



**ARIZONA DEPARTMENT OF TRANSPORTATION**

**PUBLIC-PRIVATE PARTNERSHIP**

**DESIGN-BUILD-OPERATE-MAINTAIN AGREEMENT**

**For**

**I-17, Anthem Way TI to Jct. SR 69 (Cordes Junction)**

**ADOT Project No. 17 MA 229 H6800 01C**

**Federal Project No. NHPP-017-A(228)S**

**Phoenix – Cordes Junction Highway**

**October 28, 2021**

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**LIST OF EXHIBITS**

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1 **PUBLIC PRIVATE PARTNERSHIP (P3)**  
2 **DESIGN-BUILD-OPERATE-MAINTAIN AGREEMENT**  
3 **I-17, Anthem Way TI to Jct. SR 69 (Cordes Junction)**

4 This Design-Build-Operate-Maintain Agreement (“**Agreement**”) is entered into and effective as  
5 of October 28, 2021, by and between the Arizona Department of Transportation, a public agency  
6 of the State of Arizona (“**ADOT**”), and Kiewit-Fann Joint Venture, a joint venture formed by and  
7 between Kiewit Infrastructure West Co. and Fann Contracting Inc. under the laws of the State of  
8 Delaware (together with its permitted successors and assigns, “**Developer**”) (“**ADOT**” and  
9 “**Developer**,” collectively “**Parties**”).

10 **RECITALS**

- 11 A. The State of Arizona desires to facilitate private sector investment and participation in  
12 the development of the State’s transportation system by entering into public-private  
13 partnerships as contemplated and authorized by Arizona Revised Statutes, Title 28,  
14 Chapter 22, Article 1 (the “**Statute**”) and ADOT’s P3 Program Guidelines as authorized by  
15 A.R.S. Title 28, Chapter 22, § 7702 (the “**Guidelines**”).
- 16 B. ADOT wishes to enter into an agreement with a private sector developer to design, build,  
17 operate and maintain certain capital improvements to an existing section of Interstate 17  
18 running from the northern Phoenix area to the Sunset Point Rest Area from MP 229  
19 (otherwise known as the Anthem Way Traffic Interchange) to MP 252 near the Sunset  
20 Point Rest Area (the “**Project**”).
- 21 C. Pursuant to the Statute and the Guidelines, ADOT issued a Request for Qualifications on  
22 October 29, 2019 (as amended, the “**RFQ**”).
- 23 D. In response to the RFQ, ADOT received five statements of qualifications on December 23,  
24 2019, and on January 30, 2020, shortlisted three proposers.
- 25 E. On December 3, 2020, ADOT issued to the shortlisted proposers a Request for Proposals  
26 (as subsequently amended by addenda, the “**RFP**”) to design, build, operate and maintain  
27 the Project.
- 28 F. In response to the RFP, ADOT received three proposals on July 20, 2021.
- 29 G. After conducting a thorough analysis of all responses to the RFP, ADOT determined that  
30 Developer’s Proposal best met the selection criteria contained in the RFP and that the  
31 Proposal was the one that provided the best value to the State of Arizona, and  
32 recommended that a project agreement be awarded to Developer.
- 33 H. This Agreement and the other Contract Documents collectively constitute a design-build-  
34 operate-maintain agreement as contemplated under the Statute.

1 I. The Director of ADOT has been authorized to enter into this Agreement pursuant to the  
2 Statute, and the Arizona State Transportation Board has included the Project in the  
3 current ADOT Five-Year Transportation Facilities Construction Program.

