Agreements;
 - (d) within the time periods set out therein, the information required pursuant to the Eagle Project Before and After Study Work Plan; and
 - (e) within seven days thereafter, such financial and other information as it provides to any Lender under the Designated Credit Agreements.

Preparation of Accounts

- 47.2 (a) The Concessionaire will prepare its accounts in accordance with the Applicable Requirements, GAAP or equivalent auditing principles utilized and generally accepted in the USA and Section 32 (*Audit and Records*). The Concessionaire will, subject to prior approval of RTD of the identity of the proposed appointee, appoint a firm of independent certified public accountants of international repute to audit its accounts and to prepare a report on the annual accounts.
- (b) Without prejudice to the rights of RTD and any Relevant Authority pursuant to Section 32 (*Audit and Records*), RTD will be entitled to have conducted at its own expense an audit of the accounts of the Concessionaire and/or of any tax returns and supporting information filed or other filings required to be made by the Concessionaire to any Relevant Authority.

48. ASSIGNMENT

Assignment

- 48.1 Subject to Section 48.2 (*Security*), neither Party shall assign or transfer any of its rights or obligations hereunder without the prior written consent of the other.

Security

48.2 For the purpose of the financing the design, construction, commissioning and completion of the Eagle Project, and the operation and maintenance of the Concessionaire-operated Components, the Concessionaire may, with the prior written consent of RTD, assign and/or create security over its rights and interests in and under this Agreement (including a leasehold mortgage over the lease granted by RTD to the Concessionaire under Section 2.2), any other Project Agreement, its property, its revenues, its bank accounts, the Intellectual Property Rights (to the extent it is lawfully able to do so under any Applicable Requirement) or any other rights and assets for the benefit of the Lenders and RTD will enter into the Lenders' Direct Agreement to give effect to such security assignment and to enable the Lenders, or their designees, to step-in to this Agreement in place of the Concessionaire in accordance with this Agreement and the Lenders' Direct Agreement.

PART 13 – PARTNERING AND DISPUTE RESOLUTION

49. PARTNERING

Partnering program

- 49.1 (a) RTD encourages the use of an extensive partnering program among RTD, the Concessionaire, the Project Contractors, the Material Subcontractors, the FTA and other stakeholders, as appropriate. RTD and the Concessionaire will structure the partnering relationship to draw on the strengths of each organization to identify and achieve reciprocal objectives. The Parties shall jointly identify and appoint a third party facilitator (and any replacement third party facilitator, as necessary) to assist with any partnering effort entered into pursuant to this Section 49 (*Partnering*), which facilitator shall be the O&M Expert with respect to the meetings held in accordance with Section 49.1(c)(ii) and any determinations made in accordance with Section 49.1(h)(ii).
- (b) The objectives of the partnering process are to:
- (i) identify potential problem areas, issues and differences of opinion early;
 - (ii) develop and implement procedures for resolving them in order to prevent them from becoming Disputes;
 - (iii) achieve and maintain effective and efficient performance and completion of the Work and operation and maintenance of the Commuter Rail Network and the Rolling Stock, in each case in accordance with this Agreement;
 - (iv) create mutual trust and respect for each Party's respective roles and interests in the Eagle Project while recognizing the risk allocation inherent in this Agreement and the other Project Agreements; and
 - (v) address any material or sustained increases or decreases in operation and maintenance costs that were not foreseeable as of the Final Proposal Due Date.

- (c) Without limiting the manner in which or purpose for which the Parties may use the partnering program established under this Section 49 (*Partnering*):
- (i) the Parties agree to use this partnering program to consider and, if agreed between the Parties, address, any material or sustained increases or decreases in operation and maintenance costs that were not foreseeable as of the Final Proposal Due Date, in the case of any such increases, to the extent that such increases have or are reasonably likely to have a material adverse effect on the ability of the Concessionaire to continue to perform its obligations under this Agreement, as determined after taking into account the adjustments to the Base Annual Service Payment that have or will be made in accordance with Part G (*Base Annual Service Payments*) of Attachment 11 (*Service Payments*) to reflect changes through such date in CPI, the Labor Index and the Materials Index;
 - (ii) in furtherance of the Parties' agreement under Section 49.1(c)(i), the Parties agree to meet on or about the tenth anniversary following the first Revenue Service Commencement Date hereunder and on or about every tenth anniversary thereafter prior to the End Date to consider any material or sustained increases or decreases in operation and maintenance costs as described in Section 49.1(c)(i) and any proposals made by either Party in accordance with Sections 49.1(f)(I) and 49.1(f)(II).
- (d) No later than 60 days prior to any meeting to be held pursuant to Section 49.1(c)(ii), the Concessionaire shall conduct open market procurement processes in cooperation with RTD for, and shall thereafter appoint with RTD's approval, an independent third party operations and maintenance expert (*O&M Expert*) to serve as a facilitator for such partnering meeting and to resolve any disagreement between the Parties with respect to any proposed amendment to Attachment 11 (*Service Payments*) in accordance with Section 49.1(h) (**provided** that if the Parties fail to agree on the identity of such expert and fail to complete such appointment within 30 days after the initiation of the procurement process for such expert either Party may request the Technical Panel to select and appoint such expert within 15 Business Days after such request).
- (e) Notwithstanding the Parties' agreement under Section 49.1(c)(i) to use this partnering program to consider and, if agreed between the Parties, address, any material or sustained increases or decreases in operation and maintenance costs that were not foreseeable as of the Final Proposal Due Date, the Concessionaire agrees to use Reasonable Efforts to anticipate the effect of any increase in operation and maintenance costs as may arise from time to time and will use, and will ensure each of the O&M Contractor and the O&M Subcontractors uses, Reasonable Efforts to mitigate the consequences of any increases (which measures shall include minimizing the costs of operation and maintenance (including overhead and variable costs)) that are incurred in relation to such increases.
- (f) If during the period between the date of any meeting held in accordance with Section 49.1(c)(ii) and the date of the most recent prior such meeting (or if no prior such meeting has been held, the start of the Operating Period):
- (i) any of the Labor Index, the Materials Index and/or CPI (including in each case any successor indexes previously agreed or determined in accordance with this Agreement and Attachment 11 (*Service Payments*)) has not reasonably tracked

the actual labor, materials and other costs of the Concessionaire of the types that such indices were designed to track; or

