

PART 3

Comprehensive Agreement Between Department and Design-Builder

This **COMPREHENSIVE AGREEMENT** for the I-64 Hampton Roads Bridge-Tunnel Expansion Project (the “**Agreement**”) is made as of [●], 2019 (the “**Agreement Date**”), by and between the **VIRGINIA DEPARTMENT OF TRANSPORTATION (“Department”)**, an agency of the Commonwealth of Virginia and [●] (“**Design-Builder**), a [●], for services in connection with the Project.

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RECITALS:

WHEREAS, on March 25, 1995, the Governor of the Commonwealth of Virginia signed into law, effective July 1, 1995, the Public-Private Transportation Act, which was amended and re-enacted by Chapter 612 of the 2015 Acts of Assembly and signed into law by the Governor, effective July 1, 2015 (as amended, the “**Act**”);

WHEREAS, the Act grants Department the authority to allow private entities to develop and/or operate qualifying transportation facilities if Department determines there is a need for the qualifying transportation facilities and private involvement would provide the facilities to the public in a timely and cost-effective fashion and the Transportation Public-Private Partnership Steering Committee (the “**Steering Committee**”) determines, and the Commissioner of Highways certifies, that the risks, liabilities, and responsibilities transferred, assigned, or assumed by the private entity provide sufficient benefits to the public to not proceed with the development and/or operation of the transportation facility through other means of procurement available to Department;

WHEREAS, in June 2015, Department, working in conjunction with the Federal Highway Administration (“**FHWA**”), began a supplemental environmental impact statement for the Hampton Roads Crossing Study to examine alternatives to relieve traffic congestion at the existing Interstate 64 (“**I-64**”) Hampton Roads Bridge-Tunnel, located between Interstate 664 in the City of Hampton and Interstate 564 in the City of Norfolk;

WHEREAS, in December 2016, following a public review of the draft supplemental environmental impact statement, the Commonwealth Transportation Board (the “**CTB**”), identified a preferred alternative (titled “**Alternative A**”), comprised of the expansion of the existing Hampton Roads Bridge-Tunnel and other improvements to the I-64 corridor;

WHEREAS, the I-64 Hampton Roads Bridge-Tunnel Expansion Project represents the components of Alternative A that Department has chosen to procure under the Act to improve accessibility, mobility, and the movement of goods in the Hampton Roads metropolitan region;

WHEREAS, on June 12, 2017, FHWA issued the Record of Decision for the Project;

WHEREAS, on December 12, 2017, the Steering Committee met to review the public sector analysis prepared for the Project and concurred that: (i) the assumptions regarding the scope of the Project, benefits, and costs for the public sector option developed by Department pursuant to § 33.2-1803.1:1 of the Code of Virginia were fully and reasonably developed; (ii) the assumed financing costs and valuation of both financial and construction risk mitigation included in the public sector option are financially sound and reflect the best interest of the public; and (iii) the term sheets developed for the procurement of the Project contained all necessary elements;

WHEREAS, Department issued a Request for Qualifications on December 15, 2017 (the “**RFQ**”), requesting statements of qualifications from offerors desiring to deliver the Project;

WHEREAS, on January 9, 2018, the Commissioner of Highways issued a finding of public

interest (“**Finding of Public Interest**”) for the Project pursuant to § 33.2-1803.1 of the Code of Virginia that found that development of the Project pursuant to the Act was in the public interest of the Commonwealth of Virginia, a determination to which the Secretary of Transportation, in his role as chairman of CTB, concurred;

WHEREAS, on April 27, 2018, pursuant to the process outlined in the RFQ, Department selected three (3) respondents to the RFQ to be “Offerors” that would be eligible to submit proposals in response to the Request for Proposals issued by Department based on their respective technical qualifications as detailed in their responses to the RFQ;

WHEREAS, on May 22, 2018, Department issued the Request for Proposals (including a form of this Agreement) and thereafter issued a series of addenda thereto (collectively, the “**RFP**”);

WHEREAS, on January 15, 2019, and February 8, 2019, Department received Technical Proposals and Price Proposals in response to the RFP, including the Technical Proposal and Price Proposal of [●] (the “**Successful Offeror**”) on behalf of Design-Builder;

WHEREAS, on [●], pursuant to the evaluation process outlined in the RFP, Department selected the Successful Offeror’s Proposal identifying Design-Builder as the “Successful Offeror” under the RFP;

WHEREAS, on [●], the Commissioner of Highways certified in writing to the Governor and the General Assembly that: (i) the Finding of Public Interest issued pursuant to § 33.2-1803.1 of the Code of Virginia was still valid; (ii) the transfer, assignment, and assumption of risks, liabilities, and permitting responsibilities and the mitigation of revenue risk by the private sector enumerated in the Finding of Public Interest had not materially changed since the Finding of Public Interest was issued; and (iii) the public contribution requested by the private entity does not exceed the maximum public contribution determined pursuant to subsection (A) of § 33.2-1803.1:1 of the Code of Virginia;

WHEREAS, Department and Design-Builder desire to set forth in this Agreement the terms to develop, design, and construct the Project; and

WHEREAS, this Agreement is entered into pursuant to the Act.

NOW THEREFORE, In consideration of the mutual covenants and obligations contained herein, Department and Design-Builder agree as set forth herein.

Article 1

Scope of Work

1.1 Design-Builder shall perform all design and construction services, and provide all material, equipment, tools and labor, necessary to complete the Work described in and reasonably inferable from the Contract Documents, and in all cases Design-Builder shall complete the Work in accordance with the Contract Documents.

Article 2

Contract Documents

2.1 The Contract Documents comprise the following: (i) all written modifications, amendments and Work Orders to this Agreement issued in accordance with the General Conditions of Contract; (ii) this Agreement (including all Exhibits); and (iii) the Released for Construction Plans prepared and approved in accordance with Section 2.4 of the General Conditions of Contract.

Article 3

Interpretation and Intent

3.1 Except as otherwise expressly provided in this Article 3, if there is any conflict, ambiguity, or inconsistency between the provisions of the Contract Documents (including all Exhibits), the order of precedence will be as follows, from highest to lowest:

- .1** Work Orders;
- .2** amendments to the provisions of the main body of this Agreement;
- .3** the provisions of the main body of this Agreement;
- .4** the General Conditions of Contract, as amended, attached hereto as **Exhibit 1** (the “**General Conditions of Contract**”);
- .5** the provisions of the Technical Requirements, as amended, attached hereto as **Exhibit 2** (the “**Technical Requirements**”);
- .6** the provisions of the Division I Amendments to the Department’s Standard Road and Bridge Specifications, as amended, attached hereto as **Exhibit 3** (the “**Division I Amendments**”);
- .7** the provisions of the Exhibits to this Agreement, as amended, other than **Exhibit 1**, **Exhibit 2**, **Exhibit 3**, and **Exhibit 4**;
- .8** the Released for Construction Plans; and
- .9** Design-Builder’s Proposal submitted in response to the RFP (the “Design-Builder’s Proposal”), including all final modifications and approved Alternative Technical Concepts, attached hereto as **Exhibit 4**.

3.2 The Contract Documents shall be interpreted in a manner consistent with the objective that the Work and all obligations required by the Contract Documents be completed within the Contract Times for the Contract Price. The Contract Documents are intended to be complementary and interpreted in harmony so as to avoid conflict, with words and phrases interpreted in a manner consistent with construction and design industry standards.