4 NOW, THEREFORE, in consideration of the sums to be paid by ADOT to Developer, the Work to  
5 be performed by Developer, the foregoing premises and the covenants and agreements set forth  
6 herein, the Parties hereby agree as follows:  
7

1     **SECTION 1.     DEFINITIONS AND INTERPRETATIONS; ORDER OF PRECEDENCE; APPLICABLE**  
2                                    **STANDARDS; REFERENCE INFORMATION DOCUMENTS**

3     **1.1     Definitions and Interpretations**

4             **1.1.1**     Unless the context otherwise requires, in this Agreement:

5             (a)     capitalized terms have the meaning given in Exhibit 1 (Abbreviations and Defined  
6                    Terms);

7             (b)     the words “including,” “includes” and “include” will be read as if followed by the  
8                    words “without limitation;”

9             (c)     the meaning of “or” will be that of the inclusive “or,” that is meaning one, some  
10                    or all of a number of possibilities;

11            (d)     a reference to any Party or Person includes each of their legal representatives,  
12                    trustees, executors, administrators, successors, and permitted substitutes and  
13                    assigns, including any Person taking part by way of novation;

14            (e)     references to days are references to calendar days, provided that, if the date to  
15                    perform any act or provide any Notice falls on a non-Business Day, such act or  
16                    Notice may be timely performed on the next Business Day. Notwithstanding the  
17                    foregoing, requirements contained in this Agreement relating to actions to be  
18                    taken in the event of an Emergency and other requirements for which it is clear  
19                    that performance is intended to occur on a non-Business Day shall be required to  
20                    be performed as specified, even though the date in question may fall on a non-  
21                    Business Day;

22            (f)     a reference to any Governmental Entity, institute, association or body is:

23                    (i)     if that Governmental Entity, institute, association or body is reconstituted,  
24                    renamed or replaced or if the powers or functions of that Government  
25                    Entity, institute, association or body are transferred to another  
26                    organization, a reference to the reconstituted, renamed or replaced  
27                    organization or the organization to which the powers or functions are  
28                    transferred, as applicable; and

29                    (ii)    if that Governmental Entity, institute, association or body ceases to exist,  
30                    a reference to the organization which serves substantially the same  
31                    purposes or objectives as that Governmental Entity, institute, association  
32                    or body;

33            (g)     a reference to this Agreement or to any other agreement, document or  
34                    instrument includes a reference to this Agreement or such other agreement,

- 1 document or instrument as amended, revised, supplemented or otherwise  
2 modified from time to time;
- 3 (h) a reference to any legislation or to any section or provision of it includes any  
4 amendment to or re-enactment of, or any statutory provision substituted for, that  
5 legislation, section or provision;
- 6 (i) words in the singular include the plural (and vice versa) and words denoting any  
7 gender include all genders;
- 8 (j) headings are for convenience only and do not affect the interpretation of this  
9 Agreement;
- 10 (k) a reference to a Section, Appendix, Attachment or Exhibit is a reference to a  
11 Section, Appendix, Attachment or Exhibit of or to the document in which the  
12 reference appears;
- 13 (l) where any word or phrase is given a defined meaning, any other part of speech or  
14 other grammatical form of that word or phrase has a corresponding meaning;
- 15 (m) a reference to “\$” is to currency in the United States;
- 16 (n) a reference to time is a reference to Mountain Standard Time in the United States  
17 as observed in the State of Arizona, which does not follow daylight savings time;
- 18 (o) Submittals received by ADOT after 5:00 p.m. Mountain Standard Time shall be  
19 deemed to have been received the next Business Day;
- 20 (p) in the event of an ambiguity in or dispute regarding the interpretation of this  
21 Agreement, this Agreement shall not be interpreted or construed against the  
22 Person who prepared this Agreement, and, instead, other rules of interpretation  
23 and construction shall be used; and
- 24 (q) the term “may”, when used in the context of a power or right exercisable by ADOT  
25 or ADOT’s Authorized Representative, means that ADOT or ADOT’s Authorized  
26 Representative can exercise that right or power in its absolute and unfettered  
27 discretion and ADOT or ADOT’s Authorized Representative has no obligation to  
28 Developer to do so.

29 **1.1.2** Wherever the Contract Documents impose or incorporate parts, sections or  
30 other provisions of the ADOT Standard Specifications, those parts, sections or provisions are

1 deemed to exclude all the provisions under the headings “Method of Measurement” and “Basis  
2 of Payment” in the ADOT Standard Specifications.

