

**AMENDED AND RESTATED COMPREHENSIVE AGREEMENT  
RELATING TO THE ROUTE 495 HOT LANES IN VIRGINIA PROJECT**

*DATED AS OF DECEMBER 19, 2007*

*BY AND AMONG*

**VIRGINIA DEPARTMENT OF TRANSPORTATION,  
an Agency of the Commonwealth of Virginia**

**AND**

**CAPITAL BELTWAY EXPRESS LLC,  
a Delaware limited liability company**

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This **AMENDED AND RESTATED COMPREHENSIVE AGREEMENT RELATING TO THE ROUTE 495 HOT LANES IN VIRGINIA PROJECT** (this "Agreement") is made and entered into as of December 19, 2007 by and among:

- (1) the VIRGINIA DEPARTMENT OF TRANSPORTATION (the "Department"), an agency of the Commonwealth of Virginia (the "State"), the address of which Department is 1401 East Broad Street, Richmond, Virginia 23219; and
- (2) CAPITAL BELTWAY EXPRESS LLC, a Delaware limited liability company (the "Concessionaire"), the address of which is 405 Lexington Avenue, 43<sup>rd</sup> Floor, New York, New York 10174.

## **ARTICLE 1**

### **RECITALS**

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

(2) In re-enacting the PPTA, the State General Assembly found and declared, among other things, that:

(a) there is a public need for timely development and/or operation of transportation facilities within the State to address the needs identified by the appropriate state, regional, or local transportation plan by improving safety, reducing congestion, increasing capacity, and/or enhancing economic efficiency and that such public need may not be wholly satisfied by existing methods of procurement in which qualifying transportation facilities are developed and/or operated;

(b) such public need may not be wholly satisfied by existing ways in which transportation facilities are developed and operated; and

(c) authorizing private entities to acquire, construct, improve, maintain, and/or operate one or more transportation facilities may result in the availability of such transportation facilities to the public in a more timely or less costly fashion, thereby serving the public safety and welfare.

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

(4) On July 1, 1995 the Department adopted Implementation Guidelines developed by the Commissioner for the selection of solicited and unsolicited proposals for negotiation under the PPTA, which were revised in April 2001 and further revised on October 31, 2005.

(5) On April 6, 2002, the Governor signed legislation (2002 Va. Acts ch. 593) amending the PPTA to permit tolls to be levied on existing interstate highways that are reconstructed to provide for increased capacity.

(6) Pursuant to the PPTA, on June 26, 2002, Fluor submitted an unsolicited conceptual proposal (the “Conceptual Proposal”) to the Department for improvements to approximately 14 miles of I-495 from the American Legion Bridge to the Springfield Interchange by, among other things, adding high occupancy toll lanes, which collectively the Department refers to as the Route 495 HOT Lanes in Virginia.

(7) In accordance with the Implementation Guidelines, the Department duly posted and published notice of the Conceptual Proposal and referred it to the Initial Review Committee for preliminary review. No competing proposals were received in response to the posted and published notice.

(8) Following a determination by the Initial Review Committee that the Conceptual Proposal merited further review, on July 17, 2003, the Commonwealth Transportation Board (the “CTB”), adopted a resolution approving the Conceptual Proposal for further evaluation. The Deputy Secretary of Transportation invited a detailed proposal for consideration by the Public-Private Transportation Advisory Panel (the “Advisory Panel”) in accordance with the Implementation Guidelines.

(9) On September 29, 2003, Fluor filed with FHWA a notice of intent to apply for credit assistance for the Route 495 HOT Lanes in Virginia under the Federal Transportation Infrastructure Finance and Innovation Act (“TIFIA”).

(10) On October 1, 2003, Fluor submitted its detailed proposal (the “Detailed Proposal”) for the Project to the Advisory Panel for consideration.

(11) The Advisory Panel evaluated the Detailed Proposal using the “Proposal Evaluation and Selection Criteria” set forth in the Implementation Guidelines. Based on such evaluation, on June 28, 2004, the Advisory Panel recommended to the Commissioner that the Detailed Proposal for the Project be further developed pursuant to the PPTA.

(12) Thereafter, at the direction of the Commissioner, negotiations with Fluor for a comprehensive agreement with respect to the Project commenced. Pursuant to a letter dated October 5, 2004, the Department’s Chief Engineer acknowledged that Transurban Limited, a participant on Fluor’s Project team that intends, through Affiliates thereof, to provide an investment in the Project and certain operations and customer services, would be a participant in such negotiations.

(13) The proposed Project (which will include, among other components, the New Lanes, the HOT Lanes, and the Springfield Interchange Phase VIII Project) is, for purposes of this Agreement, generally described on Exhibit B attached hereto.

(14) On April 22, 2005, FHWA (a) approved the Department’s Work Plan for the Project under Special Experimental Program 14 for Innovative Contracting (the “SEP-14”), which contemplates that the Department will negotiate a comprehensive agreement, which sets

forth general terms and conditions of the public-private venture, with a prospective Concessionaire, and (b) confirmed that its review of such agreement did not identify significant concerns requiring changes at this time, while noting certain assumptions and understandings to be addressed in the final comprehensive agreement or related documents.

(15) As of April 28, 2005, the Department, Fluor and Transurban (USA), Inc., a Delaware corporation (“Transurban”) entered into a Comprehensive Agreement to Develop, Design, Finance, Construct, Maintain and Operate the Route 495 HOT Lanes in Virginia (the “Original Comprehensive Agreement”).

(16) Pursuant to a Record of Decision dated June 29, 2006, a 4-2-2-4 HOV-HOT Lane alternative as more fully described in such Record of Decision was selected by the Department and approved by the FHWA in connection with the environmental review process for the Capital Beltway study (except that the Springfield Interchange Phase VIII was included as part of a completed environmental review and related record of decision in accordance with Section 102 of NEPA with respect to the Department’s Springfield Interchange project), and the Department has determined that the Project is consistent with such selected alternative and has chosen to undertake improvements that include the Project. A re-evaluation of the Capital Beltway study was accepted by the Federal Highway Administration on May 9, 2007.

(17) On June 27, 2006, the Federal Highway Administration Tolling and Pricing Team confirmed receipt of the Department’s submission of an Expression of Interest to initiate the process for authorization for the imposition of tolls on users of the HOT Lanes, pursuant to 23 USC §166 (a).

(18) On December 19, 2007, (i) the Department consented to the assignment and novation by Fluor and Transurban to the Concessionaire of Fluor’s and Transurban’s respective rights and obligations under the Original Comprehensive Agreement and to the release of guaranties relating thereto, pursuant to a Consent to Assignment and Novation dated December 19, 2007, and (ii) Fluor and Transurban assigned and novated their respective rights and obligations under the Original Comprehensive Agreement in favor of the Concessionaire, and the Concessionaire assumed such obligations, pursuant to an Assignment dated December 19, 2007.

(19) Since the date of the Original Comprehensive Agreement, Chapters 504 and 562 of the 2005 Acts of Assembly made certain changes to the PPTA and the Department’s “The Public-Private Transportation Act of 1995, (as Amended), Implementation Guidelines, Revised October 31, 2005,” made certain changes to the Department’s procedures for evaluating and implementing PPTA proposals. Except as otherwise may be provided herein, the Department and Concessionaire wish for this Agreement to be governed by the PPTA and such Guidelines, as so changed in 2005 and as they may be changed in the future.

(20) Pursuant to Section 13.17 (Amendment) of the Original Comprehensive Agreement, the Department and the Concessionaire desire to amend and restate the Original Comprehensive Agreement, upon the terms set forth herein, to develop, design, finance and construct the Route 495 HOT Lanes in Virginia Project, and to manage, operate, maintain and collect tolls on the HOT Lanes Project pursuant to a long-term concession arrangement granted to the Concessionaire by the Department by this Agreement.

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

## **ARTICLE 2**

### **DEFINITIONS**

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

## **ARTICLE 3**

### **ESTABLISHMENT OF PUBLIC-PRIVATE TRANSACTION; BASIC ROLES AND RESPONSIBILITIES**

#### **Section 3.01 Basic Agreement.**

(a) The parties hereto agree that the Project as described on Exhibit B attached hereto shall be developed, designed, permitted, financed, acquired, constructed, operated, maintained, equipped and insured in a transaction involving a series of agreements setting forth distinct roles and responsibilities of the Department and the Concessionaire, as well as other parties referred to in Section 3.02, in accordance with this Agreement and the other Project Agreements.

(b) The Concessionaire shall provide appropriate oversight, management and reporting of all phases of the Project and its subcontractors such that:

(i) the Route 495 HOT Lanes in Virginia Project is delivered in accordance with and “fit for purpose” intended by the contract documents;

(ii) the Concessionaire resolves all disputes with or among its contractors;

(iii) the Concessionaire shall review and approve all submittals prior to submitting documents to the Department; and

(iv) the Department’s role is one of limited oversight, and not project management.

(c) The Concessionaire shall perform, or cause the Design Build Contractor to perform, the Work in accordance with applicable Law and shall provide, or cause the Design Build Contractor to provide, all notices applicable to the Work in accordance with this Agreement, the Design-Build Contract and applicable Law. Performance of any obligation or the giving of any notice to the Department by the Design Build Contractor shall satisfy the obligation of the Concessionaire to perform such Work or give such notice, *provided* the foregoing shall not relieve the obligation of the Concessionaire to manage the Design Build Contractor, and *provided further* performance by the Design Build Contractor shall not relieve

the Concessionaire of liability for the Design Build Contractor's failure to perform or malfeasance in performance.

(d) The Concessionaire shall perform, or cause to be performed, operations and maintenance with respect to the HOT Lanes, in accordance with this Agreement and applicable Law, during the Operating Period and shall provide all notices provided for herein and in accordance with applicable Law. Performance of any obligation or the giving of any notice to the Department by the O&M Contractor shall satisfy the obligation of the Concessionaire to perform such obligation or give such notice, provided the foregoing shall not relieve the obligation of the Concessionaire to manage the O&M Contractor, or liability for the O&M Contractor's failure to perform or malfeasance.

### **Section 3.02 Parties to the Transaction.**

(a) The parties to this Agreement are the Department and the Concessionaire. The Concessionaire shall be accountable for delivering on the undertakings described in, and for delivery of executed copies of the Project Agreements described in, (b) through (d) of this Section and in Section 3.03 to the Department as well as for other responsibilities of the Concessionaire described in this Agreement.

(b) The parties to other Project Agreements will include, among others: Fluor Lane, LLC, as the Design Build Contractor under the Design-Build Contract; Fluor Corporation, a Delaware corporation, as Contractor Guarantor of the Design Build Contractor's obligations under the Design-Build Contract (the "Contractor Guarantor"), the O&M Contractor, to whom the Concessionaire will delegate certain responsibilities related to the operations and maintenance services for the Project, as well as such other private sector entities agreed to by the Concessionaire as are acceptable to the Department as parties to other Project Agreements and Project Financing Agreements.

(c) The Contractor Guarantor shall guarantee to the Concessionaire and the Department the performance and completion of all of the Design Build Contractor's obligations under the Design-Build Contract (including, but not limited to, its warranty and indemnification obligations), in accordance with the provisions of the Completion Guaranty.

(d) The Concessionaire intends to delegate to the O&M Contractor the performance of its operations and maintenance services obligations as provided in this Agreement and the other Project Agreements, pursuant to a business operations agreement (the "Operations and Support Services Agreement") in substantially the form attached to this Agreement as Exhibit C. Despite such delegation, the Concessionaire remains responsible for the performance of its obligations under this Agreement and the other Project Agreements.

### **Section 3.03 Project Agreements.**

Certain of the Project Agreements and their content are briefly described below.

(a) Operations and Support Services Agreement. The Operations and Support Services Agreement, in substantially the form attached to this Agreement as Exhibit C, executed by the O&M Contractor and the Concessionaire, pursuant to which the Concessionaire will

delegate to the O&M Contractor the performance of its operations and maintenance services obligations as provided in this Agreement and the other Project Agreements.

(b) Electronic Toll Collection Services Agreement. The Electronic Toll Collection Services Agreement, in substantially the form attached to this Agreement as Exhibit D, executed by the Concessionaire and the Department, for the provision by the Department of certain “back office” operations related to the collection of electronic tolls on the HOT Lanes, including the distribution of transponders utilized on the E-ZPass network and any successor to E-ZPass utilized on State Highways (*provided*, however, if transponders unique to HOT Lanes are distributed, or if the Department provides any other specialized services that are specific to the HOT Lanes, the Concessionaire shall pay the increased incremental cost thereof), account maintenance, customer queries and complaints services, reporting and reconciliation and customer services.

(c) Design-Build Contract. The Design-Build Contract, a copy of which is attached to this Agreement as Exhibit E, executed by the Concessionaire and the Design Build Contractor, pursuant to which the Design Build Contractor shall have, among other things, the right and obligation to complete the design and construction of the Route 495 HOT Lanes in Virginia Project as set forth more fully therein.

(d) Independent Engineer Agreement. The Independent Engineer Agreement, in substantially the form attached to this Agreement as Exhibit G, executed by the Concessionaire, the Department, the Collateral Agent and the Independent Engineer. The Concessionaire shall assign the Independent Engineer to work directly for the Department and the Collateral Agent. The Independent Engineer shall agree that the Concessionaire, the Department, the Collateral Agent, the Lender and the FHWA may rely on the reports prepared by the Independent Engineer. The Concessionaire or the Department may request additional scope of work from the Independent Engineer, subject to the reasonable approval of the Department or the Concessionaire, respectively.

(e) Project Financing Agreements. The Initial Project Financing Agreements listed on Exhibit H among the Concessionaire or an Affiliate thereof, together with certain lenders and such other parties as more fully described on such exhibit. The Concessionaire may from time to time enter into other Project Financing Agreements, subject to the terms and conditions set forth in Article 6.

(f) Completion Guaranty. The Contractor Guarantor is executing and delivering the Completion Guaranty, a copy of which is attached as Exhibit I, under which it shall guarantee to the Concessionaire and the Department the performance and completion of all of the Design Build Contractor’s obligations under the Design-Build Contract (including, but not limited to, its warranty and indemnification obligations).

(g) Guarantees of Investment Obligations. Transurban Finance Company Pty Ltd. is executing and delivering the Guaranty of Investment Obligations, a copy of which is attached as Exhibit J-1, under which it shall guarantee to the Department the obligations of Transurban DRIVE USA LLC to make an equity investment in the Concessionaire, as more particularly described by the Initial Project Financing Agreements. Fluor Corporation is executing and

delivering the Guaranty of Investment Obligations, a copy of which is attached as Exhibit J-2, under which it shall guarantee to the Department the obligations of Fluor Enterprises Inc. to make an equity investment in the Concessionaire, as more particularly described by the Initial Project Financing Agreements.

(h) Toll Agreement. The Toll Agreement, in the form attached to this Agreement as Exhibit K (the "Toll Agreement"), executed by the Department and FHWA, providing for tolling of the HOT Lanes.

#### **Section 3.04 Nature of Parties' Interests Under Certain Project Agreements.**

(a) Neither this Agreement nor any of the other Project Agreements grant to the Concessionaire any fee title, leasehold estate, easement or other real property interest of any kind in or to the Project or the Rights of Way. The Concessionaire's interests under this Agreement are limited to contract rights constituting intangible personal property (and not real estate interests), including, without limitation, the Concessionaire's right, in accordance with the provisions of this Agreement, to impose, charge, collect, use and enforce payment of Toll Revenues.

(b) The Department and the Concessionaire acknowledge their mutual intent that, despite the Department's retention of fee title to (or other good and valid real property interest in) the HOT Lanes Project and the HOT Lanes Right of Way, as a result of the Concessionaire's rights and interests therein pursuant to the permit granted to the Concessionaire under this Agreement, the Concessionaire shall be treated, to the maximum extent permitted by Law, as the owner of the HOT Lanes Project for federal income tax purposes and in that regard (i) the Concessionaire's cost of development, design, construction and start-up of the Route 495 HOT Lanes in Virginia Project represents acquisition cost of the Concessionaire's interest in the HOT Lanes Project, including the Permit (the "Permit Cost"), and (ii) no payment by the Department to the Design Build Contractor pursuant to Section 7.02 shall be treated as part of the Permit Cost. The Department shall not file any documentation with any agency of any state government, the U.S. federal government or any department thereof that is inconsistent with this intention; *provided* that it is the intention of the parties that this provision have no bearing on ownership status under Environmental Laws regarding Hazardous Substances. The Permit Cost shall be allocated for all income tax purposes in the manner determined by the Concessionaire, which allocation shall be consistent with Section 1060 of the Internal Revenue Code of 1986, as amended. The Concessionaire shall execute and file all income tax returns with the Internal Revenue Service in a manner consistent with such allocation, including Form 8594, and although it is not contemplated that the Department will be required to file any return with the Internal Revenue Service with respect to such allocation, if required to do so the Department shall file such return in a manner consistent with such allocation.

#### **Section 3.05 Quiet Enjoyment.**

The Department agrees that, if the Concessionaire performs its obligations and makes payments as provided hereunder, the Concessionaire shall, at all times during the Term, be entitled to, and shall have, the quiet possession and enjoyment of the HOT Lanes Project and the HOT Lanes Right of Way, for the purposes expressly provided by, and subject to Oversight

Services by the Department and the provisions contained in this Agreement. The Department shall, at all times during the Term, defend (a) the Department's title or real property interest to the HOT Lanes Project and HOT Lanes Right of Way, (b) the Permit and related rights the Department grants to the Concessionaire hereunder, or any portion thereof, against any Person claiming any interest adverse to the Department, the State or the Concessionaire in the HOT Lanes Project or the HOT Lanes Right of Way, or any portion thereof, except where such adverse interest arises as a result of the act, omission, negligence, misconduct or violation of Law of the Concessionaire or any other Concessionaire Party.

## ARTICLE 4

### **GRANT OF PERMIT; USE AND TOLLING OF PROJECT**

#### **Section 4.01 Grant of Permit.**

Pursuant to the PPTA and subject to the terms and conditions of this Agreement as may be further described in the other Project Agreements, the Department hereby grants to the Concessionaire a permit (the "Permit") pursuant to which the Concessionaire shall have the exclusive right, and the Concessionaire accepts the obligation (i) to finance, develop, design and construct the Route 495 HOT Lanes in Virginia Project, and (ii) from and after the Service Commencement Date and until the end of the Term, to manage, operate, maintain, improve and equip the HOT Lanes Project and establish, impose, charge, collect, use and enforce payment of tolls.

#### **Section 4.02 Development and Operation of Project.**

(a) The Concessionaire shall, in accordance with the terms and provisions of this Agreement, finance, develop, design and construct, whether directly or through Contractors, the Route 495 HOT Lanes in Virginia Project.

(b) Notwithstanding anything in this Agreement or any other Project Agreement to the contrary except Section 7.15 of this Agreement, upon Substantial Completion of the New Lanes, the Department shall assume responsibility from the Concessionaire for the operation and maintenance of the New Lanes, which shall be repaired, operated and maintained thereafter by the Department. From and after the applicable Service Commencement Date the Department shall be responsible for the maintenance, operation and repair of Springfield Interchange Phase VIII in accordance with Section 8.07.

(c) Upon Substantial Completion of the Route 495 HOT Lanes in Virginia Project and the satisfaction of the other conditions to Service Commencement set forth in Section 8.01, the Concessionaire shall assume responsibility from the Department for the operation and maintenance the HOT Lanes, which shall be repaired, operated, maintained and equipped thereafter by the Concessionaire for the Term in accordance with this Agreement.



**Section 4.03 Use of HOT Lanes.**

Except as permitted in accordance with Section 4.06, the HOT Lanes shall be used solely for travel by Permitted Vehicles.

**Section 4.04 Tolling of HOT Lanes.**

(a) Pursuant to the permit granted under Section 4.01, the Concessionaire shall implement a system for the collection of tolls and related incidental charges and/or construct or relocate and maintain different or additional tolling operations on the HOT Lanes Right of Way in accordance with the terms of this Agreement. The Concessionaire shall impose congestion pricing, which may include dynamic tolling with potential toll rate changes at frequent intervals, with a view to maintaining free flow conditions of traffic, and there shall be no restrictions upon toll rates except as set forth in Section 4.04(b). The Concessionaire has no authority or right to impose or collect any fee, charge or other amount for the use of the HOT Lanes other than as authorized by this Section 4.04.

(b) The Concessionaire's rights granted in Section 4.04(a) above are limited by, and conditioned on compliance with applicable Law and all other provisions in this Agreement, including the following:

(i) High Occupancy Vehicles equipped with a transponder (in the absence of other available technologies, as provided in clause (v) of this Section 4.04(b)) shall be entitled to use the HOT Lanes at a 100% discount from otherwise applicable tolls;

(ii) Mass Transit Vehicles and Commuter Buses, school buses, motorcycles and Exempt Vehicles equipped with a transponder (in the absence of other available technologies, as provided in clause (v) of this Section 4.04(b)) shall be entitled to use the HOT Lanes at a 100% discount from otherwise applicable tolls;

(iii) Permitted Vehicles (other than vehicles referred to in the preceding clauses (i) and (ii)) equipped with a transponder (in the absence of other available technologies, as provided in clause (v) of this Section 4.04(b)) shall be entitled to use the HOT Lanes subject to payment of the applicable tolls;

(iv) The toll rates shall be the same for persons using the HOT Lanes under like conditions, and for this purpose "like conditions" may take into consideration type, weight and occupancy of the vehicle, number of axles, time-of-day and/or day-of-week travel, time and location of entry to the HOT Lanes, traffic congestion and other traffic conditions (*provided*, that the Concessionaire may adopt and implement discount programs for different classes or groups of persons using the HOT Lanes under like conditions, subject to the provisions of Section 11.01; and, *provided further*, that it is understood that, with dynamic tolling vehicles traveling on the same Toll Section of the HOT Lanes at the same time may be subject to different toll rates); and

(v) The Concessionaire may charge, debit and collect tolls through open road tolling facilities physically located on the HOT Lanes Right of Way or use global positioning system technology, remote sensing or other technologies which shall be

interoperable with the E-ZPass network and, with reasonable notice from the Department, any successor to E-ZPass utilized on State Highways at that time to charge, debit and collect tolls for actual vehicular use of the HOT Lanes; *provided*, that it is the intent of the parties that all tolling on the HOT Lanes will be by electronic means, there will be no toll booths and the Concessionaire shall not be required to accept cash tolls. Further, the Concessionaire shall have any and all rights pursuant to applicable Law and the Project Agreements to enforce and collect toll violations, including, but not limited to, the use of automated vehicle detection systems and other technologies.

(c) The foregoing authorization to impose, charge, collect and enforce the payment of tolls includes the right, to the extent permitted by applicable Law, and subject to the terms, rules and regulations that may be established for uniform account maintenance and reconciliation among operators of electronically tolled facilities in the State, to impose, charge, collect and enforce, with respect to electronic tolling accounts managed by or on behalf of the Concessionaire, the following incidental charges:

(i) Reasonable amounts for the purchase or rental of transponders or other electronic toll devices;

(ii) Reasonable, refundable security deposits for the distribution of transponders or other electronic toll devices;

(iii) If a Concessionaire Party is administering toll collection, reasonable administrative fees for account maintenance, account statements and customer service;

(iv) If a Concessionaire Party is administering toll collection, reasonable fees, penalties and interest for toll violations, including costs of collection; and

(v) Other incidental fees and charges reasonable and customary in connection with the services being provided at that time by Concessionaire Party.

The amount of any such incidental charges shall not exceed the amount reasonably necessary for the Concessionaire to recover its reasonable out-of-pocket and documented costs and expenses, including its Allocable Costs, directly or indirectly incurred with respect to the items, services and work for which they are levied. The Concessionaire may apply such incidental charges to vehicle operators entitled to use of the HOT Lanes at a 100% discount from otherwise applicable tolls if the Concessionaire provides such Persons transponders or other electronic tolling devices.

(d) Except as otherwise provided in this Agreement, at all times during the Term, the Concessionaire shall have the exclusive right, title, entitlement and interest in and to Toll Revenues, subject to the Electronic Toll Collection Services Agreement. Toll Revenues shall be used first to pay all current and delinquent costs and expenses of operating and maintaining the HOT Lanes Project (including premiums for insurance, bonds and other performance security), before they are used for any other purpose.

(e) The Concessionaire shall not use Toll Revenues to make any distribution to the holder of an equity interest in the Concessionaire, unless and until the Concessionaire first pays the following: (i) operating and maintenance costs (including any payments to Affiliates made

solely in accordance with the applicable Affiliate Contracts entered into in accordance with Section 11.02(f)), and any amounts due to the Department pursuant to the terms of this Agreement, including without limitation any compensation due under Article 5, in accordance with Section 5.02(d), before payment of amounts described in (ii) through (iv); (ii) current and delinquent debt service (other than debt service permitted to be deferred in accordance with the terms thereof), and other current and delinquent amounts, due under any Concessionaire Loan; (iii) all taxes currently due and payable or delinquent; and (iv) all current and delinquent deposits to any Major Maintenance Reserve Fund, except with respect to any of clauses (i) through (iv), amounts, if any, that are being contested in good faith and by appropriate proceedings and with respect to which adequate reserves as required by generally accepted accounting principles consistently applied have been established by the Concessionaire). If the Concessionaire makes any distribution or payment to any holder of an equity interest in the Concessionaire in violation of this provision, the same shall be deemed to be held in trust by such Person for the benefit of the Department and the Collateral Agent, and shall be payable to the Department or the Collateral Agent on demand. If the Department collects any such amounts held in trust, it shall make them available for any of the purposes set forth above and, at the request of the Collateral Agent, deliver them to the Collateral Agent.

(f) The Concessionaire shall have no right to use Toll Revenues to pay any debt, obligation or liability unrelated to this Agreement, the Project, or the Concessionaire's services under this Agreement. The foregoing restriction in this Section 4.04(f) does not apply to or affect:

(i) the Concessionaire's right to make distributions to the holders of equity interests in the Concessionaire in accordance with the Concessionaire's governing instruments and this Agreement and the ability of the recipients thereof to apply the same in their sole discretion; or

(ii) the Concessionaire's ability to pledge, sell or otherwise transfer solely the Toll Revenues available for distribution to the holders of equity interests in the Concessionaire pursuant to any asset securitization and in accordance with the Concessionaire's governing instruments, senior Financing Assignments and this Agreement (with no other portion of the Revenues or Concessionaire's Interest encumbered thereby or subject to the exercise of remedies), in each instance so long as:

(A) the issuance by the Concessionaire of any Concessionaire Debt related to the asset securitization is a Refinancing that is permitted hereunder,

(B) pursuant to the agreements that govern the asset securitization, the Concessionaire's Interest is not subject to the exercise of remedies as a result of a default or other similar event relating to any other asset in the securitization pool or any payment default by the issuer or other obligor of the securitized debt or other instruments, and

(C) the asset securitization documents conform to the limitations and restrictions set forth in this Agreement, including Sections 4.04(d) and 4.04(e) above, respecting use and application of Revenues.

(Any asset securitization that satisfies the requirements of Section 4.04(f)(ii) is referred to herein as a “Permitted Securitization.”)

**Section 4.05 Additional Provisions Respecting Tolls.**

(a) The Concessionaire acknowledges and agrees that it shall not be entitled to receive from the Department any compensation, return on investment or other profit for providing the services contemplated by this Agreement and the other Project Agreements, other than Concessionaire Damages and other payments, including any payments provided by Section 13.05 and Article 16, to the extent specified herein. The foregoing shall not affect the Concessionaire’s entitlement to Toll Revenues and other tolls contemplated by this Agreement.

(b) Nothing in this Agreement shall obligate or be construed as obligating the Department, or any assignee thereof, to continue or cease tolls after the end of the Term.

(c) From and after the Service Commencement Date through the end of the Term, the Concessionaire shall maintain a toll collection system with respect to the HOT Lanes which shall be interoperable with the E-ZPass network and any successor to E-ZPass utilized on State Highways at that time. If the Department intends to change any State interoperability or compatibility standards, requirements or protocols for toll collection systems, it will coordinate with the Concessionaire prior to the implementation of such changes so as to minimize the disruption and cost to the Concessionaire. If the Concessionaire selects an ETTM System other than the system then utilized on other State Highways, it will coordinate with the Department prior to the implementation or any change of such system to ensure interoperability and compatibility with the system then utilized on other State Highways.

(d) In the event that the Department implements and maintains a processing system for the enforcement of penalties for toll violations in Virginia for electronic toll collection systems on roads (i) the Department shall provide such enforcement system, in accordance with a violation enforcement services agreement, for the benefit of the HOT Lanes Project at the same levels of service as are provided by the Department for any other toll roads operated within the State and (ii) the Department or its agent shall remit to the Concessionaire amounts received as a result of such enforcement efforts. For purposes of identifying and apprehending toll violators of the HOT Lanes, and subject to all applicable Law, the Department shall make available to the Concessionaire the benefits of any agreements or arrangements which the Department has in place with other state authorities or agencies that provide access to records in their possession relating to vehicle and vehicle owner data. In consideration of such services, the Concessionaire shall pay the Department its customary charges for such services in effect from time to time for providing such services.

(e) The Department will (i) use best efforts to work with the Concessionaire to limit transaction costs charged to the HOT Lanes Project by the Department, including charges for toll transaction account management services and (ii) provide annual statements containing a breakdown of any and all third-party costs incurred by the Department in connection with services provided to the Concessionaire under this Agreement.

(f) The Department agrees that the Concessionaire may at its sole discretion and cost, engage and contract with a toll transaction account management services provider other than the Department (which may be an Affiliate of the Concessionaire, to the extent permitted by Section 11.02(f)). If the Concessionaire elects to contract with another party for these services, the Department will provide the same access to accounts as if the Concessionaire had continued its transaction account management services with the Department, if such access is permitted by Law and if the Concessionaire pays to the Department the reasonable costs of providing such access.

#### **Section 4.06 Emergency Suspension of Tolls.**

(a) In addition to its rights granted pursuant to applicable Law, and the provisions of Section 12.02, the Department shall have the right, in its sole discretion, to order immediate suspension of tolling in the event the HOT Lanes are designated for immediate use as an emergency mass evacuation route. The Department shall have no liability to the Concessionaire for the loss of Toll Revenues or the increase in costs and expenses attributable to such an order issued pursuant to applicable Law by the Department or any other Governmental Authority; *provided*, that the Department: (i) concurrently suspends tolling on all other Department-operated tolled facilities that are located within the area designated for evacuation or facilitation of evacuation; (ii) concurrently orders suspension of tolling on all other tolled facilities operated by others within such area and over which the Department has the authority to order such suspension; and (iii) lifts such order over the Hot Lanes concurrently with the lifting of such order for all other designated tolled facilities. The Department will assist the Concessionaire in seeking any available reimbursement from the federal government for any lost Toll Revenues and expenses incurred during the emergency and for pursuing any applicable insurance coverage related thereto.

(b) In the event the HOT Lanes are designated for immediate use as the alternate route for the diversion of traffic from another State Highway, or from the GP Lanes, temporarily closed to all lanes in one or both directions due to a declared emergency issued pursuant to applicable Law by the Department or any other Governmental Authority or a significant incident involving one or more casualties requiring hospitalization or treatment by a medical professional or one or more fatalities on the affected State Highway or GP Lanes from which such traffic is diverted, the Department shall have the right to divert such traffic onto the HOT Lanes and to order immediate suspension of tolling on the HOT Lanes in the direction(s) of diversion. The Department and the Concessionaire shall consult with each other on such diversion of traffic and any suspension of tolling. The Department shall have no liability to the Concessionaire for the loss of Toll Revenues or the increase in costs and expenses attributable to the period that such order is in effect.

(c) The Department shall lift such order given in accordance with subsection (a) or (b) above as soon as the need for such order ceases.

#### **Section 4.07 SAFETEA-LU Compliance.**

(a) The Department agrees to provide to FHWA the certifications required of a State agency under Section 1121 of the Safe Accountable Flexible Efficient Transportation Equity

Act: A Legacy for Users (SAFETEA-LU), 23 U.S.C. §166(d)(1), and acknowledges that it has entered into the Toll Agreement. The delivery of a certification by the Department that the HOT Lanes Operations do not comply with the applicable requirements of 23 U.S.C. §166, or such other federal, rule or regulation shall not constitute a default by the Department under this Agreement.

(b) The Concessionaire agrees to maintain and operate the HOT Lanes Project, at all times, in compliance with the provisions of 23 U.S.C. §166 and 23 U.S.C. §129, successor provisions, all regulations promulgated thereunder, and the Toll Agreement. Accordingly, the Concessionaire shall be responsible for the satisfaction of the requirements of 23 U.S.C. §166(b)(4), in accordance with the terms of this Agreement, and shall otherwise coordinate its compliance efforts with the Department so as to enable the Department to provide the certifications required by Section 4.07(a) of this Agreement.

## ARTICLE 5

### **PERMIT FEE, FINANCIAL MODEL UPDATES; DEPOSIT AND USES OF PERMIT FEE; SHARING IN COST AND INTEREST RATE SAVINGS**

#### **Section 5.01 Permit Fee.**

The Department shall be entitled to receive permit fee payments as set forth in Exhibit L. The Concessionaire agrees to pay the permit fee to the Department as compensation for the Department's grant to Concessionaire of the Permit.

#### **Section 5.02 Financial Model Updates.**

The Concessionaire shall provide to the Department an updated Base Case Financial Model:

- (i) on or before April 30 of each calendar year, including the updated TRI to the end of the preceding calendar year;
- (ii) within 60 days after the occurrence of a Compensation Event;
- (iii) within 60 days after the parties agree that amendments to the Agreement or the other Project Agreements (including Department Changes during the Work Period pursuant to Section 7.12) have a material effect on future costs or Toll Revenues; and
- (iv) concurrently with written notice of any proposed Refinancing in accordance with Section 6.06(a)(ii).

The Department shall have the right to challenge any such update to the Base Case Financial Model. To the extent that the Concessionaire and Department cannot agree on the changes within 90 days of the Concessionaire delivering the updated Base Case Financial Model

to the Department, the update will be resolved in accordance with the dispute procedures of Section 17.06.

In the event of a challenge, the immediately preceding Base Case Financial Model that has not been challenged shall remain in effect pending resolution of the challenge or until a new Base Case Financial Model is issued and unchallenged. If an updated Base Case Financial Model has not been challenged, or if any such challenge has been so resolved, the updated Base Case Financial Model shall be submitted to the Escrow Agent in accordance with Section 18.05(e).

In no event shall the Financial Model used in the Base Case Financial Model be changed except with the prior written approval of both the Department and the Concessionaire, each in its sole discretion.

### **Section 5.03 Deposit and Use of Permit Fee and Other Payments.**

The Department shall deposit all amounts received pursuant to this Article 5 and Sections 7.12(c), 9.02(e), 7.12(a), 10.03(b), 13.04(a), and 19.02(b), in a concession payments account in accordance with Virginia Code Section 33.1-23.03:9(A) (the "Project Enhancement Account"), and shall use such amounts in accordance with Virginia Code Section 33.1-23.03:9(B) to pay or finance costs of programs or projects reasonably related to or benefiting users of the Route 495 HOT Lanes in Virginia Project and as otherwise permitted by applicable Law. Any proffers received in connection with the Project shall be deposited to the Project Enhancement Account. During the Work Period, the Concessionaire may submit requests, with the written concurrence of the Department Representative, to the Chairman of the CTB for allocation of any amounts in the Project Enhancement Account to fund any portion of additional costs of the Project, including without limitation, costs associated with bicycle and pedestrian accommodations.

### **Section 5.04 Sharing of Cost and Interest Rate Savings.**

The Department and the Concessionaire shall share equally in:

- (i) cost savings arising from negotiation of the capital costs of construction of the Project, and
- (ii) interest rate savings arising as a result of reductions of market interest rates of more than 25 basis points after July 10, 2007;

in either case only such savings occurring on or prior to the Closing Date; *provided*, that as of the Agreement Date the parties agree that the Department's share of such savings shall be \$15,000,000. The Department's share of any such savings shall be funded in accordance with the Initial Project Financing Agreements and such share shall be deposited to the Project Enhancement Account on the Closing Date.