3.3 Terms, words and phrases used in the Contract Documents, including this Agreement, shall have the meanings given them in this Agreement and the General Conditions of Contract.

3.4 The Contract Documents form the entire agreement between Department and Design-Builder with respect to its subject matter and by incorporation herein are as fully binding on the parties as if repeated herein. The parties have made no oral representations or other agreements, except as specifically stated in the Contract Documents.

3.5 Except as specifically set forth in this Section 3.5, and notwithstanding anything to the contrary in Design-Builder's Proposal, Design-Builder is obligated to perform the Work in full compliance with the RFP Documents. The parties agree, however, that:

.1 Betterments and higher and/or more stringent standards or specifications and design and construction criteria, concepts, and drawings set forth in Design-Builder's Proposal (collectively referred to as "**Enhancements**") shall supersede the minimum requirements of the RFP Documents and Design-Builder is obligated to perform the Work in compliance with the Enhancements.

.2 Those ATCs identified in **Exhibit 4** have been approved, either fully or conditionally, by Department and supersede the requirements of the RFP Documents. Design-Builder shall have the right to perform the Work in accordance with such ATCs, subject to Section 2.1.10 of the General Conditions of Contract.

3.6 Design-Builder shall not take advantage of any obvious or apparent error or omission in the Contract Documents. If Design-Builder discovers an error or omission, Design-Builder shall immediately notify Department and, promptly thereafter, Design-Builder and Department shall meet and confer to determine the corrections to the Contract Documents (which shall be acceptable to the Department, acting reasonably) necessary to fulfill the intent of the Contract Documents.

3.7 Capitalized terms used in the Contract Documents but not defined in this Agreement or in the General Conditions of Contract shall have the meanings customarily attributed to them by trade usage.

3.8 The Geotechnical Baseline Report (attached hereto as **Exhibit 21**) sets forth and establishes the contractual baselines and assumed geotechnical conditions in respect of the Tunnel Improvements. Whenever there is an inconsistency between the conditions indicated in the Geotechnical Baseline Report and (i) the conditions indicated in the Geotechnical Data Report (attached hereto as **Exhibit 22**) or (ii) the conditions indicated elsewhere in the Contract Documents, then the conditions indicated in the Geotechnical Baseline Report shall take precedence and shall be the conditions against which actual conditions encountered by Design-Builder are compared for the purpose of determining whether a Differing Tunnel Improvements Site Condition exists.

Article 4

Ownership of Work Product

4.1 Work Product Defined. The term “**Work Product**” means all drawings, specifications, calculations, reports, and documentation, whether in paper copy or electronic format, produced or developed by or through Design-Builder specifically for the Project that are furnished to Department.

4.2 Ownership of Work Product. Department shall own all rights, title and interest in the Work Product upon its receipt of such Work Product. Department’s ownership rights, include without restriction or limitation, the right of Department, and anyone contracting with Department, to incorporate any ideas or information from the Work Product into: (i) any other contract awarded in reference to the Project; or (ii) any subsequent procurement by Department on another project. In receiving all rights, title and interest in the Work Product, Department is deemed to own all intellectual property rights, copyrights, patents, trade secrets, trademarks, and service marks in the Work Product, and Design-Builder agrees that it shall, at the request of Department, execute all papers and perform all other acts that may be necessary (if any) to ensure that Department’s rights, title and interest in the Work Product are protected. The rights conferred herein to Department include, without limitation, Department’s ability to use the Work Product without the obligation to notify or seek permission from Design-Builder.

4.3 Use of Work Product at Department’s Risk. Department’s use of the Work Product on any subsequent procurement by Department on another project shall be at Department’s sole risk, and Design-Builder neither warrants nor represents that the Work Product is suitable for use on another project without modification. Department waives any rights to seek recovery from Design-Builder for any claims, damages, liabilities, losses and expenses arising out of or resulting from Department’s use of the Work Product on another project.

Article 5

Contract Time

5.1 Commencement of Work.

5.1.1 Limited Notices to Proceed.

1. **LNTPI.** Upon satisfaction by Design-Builder of the conditions precedent set forth in Section 1 (*Conditions Precedent to Issuance of LNTPI*) of **Exhibit 5**, Department shall within three (3) Business Days issue a limited notice to proceed (“**LNTPI**”) authorizing and obligating Design-Builder to commence the Early Work described in Section 2.A (*LNTPI – Early Work*) of **Exhibit 5**. Design-Builder shall commence such Early Work within fourteen (14) days of its receipt of LNTPI, unless the parties mutually agree otherwise in writing. The scope, schedule, payment amount and payment terms for such Early Work are set forth in **Exhibit 5**. In no event shall the total amount of compensation paid by Department to Design-Builder in respect of the Early Work undertaken pursuant to LNTPI exceed one hundred million dollars (\$100,000,000),

which amount is inclusive of the advance payment of four million dollars (\$4,000,000) made to Design-Builder in accordance with Section 8.6.2 of the Instructions for Offerors.

2. LNTP2. Within three (3) Business Days of Department receiving from Design-Builder documentation demonstrating Design-Builder's achievement of the LNTP1 Completion Milestone, Department shall issue a limited notice to proceed ("**LNTP2**") authorizing and obligating Design-Builder to commence the Early Work described in Section 2.B (*LNTP2 – Early Work*) of **Exhibit 5**. Design-Builder shall commence such Early Work within fourteen (14) days of its receipt of LNTP2, unless the parties mutually agree otherwise in writing. The scope, schedule, payment amount and payment terms for such Early Work are set forth in **Exhibit 5**. In no event shall the total amount of compensation paid by Department to Design-Builder in respect of the Early Work undertaken pursuant to LNTP2 exceed seventy-five million dollars (\$75,000,000).

3. LNTP3. Within three (3) Business Days of Department receiving from Design-Builder documentation demonstrating Design-Builder's achievement of the LNTP1 Completion Milestone, Department shall issue a limited notice to proceed ("**LNTP3**") authorizing and obligating Design-Builder to commence the Early Work described in Section 2.C (*LNTP3 – Early Work*) of **Exhibit 5**. Design-Builder shall commence such Early Work within fourteen (14) days of its receipt of LNTP3, unless the parties mutually agree otherwise in writing. The scope, schedule, payment amount and payment terms for such Early Work are set forth in **Exhibit 5**. In no event shall the total amount of compensation paid by Department to Design-Builder in respect of the Early Work undertaken pursuant to LNTP3 exceed seventy-five million dollars (\$75,000,000).

4. Aggregate Cap on Payments for Early Work. In no event shall the total aggregate amount of compensation paid by Department to Design-Builder in respect of all Early Work undertaken pursuant to LNTP1, LNTP2, and LNTP3 exceed two hundred fifty million dollars (\$250,000,000).

5.1.2 Notice to Proceed. The Work not previously performed as Early Work shall commence upon Design-Builder's receipt of Department's Notice to Proceed ("**NTP**"), unless the parties mutually agree otherwise in writing. Within three (3) Business Days of Design-Builder's satisfaction of the following conditions (or Department's waiver of such conditions, in its sole discretion), Department shall deliver the NTP to Design-Builder:

1. Design-Builder has provided, and Department has approved, a Revised Baseline Schedule;
2. Design-Builder has provided fully executed originals of the Performance Security;
3. Design-Builder has obtained and provided copies to Department of the Joint Permit;
4. Design-Builder has provided, and Department has approved, the Schedule of

Values; and

5. Design-Builder has provided proof that Design-Builder has obtained the insurance policies required pursuant to Section 1.B (*Insurance Coverages Required for NTP*) of **Exhibit 12**.