3 **1.2 Order of Precedence**

4 **1.2.1** Unless the context otherwise requires and except as provided otherwise in this  
5 Section 1.2.1, in the event of any conflict, ambiguity or inconsistency between or among the  
6 Contract Documents, the order of precedence, from highest to lowest, is as follows:

- 7 (a) for design, operations, maintenance and other non-Construction Work:
  - 8 (i) Supplemental Agreements or Directive Letters in accordance with this  
9 Agreement;
  - 10 (ii) This Agreement (including all Exhibits and the executed originals of  
11 Exhibits that are contracts, except Exhibit 2 (Developer’s Proposal  
12 Commitments and Clarifications);
  - 13 (iii) Exhibit 2 (Developer’s Proposal Commitments and Clarifications);
  - 14 (iv) Amendments to the Technical Provisions, and all exhibits and attachments  
15 to such amendments;
  - 16 (v) Technical Provisions, excluding the exhibits and attachments to the  
17 Technical Provisions;
  - 18 (vi) Exhibits and attachments to the Technical Provisions;
  - 19 (vii) Applicable Standards; and
  - 20 (viii) Project Plans.
- 21 (b) Without limiting Section 1.2.3, the same order of precedence shall apply to  
22 Construction Work as for non-Construction Work in clause (a) above, except that  
23 the Final Design Documents Submittal shall also be considered part of this  
24 Agreement and included as Section 1.2.1(a)(viii) in the order of precedence,  
25 except that any Deviations contained in the Final Design Documents Submittal  
26 take priority over conflicting requirements of other parts of this Agreement, the  
27 Technical Provisions and Applicable Standards but only to the extent that  
28 Developer specifically identifies the conflicts to ADOT and ADOT approves such  
29 Deviations by Notice to Developer.

30 **1.2.2** Except as provided otherwise in this Section 1.1.2, in the event of any conflict,  
31 ambiguity or inconsistency between the standards, criteria, requirements, conditions,

1 procedures, specifications or other provisions of the Technical Provisions and the Applicable  
2 Standards, the Technical Provisions will prevail.

3 **1.2.3** Except as otherwise directed by ADOT, in its sole discretion, in the event of any  
4 conflict, ambiguity or inconsistency between or among two or more Contract Documents, the  
5 greater or higher requirement, standard, quality, level of service, quantity or scope prevails.

6 **1.2.4** Additional or supplemental details or requirements in a lower priority Contract  
7 Document shall be given effect except to the extent they irreconcilably conflict with  
8 requirements, provisions and practices contained in the higher priority Contract Document.

9 **1.2.5** Developer acknowledges and agrees that it had the opportunity and obligation,  
10 before submission of its Proposal, to review the terms and conditions of this Agreement and to  
11 bring to the attention of ADOT any conflicts, ambiguities or inconsistencies of which it is aware  
12 contained within this Agreement.

13 **1.2.6** ADOT's interim or final answers to the questions posed during the RFP process  
14 for this Agreement do not form part of this Agreement and are not relevant in interpreting this  
15 Agreement, except to the extent ADOT, in its sole discretion, believes this Agreement is  
16 ambiguous, in which case such interim or final answers may be used to clarify such ambiguous  
17 provisions.

18 **1.2.7** Incorporation into this Agreement of any part of the Proposal, including Exhibit  
19 2 (Developer's Proposal Commitments and Clarifications) shall not (a) limit, modify, or alter  
20 ADOT's right to review and approve any Submittal included in the Proposal, or submitted to ADOT  
21 after the Proposal (including any Project Schedule), or (b) be deemed as acceptance or approval  
22 of any part of the Proposal by ADOT.