## ARTICLE 6

### **PROJECT FINANCING; LENDER RIGHTS AND REMEDIES**

#### **Section 6.01 Concessionaire Responsibility for Project Financing; No Department Liability for Concessionaire Debt.**

(a) Except as provided in Section 7.02(c), the Concessionaire is solely responsible for obtaining and repaying all financing, at its own cost and risk and without recourse to the State, the CTB or any other agency, instrumentality or political subdivision of the State, necessary to acquire, develop, permit, build, construct, maintain, improve, equip, modify, repair and operate the Project and any Concessionaire Project Enhancements. The Concessionaire also bears the risk of any changes in the interest rate, payment provisions or the other terms of its project financing plan; *provided*, however, it is acknowledged that the Department shall share in beneficial interest rate movements as contemplated in accordance with Section 5.04.

(b) None of the State, the Department, the CTB or any other agency, instrumentality or political subdivision of the State has any liability whatsoever for payment of the principal sum of any Concessionaire Debt, any other obligations issued or incurred by the Concessionaire in connection with this Agreement or the Project, or any interest accrued thereon or any other sum secured by or accruing under any Financing Assignment. Except for a violation by the Department of its express obligations to Lenders set forth in this Article 6, no Lender or Collateral Agent is entitled to seek any damages or other amounts from the Department due to the Department's breach of this Agreement, whether for the Concessionaire Debt or any other amount; *provided*, that the foregoing shall not affect any rights or claims of a Lender as a successor to the Concessionaire's Interest by foreclosure or transfer in lieu of foreclosure. The Department's review of any Financing Assignments or other project financing documents is not a guarantee or endorsement of the Concessionaire Debt, any other obligations issued or incurred by the Concessionaire in connection with this Agreement or the Project, or any Traffic and Revenue Study, and is not a representation, warranty or other assurance as to the ability of the Concessionaire to perform its obligations with respect to the Concessionaire Debt or any other obligations issued or incurred by the Concessionaire in connection with this Agreement or the Project, or as to the adequacy of the Toll Revenues to provide for payment of the Concessionaire Debt or any other obligations issued or incurred by the Concessionaire in connection with this Agreement or the Project.

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



(d) **PABs Financing.**

(i) The Concessionaire shall cause the PABs Issuer to issue the PABs as provided by and in accordance with the Initial Project Financing Agreements. The Concessionaire shall make a Financing Assignment with respect to the PABs as described in the Initial Project Financing Agreements.

(ii) Each of the Concessionaire and the Department agrees to cooperate with the PABs Issuer regarding the PABs Issuer responsibilities, if any, under SEC Rule 15c2-12 by providing information and documents available to it pertaining to the Project. The Concessionaire also shall provide requested information on the management, experience and financial condition of itself.

(iii) The Concessionaire shall cause to be provided to the Department a complete transcript of all documents executed and delivered in connection with the issuance of the PABs promptly following the issuance thereof.

(e) **Department Authorization of PABs, related Lien, etc.**

(i) To the extent required by Section 103 of the Internal Revenue Code, as amended, Revenue Ruling 63-20 and Revenue Procedure 82-26, Department, acting in its capacity as an agency of the executive branch of the State and pursuant to its authority as the Responsible Public Entity with respect to the Project under the PPTA, hereby approves and authorizes:

(A) the creation of the PABs Issuer as a Virginia nonstock, nonprofit corporation, for the purposes described in the following clauses (B) and (C) and activities incidental and ancillary thereto;

(B) the issuance of the PABs by the PABs Issuer in accordance with Initial Project Financing Agreements; and

(C) the loan by the PABs Issuer of the proceeds of the PABs to the Concessionaire to be used for (1) paying certain costs of the plan, design, development, renovation, construction and expansion of the GP Lanes; (2) paying a portion of the costs of any bond insurance or credit enhancement related to the PABs; (3) funding a portion of the capitalized interest during construction of the Route 495 HOT Lanes in Virginia Project; (4) making any required deposits to the debt service reserve fund with respect to the PABs; and (5) paying a portion of the cost of issuing the PABs (Items (1) through (5) are collectively referred to as "GP Project Costs").

(ii) Department agrees that the PABs Issuer shall have the right to make a Financing Assignment with respect to the PABs, as described in the Initial Project Financing Agreements or any amendment thereto which the Department may approve in writing in its sole discretion.

(iii) The PABs shall be issued in the name of the PABs Issuer “on behalf of” the State acting through the Department in its capacity as an agency of the executive branch of the State (within the meaning of the phrase “on behalf of,” as it is used for federal income tax purposes). The Department and the Concessionaire agree and acknowledge that the GP Lanes financed by the PABs will be owned, operated and controlled by the State while the PABs remain outstanding and at all times thereafter.

(iv) The terms and pricing of the PABs have been approved by the Department.

(v) The Department’s approval of the issuance of the PABs and of the related documentation pertaining to the PABs shall not be construed as a guarantee or endorsement of the PABs or any Traffic and Revenue Study or any representation, warranty or other assurance as to the ability of the PABs Issuer to perform its obligations with respect to the PABs or the adequacy of the Toll Revenues to provide for payment of the PABs. Each PAB shall include a conspicuous recital on its face to the effect that payment of the principal of and interest on that PAB shall be a valid claim only as against the PABs Issuer and the revenues pledged by the PABs Issuer therefor, shall not be an obligation of the State, the Department, CTB or any other agency, instrumentality or political subdivision of the State, moral or otherwise, and that neither the full faith and credit nor the taxing power of the State, the Department, CTB or any other agency, instrumentality or political subdivision of the State is pledged to the payment of the principal of and interest on the PABs.

(vi) None of the State, the Department, CTB or any other agency, instrumentality or political subdivision of the State shall have any obligation to pay debt service on the PABs.

**Section 6.02 Project Financing Agreements; Department’s Rights and Protections.**

(a) The Concessionaire has entered into concurrently with the execution of this Agreement, or intends to enter into in connection with this Agreement, the Initial Project Financing Agreements listed on Exhibit H. On or within 30 days after the Closing Date the Concessionaire Parties and the Department shall be reimbursed, from equity provided by members of the Concessionaire, for all documented fees, costs and expenses incurred on or after August 25, 2004, in connection with the investigation, development, negotiation and closing of the transactions described herein and in the Project Financing Agreements; provided, however, that all such fees, costs and expenses shall be permissible for reimbursement in accordance with requirements of State and federal Law applicable to reimbursement of such types of fees, costs and expenses and if, upon subsequent audit in accordance with Section 18.07, any such reimbursed fees, costs and expenses are determined not to meet such State or federal reimbursement requirements then such non-qualifying amounts shall be repaid by the party having received such reimbursement, within 30 days of receipt by such party of written notification of such non-qualification, to the trustee under the Master Indenture of Trust with the PABs Issuer dated as of December 1, 2007, or any successor trustee thereunder, and shall be deposited to the Construction Fund to be applied to other qualified costs of the Project.

(b) From time to time during the term of this Agreement, the Concessionaire has the right, at its sole cost and expense, to pledge, sell or otherwise transfer solely the Toll Revenues available for Distribution in connection with a Permitted Securitization or to pledge, hypothecate or assign the Concessionaire's Interest as security for any Concessionaire Debt, such debt to be issued on such terms and conditions as may be acceptable to any Lender and the Concessionaire, subject to the following terms and conditions (such pledge, hypothecation, assignment, or other security instrument, including the Initial Project Financing Agreements, being referred to in this Agreement as a "Financing Assignment"):

(i) No Person other than an Institutional Lender is entitled to the benefits and protections accorded by a Financing Assignment, except that lenders of Concessionaire Debt may be Persons other than Institutional Lenders so long as any Financing Agreement securing such Concessionaire Debt made by such Person is held by an Institutional Lender acting as Collateral Agent, and PABs may be issued, acquired and held by parties other than Institutional Lenders so long as an Institutional Lender acts as indenture trustee for the PABs;

(ii) Subject to Section 6.02(b)(iv), no Financing Assignment shall encumber less than the entire Concessionaire's Interest; *provided*, that the foregoing does not preclude (A) subordinate Financing Assignments and (B) Permitted Securitizations;

(iii) The Concessionaire is strictly prohibited from pledging or encumbering the Concessionaire's Interest, or any portion thereof, to secure any indebtedness, and no Financing Assignment shall secure any indebtedness, (A) that is issued by any Person other than the Concessionaire, any special purpose company that directly or indirectly owns the Concessionaire and has no assets except as are directly related to the Project, or any special purpose subsidiary wholly owned by such company, or the PABs Issuer, or (B) the proceeds of which are used in whole or in part for any purpose other than the Project Purposes or any other purpose permitted in Section 6.02(b)(xiv) below;

(iv) No Financing Assignment or other instrument purporting to mortgage, pledge, encumber, or create a Lien on or against the Concessionaire's Interest shall extend to or affect the fee simple interest of the Department in the Project Right of Way or the HOT Lanes Right of Way or the Department's interests hereunder or its interest and estate in and to the Project or any part thereof;

(v) Any number of permitted Financing Assignments may be outstanding at any one time, and any Financing Assignment permitted hereunder may secure two or more separate loans from two or more separate Lenders; *provided*, that each such loan and the Financing Assignment securing the same complies with the provisions of this Article 6;

(vi) The Department shall not have any obligation to any Lender or Collateral Agent pursuant hereto, except as expressly set forth in this Article 6 or in any other instrument or agreement signed by the Department in favor of such Lender or Collateral Agent and unless the Concessionaire and/or the Collateral Agent have notified the Department of the existence of such Financing Assignment;

(vii) Each Financing Assignment shall require that if the Concessionaire is in default under the Concessionaire Debt secured by the Financing Assignment or under the Financing Assignment and the Lender or Collateral Agent gives notice of such default to the Concessionaire, then the Collateral Agent shall also give concurrent notice of such default to the Department. Each Financing Assignment also shall require that the Collateral Agent deliver to the Department, concurrently with delivery to the Concessionaire or any other Person, every notice of election to sell, notice of sale or other notice required by Law or by the Financing Assignment in connection with the exercise of remedies under the Financing Assignment;

(viii) No Financing Assignment shall grant to a Lender any right to apply funds in any reserve contemplated by Section 16.09;

(ix) Each Financing Assignment shall provide that the Concessionaire may, without condition or qualification, issue additional Concessionaire Debt, secured by the Concessionaire's Interest, for the limited purpose of funding Safety Compliance Orders;

(x) Each Financing Assignment shall expressly state that the Collateral Agent and the Lenders shall not name or join the Department, the CTB or the State or any officer thereof in any legal proceeding seeking collection of the related debt or other obligations secured thereby or the foreclosure or other enforcement of the Financing Assignment except to the extent joining the Department is required as a necessary party in order to give the court jurisdiction over the dispute;

(xi) Each Financing Assignment shall expressly state that neither the Lenders nor the Collateral Agent shall seek any damages or other amounts from the Department due to the Department's breach of this Agreement, whether for Concessionaire Debt or any other amount, except damages for a violation by the Department of its express obligations to Lenders set forth in this Article 6; *provided*, that the foregoing shall not affect any rights or claims of a Lender as a successor to the Concessionaire's Interest by foreclosure or transfer in lieu of foreclosure;

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

(xiii) No Financing Assignment may secure Concessionaire Debt that prohibits prepayment or defeasance; *provided*, that the foregoing does not preclude imposition of Breakage Costs in order to prepay or defease; and

(xiv) Each Financing Assignment may only secure Concessionaire Loans the proceeds of which are used exclusively for the purpose of (A) acquiring, designing, permitting, building, constructing, improving, equipping, modifying, operating, maintaining, reconstructing, restoring, rehabilitating or renewing the Project or any Project Enhancements, (B) paying reasonable fees, development costs and expenses incurred by the Concessionaire with the closing of this Agreement and the Initial Project

Financing Agreements not otherwise reimbursed, (C) paying reasonable development fees to any Concessionaire Party for services related to the Project, (D) making Distributions, but only from the proceeds of Refinancings permitted pursuant to Section 6.06, and (E) any Refinancing of pre-existing Concessionaire Loans that conform to the provisions of this Section 6.02(b), including use of proceeds to pay the reasonable costs of closing the Refinancing (including lender fees, but excluding any amounts paid to Affiliates).

Notwithstanding anything to the contrary contained or implied herein, the provisions of Sections 6.02(b)(i), 6.02(b)(iii) and 6.02(b)(xiv) above shall not apply to or otherwise restrict any Financing Assignment that is a Permitted Securitization.

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

(d) Notwithstanding the enforcement of any security interest created by a Financing Assignment, the Concessionaire shall remain liable to the Department for the payment of all sums owing to the Department under this Agreement and the other Project Agreements and the performance and observance of all of the Concessionaire's covenants and obligations under this Agreement and the other Project Agreements.

(e) No Lender or Collateral Agent shall, by virtue of its Financing Assignment, acquire any greater rights to or interest in the Project or Revenues than the Concessionaire has at any applicable time under this Agreement, other than the provisions in this Article 6 for the specific protection of the Lenders and the Collateral Agent.

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

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

(h) No Financing Assignment shall be valid or effective, and no Lender shall be entitled to the rights, benefits and protections of this Article 6, unless the Financing Assignment complies with this Section 6.02. If the Department has actual knowledge that any Financing Assignment or amendment thereto has been entered into and does not comply with this Section 6.02, the Department shall deliver a notice to the Collateral Agent. Unless and until such non-compliance is remedied, the Financing Assignment shall be neither valid nor effective, and the Lenders thereunder shall be entitled to none of the rights, benefits and protections of this Article 6.

### **Section 6.03 Notices to Collateral Agent; No Amendments.**

As long as any Financing Assignment of record created in accordance with this Article 6 shall remain unsatisfied and the Department has received the notices and documents specified in Section 6.02(g), the following provisions shall apply with respect to any such Financing Assignment, the Collateral Agent and the related Lender or Lenders.

(a) The Department shall promptly provide the Collateral Agent with a copy of any notice it sends to the Concessionaire concerning a potential breach of this Agreement or a Concessionaire Default.

(b) The Financing Assignments may provide that while the Financing Assignments are in existence the Concessionaire shall not agree to any modification of or amendment to this Agreement that in any way could have a material adverse effect on the rights or interests of the Lender(s) under such Financing Assignments or to any voluntary surrender or termination of this Agreement, in each case, without the Collateral Agent's consent, which shall not be unreasonably withheld or delayed, except if such modification or amendment is required by Law. Such consent shall be deemed to have been given in the event the Collateral Agent fails to respond within 30 days of delivery of a request for consent if the request states that such deemed-consent will be given at the end of such time period.

### **Section 6.04 Collateral Agent's Right to Cure.**

As long as any Financing Assignment of record created in accordance with this Article 6 shall remain unsatisfied and the Department has received the notices and documents specified in Section 6.02(g), the following provisions shall apply with respect to any such Financing Assignment and the related Lender or Lenders.

(a) Should any event or condition occur which would either immediately or, following the applicable cure period or the giving of notice or both, enable the Department to terminate or suspend its obligations under this Agreement (a "Termination Event"), the Department shall not terminate this Agreement until it first gives written notice of such Termination Event to the Collateral Agent, and provides the Collateral Agent a reasonable opportunity to cure such Termination Event, as provided below:

(i) If such Termination Event results from the Concessionaire's failure to pay a monetary obligation, the Collateral Agent may cure such Termination Event by paying all amounts due within 30 days (such 30-day period to be in addition to any cure period

provided to the Concessionaire herein) after receipt of written notice thereof from the Department to the Collateral Agent.

(ii) If such Termination Event results from other than the Concessionaire's failure to pay a monetary obligation, the Collateral Agent may, within 45 days (such 45-day period to be in addition to any cure period provided to the Concessionaire herein) after receipt of written notice thereof from the Department to the Collateral Agent, remedy such Termination Event or cause the same to be remedied by an entity to be designated by the Collateral Agent reasonably acceptable to the Department; *provided*, that if the Termination Event is such that it cannot be remedied within such 45-day period despite the exercise of diligent efforts commencing promptly after delivery of the written notice of the Termination Event, or if possession is necessary in order to effect such cure, such 45-day period shall be extended if the Collateral Agent shall have commenced a cure within such period or shall have commenced the appropriate legal or other action to foreclose the Liens of the relevant Financing Assignment so as to take possession of the Concessionaire's Interest and shall thereafter diligently continue to pursue such remedy to completion, but in all events the cure period shall be not more than 180 days after written notice is provided pursuant to this Section 6.04(a); *provided, further*, that any failure to effect such cure shall not limit the rights of the Collateral Agent and the Lender to a New Agreement as provided in Section 6.05(c). If the Termination Event is peculiar to the Concessionaire and is not curable by the Collateral Agent, such as an insolvency, bankruptcy or a similar proceeding, or liquidation of the Concessionaire or its properties, then notwithstanding the Department's right to terminate, the Collateral Agent shall not be required to cure such Termination Event but shall instead be entitled to exercise its rights under the relevant Financing Assignments and not inconsistent with this Article 6.

(iii) If the Collateral Agent is prohibited by any process, stay or injunction issued by any court or by any bankruptcy or insolvency proceeding involving the Concessionaire from curing any Termination Event, the time specified above for curing any Termination Event shall be extended for the period of such prohibition, but not in excess of 180 days.

(b) If the Collateral Agent's right to cure a Termination Event has not expired, and the Collateral Agent is acting to cure such Termination Event in accordance with this Section 6.04, then the Department shall not exercise its right to terminate this Agreement by reason of such Termination Event. In furtherance of the foregoing, the Department shall permit the Collateral Agent and its Substituted Concessionaire the same access to the Project as is permitted to the Concessionaire hereunder. The Department shall accept any such performance by the Collateral Agent as though the same had been done or performed by the Concessionaire.

(c) Any payment to be made or action to be taken by the Collateral Agent hereunder as a prerequisite to keeping this Agreement in effect shall be deemed properly to have been made or taken by the Collateral Agent if such payment is made or action is taken by a Substituted Concessionaire approved by the Department. The Department's approval of a proposed Substituted Concessionaire may be withheld only if the Department reasonably determines that the proposed Substituted Concessionaire does not have the financial resources, qualifications or experience to timely perform the Concessionaire's obligations under this Agreement and the other Project Agreements. To be qualified, the proposed Substituted Concessionaire and its

Affiliates must not have been debarred or prohibited from participating in state or federally-funded projects, or indicted, convicted, pled guilty or nolo contendere to a violation of Law involving fraud, conspiracy, collusion, bribery, perjury, material misrepresentation, or any other violation that shows a similar lack of moral or ethical integrity. The Department will approve or disapprove a proposed Substituted Concessionaire within 30 days after it receives from the Collateral Agent a request for approval together with such information, evidence and supporting documentation concerning the financial resources, qualifications and experience of the proposed Substituted Concessionaire as the Department may request in good faith.

(d) Any curing of any Termination Event by the Collateral Agent shall not be construed as an assumption by the Collateral Agent of any obligations, covenants or agreements of the Concessionaire under any Project Agreement, except with respect to the work, services or actions taken or performed by or on behalf of the Collateral Agent.

(e) Notwithstanding the foregoing provisions of this Section 6.04, nothing in this Section 6.04 shall preclude or delay the Department from exercising (i) any remedies for a Concessionaire Default, other than termination of this Agreement, or (ii) its right to terminate this Agreement for failure to achieve Substantial Completion pursuant to Section 16.07.

#### **Section 6.05 Other Rights of Collateral Agent.**

(a) The Collateral Agent may exercise its rights and remedies under a Financing Assignment with respect to the Concessionaire's Interest. Upon any transfer of all the Concessionaire's Interest pursuant to the exercise of remedies of the Collateral Agent under a Financing Assignment:

(i) The Collateral Agent or Substituted Concessionaire, as transferee, shall succeed to all the Concessionaire's Interest, subject to all rights and remedies of the Department under this Agreement and the other Project Agreements, and shall be obligated to pay and perform or cause to be paid and performed in a professional and competent manner all the corresponding terms and conditions of this Agreement applicable after the date of such transfer and shall cure any outstanding defaults hereunder and under any other Project Agreements, it being understood that such transferee shall not be required to cure any non-monetary default that by its nature is not capable of cure by an entity other than the Concessionaire, including, without limitation, the bankruptcy or insolvency of the Concessionaire;

(ii) Unless and until the Collateral Agent has taken direct possession and control of the Concessionaire's Interest, whether through foreclosure, transfer in lieu of foreclosure, or has been finally determined by a court of competent jurisdiction to have become a mortgagee-in-possession, the Collateral Agent shall not be liable for any of the Concessionaire's obligations under this Agreement;

(iii) Except as provided in Section 6.05(a)(ii), the Department acknowledges that upon such a transfer of the Concessionaire's Interest to the Collateral Agent or a Substituted Concessionaire, as transferee, such transferee will acquire the entire Concessionaire's Interest, and will succeed to all of the right, title and interest and



obligations of the Concessionaire thereunder and may thereafter perform as if it were the Concessionaire under the Project Agreements, subject to all rights and remedies of the Department under this Agreement and the other Project Agreements;

(iv) Once the Collateral Agent transfers ownership of the entire Concessionaire's Interest to a Substituted Concessionaire in accordance with the provisions of this Agreement, the Collateral Agent shall cease to be liable for any of the Concessionaire's obligations under this Agreement accruing thereafter; and

(v) Nothing in this Section shall limit the Collateral Agent's step-in rights (or similar right to take from the Concessionaire temporary possession of the Project) under the Financing Assignment and related documents; provided that if at the time the Collateral Agent exercises such right Department has not declared a Concessionaire Default of a type that requires possession of the Project in order to cure, then any such step-in right shall not be exercised for longer than a 180-day period without the Department's reasonable written consent; and, *provided further*, that for the avoidance of doubt, the Collateral Agent's step-in or similar rights are conditioned, however, on compliance of the Financing Assignment with Section 6.02 and are subject to Section 7.12 and Article 16.

(b) The exercise by the Collateral Agent of its rights with respect to any Project Agreement under the Financing Assignment, whether by judicial proceedings or by virtue of any power contained in the Financing Assignment or this Article 6, or by any conveyance from the Concessionaire to the Collateral Agent in lieu of foreclosure thereunder, shall not require the consent of the Department or constitute a breach of any provision of or a default under this Agreement or any other Project Agreement.

(c) Without prejudice to the cure rights of a Collateral Agent under Section 6.04, if a trustee or person exercising the powers of trustee in any bankruptcy or insolvency proceeding rejects or disaffirms this Agreement, and if, within 60 days after such rejection or disaffirmation, the Collateral Agent or Substituted Concessionaire shall so request, and if the Collateral Agent satisfies all the conditions precedent set forth below, the Department will terminate this Agreement and execute and deliver to the Collateral Agent or its Substituted Concessionaire, a new comprehensive agreement and, if necessary, a new development contract (together the "New Agreements"). In addition, if a Termination Event occurs that cannot be cured by the Collateral Agent without having possession of the Project, if the Department terminates this Agreement by reason of such Termination Event after expiration, without cure, of the maximum 180-day period set forth in Section 6.04(a)(ii), and if the Collateral Agent satisfies all the conditions precedent set forth below, the Department will execute and deliver to the Collateral Agent or its Substituted Concessionaire, the New Agreements. The New Agreements shall run for the remainder of the Term of this Agreement and the original Development Contract, if any. The New Agreements shall otherwise contain the same covenants, terms and conditions and limitations as this Agreement and any Development Contract, if any (except for any requirements which have been fulfilled by the Concessionaire or its successors prior to termination and except that Section 15.02 shall be revised to be particular to the Collateral Agent or its Substituted Concessionaire). The right of the Collateral Agent (or its Substituted Concessionaire) to the New Agreements is subject to its satisfaction of the following conditions precedent:

(i) The Collateral Agent (or its Substituted Concessionaire) commits in writing to the Department, in a notice delivered to the Department, within 30 days after the effective date of such rejection or disaffirmation, or after the Department's termination following the lapse of the 180-day period, as applicable, that the Collateral Agent (or its Substituted Concessionaire) will enter into the New Agreements, which notice is accompanied by a copy of such New Agreements, duly executed and acknowledged by the Collateral Agent (or its Substituted Concessionaire);

(ii) The Collateral Agent (or its Substituted Concessionaire) pays or causes to be paid to the Department, at the time of the execution and delivery of the New Agreements, all amounts which, at the time of the execution and delivery thereof, would have been past-due or due and payable in accordance with the provisions of this Agreement or the Development Contract but for such termination;

(iii) Provided the Department furnishes a statement or invoice for such costs, the Collateral Agent (or its Substituted Concessionaire) pays or causes to be paid to the Department all reasonable costs and expenses (including legal fees, expert witness fees, court costs and disbursements), Taxes, fees, charges and other sums paid or incurred by the Department in connection with such defaults and termination, the recovery of possession from the Concessionaire, and in connection with the preparation, execution and delivery of the New Agreements and related agreements and documents specified in such statement or invoice, including all reasonable costs and expenses paid or incurred by the Department to manage, design, permit, build, construct, equip, install, operate, maintain, repair and insure the Project since cessation of the Concessionaire's performance of such duties; and

(iv) The Collateral Agent (or its Substituted Concessionaire), at the time of such written request, cures all then-existing defaults under this Agreement and any Development Contract (curable by the payment of money), or, if such defaults cannot be cured by the payment of money, the Collateral Agent (or its Substituted Concessionaire) commits to the Department in the New Agreements to complete cure of all such other defaults promptly and diligently after execution of the New Agreements and receipt of possession of the Project, and in any event not later than 120 days after the date it obtains possession.

The provisions of this Section 6.05(c) shall survive the termination of this Agreement and shall continue in full force and effect thereafter to the same extent as if this Section were a separate and independent contract made by the Department and the Lender or Collateral Agent.

(d) The Department shall give the Collateral Agent notice of any condemnation proceedings affecting the HOT Lanes. The Collateral Agent shall have the right to intervene and be made a party to any such condemnation proceedings, and the Department and the Concessionaire do hereby consent that the Collateral Agent may be made such party or an intervener.

(e) If the Collateral Agent, on behalf of holders of more than one Financing Assignment, shall make written requests upon the Department for New Agreements in

accordance with Section 6.05(c), the Department shall grant the New Agreements to, as applicable, the holder whose Financing Assignment was the earliest to be recorded or filed (unless otherwise agreed in writing by such holder); and thereupon the written requests of each holder whose Financing Assignment was recorded or filed later shall be deemed to be void.

**Section 6.06 Refinancing Requirements.**

(a) Notice of Refinancing.

(i) The Concessionaire shall provide to the Department written notice of any proposed Refinancing at least 75 days prior to the proposed date for closing the Refinancing.

(ii) The Concessionaire shall provide to the Department concurrently with such written notice full details of the proposed Refinancing, including, details of the changes, if any, in the Base Case Financial Model, any material changes in the Concessionaire's obligations (including, for the avoidance of doubt, contingent obligations) to the Lenders, and outline details of the changes and/or replacements, as the case may be, to the Initial Project Financing Agreements and Financing Assignments contemplated by the Refinancing.

(iii) The Concessionaire shall provide the Department the final proposed Project Financing Agreements and Financing Assignments in connection with the Refinancing promptly upon their receipt by the Concessionaire, and at least 10 days before the proposed date for closing the Refinancing.

(b) Department Approval Rights for Refinancings. Any Refinancing of Concessionaire Debt shall be subject to the Department's prior approval, which approval shall not be unreasonably withheld or delayed; *provided*, that no such approval shall be required if the Concessionaire first demonstrates to the Department that (i) the proposed Refinancing refinances existing Concessionaire Debt and does not increase the principal amount of Concessionaire Debt then outstanding other than by an amount equal to reasonable costs of closing the Refinancing, including lender fees, and the amount of any required reserves, or (ii) the proposed Refinancing has been assigned a rating (which may include a non-public rating) by a Rating Agency (without regard to bond insurance, if any) which is no lower than BBB minus or Baa3 or equivalent rating, or (iii) no portion of the proceeds of the Refinancing will be used to make Distributions or to pay non-capital costs and expenses (other than related costs of issuance and any required reserves). With respect to any proposed Refinancing for which the Department's approval is required, the Department shall not unreasonably withhold or delay its consent. Without limiting other reasonable grounds for withholding consent, the Department may withhold consent if it reasonably determines that:

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

(2) any change or series of changes in the obligations of the Concessionaire due to the Refinancing would or reasonably could be expected to result in a material increase in the Department's liabilities, obligations or risks;

(3) the Refinancing would have a material adverse effect on the ability or commitment of the Concessionaire to perform its obligations under this Agreement and the other Project Agreements; or

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

(c) Other Requirements.

(i) Every Refinancing shall be subject to the provisions of Section 6.02 and the other provisions of this Agreement pertaining to Concessionaire Debt and Financing Assignments.

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

(iii) In connection with the consummation of any proposed Refinancing, the Department shall, promptly upon the reasonable request of the Concessionaire or the Collateral Agent or any Lender and such requesting party's agreement to cover any costs incurred by the Department in connection with the requested action, (A) review the Concessionaire's written analysis of whether the Department is required to approve such Refinancing and confirm whether the Department believes its approval is required for such Refinancing, and (B) execute, acknowledge and deliver consents and representations with respect to this Agreement, which may be qualified to the knowledge and belief of a designated representative of the Department and which are consistent with the consents provided by the Department as of the Closing Date.

(iv) If the Department renders any assistance or performs any requested activity in connection with the Refinancing, then the Concessionaire shall reimburse the Department for all reasonable costs and expenses incurred by the Department in connection with such assistance or activity, at the time of the closing of the Refinancing transaction.

**Section 6.07 Limitation on Beneficiaries.**

Notwithstanding anything contained herein to the contrary, the provisions of this Article 6 that are binding on the Department shall inure only to the benefit of the Concessionaire and, subject to compliance with the terms of this Article 6, the holders of permitted Financing Assignments.

## ARTICLE 7

### **DESIGN, ACQUISITION AND CONSTRUCTION OF THE ROUTE 495 HOT LANES IN VIRGINIA PROJECT**

#### **Section 7.01 General Obligations of the Concessionaire.**

(a) The Concessionaire shall furnish or cause to be furnished all design, construction and other services, provide or cause to be provided all materials, equipment and labor and undertake all efforts necessary or appropriate (excluding those services and efforts which the Project Agreements specify will be undertaken by the Department) to perform the Work reasonably inferable from the Project Agreements, Good Industry Practice, the Technical Requirements, all applicable Law and relevant Regulatory Approvals, and the Scope Document.

(b) The Department makes no warranties or representations as to any surveys, data, reports or other information provided by the Department or other Persons, concerning surface or subsurface conditions, including the presence of Utilities, Hazardous Substances, contaminated groundwater, archeological, paleontological and cultural resources, and endangered and threatened species, affecting the Site or surrounding locations. The Concessionaire acknowledges that such information is for the Concessionaire's reference only and has not been verified.

(c) Except as otherwise expressly provided herein, the Concessionaire shall bear the risk of all conditions occurring on, under or about the Site, including (a) physical conditions of an unusual nature that differ materially from those ordinarily encountered in the area, (b) changes in surface topography, (c) variations in subsurface moisture content, (d) Utility facilities, (e) the presence or discovery of Hazardous Substances, including contaminated groundwater, (f) the discovery at, near or on the Rights of Way of any archeological, paleontological or cultural resources, and (g) the discovery at, near or on the Rights of Way of any species listed as threatened or endangered under federal or State endangered species Law.

(d) Any monitoring, auditing, review, comments or approvals provided by the Department (except as expressly stated) will not relieve the Concessionaire of independent responsibility for performance of the Work or for any acts or omissions of the design professionals, contractors and subcontractors engaged by the Concessionaire to perform the Work. Department's review, comment on and/or approval of any submission shall not be deemed to transfer any liability from Concessionaire to Department.

(e) The Concessionaire shall provide that the Substantial Completion Date shall occur not later than five years after the Closing Date, subject only to the day-for-day extensions permitted by Section 13.01 for Delay Events during the Work Period (the "Guaranteed Substantial Completion Date").

(f) The Concessionaire understands that if the Concessionaire fails to achieve the timely completion of the Work that the Department will suffer damages which are difficult to determine and accurately specify. Accordingly, to compensate the Department for such damages, the Concessionaire hereby agrees as follows:

(i) If Substantial Completion of the Work is not attained by the Guaranteed Substantial Completion Date, Concessionaire shall pay Department \$21,000 as liquidated damages for each day, up to and through, but not exceeding, one calendar year and any such additional amount as Design Build Contractor may agree to pay on or for the Department's account pursuant to Section 7.2 of the Design-Build Contract, that actual Substantial Completion of the Work extends beyond the Substantial Completion Date; *provided*, that such damages shall not be payable for any day for which the Department's aggregate compensation for Oversight Services and the Department's TMP activities during the Work Period has not exceeded \$45,000,000.

(ii) If the Department allows the temporary closure of lanes to traffic and the Concessionaire (or its contractors) failure to restore all such lanes to traffic by designated times in accordance with the Technical Requirements, the Concessionaire shall pay the Department the amount determined in accordance with the Technical Requirements as liquidated damages for any period beyond such designated times until the affected lanes are reopened to traffic.

(iii) If Final Acceptance is not attained by within 90 days after the Substantial Completion Date, the Concessionaire shall pay Department \$5,000 as liquidated damages for each day that Final Acceptance remains to be achieved following the expiration of 90 days after the Substantial Completion Date; *provided*, that such damages shall not be payable for any day for which the Department's aggregate compensation for Oversight Services and the Department's TMP activities, during the Work Period has not exceeded \$45,000,000.

The parties acknowledge, recognize and agree on the following:

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

(B) that any sums which would be payable under this Section 7.01(f) are in the nature of liquidated damages, and not a penalty, and are fair and reasonable and such payment represents a reasonable estimate of fair compensation for the losses that may reasonably be anticipated from such failure; and

(C) that any sums which would be payable under this Section 7.01(f) shall be in lieu of all liability of the Concessionaire and its contractors for any and all Losses, whether special or consequential, and of whatsoever nature incurred by Department which are occasioned by any delay described by this Section 7.01(f). Notwithstanding the above, liquidated damages are not intended to excuse Concessionaire or any of its contractors from liability for any other breach of its obligations under the Contract Documents, or limit the Department's recourse to other contract remedies hereunder such as termination pursuant to Articles 16 and

17; *provided*, that the sole termination remedy upon the occurrence of events described in Section 16.07(a)(i) or (ii) shall be as set forth in Section 16.07.

**Section 7.02 Department Obligation to Contribute Funding**

(a) The Department agrees to provide to the Design Build Contractor payments aggregating \$283,367,386 as financial support for the development, design, construction and start-up of the Project. Such payments will be used to partially fund (i) the I-66 interchange (other than any portion of the I-66 interchange that will provide access to the HOT Lanes for toll-paying vehicles), and (ii) other construction relating to the New Lanes and reconstruction of existing interchanges (other than any portion of such interchanges that will provide access to the HOT Lanes for toll-paying vehicles).

(b) In addition, the Department agrees to provide to the Design Build Contractor payments aggregating \$125,528,168 as financial support for the development, design, construction and start-up of Springfield Interchange Phase VIII (other than equipment used for tolling).

(c) The foregoing amounts will be made available by advance by the Department pursuant to the VDOT Funding Agreement, a copy of which is attached as Exhibit Q, as follows:

- (i) \$157,207,586 on the Closing Date;
- (ii) \$11,625,200 no more than 60 days after the Closing Date;
- (iii) \$21,627,600 on October 1, 2008;
- (iv) \$65,067,000 on October 1, 2009;
- (v) \$66,017,000 on October 1, 2010;
- (vi) \$63,177,168 on October 1, 2011; and
- (vii) \$24,174,000 on October 1, 2012;

*provided*, such funds after the Closing Date shall be made available by the Department only if, at the time of the advance by the Department thereof: (A) the aggregate equity funds contributed by the members of the Concessionaire and proceeds of the PABs or a TIFIA Loan requisitioned by the Concessionaire for the development, design, construction and start-up of the Project are cumulatively at least equal to or greater than the cumulative advances made by the Department (excluding the initial advance described in clause (i) above made by the Department on the Closing Date) for the period to such date, (B) there exists no Concessionaire Default, and (C) neither the Concessionaire's nor the Design-Build Contractor's actions have resulted in FHWA withholding or withdrawing reimbursement for the Project. If the Design-Build Contract is terminated for any reason prior to Substantial Completion of the Work being funded by the foregoing payments, the Department agrees that it will provide any then-unfunded portion of such amounts described in Section 7.02(c) to any replacement contractor retained by the Concessionaire to carry out the completion of such Work.