- (ii) the ratios by which the Labor Index, the Materials Index and CPI (including in each case any successor indexes previously identified in accordance with this Agreement and Attachment 11 (*Service Payments*)) are weighted in accordance with Part G (*Base Annual Service Payments*) of Attachment 11 (*Service Payments*) have not been or are not an accurate reflection of, respectively, the ratio of actual labor, materials and other costs of the Concessionaire of the types that such indices were designed to track,

and in either case (i) or (ii), such condition:

- (A) is continuing and is reasonably likely to continue;
- (B) in the case of an increase, has had and is continuing to have a material adverse effect on the Concessionaire's ability to continue to perform its obligations under this Agreement notwithstanding the Concessionaire's compliance with its obligations under Section 49.1(e); and
- (C) was not foreseeable as of the Final Proposal Due Date,

then either Party may propose to address such condition by means of an amendment to Attachment 11 (*Service Payments*) to incorporate (I) a replacement index for any index identified in Section 49.1(f)(i) and/or (II) a replacement ratio of indices for the then existing ratio of indices as set forth in Part G (*Base Annual Service Payments*) of Attachment 11 (*Service Payments*).

- (g) The Parties agree to use Reasonable Efforts, including the use of the O&M Expert as facilitator, in accordance with the spirit of partnering and in accordance with the partnering charter to seek agreement on any amendment to Attachment 11 (*Service Payments*) proposed in accordance with Section 49.1(f).
- (h) If the Parties do not reach an agreement on any proposed amendment to Attachment 11 (*Service Payments*) in accordance with Section 49.1(g) within 30 days after the Parties' initial meeting regarding such proposal, the Parties agree that:
 - (i) either Party may refer such disagreement (which disagreement shall not constitute a Dispute for resolution in accordance with the Dispute Resolution Procedure) to the O&M Expert for determination in accordance with Section 49.1(h)(ii);
 - (ii) following a referral made in accordance with Section 49.1(h)(i) the Parties agree that the O&M Expert shall determine (A) whether and to what extent Sections 49.1(f)(i) or 49.1(f)(ii) (in each case taking into account the conditions set forth in Section 49.1(f)(A), (B) and (C)) apply and (B) whether and to what extent the conditions described in Sections 49.1(f)(i) or 49.1(f)(ii) may be addressed by means of an amendment to Attachment 11 (*Service Payments*) as described in Sections 49.1(f)(I) and 49.1(f)(II); and

- (iii) any decision by the O&M Expert made in accordance with Section 49.1(h)(ii) shall be final and binding on both Parties.
- (i) Following an agreement between the Parties in accordance with Section 49.1(g) or any determination by the O&M Expert in accordance with Section 49.1(h)(ii), the Parties agree that Attachment 11 (*Service Payments*) shall be amended accordingly, which amendment shall be effective from the first day of the calendar month immediately following the month in which such agreement or determination was made; **provided** that if such amendment increases the Service Payment at any time such that RTD is required to appropriate additional funds not previously appropriated to pay such increased amount, then (i) such additional funding requirement shall constitute an RTD Appropriation Obligation and (ii) such increased amount shall only be considered due and payable from the date on which RTD appropriates such additional funds.

Partnering Charter

49.2 No later than 90 days after the Phase 1 Effective Date, RTD and the Concessionaire shall attend a team building workshop and through such workshop negotiate and sign a mutually acceptable non-binding partnering charter to govern the partnering process for the Eagle Project. The charter shall:

- (a) include non-binding rules and guidelines for engaging in free and open communications, discussions and partnering meetings between RTD and the Concessionaire, in order to further the objectives of the partnering process as described above;
- (b) require the formation and convening of a partnering panel, identify the Key Personnel of the Concessionaire and key representatives of RTD who shall serve on the partnering panel, and set the location and time for such meetings;
- (c) include non-binding rules and guidelines on whether and under what circumstances to use the services of the third party facilitator, and exchange of statements, materials and communications during partnering panel meetings;
- (d) set out escalation ladders for the escalation of Disputes or potential Disputes within RTD's and the Concessionaire's management structure;
- (e) recognize and be consistent with the obligations of RTD and the Concessionaire pursuant to this Agreement with respect to communications, cooperation, coordination and procedures for resolving Disputes; and
- (f) include non-binding rules and guidelines for the meetings described in Section 49.1(c)(ii), for agreeing any necessary amendments to Attachment 11 (*Service Payments*) as described in Sections 49.1(f) and 49.1(g) and for the procurement and appointment of an O&M Expert in accordance with Section 49.1(d)

Partnering Meetings

49.3 Under the non-binding procedures, rules and guidelines of the partnering charter, the Parties will address at partnering meetings specific interface issues, oversight interface issues, division of responsibilities, communication channels, application of alternative resolution principles and other matters as the Parties may agree.

Costs

49.4 Any costs associated with implementing the partnering program, including any costs incurred with respect to the appointment of an O&M Expert, will be agreed between the Concessionaire and RTD and will be shared equally between them. The Concessionaire shall pay all third party costs and submit paid invoices to RTD for reimbursement of 50% of such third party costs.