5.1.3 Delays to Notice to Proceed.

.1 If the NTP is not issued by Department on or before the date that is twenty-four (24) months following the date on which Department issues LNTP1 (such date, the “**NTP Delay Date**”) solely because the Joint Permit Application for the Project has not yet been approved by the relevant Governmental Unit(s) due to events or circumstances that the Design-Builder demonstrates to Department’s satisfaction (acting reasonably) are entirely outside the control of Design-Builder, then the Contract Price will be adjusted to reflect an amount equal to the Contract Price (excluding amounts having been paid or to be paid for Early Work) multiplied by a percentage equal to the Construction Cost Index for the month during which the NTP Delay Date occurs divided by the Construction Cost Index for the month during which NTP is issued. In addition, the Substantial Completion Deadline and the Final Completion Deadline shall each be extended by the number of days between the NTP Delay Date and the date of issuance of the NTP if the conditions described in this Section 5.1.3.1 occur.

.2 Notwithstanding Section 5.1.3.1 above, (i) if Department determines that the NTP will not be issued on or before the date that is six (6) months following the NTP Delay Date (such date, the “**Extended NTP Delay Date**”), provided that Department may not make such determination more than ninety (90) days in advance of the Extended NTP Delay Date, or (ii) if the NTP is not issued by Department on or before the Extended NTP Delay Date, the Contract Price, the Substantial Completion Deadline, and the Final Completion Deadline shall be subject to good faith renegotiation, in accordance with the following protocol:

(a) Department shall direct Design-Builder in writing to provide a proposal with respect to its contemplated adjustments to the Contract Price and Contract Times, with Department identifying those assumptions upon which the proposal is to be based;

(b) Design-Builder shall promptly furnish its proposal after receipt of Department’s directive; and

(c) if the parties do not reach agreement on a revised Contract Price, Substantial Completion Deadline and Final Completion Deadline within thirty (30) days of the date Department receives Design-Builder’s proposal (or such longer period as the parties may mutually agree to in writing), either party may deliver notice to the other party that it wishes to terminate this Agreement (an “**Extended NTP Delay Termination Notice**”). An Extended NTP Delay Termination Notice must (i) provide a proposed date for termination and (ii) be delivered to the other party at least fourteen (14) days before such proposed date of termination.

.3 If either party delivers an Extended NTP Delay Termination Notice in accordance with Section 5.1.3.2, this Agreement will terminate on the date stated in such Extended NTP Delay Termination Notice.

5.1.4 Termination Prior to Notice to Proceed. If (i) Department terminates all of the Work for convenience prior to the issuance of the NTP or (ii) this Agreement terminates pursuant to Section 5.1.3.3, the provisions set forth in Section 8.1.1 shall apply.

5.2 Completion Dates.

5.2.1 Substantial Completion Deadline. Design-Builder shall achieve Substantial Completion on or before September 1, 2025 (the “**Substantial Completion Deadline**”). The date the Project has achieved Substantial Completion is the “**Substantial Completion Date**.”

5.2.2 Final Completion Deadline. Design-Builder shall achieve Final Completion on or before November 1, 2025 (the “**Final Completion Deadline**”). The date the Project has achieved Final Completion is the “**Final Completion Date**.”

5.3 No Excuses Incentive Payment.

5.3.1 No Excuses Incentive Payment; Procedures to Earn Payment. Design-Builder will be entitled to earn an additional payment (the “**No Excuses Incentive Payment**”) pursuant to this Section 5.3 if Design-Builder:

.1 achieves Substantial Completion prior to the Substantial Completion Deadline;
and

.2 executes and delivers to Department a release of all claims in the form set forth in **Exhibit 7**.

Should Design-Builder (i) fail to achieve Substantial Completion prior to the Substantial Completion Deadline or (ii) having achieved Substantial Completion prior to the Substantial Completion Deadline, refuse to execute a release of all claims in the form set forth in **Exhibit 7**, Design-Builder shall have no right to the No Excuses Incentive Payment whatsoever.

5.3.2 Determination of Amount of No Excuses Incentive Payment. The amount of the No Excuses Incentive Payment shall be determined in accordance with the following provisions.

.1 If Design-Builder achieves Substantial Completion on or before April 1, 2025, the amount of the No Excuses Incentive Payment will equal ninety million dollars (\$90,000,000).

.2 If Design-Builder achieves Substantial Completion on or after April 2, 2025, but before May 16, 2025, the amount of the No Excuses Incentive Payment will equal (i) ninety million dollars (\$90,000,000) less (ii) four hundred fifty thousand dollars (\$450,000) for each day that Substantial Completion extends beyond April 1, 2025;

.3 If Design-Builder achieves Substantial Completion on May 16, 2025, the amount of the No Excuses Incentive Payment will equal fifty million dollars (\$50,000,000);

.4 If Design-Builder achieves Substantial Completion on or after May 17, 2025, but before July 5, 2025, the amount of the No Excuses Incentive Payment will equal (i) fifty million dollars (\$50,000,000) less (ii) four hundred thousand dollars (\$400,000) for each day that Substantial Completion extends beyond May 16, 2025;

.5 If Design-Builder achieves Substantial Completion on July 5, 2025, the amount of the No Excuses Incentive Payment will equal twenty million dollars (\$20,000,000); and

.6 If Design-Builder achieves Substantial Completion on or after July 6, 2025, but before September 1, 2025, the amount of the No Excuses Incentive Payment will equal (i) twenty million dollars (\$20,000,000) less (ii) three hundred fifty thousand dollars (\$350,000) for each day that Substantial Completion extends beyond July 5, 2025.

.7 If Design-Builder achieves Substantial Completion on or after September 1, 2025, the amount of the No Excuses Incentive Payment will equal zero dollars (\$0).

Department will pay the No Excuses Incentive Payment in addition to and separate from the Contract Price.

5.3.3 Acknowledgement of Delays, Costs, and Other Impacts. The parties acknowledge that delays, costs, and other impacts may be caused by, or arise from, any number of events or causes during the performance of the Work. Accordingly, if Design-Builder requests and is paid the No Excuses Incentive Payment, Design-Builder acknowledges and agrees that it shall be solely responsible for all delays, costs, and any other impacts experienced or incurred by Design-Builder that were not previously identified and covered by Work Order at the time Design-Builder requests the No Excuses Incentive Payment.

5.4 Adjustments. The Contract Times shall be subject to adjustment in accordance with the General Conditions of Contract. The deadlines related to the calculation and payment of the No Excuses Incentive Payment will not be adjusted for any reason, cause, or circumstance whatsoever, unless determined otherwise by Department in its sole discretion. In the event that Department approves adjustments to the Contract Times, Department will issue a Work Order setting forth the date changes and the application, if any, of any incentive or liquidated damage with respect to any revised Substantial Completion Deadline or Final Completion Deadline.

5.5 Time is of the Essence. Department and Design-Builder mutually agree that time is of the essence with respect to the Contract Times.

5.6 Liquidated Damages Related to Completion Dates. Design-Builder understands that if the Substantial Completion Deadline or the Final Completion Deadline, or both, is not attained, Department will suffer damages that are difficult to determine and accurately specify. To

compensate Department for such damages, Design-Builder shall pay Department liquidated damages in accordance with Section 11.2.