**Section 7.03 Conditions Precedent to Work.**

(a) Conditions Precedent to Commencement of Work. The Concessionaire shall not permit the Design Build Contractor to commence Work unless and until the following conditions (in addition to the conditions set forth in Section 7.03(b) with respect to any construction of a Construction Segment, if applicable) have been satisfied or waived by the Department in either case in writing (the "Work Commencement Approval"):

(i) the Initial Project Financing Agreements shall have been executed and delivered by the parties thereto in substantially the forms attached hereto as Exhibit H;

(ii) the Concessionaire and the Design Build Contractor shall have executed and delivered the Design-Build Contract in substantially the form attached hereto as Exhibit F, the Contractor Guarantor shall have executed and delivered the Completion Guaranty, and the Concessionaire shall have delivered the Initial Baseline Schedule to the Department;

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

(iv) all representations and warranties of the Concessionaire set forth in Section 15.02 remain true in all material respects; and

(v) there exists no uncured Concessionaire Default for which the Concessionaire has received notice from the Department.

(b) Conditions Precedent to Commencement of Construction. The Concessionaire shall not permit the Design Build Contractor to commence construction of any Construction Segment unless and until the following conditions have been satisfied or waived by the Department in either case in writing (the "Construction Segment Approval"):

(i) The Concessionaire shall have delivered to the Department correct and complete copies of Design Documentation and Construction Documentation, as approved by the Department to the extent required under Section 7.05, relating to the applicable Construction Segment pursuant to Section 7.05(b), (c) and (d);

(ii) All Regulatory Approvals (including Department Regulatory Approvals and any applicable FHWA approvals and agreements) necessary for the construction of the applicable Construction Segment shall have been acquired (and copies provided to the Department), and the Concessionaire has satisfied all applicable pre-construction requirements of the Regulatory Approvals; and

(iii) All rights of access or other property rights necessary for the commencement of construction within the applicable portion of a Construction Segment shall have been obtained.



**Section 7.04 Delay in Work Approvals.**

The Concessionaire shall deliver notice to the Department upon the satisfaction of the applicable conditions set forth in Section 7.03 and request that the Department issue a Work Commencement Approval or Construction Segment Approval, as applicable, for such Work. The Department shall endeavor to respond to such request, within 21 days following delivery of such request to the Department, by delivery to the Concessionaire of either the requested Work Commencement Approval or Construction Segment Approval, as applicable, or notice of the conditions that the Department believes to be lacking. If the Concessionaire has not received a response within such 21-day period, such failure by the Department to respond shall be deemed approval, but shall not be deemed a waiver of the other conditions set forth in Section 7.03, including compliance with the Technical Requirements, Regulatory Approvals and applicable Law.

**Section 7.05 Approval of Design-Build Contract; Project Design and Construction Documentation.**

(a) The Department has hereby approved the Design Build Contractor and the Design-Build Contract, including the schedules, exhibits and other attachments thereto, in substantially the form attached hereto as Exhibit F. Approval by the Department of the Design Build Contractor and the Design-Build Contract shall not constitute the Department's waiver of any terms or requirements of this Agreement. The Design-Build Contract shall not impose obligations on the Department; the Department's Work Period obligations are provided in this Agreement. The Department shall be a third party beneficiary of the Design-Build Contract. The Concessionaire shall not amend or modify the Design-Build Contract without the prior written consent of the Department; *provided*, however, that the Department's consent shall not be required with respect to change orders that neither: (i) constitute a change in the scope of the Work or Deviations from the Technical Requirements nor (ii) result in increases in the time to complete the Work pursuant to this Agreement or the imposition or enlargement of any of the Department's costs, liabilities or obligations. The Concessionaire shall provide the Department with notice of all proposed change orders whether or not the Department's consent is required.

(b) The Concessionaire shall submit to the Department accurate and complete copies of all Design Documentation and Construction Documentation relating to the Work at such times as and when such documentation is delivered by the Design Build Contractor to the Concessionaire under the Design-Build Contract. The Concessionaire shall have the right to amend, supplement or otherwise modify the Design Documentation or the Construction Documentation or any part thereof without the approval of the Department; *provided*, however, that the Department's approval shall be required with respect to amendments, supplements or modifications that either: (i) constitute a change in the scope of the Work or Deviations from the Technical Requirements, or (ii) result in increases in the time to complete the Work or the imposition or enlargement of any of the Department's costs, liabilities or obligations. The Concessionaire shall provide the Department notice of all proposed amendments, supplements and amendments whether or not the Department's consent is required.

(c) The Concessionaire shall provide the Department with a schedule of its proposed submittals of Design Documentation and Construction Documentation (which schedule shall be

updated periodically as necessary) so as to facilitate the Department's coordination and review of such Documents, and shall complete quality assurance reviews of all Design Documentation and Construction Documentation to ensure that they are accurate and complete and comply with the requirements of this Agreement and the Technical Requirements included as Exhibit N prior to any submission to the Department. Whenever the Department is entitled to review and comment on, or to affirmatively approve the Design Documentation and Construction Documentation and other items submitted in accordance with this Agreement or the Technical Requirements, the Department shall respond within 21 days after the Department's acknowledgement of receipt. In the event that the Department fails to respond in 21 days, such failure by the Department to respond shall be deemed approval, except to the extent that submittals deviate from the Technical Requirements, Regulatory Approvals or applicable Law. If the Department has responded, the Concessionaire shall respond to all of the Department's comments and objections and, to the extent Department approval is required pursuant hereto, make modifications to the Design Documentation and Construction Documentation necessary to fully reflect and resolve all such comments and objections, and resubmit such documentation to the Department for its review and approval in accordance with the foregoing procedures.

(d) The Concessionaire shall provide Department with five sets (together with one electronic version in a format acceptable to the Department) of the following interim design submissions for approval, which submissions generally correspond to the Department's concurrent engineering process: (i) Design Public Hearing Documentation; (ii) Design Documentation for Field Inspection and Right-of-Way ("FI/RW"); and (iii) Construction Documentation issued for construction.

(A) On or about the time of the scheduled submissions, the Concessionaire shall meet with the Department and shall identify during such meetings, among other things, the evolution of the design and any significant changes or deviations from the contract documents, or, if applicable, previous design submissions. Minutes of the meetings will be maintained by the Concessionaire and provided to all attendees for review.

(B) Construction Documentation shall set forth in detail drawings and specifications describing the requirements for construction of the Work, in full compliance with all Law and Regulatory Approvals. The Construction Documentation shall be consistent with the latest set of interim design submissions; as such submissions may have been modified in a design review meeting, as agreed upon in writing, and shall be submitted after Concessionaire has obtained all requisite Regulatory Approvals associated with the Work contained in such documents. Concessionaire shall proceed with construction in accordance with the approved Construction Documentation and shall submit five sets (together with an electronic copy in a format acceptable to the Department) of approved Construction Documentation to Department prior to commencement of construction.

(C) In addition, the Concessionaire shall cause the Design Build Contractor to permit the Department and its agents and consultants access to its FTP website for purposes of viewing and downloading copies of all Construction

Documentation, Design Documentation and any other documents relevant to the design or construction of the Project.

(e) Department's review, comment and/or approval of interim design submissions and the Construction Documentation are for the purpose of establishing Concessionaire's compliance with the requirements of this Agreement and mutually establishing a conformed set of contract documents compatible with the requirements of the Work.

#### **Section 7.06 Construction Management and Coordination**

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

(b) The Department's and the Concessionaire's project manager and senior representatives and other pertinent representatives of the parties shall meet within seven days after the Closing Date to discuss issues affecting the administration of the Work and to implement the necessary procedures, including those relating to submittals and approvals, to facilitate the ability of the parties to perform their obligations under this Agreement.

(c) The Concessionaire shall hold monthly progress meetings with the Department. During such meetings, progress during the prior month shall be reviewed and the Concessionaire shall collect information from any key subcontractors/sub-consultants responsible for work completed during the specified duration and work scheduled during the upcoming reporting duration. These meetings shall be attended by the Concessionaire Representative and other personnel as requested by the Department. Meetings will occur monthly beginning the month after the Closing Date. The Concessionaire shall be responsible for preparing, maintaining and distributing minutes of the meetings to all attendees for review. The meeting minutes shall be provided to the Department within two calendar days after the monthly progress meeting.

(d) The Initial Baseline Schedule attached as Exhibit O shall be the basis for monitoring the Concessionaire's performance of the Work until such time as a Baseline Schedule has been approved by the Department in accordance with subsection (e) below. The Baseline Schedule shall provide for a Guaranteed Substantial Completion Date in accordance with Section 7.01(e).

(e) Within 60 days of the date the Work Commencement Approval is issued, the Concessionaire shall submit to the Department, for its review and approval, a CPM schedule that includes among other things: (i) the order in which the Concessionaire proposes to carry out of the Work (including each stage of the design, Rights of Way acquisition, Regulatory Approvals (including but not limited to permit acquisition), procurement, manufacture, delivery to Site, construction, inspection and testing); and (ii) the times when submissions to, and approvals or consents by, the Department are required (provided, however, that such times shall be no less than 21 days). This schedule shall be resource-loaded, broken down into work packages and in deliverables generally completed within 30 days, with the dollar value (price) of each deliverable being identified, and is otherwise in compliance with the Technical Requirements and in a form acceptable to the Department. If the Department does not approve such submission, the

Concessionaire shall resubmit a revised schedule to the Department within seven days of its receipt of the Department's comments on such schedule. This process shall continue until such time as a schedule is so approved by the Department (as updated or revised pursuant to this Agreement, the "Baseline Schedule"). The Concessionaire shall submit proposed updates to the Baseline Schedule for the Department's review and approval, following the process outlined in this section, whenever there are changes that materially impact the critical path or the Guaranteed Substantial Completion Date. Otherwise, monthly schedule updates shall be provided by the Concessionaire as noted below.

(f) As part of, and in conjunction with, the monthly meetings required by Section 7.06 (c) above, the Concessionaire shall provide the Department with any proposed update of the Baseline Schedule for the Department's review, and, if required under this Section 7.06 (other than Section 7.06(f)), approval, and a progress narrative that describes, at a minimum, the overall progress for the preceding month, a critical path analysis, a discussion of problems encountered and proposed solutions thereof, work calendars, constraints, delays experienced and any pending Time Impact Analysis ("TIA"), float consumption as a result of either Department and, Concessionaire, and/or Design Build Contractor delays, documentation of any logic changes, duration changes, resource changes or other relevant changes. The monthly progress narrative shall also include the following:

(i) Comparisons of actual and planned progress, including: (1) illustrating schedule variance graphically by plotting the budgeted cost of work performed ("BCWP") and the budgeted cost of work scheduled ("BCWS"); and (2) reporting the schedule performance index ("SPI"), defined as the ratio of BCWP divided by BCWS; and

(ii) Statement by the Concessionaire that this is the only schedule being executed to perform the Work; and

(iii) Details of any aspects of the Work which may jeopardize the completion in accordance with the Agreement; and

(iv) Measures being (or to be) adopted to overcome such aspects and a list of approvals needed to adopt such measures.

(g) If the Department believes that the Baseline Schedule needs a specific revision, either in logic, activity duration, manpower or cost, it will be requested from the Concessionaire in writing. The Concessionaire shall respond in writing within seven days, either agreeing with the Department's proposed revision, and henceforth including it in the next Baseline Schedule update, or providing justification why it should not be accomplished. If revisions cannot be agreed upon either through written correspondence or subsequent meetings, the Department and Concessionaire shall agree to attempt to resolve the issues through the dispute resolution process described in Section 17.06. At no time shall the Concessionaire continue to reflect items of non-concurrence from the Department in Baseline Schedule updates.

(h) The Concessionaire shall submit two copies in electronic format of the Baseline Schedule, including updates and narratives. A CD-ROM containing the latest Baseline Schedule

update in electronic format shall be submitted for each schedule iteration along with two color coded plots of the current Time Scaled Logic Diagram, which shall be neatly organized and plotted time scaled from left to right on 11"x17" sheets with suitable notation relating the interface points among sheets. Time Scaled Logic Diagrams shall clearly depict the critical path, as well as activity identifications, activity descriptions, original durations, early start, early finish, late start, late finish, and actual dates as applicable. This process shall continue until Final Completion. The Concessionaire shall use Primavera Project Planner P3 v 3.1 software as the format for the Baseline Schedule and all updates. The Concessionaire shall also provide two licenses with maintenance agreements covering the entire construction duration from Primavera Project Planner P3 v 3.1 to the Department to enable it to access and analyze all such schedules.

(i) The Concessionaire shall, whenever required by the Department, provide in writing a general description of the arrangements and methods which the Concessionaire proposes to adopt for the execution of the Work. No significant alteration to the Baseline Schedule, or to such arrangements and methods, shall be made without informing the Department and any alterations made shall reflect the requirement for coordination of the Work with the actions and obligations of the Department and the work to be carried out by the Department's separate contractors, if any. If any alteration affects any such actions, obligations or work, it shall not be made without the prior approval of the Department. If the progress of the Work does not conform to the Baseline Schedule, as updated herein, the Concessionaire will reasonably consider revisions to the Baseline Schedule proposed by the Department, to achieve completion within the timeframe set forth in the Agreement.

(j) The parties further agree to abide by the terms and procedures set forth in the Technical Requirements pertaining to project management and coordination matters.

(k) Whenever the Department is required to respond to the Concessionaire's request for the Department's approval or consent pursuant to this Article 7 (whether or not failure to respond is deemed approval or consent), the Department shall be deemed to have responded if it has notified the Concessionaire, within the applicable time period, that the Department requires additional time to obtain information or to perform reviews necessary or appropriate for a complete response.

#### **Section 7.07 Regulatory Approvals.**

(a) It shall be the sole responsibility of the Concessionaire, at its own cost and expense, to obtain and maintain in full force and effect and comply with all Regulatory Approvals necessary for the development, design, construction, management, operation and maintenance of the Project and any Project Enhancements throughout the Term; *provided that* (i) the Department shall obtain at its cost, all Department Regulatory Approvals, and (ii) any Regulatory Approval necessitated by a Department Change or Department Project Enhancement shall be governed by the provisions of Section 7.12 or Section 9.02, as applicable. The Department and the Concessionaire acknowledge that as of the Agreement Date all such Department Regulatory Approvals are described in Exhibit M and have been obtained and that any additional permits and approvals required for the Project shall be the Concessionaire's responsibility.

(b) Subject to Section 7.07(c) below, the Department shall provide reasonable assistance and cooperation to the Concessionaire, as requested by the Concessionaire and at the Concessionaire's cost, in obtaining Regulatory Approvals relating to the Project or any Project Enhancements and any revisions, modifications, amendments, supplements, renewals, reevaluations and extensions of existing Regulatory Approvals.

(c) Except as otherwise provided in this Agreement or any other Project Agreement, the Department shall not unreasonably withhold or delay any Regulatory Approval for which it is the issuing Governmental Authority with respect to the design, construction, operation or maintenance of the Project or any Project Enhancement. For the avoidance of doubt, the provisions of this Section 7.07(c) are not intended to supersede any provision of this Agreement or any other Project Agreement providing for the conditions to or time of approval of any such Regulatory Approval, or any express right of the Department to withhold consent in its sole discretion.

(d) Regardless of the Department's exercise or failure to exercise any such rights, regardless of the issuance of permits or certificates of completion or acceptance, and regardless of Final Acceptance of the Route 495 HOT Lanes in Virginia Project or any Project Enhancement, the Concessionaire at all times shall have an independent duty and obligation to obtain all Regulatory Approvals (except Department Regulatory Approvals) necessary to design, acquire, construct, equip, operate, maintain, police, renew, replace, provide traffic management for and otherwise manage the Project and Rights of Way in accordance with the standards and requirements set forth in the Project Agreements.

#### **Section 7.08 Acquisition of Project Right of Way and Utility Relocations.**

(a) The Concessionaire shall perform or cause the performance of all Project Right of Way acquisition Work and Utility Relocations necessary for the construction of the Route 495 HOT Lanes in Virginia Project including but not limited to all appraisals, appraisal reviews, negotiations with landowners and utility owners, relocation assistance and advisory services, and legal services. The Concessionaire shall carry out the work, or cause the performance of the work, specified herein as follows:

(i) The Concessionaire shall acquire all Project Right of Way, at its sole cost and expense, except to the extent otherwise provided by Section 7.08(e), in accordance with the Technical Requirements (including VDOT Right of Way and Utilities Manuals, Vol. I and II), all federal and State laws and regulations, including but not limited to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (the "Uniform Act") and Titles 25.1 and 33.1 of the Virginia Code.

(ii) The Concessionaire shall submit a Right of Way Acquisition Plan (as defined in the Technical Requirements) for Department approval. The Right of Way Acquisition Plan shall identify a schedule of right of way activities including the specific parcels to be acquired and all relocations. The Right of Way Acquisition Plan shall allow for the orderly relocation of displaced persons based on time frames not less than those provided by the Uniform Act. In the event the Department fails to

respond in 21 days, such failure by the Department shall not be deemed approval of the Right of Way Acquisition Plan. The Right of Way Acquisition Plan shall be updated as necessary during the life of the Route 495 HOT Lanes in Virginia Project.

(iii) The Concessionaire shall exercise due diligence and use reasonable care in determining whether property to be acquired may contain wastes or other materials or hazards requiring remedial action or treatment and shall otherwise comply with the Technical Requirements, including the undertaking of studies, assessments and tests required by the Technical Requirements.

(iv) The Concessionaire shall make direct payments of benefits to property owners for negotiated settlements, relocation benefits, and payments to be deposited with the court.

(v) The Concessionaire shall prepare, obtain execution of, and record documents conveying title of the Project Right of Way to the State and deliver all executed and recorded general warranty deeds to the Department. For all property purchased in conjunction with the Route 495 HOT Lanes in Virginia Project, title will be acquired in fee simple except as may be specifically agreed to by the Department.

(b) Condemnation. The Concessionaire shall use its best efforts (which shall not require the Concessionaire to pay more than fair market value for land or land rights) to settle claims with landowners amicably. If, despite the Concessionaire's best efforts, it is unable to reach a settlement with any landowners within a reasonable period of time, as a last resort the Department will handle any necessary condemnation proceedings subject to the following. Prior to the Department filing a condemnation proceeding, the Concessionaire shall prepare or cause to be prepared all necessary paperwork and supporting documentation required for the proceeding and it shall deliver that documentation to the Department. The Department then will file the condemnation proceeding(s) and handle such proceeding(s) in accordance with the Technical Requirements.

(c) Property outside the Project Right of Way. The Concessionaire shall be responsible, at its own cost and expense, for the acquisition of, or to cause the acquisition of, any property, temporary easements or other property rights outside of the Project Right of Way which may be necessary for any permanent or temporary works outside of the Project Right of Way, including those necessary to accommodate laydown, staging, drainage and other construction methods in connection with the construction of the Project, and for all facilities and improvements required for the opening and operation of the HOT Lanes Project.

(d) Utility Relocations. The Concessionaire shall cause all Utility Relocations necessary to accommodate construction of the Route 495 HOT Lanes in Virginia Project. Utility Relocations shall be performed in accordance with the Technical Requirements (including the Department's Right of Way & Utilities Division Manual of Instructions – Volume II – Utility Relocation Policies and Procedures, November 2003 and any relevant agreements with the affected Utilities). Subject to all applicable Law, the Department shall provide to the Concessionaire the benefit of any provisions in recorded utility or other easements affecting the Project which require the easement holders to relocate at their expense and the Department shall

provide reasonable assistance to the Concessionaire in obtaining the cooperation of the easement holders in connection with Utility Relocations, it being understood that such assistance shall not entail the initiation of or participation in legal actions or proceedings, and that the Concessionaire shall reimburse the Department for its Allocable Costs in providing such assistance.

(e) ROW Acquisition Costs. If the aggregate ROW Acquisition Costs exceed the ROW Allowance, the Department shall pay any such excess, and if such Costs are less than the ROW Allowance such excess shall be deposited in the Project Enhancement Account.

### **Section 7.09 Management of Hazardous Substances**

During the Work Period, the responsibilities of the parties with respect to the management, treatment, handling storage, remediation and removal of all Hazardous Substances shall be allocated and undertaken in accordance with the following terms and conditions:

(a) The Department shall reimburse Concessionaire for its Allocable Costs incurred for the management, treatment, handling, storage, remediation and removal of Pre-Existing Hazardous Substances discovered on the property owned as of the Agreement Date by the Department within the Project Right of Way ("VDOT Existing ROW"), subject to compliance with Section 7.09(c).

(b) The Concessionaire shall be responsible for the management, treatment, handling storage, remediation and removal of all other Hazardous Substances discovered in the course of its work on the Project.

(c) The parties shall carry out their respective responsibilities in accordance with the provisions of the Technical Requirements, which entail, at a minimum, that: (i) the Concessionaire shall obtain all environmental site assessments of the affected property and submit copies of such assessments to the Department for its review and approval; (ii) the Concessionaire shall develop the plans, subject to the review and approval of the Department, for the management, treatment, handling, storage, remediation and removal of the Hazardous Substances, and shall obtain all necessary Regulatory Approvals to implement such plans; and (iii) the Concessionaire shall provide cost estimates with respect to such Work which is to be reimbursed by the Department, for the Department's review and approval prior to proceeding with any such Work. If the Department has not responded to a request for such approval pursuant to this subsection (c) within 21 days after the Department's acknowledgement of receipt, the request shall be deemed to be approved, except to the extent matters deviate from applicable Technical Requirements, Regulatory Approvals or Law.

(d) The Concessionaire shall seek pre-approval and pursue reimbursement from the Virginia Petroleum Underground Storage Tank Fund ("VPSTF") for qualifying expense incurred during the course of investigation and/or containment, management, mitigation, remediation activities on underground storage tank sites. The Concessionaire shall promptly pay over to the Department all monies the Concessionaire receives from the VPSTF with respect to activities subject to reimbursement by the Department to the Concessionaire pursuant to Section 7.09(a).



**Section 7.10 Regional Congestion Management Plan and TMP.**

The Concessionaire will carry out any construction activities on the Project or with respect to any Project Enhancement in accordance with a TMP to be developed by the Concessionaire and in coordination with the Department. In addition, the Concessionaire shall participate in any federally approved regional congestion management plan that is implemented by the Department or its designee with respect to the Capital Beltway and the regional transportation network.

**Section 7.11 Public Information.**

Prior to and during the construction thereof, the Concessionaire will provide information to the public concerning the Route 495 HOT Lanes in Virginia Project, any Project Enhancements or any other construction activities in accordance with a Public Information Plan to be developed by the Concessionaire in coordination with the Department.

**Section 7.12 Department Changes During the Work Period.**

(a) Department's Right to Issue Change Orders. The Department may, at any time and from time to time during the Work Period, authorize and/or require changes (i) in the Work as set forth in the Scope Document pursuant to a Change Order or (ii) in the terms and conditions of the Technical Requirements (including changes in the standards applicable to the Work); *provided*, that increased costs resulting from a Department Change shall be borne by the Department, and; *provided further*, that the Department has no right to require any change that:

- (i) Is not in compliance with applicable Law;
- (ii) Would contravene an existing Regulatory Approval and such contravention cannot be corrected by the issuance of a further or revised Regulatory Approval;
- (iii) Would cause an insured risk to become uninsurable; or
- (iv) Would materially and adversely affect the health or safety of users or employees of the Route 495 HOT Lanes in Virginia Project.

The Concessionaire shall have no obligation to perform any Work outside the general scope of this Agreement, except on terms mutually acceptable to the Department and the Concessionaire. If a Department Change results in Concessionaire Damages, the Department shall compensate the Concessionaire in accordance with Sections 13.02 and 13.03; *provided*, that any Positive Revenue resulting from a Department Change shall be shared equally between the Concessionaire and the Department, in addition to and without regard to any amounts payable under Article 5, and the Department's share of such Positive Revenue shall be paid by the Concessionaire and deposited in the Project Enhancement Account.

(b) Request for Change Proposal.

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

(ii) Within 21 days following Concessionaire's receipt of the Request for Change Proposal, the Concessionaire shall provide the Department with a preliminary written response, and within a reasonable time thereafter, with a definitive written response, as to whether, in the Concessionaire's opinion, the Department Change constitutes a Compensation Event, and, if so; (a) a detailed assessment of the cost, an estimate of any Concessionaire Damages, Toll Revenue and schedule impact of the proposed Department Change; (b) the effect of the proposed Department Change on the Baseline Schedule, taking into account the Concessionaire's duty to mitigate delay to the extent reasonably practicable; and (c) the effect of the proposed Department Change on traffic volume and traffic flow on the HOT Lanes following the Service Commencement Date.

(iii) The Department shall be entitled to obtain a comprehensive report as to the proposed Department Change (including comments concerning the Concessionaire's estimate of the costs and other impacts) from the Independent Engineer and a traffic and revenue study relevant to such impacts from a traffic and revenue consultant acceptable to the Department.

(iv) Following the Department's receipt of the reports from the Independent Engineer and the traffic and revenue consultant if requested by the Department, or within 21 days following the delivery of the Concessionaire's response to the Department pursuant to (ii) above if the Department has not requested such reports, the Concessionaire and the Department shall exercise good faith efforts to negotiate a mutually acceptable Change Order, including adjustments to the Baseline Schedule and, if the Department Change constitutes a Compensation Event, any Concessionaire Damages to which the Concessionaire may be entitled (taking into account the reports, if any, obtained by the Department).

(v) The Concessionaire shall perform the work required to implement the Department Change in a timely manner and in accordance with a budget mutually agreed upon by the Department and the Concessionaire; *provided*, that:

(A) a Change Order setting forth the adjusted scope of work shall have been mutually agreed upon between the Department and the Concessionaire and issued by the Department;

(B) the Department and the Concessionaire shall have identified sufficient funds that may be made available to the Concessionaire to perform the work required to implement the Department Change;

(C) the Baseline Schedule for the Work shall have been adjusted as agreed upon by the Department and the Concessionaire to reflect any projected delays in the timing of the Work as a result of the Department Change (taking into

consideration the Concessionaire's duty to mitigate any delay to the extent reasonably practicable); and

(D) the Concessionaire shall have obtained (with the cooperation of the Department) all relevant Regulatory Approvals from all relevant Governmental Authorities required for such work.

(vi) If the Department and the Concessionaire are unable to reach an agreement on a Change Order, the Department may deliver to the Concessionaire a Directive Letter, directing the Concessionaire to proceed with the performance of the Work in question, notwithstanding such disagreement. Upon receipt of the Directive Letter, pending final resolution through the dispute resolution procedures of the relevant Change Order, the Concessionaire shall implement and perform the Work in question as directed by the Department and the Department shall make interim payments to the Concessionaire on a monthly basis for the reasonable documented Allocable Costs of the Work in question, subject to subsequent adjustment through the dispute resolution procedures set forth in Section 17.06.

(c) If the Concessionaire has refused or fails to implement any such Department Change or the parties are unable to reach agreement on a Change Order, the Department shall have the right to perform the work required to implement such Department Change; *provided* that the Department shall perform any such work in a manner that shall (i) not unduly interfere with the construction or operation of the Project or the generation of Toll Revenues and (ii) adhere to the requirements of this Agreement; *provided* that Positive Revenue resulting from a Department Change shall be shared equally between the Concessionaire and the Department, in addition to and without regard to amounts payable under Article 5, and the Department's share of such Positive Revenues shall be paid by the Concessionaire and deposited in the Project Enhancement Account.

(d) Technical Requirement Revisions Treated as Department Change.

(i) The Concessionaire and the Department anticipate that from time to time after the Closing Date, the Department may adopt, through revisions to existing manuals and publications or new manuals and publications, changes, deletions, supplements or other modifications to the Technical Requirements (the "Technical Requirement Revisions"). The Department shall have the right to make Technical Requirement Revisions by delivering written notice to the Concessionaire, whereupon they shall constitute amendments to, and become part, of the Technical Requirements; *provided*, that if the Department elects to adopt Technical Requirement Revisions during the period before Substantial Completion, such revisions shall be considered Department Changes and handled pursuant to the Change Order procedures for a Department Change in Sections 7.12(a), (b) and (c). In the absence of a Change Order relating to such Technical Requirement Revision, the Concessionaire shall not be obligated to (but may with the Department's approval) incorporate the same into its design and construction of the Project prior to the Substantial Completion Date.

(ii) References in the Technical Requirements to manuals or other publications prior to the Substantial Completion Date shall mean those versions of the documents in effect as of August 1, 2007, unless expressly provided otherwise by Technical Requirement Revisions or mutually agreed by the Department and the Concessionaire. To the extent any Technical Requirement Revisions encompass matters that are addressed in versions of such manuals or other publications in effect as of August 1, 2007, they shall, upon delivery of the Department's written notice referred to in Section 7.12(d)(i), replace and supersede inconsistent provisions of the Technical Requirements. The Department shall identify any superseded provisions in its notice to the Concessionaire unless otherwise stated below.

(iii) Either party is entitled to refer any dispute arising out of a proposed Department Change, other than the Department's adoption of Technical Requirement revisions, in accordance with the dispute resolution procedures set forth in Section 17.06.

(e) Department Delays Treated as Department Changes.

(i) The Concessionaire may submit to the Department a request for Change Order if the Design Build Contractor incurs a material increase of its construction costs or incurs a material impact to the critical path which delays the Guaranteed Substantial Completion Date due to a material breach or an inexcusable delay by the Department in performing any of its obligations described in Article 7 of this Agreement. For the purposes of this Section, an "inexcusable delay" shall mean a delay that is attributable solely to error or omission of the Department, and an inexcusable delay or a material breach specifically excludes delay or breach attributable to: (a) the submission of incomplete documentation for the Department's review, (b) required review or approvals from other Governmental Authorities necessary or appropriate to the Department's review, (c) failure to obtain appropriation and allocation of public funds, (d) consumption of available float, (e) submittals or requests that are "deemed approved" if no response is provided within 21 days, or (f) force majeure events. A response pursuant to Section 7.06(k) shall not be considered "deemed approved", and shall not be considered an "inexcusable delay" in the event that a delay is attributable to items (a) through (f) above or is not attributable solely to error or omission of the Department.

(ii) The Concessionaire shall submit its request for Change Order within 21 days after the occurrence giving rise to the request for adjustment or relief. The request for Change Order shall include sufficient information to advise Department of the circumstances giving rise to the request for adjustment and the basis of such request.

(iii) If the Department determines the Concessionaire is entitled to cost relief, the Concessionaire shall be entitled to recover only the direct costs reasonably and necessarily incurred by the Design Build Contractor as a direct result of the Department's delay. However, under no circumstances will such recoverable costs include home office overhead incurred by the Design Build Contractor's member companies or financing costs.

(iv) The Concessionaire's request for Change Order may include the price escalation for materials only if the Department's delay causes the Guaranteed Substantial Completion Date to be delayed by at least one year and such delay is not attributable to the actions or negligence of the Concessionaire, a Concessionaire Party, or the Design Build Contractor.

(v) The Department may extend the Guaranteed Substantial Completion Date only if its delay results in a material impact to the critical path set forth in the Baseline Schedule.

(vi) If for any reason the Concessionaire fails to deliver the request for Change Order within the time period specified in Section 7.12(e)(ii), the Concessionaire shall be deemed to have irrevocably and forever waived and released any Claim or right to cost or schedule relief attributable to any such alleged Department delay or breach.

(vii) If the Department grants to the Concessionaire cost relief, schedule relief, or both, the Concessionaire shall pass such relief to the Design Build Contractor pursuant to the terms of the Design-Build Contract.

(viii) If the authorized project representatives of the Concessionaire and the Department fail to agree on the terms of any Change Order submitted pursuant to this Section 7.12(e) within 60 days after the request is received by the Department the matter shall be resolved at the discretion of the Department's Chief Engineer. Otherwise, the Concessionaire's sole recourse shall be litigation in accordance with Sections 17.06(c) and 17.06(d).

### **Section 7.13 Concessionaire Requests for Deviations from Technical Requirements.**

(a) The status of Deviations submitted to the Department as of the Agreement Date shall be set forth in the Technical Requirements.

(b) The Concessionaire may request the Department to approve additional Deviations to the Technical Requirements by submitting to the Department a written change request in a form approved by the Department. The change request shall set forth the Concessionaire's estimate of impacts on costs, Toll Revenues and schedule attributable to the requested Deviation. The Department shall consider, in its sole discretion, any such request, and the Concessionaire shall bear the burden of persuading the Department that the Deviation sought constitutes sound and safe engineering consistent with Good Industry Practice and achieves the Department's applicable safety standards and criteria. No Deviation shall exist or be effective unless and until approval thereof is provided in writing by the Department; *provided*, that the failure of the Department to provide a written notice of approval of such Deviation within 21 days following receipt of the Concessionaire's request shall be deemed the Department's approval thereof, but shall not be deemed a waiver of applicable Law or Regulatory Approvals.

(c) The Concessionaire shall be solely responsible for payment of any increased costs, for any revenue losses and for any schedule delays or other impacts resulting from the

implementation of a Deviation from the Technical Requirements that has been approved, or deemed approved, by the Department.

(d) Positive Revenue resulting from any such Department approved additional Deviation in accordance with Section 7.13(b) shall be shared equally between the Concessionaire and the Department, in addition to and without regard to any amounts payable under Article 5, and the Department's share of such Positive Revenue shall be paid by the Concessionaire to the Department for deposit in the Project Enhancement Account.

#### **Section 7.14 Substantial Completion and Final Acceptance.**

(a) Substantial Completion.

(i) The Concessionaire shall provide the Department and the Independent Engineer with written notice of anticipated Substantial Completion at least 21 days prior to the anticipated Substantial Completion Date. During such 21-day period, the Concessionaire, the Independent Engineer and the Department shall meet, confer and exchange information on a regular basis with the goal being the Department's orderly, timely inspection and review of the Route 495 HOT Lanes in Virginia Project and final design and construction documents and the Department's issuance of a Substantial Completion Certificate. In addition, the Independent Engineer shall conduct an inspection of the Route 495 HOT Lanes in Virginia Project, the final design and construction documents, and such other matters as may be necessary to determine whether Substantial Completion is achieved and, not later than five days following the expiration of such 21-day period, shall deliver a written report of findings and recommendations to the Department and the Concessionaire. The Department may jointly with the Independent Engineer or independently conduct such inspection, review and investigation within such period.

(ii) If the Department disapproves the issuance of a Substantial Completion Certificate, then the Department shall provide a written notice to the Concessionaire specifying its reasons for such disapproval, and the Concessionaire shall have a reasonable opportunity to correct the defects or deficiencies in the Work to which the Department's disapproval relates. The Department may jointly with the Independent Engineer or independently inspect, review and investigate the corrective work. If the Department and the Concessionaire cannot, despite good faith efforts, agree as to Substantial Completion, such dispute shall be resolved in accordance with the dispute resolution procedures set forth in Section 17.06. The Concessionaire shall provide notice to the Department if the Department has not approved or disapproved the issuance of a Substantial Completion Certificate within such 21-day period, and if the Department has not notified the Concessionaire of such approval or disapproval within 15 days after such Concessionaire notice, if the delay is not a result of a Concessionaire Party action or inaction, then such delay shall constitute a Compensation Event, and the Concessionaire shall be entitled to Concessionaire Damages, if any, pursuant to Sections 13.02 and 13.03.

(iii) Subject to Section 7.15, when the requirements for Substantial Completion have been achieved with respect to the New Lanes in their entirety in accordance with this Section (without regard to the status of the remainder of the Route 495 HOT Lanes in Virginia Project), (A) the Department shall issue a Substantial Completion Certificate for the New Lanes, (B) the Department shall assume responsibility from the Concessionaire for operation and maintenance of the New Lanes, (C) the Department shall include such constructed New Lanes as part of the State Highway system, and (D) the Concessionaire shall have no further obligations with respect to the New Lanes except as required to satisfy the conditions to Final Acceptance as provided in Section 7.13(b) and as required by Sections 7.19, 8.07, 14.01 and 14.03; *provided*, that solely for the purpose of processing such Final Acceptance, all references to the Route 495 HOT Lanes in Virginia Project in Section 7.13(a)(ii) and (iii) and (b) shall be changed to reference the New Lanes.

(b) Final Acceptance.

(i) Within 90 days following the issuance of the Certificate of Substantial Completion, the Concessionaire shall perform all remaining Work, including completion of all Punch List items for the Route 495 HOT Lanes in Virginia Project.