50. DISPUTE RESOLUTION PROCEDURE

Disputes

- 50.1 (a) Except as expressly set out in this Agreement, any dispute, difference or disagreement (each, a *Dispute*) between the Parties arising under, out of or in connection with or relating to this Agreement, including any question regarding its existence, validity or termination, will be resolved in accordance with the provisions of this Section 50.
- (b) The Parties will not be precluded from attempting to reach an amicable settlement at the same time as a Dispute is being referred for resolution pursuant to Section 50.1(a); **provided** that, other than as set out in Section 50.2 (*Designated Senior Representatives*), any such efforts to reach a settlement will not have the effect of suspending the procedure or any time limits set out under this Section 50, unless agreed otherwise by the Parties during the procedure for attempting to reach an amicable settlement and prior to the settlement of the relevant Dispute otherwise under this Section 50.

Designated Senior Representatives

- 50.2 (a) Except as expressly set out in this Agreement, upon the referral by either Party of any Dispute for resolution in accordance with the Dispute Resolution Procedure, the Designated Senior Representative of each Party will meet and use all Reasonable Efforts to resolve the Dispute between the Parties for a period of at least 15 days. Statements made by representatives of the Parties during any such meetings and documents specifically prepared for such meetings shall be considered part of settlement negotiations and shall not be admissible as evidence in any proceeding between the Parties of any kind without the mutual written consent of the Parties.
- (b) If the Concessionaire and RTD succeed in resolving a Dispute through their Designated Senior Representatives, they shall memorialize the resolution in writing, including execution of Changes as appropriate, and promptly perform their respective obligations in accordance therewith.
- (c) If the Designated Senior Representatives of each Party are unable to resolve the Dispute within such 15-day period, unless the Parties agree to extend the period for negotiation between the Designated Senior Representatives, either Party may refer the Dispute:
- (i) if such Dispute is within the categories of Disputes which may be resolved by a Dispute Resolution Panel in accordance with Section 50.3(a), for resolution by the appropriate Dispute Resolution Panel; or
 - (ii) if such Dispute is not within the categories of Disputes which may be resolved by a Dispute Resolution Panel in accordance with Section 50.3(a), for resolution by

the applicable authority as determined in accordance with Section 50.4 (*Determination of Applicable Authority*).

Dispute Resolution Panel

50.3 (a) Two separate Dispute Resolution Panels will be created pursuant to this Agreement, the Technical Panel and the Financial Panel. Any Dispute arising under or in connection with (including with respect to the Attachments related thereto) Sections 5.4 (*Early Work following Failure to Achieve Phase 1 Effective Date*), 5.11 (*Phase 2 Rolling Stock Termination*), 5.12 (*Cooperation on Other RTD Projects*), 28.6 (*Third Party Option Exercise*), 19.3 (*Disputes*), 22.2 (*Concessionaire's Project Management Plan*), 22.3 (*Quality Management*), 23.3 (*Project Schedule*), 24.5 (*Disputes*), 25.5 (*Inspections and Audits During the Design/Build Period*), 26.3 (*Statement Audit*), 26.4 (*Payment*), 29.8 (*Inspections and Audits During the Operating Period*), 29.9 (*Concessionaire's Responsibility During the Operating Period*), 31.1 (*Rolling Stock Option*), 31.2 (*Rolling Stock Replacement*), 36 (*Changes*), 37 (*Changes in Law*), 38 (*Relief Events*), 39 (*Force Majeure*), 40 (*Damage to the Concessionaire-Operated Components*), 41.1 (*Concessionaire Termination Events*), 41.3 (*Remedial Plan*), 43.1 (*Handover and Reinstatement Work Procedures Following Termination*), 51.2 (*Disputed Amounts*), and in relation to the determination of professional costs in respect of a Qualifying Refinancing as set out in Section 10.4 (*Refinancing*) may be referred by either Party (and notified in writing to the other Party):

- (i) to the extent such Dispute is of a technical nature, for resolution by the Technical Panel; or
- (ii) to the extent such Dispute is of a financial nature, for resolution by the Financial Panel;

provided that the Parties shall not refer Disputes with respect to the legal validity of this Agreement to either Panel for determination nor shall either Panel make any determination relating to the legal validity of this Agreement.

(b) If a Dispute involves issues of a technical nature and issues of a financial nature, the Parties, acting reasonably, may refer such Dispute to the Technical Panel and the Financial Panel jointly. In such case, the two Panels shall cooperate in determining such Dispute.

(c) (i) Each Panel will consist of three persons who will be independent of the Parties and impartial.

(ii) In the case of each Panel (other than the Technical Panel for the period referred to in Section 50.3(e)), no later than 15 days after a Dispute is referred to a Panel, each Party will appoint one Person as a member of that Panel. If either Party fails to appoint a Person as a member of the Panel, the relevant member of the Panel will be appointed by the International Institute for Conflict Prevention and Resolution, upon the request of either Party.

(iii) A third person (the *Chairperson*) will be jointly appointed by agreement of the two appointed members of the Panel no later than 10 days following their

appointment. In the event of failure to agree on the appointment of the third member of the relevant Panel, the Chairperson will be appointed by the International Institute for Conflict Prevention and Resolution, upon the request of either Party.

- (iv) The fees and expenses payable to the members of each Panel will be agreed by the Parties. Responsibility for the fees of the Panel members will be determined by the Panel and shall be aligned with the determination of the Dispute by the Panel.
 - (v) In the event of death, resignation, inability or refusal to act by one of the members of either Panel, the new member of the Panel will be appointed by the Person(s) who appointed the original member.
- (d) The Parties will establish the Technical Panel no later than 30 days following the Phase 1 Effective Date. The Technical Panel will comprise:
- (i) one Person selected by the Concessionaire;
 - (ii) one Person selected by RTD; and
 - (iii) one Person to be selected by the other members of the Panel, which Person shall act as Chairperson,

and shall otherwise be established in accordance with Section 50.3(c).