Article 6

Contract Price

6.1 Contract Price. Department shall pay Design-Builder in accordance with Article 6 of the General Conditions of Contract the sum of \$[●]¹ (“**Contract Price**”), subject to adjustments, if any, made in accordance with the General Conditions of Contract. Unless otherwise provided in the Contract Documents, the Contract Price is deemed to include all sales, use, consumer and other taxes mandated by applicable Legal Requirements.

6.2 Markups for Changes. If the Contract Price requires an adjustment due to changes in the Work, and the cost of such changes is determined under Section 9.5.1.4 of the General Conditions of Contract, markups shall be allowed on such changes in accordance with requirements of Section 109.05 of the Division I Amendments.

6.3 Adjustments to Asphalt, Fuel and Steel. Department and Design-Builder agree to adjust prices for certain commodities, in accordance with Department’s pertinent special provisions, attached hereto as **Exhibit 9**, **Exhibit 10** and **Exhibit 11**; *provided* Design-Builder (i) declares its intent, in the Price Proposal, to use such provisions for price adjustments and (ii) submits the information required in the pertinent special provisions with its Proposal. Notwithstanding the special provisions, such price adjustments will be based on the quantities identified in the Schedule of Items in Design-Builder’s Proposal, which quantities shall be specifically summarized and provided in the Price Proposal. Actual quantities shall be monitored and documented by Design-Builder, and submitted to Department in the monthly report required by Section 11.1.8 below, on forms provided by Department.²

¹ **Note to Draft:** To be inserted from the Successful Offeror’s Financial Proposal.

² **Note to Draft:** The Department continues to consider mechanisms for managing price fluctuations for key commodities.

Article 7

Procedure for Payment

7.1 Progress Payments

7.1.1 Prior to Department's issuance of the NTP, Department shall make payments to Design-Builder in accordance with payment procedure set forth in **Exhibit 5**. Following Department's issuance of the NTP, Department shall make payments to Design-Builder in accordance with this Article 7 and Article 6 of the General Conditions of Contract.

7.1.2 Design-Builder shall submit to Department on the tenth (10th) day of each month, beginning with the first month after Design-Builder's receipt of Department's Notice to Proceed, Design-Builder's Application for Payment in accordance with Article 6 of the General Conditions of Contract.

7.1.3 Department shall make payment in accordance with Article 6 of the General Conditions of Contract.

7.1.4 Within seven (7) days following receipt of monies from Department for work performed by any Subcontractor, Design-Builder shall either: (i) pay the Subcontractor for the proportionate share of the total payment received from Department attributable to the work performed by the Subcontractor or (ii) notify Department and Subcontractor, in writing, of Design-Builder's intention to withhold all or a part of the Subcontractor's payment, specifying the reason for such withholding, which reason must be a good faith reason.

7.1.5 Design-Builder shall include in all of its Subcontracts a provision that: (i) obligates Design-Builder to pay interest to Subcontractors on all amounts owed by Design-Builder that remain unpaid after seven (7) days following receipt of monies from Department for work performed by any Subcontractor, except for amounts properly withheld; (ii) states, "unless otherwise provided under the terms of this contract, interest shall accrue at the rate of one percent per month"; and (iii) obligates each Subcontractor to include or otherwise be subject to the same payment and interest requirements as specified in this Section 7.1.5 with respect to each lower-tier Subcontractor.

7.1.6 Design-Builder's obligations to pay an interest charge to a Subcontractor pursuant to Section 7.1.5 above shall not be construed to be an obligation of Department, nor shall any modification to this Agreement be allowed for the purpose of providing reimbursement for such interest charge. Cost reimbursement claims shall not include any amount for reimbursement for such interest charge.

7.1.7 Design-Builder shall include language in each of its Subcontracts requiring the Subcontractor to notify the Department and Design-Builder's surety, in writing, if Design-Builder fails to make payment to the Subcontractor (i) within the timeframe set forth in Section 7.1.4 or (ii) in accordance with other applicable provisions of such Subcontract. Design-Builder's surety shall be responsible for insuring payment to the Subcontractor.

7.1.8 Design-Builder agrees to provide Department, within five (5) days of the Agreement Date, its federal employer identification number.

7.2 **Retainage on Progress Payments.** Retainage will not be withheld from Progress Payments.

7.3 **Final Payment.** Design-Builder shall submit its Final Application for Payment to Department in accordance with Section 6.8.3 of the General Conditions of Contract. Department shall make payment on Design-Builder's properly submitted and accurate Final Application for Payment within thirty (30) days after Department's receipt of the Final Application for Payment, provided that Design-Builder has satisfied the requirements for Final Payment set forth in Section 6.8.3 of the General Conditions of Contract.

7.4 **Interest.** Undisputed payments that are due and unpaid by Department to Design-Builder, whether progress payments or Final Payment, shall bear interest (at the rate of one percent per month) commencing seven (7) days after payment is due.

7.5 **Record Maintenance and Retention of Records.** Design-Builder shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management, using accounting and control systems in accordance with GAAP and as may be provided in the Contract Documents. During the performance of the Work and for a period of five (5) years after Final Payment, Department, Department's accountants, and HRTAC shall be afforded access from time-to-time, upon reasonable notice, to Design-Builder's records, books, correspondence, receipts, subcontracts, purchase orders, vouchers, memoranda and other data, including but not limited to electronic schedules and other electronic data (all collectively referred to as "**Books and Records**") relating to (i) changes in the Work performed on a cost basis or (ii) any request by Design-Builder for an adjustment to the Contract Price or Contract Times. Design-Builder shall preserve all of its Books and Records for a period of five (5) years after Final Payment.

Article 8

Termination for Convenience

8.1 Upon ten (10) days' written notice to Design-Builder, Department may, for its convenience and without cause, elect to terminate all or part of the Work if Department, in its sole discretion, determines that such a termination is in Department's best interests. Department shall notify Design-Builder of the decision to terminate by delivering to Design-Builder a written notice of termination specifying the extent of termination and its effective date (a "**Termination for Convenience Notice**").

8.1.1 If (i) Department terminates all of the Work for convenience before issuing the NTP or (ii) this Agreement terminates pursuant to Section 5.1.3.3, Department shall pay Design-Builder for the Early Work performed by Design-Builder as of the date of the Notice of Termination, if any; *provided* that in no event shall the total amount of compensation paid by Department to Design-Builder in respect of the Early Work exceed two hundred fifty million dollars

(\$250,000,000). Department shall pay any amounts due to Design-Builder pursuant to this Section 8.1.1 within sixty (60) days of Department's receipt of reasonable documentary evidence from Design-Builder of the performance of the applicable elements of the Early Work sufficient for Department to reasonably determine that such performance has occurred and such payment is due. Except as expressly provided in the preceding sentence, Design-Builder specifically waives any and all rights to assert a claim against Department for any cost, profit, overhead contribution or any other monetary relief associated with the Contract Documents or Project, including but not limited to bid and proposal costs, or any services that might have constituted Work under the Contract Documents.

8.1.2 If Department terminates all or part of the Work for convenience after issuing the NTP, then Sections 8.2 through 8.8 below shall apply.