(ii) The Concessionaire shall provide the Department and the Independent Engineer with written notification when it has determined that the following conditions to Final Acceptance have been satisfied: (a) all requirements for Substantial Completion have been satisfied; (b) all Punch List items have been completed and delivered to the reasonable satisfaction of the Department; (c) the Concessionaire shall have delivered correct and complete copies of all as-built drawings of the Route 495 HOT Lanes in Virginia Project to the Department; (d) all work that the Concessionaire is obligated to perform for or on behalf of third parties has been accepted by such third parties (other than disputed items); (e) the Concessionaire has paid for all work by third parties that the Concessionaire is obligated to pay (other than disputed amounts); (f) the Concessionaire has delivered all required certifications from the engineer of record and architect of record for the Project to all necessary Governmental Authorities and to the Department; (g) the Concessionaire has made all deliveries of Work Product to the Department that are required to be made under this Agreement; and (h) the conditions set forth in Section 6.7.1 of the Design-Build Contract have been satisfied, with the exception of the condition requiring that Final Acceptance has occurred under this Agreement. During the 21 day period following delivery of such notice, the Concessionaire, the Department and the Independent Engineer shall meet, confer and exchange information with the goal being the Department's and the Independent Engineer's orderly, timely inspection of the Route 495 HOT Lanes in Virginia Project and final acceptance by the Department in writing (such written acceptance the "Final Acceptance Certificate"), and the Independent Engineer shall conduct an inspection of the Punch List items, a review of the final drawings and such other investigation as may be necessary to evaluate whether the conditions to Final Acceptance have been satisfied. The Independent Engineer shall submit to the Department and the Concessionaire a report of its findings and recommendations prior to the expiration of such 21-day period. The Department may

jointly with the Independent Engineer or independently conduct such inspection, review and investigation within such period.

(iii) Within five days following the expiration of such 21-day period and the Department's receipt of the Independent Engineer's report, the Department shall issue a Final Acceptance Certificate or shall notify the Concessionaire why Final Acceptance has not been achieved; *provided*, that if the Department has failed to issue a Final Acceptance Certificate or to notify the Concessionaire why Final Acceptance had not been achieved within 21 days after the expiration of the 21 day period described in Section 7.14(b)(ii), a Final Acceptance Certificate shall be deemed to be issued.

**Section 7.15 Substantial Completion of Portions of the Route 495 HOT Lanes in Virginia Project.** In the Department's sole discretion it may issue a Substantial Completion Certificate with respect to certain segments of the New Lanes, or with respect to Springfield Interchange Phase VIII, prior to issuing a Substantial Completion Certificate for the balance of the New Lanes. In such case, solely for the purpose of processing such early acceptance, all references to the Route 495 HOT Lanes in Virginia Project in Section 7.14(a)(i) and (iii) and (b) shall be deemed to refer to such portion of the Route 495 HOT Lanes in Virginia Project that the Department has agreed in its sole discretion to accept early pursuant to this Section 7.15.

**Section 7.16 Failure to Achieve Substantial Completion by Outside Substantial Completion Date; Recovery Plan.**

(a) If at any time prior to Substantial Completion the monthly schedule update indicates that actual progress projects that Substantial Completion will occur more than five months later than the then-current Guaranteed Substantial Completion Date, the Concessionaire shall consult with the Design-Build Contractor and the Collateral Agent, and shall prepare a schedule recovery plan. The Concessionaire shall submit its proposed plan to the Department concurrent with the next monthly schedule update. The updated schedule and recovery plan shall detail the actions proposed to improve progress, and shall set forth a revised Baseline Schedule for which the projected Substantial Completion Date shall not be later than the Outside Substantial Completion Date, or such later date as may be mutually agreed to by the Concessionaire and the Department. The Concessionaire shall reasonably consider the Department's proposed changes or additions to the schedule recovery plan. The Concessionaire shall respond to the Department's schedule review comments, following the process outlined in Section 7.06(e), until the Department has approved the revised Baseline Schedule. The Concessionaire shall continue to monitor progress of the work on a monthly basis, and shall repeat the process described in Section 7.16(a), above, whenever actual progress lags the then-approved schedule by more than five months.

(b) If at any time the Concessionaire determines that it is unlikely to achieve Substantial Completion by the Outside Substantial Completion Date, the Concessionaire shall provide prompt written notice to the Department. Within two months thereafter, the Concessionaire shall submit for the Department's review and approval a written work plan outlining the actions the Concessionaire proposes to take in order to cause Substantial Completion to occur as promptly as reasonably possible, which plan may include increasing work hours to the extent permitted under applicable Law and utilizing additional labor and



equipment and other appropriate acceleration techniques to improve schedule progress and setting forth a Revised Outside Substantial Completion Date (the “Concessionaire Recovery Plan”). The parties shall meet within 21 days after the Department receives the Concessionaire Recovery Plan to discuss the Concessionaire Recovery Plan after its submission to the Department, and the Concessionaire shall provide promptly any additional information and respond to any comments that the Department may have. The Department in its reasonable discretion may approve or disapprove the Concessionaire Recovery Plan, and the Department shall deliver its approval or disapproval within 21 days after the parties have met to discuss a Concessionaire Recovery Plan. The approval by the Department of a Concessionaire Recovery Plan or any other actions by the Department pursuant to this Section 7.16, shall not affect or reduce the Concessionaire’s obligation to pay delay liquidated damages in accordance with Section 7.01(f) for the period after the Guaranteed Substantial Completion Date.

### **Section 7.17 Quality Management.**

(a) The Concessionaire shall provide oversight and management of the Project to control the scope, quality, cost, and on-time delivery of the Work. If the Work does not satisfy the applicable performance or quality standards, the Concessionaire shall increase and improve its management and oversight efforts such that repair or replacement of non-conforming items does not require any increase in the Department’s limited oversight of the project.

(b) In accordance with this Agreement and the Technical Requirements, the Concessionaire shall be responsible for all quality assurance and quality control activities necessary to manage the development, design, construction, operation and maintenance of the Project and any Concessionaire Project Enhancement or any Department Project Enhancement undertaken by the Concessionaire pursuant to Section 9.02, and will develop and provide to the Department its Quality Management Plans, manuals, and procedures. The Quality Management Plans, manuals and procedures for design and construction shall be consistent with the Department’s quality assurance and quality control requirements, as well as the procedures and processes set forth in the Technical Requirements, as amended from time to time. Changes to the Technical Requirements during the Work Period shall be handled in accordance with Section 7.12(d).

(c) The Concessionaire will require each of its contractors, subcontractors and suppliers at every level to comply with the requirements of the Quality Management Plans.

(d) The Department has the right to review the Concessionaire’s quality management system, including the right to inspect work and/or activities and to verify the accuracy and adequacy of quality management documentation. The Concessionaire will require its contractors and subcontractors to provide such access and assistance as the Department reasonably requires in conducting such reviews.

### **Section 7.18 NEPA Compliance.**

The parties acknowledge that (a) the EIS has been obtained, that a Record of Decision was issued for the Project, and that the re-evaluation of the Capital Beltway study was accepted by the Federal Highway Administration on May 9, 2007, and (b) a Finding of No Significant

Impact was approved for the Springfield Interchange Phase VIII on September 24, 1994 (the EIS, the Record of Decision and the Finding of No Significant Impact, together with all subsequent amendments, modifications and re-evaluations, being referred to as the “NEPA Documents”). The Concessionaire shall be responsible for compliance with the terms and conditions of the NEPA Documents, at the Concessionaire’s sole cost and expense.

**Section 7.19 Construction Warranties.**

(a) If and to the extent that the Concessionaire obtains general or limited warranties from any contractor in favor of the Concessionaire with respect to the design, materials, workmanship, equipment, tools, supplies, software or services, the Concessionaire also shall cause such warranties to be expressly extended to the Department.

(b) The Concessionaire shall obtain, and grant to and for the benefit of and expressly extended to the Department, construction warranty coverage; (i) with respect to the entire Project, excluding the HOT Lanes Project and the Springfield Interchange Phase VIII, for a term extending five years after issuance of a Substantial Completion Certificate therefor or for the applicable segment thereof, as applicable; and (ii) with respect to the Springfield Interchange Phase VIII, for a term extending five years after the Service Commencement Date. Such warranty shall be supported by the following (which, together with the warranty itself, shall be in form and substance acceptable to the Department): (i) commencing upon the first of the applicable warranty commencement dates and continuing until at least the expiration of two years after the commencement of the last of the warranty commencement dates, an irrevocable letter of credit in favor of the Department, in an initial amount of \$10,000,000, which shall be replaced with another letter of credit in the amount of \$30,000,000 upon Substantial Completion of the entire Project; and (ii) an unconditional guaranty from Fluor Corporation, in accordance with Section 3.02(c). The warranties shall include the following: (A) the design of the Project will satisfy the requirements of this Agreement and the Technical Requirements, and the Design-Build Contract; (B) all work (except for work described in (A) above), including all materials and equipment furnished as part of the construction, is new unless otherwise specified in the Design-Build Contract, of good quality, in conformance with this Agreement and the Technical Requirements and the Design-Build Contract, free of defects in materials and workmanship and will be fit for its intended purpose; and (C) the completed work will be free of defects and deficiencies in design, materials and workmanship. The warranty period shall be extended for an additional 12 months from the date of repair or replacement with respect to any portion of the Work that is repaired or replaced during the final year of the initial warranty period. Longer duration warranties from third party suppliers, if any, will be passed through to the Department. However, following the expiration of the first two years of the applicable warranty period, the warranty shall extend only to repairs which exceed \$15,000 per occurrence (but such threshold shall not apply if the same type of defect causes the same type of repair more than twice), subject to a per annum aggregate exclusion of \$60,000.

(c) In the event of the occurrence of a defect or deficiency in the Work encompassed by the warranty, the Department shall be entitled:

(i) to demand that either the Concessionaire or the Design Build Contractor rectify such defect or deficiencies in the Work occurring during the warranty period at

their sole expense, and the Concessionaire shall be permitted to draw on the letter of credit provided to the Department to the extent of the cost of any work performed by Concessionaire;

(ii) to rectify the defect or deficiency itself and to obtain reimbursement of its Allocable Costs from the Concessionaire or the Design Build Contractor or from a draw on its letter of credit; *provided*, however, that the Department agrees that it shall not seek reimbursement from the Concessionaire, unless it has requested and the Concessionaire and Design Build Contractor have failed to promptly rectify the defect or deficiency, and the Concessionaire shall be permitted to draw on the letter of credit provided to the Department to the extent of any amounts reimbursed by the Concessionaire; or

(iii) to seek performance or reimbursement from the Parent Guarantor.

(d) Upon Substantial Completion of any segment of the Project, excluding the HOT Lanes, the Concessionaire shall assign in favor of the Department the Concessionaire's rights under the Design-Build Contract with respect to the construction warranty coverage for that segment under terms that provide for the warranties to run for the benefit of and expressly extend to the Department.

(e) This Section 7.19, Section 8.07, Section 14.01, Section 14.04 and Articles 16 and 17 of this Agreement and the applicable provisions of the Design-Build Contract set forth the Department's exclusive remedies against the Concessionaire and the Design Build Contractor, and the Department hereby waives all other remedies, regarding defects or deficiencies in the Work, whether patent or latent in arising in contract, tort (including negligence) or pursuant to other legal theory, except for defects and deficiencies in the Work resulting from the fraud or deceit of any Concessionaire Party. The Concessionaire and the Concessionaire Party make no other warranties, express or implied, relating to the quality of the Work; *provided*, however, that Concessionaire shall continue to be responsible for all of its other obligations under this Agreement, including the design and construction of the Project pursuant to Section 3.01(c), notwithstanding the parties agreement to exclusive remedies for breach of warranty under this clause.

## ARTICLE 8

### **PROJECT MANAGEMENT; OPERATIONS AND MAINTENANCE**

#### **Section 8.01 Conditions Precedent to Service Commencement of the HOT Lanes.**

(a) The Concessionaire shall not initiate Service Commencement of the HOT Lanes until all of the following conditions have been satisfied:

(i) The Department has issued the Substantial Completion Certificate, or it has been determined pursuant to the dispute resolution procedures set forth herein that the Department should have issued such certificate;

(ii) The Concessionaire and the Department have agreed to a Punch List;

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

(iv) All insurance policies required under this Agreement have been obtained and shall be in full force and effect (with coverage as of the Service Commencement Date) and the Concessionaire has delivered to Department the originals or copies thereof certified by the Concessionaire's insurance broker to be true and correct copies of the originals;

(v) The Concessionaire shall not then be in receipt of any notice of Concessionaire Default under this Agreement except as to any such noticed default that has been cured or for which Service Commencement will effect its cure;

(vi) All Project Agreements are in full force and effect;

(vii) The Concessionaire has certified to the Department in writing that the conditions set forth in subsections (iii) through (vi) have been satisfied as of the date of such certification, and the Independent Engineer has confirmed to the Department in writing that the condition set forth in subsection (iii) has been satisfied as of the date of such certification; and

(viii) Subject to the provisions of Section 8.01(b), the Department issues, or shall have been deemed to have issued, a written notice (the "Service Commencement Notice"), evidencing its concurrence with the Concessionaire that the foregoing conditions of this Section 8.01 have been satisfied.

(b) If the Department has determined that all of the conditions to Service Commencement set forth in the preceding Section 8.01(a) have not been satisfied, it shall notify the Concessionaire in writing setting forth, as applicable, why the conditions to Service Commencement have not been satisfied. If the Concessionaire and the Department, despite good faith efforts, cannot reach agreement as to such matters, such dispute shall be resolved in accordance with the dispute resolution procedures set forth in Section 17.06. In the event that the Department has not notified the Concessionaire of a determination that all such conditions have not been satisfied or has delayed the issuance of the Service Commencement Notice by more than 21 days beyond the date on which Certificates from the Concessionaire and the Independent Engineer were received by the Department pursuant to Section 8.01(a), the Concessionaire shall give notice of such delay to the Department, and if the Department has not either notified the Concessionaire of such non-satisfaction or issued the Service Commencement Notice within 15 days after such Concessionaire notice, if the delay is not a result of a Concessionaire Party action or inaction, then such Service Commencement Notice shall be

deemed to have been issued upon expiration of such 15 day period, but shall not be deemed a waiver of the other conditions set forth in Section 8.01(a) (i) through (vi).

(c) All the conditions precedent set forth in Section 8.01(a) above are for the sole benefit of the Department. The Department may waive any condition precedent; *provided*, that no person or entity shall be entitled to assume that the Department will waive or refuse to waive any condition precedent in the absence of strict compliance therewith. Unless the Department waives a condition precedent which requires action by the Concessionaire to be satisfied, the Concessionaire shall remain bound to use diligent efforts to satisfy the condition precedent. The Department's issuance of the Service Commencement Notice shall not constitute a waiver by the Department of any then-existing Concessionaire Default.

**Section 8.02 Reserved.**

**Section 8.03 Concessionaire Obligation to Manage and Operate.**

(a) The Concessionaire shall, from and after the first to occur of the Service Commencement Date and the Final Acceptance Date through the expiration or earlier termination of the Term, cause the HOT Lanes to be managed, maintained and operated in accordance with all applicable Law, all Regulatory Approvals, and the terms, conditions and standards set forth in this Agreement, including the operations and maintenance requirements set forth in the Technical Requirements, attached as Exhibit N. For the avoidance of doubt, the obligations of the Concessionaire under this Section 8.03 or with respect to Major Maintenance shall not include any obligation to maintain, repair or renew the Springfield Interchange Phase VIII, which shall be the responsibility of the Department or, to the extent provided in the Design-Build Contract, the Design Build Contractor. Without limiting the foregoing, the Concessionaire agrees to be responsible for the following, at its sole cost and expense:

(i) the management and control of traffic on the HOT Lanes, including but not limited to, incident response services and temporary partial or full closures of the HOT Lanes;

(ii) the maintenance and repair of the HOT Lanes Project and all systems and components thereof, including the ETTM System, which the Concessionaire may upgrade, modify, change and replace, as applicable, in accordance with this Agreement and the operations and maintenance requirements set forth in Exhibit N;

(iii) the operation of the HOT Lanes Project, the ETTM Facilities and the ETTM System and otherwise carrying out the collection and enforcement of tolls and other incidental charges respecting the HOT Lanes;

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

(v) traffic management, and maintenance and repair responsibilities under Section 8.03(a) above in accordance with Exhibit N; and

(vi) carrying out activities in accordance with a TMP to be developed by the Concessionaire in coordination with the Department in accordance with Section 12.02(a).

**Section 8.04 Operations, Maintenance and Tolling; O&M Contractor.**

(a) The operation and maintenance of the HOT Lanes Project shall, at all times from the Service Commencement Date and continuing during the Term, be under the direction of the Concessionaire, who may subcontract with the O&M Contractor or another active operator with the expertise, qualifications, experience, competence, skills and know-how to perform the operations and maintenance obligations of the Concessionaire in accordance with this Agreement (an “O&M Contractor”). For the avoidance of doubt, the O&M Contractor shall be the primary Person performing the management functions of the Concessionaire, all operations, tolling and maintenance functions with respect to the HOT Lanes, and, if a different Person, the primary contractor or subcontractor for the ETTM System, and any other contractor or subcontractor, shall not be the O&M Contractor, and this Section 8.04 shall not be applicable to such other contractors or subcontractors. Notwithstanding its use of an O&M Contractor, the Concessionaire remains ultimately responsible for the operation and maintenance of the HOT Lanes Project during the Term in accordance with this Agreement. The O&M Contractor shall at all times be subject to the direction and control of the Concessionaire, and any delegation to an O&M Contractor does not relieve the Concessionaire of any obligations, duties or liability hereunder. The Concessionaire shall immediately notify the Department upon the termination or resignation of an O&M Contractor. Any agreement between the Concessionaire and any O&M Contractor shall by its terms terminate without penalty at the election of the Department upon five days’ notice to such O&M Contractor upon the termination of this Agreement. The O&M Contractor shall have no interest in or rights under this Agreement or the HOT Lanes Project.

(b) The Concessionaire shall not engage or appoint an O&M Contractor, unless the Department has approved such O&M Contractor (based upon a determination in accordance with the criteria set forth below). The Department will not withhold or delay its approval of a proposed O&M Contractor unless the Department reasonably determines that the engagement of such proposed O&M Contractor is prohibited by applicable Law or such proposed O&M Contractor is not capable of performing the obligations of the Concessionaire in accordance with this Agreement. The Department’s determination may be based upon, or take into account, one or more of the following factors:

(i) the proposed O&M Contractor’s financial strength, individually and, where appropriate, on a consolidated basis with its Affiliates;

(ii) the proposed O&M Contractor’s experience in operating and maintaining comparable toll roads and highways;

(iii) the background, reputation and integrity of the proposed O&M Contractor and its Affiliates, including their respective officers, directors and employees, and the quality of any such Person’s past or present performance on other comparable projects;

(iv) whether the proposed O&M Contractor or any of its Affiliates, including their respective officers, directors and employees, have been debarred or prohibited from

participating in state or federally-funded projects, or indicted, convicted, pled guilty or nolo contendere to a violation of Law involving fraud, conspiracy, collusion, bribery, perjury, material misrepresentation, or any other violation that shows a similar lack of moral or ethical integrity; and

(v) the material terms of the proposed engagement of the O&M Contractor that could potentially impact the ability of the Concessionaire to comply with the terms of this Agreement and the other Project Agreements.

(c) The Department may also condition its approval of a proposed replacement O&M Contractor on that O&M Contractor's fulfillment of any additional reasonable conditions that the Department may choose to impose upon it.

(d) The Department hereby approves the initial O&M Contractor in accordance with the Operations and Support Services Agreement.

#### **Section 8.05 Annual Budget.**

For each calendar year and partial calendar year from and after the Service Commencement Date, the Concessionaire shall file with the Department an Annual Budget for the Project for such full or partial calendar year at least 90 days prior to the start of such calendar year or partial calendar year. Each such Annual Budget shall be in a form reasonably acceptable to the Department and show in reasonable detail all projected Revenues, operating and maintenance expenses, debt service, contributions to individual reserves, projected Total Return on Investment, projected permit fee payable to the Department under Article 5, distributions to holders of equity interests in the Concessionaire and other related items for such period on an annual basis and such other information as the Department may reasonably require.

**Section 8.06 Procedures Relating to Major Maintenance Work.** The Concessionaire shall, at its sole cost and expense, perform all Major Maintenance with respect to the HOT Lanes, the ETTM Facilities and the ETTM System on the HOT Lanes Project in accordance with Life Cycle Maintenance Plans approved by the Department. All design and construction Work during the Operating Period must comply with the applicable Technical Requirements.

(a) Not later than 18 months prior to the projected Service Commencement Date, the Department and the Concessionaire shall agree upon baseline asset condition reports by the Department that evaluate (i) the four inner lanes of the Capital Beltway and maintenance/repair requirements during the period preceding the Service Commencement Date, to be done at or about the time the New Lanes are opened, and (ii) the HOT Lanes and all other improvements and assets of the HOT Lanes Project (the HOT Lanes and all such other improvements and assets, collectively, the "HOT Lanes Assets") and their physical conditions as of the date of such report (in the format set forth as Exhibit P, the "Baseline Report"). Further, prior to the Service Commencement Date the Department shall elect to (A) undertake the rehabilitation of any defect or outstanding maintenance item identified in the Baseline Report, at its sole cost, or (B) pay the Concessionaire the cost, as determined by the Department and the Concessionaire using the same methodology as employed by the Department for other State highways for similar purposes, of any such rehabilitation or maintenance not so undertaken or completed, as applicable, by the

Department. The Baseline Report shall be revised to reflect completion of any such rehabilitation or maintenance. The Concessionaire shall be deemed to have accepted the HOT Lanes in their then current condition on the Service Commencement Date, except to the extent specified by delivery of written notice by the Concessionaire to the Department of any conditions that remain to be corrected pursuant to the Baseline Report.

(b) Every five years after the Service Commencement Date, the Concessionaire shall conduct a reassessment of the physical condition of the HOT Lanes Assets, and prepare a comparative analysis of such conditions to the conditions as reported in the Baseline Report (or, with respect to any Project Enhancements, their condition upon completion thereof), such analysis to take into account any changes in federal requirements and changes to safety standards. If the condition of any HOT Lanes Asset is determined by the Concessionaire, the Department or the Independent Engineer to fall below its assessment rating in the Baseline Report (or the original condition of such Project Enhancement), the Concessionaire shall, within 90 days of such assessment, develop and submit to the Department a plan to restore such HOT Lanes Asset to its baseline or original condition, as applicable, subject to ordinary wear and tear, including a budget, timeline and identification of the funding sources that will be utilized to restore such HOT Lanes Asset.

(c) No later than 90 days before the beginning of each calendar year after the Service Commencement Date, the Concessionaire shall annually prepare and provide to the Department for its review and approval a full five-year period maintenance plan on a rolling basis that describes life cycle asset maintenance for the HOT Lanes Project (the “Life Cycle Maintenance Plan”). The Life Cycle Maintenance Plan shall include a description of all Major Maintenance to be undertaken during such five-year period, by component, item or discrete project (each a “Task”), the estimated costs and timing relating to each Task, and such other information as may be reasonably requested by the Department. The Concessionaire shall reasonably consider any changes or additions proposed by the Department to the proposed Life Cycle Maintenance Plan and shall modify the Life Cycle Maintenance Plan to reflect those changes and additions which are consistent with Good Industry Practice, applicable Law, Technical Requirements or Regulatory Approvals, and the Department shall deliver its approval or disapproval to the Concessionaire within 45 days after the Concessionaire has provided the assessment to the Department in accordance with the first sentence of this Section 8.06(b).

(d) In the event of any disagreement or dispute relating to a Life Cycle Maintenance Plan, the Department and the O&M Contractor shall endeavor in good faith to resolve any such disagreement or dispute within 60 days after such assessment is provided to the Department. Any disagreements or disputes raised by the Department with respect to the Life Cycle Maintenance Plan must be based on whether such assessment and the underlying assumptions are reasonable, realistic and consistent with Good Industry Practice, Project experience and condition, the Technical Requirements and applicable Law. If no agreement is reached within such 60-day period as to any such matter, either party may submit the dispute to the disputes resolution procedures set forth in Section 17.06. Until resolution of any disagreement or dispute relating to a Life Cycle Maintenance Plan, the treatment of the disputed Tasks in the most recently-approved Life Cycle Maintenance Plan shall remain in effect and govern the requirements relating to such Tasks.



(e) If at any time the Concessionaire fails to complete all or any of the Tasks of the Major Maintenance within the time schedules agreed to by the Department and the Concessionaire in the relevant Life Cycle Maintenance Plan (as such schedule may be mutually extended or shortened by the Department and the Concessionaire) by more than 30 days or, if in the reasonable determination of the Department, the Concessionaire fails to perform any Task in accordance with Good Industry Practice, all applicable Law, Technical Requirements or Regulatory Approvals, the Department may, at its option, but is not obligated to, either (i) notify the Concessionaire that the Department will carry out such Task or correct such defective work using Department personnel, materials and equipment or (ii) procure the services for such Task or corrective work by one or more contractors. Upon such notice or such determination by the Department of the tentative winning contract award(s), as the case may be, the Department shall be entitled to demand that the Concessionaire pay to the Department an amount equal to the Department's good faith estimate of the Allocable Costs it will incur to complete such Task or corrective work, plus a 10% contingency, and its third-party costs incurred to procure such contract(s). The Concessionaire shall make such payment to the Department not later than 30 days after demand by the Department for such payment. If the Department's Allocable Costs to complete such Tasks and any third-party costs incurred to procure such contract(s), are greater or less than the amount the Concessionaire previously paid to the Department under this Section 8.06(e), the Concessionaire shall pay to the Department an amount equal to such excess or the Department shall reimburse the excess funds paid by the Concessionaire, as applicable. The Concessionaire or the Department shall make such payment not later than 30 days after the Department has finalized its calculation of the Allocable Costs to complete such Tasks and any third-party costs to procure such contract(s) and demand has been made for such payment.

(f) The Concessionaire may, by written notice delivered to the Department within 30 days, object to any demand by the Department in accordance with Section 8.06(e) above on the basis that the Concessionaire has completed the Task(s) specified in the Department's demand in accordance with Good Industry Practice, all applicable Law, Technical Requirements or Regulatory Approvals or that such Task(s) are not then delayed by more than 30 days, which notice will give details of the grounds for such objection. Upon the giving of any such notice, the parties will endeavor to reach agreement as to any matters referred to in the notice. If no agreement is reached as to any such matter within 30 days after the giving of such notice, either party may refer the matter to the dispute resolution procedures pursuant to Section 17.06 for determination.

**Section 8.07 Springfield Interchange Phase VIII O&M Services and Major Maintenance.**

(a) From and after the Service Commencement Date, the Department shall be responsible, at its cost, for the management, operation (not to include ETTM or other toll collection) and maintenance of the Springfield Interchange Phase VIII. The Concessionaire may, in accordance with all Project Agreements and applicable Law, and at its cost, install, maintain and operate ETTM on the Springfield Interchange Phase VIII.

(b) Upon the Service Commencement Date, the Concessionaire shall assign in favor of the Department all of the Concessionaire's rights under the Design-Build Contract relating to the Springfield Interchange Phase VIII, including warranties provided by the Design Build

Contractor and any subcontractor or vendor required to provide warranties thereunder including the obligations of the Design Build Contractor to provide all Major Maintenance for any Structural Element of the Springfield Interchange Phase VIII improvements (except for Major Maintenance that is not due to substandard design or construction but is primarily required as a result of accidents or Force Majeure Events) until 10 years after Substantial Completion. The Concessionaire shall not agree to any amendment of such warranty coverage without the prior written approval of the Department.

**Section 8.08 Major Maintenance Reserve.** The parties hereto acknowledge that any reserves, security and funding for Major Maintenance required by Section 8.06 shall be provided for in the Project Financing Agreements.

**Section 8.09 Ethical Standards.**

(a) The Concessionaire has adopted and provided copies to the Department of its written policies establishing ethical standards of conduct for all its directors, officers and supervisory or management personnel in dealing with the Department and employment relations. Such policy including any amendments or modifications shall include standards of ethical conduct concerning the following:

(i) Restrictions on gifts and contributions to, and lobbying of, the Department, the CTB and any of their respective commissioners, directors, officers and employees;

(ii) Protection of employees from unethical practices in the selection, use, hiring, compensation or other terms and conditions of employment, or in firing, promotion and termination of employees;

(iii) Protection of employees from retaliatory actions (including discharge, demotion, suspension, threat, harassment, pay reduction or other discrimination in the terms and conditions of employment) in response to reporting of illegal (including the making of a false claim), unethical or unsafe actions or failures to act by the Concessionaire or its personnel or any contractors;

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

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

(vi) Adherence to the Department's organizational conflict of interest rules and policies pertaining to the hiring of any Consultant which has assisted the Department in connection with the negotiation of this Agreement or the conduct of Oversight Services for the Project.

(b) The Concessionaire shall cause its directors, members, officers and supervisory and management personnel, and require those of its contractors, to adhere to and enforce the adopted policy on ethical standards of conduct. The Concessionaire shall establish reasonable systems and procedures to promote and monitor compliance with the policy.

#### **Section 8.10 Police and Enforcement Services.**

(a) The Department shall cause the Virginia State Police to provide police services, and cause emergency services (fire and rescue), including traffic patrol and traffic law enforcement services, to be provided on the HOT Lanes at a level of service equivalent to that provided on comparable State Highways from time to time, which shall in any event not be less in scope, level or quality of service than that provided on the Capital Beltway as of the Closing Date. All such foregoing services shall be provided without any charge to the Concessionaire or the Project. In addition, if required by the Concessionaire, the Department shall assist the Concessionaire in obtaining enhanced levels of police services for the control of traffic for construction or maintenance activities or as otherwise as needed (and in each case, at the Concessionaire's sole cost and expense) or the Concessionaire may obtain such services from another entity at its cost and expense, subject to compliance with all applicable Law.

(b) The Concessionaire may, at its sole cost and expense, engage the Virginia State Police to provide toll and HOV enforcement services (including the identification and apprehension of toll violators), and the Department shall assist the Concessionaire in obtaining such services if so requested by the Concessionaire. The Concessionaire shall not engage or permit the engagement of private security services to provide traffic patrol or traffic law enforcement services on the HOT Lanes; *provided*, however, that the foregoing does not preclude the Concessionaire from engaging private security firms or employing other appropriate security devices, vehicle occupancy detection equipment or other automated technology to protect, collect and enforce the payment of Toll Revenues or to identify toll violators, subject to compliance with Law, nor does it limit the Concessionaire's right to enforce any private rights and civil remedies available to it respecting toll violations.

(c) The Department shall not have any responsibility or liability to the Concessionaire resulting from or otherwise relating to the failure of the Virginia State Police or any other public agencies to provide policing services contemplated by this Section 8.10 or any of the acts or omissions of the Virginia State Police or such agencies with respect to such services.

#### **Section 8.11 Hazardous Substances Management.**

(a) Not later than 150 days prior to the projected Service Commencement Date, the Concessionaire shall prepare and submit to the Department for its approval, not to be unreasonably withheld or delayed, a Hazardous Substances management plan describing a cost-

effective approach to Hazardous Substances management in connection with the operations, maintenance and management of the HOT Lanes Project, and any construction activity relating to Concessionaire Project Enhancements during the Operating Period. Such management plans shall comply with applicable Law, Regulatory Approvals, Technical Requirements, and any multi-agency agreements the Department may have related to hazardous material incident response, each as in effect from time to time.

(b) The Concessionaire shall review the Hazardous Substances management plans annually with the Department and make changes, subject to the Department's prior approval, not to be unreasonably withheld or delayed, as necessary to respond to changes in Law, Regulatory Approvals, industry practices and standards, and circumstances affecting the Project, as the case may be. The Hazardous Substances management plans shall address contamination encountered, impacted, caused by or occurring in connection with any work or activity of or on behalf of the Concessionaire, as well as the investigation and remediation of such contamination. The Concessionaire shall comply with the procedures and requirements set forth in the approved Hazardous Substances management plan and as required by the Technical Requirements.

(c) If during the Operating Period, the Concessionaire encounters Hazardous Substances within the Project Right of Way or the HOT Lanes Right of Way that under applicable Law or requirement of a regulatory agency must be handled, stored, monitored, treated, disposed of, removed, remediated or transported (collectively "Remedial Action"), the Concessionaire shall promptly notify the Department and shall proceed and act in accordance with the appropriate Hazardous Substances management plan. Such actions shall include, but not be limited to, (i) conducting such further investigations as may be necessary or appropriate to determine the nature and extent of the Hazardous Substances, (ii) taking reasonable steps, including in the case of excavation, construction, reconstruction or rehabilitation, modifications and/or construction techniques, to avoid or minimize excavation or dewatering in areas with Hazardous Substances, (iii) preparing and obtaining necessary Regulatory Approvals for remedial action plans, including Department approval, and (iv) carrying out the remedial action plan, including, as necessary, off-site disposal of the Hazardous Substances.

(d) Before any remedial action is taken that would inhibit the Department's ability to ascertain the nature and extent of the contamination, the Concessionaire shall afford the Department the opportunity to inspect areas and locations containing Hazardous Substances that must be remediated; *provided*, that in the case of a sudden release of Hazardous Substances the Concessionaire may take the minimum action necessary to stabilize and contain the release without prior notice or inspection, but shall immediately notify the Department of the sudden release and its location.

(e) The Concessionaire shall obtain all Regulatory Approvals relating to remedial work, including federal and State surface water and groundwater discharge permits and permits for recycling or reuse of Hazardous Substances. The Concessionaire shall be solely responsible for compliance with such Regulatory Approvals and applicable Environmental Laws concerning or relating to Hazardous Substances. In carrying out remedial action to be paid by the Department, the Concessionaire shall take such steps and actions as are required to protect and preserve the Department's potential claims of contribution and indemnity, statutory or otherwise, against potentially responsible parties.

(f) The Concessionaire shall bear all costs and expenses of preparing and complying with the Hazardous Substances management plans and remedial action plans, of complying with Law and obtaining and complying with Regulatory Approvals pertaining to Hazardous Substances, and otherwise of carrying out remedial action, except as otherwise provided by Section 8.11(h).

(g) Except for any Hazardous Substances that are the subject of the Concessionaire's indemnity in Section 14.03, the Concessionaire shall not be considered the generator of Hazardous Substances located within the Project Right of Way owned by the Department as of the Agreement Date. The Concessionaire shall be considered the generator of any Hazardous Substances that are the subject of the Concessionaire's indemnity in Section 14.03. Except with respect to Hazardous Substances that are the subject of the Concessionaire's indemnity in Section 14.03, if the Concessionaire disposes of Hazardous Substances, the Concessionaire (i) shall use an EPA identification number or other appropriate legal device obtained by, and carried in the name of, the Department or another Person designated by the Department, and (ii) shall not be required to execute any Hazardous Substance manifests as a "generator".

(h) The Department shall reimburse Concessionaire for its Allocable Costs incurred by the Concessionaire for the management, treatment, handling, storage, remediation and removal of Pre-Existing Hazardous Substances discovered on VDOT Existing ROW, during the Operating Period, subject to the Concessionaire's compliance with the terms of this Section 8.11 and, specifically, the following terms: (i) the Concessionaire shall obtain all environmental site assessments of the affected property and submit copies of such assessments to the Department for its review and approval; (ii) the Concessionaire shall develop the plans, subject to the review and approval of the Department, for the management, treatment, handling, storage, remediation and removal of the Hazardous Substances, and shall obtain all necessary Regulatory Approvals to implement such plans; and (iii) the Concessionaire shall provide cost estimates with respect to such Work which is to be reimbursed by the Department, for the Department's review and approval prior to proceeding with any such Work. If the Department has not responded to a request for such approval pursuant to this subsection (h) within 21 days after the Department's acknowledgement of receipt (or in the case of an emergency a reasonably appropriate shorter period), the request shall be deemed to be approved, except to the extent matters deviate from applicable Technical Requirements, Regulatory Approvals or Law. In addition, the Concessionaire shall seek pre-approval and pursue reimbursement from the Virginia Petroleum Underground Storage Tank Fund ("VPSTF") for qualifying expense incurred during the course of investigation and/or containment, management, mitigation, remediation activities on underground storage tank sites. The Concessionaire shall promptly pay over to the Department all monies the Concessionaire receives from the VPSTF with respect to activities subject to reimbursement by the Department pursuant to this Section 8.11(h).

## **Section 8.12 Contract Services.**

If at any time the Department procures a contract for any maintenance services for State Highways on a regional or network basis in the area of the Project, the Department shall require the contractor, so long as it is under contract with the Department, at Concessionaire's request, to offer comparable services to the Concessionaire on comparable terms and conditions, subject to the contractor's reasonable approval of Concessionaire's ability to pay. Subject to Section 8.13

below, the Department shall have no obligation to provide any such services to the Concessionaire and shall have no liability with respect to the contractor's performance or failure to perform. The Department shall have full discretion to establish priorities for its contractors regarding timing and location of services, materials and equipment, without liability to Concessionaire.