- (e) The Persons so selected shall comprise the Technical Panel until the date which is six months after the last Revenue Service Commencement Date unless such panel is dissolved earlier in accordance with Section 50.3(l). Thereafter, a new Technical Panel may be constituted by the Parties in accordance with the provisions of Section 50.3(c).
- (f) A Dispute is referred to the appropriate Dispute Resolution Panel by, and on the date of, service of a notice of reference to the appropriate Dispute Resolution Panel by the referring Party upon the other Party. A copy of the notice of reference will also be served by the referring Party upon the Chairperson of the appropriate Dispute Resolution Panel. Each Party will be entitled within 14 days following the notice of reference, to deliver to the Panel:
- (i) a concise summary of the nature and background of the Dispute, of the facts relevant to the Dispute and of the issues to be decided;
 - (ii) a statement of the relief which the referring Party is seeking;
 - (iii) a file of copy correspondence, reports and such other documents to which the Party wishes to refer or upon which it relies.
- (g) Each Party will promptly deliver such other information as the applicable Dispute Resolution Panel may from time to time reasonably require for the purposes of resolving the Dispute.

- (h) (i) Subject to Section 50.3(h)(ii), each Dispute Resolution Panel will fix its own rules of procedure, either generally or on an ad hoc basis, and will notify the Parties of such rules of procedure.
- (ii) Each Dispute Resolution Panel will have the following powers:
- (A) the Chairperson of the Dispute Resolution Panel will decide whether or not to convene a hearing or otherwise to take oral evidence or whether the Panel will determine the Dispute on a documents-only basis;
- (B) the Chairperson may order the evidence of a witness to be presented in written form by way of a signed statement and may order the production of any drawing, certificate, specification, report, study, written information and data and any other document (including a record of such document in software form) (or copies thereof) in the possession of any Party; and
- (C) the Chairperson of the Technical Panel may request any samples of materials to be taken and analyzed or tests to be made on site by experts.
- (iii) Unless a Dispute Resolution Panel decides otherwise, the Chairperson will fix the date, time and place of any hearing (which will be in Colorado) before such Dispute Resolution Panel, the rules of procedure of the hearing and will require the attendance of the Parties. Each Party may appear before such Dispute Resolution Panel accompanied by or represented by legal, technical or financial consultants.
- (i) In determining any Dispute referred to it, each Dispute Resolution Panel will act fairly and impartially as between the Parties, giving each Party a reasonable opportunity of presenting its case and responding to the case of the other Party, and shall adopt procedures appropriate to the circumstances of the particular case avoiding unnecessary delay, so as to provide a fair and expeditious means for determination of the Dispute.
- (j) All decisions of each Dispute Resolution Panel will be made, and notified in writing (with reasons for the decision) to the Parties, as soon as possible but in any event no later than 60 days following the Dispute being referred or such other period of time as the Parties may agree. Immediately upon expiry of the 60-day period, either Party may refer the Dispute to the applicable authority as determined in accordance with Section 50.4 (*Determination of Applicable Authority*). If a Dispute Resolution Panel fails to notify its decision to the Parties within that 60-day period (as may be extended as aforesaid), such Dispute Resolution Panel will be deemed to have failed to reach a decision in the matter and any decision of such Dispute Resolution Panel notified to the Parties after the 60-day period (as may be extended as aforesaid), will be ineffective.
- (k) Every decision will state whether it is a unanimous decision of the Dispute Resolution Panel. In the event of lack of unanimity, reasons for any dissenting opinion will be given.
- (l) Each of the Technical Panel and the Financial Panel will be dissolved on mutual agreement between the Parties. New Dispute Resolution Panel(s) may be constituted by the Parties at any time thereafter, in which case the provisions of this Section 50 will

- apply as to its or their appointment, constitution and functioning (except in relation to the period of its or their appointment, which will be decided in each case by the Parties).
- (m) Neither Dispute Resolution Panel shall be deemed to be arbitrators, but both will render their decisions as experts.

Determination of Applicable Authority

50.4 If in accordance with Section 50.2(c)(ii) or Section 50.3(j) either Party wishes to refer a Dispute for resolution under this Section 50.4, then either Party may make such reference:

- (a) if the amount reasonably claimed by the referring Party equals or exceeds U.S.\$25,000,000, to the District Court of Colorado for the City and County of Denver in accordance with Section 50.7 (*Court Proceedings*); or
- (b) if the amount reasonably claimed by the referring Party is less than U.S.\$25,000,000, for resolution in accordance with Section 50.5 (*Arbitration*).

Arbitration

- 50.5 (a) Subject to Section 50.5(b), arbitration shall be commenced by the service of a demand for arbitration, which specifies the nature of the controversy, the nature and extent of damages sought, and compliance with any provisions of this Agreement that may be required before arbitration may be requested (the ***Demand for Arbitration***).
- (b) The arbitration shall be conducted pursuant to the American Arbitration Association (AAA) Rules for Commercial Disputes or, if the Parties agree, the AAA Rules for Construction Disputes, or any other rules or procedures mutually agreeable between the Parties (the ***Rules of Arbitration***). The use of the rules promulgated by the AAA neither requires nor implies that the arbitration must be administered by the AAA.
- (c) The arbitration of the Dispute will be conducted before a single arbitrator, appointed by agreement of the Parties within 30 days of the initial Demand for Arbitration. The arbitration will take place in Denver, Colorado and shall be conducted in English.
- (d) In the event that the Parties are unable to agree to an arbitrator within such 30-day period, the Party making the initial Demand for Arbitration shall submit the Demand for Arbitration to the AAA and the Parties shall thereafter proceed with the arbitration under the administration of the AAA.
- (e) Any arbitration of a Dispute referred by either Party in accordance with Section 50.5(a) will not be limited to a review of any previous decision or finding of the Dispute Resolution Panel and shall be *de novo*. Discovery shall be permitted in accordance with the Uniform Arbitration Act, Section 13-22-217, Colorado Revised Statutes. The decision of the Dispute Resolution Panel may be admitted into evidence; if it is so admitted, it shall not be given any greater evidentiary weight than any other relevant and competent evidence submitted by the Parties.
- (f) The Parties agree to act in good faith to ensure that the hearing is completed within one hundred and twenty days from the date of the Demand for Arbitration, and the arbitrator