23 **1.2.8** Developer shall not take advantage of or benefit from any apparent or actual  
24 error, conflict, ambiguity or inconsistency in this Agreement. If Developer becomes aware that  
25 any matters with respect to the Work are not sufficiently detailed, described, or explained in this  
26 Agreement, or if Developer becomes aware of any error or any conflict, ambiguity or  
27 inconsistency between or among the documents forming this Agreement, Developer shall  
28 promptly provide Notice to ADOT, including the item Developer considers should apply based on  
29 the applicable rules in this Section 1.1.2. Except as expressly stated in this Agreement, if (a) the  
30 conflict, ambiguity or inconsistency conflict or error cannot be reconciled by applying the  
31 applicable rules or (b) the Parties disagree about (i) which rule applies and/or (ii) the results of  
32 the application of such applicable rule(s), then ADOT will determine, in its good faith discretion,  
33 which of the conflicting items is to apply and provide Notice to Developer before Developer  
34 proceeds with the applicable aspect of the Work.

35 **1.2.9** Developer shall comply and require its Subcontractors to comply with all Federal  
36 Requirements, including those requirements set forth in Exhibit 4 (Federal Requirements). In the  
37 event of any conflict between any applicable Federal Requirements, including those set forth in  
38 Exhibit 4 (Federal Requirements), and the other requirements of the Contract Documents, the

1 Federal Requirements shall prevail, take precedence and be in force over and against any such  
2 conflicting provisions.

3 **1.2.10** If a conflict occurs between the terms of a Utility Agreement and those of the  
4 Contract Documents, the terms that establish the higher quality, manner or method of  
5 performing Utility Adjustment Work, establish better Good Industry Practice, or use more  
6 stringent standards, shall prevail between Developer and ADOT. If the foregoing criteria are not  
7 met by the conflicting Utility Agreement or otherwise not relevant to the terms at issue, then the  
8 Contract Documents shall prevail, unless expressly provided otherwise in the Contract  
9 Documents.

### 10 **1.3 Applicable Standards**

11 **1.3.1** References in this Agreement or the Technical Provisions to Applicable Standards  
12 governing the Work shall mean the most recent edition, revision, amendment or supplement in  
13 effect on the Setting Date.

14 **1.3.2** In interpreting Applicable Standards as well as TP Attachments 450-1, 455-1 and  
15 466-1:

- 16 (a) the interpretation provisions in this Agreement or Section GP 110.01.1.1 of the  
17 Technical Provisions shall apply;
- 18 (b) references to the “project owner,” “department” or “agency” shall mean ADOT,  
19 except where the context indicates a different department or agency;
- 20 (c) references to “District Engineer,” “Resident Engineer,” “Engineer” or “authorized  
21 representative” shall mean ADOT or its Authorized Representative, except where  
22 the context indicates a different entity or individual;
- 23 (d) references to “contractor” shall mean Developer;
- 24 (e) references to “Plan(s)” or “RFC Plans” shall mean the RFC Submittals.
- 25 (f) capitalized terms and acronyms have the respective meanings provided in the  
26 Applicable Standards or applicable TP Attachment if not defined in Exhibit 1  
27 (Abbreviated and Defined Terms);
- 28 (g) any word or combination of words that (i) is not capitalized, or is capitalized but  
29 not defined in the Applicable Standards or TP Attachment and (ii) describes an  
30 item, matter or event that is similar in substance or meaning to a term defined in  
31 Exhibit 1 (Abbreviated and Defined Terms) shall have the meaning of the defined  
32 term in Exhibit 1;
- 33 (h) provisions concerning bid prices shall have no force or effect; and



1 (i) provisions concerning payment of additional compensation, incentive payments  
2 or time extension shall have no force or effect; rather, this Agreement shall  
3 exclusively govern Developer’s rights to additional compensation, incentive  
4 payments and time extension.

5 **1.4 Errors in Technical Provisions and Applicable Standards**

6 **1.4.1** Developer acknowledges that prior to the Effective Date Developer had the  
7 opportunity to identify any Errors and potentially unsafe provisions in the Technical Provisions  
8 and Applicable Standards, and the opportunity and duty to notify ADOT of such fact and of the  
9 changes to the provisions that Developer believed were the minimum necessary to render the  
10 provisions correct and safe. Developer shall not take advantage of or benefit from any Error in  
11 the Technical Provisions or Applicable Standards that Developer knew of or, through the exercise  
12 of reasonable care, had reason to know of prior to the Effective Date.