**Section 8.13 Snow and Ice Removal.**

(a) Subject to Section 8.13(c), the Department shall provide snow and ice removal services on the HOT Lanes at a comparable level of service to that it provides on the GP Lanes; *provided*, that the Concessionaire shall pay to the Department an annual fee of \$500,000 beginning on the first November 1 after the Service Commencement Date and each November 1 thereafter during the Term, which amount shall be escalated in accordance with increases in the CPI from the initial November 1 on which any such amount is payable hereunder, using the CPI published for the calendar year immediately preceding the year of such payment.

(b) The Department shall have no liability to the Concessionaire arising out of its ice and removal services. Subject to Section 8.13(a) the Department shall have full discretion to establish priorities for its contractors regarding timing and location of services, materials and equipment, without liability to the Concessionaire.

(c) If the Department fails at any time to provide snow and ice removal to the HOT Lanes at a level of service comparable to that it provides on the GP Lanes, with prior written notice to the Department, the Concessionaire may arrange for other contractors to provide such service *provided* that such contractors shall not in any way hinder the removal of snow and ice from the GP Lanes. The Concessionaire shall provide at least 30 days written notice to Department if such services are to be performed by any such other contractor, in which case subsequent Department payments pursuant to Section 8.13(a) shall thereafter not be required so long as the Department is not providing such services on the HOT Lanes.

**Section 8.14 Obligation to Turn Over HOT Lanes at End of Term.**

Upon the last day of the Term, whether upon expiration or earlier termination, the Concessionaire shall surrender and deliver the HOT Lanes Project to the Department as provided in Section 16.05 and in accordance with Section 16.09. Not later than 180 days preceding the end of the Term, the Concessionaire and the Department shall develop a plan to assure the orderly transition of the HOT Lanes to the Department or a Department contractor.

**Section 8.15 User Confidentiality.**

The Concessionaire shall comply with all applicable Law related to confidentiality and privacy of users of the HOT Lanes Project.

## **Section 8.16 Performance Point System.**

### **(a) Description of the System**

(i) Exhibit T to this Agreement sets forth a table for the identification of certain Concessionaire breaches or failures to perform its obligations under this Agreement that may result in the assessment by the Department of Performance Points. The Performance Points system is used by the Department to measure the Concessionaire's performance levels and the accumulation of Performance Points by the Concessionaire may trigger the remedies set forth or referenced in this Section 8.16. This Section 8.16 shall apply only during the Operating Period. The inclusion in Exhibit T of a breach or failure to perform shall not determine whether such breach or failure is material.

(ii) The Department may exercise any of its remedies under this Section 8.16 without prejudice to any other rights or remedies it has under this Agreement.

(iii) If the Department determines any breach or failure described in Exhibit T has occurred, the Department shall within five days of its determination deliver to the Concessionaire written notice thereof describing the breach or failure in reasonable detail. Within five days of receipt of the Department's notice, the Concessionaire shall investigate the Department's claim and provide a written report as to whether the breach or failure in performance has in fact occurred and describing any mitigating factors. Within 10 days after receiving the Concessionaire's report, the Department shall deliver to the Concessionaire a written determination setting forth the number of Performance Points, if any, the Department, in its sole discretion, has assessed to the Concessionaire.

### **(b) Assessment of Points and Cure Periods**

The Department may assess Performance Points as described in Section 8.16(c) and (d) subject to the following terms and conditions.

(i) The Performance Points system will apply commencing on the fifth anniversary of the Service Commencement Date. In addition, there will be a phased introduction of the Performance Points system, and for the initial year that the Performance Points system is applicable, the thresholds for "Total Cumulative Number of Uncured Points" specified on page 1 of Exhibit T will be increased by 50% for the first year, and over the period of the next five years such threshold will be reduced 10% per year such that the thresholds in Exhibit T (30, 45 and 68 total cumulative number of uncured points, respectively) apply.

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

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

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

(v) For breaches or failures classified as category A in Exhibit T, Performance Points shall be assessed only at the end of the applicable cure period if the Concessionaire has failed to cure within that time. Additional Performance Points may be assessed again at the end of each subsequent cure period, until the breach or failure is cured, or the cumulative total of cured and uncured Performance Points equals or exceeds the level described in Section 8.16(e)(iii).

(vi) For breaches or failures classified as category B in Exhibit T, the Performance Points shall be assessed on the date of the written determination from the Department to the Concessionaire. Provided that the breach or failure is not then cured within the applicable cure period, Performance Points shall be assessed again at the end of the first and each subsequent cure period, until the breach or failure is cured, or the cumulative total of cured and uncured Performance Points equals or exceeds the level described in Section 8.16(e)(iii).

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

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

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

**(c) Notification of Cure**

When the Concessionaire determines it has cured any breach or failure for which the Department has assessed Performance Points, the Concessionaire shall deliver written notice to the Department. The Concessionaire's written notice shall identify the breach or failure at issue and describe what steps were undertaken to cure it. The Department or its designee shall then promptly verify the cure through inspection or other means and provide to the Department a



written certification of cure. The Department retains the right to verify independently that the breach or failure in performance has in fact been cured.

**(d) Accumulation of Performance Points**

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

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

**(e) Impact of Performance Points**

(i) Increased Monitoring

If the Concessionaire is assessed 135 or more Performance Points during any 365 day cycle or maintains 30 (or any higher applicable number during the phase-in period) or more uncured Performance Points at any time as described in Section 8.16(d), the Department may increase the level of monitoring of the Project in accordance with Section 10.03. The Concessionaire shall compensate the Department for its Allocable Costs incurred as a result of such increased level of monitoring. The Concessionaire may submit a cure plan describing specific actions the Concessionaire will undertake to improve its performance and avoid the need for increased monitoring, which the Department may accept or reject.

(ii) The Remedial Plan

(A) If the Concessionaire is assessed 200 or more Performance Points during any 365 day cycle or maintains 45 (or any higher applicable number during the phase-in period) or more uncured Performance Points at any time as described in Section 8.16(d), the Department may require the Concessionaire to prepare and submit a remedial plan for the Department's approval. The remedial plan shall be delivered to the Department within 45 days of its request. The remedial plan shall set forth a schedule and describe specific actions the Concessionaire will undertake to improve its performance as demonstrated by its incurring no additional Performance Points and by reducing the total number of uncured Performance Points it has accumulated to date. Such actions may include but are not limited to improvements to Concessionaire's quality management practices, plans and procedures; changes in its organizational and management structures; increased monitoring and inspections; changes in key personnel; and the replacement of subcontractors.

(B) If, after 180 days following the implementation of the remedial plan, the Concessionaire can demonstrate that: (1) the remedial plan has reduced the number and frequency of Performance Points assessed as compared to the period prior to the implementation of the remedial plan; (2) the Concessionaire is complying in all material respects with the course of action described in the remedial plan; and (3) the Concessionaire has no uncured Performance Points, then the total number of Performance Points assessed over the course of the 180 day period shall be reduced by 50%. If the rolling 365 day cycle described in Section 8.16(d)(ii) ends at any time during the 180 day period described herein, the total number of Performance Points the Concessionaire has cured during that 365 day cycle shall carry over to the next 365 day cycle. However, if the total number of Performance Points assessed over the course of the 180 day period is reduced by 50% as described above, the total number of previously cured Performance Points that were carried over also shall be subtracted from the Concessionaire's cumulative total number of assessed Performance Points.

(iii) Default

If the Concessionaire: (1) fails to deliver to the Department the remedial plan within 45 days of the Department's request; or (2) fails to comply with the course of action set forth in the remedial plan and incurs a total of 245 Performance Points during any 365 day cycle or maintains 68 (or any higher applicable number during the phase-in period) or more uncured Performance Points at any time as described in Section 8.16(d)(i), the Department may notify the Concessionaire in writing that such failure is a breach of a material obligation hereunder, in which event such failure shall become breach of a Concessionaire Default under Section 17.01(c) unless cured following such notice within the time period specified in Section 17.01(c). Concessionaire shall have failed to perform a material obligation of this agreement under Section 17.01(c).

(f) **Disputes Regarding the Assessment of Performance Points**

(i) The Concessionaire may object to the assessment of Performance Points or the amount of Performance Points assessed by delivering to the Department written notice of its objection within 10 days of receipt of the Department's written determination assessing the Performance Points at issue. Such notice shall set forth with specificity the grounds for the Concessionaire's objection.

(ii) The Department will reasonably consider the Concessionaire's objections and Representatives of the Department and the Concessionaire will meet to discuss the matter within 30 days after the Concessionaire has provided its written objection. If, at the conclusion of this 30 day period, the Concessionaire still objects to the Department's decision, it may pursue dispute resolution under Section 17.06.

(iii) If for any reason the Concessionaire fails to deliver its written notice of objection within the time period specified in Section 8.16(f)(i), the Concessionaire shall have waived its right to challenge the Department's assessment of Performance Points.

(g) **Monitoring by Independent Engineer**

The Department may, in its discretion, request the Independent Engineer to undertake routine inspection responsibilities for monitoring and reporting to the Department any breaches or failures described in Exhibit T and providing written recommendations as to whether Performance Points should be assessed. The cost of such services shall be paid by the Concessionaire; *provided* that, except when increased monitoring is permitted at any time as described in Section 8.16(e)(i), the aggregate amount payable by the Concessionaire for such services and for costs and expenses with respect to other Oversight Services shall not exceed in any calendar year (pro rated for any partial year) the maximum amount specified in Section 10.03(b), and the costs of such services and other Oversight Services in excess of such maximum levels shall be borne by the Department.

**ARTICLE 9**

**PROJECT ENHANCEMENTS; SAFETY COMPLIANCE ORDERS**

**Section 9.01 Project Enhancements by the Concessionaire.**

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

**Section 9.02 Project Enhancements by the Department.**

(a) Subject to Section 9.02(e) below, the Department shall have the right from time to time after the Service Commencement Date, at its sole cost and expense to design, develop, construct, operate and maintain Department Project Enhancements. The Department shall have the right to design, develop, construct, operate and maintain Department Project Enhancements through one or more of the following mechanisms, as the Department selects from time to time in its sole discretion:

- (i) use by the Department of its own personnel, materials and equipment;
- (ii) contracting with third parties through requests for proposals, competitive bids, negotiations or any other lawful procurement process; and
- (iii) authorizing and directing the Concessionaire, at the Department's sole cost and expense, to undertake the Department Project Enhancements through subcontracting for necessary traffic and revenue studies and for necessary planning, design, engineering, permitting, financial, right-of-way acquisition services, Utility Relocation, construction, installation, project management, operation, maintenance, repair and other work and services.

(b) If the Department authorizes and directs the Concessionaire to undertake Department Project Enhancements pursuant to Section 9.02(a)(iii) above, then the Concessionaire, in cooperation with the Department and subject (1) to the review and written approval by the Department in its sole discretion, and (2) to the Department making available to the Concessionaire sufficient funds, through monthly progress payments for work performed and costs incurred (plus 10% of such costs to reimburse the Concessionaire for costs of administering the work), including without limitation the costs of obtaining any Regulatory Approvals necessitated by such Department Project Enhancement, in order to perform the work required to design, construct, operate and maintain such Department Project Enhancement, shall have the right and obligation:

(i) to solicit, negotiate, enter into and enforce performance of subcontracts for all necessary work and services as described in Section 9.02(a)(iii) above;

(ii) to obtain or cause to be obtained payment and performance bonds, insurance policies, guarantees, indemnities, revenue subsidies and other risk management and credit instruments as may be appropriate in connection with the Department Project Enhancements;

(iii) to use diligent efforts to cause all Regulatory Approvals to be obtained for, and thereafter cause to be designed and constructed, such Department Project Enhancements, subject to prior written approval of the designs and plans therefor, and any changes thereto, by the Department in its sole discretion;

(iv) to show all such completed Department Project Enhancements on final, as-built plans and specifications submitted to the Department; and

(v) after completion, to collect tolls (on behalf and for the account of the Department), manage, operate, maintain and repair such Department Project Enhancements, subject to the Department's right at any time to assume responsibility for all or any portion of such functions.

(c) Notwithstanding the foregoing Section 9.02(a) and (b), but subject to Section 9.02(f), if the Department determines that additional traffic lanes on the Capital Beltway Corridor are in the State's best interests, the Department shall consult with the Concessionaire as to an appropriate strategy to implement such additional traffic lanes on the Capital Beltway Corridor or, at the Department's sole discretion, permit the construction of additional lanes as part of the Project with a view to minimizing any detrimental impact on the Project or its ability to generate Revenues, and the Department will give the Concessionaire the opportunity to submit a proposal to construct new HOT Lanes or toll lanes at the Concessionaire's sole cost as a Concessionaire Project Enhancement so long as the Concessionaire demonstrates that it has or can obtain all required Regulatory Approvals for such Project Enhancement with appropriate assistance from the Department. In the event that the Concessionaire determines not to pursue the construction of new HOT Lanes or toll lanes or the Department does not approve such Project Enhancement, and the Department adds Additional Traffic Lanes (whether general purpose or tolled), such Additional Traffic Lanes shall be a Department Project Enhancement.

(d) The Department shall have unfettered rights to finance, develop, approve, expand, improve, modify, upgrade, add capacity to, reconstruct, renew and replace any existing and new transportation or other facilities. In no event shall the taking of any such action by the Department constitute a default by the Department under this Agreement. The Department shall also have the right, without liability (other than any obligation to pay any such compensation required hereby), to make discretionary and non-discretionary distributions of federal and other funds for any transportation projects (including any Additional Traffic Lanes) and programs, and the planning thereof, and exercise all of its authority to advise and recommend on transportation planning, development and funding, and to otherwise improve the GP Lanes and other roadways and structures within or adjacent to the Capital Beltway Corridor.

(e) The Department shall have the right to enter upon the Project and the relevant rights of way for any purpose relating to Department Project Enhancements under this Section 9.02 to the extent reasonably necessary. If the Department elects to develop Department Project Enhancements without the Concessionaire's participation, then the Department shall coordinate such development with the Concessionaire so as to minimize to the extent reasonably feasible the disruption to the Concessionaire's operation and maintenance of the HOT Lanes and the generation of Toll Revenues.

(f) The parties agree that the Department may, at its sole cost and discretion, develop, design, finance, construct, operate, and maintain the following improvements: (i) a flyover ramp from the northbound GP Lanes to westbound lanes along I-66; (ii) improvements to I-66 outside the Capital Beltway Corridor; (iii) improvements to the interchange of the GP Lanes and the Dulles Toll Road (the "DTR"); (iv) right hand ramps and flyovers from the northbound GP Lanes to the westbound lanes of the DTR; (v) ramps or flyovers from southbound GP Lanes to eastbound along the DTR; (vi) connections from DTR/Dulles Airport Access Road (the "DAAR") westbound to the northbound and southbound HOT Lanes; and (vii) connections from the southbound HOT Lanes to the eastbound and westbound lanes of the DTR/DAAR.

(g) The improvements identified in Section 9.02(f) above may be considered a Department Project Enhancement or Department Change under Section 7.12, but shall not result in a Compensation Event or liability for Concessionaire Damages; *provided*, however, that a Department Change under Section 7.12 may be required if the Department chooses, at its sole cost and discretion, to undertake such improvements during the Work Period. The parties will agree, in connection with such a Department Change, on additional costs directly resulting from construction of the change, if any, for modification of the HOT Lanes in Virginia Project that may be required to enable the improvements contemplated in Section 9.02(f).

(h) If any Regulatory Approvals require the construction of the flyover described in Section 9.02(f)(i) above, the Department accepts responsibility for the cost to develop, design, finance, construct, operate, and maintain the flyover and may issue a change order for such work to the Concessionaire. In such event, (1) the parties will agree to the terms of the change order, (2) such change order shall not be deemed a Compensation Event or result in liability for any Concessionaire Damages; and (3) the change order shall not affect the treatment allowed for the flyover ramp in accordance with Section 9.02(f) and (g).

(i) For the avoidance of doubt, the Department is not obligated to undertake any of the improvements described in Section 9.02(f), other than as expressly provided by Section 9.02(h), and the terms set forth in Section 9.02(f) and (g) in no way supersede any obligations or responsibilities otherwise stated in this Agreement regarding the parties' respective rights or obligations to obtain, maintain or comply with Regulatory Approvals.

(j) If any Department Project Enhancement carried out pursuant to Section 9.02(a), (b) or (c) results in Concessionaire Damages, such Department Project Enhancement shall constitute a Compensation Event and the Department shall compensate the Concessionaire in accordance with Sections 13.02 and 13.03, and any Positive Revenue resulting from Department Project Enhancements shall be shared equally between the Concessionaire and the Department, and the Department's share shall be paid by the Concessionaire and deposited in the Project Enhancement Account, in accordance with Sections 13.02 and 13.03, in addition to and without regard to amounts payable under Article 5; *provided*, that in the case of Additional Traffic Lanes (i) if an aggregate of two or fewer Additional Traffic Lanes have been added, Concessionaire Damages shall not be payable with respect to any period after the HOT Lanes Project has achieved the Base Case Second Level Targeted Rate of Return, and (ii) if an aggregate of more than two Additional Traffic Lanes have been added, Concessionaire Damages shall not be payable with respect to any period after the HOT Lanes Project has achieved the Base Case Third Level Targeted Rate of Return; and *provided further*, that nothing herein shall limit the Department's ability to operate, maintain or improve the GP Lanes in any respect or, except as expressly provided above, give rise to a Compensation Event or any payment of Concessionaire Damages with respect thereto.

### **Section 9.03 Safety Compliance Orders.**

(a) The Department may, but is not obligated to, issue Safety Compliance Orders to the Concessionaire at any time during the Operating Period; *provided*, that no Safety Compliance Order may in any event order or direct the Concessionaire to do any act in violation of any applicable Law or cause the Concessionaire to fail to be in compliance with this Agreement or any other Project Agreement to which the Department is a party.

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

(c) Expeditiously after the Department issues a Safety Compliance Order, the Concessionaire shall proceed with the necessary environmental, design and construction work to carry out the Safety Compliance Order, at the Concessionaire's sole cost and expense.

(d) The Concessionaire shall have the right to dispute a Safety Compliance Order by providing written notice to the Department setting forth the Concessionaire's claim that no condition exists to justify the disputed Safety Compliance Order and the Concessionaire's estimate of impacts on costs, Toll Revenues and the Construction Schedule, if applicable, attributable to such Safety Compliance Order. The Concessionaire shall nevertheless implement the Safety Compliance Order, but if it is finally determined in accordance with the dispute resolution procedures in Section 17.06 that conditions warranting the Safety Compliance Order did not exist, then the Safety Compliance Order shall be treated as a Department Change pursuant to Section 7.12 if the Safety Compliance Order was originally issued prior to Final Acceptance, or a Department Project Enhancement pursuant to Section 9.02 if the Safety Compliance Order was originally issued after the Service Commencement Date.

## ARTICLE 10

### **DEPARTMENT OVERSIGHT AND OTHER SERVICES**

#### **Section 10.01 Right to Oversee Work.**

The Department shall have the right at all times during the Term to carry out Oversight Services with respect to all aspects of the design, permitting, financing, acquisition, construction, installation, equipping, maintenance, repair, preservation, modification, operation, management and administration of the Route 495 HOT Lanes in Virginia Project and the HOT Lanes Project, as the case may be, and any Change Orders or Project Enhancements. During the Work Period, Oversight Services shall include services with respect to the TMP. The Concessionaire shall fully cooperate with the Department to facilitate its conduct of Oversight Services. In the course of performing Oversight Services, the Department shall use reasonable efforts to minimize the effect and duration of any disruption to or impairment of the Work or the HOT Lanes Project and shall perform Oversight Services in cooperation with the Independent Engineer so as to minimize to the extent reasonably possible duplication or inefficiencies in the performance of such Oversight Services.

#### **Section 10.02 Department Access and Inspection.**

The Department and its duly authorized agents and the Independent Engineer shall have unrestricted access at all times to enter upon, inspect, sample, measure and physically test any part of the Project or the Rights of Way. In the course of performing its inspections, sampling, measurements and tests hereunder, the Department shall use reasonable efforts to minimize the effect and duration of any disruption to or impairment of the Work or the HOT Lanes Operations, as the case may be, or the Concessionaire's rights or responsibilities under this Agreement. The Department shall also have the right, upon reasonable advance written notice to the Concessionaire and subject to Section 18.07, to inspect financial or other records relating to the Project. If at any time the Concessionaire has failed to perform any of its construction, operating or maintenance obligations in any material respect then, in addition to other remedies available under this Agreement and the other Project Agreements, the Department is entitled to increase the level of its monitoring (a) during the Work Period, of the Route 495 HOT Lanes in Virginia Project, or (b) during the Operating Period, of the HOT Lanes Project, as the case may

be, and the Concessionaire's compliance with its construction, operation and maintenance obligations under this Agreement until such time as the Concessionaire has demonstrated to the Department's reasonable satisfaction that it will perform and is capable of performing its construction, operation and maintenance obligations under this Agreement. The Concessionaire shall compensate the Department for all Allocable Costs incurred by the Department as a result of such increased level of monitoring.

**Section 10.03 Compensation for Oversight Services and TMP.**

(a) The Department shall be compensated for all its Oversight Services under Section 10.01, Section 10.02, including, but not limited to, Oversight Services relating to the design, inspection or permitting for the Project, any Project Enhancement pursuant to Section 9.01 or 9.02 or any Safety Compliance Orders pursuant to Section 9.03, and for all costs incurred by the Department with respect to the TMP.

(b) Such compensation shall be in an amount equal to the Department's Allocable Costs, together with all out-of-pocket expenses incurred, including, but not limited to, the cost of all legal, expert witness and other support services, and awards of litigation expenses; *provided*, that the aggregate amount payable by the Concessionaire pursuant to this Section 10.03 (i) for costs and expenses incurred during the Work Period with respect to Oversight Services and to the TMP shall not exceed \$45,000,000 in the aggregate for the Work Period, and (ii) for costs and expenses during the Operating Period with respect to Oversight Services shall not exceed \$65,000 per calendar year (pro-rated for any partial year and escalated at the beginning of each calendar year during the Term in accordance with increases in the CPI, using the ratio of the CPI published for the month immediately preceding the beginning of the calendar year to the CPI published for the month immediately prior to the Service Commencement Date); and, *provided* that the amounts provided in (i) and (ii), (A) relate only to the Route 495 HOT Lanes in Virginia Project and not to Oversight Services and TMP in connection with any contract related to any Project Enhancements, and (B) shall not limit the payment of Department costs as a result of increased levels of monitoring in accordance with Section 8.16(e) or 8.16(g). The costs of Oversight Services in connection with the Route 495 HOT Lanes in Virginia Project and services with respect to the TMP in connection with the Route 495 HOT Lanes in Virginia Project in excess of the foregoing maximum levels shall be borne by the Department. If the aggregate Work Period payments by the Concessionaire to the Department for Oversight Services and with respect to the TMP are less than \$45,000,000, within 30 days after the Service Commencement Date (or, if earlier, within 30 days after the Department notifies the Concessionaire that it has issued its final invoice for such services), the Concessionaire shall pay to the Department one-half of the difference between \$45,000,000 and the aggregate amount of the payments for such services, which payment shall be deposited to the Project Enhancement Account.

(c) The Department shall prepare and submit to the Concessionaire the Department's invoices reasonably documenting amounts owing to the Department for Oversight Services provided. The Concessionaire shall pay each invoiced amount no later than 30 days after the Department prepares and delivers an invoice reasonably documenting the amount of such Oversight Services provided.



**Section 10.04 Department Approvals.**

(a) Except as otherwise expressly provided herein, in any case in which the Department's response to a request for its approval is required by the terms hereof within a specified time period (or such extended period of time as shall have been mutually agreed by the Department and the Concessionaire, and provided that any such time period shall be extended for the duration of the results of a Force Majeure Event that prevents such performance), the failure by the Department to respond to a written request for such approval within such specified time period (as may be so extended) shall be deemed to be the Department's approval of such request.

(b) In all cases where approvals, consents or determinations are required to be provided hereunder, such approvals or consents shall not be withheld unreasonably and such determinations shall be made reasonably except in cases where a different standard (such as, by way of example only, sole discretion) is specified. In cases where sole discretion is specified for an approval, consent, determination or other decision, the decision shall not be subject to dispute resolution hereunder.

**Section 10.05 Limitations on the Concessionaire's Right to Rely.**

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

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

(ii) to review, comment on and approve or disapprove qualifications and performance of, and to communicate with, contractors, subcontractors, architects, engineers or other Consultants of the Concessionaire, and

(iii) to perform Oversight Services:

(A) exist solely for the benefit and protection of the Department, (B) do not create or impose upon the Department any standard or duty of care toward any Concessionaire Party, all of which are hereby disclaimed, (C) may not be relied upon, nor may the Department's exercise or failure to exercise any such rights be relied upon, by the Concessionaire in determining whether the Concessionaire has satisfied the standards and requirements set forth in this Agreement or any other Project Agreement, and (D) may not be asserted, nor may the Department's exercise or failure to exercise any such rights be asserted, against the Department by the Concessionaire as a defense, legal or equitable, to the Concessionaire's obligation to fulfill such standards and requirements.

(b) To the maximum extent permitted by Law, and subject to the provisions of this Agreement, the Concessionaire hereby releases and discharges the Department from any and all duty and obligation to cause permitting, Project Right of Way acquisition, Utility Relocation,

construction, equipping, operations, maintenance, policing, renewal, replacement, traffic management or other management of or for the Project or the Rights of Way, by the Department, to satisfy the standards and requirements set forth in the Project Agreements.

(c) No rights of the Department described in Section 10.05(a) above, no exercise or failure to exercise such rights, no failure of the Department to meet any particular standard of care in the exercise of such rights, no issuance of permits or certificates of completion or acceptance and no Final Acceptance of the Route 495 HOT Lanes in Virginia Project or any Project Enhancement shall:

(i) relieve the Concessionaire of its responsibility for the selection and the competent performance of all contractors, subcontractors, architects, engineers and other Consultants (except those hired by the Department);

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

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

(iv) be deemed or construed as any kind of representation or warranty, express or implied, by the Department.

(d) Notwithstanding Sections 10.05(a), 10.05(b) and 10.05(c) above, (i) the Concessionaire shall be entitled to rely on specific written deviations and interpretative engineering decisions the Department gives under this Agreement in accordance with the Technical Requirements, the Design-Build Contract or any Development Contract, and any applicable Law, (ii) the Department is not relieved from any liability arising out of a knowing, intentional material misrepresentation under any written statement the Department delivers, and (iii) the Department is not relieved from its obligations under any Development Contract.

## ARTICLE 11

### CONTRACTING PRACTICES

#### **Section 11.01 Obligation to Refrain from Discrimination.**

The Concessionaire covenants and agrees that it shall not discriminate and it shall require all contractors not to discriminate against any person, or group of persons, on account of age, sex, marital status, race, creed, color, national origin, religion or the presence of any sensory, mental or physical handicap in the permitting, design, acquisition and construction of the Route 495 HOT Lanes in Virginia Project, or the maintenance, operation or management of the HOT Lanes, nor shall the Concessionaire establish or permit any such practice or practices of discrimination or segregation with reference to the selection, use, hiring, firing, promotion or termination of employees, contractors, subcontractors and vendors or with reference to the use, occupancy or enjoyment of or access to or toll rates charged for use of the Route 495 HOT Lanes in Virginia Project or the HOT Lanes, as the case may be; *provided*, that the prohibition against

discrimination on the basis of sensory, mental or physical handicap shall not apply if the particular disability prevents the proper performance of the particular person involved.

**Section 11.02 Subcontracting.**

(a) Subject to Section 8.04, the Concessionaire may perform its permitting, construction, traffic management, ordinary maintenance and repair, and other responsibilities under this Agreement through use of its own personnel, materials and equipment, or by subcontracting to Persons with the expertise, qualifications, experience, competence, skills and know-how to perform the responsibilities being subcontracted in accordance with all applicable Law, all Regulatory Approvals and the terms, conditions and standards set forth in this Agreement.

(b) Each subcontract that the Concessionaire executes at a minimum:

(i) shall set forth a standard of professional responsibility or a standard for commercial practice equal to prudent industry standards for work of similar scope and scale and shall set forth effective procedures for claims and change orders;

(ii) shall establish provisions for prompt payment by the Concessionaire in accordance with the provisions of Sections 2.2-4347 through 4355 of the Virginia Code, which would apply if the Department was contracting with such subcontractor;

(iii) shall require the subcontractor to carry out its scope of work in accordance with all applicable Law, all Regulatory Approvals and the terms, conditions and standards set forth in this Agreement;

(iv) shall set forth warranties, guaranties and liability provisions of the contracting party in accordance with Good Industry Practice for work of similar, scope and scale;

(v) shall be fully assignable to the Department, such assignability to include the benefit of all subcontractor warranties, indemnities, guarantees and professional responsibility and include express requirements that, if the Department succeeds to the Concessionaire's rights under the subject contract (by assignment or otherwise), then the relevant subcontractor agrees that it will (A) maintain usual and customary books and records for the type and scope of operations of business in which it is engaged (e.g., constructor, equipment supplier, designer, service provider), (B) permit audit thereof by the Concessionaire, and provide progress reports to the Concessionaire appropriate for the type of subcontract it is performing sufficient to enable the Concessionaire to provide the reports it is required to furnish the Department under this Agreement, and (C) allow the Department, to assume the benefit of the Concessionaire's subcontract rights and the work performed thereunder with liability only for those remaining obligations accruing after the date of assumption;

(vi) shall not be assignable by the subcontractor without the Concessionaire's prior written consent;

(vii) shall expressly require the subcontractor to participate in meetings between the Concessionaire and the Department, upon the Department's reasonable request, concerning matters pertaining to such subcontractor or its work, provided that all direction to such subcontractor shall be provided by the Concessionaire, and provided, further that nothing in this Section 11.02(b)(vii) shall limit the authority of the Department to give such direction or take such action which in the opinion of the Department is necessary to remove an immediate and present threat to the safety of life or property;

(viii) shall expressly provide that all Liens and claims of the subcontractor and its subcontractors at any time shall not attach to any interest of the Department in the Project or the Rights of Way; and

(ix) shall be consistent in all other respects with the terms and conditions of this Agreement to the extent such terms and conditions are applicable to the scope of work of such subcontractors.

(c) The Concessionaire shall not enter into any contract or subcontracts with any Person then debarred or prohibited from participating in state or federally-funded projects, or indicted, convicted, pled guilty or nolo contendere to a violation of Law involving fraud, conspiracy, collusion, bribery, perjury, material misrepresentation, or any other violation that shows a similar lack of moral or ethical integrity.

(d) The Concessionaire shall include a provision in each subcontract requiring the subcontractor to maintain all licenses required by applicable Law.

(e) The appointment of subcontractors by the Concessionaire shall not relieve the Concessionaire of its responsibility hereunder or for the quality of work, materials and services provided by it. The Concessionaire shall at all times be held fully responsible to the Department for the acts and omissions of its subcontractors and persons employed by them and no subcontract entered into by the Concessionaire will impose any obligation or liability upon the Department to any such subcontractor or any of its employees. Nothing in this Agreement will create any contractual relationship between the Department and a subcontractor of the Concessionaire.

(f) The Concessionaire shall not enter into or materially amend a contract or subcontract with an Affiliate (an "Affiliate Contract") without notice to and consent of the Department, which consent shall not be unreasonably withheld or delayed if the contract or subcontract is entered into in the ordinary course of business and the Concessionaire demonstrates to the Department's satisfaction that the contract or subcontract is on overall terms no less favorable or unfavorable to the Concessionaire than terms the Concessionaire could obtain in an arm's-length transaction for comparable services with a Person that is not an Affiliate of the Concessionaire; *provided*, that no consent shall be required for (i) reasonable overhead sharing fees and reimbursement of third-party costs payable to an Affiliate for legal, accounting, tax, computer and other centralized management services provided to the Concessionaire in lieu of Concessionaire having its own employees for such functions; or (ii) the joint ownership of assets or property used for the operation or maintenance of the Project and

other projects owned or operated by Affiliates of the Concessionaire so long as the cost of such assets and properties are reasonably shared and documented.

**Section 11.03 Small, Women-Owned and Minority Business (SWaM) and Disadvantaged Business Enterprise (DBE) Reporting.**

(a) The parties recognize the importance of pursuing, inviting and developing the participation of minority, women-owned and small businesses through the federal Disadvantaged Business Enterprise (“DBE”) and Small, Women-Owned and Minority Business (“SWaM”) programs, where applicable. Accordingly, during the Operating Period the Concessionaire will promote the participation of local small business as well as minority and women owned businesses in the Project. The Concessionaire will set annual goals and make a good faith effort to achieve or exceed them in contracts for operating and for goods and services related to operating the HOT Lanes Project. The Concessionaire will provide its participation on such matters to the Department Representative, and the Department may include those participation rates, as appropriately adjusted, with its own towards the Commonwealth’s long-term goal established pursuant to the Office of the Governor’s Executive Order 33 (2006). The long-term participation SWaM goal for the Concessionaire during the Operating Period shall be 40%.

(b) During the Work Period, in an effort to comply with 49 CFR Part 26 and support Executive Order 33 (2006), the Department has established a goal of 15% for DBE participation and 25% for SWaM participation, such percentages relating to the value of the Design-Build Contact totaling an aggregate goal of 40% of the value of the Design-Build Contact during the Work Period. The Department and the Concessionaire agree to manage this goal during the Work Period as follows: (1) the Concessionaire will establish a goal for each bid item group (*i.e.*, aggregates, box culverts, clearing and grubbing, excavation, pavement marking) that equates to the overall goal of 40%; (2) the Concessionaire will prepare first draft of proposed goals and will submit such draft to the Department for review and comment; (3) the goals for each bid item group will be established 30 days after finalizing the agreement and reviewed annually; (4) if the goal can not be achieved on a particular bid item group, the Department may, in its reasonable discretion, waive the goal on that item subject to the submission of acceptable Good Faith Effort (“GFE”) documentation using form C-49 and other supplemental information as appropriate; and (5) the Concessionaire agrees that if the Department accepts the GFE documentation on a particular bid item group, the Concessionaire will make reasonable efforts to accomplish the overall goal using other bid item groups.

(c) Furthermore, during the Work Period the parties will work cooperatively to accomplish the DBE and SWaM objectives. The Department will assist the Concessionaire in meeting the Work Period goals by offering assistance to include, but not limited to, the following items:

- Prior to items (b)(1) and (2) noted above, the Department will participate with the Concessionaire in a planning session to establish the above referenced goals for each bid item group by reviewing the work, available firms, strategies, anticipated obstacles and means to overcome obstacles,
- The parties will jointly conduct outreach meetings for DBE / SWaM firms,

- The Department will identify to the Concessionaire DBE and SWaM firms that are eligible to bid on the specific bid item groups, and
- The Department will provide access to technical and managerial assistance to eligible DBE and SWaM firms through the Business Opportunity Workforce Development (BOWD) Center.

(d) The Concessionaire acknowledges that the Department's assistance and cooperation will not eliminate or reduce the Concessionaire's responsibility to achieve the Work Period goals or demonstrate GFE. The Concessionaire is expected to utilize a variety of means and methods and creative strategies to do so. These strategies should be employed for all phases of the project. The Concessionaire is expected to meet the goal or demonstrate that a "good faith effort" has been made. The Concessionaire shall submit quarterly reports of good faith efforts' documentation, and, DBE/SWaM payments on form C-63 to the Department Representative, who will make determinations on good faith efforts.

(e) When there is a contract goal during the Work Period, a contractor/consultant (Concessionaire) must make good faith efforts to meet the Goal either through obtaining enough DBE/SWaM participation or documenting the GFE it made to do so. These means of meeting contract goal requirements are fully equivalent. 49 CFR Part 26 (the Rule) explicitly provides that the Department must not disregard showings of good faith efforts, and it gives concessionaires the right to have the Department reconsider a decision that their good faith efforts were insufficient. The Department must seriously consider concessionaire's documentation of GFE. The Department will issue a Guidance Memorandum on good faith effort, providing examples, procedures and reporting requirements for the Concessionaire.