- shall be directed to issue a ruling within thirty days of the date of the completion of the hearing.
- (g) The arbitrator's award will be in accordance with the laws of the State of Colorado (without reference to choice of law rules) and the terms of this Agreement, and will be in writing and supported by substantial evidence. The arbitrator is empowered to grant provisional remedies and equitable relief to the Parties as necessary and appropriate in the circumstances. To the extent such remedies or relief are necessary against third persons not party to the arbitration, the Parties may apply to a court of competent jurisdiction in the City and County of Denver, Colorado for the same.
 - (h) The arbitration award will provide for the costs of the arbitration.
 - (i) The award of the arbitrator will be final and binding, except as it may be corrected or vacated in accordance with the Uniform Arbitration Act, Section 13-22-217, Colorado Revised Statutes, and judgment may be entered thereon by a court of competent jurisdiction in the City and County of Denver, Colorado. Each Party accepts and submits to the arbitral jurisdiction referenced in this Section 50.5 and the jurisdiction of the courts in the City and County of Denver, Colorado for all purposes in connection with the arbitration and enforcement of the award. Process in any action filed in a court of competent jurisdiction in the City and County of Denver, Colorado may be served on a party anywhere in the world.

Joinder of Actions

50.6 If there is a Dispute being, or to be, determined by a Dispute Resolution Panel or by arbitration under this Agreement which relates to a dispute under the Design/Build Contract, the O&M Contract or Rolling Stock Supply Contract, then the Parties shall meet with the parties to such other contract to determine whether, at the sole discretion of each party, the actions should be joined and heard in a single arbitration proceeding, before the same arbitrator, under the Rules of Arbitration applicable under this Agreement.

Court Proceedings

- 50.7 (a) Any Dispute not settled in accordance with the preceding provisions of this Section 50 shall be subject to the jurisdiction of the District Court of Colorado for the City and County of Denver.
- (b) Decisions of a Dispute Resolution Panel that are referred to the District Court of Colorado for the City and County of Denver in accordance with Section 50.4(a) shall be reviewed and judged by the District Court of Colorado for the City and County of Denver *de novo*.
 - (c) Each of the Concessionaire and RTD hereby irrevocably submits to the jurisdiction of such court with regard to any such Dispute, and irrevocably waives, to the fullest extent permitted by applicable Law:
 - (i) any objection it may have at any time to the laying of venue of any such action or proceeding in such court;

- (ii) any claim that any such action or proceeding brought in any such court has been brought in an inconvenient forum; and
 - (iii) the right to object, with respect to any such action or proceeding that such court does not have any jurisdiction over such Party.
- (d) Either Party shall be entitled to seek equitable relief in respect of any Dispute before the District Court of Colorado for the City and County of Denver but not before the conclusion of the 15-day period referred to in Section 50.2(a).

WAIVER OF JURY TRIAL

50.8 EACH PARTY HEREBY WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, ANY RIGHT THAT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY PROCEEDING. Each of the Parties hereby (i) certifies that no representative, agent or attorney of any other has represented, expressly or otherwise, that such other would not, in the event of any suit, action or proceedings relating to this Agreement, seek to enforce the foregoing waiver and (ii) acknowledges that it has been induced to enter into this Agreement by, among other things, the mutual waivers and certifications in this Section 50.8.

PART 14 – PAYMENTS, DEFAULT INTEREST AND SET-OFF

51. PAYMENTS, DEFAULT INTEREST AND SET-OFF

Payments other than Construction Payments, Service Payments and Termination Payments

51.1 All payments to be made under this Agreement (other than Construction Payments, to which the provisions of Section 26 (*Construction Payments*) will apply, Service Payments, to which Section 30.2 (*Service Payments*) and Attachment 11 (*Service Payments*) will apply, and any Applicable Termination Amount, to which the provisions of Section 42 (*Compensation Following Termination*) will apply) will be due and payable no later than 30 days after written request in respect of such amount in accordance with the provisions of this Agreement (together with such supporting documentation required under this Agreement or reasonably requested by the Party from which payment is claimed).

Disputed Amounts

51.2 (a) If either Party disputes in good faith any amount claimed to be payable by it (other than Construction Payments, to which the provisions of Section 26 (*Construction Payments*) will apply and any Applicable Termination Amount, to which the provisions of Section 42 (*Compensation Following Termination*) will apply) and does so before payment is due under Section 30.2 (*Service Payments*) or Section 51.1 (*Payments other than Construction Payments, Service Payments and Termination Payments*), such Party will pay such amount as is not in dispute and will be entitled to withhold the balance pending resolution of the dispute. If any Party disputes the amount being claimed for payment, it may refer the matter no later than 30 days following receipt of the relevant written demand for resolution in accordance with the Dispute Resolution Procedure. If the matter is not referred for resolution in accordance with the Dispute Resolution Procedure within such 30-day period and the relevant amount is not paid, such amount will become due at the end of that 30-day period, and the Party from which payment is claimed will pay the amount claimed in full in accordance with Section 30.2 (*Service*