13 **1.4.2** If it is reasonable or necessary to adopt changes to the Technical Provisions or  
14 Applicable Standards after the Effective Date to make the provisions correct and safe, such  
15 changes shall not be grounds for any adjustment to the Contract Price, adjustment of Completion  
16 Deadlines or other Claim; provided, however, that adoption of such a change shall be treated as  
17 an ADOT-Directed Change if:

18 (a) (i) Developer neither knew nor had reason to know through the exercise of  
19 reasonable care prior to the Effective Date that the provision was erroneous or  
20 created a potentially unsafe condition, or (ii) Developer knew of and reported to  
21 ADOT the erroneous or potentially unsafe provision prior to the Effective Date and  
22 ADOT did not adopt reasonable and necessary changes; and

23 (b) Adoption of such change is not treated as a Change in Law under Section 16.4.9.

24 **1.4.3** If Developer commences or continues any Work affected by such a change after  
25 the need for the change was discovered or suspected, or should have been discovered or  
26 suspected through the exercise of reasonable care, Developer shall bear any additional costs  
27 associated with redoing the Work already performed.

28 **1.4.4** If Developer identifies any Errors in the Technical Provisions or Applicable  
29 Standards (including those Reference Information Documents described in Section 1.5.4),  
30 Developer shall promptly notify ADOT of such Errors and obtain specific instructions from ADOT  
31 regarding any such Error before proceeding with the affected Work.

32 **1.4.5** If Developer determines that the Contract Documents do not detail or describe  
33 sufficiently the Work or any matter relative thereto, Developer shall request further explanation  
34 from ADOT and shall comply with any explanation thereafter provided by ADOT. The fact that  
35 the Contract Documents omit or lack details of any Work that are necessary to carry out the  
36 intent of the Contract Documents shall not relieve Developer from performing such omitted or  
37 insufficiently detailed Work (no matter how extensive). Instead, Developer shall be deemed to

1 have known or have had reason to know of such omission or lack of detail prior to the Effective  
2 Date, and shall perform such Work as if the details were fully and correctly set forth and  
3 described in the Contract Documents without entitlement to a Supplemental Agreement, except  
4 as specifically allowed under Section 16.

5 **1.4.6** Errors in the Schematic Design that require a Necessary Schematic ROW Change  
6 are governed by Sections 8.4.3(b) and 16.4.15.

7 **1.4.7** Inconsistent or conflicting provisions of the Contract Documents shall not be  
8 treated as erroneous provisions under this Section 1.4, but instead shall be governed by Section  
9 1.2.

10 **1.5 Reference Information Documents**

11 **1.5.1** ADOT has provided the Reference Information Documents to Developer for the  
12 purposes of disclosure and, in the case of general industry and general governmental manuals  
13 and publications, for guidance regarding Good Industry Practice.

14 **1.5.2** Developer acknowledges and agrees that neither ADOT nor any ADOT Person  
15 gives any warranty, representation or undertaking in respect of the Reference Information  
16 Documents, including that the Reference Information Documents:

- 17 (a) are complete, accurate or fit for purpose;
- 18 (b) contain accurate or reliable cost estimates; or
- 19 (c) represent all of the information in ADOT's possession or power, relevant or  
20 material in connection with the Project.

21 **1.5.3** Developer acknowledges and agrees that:

- 22 (a) it has, before the Effective Date, conducted its own analysis and review of the  
23 Reference Information Documents upon which it places reliance;
- 24 (b) any use or reliance on such Reference Information Documents by Developer shall  
25 be solely at its own risk;
- 26 (c) no Developer-Related Entity is entitled to make any Claim against ADOT or any  
27 ADOT Person for any liability in connection with the Reference Information  
28 Documents including on the grounds:
  - 29 (i) of any misunderstanding or misapprehension in respect of the Reference  
30 Information Documents;

- 1 (ii) of any failure to disclose or make available to any Developer-Related Entity
- 2 any information, documents or data or to review or update the Reference
- 3 Information Documents; or
  