(f) If, at any time during the Work Period, the Department determines that the Concessionaire or a Concessionaire Party neither achieves the goals nor demonstrates GFE, the Concessionaire, such Concessionaire Party neither achieving the goals nor demonstrating GFE and/or their respective Affiliates may be enjoined or disqualified from additional work or new contracts with the Commonwealth of Virginia; *provided*, however, that in the case of a failure to achieve the goals or demonstrate GFE with respect to the Design-Build Contract such parties subject to disqualification in accordance with the next sentence shall be solely the Design Build Contractor, and the managing member of the Design Build Contractor and its Affiliates. The Department will disqualify any such Persons for a minimum period of 90 days from the date of the Department's notice of disqualification. Such notice will also be provided to the FHWA and will be posted on the Department's web site. If, during any 90-day-period that any such Person is disqualified, the Concessionaire or such Concessionaire Party continues to fail to achieve the goals and fails to demonstrate GFE then the period of disqualification shall be extended for an additional 90 days.

#### **Section 11.04 Federal and State Requirements.**

The Concessionaire shall comply with applicable Law.

## ARTICLE 12

### **INTERRELATIONS AMONG TRANSPORTATION FACILITIES**

#### **Section 12.01 Coordination Regarding Certain Transportation Facilities.**

The Department shall have the right at any time (and without liability to the Concessionaire for any damages it may suffer, except as specifically provided in Section 12.01(c) or 12.01(d)) to modify existing facilities, to construct new facilities, including but not limited to Project Enhancements, and to perform planned and emergency maintenance, renewal and replacement, safety and repair activities on existing and new facilities adjacent to or near the Project regardless of the impact of such activities on the Project; *provided*, that:

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

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

(c) to the extent it relates to Department Project Enhancements, the provisions of Section 9.02 shall govern the Department's liability to the Concessionaire therefor; and

(d) to the extent it relates to Department Changes, the provisions of Section 7.12 shall govern the Department's liability to the Concessionaire therefor.

#### **Section 12.02 Traffic Management Activities.**

(a) The Concessionaire shall cooperate with the Department in managing the HOT Lanes as part of the overall transportation network in Northern Virginia. The Concessionaire's congestion pricing methodology on the HOT Lanes is not intended to be inconsistent with the Department's plans and programs for highway system management of the overall transportation network in Northern Virginia; *provided*, that implementation of such congestion pricing methodology is not otherwise inconsistent with and will not materially impact (i) the Concessionaire's financial plan for financing the costs of the Project or (ii) the financial performance of the Project, and will not result in a breach of the SAFETEA-LU or other agreed operational requirements. For purposes of this subsection, "congestion pricing methodology" means a tolling methodology intended to maintain free-flow traffic conditions.

(b) The Department may temporarily override any messages posted on variable message signs within or solely serving the Route 495 HOT Lanes in Virginia Project or the HOT Lanes in order to post information regarding a declared emergency issued pursuant to applicable Law by the Department or any other Governmental Authority or a significant incident involving one or more casualties requiring hospitalization or treatment by a medical professional or one or more fatalities; *provided*, that any such activities must be coordinated with the Concessionaire in accordance with the protocols set forth in Exhibit E.

(c) The Department and the Concessionaire shall agree to the intersection control plans setting forth the management of the intersections and other junctions connecting the HOT Lanes to the surrounding roadway system to be included in or as amendments to the Joint Operating and Maintenance Protocols. At the Concessionaire's request and expense, the Department shall be obligated from time to time to cooperate reasonably with the Concessionaire in reviewing and, if appropriate, revising the intersection control plans in order to assist the Concessionaire in meeting operational and performance targets for the HOT Lanes.

(d) Subject to the Concessionaire's obligations hereunder, during the Term the Department shall maintain, repair and, in accordance with the Department's normal course of operations and activities, cause to be continuously open and operational, so as to permit access to the HOT Lanes by Permitted Vehicles (except for closures for activities in the following proviso), the Capital Beltway and the ramps, bridges and roadways directly connecting to the HOT Lanes and the Capital Beltway Corridor that are part of the interstates and primary system of State Highways; *provided*, that the foregoing does not restrict the Department's right to operate existing or new facilities, to modify existing facilities, to construct new facilities, including but not limited to Project Enhancements, and to perform planned and emergency maintenance, renewal and replacement, safety and repair activities on existing and new facilities adjacent to or near the Project regardless of the impact of such activities on the Project.

### **Section 12.03 Intelligent Transportation Systems (ITS) Activities.**

With the approval of the Concessionaire (such approval not to be unreasonably withheld), the Department shall have the right to perform ITS research and install ITS equipment on the HOT Lanes Right of Way for public, non-revenue generating purposes, *provided* that such ITS equipment does not materially interfere with the functioning of the ETTM System or existing ITS systems being utilized for the HOT Lanes, and does not materially and negatively impact toll operations or reduce vehicle throughput capacity of the Project; and *provided, further*, that if the Department's ITS activities pursuant to this Section 12.03 result in the incurrence by the Concessionaire of Concessionaire Damages, the Concessionaire shall be entitled to compensation in accordance with Sections 13.02 and 13.03. The Department shall bear all installation, maintenance, operation, replacement and other costs and expenses relating to such ITS equipment and research and all claims and liabilities resulting therefrom, and subject to any applicable privacy Law, shall provide access to all transportation data generated thereby, including video streams, to the Concessionaire at no cost for the sole purpose of traffic management.

### **Section 12.04 Signage.**

(a) The Concessionaire shall have the right, at its cost, to install and maintain variable messaging signs or static signs on or above any portion of the Capital Beltway Corridor notifying motorists of such information as the Concessionaire deems appropriate in the construction, operations and management of the Project, including, but not limited to, notice of construction and diversion to alternate directional routes, access to the HOT Lanes, the applicable High Occupancy Requirement and applicable tolls and fines for toll violations and, consistent with the Department's Reserved Rights, promotional and public relations materials, in accordance with applicable Law and the Technical Requirements. The Department shall remain responsible, at its



cost, for general directional signs on State Highways informing the public of the direction and distance to the HOT Lanes and other State Highways.

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

(c) During the Term, the Department shall also cooperate with, and use its best efforts to cause other public agencies or entities to cooperate with, the Concessionaire to install, at the Concessionaire's cost, additional signs along feeder roads and other roadways notifying motorists of the access to the HOT Lanes and any other communications relating to the HOT Lanes as are reasonably requested by the Concessionaire, subject to any obligation to obtain any necessary authorizations of any other Governmental Authority and in accordance with applicable Law, including, without limitation, the MUTCD. In connection with any such request, the Concessionaire will submit the proposed layout, location, type, size, color and content of all such traffic signs or other signs.

## ARTICLE 13

### **DELAY EVENTS; COMPENSATION EVENTS; FORCE MAJEURE EVENTS**

#### **Section 13.01 Delay Events.**

(a) If the Concessionaire is affected by a Delay Event, it shall give notice within 30 days following the date on which it first became aware (or should have been aware, using all reasonable due diligence) of such Delay Event to the Department (*provided*, that in the case of the same Delay Event being a continuing cause of delay, only one notice shall be necessary), which notice shall include (i) a statement of which Delay Event the claim is based upon, (ii) details of the circumstances from which the delay arises, and (iii) an estimate of the delay in the performance of obligations under this Agreement attributable to such Delay Event and information in support thereof, if known at that time. The Department shall, after receipt of the said notice, be entitled by notice to require the Concessionaire to provide such further supporting particulars as the Department may reasonably consider necessary. If for any reason the Concessionaire fails to deliver such notice of a Delay Event within such 30 day period, the Concessionaire shall be deemed to have irrevocably and forever waived and released any Claim or right to time extensions or any other relief with respect to such Delay Event.

(b) The Concessionaire shall notify the Department within 15 days following the date on which it first became aware (or should have been aware, using all reasonable due diligence) that such a Delay Event has ceased.

(c) Subject to the Concessionaire giving the notice required in Section 13.01(a)(i), a Delay Event pursuant to this subsection (b) shall excuse the Concessionaire from whatever performance is prevented by the Delay Event referred to in such notice for such appropriate

number of days as the Department and the Concessionaire jointly determine, each acting reasonably. During the Work Period, extensions for Delay Events affecting the Work shall be based on TIA and the then current Baseline Schedule, taking into account impacts of the Delay Events on critical path items. If the Department and the Concessionaire cannot agree upon the period of extension, then either Party shall be entitled to refer the matter to the dispute resolution procedure in Section 17.06. This Section 13.01(c)(iii) shall not excuse the Concessionaire from the performance and observance under this Agreement of all obligations and covenants not affected by the Delay Event. Notwithstanding the occurrence of a Delay Event, the Concessionaire shall continue its performance and observance under this Agreement of all of its obligations and covenants to be performed to the extent that it is reasonably able to do so and shall use its reasonable efforts to minimize the effect and duration of the Delay Event. Nothing herein shall permit or excuse noncompliance with a change to applicable Law.

### **Section 13.02 Compensation Events.**

(a) Either party hereto may submit a written notice to the other party of any Compensation Event, which notice shall be submitted within 30 days following the date on which the submitting party first became aware (or should have been aware, using all reasonable due diligence) that an event has occurred and that it is or will become a Compensation Event pursuant hereto (a "Compensation Event Notice"). The Compensation Event Notice shall set forth (i) the Compensation Event and its date of occurrence in reasonable detail, and (ii) the amount claimed as the Concessionaire Damages or as Positive Revenue, as applicable, and details of the calculation thereof including a written analysis and calculation of the estimated Net Cost Impact, if any, and estimated Net Revenue Impact.

(b) If for any reason the Concessionaire fails to deliver such written Compensation Event Notices within the foregoing time periods, the Concessionaire shall be deemed to have irrevocably and forever waived and released any Claim or right to compensation for any Concessionaire Damages or other adverse effects on Toll Revenues or on costs, expenses and liabilities attributable to such Compensation Event.

(c) After a party hereto submits a Compensation Event Notice, the other party shall be entitled to obtain (i) from the Independent Engineer a comprehensive report as to the Concessionaire's estimate of the Net Cost Impact attributable to the Compensation Event and (ii) from a traffic and revenue consultant a traffic and revenue study, prepared in accordance with Good Industry Practice, analyzing and calculating the estimated Net Revenue Impact or Positive Revenue, as applicable, attributable to the Compensation Event. Within 90 days after receiving a Compensation Event Notice, the party in receipt of such notice shall provide to the party having given such notice a copy of such reports as it has elected to obtain. Within 120 days after the delivery of the Compensation Event Notice, the Concessionaire and Department shall commence good faith negotiations to determine the Concessionaire Damages, Positive Revenue or other compensation, if any, to which a party is entitled, including calculation of the present value of such Concessionaire Damages, Positive Revenue or other compensation pursuant to Section 13.03(a).

(d) If the Concessionaire and Department are unable to agree upon the amount of the Concessionaire Damages, Positive Revenue or other compensation, if any, or present value

thereof, within 30 days after commencement of negotiations, then either party may request that the matters under dispute be reviewed by the Independent Engineer (and, if the disputed matters involve issues outside the Independent Engineer's expertise, the Independent Engineer may consult with another independent third party expert having appropriate expertise with respect to the matters in dispute). If, despite the recommendations of the Independent Engineer, the parties are unable to agree upon the matters in dispute within 60 days after commencement of negotiations, either party, by written notice to the other party, may terminate the negotiations and request the dispute be resolved in accordance with Section 17.06.

(e) The Concessionaire shall take all steps reasonably necessary to mitigate the amount of the Concessionaire Damages attributable to, and other consequences of, any Compensation Event, including all steps that would generally be taken in accordance with Good Industry Practice.

### **Section 13.03 Payment Options for Concessionaire Damages and Positive Revenue.**

(a) Subject to Section 20.18, following a determination of the Concessionaire Damages, including those determined under Sections 9.02, 12.03, 13.04, 13.05, 13.06 and 17.04, Positive Revenue under Sections 7.12, 9.02, and 13.04, compensation regarding certain Hazardous Substances under Section 8.10, or compensation for Net Revenue Impact or Net Cost Impact under Section 19.02, by mutual agreement or dispute resolution, the party owing such compensation shall pay such compensation; *provided*, that it may make such payment or payments in any of the following manners:

(i) a lump-sum payment of the present value of the compensation, discounted to the date of payment at the then applicable discount rate that an informed buyer and an informed seller of the future payment obligations, under no compulsion to buy or sell, would agree to use in determining the present value of such compensation;

(ii) through quarterly or other periodic payments of the compensation over the remaining life of the Term so long as such payment schedule provides for payment of such portion of the compensation within 90 days after such damages or compensation is projected to be incurred; *provided*, that if any such payment is made more than 90 days after the recipient party incurs or suffers the compensation or damages, the unpaid compensation shall accrue interest at the Bank Rate from and after such 90th day to the date such payment is made; and *provided further*, that if the payor elects to make quarterly or other periodic payments, at any later time it may choose to complete compensation through a lump-sum payment of the present value of the remaining compensation;

(iii) by set-off against amounts then due and owing to the Department pursuant to the permit fee arrangements detailed in Article 5; or

(iv) in such other manner as agreed upon by the parties or determined through dispute resolution.

(b) As a condition precedent to one party's obligation to compensate the other party for the Concessionaire Damages, Positive Revenue or otherwise under this Section 13.03, the

party entitled to receive such compensation shall execute a full, unconditional, irrevocable release of any Claims or other rights to compensation or other monetary relief associated with such Compensation Event other than the right to receive the applicable Concessionaire Damages, Positive Revenue or otherwise under this Section 13.03.

#### **Section 13.04 Change in Law.**

(a) Subject to Section 20.18, if (i) a Discriminatory Change in Law occurs after the Agreement Date and (ii) such Discriminatory Change in Law results in Concessionaire Damages, the Department shall compensate the Concessionaire in accordance with Sections 13.02 and 13.03; *provided*, that any Positive Revenue resulting from a Discriminatory Change in Law shall be shared equally between the Concessionaire and the Department and the Department's share of such Positive Revenue shall be paid by the Concessionaire and deposited in the Project Enhancement Account, in addition to and without regard to any amounts payable under Article 5, and *provided further*, however, that none of the following shall be a Discriminatory Change in Law: (A) the development, redevelopment, construction, maintenance, modification or change in the operation of any existing or new mode of transportation (including a road, street or highway) that results in the reduction of Toll Revenues or in the number of vehicles using the HOT Lanes Project, including any action described in Section 12.01(a); (B) an increase in Taxes of general application; or (C) a Reimbursable Tax Imposition.

(b) Subject to Section 20.18, if regulatory control and jurisdiction over the HOT Lanes is transferred or assigned to a Governmental Authority other than the State or a State agency during the Lock-up Period and the effect of such action has a Net Revenue Impact or Net Cost Impact, the Department shall pay to the Concessionaire any Concessionaire Damages with respect thereto in accordance with Sections 13.02 and 13.03. If regulatory control and jurisdiction over the HOT Lanes is transferred to a Governmental Authority other than the State or a State agency after the Lock-up Period, at least 60 days prior to any such transfer or assignment the Department shall consult with the Concessionaire about the intended transfer or assignment and the Concessionaire shall have the opportunity to submit to the Department information as to the potential economic impact to the HOT Lanes Project of such transfer or assignment. Notwithstanding any other provision of this Agreement, if as a result of or subsequent to any such transfer or assignment to another Governmental Authority applicable local law or regulation has the effect of preventing the Concessionaire from meeting its obligations under this Agreement such effect may not in and of itself be the basis for any termination of this Agreement by the Department.

#### **Section 13.05 Toll Exemptions; Excess High Occupancy Vehicle Usage.**

(a) Subject to Section 20.18, if any Governmental Authority enacts, adopts, promulgates, modifies, or repeals any Law during the Term that (i) permits vehicles other than as provided by Section 4.04(b)(i) or (ii) to travel on the HOT Lanes without paying the full tolls established by the Concessionaire, including by any decrease in the High Occupancy Requirement to HOV-2 or below, or (ii) permits vehicles other than Permitted Vehicles to travel on the HOT Lanes, and the effect of such action has a Net Revenue Impact, the Department shall pay to the Concessionaire any Concessionaire Damages with respect thereto in accordance with Sections 13.02 and 13.03.

(b) The Department agrees to pay the Concessionaire, subject to Section 20.18, amounts equal to 70% of the Average Toll applicable to vehicles paying tolls for the number of High Occupancy Vehicles exceeding a threshold of 24% of the total flow of all Permitted Vehicles that are then using such Toll Section going in the same direction for the first 30 consecutive minutes during any day, and any additional 15 consecutive minute periods in such day, during which average traffic for a Toll Section going in the same direction exceeds a rate of 3,200 vehicles per hour based on two lanes. Notwithstanding the foregoing, (A) this Section 13.05(b) shall apply only with respect to periods beginning one year after the Service Commencement Date and ending not later than 40 years after the Closing Date, (B) this Section 13.05(b) shall cease to apply once a pre-tax internal rate of return (rounded up, if necessary, to a whole multiple and 1/1000 of 1%) on Total Invested Project Funds of 12.98%, calculated based on the nominal Net Cash Flow of the HOT Lanes Project for the period from the Service Commencement Date to the end of a calendar year, has been achieved, and (C) for purposes of determining the High Occupancy Vehicles as a percentage of flow, HOV-2 or below vehicles and Permitted Vehicles violating the High Occupancy Requirement shall not be counted as High Occupancy Vehicle usage but shall be counted as part of total flow. Failure by the Concessionaire to notify the Department in writing of its claim for a payment pursuant to this Section 13.05(b), and to provide audited or otherwise independently verified information relevant to this calculation, within 30 days after the end of each calendar month with respect to which this provision applies shall constitute a permanent waiver of any such claim with respect to such month. The Department will have 30 days upon receipt of this information to review the information and calculations provided and if the Department agrees with the calculation, make the calculated payment, together with interest on such amount, which interest shall commence accruing 30 days after the month to which the payment relates. To the extent there are amounts on deposit in the Project Enhancement Account, such payments shall be made first from the Project Enhancement Account and the interest due shall be calculated based on the average earnings rate on the Project Enhancement Account, during such period. If there are no amounts on deposit therein then interest shall be based on the average earnings rate on the State's Transportation Trust Fund or any successor thereto, during such period. Any disputes with regards to the information or the calculation will be subject to the dispute resolution process in Section 17.06.

### **Section 13.06 Reimbursable Tax Imposition**

Subject to Section 20.18, if a Reimbursable Tax Imposition occurs at any time during the Term, the Department shall pay to the Concessionaire the Concessionaire Damages with respect thereto in accordance with this Section 13.06 and Sections 13.02 and 13.03. The Concessionaire shall promptly notify the Department if the Concessionaire obtains written advice or written information of any proposed or threatened change in Law that could result in a Reimbursable Tax Imposition or of any local taxing district or other Governmental Authority's intent to levy such a tax.

### **Section 13.07 Significant Force Majeure Event**

(a) Within 30 days following the date on which the Concessionaire first became aware of any Force Majeure Event that is reasonably expected to be a Significant Force Majeure

Event, the Concessionaire shall give notice (“Force Majeure Notice”) to the Department setting forth the date and details of the Force Majeure Event.

(b) If a Significant Force Majeure Event occurs, the Concessionaire shall have the right to extend the Term, contingent on the Concessionaire’s agreement to diligently and completely restore of the HOT Lanes before the end of the existing Term of this Agreement (as of the date of the Force Majeure Event) to at least the same condition as it would have been had such Force Majeure Event not occurred, for a period of time that would be sufficient so as to restore the Concessionaire to the same economic position, based on the most recent updated Base Case Financial Model (as of the date of the Force Majeure Event), as it would have been in had such Force Majeure Event not occurred (a “Force Majeure Extension”).

(c) If the Concessionaire elects to exercise the right to a Force Majeure Extension, the Concessionaire shall give notice (“Force Majeure Extension Notice”) thereof to the Department during the period the result of such Force Majeure Event is continuing and within 180 days after the occurrence of such Force Majeure Event setting forth (i) the amount of time reasonably required to diligently restore the HOT Lanes to at least the same condition as it would have been had such Force Majeure Event not occurred (*provided*, that if this cannot occur before the end of the existing Term of this Agreement, there shall be no right to a Force Majeure Extension), and (ii) the extension of the Term claimed by the Concessionaire in accordance with Section 13.07(b). The Department shall, within 30 days after receipt of the Force Majeure Extension Notice, be entitled by notice to require the Concessionaire to provide such further supporting particulars as the Department may reasonably consider necessary. The Department shall, in writing within 30 days after receipt of the Force Majeure Extension Notice or, if later, within 30 days after receipt of such further information requested by the Department, either (A) accept the Force Majeure Extension Notice, or (B) dispute that a Significant Force Majeure Event has occurred or the amount of time required for such diligent restoration or the Force Majeure Extension period claimed in the Force Majeure Notice or Force Majeure Extension Notice, as applicable. For purposes of the Department’s review of any Force Majeure Extension Notice, what constitutes prompt restoration may be established by an opinion of the Independent Engineer. If the Department accepts the Force Majeure Extension Notice, the Concessionaire shall diligently pursue the Work and restore any physical damage or destruction to the HOT Lanes Project; *provided*, that the Concessionaire shall not undertake such Work unless all aspects thereof are approved in writing by the Department, and the Concessionaire and the Department shall use all reasonable efforts to enter into a Development Contract with the Department with respect thereto within 60 days after the Department has accepted the Force Majeure Extension Notice. If the Department wishes to dispute that a Significant Force Majeure Event has occurred, the amount of time required for such diligent restoration or the Force Majeure Extension period claimed in the Force Majeure Notice or Force Majeure Extension Notice, as applicable, the Department shall give notice of dispute (the “Force Majeure Dispute Notice”) to the Concessionaire within 30 days following the date of receipt of the Force Majeure Notice or Force Majeure Extension Notice, as applicable, stating the grounds for such dispute, and if neither the Force Majeure Extension Notice nor the Force Majeure Dispute Notice has been revised in a manner acceptable to the Department or withdrawn within 30 days following the date of receipt of the Force Majeure Dispute Notice by the Concessionaire, the matter shall be submitted to the dispute resolution procedure set forth in Section 17.06.

## ARTICLE 14

### INDEMNIFICATION AND INSURANCE

#### **Section 14.01 Indemnities of the Concessionaire.**

(a) The Concessionaire shall indemnify and hold harmless each State Indemnitee from and against any Losses actually suffered or incurred by such State Indemnitee (except for such Losses to the extent caused by the negligence or willful misconduct of such State Indemnitee), due to Third Party Claims that are based upon, arise out of, relate to, are occasioned by or are attributable to (i) any failure by the Concessionaire to comply with, observe or perform any of the covenants, obligations, agreements, terms or conditions in this Agreement or, any breach by the Concessionaire of its representations or warranties set forth herein, (ii) any actual or alleged misconduct, negligence or other culpable act, error or omission of a Concessionaire Party in connection with the Project, (iii) any actual or alleged patent or copyright infringement or other actual or alleged improper appropriation or use of trade secrets, patents, proprietary information, know-how, trade marked or service marked materials, equipment, devices or processes, copyright rights or inventions by a Concessionaire Party in connection with the Project, (iv) inverse condemnation, trespass, nuisance or similar taking of or harm to real property committed or caused by a Concessionaire Party in connection with the Project, (v) any tax attributable to any Transfer of the Concessionaire's Interest or any part thereof or (vi) any claim for brokerage commissions, fees or other-compensation by any Person who acted on behalf of the Concessionaire, its Affiliates or their respective Representatives in connection with this Agreement, any Transfer of the Concessionaire's Interest or any part thereof.

(b) The indemnities of the Concessionaire shall survive the expiration or earlier termination of this Agreement and the other Project Agreements to which the Concessionaire is a party and shall continue for six years following the expiration or termination of this Agreement; *provided*, that such six-year limitation on survival shall not apply in the event of fraud or a material misrepresentation with respect to a particular covenant, agreement, representation or warranty, and, *provided further*, that additional indemnification agreements shall be as provided in any Design-Build Contract and any other Project Agreement. Notwithstanding the foregoing, the Concessionaire's indemnification of any State Indemnitee shall be limited solely to its obligations under this Agreement and other Project Agreements to which the Concessionaire becomes a party.

(c) (i) In the event that any Third-Party Claim for which the Concessionaire may be required to indemnify a State Indemnitee hereunder is asserted in writing against the Department, it shall as promptly as practicable notify the Concessionaire in writing of such Claim, and such notice shall include a copy of the Claim and any related correspondence or documentation from the third party asserting the Claim; *provided*, that any failure to give such prompt notice shall not constitute a waiver of any rights of the Department, except to the extent that the rights of the Concessionaire are actually and materially prejudiced thereby. If any Third-Party Claim for which the Concessionaire may be required to indemnify a State Indemnitee hereunder is asserted in writing against a State Indemnitee other than the Department, a failure by such State Indemnitee to give the Concessionaire prompt notice in writing of such Claim

together with a copy of the Claim and any related correspondence or documentation from the third party asserting the Claim, shall constitute a waiver of any rights of such State Indemnitee to indemnification to the extent, and only to the extent, that the rights of the Concessionaire are actually and materially prejudiced thereby.

(ii) The Concessionaire shall be entitled and obligated to appoint counsel of its choice at the expense of the Concessionaire to represent a State Indemnitee in any action for which indemnification is sought (in which case the Concessionaire shall not thereafter be responsible for the fees and expenses of any separate counsel retained by that State Indemnitee except as set forth below); *provided*, that such counsel shall be satisfactory to such State Indemnitee. Notwithstanding the Concessionaire's appointment of counsel to represent a State Indemnitee in any action, such State Indemnitee shall have the right to employ separate counsel, and the Concessionaire shall bear the reasonable fees, costs and expenses of such separate counsel, if (A) the use of counsel chosen by the Concessionaire to represent the State Indemnitee would present such counsel with a conflict of interest; (B) the actual or potential defendants in, or targets of, any such action include both the State Indemnitee and the Concessionaire and the State Indemnitee shall have reasonably concluded that there may be legal defenses available to it and/or other State Indemnitees which are different from or additional to those available to the Concessionaire; (C) the Concessionaire shall not have employed counsel to represent the State Indemnitee within a reasonable time after notice of the institution of such action; or (D) the Concessionaire shall authorize the State Indemnitee to employ separate counsel at the Concessionaire's expense. The Concessionaire shall not be liable for any settlement or compromise of any action or claim by an State Indemnitee affected except with the Concessionaire's prior written consent, which consent shall not be unreasonably withheld or delayed, or except where the settlement or compromise is approved by the court after the Concessionaire receives reasonable notice and the opportunity to be heard and such court approval has become final and nonappealable.

#### **Section 14.02 Insurance Coverage Required.**

(a) Required Insurance During the Work Period. The Concessionaire shall cause to be maintained during the Work Period the insurance coverages required in the Design-Build Contract.

(b) Required Insurance During Operating Period. The Concessionaire shall provide and maintain at its own expense, or cause to be maintained, during the Operating Period and during any time period following the Term's expiration if the Concessionaire is required to return and perform any additional work, the insurance coverages specified below, insuring the HOT Lanes Project and all HOT Lanes Operations:

(i) Property and Business Interruption. The Concessionaire shall obtain property insurance at replacement cost, covering loss, damage or destruction to the HOT Lanes Project, including improvements and betterments; *provided*, that the limits of such coverage may be based on a maximum foreseeable loss analysis, subject to the Department's approval of such maximum foreseeable loss analysis by an independent



third party that is reasonably acceptable to the Department, with such approval of the Department not to be unreasonably withheld, and, *provided further*, that:

(A) Coverage shall include, but not be limited to, the following: flood, earthquake, earth movement, collapse, water including overflow, leakage, utility interruption, debris removal, business ordinance or law for increased cost of construction, extra expense, valuable papers and terrorism.

(B) Coverage shall also insure against interruption or loss of projected Toll Revenues for at least one full year from the occurrence of the risk, resulting from physical damage to the HOT Lanes Project and any relevant feeder roads.

(C) The Department is to be named as an additional insured.

(D) The Concessionaire is responsible for all loss or damage to personal property (including, but not limited to, materials; fixtures/contents, equipment, tools and supplies) of the Concessionaire.

(ii) Commercial General Liability (Primary and Umbrella). The Concessionaire shall provide commercial general liability Insurance or its equivalent with limits of not less than \$50,000,000 per occurrence and in the aggregate in any one annual period of insurance for bodily injury, personal injury and property damage liability. Coverage shall include, but not be limited to, the following: all premises and operations, products/completed operations, explosion, collapse, separation of insureds, defense, terrorism (if available) and contractual liability (to the extent such a clause can be obtained). The Department is to be named as an additional insured on a primary, non-contributory basis for any liability arising directly or indirectly under or in connection with this Agreement and shall contain a cross liability clause so that the insurance shall operate in the circumstance that one insured brings a claim against another insured party. Such insurance shall also be required with regard to the periods described in (viii) below.

(iii) Automobile Liability (Primary and Umbrella). When any motor vehicles (owned, non-owned or hired) are used in connection with work to be performed, the Concessionaire shall provide or cause to be provided automobile liability insurance with limits of not less than \$10,000,000 combined single limit or per occurrence and in the aggregate in any one annual period insurance for bodily injury and property damage. Such limit may be combined with an umbrella limit applicable to (ii) above (commercial general liability). The Department is to be named as an additional insured on a primary, non-contributory basis.

(iv) Builder's Risk. Subject to the further requirements of any Development Contract, when the Concessionaire undertakes any construction, maintenance or repairs to the HOT Lanes Project, including improvements and betterments pursuant to this Agreement, the Concessionaire shall provide or cause to be provided, builder's risk insurance at replacement cost for material, supplies, equipment, machinery and fixtures that are or will be part of the HOT Lanes Project. Coverage shall include, but not be limited to, the following: right to partial occupancy, earthquake, earth movement, and

flood. The Department shall be named as an additional insured on a primary, non-contributory basis.

(v) Workers' Compensation and Employer's Liability. The Concessionaire shall provide workers' compensation insurance, as prescribed by applicable Law, for all Concessionaire employees.

(vi) Contractor Pollution Liability. The Concessionaire shall provide or cause to be provided contractor pollution liability insurance of not less than \$10,000,000 any one claim and in the aggregate in any one annual period of insurance and a deductible that does not exceed \$500,000.

(c) General Requirements Applicable to Insurance. The insurances which the Concessionaire is required to effect under Section 14.02(a) and Sections 14.02(b) above:

(i) shall be effected with insurers approved by the Department (such approval not to be unreasonably withheld);

(ii) shall be on terms approved by the Department (such approval not to be unreasonably withheld);

(iii) shall not contain any exclusion, endorsement or alteration, unless it is first approved by the Department (such approval not to be unreasonably withheld);

(iv) other than for workers compensation insurance and automobile liability insurance and contractor pollution liability insurance without inferring a right of cancellation that would not exist in the absence of these endorsements, shall contain a term which requires the insurer to give not less than 30 days' prior notice to the Department whenever the insurer gives the Concessionaire a notice of cancellation or any other notice with respect to the policy;

(v) with regard to workers compensation insurance, automobile liability insurance and contractor pollution liability insurance, shall be effected on a severability of interest basis for the purposes of which the insurer accepts the term "insured" as applying to each of the persons comprising the insured as if a separate policy of insurance had been issued to each of them (subject always to the overall sum insured not being increased as a result);

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

(vii) other than for workers compensation insurance, automobile liability insurance, contractor pollution liability insurance, shall contain a provision under which the insurer agrees that the failure of one insured to observe and fulfill the terms of the policy will not prejudice the policy with respect to the interests of the other insureds; and

(viii) other than for workers compensation insurance and automobile liability insurance, have each policy endorsed to the effect that the Department and the other insureds shall not be prejudiced by an unintended and/or inadvertent error, omission or misdescription of the risk interest in property insured under the policies, incorrect declaration of values, failure to advise insurers of any change of risk interest or property insured or failure to comply with a statutory requirement.

The Concessionaire shall give the Department proof satisfactory to it of currency and coverage of insurances, as soon as practicable after the Closing Date (with respect to insurance required during the Work Period) or no later than 30 days prior to the Service Commencement Date (with respect to insurance required during the Operating Period) and also whenever reasonably requested by the Department.

Within Section 14.02(b), all stipulated monetary amounts shall be reviewed at three yearly intervals and increased as appropriate, in line with such amounts that would be insured by a prudent business similar to, and undertaking similar activities to, the Concessionaire.

(d) Unavailability of Insurance.

(i) If any insurance required to be maintained pursuant to this Section 14.02 (including the limits or deductibles or any other terms under policies for such insurance) ceases to be available on a commercially reasonable basis, the Concessionaire shall provide written notice to the Department accompanied by a letter from the Concessionaire's insurance advisor stating that such insurance is unavailable on a commercially reasonable basis. Such notice shall be given not less than 30 days prior to the scheduled date for renewal of any such policy. Except to the extent attributable to the Concessionaire, or any Concessionaire Party upon receipt of such notice by the Department, the Concessionaire and the Department shall immediately enter into good faith negotiations regarding the matters set forth in Section 14.02(c)(ii) and (iii) below.

(ii) In the event that the Concessionaire and the Department cannot reach a resolution acceptable to both parties within 10 days, the Concessionaire and the Department shall make arrangements for the formation of an insurance panel consisting of the Concessionaire's insurance advisor (or broker), the Department or its insurance advisor (or broker) and an independent insurance expert from a nationally recognized insurance brokerage firm, chosen by the Concessionaire and reasonably acceptable to the Department. Such independent expert shall conduct a separate review of the relevant insurance requirements of this Section 14.02 and the market for such insurance at the time, giving due consideration to the representations of both insurance advisors, and upon conclusion of such review shall issue a written report stating whether such insurance is available or unavailable on a commercially reasonable basis.

(iii) If the insurance expert concludes that such insurance is not available on a commercially reasonable basis, the insurance expert shall provide a written recommendation (which shall include the amount and type of insurance which is available upon a commercially reasonable basis) not less than 15 days before the date for

renewal of such insurance. The Concessionaire shall, prior to the expiration of the insurance then in effect, obtain the insurance required by this Section 14.02 that is available on a commercially reasonable basis.

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

**Section 14.03 Concessionaire Indemnifications Regarding Hazardous Substances.**

(a) The Concessionaire shall indemnify, protect, hold harmless and release each State Indemnitee from and against any and all Losses, including attorneys fees, such State Indemnitee incurs, and the Concessionaire shall defend each State Indemnitee from and against any Claims, asserted by third parties, arising out of the following:

(i) Any Hazardous Substances originally introduced to or brought onto the Project Right of Way or the HOT Lanes Right of Way by any Concessionaire Party or on property within the Project Right of Way acquired by the Concessionaire or the Design Build Contractor for the Department pursuant to Section 7.08;

(ii) Failure of any Concessionaire Party to perform its obligations pursuant to Sections 7.08, 7.18 or 8.11, or any other provisions of this Agreement or any other Project Agreement related to Hazardous Substances or to otherwise comply with applicable Environmental Laws and Regulatory Approvals; and

(iii) Exacerbation, due to the negligence, recklessness or willful misconduct or failure to provide proper engineering controls of any Concessionaire Party, of the release, spreading, migration or toxicity of Pre-Existing Hazardous Substances which are or become known or apparent to or reasonably suspected by any Concessionaire Party prior to such exacerbation.

(b) Except to the extent provided in Sections 14.03(a), the Concessionaire shall not have any obligation to indemnify the Department or any third-party beneficiary or assignee with respect to any third party Claim relating to Pre-Existing Hazardous Substances.

(c) Except to the extent matters are addressed by the provisions of Section 14.03(a), the Department agrees that, to the extent permitted by applicable Law, it shall assume responsibility for the discharge and satisfaction of liabilities and other Claims asserted by a third party against the Concessionaire or a Concessionaire Party for personal injury or damage or harm to its property or business due to Pre-Existing Hazardous Substances.

**ARTICLE 15**

**REPRESENTATIONS, WARRANTIES AND FINDINGS**

### **Section 15.01 Department Representations and Warranties.**

The Department hereby represents and warrants to the Concessionaire as follows:

(a) The Department is an agency of the State and has full power, right and authority to execute, deliver and perform its obligations under, in accordance with and subject to the terms and conditions of this Agreement and other Project Agreements to which the Department is a party.

(b) Each person executing this Agreement or any other Project Agreement on behalf of the Department to which the Department is a party has been or at such time will be duly authorized to execute each such document on behalf of the Department.

(c) Neither the execution and delivery by the Department of this Agreement and the other Project Agreements executed concurrently herewith to which the Department is a party, nor the consummation of the transactions contemplated hereby or thereby, is in conflict with or will result in a default under or violation of any other agreements or instruments to which it is a party or by which it is bound.