- Payments*) or Section 51 (*Payments other than Construction Payments, Service Payments and Termination Payments*), as applicable.
- (b) Payment under Section 51.2(a) will be made without prejudice to the right of the Party making payment to question at any later date whether the amount claimed for payment and actually paid was in fact due and to claim repayment of any amount determined to have been wrongly claimed or overpaid. Any such matter will be referred for resolution in accordance with the Dispute Resolution Procedure.
 - (c) The disputed portion of any amount withheld pending resolution of any dispute in accordance with the Dispute Resolution Procedure will, to the extent that such dispute is resolved in favor of the payee, be due and payable (subject to Section 51.2(d)) no later than seven days after such resolution and will be paid together with interest on such amount in accordance with Section 51.3 (*Interest*), calculated on the basis that the relevant amount is overdue from the date such disputed amount would have become overdue had it not been disputed to the date of payment.
 - (d) If any Party has paid, in good faith, any amount which the other Party receiving such payment was not entitled to, then such other Party shall return such amount together with interest on such amount in accordance with Section 51.3 (*Interest*), calculated on the basis that the relevant amount is overdue from the date such amount has been paid.

Interest

- 51.3 (a) Each Party agrees to pay interest on any amount due and payable by it under this Agreement (other than any such amounts that are expressly excluded for this purpose pursuant to Section 42.4 (*Compensation Following Termination*)), including Construction Payments and Service Payments, to the extent unpaid for the period commencing on the due date for payment of that amount until the date of actual payment, at the rate of eight percent per annum; **provided** that in no case shall the annual repayment costs and total repayment costs due on the TABOR Portions or the Additional TABOR Portions exceed the annual caps on such amounts set forth in Table 4 of Part H (*TABOR Secured Payments*) of Attachment 11 (*Service Payments*) or in any notice delivered by the Concessionaire. For purposes of this Section 51.3(a), the Board's failure to make an appropriation of monies to pay any RTD Appropriation Obligation shall not prevent such amount that is an RTD Appropriation Obligation from being considered due and payable.
- (b) Interest periods will be either (i) for such successive periods (or part thereof in respect of the last interest period) as uniformly set forth for the calculation of interest in the Designated Credit Agreements or (ii) in the event the Designated Credit Agreements do not uniformly provide the same periods for the calculation of interest, successive periods of three months (or part thereof in respect of the last interest period), the first period beginning on the due date for payment of the relevant amount. The last interest period will end on the date upon which such unpaid amount (together with interest accrued on that amount pursuant to Section 51.2(d)) is paid in full. Interest will be capitalized and added to the amount in default at the end of each one-year period beginning on the date of commencement of the first interest period, but will not be so capitalized in the event the amount is paid in full before the expiration of the one-year period.

Set-off

51.4 Subject to the right of the Agent Bank to direct payments of any Applicable Termination Amount under Section 6 of the Lenders' Direct Agreement, whenever any amount or amounts of money are recoverable from or payable by the Concessionaire under this Agreement, such amount or amounts may be set off against, by applying the same in or towards satisfaction of, any amount then due to the Concessionaire (and appropriated for payment by RTD, to the extent such amount is required to be appropriated for payment by RTD) under this Agreement so that the amount due to the Concessionaire will be the net amount after the exercise of any such set-off, provided that the amount is due and payable and not in dispute.

PART 15 – MISCELLANEOUS**52. NO PARTNERSHIP**

Nothing contained in this Agreement shall be deemed to constitute a partnership between the Parties. Neither Party shall hold itself out contrary to the terms of this Section 52. This Agreement is not for the benefit of any third party and shall not be deemed to create or evidence any right or remedy of any such third party, whether referred to herein or not.

53. ILLEGAL ALIENS

53.1 The Concessionaire shall comply, and shall ensure that the Project Contractors and all Subcontractors comply, in all material respects, with all applicable requirements of Section 8-17.5-101 *et seq.*, Colorado Revised Statutes.

53.2 The Concessionaire shall not (i) knowingly employ or contract with an illegal alien to perform any work under this Agreement or (ii) enter into a contract with any Project Contractor or Subcontractor that fails to certify to the Concessionaire that the Project Contractor or Subcontractor shall not knowingly employ or contract with an illegal alien to perform any work under such contract or this Agreement.

53.3 The Concessionaire shall confirm, and shall ensure that the Project Contractors and all Subcontractors confirm, the employment eligibility of all employees who are hired in connection with the Concessionaire's performance of its obligations under this Agreement through participation in either the E-Verify Program or the Department Program.

53.4 The Concessionaire shall not use the E-Verify Program or the Department Program procedures for the purpose of pre-employment screening of job applicants while this Agreement is being performed.

53.5 If the Concessionaire participates in the Department Program, the Concessionaire shall:

- (a) notify RTD of participation in the Department Program and shall comply with Section 8-17.5-102(c), Colorado Revised Statutes and any other requirements of the Department Program;
- (b) no later than 20 days after hiring an employee who is hired in connection with the Concessionaire's performance of its obligations under this Agreement, confirm to RTD, in a notarized certificate in form and substance satisfactory to RTD, that the Concessionaire has examined the legal work status of such employee, retained copies of

- the documents required by 8 U.S.C. §1324a, and not altered or falsified the identification documents for such employees; and
- (c) consent (and does hereby consent) to United States Department of Labor and Employment audits conducted in accordance with Colorado Revised Statutes §8-17.5-102(5)(C)(III).

53.6 If the Concessionaire obtains actual knowledge that a Project Contractor or Subcontractor responsible for the performance of any part of the Concessionaire's obligations under this Agreement employs or contracts with an illegal alien, the Concessionaire must notify such Project Contractor or Subcontractor and RTD within three Business Days of the Concessionaire having such actual knowledge. If, within three Business Days of receiving such notice, the Project Contractor or Subcontractor does not stop employing or contracting with the illegal alien, the Concessionaire shall terminate the agreement with the Project Contractor or Subcontractor; **provided** that the Concessionaire shall not be required to terminate such agreement with such Project Contractor or Subcontractor if, during such three Business Days after receiving the notice required in this Section 53.6, the Project Contractor or Subcontractor provides information to RTD to establish that the Project Contractor or Subcontractor did not knowingly employ or contract with an illegal alien.