8.2 After receipt of a Notice of Termination, and except as directed by Department, Design-Builder shall immediately proceed as follows, regardless of any delay in determining or adjusting any amounts due under this Article 8:

- (a) stop Work as specified in the Notice of Termination;
- (b) enter into no further Subcontracts and place no further orders for materials, services or facilities, except as necessary to complete the continued portion of the Work not terminated by Department, if any, or for mitigation of damages;
- (c) terminate all Subcontracts to the extent they relate to the Work terminated, unless instructed otherwise by Department because Department has determined that the continuation of any such Subcontract is necessary in order to mitigate damages;
- (d) assign to Department or its designee in the manner, at the times, and to the extent directed by Department, all of the right, title, and interest of Design-Builder under the Subcontracts so terminated, in which case Department will have the right, in its sole discretion, to accept performance, settle or pay any or all claims under or arising out of the termination of such Subcontracts;
- (e) settle outstanding liabilities and claims arising out of such termination of Subcontracts, with the approval or ratification of Department, to the extent it may require, which approval or ratification shall not be unreasonably withheld or delayed;
- (f) transfer and deliver to Department or its designee, as directed by Department (i) possession and control of the Project and (ii) all right, title and interest of Design-Builder in and to: (a) the Work in process, completed Work, supplies and other materials produced or acquired for the Work terminated; (b) the Released for Construction Plans and all other completed or partially completed drawings (including plans, elevations, sections, details and diagrams), specifications, records, reports, books, samples, information and other Work Product that would have been required to be furnished to Department if the Work had been completed; and (c) all intellectual property developed specifically for the Project; *provided, however*, that in the event of such transfer, Design-

Builder shall not be liable for any warranties for Work which has not achieved Final Completion, nor shall Design-Builder have any liability with respect to any design materials produced with respect to the Project;

(g) complete performance in accordance with the Contract Documents of all Work not terminated, if any;

(h) take all action that may be necessary, or that Department may direct, for the protection and preservation of the property related to the Contract Documents that is in the possession of Design-Builder and in which Department has or may acquire an interest; and

(i) as authorized by Department, use its best efforts to sell at fair market value any property of the types referred to in Section 8.3 below; *provided, however,* that Design-Builder: (i) shall not take any such action with respect to any items for which title has previously transferred to Department; (ii) is not required to extend credit to any purchaser; and (iii) may acquire the property itself, under the conditions prescribed and at prices approved by Department. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by Department under the Contract Documents or paid in any other manner directed by Department.

8.3 Inventory. Design-Builder shall submit to Department a list of termination inventory not previously disposed of and excluding items authorized for disposition by Department. Within thirty (30) days of receipt of the list, Design-Builder shall deliver such inventory to Department and Department shall accept title to such inventory as appropriate.

8.4 Settlement Proposal. After termination under this Article 8, or for any other category of termination for which the Contract Documents expressly permit Design-Builder to recover under this Article 8, Design-Builder shall submit a final termination settlement proposal to Department in the form and with the certification prescribed by Department. Design-Builder shall submit the proposal promptly, but no later than ninety (90) days from the effective date of termination unless Design-Builder has requested a time extension in writing within such ninety (90)-day period and Department has agreed in writing to allow such an extension.

8.5 Amount of Termination Settlement. Design-Builder and Department shall negotiate in good faith to reach agreement on the settlement amount to be paid to Design-Builder by reason of the termination of Work pursuant to this Article 8. Such negotiated settlement shall include an allowance for profit solely on Work that has been performed as of the termination date. Such agreed amount or amounts payable for the terminated Work shall not exceed the total Contract Price, as reduced by the value of Work not performed. Upon determination of the settlement amount, this Agreement will be amended accordingly, and Design-Builder will be paid the agreed amount as described in this Section 8.5. Department's execution and delivery of any settlement agreement shall not be deemed to affect any of its rights with respect to compliance of the Work which has achieved Final Completion with all applicable requirements of the Contract Documents or any of its rights under payment and performance bonds or any of its rights against Subcontractors.

8.6 No Agreement as to Amount of Claim. In the event of failure of Design-Builder and Department to agree upon the amount to be paid to Design-Builder by reason of the termination of Work pursuant to this Article 8, the amount payable (exclusive of interest charges) shall be determined in accordance with the dispute resolution procedures set forth in Article 10 of the General Conditions of Contract.

8.7 Reduction in Amount of Claim. The amount otherwise due Design-Builder under this Article 8 shall be reduced by (i) the amount of any valid claim which Department may have against Design-Builder in connection with this Agreement and (ii) the agreed price for, or the proceeds of sale of, materials, supplies or other things previously paid for by Department and to be retained by Design-Builder or sold by Design-Builder (with the proceeds being retained by Design-Builder), pursuant to the provisions of this Article 8.

8.8 Payment. Department may, from time-to-time, under such terms and conditions as it may prescribe and in its sole discretion, make partial payments on account against costs incurred by Design-Builder in connection with the terminated portion of this Agreement, whenever in the opinion of Department the aggregate of such payments shall be within the amount to which Design-Builder will be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this Article 8, such excess shall be payable by Design-Builder to Department upon demand together with interest at a variable rate per annum equal to the reference rate announced by Bank of America, N.A., from time-to-time, plus one percent (1%).

8.9 Inclusion in Subcontracts. Design-Builder shall insert in all Subcontracts that the Subcontractor shall stop Work on the date of and to the extent specified in a Notice of Termination from Department and shall require that Subcontractors insert the same provision in each Subcontract at all tiers. Design-Builder shall communicate, immediately upon receipt thereof, any Notice of Termination issued by Department to all affected Subcontractors.

8.10 No Consequential Damages. Under no circumstances shall Design-Builder or any Subcontractor be entitled to anticipatory or unearned profits, unabsorbed overhead, opportunity costs, or consequential damages (whether arising in contract, warranty, tort (including any theories of negligence), strict liability, or otherwise, and including all indirect, incidental, special, and punitive damages) as a result of a termination for convenience under this Article 8. The payment to Design-Builder determined in accordance with this Article 8 constitutes Design-Builder's exclusive remedy for a termination hereunder.

8.11 No Waiver. Anything contained in this Agreement to the contrary notwithstanding, a termination under this Article 8 shall not waive any right or claim to damages that Department may have with respect to Work that has achieved Final Completion prior to the date of termination, and Department may pursue any cause of action that it may have by law or under this Agreement on account of such completed Work. Design-Builder makes no warranties with respect to Work that has not achieved Final Completion prior to the date of termination. Department's termination of this Agreement shall not relieve any rights Department has under any performance bonds issued on the Project.

8.12 Dispute Resolution. The failure of the parties to agree on amounts due under this Article 8 shall be a dispute to be resolved in accordance with the requirements of Article 10 of the General Conditions of Contract.

8.13 Right to Use Work Product. If Department terminates this Agreement pursuant to this Article 8, Department’s rights to use the Work Product shall be as set forth in Article 4 hereof.