(d) There is no action, suit, proceeding, investigation or litigation pending and served on the Department which challenges the Department's authority to execute, deliver or perform, or the validity or enforceability of, this Agreement and the other Project Agreements to which the Department is a party, or which challenges the authority of the Department official executing this Agreement or the other Project Agreements, and the Department has disclosed to the Concessionaire any pending and unserved or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which the Department is aware.

(e) Other than with respect to portions of the Rights of Way not yet acquired as of the Agreement Date, the Department has good and sufficient title and interest to the Rights of Way necessary for purposes of this Agreement free and clear of all Liens or other exceptions to title, except Permitted Encumbrances. As of the Agreement Date, no agreement, contract, option, commitment or other right exists which binds, or which in the future may become binding on, the Department to sell, transfer, convey, dispose of or encumber the Project. The Department has not assigned any interest in Revenues to any other party other than the Concessionaire under this Agreement.

(f) This Agreement has been duly authorized, executed and delivered by the Department and constitutes a valid and legally binding obligation of the Department, enforceable against it in accordance with the terms hereof, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and the general principles of equity.

(g) The Department has taken or caused to be taken all requisite action to authorize the execution and delivery of, and the performance of its obligations under, this Agreement and the other Project Agreements to which the Department is a party.

(h) The Department is in material compliance with all Law and Regulatory Approvals applicable to the Project and its activities in connection with this Agreement.

(i) Under State Law as of the Agreement Date, the State has regulatory control and jurisdiction over the interstates and primary system of State Highways, including the Capital Beltway, and the Capital Beltway is constructed and maintained under the direction and supervision of the Commonwealth Transportation Board and the Commissioner.

**Section 15.02 Concessionaire Representations and Warranties.**

The Concessionaire hereby represents and warrants to the Department as follows:

(a) The Financial Model and Base Case Financial Model were prepared by or on behalf of Concessionaire in good faith and, as of the Agreement Date, represent reasonable projections; *provided*, that such projections are based upon a number of estimates and assumptions and are subject to significant business, economic and competitive uncertainties and contingencies and that, accordingly, no representation or warranty is made that any of the assumptions are correct, that such projections will be achieved or that the forward-looking statements expressed in such projections will correspond to actual results. The Base Case Financial Model fully discloses financial assumptions and projections that the Concessionaire is using for disclosures to potential lenders, and has been audited and verified by an independent recognized model auditor acceptable to the Lenders prior to the Closing Date. The financial formulae in the Base Case Financial Model are the same financial formulae which the Concessionaire is utilizing in making its decisions to enter into this Agreement and is utilizing for disclosures to potential lenders and has been provided to the Department.

(b) The Concessionaire is a duly organized limited liability company created under the laws of the State of Delaware, is qualified to conduct business in the State, has the requisite power and all required licenses to carry on its present and proposed activities, and has full power, right and authority to execute and deliver this Agreement and the other Project Agreements to which the Concessionaire is a party and to perform each and all of the obligations of the Concessionaire provided for herein and therein.

(c) The Concessionaire has taken or caused to be taken all requisite action to authorize the execution and delivery of, and the performance of its obligations under, this Agreement and the other Project Agreements to which the Concessionaire is a party.

(d) Each person executing this Agreement or any other Project Agreement on behalf of the Concessionaire has been or will at such time be duly authorized to execute each such document on behalf of the Concessionaire.

(e) This Agreement has been duly authorized, executed and delivered by the Concessionaire and constitutes a valid and legally binding obligation of the Concessionaire, enforceable against it in accordance with the terms hereof, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and the general principles of equity.

(f) Neither the execution and delivery by the Concessionaire of this Agreement and the other Project Agreements to which the Concessionaire is a party, nor the consummation of the transactions contemplated hereby or thereby, is in conflict with or will result in a default

under or a violation of the governing instruments of the Concessionaire or any other agreements or instruments to which it is a party or by which it is bound.

(g) There is no action, suit, proceeding, investigation or litigation pending and served on the Concessionaire which challenges the Concessionaire's authority to execute, deliver or perform, or the validity or enforceability of, this Agreement and the other Project Agreements to which the Concessionaire is a party, or which challenges the authority of the Concessionaire official executing this Agreement or the other Project Agreements; and the Concessionaire has disclosed to the Department any pending and unserved or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which the Concessionaire is aware.

(h) The Concessionaire is in material compliance with all Law applicable to the Concessionaire or its activities in connection with this Agreement and the other Project Agreements.

(i) Except for any broker or advisor whose fees will be paid by the Concessionaire, there is no investment banker, broker, finder or other intermediary which has been retained by or is authorized to act on behalf of the Concessionaire or any of its Affiliates (including the O&M Contractor) who might be entitled to any fee or commission in connection with the transactions contemplated by this Agreement.

(j) The Concessionaire shall cause all O&M Contractor representations and warranties contained in the Operations and Support Services Agreement to be made for the benefit of the Department.

(k) As of the Agreement Date, (i) Transurban DRIVE Holdings LLC, a Delaware limited liability company ("DRIVE Holdings"), is the sole member of Transurban DRIVE LLC, a Delaware limited liability company, which in turn owns 90% of the membership interests in the Concessionaire; (ii) Transurban DRIVE Management LLC, a wholly-owned subsidiary of Transurban International Ltd. ("TIL"), an Australian company whose securities are listed on the Australian Stock Exchange as part of the triple-stabled securities comprising the Transurban Group, provides management and oversight of the operations of DRIVE Holdings and its subsidiaries pursuant to a management agreement; and (iii) Fluor corporation, a Delaware corporation, owns all of the shares of capital stock of Fluor Enterprises Inc., a Delaware corporation, which in turn owns 10% of the membership interests in the Concessionaire.

(l) The Concessionaire is not suspended or debarred or subject to a proceeding to suspend or debar it from bidding, proposing or contracting with any federal or State department or agency.

### **Section 15.03 Survival of Representations and Warranties.**

The representations and warranties of the Department and the Concessionaire contained herein shall survive expiration or earlier termination of this Agreement and the other Project Agreements.

**Section 15.04 The Department's Findings Under PPTA.**

The Department, as the Responsible Public Entity with respect to the Project, makes the following findings:

(a) the actions taken by the Department pursuant to the PPTA facilitate the development, design, construction, management, operation and maintenance of the Project and the timely development of any Project Enhancements, and such public need may not be wholly satisfied by existing methods of procurement in which qualifying transportation facilities are developed and/or operated;

(b) there is a public need to construct and operate a qualifying transportation facility (as defined in Section 56-557 of the Virginia Code) of the type of the Project;

(c) the Permit granted hereunder authorizing the Concessionaire to develop, design, construct, manage and operate and maintain the Project, including the development of any Project Enhancements, may result in their availability to the public in a more timely, more efficient and less costly fashion, thereby serving the public safety and welfare;

(d) the Project, its interconnections with existing transportation facilities, and the Concessionaire's plans for the development, design, construction, operation and maintenance of the Project are reasonable and compatible with the State transportation plan and with local comprehensive plans;

(e) the estimated cost of developing, designing, constructing, operating and maintaining the Project is reasonable in relation to similar transportation facilities;

(f) the Concessionaire's plans will result in the timely construction and operation and maintenance of the Project and in the development of any Project Enhancements;

(g) the Department will continue to have fee title or good and valid interest to the Project and the HOT Lanes Project will remain open for use by members of the public as a public road upon payment of the applicable tolls;

(h) through this Agreement the Department intends to encourage investment in the State by the Concessionaire to facilitate the development, construction, operation and maintenance of the Project and the development of any Project Enhancements; and

(i) the terms and conditions of this Agreement serve the public purpose of the PPTA.

**ARTICLE 16**

**TERM AND TERMINATION**

**Section 16.01 Term.**



This Agreement shall take effect on the Agreement Date, and shall remain in effect until the date that is 80 years from the Agreement Date, or earlier termination of this Agreement pursuant to this Article 16, subject to (a) day-for-day extensions solely for Delay Events during the Work Period permitted by Section 13.01, and (b) extension related to certain Significant Force Majeure Events in accordance with Section 13.07 (the “Term”). The period during which the Concessionaire shall have the right to operate and maintain the HOT Lanes Project and collect tolls therefrom shall commence upon the Service Commencement Date and end upon the expiration or earlier termination of this Agreement.

### **Section 16.02 Termination Upon Expiration of Term.**

Unless earlier terminated in accordance with the terms of this Article 16, all the rights and obligations of the parties hereunder shall cease and terminate without notice or demand on the last day of the Term.

### **Section 16.03 Termination for Significant Force Majeure Event.**

(a) If a Significant Force Majeure Event occurs that has the effect of causing physical damage or destruction to the HOT Lanes, the Concessionaire shall within 120 days (or such fewer number of days as mutually agreed to in writing by the parties) after the Significant Force Majeure Event notify the Department in writing (the “Force Majeure Election”) whether it will or will not, before the end of the existing Term of this Agreement (as of the date of the Force Majeure Event), diligently and completely restore the HOT Lanes to at least the same condition as they would have been had such Force Majeure Event not occurred (subject, as applicable, to the provisions of Section 13.07), and if it will such election shall specify the date by which such prompt restoration will occur. Thereafter, if the Force Majeure Election provided that the Concessionaire will not restore the HOT Lanes, or if in the opinion of the Independent Engineer any such restoration cannot reasonably be completed using all reasonable diligent efforts before the end of such existing Term (subject to the dispute resolution procedure set forth in Section 17.06), either the Department or the Concessionaire may deliver to the other such party written notice of its election to terminate this Agreement (“Force Majeure Termination Notice”).

(b) If this Agreement is terminated at the election of the Concessionaire pursuant to this Section 16.03, no amount shall be payable by the Department to the Concessionaire as a result of such termination. If this Agreement is terminated at the election of the Department pursuant to this Section 16.03, subject to Section 20.18 the Department must pay to the Concessionaire a sum equal to the lesser of (i) Project Value (as determined pursuant to Section 17.05) after such Force Majeure Event, or (ii) the lesser of (A) 80% of Senior Debt outstanding at the time of such event (including any PABs then outstanding), plus 80% of any TIFIA Loans then outstanding, or (B) 80% of Senior Debt (including PABs) plus 80% of the TIFIA Loans projected in the Closing Date Financial Model to be then outstanding, in either such case (x) minus all cash and credit balances (if any) held under any Project Agreement, (y) minus the amount of all Distributions and all payments to Concessionaire Affiliates made on or after the relevant Force Majeure Event, and (z) minus the proceeds of any insurance (including casualty insurance and business interruption insurance) that is actually carried by or insuring any Concessionaire Party under policies solely with respect to the Project and the Work, regardless of whether required to be carried pursuant to Section 14.02, and that provides coverage to pay,

reimburse or provide for any of the Losses resulting from the Force Majeure Event. If the Concessionaire fails to diligently and completely restore the HOT Lanes and such failure constitutes a Concessionaire Default, the provisions of Section 17.01 shall apply. Subject to Section 20.18, the Department shall pay any sum due pursuant to this Section, together with interest, if any, as provided in this Section 16.03, within 60 days of the date of determination of Project Value; provided, that the Department may defer this payment for an additional 120 days if it reasonably determines that such additional period is necessary in order to obtain funds to make such payment; provided further, that any payment of any such sum shall be made together with interest thereon at the average earnings rate on the State's Transportation Trust Fund, or any successor thereto, during such period from the date of termination to the date of determination of the Project Value and thereafter at the Bank Rate to the payment date thereof; and provided further, that a termination as contemplated by this Section 16.03 shall not be effective unless and until Project Value has been determined pursuant to Section 17.05.

#### **Section 16.04 Default Termination.**

(a) The Department is entitled to terminate this Agreement (and the Permit granted to the Concessionaire hereunder) and/or any other Project Agreement to which the Department is a party as provided in Section 17.02(a). In the case of any such termination pursuant to Section 17.02(a), no compensation would be payable to the Concessionaire as a result of such termination.

(b) The Concessionaire is entitled to terminate this Agreement only in the event of a material default by the Department as described in Section 17.04(a) that materially impairs the Concessionaire's rights to realize the benefits of the permit granted under this Agreement (more particularly, that materially impairs the Concessionaire's rights under this Agreement to plan, develop, finance, construct and operate the Project and to impose and collect tolls on the users thereof).

#### **Section 16.05 Concessionaire Actions Upon Termination.**

(a) On the effective date of termination of this Agreement or the Concessionaire's rights hereunder, whether due to expiration or earlier termination of the Term, the Concessionaire shall deliver to the Department:

(i) subject to Sections 18.03 and 18.04, all tangible personal property, reports, books, records, Work Product and Intellectual Property used or owned by the Concessionaire or any Affiliate relating to the Project, the Work or HOT Lanes Operations;

(ii) possession and control of the Project and Rights of Way, free and clear of any and all Liens created, incurred or suffered by the Concessionaire or anyone claiming under the Concessionaire;

(iii) subject to Sections 18.03 and 18.04, all other intangible personal property used or owned by any Concessionaire Party and relating to or derived from the Project, the Work or the HOT Lanes Operations and the Handback Reserve; and

(iv) a recordable notice of termination of this Agreement, in the form required by the Department, executed and acknowledged by the Concessionaire. The Department may record such notice of termination in the land records of each county in which the Project is located and of the City of Richmond.

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

(c) Each of the Concessionaire and the Department shall be liable for all costs, expenses and other amounts for which it is liable or responsible hereunder incurred up to but not including the effective date of termination of this Agreement or the Concessionaire's rights hereunder, whether due to expiration or earlier termination of the Term, and the Concessionaire shall not be liable for any costs, expenses and amounts incurred in connection with the HOT Lanes Operations or the Work on and after such date, except to the extent such costs, expenses and amounts are properly included in the measure of any damages due to the Department arising from a default by the Concessionaire under this Agreement.

**Section 16.06 Liability After Termination.**

(a) If this Agreement or any other Project Agreement is terminated by reason of a material default, such termination shall not excuse the defaulting party from any liability arising out of such default as provided in the Project Agreements.

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

**Section 16.07 Termination for Failure to Achieve Substantial Completion.**

(a) The Department is entitled to terminate this Agreement by written notice to the Concessionaire upon the occurrence of any of the following:

(i) the Concessionaire fails to achieve Substantial Completion by the Outside Substantial Completion Date (unless a recovery plan has been approved prior to such date in accordance with Section 7.16); or

(ii) if a recovery plan has been approved in accordance with Section 7.16, (A) the Concessionaire fails to diligently pursue such recovery plan or (B) the Concessionaire fails to achieve Substantial Completion by the Revised Outside Substantial Completion

Date; *provided*, that the Department shall not exercise the termination remedy pursuant to this clause (ii) prior to the Outside Substantial Completion Date.

(b) The Department agrees that any termination of this Agreement pursuant to Section 16.07(a)(i) or (ii) shall be exercised reasonably.

(c) If this Agreement is terminated pursuant to Section 16.07(a), subject to Section 20.18 the Department must pay to the Concessionaire the lesser of (i) construction value of the Route 495 HOT Lanes in Virginia Project completed to date as determined by the Independent Engineer, minus funding contributed to such date by the Department pursuant to Section 7.02, minus the positive difference, if any, between the Department's estimated cost to complete the Project (which shall be concurred with by the Independent Engineer) and the Design-Build Contract fixed price, and (ii) the lesser of all Senior Debt then outstanding (including PABs) plus any TIFIA Loan then outstanding or Senior Debt (including PABs) plus any TIFIA Loan projected in the Closing Date Financial Model to be then outstanding, and any Breakage Costs related to the prepayment or satisfaction thereof on the date on which the termination payment is paid by the Department. The Department shall pay the foregoing sum, together with interest, if any as provided in this Section 16.07, within 60 days of the date of determination of the payment amount in clause (i)(A) of this Section 16.07(b); *provided*, that the Department may defer this payment for an additional 120 days if it reasonably determines that such additional period is necessary in order to obtain funds to make such payment; and *provided further*, that any payment of the foregoing sum (unless calculated pursuant to clause (i)(B) of this Section 16.07(b)) shall be made together with interest thereon at the average earnings on the State's Transportation Trust Fund or any successor thereto from the date of termination to the payment date thereof.

(d) A termination as contemplated by this Section 16.07 and the determination of construction value pursuant to this Section 16.07 shall be subject to the dispute resolution process of Section 17.06.

#### **Section 16.08 Other Termination.**

If this Agreement is terminated by the Department or the State prior to the end of the Term, other than pursuant to Section 16.03, 16.04, 16.07 or 17.02, or is canceled, rescinded or voided during the Term, subject to Section 20.18 the Department must pay to the Concessionaire the greater of (a) Project Value (determined, without regard to the effect of such termination, pursuant to Section 17.05) plus, without duplication, the reasonable out-of-pocket and documented costs and expenses incurred by the Concessionaire, including its reasonable Allocable Costs, as a direct result of such termination and (b) the lesser of 100% of Concessionaire Debt then outstanding or 100% of Concessionaire Debt projected in the Closing Date Financial Model to be then outstanding, and any Breakage Costs related to the prepayment or satisfaction thereof on the date on which the termination payment is paid by the Department. The Department shall pay the foregoing sum, together with interest, if any as provided in this Section 16.08, within 60 days of the date of determination of Project Value pursuant to Section 17.05; *provided*, that the Department may defer this payment for an additional 120 days if it reasonably determines that such additional period is necessary in order to obtain funds to make such payment; and *provided further*, that any payment of the foregoing sum shall be made together with interest thereon at the average earnings rate on the State's Transportation Trust

Fund or any successor thereto during such period from the date of determination of Project Value pursuant to Section 17.05 to the date that is 60 days after the date of determination of the Project Value and thereafter at the Bank Rate to the payment date thereof. A termination as contemplated by this Section 16.08 shall not be effective unless and until Project Value has been determined pursuant to Section 17.05.

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

**Section 16.09 Handback Obligations and Reserve.**

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

(b) Beginning 20 years prior to the expiration of the Term and every five years thereafter, the Concessionaire, the Department, and the Independent Engineer will jointly conduct inspections of the HOT Lanes Project, for the purposes of jointly (i) determining and verifying the condition of all HOT Lanes Project assets and their residual lives, and (ii) determining, revising and updating the Life Cycle Maintenance Plan to reflect the Handback Requirements..

(c) Beginning five years prior to the expiration of the Term, the Concessionaire, the Department and the Independent Engineer will jointly conduct annual inspections of the HOT lanes to ensure that the Handback Requirements will be met.

(d) The Concessionaire shall diligently perform and complete all work contained in the Life Cycle Maintenance Plan prior to reversion of the HOT Lanes Project back to the Department, based on the required adjustments and changes to the Life Cycle Maintenance Plan resulting from the inspections and analysis under Section 16.09 (b) and (c). The Concessionaire shall complete all such work prior to the end of the Term.

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

(f) The Department will determine whether the HOT Lane assets meet the Handback Requirements based on routine inspections up to five years after termination or expiration of the Term (“Handback Period”). If the Concessionaire disagrees with the Department’s determination of the condition of the HOT Lanes during the Handback Period, the Concessionaire may, at its own expense, retain an engineer to inspect the facility and review the findings of the Independent Engineer. Resolution of the issue will be subject to dispute resolution process contained in Section 17.06.

#### **Section 16.10 Exclusive Termination Remedies.**

This Article 16 and Article 17 set forth the entire and exclusive provisions and rights of the Department and the Concessionaire regarding termination of this Agreement, and any and all other rights to terminate at law or in equity are hereby waived to the maximum extent permitted by law. The parties hereto agree that, upon any termination of this Agreement, the payments provided herein shall constitute the Concessionaire’s sole compensation pursuant to this Agreement in the event the Department or any designee or licensee of the Department imposes tolls for travel on the HOT Lanes after termination of this Agreement, neither the Concessionaire nor any beneficiary or Lender as a result of a Financing Assignment shall be entitled to any further compensation in respect thereof. In furtherance of the foregoing, the parties hereto agree that the provisions of Virginia Code Section 56-568B shall not apply to the Project after the termination of this Agreement.

### **ARTICLE 17**

#### **DEFAULTS AND REMEDIES; DISPUTE RESOLUTION**

##### **Section 17.01 Concessionaire Defaults.**

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

(a) Any representation or warranty made by the Concessionaire herein or in any other Project Agreement is inaccurate or misleading in any respect on the date made and a material adverse effect upon the Project or the Department’s rights or obligations under the Project Agreements results therefrom;

(b) The Concessionaire fails to pay to the Department when due all monies payable to the Department under this Agreement or any other Project Agreement or to deposit funds to any reserve or account in the amount and within the time period required by this Agreement, and such failure continues unremedied for a period of 30 days following written notice thereof;

(c) The Concessionaire fails to comply with, perform or observe any material obligation, covenant, agreement, term or condition in this Agreement or any other Project Agreement (*provided*, that the failure to comply with the provisions of Section 8.13 or achieve any goals relating to SWaM or DBE participation in Section 11.03 shall not constitute a Concessionaire Default), including material failure to perform any Work relating to the design, construction, operation and maintenance of the Project or any material portion thereof in

accordance with this Agreement, and such failure continues unremedied for a period of ninety (90) days following notice thereof (giving particulars of the failure in reasonable detail) from the Department to the Concessionaire or for such longer period as may be reasonably necessary to cure such failure; *provided*, in the latter case, that the Concessionaire has demonstrated to the satisfaction of the Department, acting reasonably, that (i) it is proceeding, and will proceed, with all due diligence to cure or cause to be cured such failure, (ii) its proceeding can be reasonably expected to cure or cause to be cured such failure within a reasonable period of time acceptable to the Department, and (iii) such failure is in fact cured within such period of time;

(d) This Agreement or all or any portion of the Concessionaire's Interest is Transferred in contravention of Section 20.01;

(e) The Concessionaire (i) admits, in writing, that it is unable to pay its debts as they become due, (ii) makes an assignment for the benefit of its creditors, (iii) files a voluntary petition under Title 11 of the U.S. Code, or if such petition is filed against it and an order for relief is entered, or if the Concessionaire files any petition or answer seeking, consenting to or acquiescing in any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under the present or any future U.S. bankruptcy code or any other present or future applicable Law, or shall seek or consent to or acquiesce in or suffer the appointment of any trustee, receiver, custodian, assignee, sequestrator, liquidator or other similar official of the Concessionaire, or of all or any substantial part of its properties or of the Project or any interest therein, or (iv) takes any action in furtherance of any action described in this paragraph;

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

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

#### **Section 17.02 Department Remedies upon Concessionaire Default.**

Upon the occurrence of a Concessionaire Default, the Department may, by notice to the Concessionaire with a copy to the Collateral Agent in accordance with the terms hereof, declare the Concessionaire to be in default and may, subject to Section 6.04, do any or all of the following as the Department, in its discretion, shall determine:

(a) As provided in Section 56-568A.2 of the Virginia Code, the Department may terminate this Agreement (and the permit granted hereunder), and any executory Project Agreements to which the Department is a party, by giving 60 days' prior written notice to the Concessionaire and the Collateral Agent upon the occurrence of a material Concessionaire Default; *provided*, that (i) the Concessionaire is entitled to cure a Concessionaire Default pursuant to this Section 17.02(a) if the Concessionaire Default is a failure to pay monies due the Department, by paying the full amount due together with interest at the Bank Rate within such 60-day period, and (ii) if the Concessionaire Default is other than a failure to pay monies due, by providing the Department with a written work plan within such 60-day period outlining the actions by which the Concessionaire will ensure future compliance with the obligation, covenant, agreement, term or condition in this Agreement that the Concessionaire failed to perform or observe, which work plan is approved by the Department, but any failure of the Concessionaire to comply in any material respect with such approved work plan following 60 days' notice of such failure from the Department to the Concessionaire shall be deemed to be a Concessionaire Default described in Section 17.01(b) and the entitlement of the Concessionaire to cure such Concessionaire Default by the delivery of an approved work plan shall not apply thereto. Such termination shall automatically extinguish the Concessionaire's Interest and all Liens and claims on or against the Concessionaire's Interest; *provided further*, that the Department shall not exercise the remedy provided in this Section 17.02(a) if the Concessionaire Default consists solely of a violation of Section 11.01, 11.02(a), (b) and (d)-(f), or 11.03, but any such violation shall nonetheless subject the Concessionaire to such fines and penalties otherwise applicable to such violation as may be imposed by the appropriate Governmental Authority; and *provided further*, that the sole termination remedy upon the occurrence of events described in Section 16.07(a)(i) or (ii) shall be as set forth in Section 16.07.

(b) If the Concessionaire Default is by reason of the failure to pay any monies, the Department may (without any obligation to do so) make payment on behalf of the Concessionaire of such monies, and any amount so paid by the Department shall be payable by the Concessionaire to the Department within five days after demand therefor;

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

(d) The Department may seek specific performance, injunction or other equitable remedies, it being acknowledged that damages are an inadequate remedy for a Concessionaire Default;



(e) The Department may seek to recover its Losses arising from such Concessionaire Default and any amounts due and payable under this Agreement (including the Concessionaire's obligation to pay interest at the Bank Rate from the date a payment is due until paid) and, in connection therewith, exercise any recourse available to any Person who is owed damages or a debt;

(f) With respect to those Concessionaire Defaults that entitle the Department to terminate this Agreement pursuant to Section 17.02(a), the Department may terminate the Concessionaire's right of possession of the Project, and in such event, the Department or the Department's agents and servants may immediately or at any time thereafter re-enter the Project and remove all persons and all or any property therefrom, by any available action or proceeding at law or in equity, and with or without terminating this Agreement, and repossess and enjoy the Project; *provided*, that no reentry by the Department shall be construed as an election on its part to terminate this Agreement unless a notice of such intention is given to the Concessionaire; *provided, further*, that any re-entry or termination of this Agreement made in accordance with this Agreement as against the Concessionaire shall be valid and effective against the Concessionaire even though made subject to the rights of the Collateral Agent to cure any default of the Concessionaire and continue as in the place of the Concessionaire under this Agreement or a new concession and lease agreement as provided herein;

(g) The Department may, subject to applicable Law, distraint against any of the Concessionaire's goods situated on the Project and the Concessionaire waives any statutory protections and exemptions in connection therewith;

(h) The Department may close any and all portions of the Project;

(i) The Department may exercise any of its other rights and remedies provided for hereunder or at law or equity, except where an exclusive remedy is expressly provided herein.

### **Section 17.03 Department Defaults.**

The occurrence of any one or more of the following events during the Term shall constitute a "Department Default" under this Agreement:

(a) Any representation or warranty made by the Department herein or in any other Project Agreement is inaccurate or misleading in any respect on the date made and a material adverse effect upon the Project or the Concessionaire's rights or obligations under the Project Agreements results therefrom;

(b) The Department fails to comply with or observe any material obligation, covenant, agreement, term or condition in this Agreement or any other Project Agreement to which it is a party and such failure continues unremedied for a period of 90 days following notice thereof (giving particulars of the failure in reasonable detail) from the Concessionaire to the Department or for such longer period as may be reasonably necessary to cure such failure, in the latter case, that the Department has demonstrated to the satisfaction of the Concessionaire, acting reasonably, that (i) it is proceeding with all due diligence to cure or cause to be cured such failure, (ii) its proceeding can be reasonably expected to cure or cause to be cured such failure

within a reasonable period of time acceptable to the Concessionaire, acting reasonably, and (iii) such failure is in fact cured within such period of time;

(c) A levy under execution or attachment has been made against all or any part of the Project or the Concessionaire's Interest as a result of any Lien (other than a permitted Lien) created, incurred, assumed or suffered to exist by the Department or any Person claiming through it, and such execution or attachment has not been vacated, removed or stayed by court order, bonding or otherwise within a period of 60 days, unless such levy resulted from actions or omissions of the Concessionaire or its Representatives or if all or a material part of the Project is subject to a condemnation or a similar taking by the State or any agency thereof; and

(d) The Department (i) admits, in writing, that it is unable to pay its debts as they become due, (ii) makes an assignment for the benefit of its creditors, (iii) files a voluntary petition under Title 11 of the U.S. Code, or if such petition is filed against it and an order for relief is entered, or if the Department files any petition or answer seeking, consenting to or acquiescing in any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under the present or any future U.S. bankruptcy code or any other present or future applicable Law, or shall seek or consent to or acquiesce in or suffer the appointment of any trustee, receiver, custodian, assignee, sequestrator, liquidator or other similar official of the Department, or of all or any substantial part of its properties (in each case, to the extent applicable to a state agency), or (iv) takes any action in furtherance of any action described in this paragraph; or if within 90 days after the commencement of any proceeding against the Department seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under the present or any future U.S. bankruptcy code or any other present or future applicable Law, such proceeding has not been dismissed, or, within 90 days after the appointment, without the consent or acquiescence of the Department, of any trustee, receiver, custodian, assignee, sequestrator, liquidator or other similar official of the Department or of all or any substantial part of its properties (in each case, to the extent applicable to a state agency), such appointment has not been vacated or stayed on appeal or otherwise, or if, within 90 days after the expiration of any such stay, such appointment has not been vacated.

#### **Section 17.04 Remedies of the Concessionaire upon Department Default.**

Upon the occurrence of a Department Default under this Agreement, the Concessionaire may by notice to the Department declare the Department to be in default and may, subject to the provisions of Section 17.03(b), do any or all of the following as the Concessionaire, in its discretion, shall determine:

(a) Subject to Section 16.04(b), the Concessionaire may terminate this Agreement (and the permit granted hereunder), and any executory Project Agreements to which the Concessionaire is a party, by giving 90 days' prior written notice to the Department; *provided*, that the Department shall be entitled to cure a Department Default pursuant to Section 17.03(b) by providing the Concessionaire with a written work plan within such 90-day period outlining the actions by which the Department will ensure future compliance with the obligation, covenant, agreement, term or condition in this Agreement that the Department failed to perform or observe, which work plan is approved by the Concessionaire (which approval shall not be unreasonably withheld, delayed or conditioned), but any failure of the Department to comply in

any material respect with such approved work plan following 90 days' notice of such failure from the Concessionaire to the Department shall be deemed to be a Department Default described in Section 17.03(b) and the entitlement of the Department to cure such Department Default by the delivery of an approved work plan shall not apply thereto; and upon such termination, subject to the limitations of Section 20.18, the Department shall be obligated to pay to the Concessionaire the greater of (i) Project Value determined without regard to the effect of the relevant Department Default (with fair market value determined pursuant to Section 17.05) plus, without duplication, the reasonable out-of-pocket and documented costs and expenses incurred by the Concessionaire as a result of such termination, including its reasonable Allocable Costs and (ii) the lesser of 100% of Concessionaire debt then outstanding or 100% of Concessionaire Debt projected in the Closing Date Financial Model to be then outstanding and any Breakage Costs related to the prepayment or satisfaction thereof on the date on which the termination payment is paid by the Department;

(b) The Concessionaire may exercise any of its rights and remedies at law or in equity;

(c) Subject to Section 20.18, the Concessionaire may seek to recover its Losses and any amounts due and payable under this Agreement (including the Department's obligation to pay interest at the Bank Rate from the date a payment is due until paid) and, in connection therewith, exercise any recourse available to any Person who is owed damages or a debt; and

(d) The Concessionaire may exercise any of its other rights and remedies provided for hereunder.

Notwithstanding any provision to the contrary in this Agreement, neither a Department Default nor, except as provided in clause (g) of the definition of Compensation Event, a Compensation Event will be deemed to have occurred if an injunction or other legal proceeding has enjoined or estopped the Department from the performance of its obligations under this Agreement.

#### **Section 17.05 Determination of Project Value.**

In the event the Department owes the Concessionaire an amount calculated by reference to the Project Value pursuant to Sections 16.03, 16.08 or 17.04(a), the fair market value of the Concessionaire's Interest shall be determined according to the following procedures:

(a) Within 30 days after a party requests the appointment thereof, the Department and the Concessionaire shall confer in good faith to mutually appoint an independent third-party appraiser to determine the fair market value by written appraisal. This appraiser must be nationally recognized and experienced in appraising similar assets.

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

(c) If the parties are unable to appoint an independent third party appraiser under Section 17.05(b) above within 30 days after the time period under Section 17.05(a) expires, then either party may petition the Circuit Court for the City of Richmond to appoint an independent third party appraiser having such reputation and experience.

(d) Each party shall pay the costs of its own appraiser. The Department and the Concessionaire shall pay in equal shares the reasonable costs and expenses of the independent appraiser.

(e) Once appointed, the independent appraiser shall conduct an appraisal of the fair market value and deliver to both parties a draft appraisal report and draft valuation. The appraiser shall appraise fair market value by taking into account projected cash flows and projected costs of the Project for the remainder of the Term had this Agreement not been terminated, as determined by the appraiser. In conducting the appraisal, and before issuing a draft appraisal report, the independent appraiser shall afford reasonable and comparable opportunity to each party to provide the appraiser with information, data, analysis and reasons supporting each party's view on the fair market value. The parties shall have 15 days after receipt of the draft appraisal report to comment thereon. After the opportunity to comment has expired, the independent appraiser shall consider and evaluate all comments, prepare a final appraisal report stating the fair market value, and deliver the final appraisal report to both parties.

(f) The independent appraiser's determination of fair market value shall be subject to dispute resolution. In any dispute resolution the independent appraiser's determination shall be given substantial weight in the evidence, absent failure to properly apply the terms of this Agreement or applicable Law.

**Section 17.06 Dispute Resolution; No Declaratory Judgment Procedure.**

(a) Any dispute arising out of, relating to, or in connection with this Agreement shall be resolved as set forth in this Section 17.06.

(b) The parties shall attempt in good faith to resolve the dispute within 15 days or such other time period as may be specifically established for such dispute under this Agreement. If the parties are unable to resolve the dispute within that timeframe, and upon notice by either Party to the other, the dispute shall be referred to mediation or any other form of alternative dispute resolution that is acceptable to both of them. They must share equally the expenses of the mediator or other alternative dispute resolution process. If, after 180 days (or, in the case of disputes relating to the Route 495 HOT Lanes in Virginia Project arising prior to Substantial Completion, 60 days) following the date of the referral, the dispute remains unresolved, then either Party may litigate the matter in a court of law as set forth in Section 17.06(c). The provisions of this Section 17.06(b) shall not be applicable to any dispute regarding a Concessionaire Default described in Section 17.02(a)(i).

(c) All litigation between the parties arising out of or pertaining to this Agreement or its breach shall be filed, heard and decided in the Circuit Court for the City of Richmond, Virginia, Division I, which shall have exclusive jurisdiction and venue; *provided*, that the

foregoing does not affect any claims or matters which are governed by a different dispute resolution procedure set forth in any other Project Agreement.

(d) Each party shall bear its own attorneys' fees and costs in any dispute or litigation arising out of or pertaining to this Agreement or any other Project Agreement, and no party shall seek or accept an award of attorneys' fees or costs, except as otherwise expressly set forth in this Agreement.

(e) As permitted by Section 56-569 of the Virginia Code, the parties agree that any requirement that the State Corporation Commission issue a declaratory judgment regarding a material default (as defined in Section 56-565 of the Virginia Code) pursuant to such Section 56-569, as a prerequisite to exercising any remedy set forth in this Agreement, any other Project Agreements or such Section 56-569, shall not apply to this Agreement or any other Project Agreement.

## ARTICLE 18

### **RECORDS, REPORTS, WORK PRODUCT AND INTELLECTUAL PROPERTY**

#### **Section 18.01 Maintenance of Records.**

The Concessionaire shall maintain or cause to be maintained proper books of records and accounts in which complete and correct entries shall be made of its transactions in accordance with Generally Accepted Accounting Principles. Such books and records shall be maintained at a location situated within the contiguous United States as designated by the Concessionaire by delivery of notice of such location to the Department.

#### **Section 18.02 Public Records.**

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

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

### **Section 18.03 Ownership of Work Product.**

(a) All Work Product, including but not limited to reports, studies, data, information, logs, records, designs, drawings, plans, plans and specifications, record plans and specifications, intangible property and the like (including records thereof in software form), which the Department or the contractors thereof has prepared or procured prior to the Closing Date, or prepares or procures after the Closing Date, shall be and remain the exclusive property of the Department; *provided*, that the Department shall make available to the Concessionaire without charge, and without representation or warranty of any kind, any documents in the possession of the Department relating to the planning, design, engineering and permitting of the Project and any Project Enhancement that the Concessionaire elects to or is directed to carry out.