53.7 The Concessionaire shall cooperate and comply with any reasonable request the United States Department of Labor and Employment makes in the course of any investigation it undertakes.

54. NO FEDERAL GOVERNMENT OBLIGATION

The Concessionaire acknowledges and agrees that, notwithstanding any concurrence by the United States federal government in, or approval of, the solicitation or award of this Agreement, the United States federal government is not a party to this Agreement and shall not be subject to any obligations or liabilities to RTD, the Concessionaire, or any other party (whether or not a party to this Agreement) pertaining to any matter resulting from this Agreement.

55. CONFIDENTIALITY

55.1 In this Section 55, **Information** means all information relating to the other Party which is supplied by or on behalf of the other Party (whether before or after the date of this Agreement), either in writing, orally or in any other form, directly or indirectly from or pursuant to discussions with the other Party or which is obtained through observations made by the receiving Party and such term includes all Work Products, analyses, compilations, studies and other documents whether prepared by or on behalf of a Party which contain or otherwise reflect or are derived from such information.

55.2 Each Party will maintain the confidentiality of any Information, except that Information may be disclosed or provided:

- (a) by either Party to its and its Affiliates' directors, officers, employees, consultants and agents, including accountants, legal counsel and other advisors;
- (b) by RTD, to the Project Third Parties or Relevant Authorities or otherwise as RTD may require for the operation, maintenance or improvement of the Concessionaire-operated Components in the event of, or following, termination of this Agreement;

- (c) by the Concessionaire:
 - (i) to the Lenders to the extent such Information is reasonably required by the Lenders in connection with arranging the Concessionaire Financing or which the Concessionaire is obligated to supply by the terms of the Designated Credit Agreements; and
 - (ii) to any Project Contractor or their respective Subcontractors to the extent such Information is necessary for the performance by the Concessionaire of its obligations under this Agreement;
- (d) by either Party to the extent:
 - (i) it is required to disclose such Information pursuant to an Applicable Requirement or by any subpoena or similar legal process or by any Relevant Authority;
 - (ii) the other Party confirms in writing that such Information is not required to be treated as confidential (such confirmation not to be unreasonably withheld or delayed);
 - (iii) such Information is or comes into the public domain otherwise than through any disclosure prohibited by this Agreement;

provided that, in the cases of paragraphs (a), (b) and (c) of this Section 55.2, the Persons to whom such disclosure is made will be informed of the confidential nature of such Information and will so provide such Information subject to the same or similar requirements to maintain confidentiality as contained in this Agreement.

55.3 The Concessionaire understands that any documents that it supplies to RTD under this Agreement are subject to public inspection and copying under the Colorado Open Records Act, Section 24-72-201 *et seq.*, unless exempt from public disclosure by Law. The Concessionaire agrees that if it considers documents to be exempt from public disclosure, it must indicate to RTD the provision of the Colorado Open Records Act which exempts such document from public disclosure and is otherwise responsible for ensuring that any documents exempt from public disclosure are clearly marked as such. The Parties agree that if a Colorado Open Records Act request is filed with RTD seeking disclosure of those documents, RTD will promptly notify the Concessionaire of such request and the Concessionaire will assist RTD in responding to the request by reviewing the documents requested and confirming that the Concessionaire does not wish RTD to make them public. In addition, the Concessionaire agrees to hold RTD harmless and, at RTD's option, provide legal defense for RTD from all claims and demands, including attorney's fees, asserted against RTD that result from RTD refusing to make public the documents the Concessionaire has designated as confidential and proprietary. The Concessionaire also agrees that, if any action is filed in court seeking disclosure of the documents declared confidential and proprietary by the Concessionaire, RTD may deposit the documents with the court and the Concessionaire will defend in court its designation of the information as exempt from disclosure.

56. NO DEEMED WAIVERS; REMEDIES CUMULATIVE

No failure or delay by either Party in exercising any right or power hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any such right or power, or any abandonment or discontinuance of steps to enforce such a right or power, preclude any other or

further exercise thereof or the exercise of any other right or power. Notwithstanding any other provision of this Agreement (other than Section 42.5 (*Full and Final Settlement and Acknowledgement of Applicable Termination Amounts*)), the rights and remedies of the Parties hereunder are cumulative and are not exclusive of any rights or remedies that the Parties would otherwise have. No waiver of any provision of this Agreement or consent to any departure by either Party therefrom shall in any event be effective unless such waiver is permitted by Section 57 (*Amendments*), and then such waiver or consent shall be effective only in the specific instance and for the purpose for which given.

57. AMENDMENTS

Neither this Agreement nor any provision hereof may be waived, amended or modified except pursuant to an agreement or agreements in writing entered into by the Parties.