Article 9

Representatives of the Parties

9.1 Department Representatives.

9.1.1 Department designates the individual listed below as its senior representative (“**Department’s Senior Representative**”), which individual has the authority and responsibility for avoiding and resolving disputes under Section 10.2.2 of the General Conditions of Contract:

James S. Utterback
Project Director
Virginia Department of Transportation
204 National Avenue
Hampton, Virginia 23663
Telephone: 757-956-3000
E-mail: HRBTproject@vdot.virginia.gov

9.1.2 Department designates the individual listed below as its representative (“**Department’s Representative**”), which individual has the authority and responsibility set forth in Section 3.4 of the General Conditions of Contract:

[•]

9.2 Design-Builder Representatives.

9.2.1 Design-Builder designates the individual listed below as its senior representative (“**Design-Builder’s Senior Representative**”), which individual has the authority and responsibility for avoiding and resolving disputes under Section 10.2.2 of the General Conditions of Contract:

[•]

9.2.2 Design-Builder designates the individual listed below as its representative (“**Design-Builder’s Representative**”), which individual has the authority and responsibility set forth in Section 2.1.1 of the General Conditions of Contract:

[•]

9.3 Department and Design-Builder shall, in the spirit of cooperation, exchange information in a timely manner. While the Contract Documents establish a timeline and process for making decisions and managing communications on the Project, the parties recognize it is not possible to specify processes for all activities that may occur.

Article 10

Insurance; Performance and Payment Security

10.1 Insurance. Design-Builder shall procure and maintain insurance in accordance with the Contract Documents, including Article 5 of the General Conditions of Contract, Section 107.19 of the Division 1 Amendments, and **Exhibit 12.**

10.2 Performance and Payment Security.

10.2.1 As a condition precedent to Department's issuance of LNTP1, Design-Builder shall procure and maintain:

.1 a performance bond that provides for expedited or accelerated dispute resolution in the form set forth in **Exhibit 13**, executed by a surety acceptable to Department, in an amount equal to two hundred fifty million dollars (\$250,000,000); and

.2 a payment bond in the form set forth in **Exhibit 14**, executed by a surety acceptable to Department, in an amount equal to two hundred fifty million dollars (\$250,000,000).

10.2.2 As a condition precedent to Department's issuance of the NTP, Design-Builder shall procure and maintain:

.1 a performance bond that provides for expedited or accelerated dispute resolution in the form set forth in **Exhibit 13**, executed by a surety acceptable to Department, in an amount equal to one billion two hundred fifty million dollars (\$1,250,000,000) (the "**Performance Bond**"); and

.2 a payment bond in the form set forth in **Exhibit 14**, executed by a surety acceptable to Department, in an amount equal to one billion two hundred fifty million dollars (\$1,250,000,000) (the "**Payment Bond**").

10.2.3 Design-Builder may satisfy the terms of Section 10.2.2 by (i) increasing the penal sum of each of the performance bond and the payment bond provided by Design-Builder pursuant to Section 10.2.1 to the amount specified in Section 10.2.2 or (ii) replacing each of the performance and payment bond provided by Design-Builder pursuant to Section 10.2.1 with a performance bond and a payment bond that meet the requirements set forth in Section 10.2.2.

10.2.4 Design-Builder shall maintain the Payment Bond until the date on which Department makes final payment to Design-Builder in accordance with Section 6.8.3 of the General Conditions of Contract. Design-Builder shall maintain the Performance Bond until the later of:

(i) the second (2nd) anniversary of the Final Completion Date and (ii) the expiration of the warranty period set forth in Section 2.10 of the General Conditions of Contract; *provided* that, as of the Final Completion Date, the surety's penal sum under the Performance Bond shall be reduced to one hundred million dollars (\$100,000,000).

10.3 Guarantee. On or before the Agreement Date, Design-Builder shall cause each of the Guarantors to execute and deliver a guarantee in the form of **Exhibit 16** (each, a “**Guarantee**”) pursuant to which each of the Guarantors shall jointly and severally guarantee the full performance of Design-Builder's obligations under this Agreement. Each Guarantee shall expire on the fifth (5th) anniversary of the expiration of the warranty period as set forth in Section 2.9.2 of the General Conditions of Contract, and Department shall return such Guarantee within seven (7) days of its expiry.

Article 11

Other Provisions

11.1 Project Management and Reporting Requirements

11.1.1 Preliminary Schedule. Within fifteen (15) days of Design-Builder's receipt of LNTP1, Design-Builder shall submit to Department, for its review and approval, a Preliminary Schedule in accordance with Section 2.3 of the Technical Requirements. The Preliminary Schedule shall be the basis for monitoring Design-Builder's performance of the Work (including the Early Work) until such time as a Baseline Schedule has been approved by Department in accordance with Section 11.1.2 below. Department reserves the right to withhold approval for all or part of Design-Builder's Applications for Early Work Payment until such time Design-Builder furnishes an approved Preliminary Schedule.

11.1.2 Baseline Schedule. Within ninety (90) days of Design-Builder's receipt of LNTP1, Design-Builder shall submit to Department, for its review and approval, a Baseline Schedule in accordance with Section 2.3 of the Technical Requirements. Department reserves the right to withhold approval for all or part of Design-Builder's Applications for Early Work Payment until such time Design-Builder furnishes an approved Baseline Schedule.

11.1.3 Schedule Updates. Design-Builder shall submit Schedule Updates in accordance with Section 2.3 of the Technical Requirements. Department reserves the right to withhold approval for all or part of Design-Builder's Applications for Early Work Payment or Applications for Payment, as applicable, until such time Design-Builder furnishes an approved Schedule Update.

11.1.4 Revised Baseline Schedule. Design-Builder shall submit a Revised Baseline Schedule within fifteen (15) days of Department's issuance of LNTP2 and whenever required in accordance with Section 2.3 of the Technical Requirements. Department reserves the right to withhold approval for all or part of Design-Builder's Applications for Early Work Payment or Applications for Payment, as applicable, until such time Design-Builder furnishes an approved Revised Baseline Schedule.

11.1.5 Final As-Built Schedule. Design-Builder shall submit a Final As-Built Schedule in accordance with Section 2.3 of the Technical Requirements. Department reserves the right to

withhold approval for all or part of Design-Builder's Applications for Final Payment until such time Design-Builder furnishes an approved Final As-Built Schedule.

11.1.6 Other Information and Alteration. Design-Builder shall, whenever required by Department, provide in writing a general description of the arrangements and methods which Design-Builder 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 Design-Builder informing Department and Department making no objection to such information within a reasonable period of time, and any alterations made shall reflect the requirement for coordination of the Work with the actions and obligations of Department and the work to be carried out by Separate Contractors, if any. If any alteration affects any such actions, obligations or Work, it shall not be made without the prior approval of Department. If the progress of the Work does not conform to the Baseline Schedule, as updated herein, Department may instruct Design-Builder to revise the Baseline Schedule, showing the modifications necessary to achieve completion within the Contract Times.

11.1.7 Department's Separate Contractors. Design-Builder agrees to include the activities of Department's Separate Contractors into the Baseline Schedule. Design-Builder shall reasonably cooperate with Department's Separate Contractors and coordinate its activities with those of such Separate Contractors, and Department shall cause such Separate Contractors to reasonably cooperate with Design-Builder and coordinate its activities with those of Design-Builder so that the Project can be completed in an orderly and coordinated manner without unreasonable disruption.

11.1.8 Department's Review and Approval of Schedule Submissions. Department's review and approval of the Preliminary Schedule, Baseline Schedule or subsequent Schedule Updates and Revised Baseline Schedule shall not be construed as relieving Design-Builder of its complete and exclusive control and responsibility over the means, methods, sequences and techniques for executing the Work and does not constitute approval or acceptance of Design-Builder's ability to complete the Work within the Contract Times.