(b) Prior to the expiration or earlier termination of this Agreement, all Work Product prepared by or on behalf of the Concessionaire shall remain exclusively the property of the Concessionaire, notwithstanding any delivery of copies thereof to the Department, except for any related plans, drawings and specifications which shall be delivered to the Department after Final Acceptance with respect to the New Lanes and any construction-related project, which items of Work Product shall constitute the exclusive property of the Department. Upon the expiration or earlier termination of this Agreement for any reason, including but not limited to termination by the Concessionaire for a Department Default, the Concessionaire shall promptly turn over to the Department a copy of all Work Product the Concessionaire owns, except Proprietary Work Product, but including any Proprietary Work Product necessary for the Department to continue to operate and maintain the Project; and all such Work Product shall be considered the sole and exclusive property of the Department without compensation due the Concessionaire or any other party (except to the extent the Concessionaire is entitled to compensation due to a Department Default). The Department shall enter into a confidentiality agreement reasonably requested by the Concessionaire with respect to any Proprietary Work Product, subject to Section 18.02. The Concessionaire shall continue to have a full and complete right to use any and all duplicates or other originals of such Proprietary Work Product in any manner it chooses.

### **Section 18.04 Ownership of Intellectual Property.**

(a) All Proprietary Intellectual Property of the Concessionaire shall remain exclusively the property of the Concessionaire, notwithstanding any delivery of copies thereof to the Department. Upon the expiration or earlier termination of, or any assignment by the Concessionaire of its rights under, this Agreement for any reason whatsoever, the Department

shall have a nonexclusive, nontransferable, irrevocable, fully paid up license to use the Proprietary Intellectual Property of the Concessionaire solely in connection with the Project. The Department shall not at any time sell any such Proprietary Intellectual Property or use or allow any party to use any such Proprietary Intellectual Property for any purpose whatsoever other than in connection with the Project (except as permitted use on other State Highways in accordance with Section 18.04(b) below). The Department shall not disclose any Proprietary Intellectual Property of the Concessionaire (other than to its concessionaires, contractors, subcontractors, employees, attorneys and agents in connection with the Project who agree to be bound by any confidentiality obligations of the Department relating thereto), subject to Section 18.02 and the Department shall enter into a confidentiality agreement reasonably requested by the Concessionaire with respect to any such Proprietary Intellectual Property, subject to Section 18.02. The Concessionaire shall continue to have a full and complete right to use any and all duplicates or other originals of its Proprietary Intellectual Property in any manner it chooses.

(b) The Department shall have the right to purchase from the Concessionaire a nonexclusive, nontransferable, irrevocable, fully paid up license to use the Proprietary Intellectual Property of the Concessionaire on any other tolled State Highway owned and operated by the Department or other State agency on commercially reasonable terms.

(c) With respect to any Proprietary Intellectual Property owned by a Person other than the Concessionaire or the Department, the Concessionaire shall obtain from such owner, concurrently with execution of any contract, subcontract or purchase order with such owner, both for the Concessionaire and the Department, nonexclusive, nontransferable, irrevocable, fully paid up (other than with respect to ongoing maintenance and support fees) licenses to use such Proprietary Intellectual Property solely in connection with the Project, of at least identical scope, purpose, duration and applicability as the licenses granted by Section 18.04(a) above. The Concessionaire shall use commercially reasonable efforts to obtain from such owner a right in favor of the Department to purchase from such owner a nonexclusive, nontransferable, irrevocable, fully paid up license to use such owner's Proprietary Intellectual Property on any other tolled State Highway owned and operated by the Department or other State agency on commercially reasonable terms. The limitations on sale and disclosure by the Department set forth in Section 18.04(a) above shall also apply to the Department's licenses in such Proprietary Intellectual Property.

(d) The Concessionaire's name and/or other trademarks, service marks and tradenames owned by the Concessionaire (the "Concessionaire Marks") may appear on some of the Project assets, including supplies, materials, stationery and similar consumable items at the Project on the last day of the Term. The parties agree that the Concessionaire shall remain the owner of the Concessionaire Marks at the end of the Term, and the Concessionaire may remove, at its expense, the Concessionaire Marks prior to the end of the Term. The Department acknowledges and agrees that it shall have no right, title, interest or license in the Concessionaire Marks.

(e) Prior to the Closing Date, the Department shall grant to the Concessionaire a nonexclusive, nontransferable, irrevocable, fully paid up license to use any Proprietary Intellectual Property of the Department that has been developed for the HOT Lanes Project,

solely in connection with the operation, maintenance and other incidental activities of the HOT Lanes Project. The Concessionaire shall not at any time sell such Proprietary Intellectual Property or use or allow any party to use such Proprietary Intellectual Property for any purpose whatsoever other than in connection with the HOT Lanes Project. Prior to the Closing Date, the Department shall also assign in favor of the Concessionaire the Department's rights with respect to any license by the Department's software suppliers for the use of any Proprietary Intellectual Property for the HOT Lanes Project, together with an assignment of the Department's rights under any escrow for the Source Code and related documentation relating to such Proprietary Intellectual Property, which assignments shall be reasonably satisfactory to the Concessionaire. The Concessionaire shall not disclose any such Proprietary Intellectual Property (other than to its contractors, subcontractors, employees, attorneys and agents in connection with the HOT Lanes Project who agree to be bound by any confidentiality obligations of the Concessionaire relating thereto), and the Concessionaire shall enter into a confidentiality agreement reasonably requested by the Department with respect to any such Proprietary Intellectual Property.

#### **Section 18.05 Escrowed Pricing Documents.**

(a) Scope. Pursuant to subsection (e) below, the Concessionaire shall submit to the Department, on or before the Agreement Date the following material hereinafter referred to collectively as Escrow Pricing Documents ("EPDs"): one copy of all documentary information generated with respect to (i) the expected costs of the Project available to the Concessionaire under the Design-Build Contract (the "D-B PDs"), and (ii) the components of, and formulae for, the Financial Model and Base Case Financial Model including, without limitation, forecast revenue and expected non-financial costs of the Project during the Operating Period included in the Base Case Financial Model (the "ARCA EPDs").

(b) Ownership. The EPDs are, and shall always remain, the property of the Concessionaire, subject to joint review by the Department and the Concessionaire, as provided herein.

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



(c) Purpose. EPDs may be used to assist in the negotiation of price adjustments and Change Orders and in the settlement of disputes and claims.

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

It is required that the EPDs clearly itemize the estimated costs of performing each item of the Route 495 HOT Lanes in Virginia Project, including financing, administrative and related costs. Cost items shall be separated into sub-items as required to present a detailed cost estimate and allow a detailed cost review. The EPDs shall include: estimates for costs of the design professionals and consultants itemized by discipline both for development of the design, all quantity take-offs, crew size and shifts, equipment, calculations of rates of production and progress, copies of quotes from subcontractors and suppliers, and memoranda, narratives, drawings and sketches showing site or work area layouts and equipment, add/deduct sheets, geotechnical reviews and consultant reports, all other information used by the Concessionaire to arrive at the estimated prices for the Route 495 HOT Lanes in Virginia Project, and all information and formulae used by the Concessionaire in developing the initial Base Case Financial Model. Estimated costs shall be broken down into estimate categories for items such as direct labor, repair labor, equipment ownership and operation, expendable materials, permanent materials and subcontract costs as appropriate. Plant and equipment, indirect costs, bond rates and calculations, insurance costs and financing should be detailed. The Concessionaire's allocation of indirect costs, contingencies, and mark-up shall be identified.

All costs shall be identified. For items amounting to less than \$50,000, estimated unit costs are acceptable without a detailed cost estimate, *provided*, that labor, equipment, materials and subcontracts, as applicable, are specified, and *provided further*, that indirect costs, contingencies, and mark-up, as applicable, are allocated.

(e) Submittal. The EPDs shall be submitted in a sealed containers, the D-B EPDs in one and the ARCA EPDs in another, to the Department, which containers shall be clearly marked on the outside with the Concessionaire's name, reference to the Route 495 HOT Lanes in Virginia Project, and the words "D-B Escrow Pricing Documents" or "ARCA Escrow Pricing Documents" as applicable.

On or about the Agreement Date, the EPDs will be transferred to the Escrow Agent and will be examined, organized and inventoried by representatives of the Department, assisted by members of the Concessionaire's staff who are knowledgeable in how the EPDs were prepared. This examination is to ensure that the EPDs are legible and complete. It will not include review of, and will not constitute approval of proposed construction methods, estimating assumptions, or interpretations of any Project Agreements, including the Design-Build Contract. Such examination will not alter any condition or term of any Project Agreement.

Timely submission of complete EPDs as of the Agreement Date is an essential element of the Concessionaire's responsibility and a prerequisite to the execution and delivery of this Agreement by the Department.

Upon each modification of the Financial Model or the Base Case Financial Model in accordance with Section 5.04, such modified and updated Financial Model shall be submitted by the Concessionaire to the Escrow Agent promptly and in any event within seven days after an update has not been challenged or any such challenge has been resolved, in either case in accordance with Section 5.04 for inclusion as part of the ARCA EPDs.

If the Concessionaire's proposal is based upon subcontracting any part of the work, each subcontractor whose total subcontract price exceeds 5% of the Project costs, shall provide separate similar documentation to be included with those of the Concessionaire. Such documents shall be opened and examined in the same manner and at the same time as the examination described above for the Concessionaire.

If the Concessionaire is otherwise permitted by this Agreement to subcontract any portion of the work after the Agreement Date, the Department retains the right to require the Concessionaire to submit similar documentation from the subcontractor before the subcontract is approved.

- (f) Storage. The EPDs shall be stored at the following address:

SunTrust Bank  
ATTN: Emily J. Hare  
919 East Main Street, 10<sup>th</sup> Floor  
Richmond, Virginia 23219  
(804) 782-5400

The cost for storing the EPDs will be paid by the Concessionaire.

- (g) Examination. The EPDs shall be examined by the Department and the Concessionaire, at any time deemed necessary by the Department.

The Department may delegate review of EPDs to members of the Department's staff or consultants. The foregoing notwithstanding, the EPDs and information contained therein may be used in the resolution of any claim or dispute before any entity selected to resolve disputes and in any litigation or arbitration commenced hereunder. No other person shall have access to the EPDs.

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

(h) Final Disposition and Return of EPDs. The D-B EPDs will be returned to the Concessionaire at such time as the Design-Build Contract has been completed, final payment has been made, and all claims or disputes arising under or related to the Design-Build Contract have been fully and finally resolved and/or adjudicated. The ARCA EPDs will be returned to the Concessionaire at such time as this Agreement has terminated in accordance with the provisions hereof and all claims or disputes arising hereunder or related hereto have been fully and finally resolved and/or adjudicated.

(i) Execution of EPD Escrow Agreement.

The Concessionaire, as a condition of the execution and delivery of this Agreement by the Department, agrees to execute the EPD Escrow Agreement in substantially the form set forth in Exhibit R hereto.

#### **Section 18.06 Source Code Escrow.**

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

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

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

(b) By no later than the Service Commencement Date, the Department and the Concessionaire shall establish one or more escrows (the "Source Code Escrows") with the Escrow Agent on terms and conditions reasonably acceptable to the Department and to the Concessionaire into which such Source Code and related documentation shall be escrowed, including all relevant commentary, explanations and other documentation, as well as instructions

to compile such Source Code and all modifications, additions or substitutions made to such Source Code and related documentation.

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

(d) The Concessionaire shall pay the reasonable costs and expenses of the Escrow Agent.

#### **Section 18.07 Inspection and Audit Rights.**

(a) Subject to Section 18.07(c), the Concessionaire shall make available to the Department, and allow the Department such access to, such books, records and documents as the Department may reasonably request in connection with the Project for any purpose related to the Project, this Agreement or the other Project Agreements, including but not limited to monitoring compliance with the terms and conditions of this Agreement and the other Project Agreements.

(b) Subject to Section 18.07 (c), the Department and the State shall have the right to carry out an audit of information relating to (i) the operation, maintenance and repair of the Project or (ii) other information required to be maintained or delivered by the Concessionaire under this Agreement or any other Project Agreement. Such audit may extend, without limitation, to calculations undertaken, and financial or business reports provided, by or on behalf of the Concessionaire under this Agreement and the other Project Agreements. The Department or its agents, auditors, attorneys and Consultants, at the Department's own expense, at any time upon 48 hours' prior written notice (or unannounced and without prior notice where there is good faith suspicion of fraud), may examine, copy, take extracts from and audit all the books and records of the Concessionaire related to the Project, including all subcontracts entered into under Section 11.02. In addition, the Department or its agents, auditors, attorneys and Consultants, at the Department's own expense, at any time upon 48 hours' prior written notice (or unannounced and without prior notice where there is good faith suspicion of fraud), may conduct a re-audit and observe the business operations of the Concessionaire to confirm the accuracy of books and records.

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

(d) At FHWA's request, the Concessionaire shall make all its records relating to the Project available to the FHWA for inspection and audit. In addition, Concessionaire, at its expense, shall cause a reputable independent auditor to annually audit the Concessionaire's books and records relating to the Project, according to GAAP. Concessionaire shall cause the independent auditor to deliver the audit report to the FHWA and the Department promptly after it is completed, but in any event within 120 days of the end of each of the Concessionaire's fiscal years.

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

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

(g) At the request of the Department, the Concessionaire shall furnish or cause to be furnished to the Department such information relating to the operation, maintenance and repair of the Project as the Department may reasonably request for any purpose related to the Project or this Agreement and as shall be in the possession and control of the Concessionaire, any Concessionaire Party, or any of their Representatives. Unless disclosure is required by applicable Law, the Department shall keep confidential any information obtained from the Concessionaire, any Concessionaire Party or their Representatives that (i) constitutes trade secrets or commercial or financial information (A) where the trade secrets or commercial or financial information are proprietary, privileged or confidential, or (B) where disclosure of the trade secrets or commercial or financial information may cause competitive harm and (ii) is designated as such by the Concessionaire, a Concessionaire Party or their Representatives in writing to the Department.

## ARTICLE 19

### RESERVED RIGHTS

#### **Section 19.01 Exclusions from the Concessionaire's Interests.**

The Concessionaire's rights and interests in the Project and Rights of Way have been granted to Concessionaire under the permit set forth in this Agreement in order to enable it to accomplish the Project Purposes. Subject to Section 19.04, the Concessionaire's rights and interests specifically exclude all Reserved Rights.

#### **Section 19.02 Department Reservation of Rights.**

All rights to own, lease, sell, assign, transfer, utilize, develop or take advantage of the Reserved Rights are hereby reserved to the Department; and the Concessionaire shall not engage in any activity infringing upon the Reserved Rights. The Department may, at any time at its sole cost and expense, devote, use or take advantage of the Reserved Rights for any public purpose without any financial participation whatsoever by the Concessionaire. The Department hereby reserves to itself all ownership, development, maintenance, repair, replacement, operation, use and enjoyment of, and access to, the Reserved Rights. The Department shall use reasonable efforts to minimize interference with the construction, operation and maintenance of the Project in connection with the exercise of Reserved Rights. The Department shall owe no compensation or damages on account of its exercise of Reserved Rights, subject to any rights the Concessionaire has with respect to Department Project Enhancements.

**Section 19.03 Disgorgement.**

If a Concessionaire Default concerns a breach of the provisions of Section 19.01 or 19.02, in addition to any other remedies under this Agreement, the Department shall be entitled to disgorgement of all profits from the prohibited activity and to sole title to and ownership of the prohibited assets and improvements.

**Section 19.04 Alternate Treatment of Reserved Rights.**

Notwithstanding Sections 19.01 and 19.02, the Department may elect in its sole discretion to treat any development of improvements respecting Reserved Rights that it undertakes as Project Enhancements, in which case all the provisions of Section 9.02 shall apply.

**Section 19.05 Names for Capital Beltway and HOT Lanes.**

(a) The Department hereby grants the Concessionaire (with the right to sub-license such rights to the O&M Contractor) a nonexclusive, royalty-free license to use, solely in connection with the operation of the HOT Lanes and the performance by the Concessionaire of its obligations hereunder, any name the Department may give to the Capital Beltway during the Term (including as part of the logos and marks used in connection with the HOT Lanes Operations); *provided*, that naming rights for the HOT Lanes shall be reserved to the Concessionaire, subject to approval of any such name by the Department and to compliance with applicable Law. The Concessionaire shall request the Department's approval of a name for the HOT Lanes in writing and no such approval shall be effective unless and until provided in writing by the Department; *provided*, that the failure of the Department to respond in writing to such request within 21 days following receipt of the Concessionaire's request shall be deemed the Department's approval thereof. The Concessionaire may sub-license any such rights to the O&M Contractor.

(b) If the Department changes the name of the Capital Beltway, the Concessionaire shall, at the Department's expense, change any signage on the HOT Lanes referring to the Capital Beltway. If the Concessionaire changes the name of the HOT Lanes, the Concessionaire shall reimburse the Department for the cost of changing names on signs maintained by the Department pursuant to Section 12.04.

**ARTICLE 20**

**MISCELLANEOUS**

**Section 20.01 Transfers by the Concessionaire.**

(a) The Concessionaire shall not Transfer, or otherwise permit the Transfer of, any or all of the Concessionaire's Interest to or in favor of any Person (a "Transferee") during the Lock-up Period (unless it is the Collateral Agent or a transferee from the Collateral Agent, in each case if permitted under Article 6, or unless it is the issuer, special-purpose entity, trustee or collateral agent in a Permitted Securitization or a transferee therefrom, in each case if permitted under

Article 6). Following the Lock-up Period, the Concessionaire shall not Transfer, or otherwise permit the Transfer of, any or all of the Concessionaire's Interest to or in favor of a Transferee, unless (i) the Department has approved (based upon a determination in accordance with Section 20.01(b)) such proposed Transferee (unless it is the Collateral Agent permitted under Article 6 or the issuer, special-purpose entity, trustee or collateral agent in a Permitted Securitization) and (ii) the proposed Transferee (unless it is the Collateral Agent permitted under Article 6 or the issuer, special-purpose entity, trustee or collateral agent in a Permitted Securitization) enters into an agreement with the Department in form and substance satisfactory to the Department, acting reasonably, wherein the Transferee acquires the rights and assumes the obligations of the Concessionaire and agrees to perform and observe all of the obligations and covenants of the Concessionaire under this Agreement. Any Transfer made in violation of the foregoing provision shall be null and void ab initio and of no force and effect.

(b) The Department's approval of a proposed Transferee may be withheld only if the Department reasonably determines that the proposed Transfer is prohibited by applicable Law or such proposed Transferee is not capable of performing the obligations and covenants of the Concessionaire under this Agreement, which determination may be based upon, or take into account, one or more of the following factors: (i) the financial strength and integrity of the proposed Transferee, its direct or indirect beneficial owners, any proposed managers or operating partners and each of their respective Affiliates; (ii) the capitalization of the proposed Transferee; (iii) the experience of the proposed Transferee or the Concessionaire to be engaged by the proposed Transferee in operating toll roads or highways and performing other projects; (iv) the background and reputation of the proposed Transferee, its direct or indirect beneficial owners, any proposed managers or operating partners, each of their respective officers, directors and employees and each of their respective Affiliates (including the absence of criminal, civil or regulatory claims or actions against any such Person and the quality of any such Person's past or present performance on other projects); and (v) the O&M Contractor engaged by the proposed Transferee, and whether it meets the conditions set forth in Section 6.04(b). If the Department is not reasonably satisfied that these conditions are met, it may condition its consent on provision of reasonable additional security or other reasonable arrangements.

(c) No Transfer of all or any of the Concessionaire's Interest (except a Transfer to the Collateral Agent upon its exercise of remedies under the Financing Assignments and a subsequent transfer to the Lender's transferee that has been approved under Section 6.04, and except a Transfer to the issuer, special-purpose entity, trustee or collateral agent in a Permitted Securitization and a subsequent transfer to such holder's transferee that has been approved under Section 6.04) shall be made or have any force or effect if, at the time of such Transfer there has occurred a Concessionaire Default that has not been remedied or an event that with the lapse of time, the giving of notice or otherwise would constitute a Concessionaire Default.

(d) A Change in Control of the Concessionaire shall be deemed to be a Transfer of the Concessionaire's Interest for purposes of the foregoing provisions.

#### **Section 20.02 Assignment by the Department.**

The Department may transfer and assign its interests, in whole or in part, in the Project, this Agreement and any other Project Agreements to any other public agency or public entity of

the State as permitted by law; *provided*, that the successor or assignee has assumed all of the Department's obligations, duties and liabilities under this Agreement and the Project Agreements then in effect and has provided the Concessionaire with reasonable assurance of its legal authority and sufficient financial resources to honor and perform the same; *provided*, that the successor or assignee shall not be required to have financial resources in excess of those then available to the Department.

**Section 20.03 Authorized Representatives.**

Each of the Concessionaire and the Department hereby designate the individuals indicated on Exhibit S as its initial Concessionaire Representative(s) and Department Representative(s), respectively, to administer this Agreement on its respective behalf.

The Concessionaire Representatives and the Department Representatives shall have the authority to issue instructions and other communications on behalf of the Concessionaire and Department, respectively, and shall be the recipient of notices and other written communications from the other party under this Agreement (except any notice initiating or relating to the dispute resolution the procedures of Section 17.06 shall be given in accordance with Section 20.04). However, such representatives shall not have the authority to make decisions or give instructions binding upon the Concessionaire or the Department, except to the extent expressly authorized by Concessionaire or the Department, as the case may be, in writing. In the event the Concessionaire or Department designates different representatives, it shall give the other party written notice of the identity of and contact information for the new Concessionaire Representative(s) or Department Representative(s), as the case may be.

**Section 20.04 Notices.**

(a) Whenever under the provisions of this Agreement it shall be necessary or desirable for one party to serve any notice, request, demand, report or other communication on another party, the same shall be in writing and shall not be effective for any purpose unless and until actually received by the addressee or unless served (a) personally, (b) by independent, reputable, overnight commercial courier, (c) by facsimile transmission, where the transmitting party includes a cover sheet identifying the name, location and identity of the transmitting party, the phone number of the transmitting device, the date and time of transmission and the number of pages transmitted (including the cover page), where the transmitting device or receiving device records verification of receipt and the date and time of transmission receipt and the phone number of the other device, and where the facsimile transmission is immediately followed by service of the original of the subject item in another manner permitted herein, or (d) by deposit in the United States mail, postage and fees fully prepaid, registered or certified mail, with return receipt requested, addressed as follows:



If to the Department:

Virginia Department of Transportation  
1401 E. Broad Street  
Richmond, VA 23219  
Attention: Commissioner  
Facsimile: (804) 786-2940

*With copies to:*

Office of the Attorney General  
900 E. Main Street  
Richmond, VA 23219  
Attention: Chief Transportation Section  
Facsimile: (804) 786-9136

If to the Concessionaire:

Capital Beltway Express LLC  
565 Fifth Avenue, 18<sup>th</sup> Floor  
New York, NY 10017  
Attention: President  
Telephone: (646) 278-0870  
Facsimile: (646) 278-0839

With copies to:

1421 Prince Street, Suite 200  
Alexandria, VA 22314  
Attention: Vice President, Development

(b) Any party may, from time to time, by notice in writing served upon the other party as aforesaid, designate an additional and/or a different mailing address or an additional and/or a different person to whom all such notices, requests, demands, reports and communications are thereafter to be addressed. Any notice, request, demand, report or other communication served personally shall be deemed delivered upon receipt, if served by mail or independent courier shall be deemed delivered on the date of receipt as shown by the addressee's registry or certification receipt or on the date receipt at the appropriate address is refused, as shown on the records or manifest of the United States Postal Service or independent courier, and if served by facsimile transmission shall be deemed delivered on the date of receipt as shown on the received facsimile (provided the original is thereafter delivered as aforesaid).

**Section 20.05 Binding Effect.**

Subject to the limitations of Sections 20.01 and 20.02, this Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective legal representatives,

successors and permitted assigns, and wherever a reference in this Agreement is made to any of the parties hereto, such reference also shall be deemed to include, wherever applicable, a reference to the legal representatives, successors and permitted assigns of such party, as if in every case so expressed.

**Section 20.06 Relationship of Parties.**

(a) The relationship of the Concessionaire to the Department shall be one of an independent contractor, not an agent, partner, lessee, joint or co-venturer or employee, and neither the Department nor the Concessionaire shall have any rights to direct or control the activities of the other or their respective Affiliates, contractors or consultants, except as expressly provided by this Agreement.

(b) Officials, employees and agents of the Concessionaire or the Department shall in no event be considered employees, agents, partners or representatives of the other.

**Section 20.07 No Third-Party Beneficiaries.**

Nothing contained in this Agreement is intended or shall be construed as creating or conferring any rights, benefits or remedies upon, or creating any obligations of the parties hereto toward, any person or entity not a party to this Agreement, except rights expressly contained herein for the benefit of the Lenders and/or the Collateral Agent.

**Section 20.08 Limitation on Consequential Damages.**

Except as expressly provided in this Agreement to the contrary, neither party shall be liable to the other for indirect, incidental or consequential damages of any nature, whether arising in contract, tort (including negligence) or other legal theory. The foregoing limitation shall not, however, in any manner:

(a) prejudice Department's right to recover liquidated damages from Concessionaire as provided in this Agreement or any Development Contract;

(b) limit Concessionaire's liability for any type of damage arising out of Concessionaire's obligation to indemnify, defend and hold each State Indemnitee harmless from Third Party Claims under Article 14 and elsewhere in this Agreement;

(c) limit Concessionaire's liability for any type of damage to the extent covered by insurance required hereunder;

(d) limit the amounts the Department or the Concessionaire may owe under the express provisions of this Agreement for Compensation Events or events of termination.

**Section 20.09 Waiver.**

(a) No waiver by any party of any right or remedy under this Agreement or the other Project Agreements shall be deemed to be a waiver of any other or subsequent right or remedy under this Agreement or the other Project Agreements. The consent by one party to any act by

the other party requiring such consent shall not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

(b) No act, delay or omission done, suffered or permitted by one party or its agents shall be deemed to waive, exhaust or impair any right, remedy or power of such party under this Agreement or any other Project Agreement, or to relieve the other party from the full performance of its obligations under this Agreement and the other Project Agreements.

(c) No waiver of any term, covenant or condition of this Agreement shall be valid unless in writing and signed by the obligee party.

(d) The acceptance of any payment or reimbursement by a party shall not: (i) waive any preceding or then-existing breach or default by the other party of any term, covenant or condition of this Agreement, other than the other party's prior failure to pay the particular amount or part thereof so accepted, regardless of the paid party's knowledge of such preceding or then-existing breach or default at the time of acceptance of such payment or reimbursement; or (ii) continue, extend or affect (A) the service of any notice, any suit, arbitration or other legal proceeding or final judgment, (B) any time within which the other party is required to perform any obligation or (C) any other notice or demand.

(e) No custom or practice between the parties in the administration of the terms of this Agreement shall be construed to waive or lessen the right of a party to insist upon performance by the other party in strict compliance with the terms of this Agreement.

#### **Section 20.10 No Brokers.**

Except for any financial adviser or investment banker whose fee will be paid by the party retaining such adviser or banker, each party represents and warrants that it has not dealt with any real estate or business opportunity broker or agent or any finder in connection with this Agreement. Each party agrees, to the extent permitted by Law, to indemnify, protect, defend with counsel acceptable to the other party and hold harmless the other party against any claim for commission, finder's fee or like compensation asserted by any real estate or business opportunity broker, agent, finder or other person claiming to have dealt with the indemnifying party in connection with this Agreement.

#### **Section 20.11 Governing Law and Venue.**

This Agreement shall be governed and construed in accordance with the laws of the State applicable to contracts executed and to be performed within the State. Venue for any legal action arising out of this Agreement shall lie in the Circuit Court in the City of Richmond, Virginia, Division I.

#### **Section 20.12 Use of Police Power.**

Nothing in this Agreement limits the authority of the Department to exercise its regulatory and police powers granted by law, including but not limited to its powers of

condemnation with respect to all or any part of the Project, the Rights of Way and any of the Concessionaire's rights hereunder.

**Section 20.13 Survival.**

All covenants, agreements, representations and warranties made in or pursuant to this Agreement shall be deemed continuing and made at and as of the date of this Agreement and at and as of all other applicable times during the Term. All covenants, agreements, representations and warranties made in or pursuant to this Agreement shall survive the expiration or earlier termination of this Agreement and shall not be waived by the execution and delivery of this Agreement, by completion of construction, by any investigation by the Department or by any other event except a specific written waiver by the party against whom waiver is asserted.

**Section 20.14 Subpoena.**

Except as provided for in Virginia Code Section 33.1-4, the Concessionaire may subpoena any Department personnel; *provided*, that the Concessionaire shall pay for such personnel's time at its fully burdened rate (including overhead and fringe benefits), together with all out-of-pocket expenses incurred, no later than 30 days after the Concessionaire's receipt of an invoice reasonably documenting the amount of such time provided.

**Section 20.15 Construction and Interpretation of Agreement.**

(a) The language in all parts of this Agreement shall in all cases be construed simply, as a whole and in accordance with its fair meaning and not strictly for or against any party. The parties hereto acknowledge and agree that this Agreement has been prepared jointly by the parties and has been the subject of arm's length and careful negotiation over a considerable period of time, that each party has been given the opportunity to independently review this Agreement with legal counsel, and that each party has the requisite experience and sophistication to understand, interpret and agree to the particular language of the provisions hereof. Accordingly, in the event of an ambiguity in or dispute regarding the interpretation of this Agreement, this Agreement shall not be interpreted or construed against the party preparing it, and instead other rules of interpretation and construction shall be utilized.

(b) If any term or provision of this Agreement, the deletion of which would not adversely affect the receipt of any material benefit by either party hereunder, shall be held by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Agreement shall not be affected thereby and each other term and provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law. It is the intention of the parties to this Agreement, and the parties hereto agree, that in lieu of each clause or provision of this Agreement that is illegal, invalid or unenforceable, the parties in good faith shall supply as a part of this Agreement an enforceable clause or provision as similar in terms to such illegal, invalid or unenforceable clause or provision as may be possible.

(c) The captions of the articles and sections herein are inserted solely for convenience and under no circumstances are they or any of them to be treated or construed as part of this instrument.

(d) References in this instrument to this “Agreement” mean, refer to and include this instrument as well as any riders, exhibits, addenda and attachments hereto (which are hereby incorporated herein by reference) or other documents expressly incorporated by reference in this instrument. Any references to any covenant, condition, obligation and/or undertaking “herein,” “hereunder” or “pursuant hereto” (or language of like import) mean, refer to and include the covenants, conditions, obligations and undertakings existing pursuant to this instrument and any riders, exhibits, addenda, attachments or other documents affixed to or expressly incorporated by reference in this instrument. All terms defined in this instrument shall be deemed to have the same meanings in all riders, exhibits, addenda, attachments or other documents affixed to or expressly incorporated by reference in this instrument unless the context thereof clearly requires the contrary. Unless expressly provided otherwise, all references to Articles and Sections refer to the Articles and Sections set forth in this Agreement. Unless otherwise stated in this Agreement or the Project Agreements, words which have well-known technical or construction industry meanings are used in this Agreement or the Project Agreements in accordance with such recognized meaning.

(e) As used in this Agreement and as the context may require, the singular includes the plural and vice versa, and the masculine gender includes the feminine and vice versa.

(f) This Agreement, its exhibits and the other Project Agreements are intended to be complementary and consistent with each other and shall, to the maximum extent possible, be construed according to such intent. In the event of an irreconcilable conflict or inconsistency between the terms and conditions of this Agreement, the exhibits to this Agreement and/or the executed Project Agreements, the conflict or inconsistency shall be resolved by applying the following order of document precedence:

Highest:	A. Agreement and <u>Exhibit A</u>
	B. Exhibits other than Technical Requirements and Scope Document
	C. Technical Requirements
	D. Scope Document
	E. Other Project Agreements to which Department is a party
Lowest:	F. Other Project Agreements, including Design-Build Contract, to which Department is not a party

**Section 20.16 Counterparts.**

This instrument may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

**Section 20.17 Entire Agreement; Amendment.**

THIS AGREEMENT AND THE PROJECT AGREEMENTS CONSTITUTE THE ENTIRE AND EXCLUSIVE AGREEMENT BETWEEN THE PARTIES RELATING TO THE SPECIFIC MATTERS COVERED HEREIN AND THEREIN. ALL PRIOR WRITTEN AND PRIOR OR CONTEMPORANEOUS VERBAL AGREEMENTS, UNDERSTANDINGS, REPRESENTATIONS AND/OR PRACTICES RELATIVE TO THE FOREGOING ARE HEREBY SUPERSEDED, REVOKED AND RENDERED INEFFECTIVE FOR ANY PURPOSE. THIS AGREEMENT MAY BE ALTERED, AMENDED OR REVOKED ONLY BY AN INSTRUMENT IN WRITING SIGNED BY EACH PARTY HERETO, OR ITS PERMITTED SUCCESSOR OR ASSIGNEE. NO VERBAL AGREEMENT OR IMPLIED COVENANT SHALL BE HELD TO VARY THE TERMS HEREOF, ANY STATUTE, LAW OR CUSTOM TO THE CONTRARY NOTWITHSTANDING.

This Agreement and the other Project Agreements attempt to set forth in full all requirements applicable under the PPTA as to the development, operation, maintenance, repair, management and financing of the Project and attempt to define in full the rights and responsibilities of each party in connection therewith. To the extent requirements and rights and responsibilities have not been addressed in this Agreement and the other Project Agreements, the parties agree to carry out their respective responsibilities in the spirit of cooperation contemplated by the PPTA, recognizing that they may not have defined in a sufficient detail or anticipated fully all activities necessary for the full implementation of the Project.

**Section 20.18 Payment of Concessionaire Damages and Other Amounts by the Department.**

The Department's payment of any Concessionaire Damages, Losses or any other amounts due and owing by the Department to the Concessionaire under this Agreement shall be subject to appropriation by the General Assembly and allocation by the CTB therefor; *provided* that upon determination of Concessionaire Damages or such other amounts the Department shall with all practical dispatch consistent in all respects with applicable law and its obligations under this Agreement (i) deliver to the Governor and the Director of the Department of Planning and Budget of the State, before December 1 with respect to any such payment requested to be appropriated by the next regular session of the General Assembly, a statement of the amount of any such payment due or expected to be due and a request that the Governor include in his budget to be delivered to the next session of the General Assembly a provision that there be appropriated such amounts for such purpose to the extent required, from any legally available funds, (ii) use its diligent efforts to have (A) the Governor include, in each biennial or any supplemental budget the Governor presents to the General Assembly, the amounts set forth in any statement delivered pursuant to (i) above, (B) the General Assembly appropriate and reappropriate, as applicable, such amounts to or on behalf of the Department for the purpose of paying any Concessionaire Damages or other amounts due and owing by the Department to the

Concessionaire under this Agreement, and (C) the CTB allocates such appropriated amounts as applicable for payment to the Concessionaire, and (iii) notify the Concessionaire promptly upon becoming aware of any failure by (A) the Governor to include such amounts in his budget delivered to the next session of the General Assembly, (B) the General Assembly to appropriate such amounts during such next session of the General Assembly or (C) the CTB to so allocate such amounts for payment to the Concessionaire; and *provided further*, that the parties hereto agree and acknowledge that such subject to appropriation obligation of the Department to pay the Concessionaire Damages and other amounts was and is a material inducement and consideration for the execution and delivery of this Agreement by the Concessionaire.

**Section 20.19 Payments to Department.**

Except as otherwise expressly provided herein or in any Project Agreement, payments due to the Department hereunder shall be due and payable within 30 days of receipt by the Concessionaire of an invoice therefor.

**Section 20.20 Interest on Overdue Amounts.**

Any amount not paid when due under this Agreement shall bear interest from the date such payment is due until payment is made (after as well as before judgment) at a variable rate per annum at all times equal to the Bank Rate, which interest shall be payable on demand.

[THE REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK,  
SIGNATURE PAGE (S) TO FOLLOW]

IN WITNESS WHEREOF, the parties, intending to be legally bound, have executed this Amended and Restated Comprehensive Agreement Relating to the Route 495 HOT Lanes in Virginia Project as of the date first written above.

**VIRGINIA DEPARTMENT OF TRANSPORTATION,**  
an agency of the Commonwealth of Virginia

By: David S. Ekem  
David S. Ekem  
Commonwealth Transportation Commissioner

**CAPITAL BELTWAY EXPRESS LLC,**  
a Delaware limited liability company

By: [Signature]  
Name: James Brett Burns  
Title: Power of Attorney