58. NOTICES, ETC.; LANGUAGE

58.1 Any notice, approval, election, demand, direction, consent, designation, request, agreement, instrument, certificate, report or other communication required or permitted to be given or made under this Agreement (each, a *notice*) to a Party must be given in writing (including by fax or electronic mail). All notices will be validly given if on a Business Day to each Party at the following address:

(a) To RTD: Richard F. Clarke
Assistant General Manager, Capital Programs
1560 Broadway, FAS-71
Denver, Colorado 80202
Fax: (303) 299-2452
Email: richard.clarke@rtd-fastracks.com

With a copy to: John Dawson
RTD Purchasing Agent
1600 Blake Street, BLK-22
Denver, Colorado 80202
Fax: (303) 299-2010
Email: john.dawson@rtd-denver.com

(b) To the Concessionaire: Denver Transit Partners, LLC
c/o Gregory J. Amparano
General Manager
Denver Transit Holdings, LLC
999 18th Street, Suite 1201 North
Denver, Colorado 80202
Fax: (303) 297-7553

With a copy to: Nicholas Hann
Executive Director
Macquarie Capital Advisors
Suite 2400, Bentall 5
550 Burrard Street
Vancouver, BC V6C 2B5

Canada
Fax: (604) 605-1634
Email: Nick.Hann@macquarie.com

and

Spencer C. Weiss
General Counsel
Fluor Corporation
100 Fluor Daniel Dr.
Greenville, SC 29607
Fax: (864) 281-6868
Email: Spencer.Weiss@Fluor.com

58.2 A notice shall be deemed to have been given:

- (i) upon receipt, if delivered in person;
- (ii) upon receipt (confirmed by automatic answer back or equivalent evidence of receipt), if validly transmitted electronically before 3:00 p.m. (local time at the place of receipt) on a Business Day;
- (iii) one Business Day after delivery to the courier properly addressed, if delivered by overnight courier; or
- (iv) four Business Days after deposit with postage prepaid and properly addressed, if delivered by United States certified or registered mail.

58.3 The Parties will notify each other in writing of any change of address, such notification to become effective 15 days after notification.

58.4 All of the Project Agreements, the Designated Credit Agreements, the Contract Data, the Work Products and all written communications between any of RTD, the Concessionaire, the Project Contractors and the Subcontractors shall be in English.

59. CAPTIONS

The captions and section headings appearing herein are included solely for convenience of reference and are not intended to affect the interpretation of any provision of this Agreement.

60. GOVERNING LAW

This Agreement shall be construed in accordance with, and this Agreement and all matters arising out of or relating in any way whatsoever to this Agreement (whether in contract, tort or otherwise) shall be governed by, the law of the State of Colorado.

61. CONSENT TO SERVICE OF PROCESS

Each Party irrevocably consents to service of process by personal delivery, certified mail, postage prepaid or overnight courier. Nothing in this Agreement will affect the right of any Party to serve process in any other manner permitted by law.

62. WAIVER OF CONSEQUENTIAL DAMAGES

In no event, whether based on contracts, indemnity, warranty, tort (including, as the case may be, a Party's own negligence) or otherwise, shall either Party be liable to the other Party for or with respect to any Claims for consequential, indirect, punitive, exemplary, special or incidental damages, lost profits, lost revenues or otherwise; **provided**, however, that this Section 62 shall not limit a Party's right to any termination payments payable under Section 42.4 (*Compensation Following Termination*) or damages (i) which are fines, penalties or other charges assessed by a Relevant Authority, (ii) which arise out of occurrences actually covered by any valid and collectible insurance maintained by either or both Parties or (iii) which are expressly provided for in this Agreement.

63. EXECUTION IN COUNTERPARTS

This Agreement (and each amendment, modification and waiver in respect of this Agreement) may be executed and delivered in counterparts (including by facsimile or email transmission), each of which will be deemed an original, but all of which when taken together shall constitute a single contract. This Agreement shall become effective when it shall have been executed by each Party and when each Party shall have received counterparts hereof, which, when taken together, bear the signatures of the other Party hereto, and thereafter shall be binding upon and inure to the benefit of the Parties hereto and their respective successors and assigns. Delivery of an executed counterpart of a signature page to this Agreement (including by facsimile or e-mail) shall be effective as delivery of a manually executed counterpart of this Agreement.

64. BINDING EFFECT

This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and assigns.

65. SEVERABILITY

Any provision of this Agreement held to be invalid, illegal or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such invalidity, illegality or unenforceability without affecting the validity, legality and enforceability of the remaining provisions hereof; and the invalidity of a particular provision in a particular jurisdiction shall not invalidate such provision in any other jurisdiction.

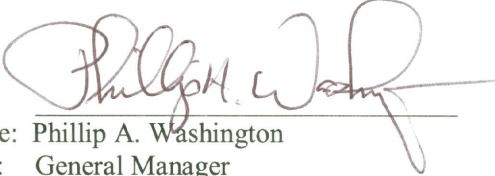
66. ENTIRE AGREEMENT

This Agreement embodies the entire agreement between the Parties relating to the subject matter hereof and supersedes all prior commitments, agreements, representations, and understandings, whether oral or written, relating to the subject matter hereof, and may not be contradicted or varied by evidence of prior, contemporaneous, or subsequent oral agreements or discussions of the Parties hereto. All Attachments referred to herein are incorporated in this Agreement by reference and constitute a part of this Agreement.


IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed and delivered as of the date first above written.

REGIONAL TRANSPORTATION DISTRICT

By: 
Name: Lee Kemp
Title: Chair of Board


By: 
Name: Phillip A. Washington
Title: General Manager

Approved as to legal form for the Regional Transportation District:

By: 
Name: Jenny C. Barket
Title: Associate General Counsel

[RTD Signature Page to Concession and Lease Agreement]

DENVER TRANSIT PARTNERS, L.L.C.

By: 
Name: David Parker
Title: Authorized Signatory

By: _____
Name: Chris Voyce
Title: Authorized Signatory

By: _____
Name: Charles Nuttall-Smith
Title: Authorized Signatory

[Concessionaire Signature Page to Concession and Lease Agreement]

DENVER TRANSIT PARTNERS, LLC,

By: _____
Name: David Parker
Title: Authorized Signatory

By:  _____
Name: Chris Voyce
Title: Authorized Signatory

By:  _____
Name: Charles Nuttall-Smith
Title: Authorized Signatory

[Concessionaire Signature Page to Concession and Lease Agreement]