11.1.9 Monthly Reports. Monthly reports shall be prepared by Design-Builder and submitted to Department in paper and electronic format, as specified by Department. The first report shall cover the time period up to the end of the calendar month after that in which the Agreement Date occurred. Reports shall be submitted monthly by Design-Builder thereafter, on or before the tenth (10th) day of each month. Monthly reporting shall continue until Design-Builder has achieved Final Completion. Each report shall include:

.1 photographs and detailed descriptions of progress, including each stage of design, right-of-way acquisition, Governmental Approvals (including but not limited to permit acquisition), procurement, delivery to the Project Right-of-Way, and construction;

.2 charts showing the status of all design documents, purchase orders, right-of-way acquisition, Governmental Approvals (including but not limited to permit acquisition) and construction;

- .3 records of Design-Builder's personnel and equipment;
- .4 copies of quality assurance documents, and test results;
- .5 safety statistics, including details of any hazardous incidents and activities relating to environmental aspects and public relations;
- .6 monthly updates to the Baseline Schedule, narrative, and anticipated monthly earnings schedule;
- .7 unresolved claims or disputes that involve requests for extension to the Contract Times or adjustment to any other date or milestone set forth in the Contract Documents or increases in the Contract Price;
- .8 all required EEO documentation for federal-aid projects;
- .9 weekly work zone safety reviews, on Department-provided forms;
- .10 erosion and sediment control reports, on Department-provided forms; and
- .11 actual quantities for fuel, asphalt and steel on Department-provided forms.

Failure of Design-Builder to provide complete monthly reports, including but not limited to the monthly schedule updates, shall be grounds for Department to withhold approval for all or part of Design-Builder's Application(s) for Payment until such time Design-Builder furnishes such complete reports.

11.1.10 Project Records. Design-Builder shall organize and maintain its project records in a manner that allows such project records to be filed by work packages, as applicable. Additionally, Design-Builder shall develop a tracking log wherein the project records are provided chronologically, with the file type, description, date received/sent, entity the documentation is from/to, pay package reference, status and electronic location. Such tracking log shall be developed in accordance with the format reasonably acceptable to Department. If the project record relates to changes in the Work, preferably only one work package shall be referenced in such project record. If a project record relates to multiple work packages, then all related work packages shall be referenced in such project record. As a condition of Final Payment, Design-Builder shall provide Department with a complete set of all project records by and between Design-Builder and Department exchanged on the Project.

11.2 Liquidated Damages

11.2.1 General. Department shall have the right to deduct any amount owed by Design-Builder to Department pursuant to this Section 11.2 from any amounts owed by Department to Design-Builder, or to collect any such amount from the Performance Security.

11.2.2 Liquidated Damages Related to Completion

.1 If Substantial Completion is not achieved by the Substantial Completion Deadline, Design-Builder shall pay Department one hundred forty-two thousand dollars (\$142,000) for each day that actual Substantial Completion extends beyond the Substantial Completion Deadline.

2. If Final Completion is not attained by the Final Completion Deadline, Design-Builder shall pay Department fifty thousand dollars (\$50,000) for each day that actual Final Completion extends beyond the Final Completion Deadline, except that if Substantial Completion is not achieved by the Final Completion Deadline then the per day liquidated damages set forth in Section 11.2.2.1 shall continue to apply until Substantial Completion is achieved, after which time the per day liquidated damages set forth in this Section 11.2.2.2 shall apply until Final Completion is achieved.

.3 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 Design-Builder's failure to complete the Work on or before the applicable Contract Times;

(b) that any sums that would be payable under this Article 11 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 that would be payable herein shall be in lieu of all liability for any and all costs, losses, expenses, claims, penalties and any other damages, whether special or consequential, arising from any delay in achieving the applicable Contract Times for the above-referenced Work.

11.2.3 Lane Closure Liquidated Damages

.1 Design-Builder shall pay to Department liquidated damages for any Non-Permitted Lane Closure ("**Lane Closure Liquidated Damages**").

.2 If a Non-Permitted Lane Closure occurs, Department will notify Design-Builder thereof and of the associated Lane Closure Liquidated Damages, in writing, within forty-eight (48) hours. Design-Builder shall pay to Department the amount of Lane Closure Liquidated Damages described in such written notification within thirty (30) days of the date of such written notification.

.3 Subject to Sections 11.2.3.4 below, Department shall assess Lane Closure Liquidated Damages as follows:

Schedule of Lane Closure Liquidated Damages, per 15-Minute Interval				
HOURS	I-64 EASTBOUND		I-64 WESTBOUND	
	Summer (April 15 - October 15)	Non-Summer (October 16 - April 14)	Summer (April 15 - October 15)	Non-Summer (October 16 - April 14)
<i>MONDAY TO FRIDAY</i>				
5:00 AM to 5:59 AM	\$3,000	\$2,500	\$2,500	\$2,500
6:00 AM to 6:59 AM	\$44,000	\$33,000	\$11,000	\$6,500
7:00 AM to 7:59 AM	\$50,000	\$37,500	\$25,700	\$17,000
8:00 AM to 8:59 AM	\$21,000	\$15,000	\$14,000	\$10,000
9:00 AM to 1:59 PM	\$6,000	\$4,000	\$6,000	\$5,000
2:00 PM to 6:59 PM	\$20,000	\$20,000	\$10,000	\$15,000
7:00 PM to 8:59 PM	\$5,000	\$5,000	\$,000	\$5,000
<i>SATURDAY TO SUNDAY</i>				
7:00 AM to 7:59 AM	\$2,500	\$2,500	\$2,500	\$2,500
8:00 AM to 8:59 AM	\$2,500	\$2,500	\$2,500	\$2,500
9:00 AM to 9:59 AM	\$3,500	\$2,500	\$5,000	\$2,500
10:00 AM to 10:59 AM	\$7,000	\$2,500	\$6,500	\$2,500
11:00 AM to 11:59 AM	\$8,000	\$2,500	\$5,500	\$4,000
12:00 PM to 5:59 PM	\$8,000	\$5,000	\$5,000	\$5,000
6:00 PM TO 10:00 PM	\$2,500	\$2,500	\$2,500	\$2,500

.4 A five (5)-minute grace period will be allowed before the first fifteen (15)-minute period begins to run for purposes of determining any Lane Closure Liquidated Damages to be assessed pursuant to Section 11.2.3.3 above. For any Non-Permitted Lane Closure that persists for only a portion of a fifteen (15)-minute period, the relevant Lane Closure Liquidated Damages amount shall be assessed as if the impact is in place for the full fifteen (15)-minute period. A Non-Permitted Lane Closure will cease when traffic has been restored. Restoration of traffic shall mean removal of all blockages or the completion of all Work, as applicable, including the removal of all traffic control devices, signs, workers, materials, and equipment from the roadway allowing all lanes to be opened safely to public traffic.

.5 The parties acknowledges that in some cases Appendix A13-1 of the Technical Requirements permits Lane Closures during certain times included in the Schedule of Lane Closure Liquidated Damages above. With respect to each such case, the permitted Lane Closure hours set forth in Appendix A13-1 shall take precedence over the Schedule of Lane Closure

Liquidated Damages above and Department shall not assess Lane Closure Liquidated Damages for such Lane Closures undertaken in accordance with the Technical Requirements.

- .5 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 any Non-Permitted Lane Closure;
 - (b) the occurrence of any Non-Permitted Lane Closure shall result in the assessment of Lane Closure Liquidated Damages in accordance with this Section 11.2.3;
 - (c) that any sums which would be payable herein shall be in lieu of all liability for any and all costs, losses, expenses, claims, penalties and any other damages, whether special or consequential, incurred by Department arising from any Non-Permitted Lane Closures; and
 - (d) such Lane Closure Liquidated Damages are in the nature of liquidated damages (and not a penalty) and are fair and reasonable to compensate Department for losses it will incur as a result of the Non-Permitted Lane Closure, including but not limited to (i) additional costs of providing oversight of the Work and (ii) loss of use, enjoyment and benefit of travel lanes by the traveling public.
 - (e) Design-Builder waives any defense as to the validity of the Lane Closure Liquidated Damages assessed by Department against Design-Builder on the grounds that such Lane Closure Liquidated Damages are void as penalties, or are not reasonably related to actual damages.

11.2.4 Liquidated Damages for Changes to Key Personnel

.1 If Design-Builder changes or substitutes any of the individuals identified as Key Personnel in **Exhibit 20** for reasons other than the voluntary or involuntary termination of employment, retirement, death, disability or incapacity of any such individual or because Department has directed Design-Builder to remove or replace any such individual, Design-Builder acknowledges and agrees that (i) Department will suffer significant and substantial losses due to such change or substitution and (ii) it is impracticable and extremely difficult to ascertain and determine the actual losses which would accrue to the Department. In such event, and regardless of whether Design-Builder has replaced any such individual with another individual approved by Department, Design-Builder shall pay to Department the liquidated damages amount set forth in **Exhibit 20** for each Key Personnel as compensation to Department for such losses.

.2 Design-Builder understands and agrees that any amounts payable to Department pursuant to this Section 11.2.4 are in the nature of liquidated damages, not a penalty, and are reasonable under the circumstances existing as of the Agreement Date.

.3 The parties acknowledge, recognize and agree that any sums which would be payable herein shall be in lieu of all liability for any and all costs, losses, expenses, claims, penalties and any other damages, whether special or consequential, incurred by Department arising from any removal or unpermitted substitution of Key Personnel.

11.3 Limitation on Liability

11.3.1 Limitation on Liability for Liquidated Damages. The aggregate liability of Design-Builder in relation to liquidated damages assessed pursuant to Section 11.2 shall not exceed three percent (3%) of the Contract Price, as such price may be adjusted in accordance with this Agreement (the “**Liquidated Damages Liability Cap**”).

11.3.2 Aggregate Liability Cap. Subject to Section 11.3.3, the maximum aggregate liability of Design-Builder for payments to Department under this Agreement, including for defaults, breaches, negligence, liquidated damages or otherwise in connection with the Work shall be limited in an amount equal to forty percent (40%) of the Contract Price, as such price may be adjusted in accordance with this Agreement (the “**Aggregate Liability Cap**”).

11.3.3 The Aggregate Liability Cap does not apply to, and the calculation thereof shall not include:

- .1 any losses to the extent that:
 - (a) the amount thereof is paid from the proceeds of insurance policies required to be maintained by Design-Builder under this Agreement;
 - (b) the amount thereof is paid by Design-Builder but subsequently recovered by Design-Builder from (i) the proceeds of insurance policies required to be maintained by Design-Builder under this Agreement or (ii) from any third party (other than an entity providing insurance); or
 - (c) the same would have been recovered through insurance and (i) Design-Builder failed to maintain such insurance if required to be maintained by Design-Builder under this Agreement or (ii) Design-Builder failed to comply with its obligations under, and the limitations of, such insurance policies or did not diligently pursue a relevant insurance claim;
- .2 any losses that arise from any Third-Party Claim (including Design-Builder’s indemnities under the Contract Documents to the extent any such indemnification obligation relates to any Third-Party Claim);
- .3 any losses that arise from Design-Builder’s gross negligence, willful misconduct, or fraud;

.4 any losses, fines, and penalties under any Legal Requirements or any costs incurred that arise out of any failure by Design-Builder to comply with any Legal Requirements, including workers' compensation, employment, or health and safety laws or regulations; or

.5 any reasonable costs incurred by Department in the enforcement of any of the performance or payment security, which is settled or finally resolved in favor of Department.

11.4 Miscellaneous

11.4.1 By executing this Agreement, Design-Builder represents that it has the necessary financial resources to fulfill its obligations under this Agreement, and has the necessary approvals to execute this Agreement and to perform the services and obligations described herein.

11.4.2 [Design-Builder is comprised of the Design-Builder Members and, for good and valuable consideration the receipt and sufficiency of which are acknowledged by each of them, each Design-Builder Member agrees that it is and shall be jointly and severally obligated to Department to perform all of the duties and obligations of Design-Builder pursuant to this Agreement and to satisfy all liabilities of Design-Builder arising under or in connection with this Agreement.]³

11.4.3 Department's payment to Design-Builder of any amounts due and owing by Department pursuant to this Agreement shall be subject to appropriation by the General Assembly and allocation by the CTB.

11.5 Exhibits

11.5.1 The following exhibits are made part of, and incorporated into this Agreement.

EXHIBIT 1	--	GENERAL CONDITIONS OF CONTRACT
EXHIBIT 2	--	TECHNICAL REQUIREMENTS
EXHIBIT 3	--	DIVISION I AMENDMENTS
EXHIBIT 4	--	DESIGN-BUILDER'S PROPOSAL
EXHIBIT 5	--	EARLY WORK SCOPE DOCUMENT
EXHIBIT 6	--	MAXIMUM CUMULATIVE COMPENSATION AMOUNT
EXHIBIT 7	--	FORM OF RELEASE OF ALL CLAIMS
EXHIBIT 8	--	U.S. NAVY REQUIREMENTS
EXHIBIT 9	--	PRICE ADJUSTMENT FOR ASPHALT
EXHIBIT 10	--	PRICE ADJUSTMENT FOR FUEL
EXHIBIT 11	--	PRICE ADJUSTMENT FOR STEEL
EXHIBIT 12	--	REQUIRED INSURANCE
EXHIBIT 13	--	FORM OF PERFORMANCE BOND
EXHIBIT 14	--	FORM OF PAYMENT BOND

³ **Note to Draft:** Section 11.4.2 to be deleted if Design-Builder is not structured as a joint venture.

EXHIBIT 15	--	NOT USED
EXHIBIT 16	--	FORM OF GUARANTEE
EXHIBIT 17	--	DISPUTE RESOLUTION BOARD
EXHIBIT 18	--	NOT USED
EXHIBIT 19	--	DEPARTMENT'S GOVERNMENTAL APPROVALS LIST
EXHIBIT 20	--	KEY PERSONNEL POSITIONS
EXHIBIT 21	--	GEOTECHNICAL BASELINE REPORT
EXHIBIT 22	--	GEOTECHNICAL DATA REPORT
EXHIBIT 23	--	DBE & SWaM MATTERS
EXHIBIT 24	--	FORM OF ESCROW AGREEMENT
EXHIBIT 25	--	DISCLOSED INFORMATION INDEX
EXHIBIT 26	--	FEDERAL REQUIREMENTS

[SIGNATURE PAGE(S) TO FOLLOW]

IN WITNESS WHEREOF, the parties, intending to be legally bound, have executed this Comprehensive Agreement relating to the I-64 Hampton Roads Bridge-Tunnel Expansion Project as of the date first written above.

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

By: _____
Stephen C. Brich, P.E.
Commissioner of Highways

[•],
a [•]

By: _____
Name: _____
Title: _____