- 4 (iii) that the Reference Information Documents are inaccurate, incomplete or
- 5 not fit for purpose; and
  
- 6 (d) the Reference Information Documents may include interpretations,
- 7 extrapolations, analyses, and recommendations about data, design solutions,
- 8 technical issues and solutions, construction and installation means and methods,
- 9 and operations and maintenance means and methods. Such interpretations,
- 10 extrapolations, analyses, and recommendations are:
  
- 11 (i) preliminary in nature and, in many cases, obsolete;
  
- 12 (ii) not intended to express the views or preferences of ADOT or any other
- 13 Governmental Entity, or represent any statement of approval or
- 14 acceptance thereof by ADOT or any other Governmental Entity; and
  
- 15 (iii) not intended to form the basis of Developer’s design solutions, technical
- 16 solutions, construction, operations or maintenance means and methods.

17 **1.5.4** Certain Reference Information Documents, or portions thereof, are specifically  
18 referenced in the Contract Documents for the purpose of defining requirements of the Contract  
19 Documents. Notwithstanding Sections 1.5.2 and 1.5.3, Reference Information Documents, or  
20 portions thereof, that are specifically referenced in the Contract Documents for the purpose of  
21 defining certain requirements shall be deemed incorporated into the Contract Documents to the  
22 extent so referenced with the same order of priority as the applicable Contract Document.

23 **1.5.5** Sections 1.5.2 and 1.5.3 shall not adversely affect the specific relief available to  
24 Developer under Section 16 for Relief Events under clauses (f), (g), (i), (j), (k), (o), (p), (s) and (t)  
25 of the definition of Relief Event.  
26

1 **SECTION 2. TERM; SURVIVAL**

2 **2.1 Term**

3 This Agreement shall take effect on the Effective Date, and shall remain in effect until the earlier  
4 to occur of: (a) the end of the O&M Period; or (b) the date that this Agreement is terminated as  
5 provided herein (the “**Term**”).

6 **2.2 Survival**

7 Notwithstanding any other provision of this Agreement, any provisions of this Agreement  
8 together with any provisions necessary to give effect to such provisions which expressly or by  
9 implication from their nature are intended to survive the Term shall survive the Term, including  
10 the following provisions:

11 **2.2.1** Section 4 (Representations, Warranties and Covenants);

12 **2.2.2** Section 8.8.7 (Developer indemnity regarding Hazardous Materials);

13 **2.2.3** Section 10.14 (Handback);

14 **2.2.4** Section 13 (Insurance; Risk of Loss; Claims Against Third Parties) and Exhibit 11  
15 (Insurance Coverage Requirements);

16 **2.2.5** Section 15 (Payment for Services);

17 **2.2.6** Section 21.2 (ADOT Remedies for Developer Default);

18 **2.2.7** Section 23 (Indemnification);

19 **2.2.8** Section 24.2 (Dispute Resolution Procedures);

20 **2.2.9** Section 25.4 (Maintenance and Inspection of Books and Records);

21 **2.2.10** Section 25.5 (Audits);

22 **2.2.11** Section 25.7 (Intellectual Property);

23 **2.2.12** Section 26.9 (Responsibilities after Notice of Termination);

24 **2.2.13** Section 26.11 (No Consequential Damages); and

25 **2.2.14** Section 27.8 (No Personal Liability of ADOT Employees; Limitation on State’s  
26 Liability).  
27



1 **3.3 Project Plans**

2 Developer shall:

3 **3.3.1** Prepare, update and submit the Project Plans to ADOT for review and approval  
4 in accordance with Section GP 110.03 of the Technical Provisions;

5 **3.3.2** Unless otherwise agreed by ADOT, and except as provided otherwise in Section  
6 1.2, perform the Work and deliver the Project in accordance with the approved Project Plans;  
7 and

8 **3.3.3** Except as provided otherwise in Section 1.2, comply at all times with the then  
9 current approved version of the Project Plans.

10 **3.4 Incorporation of ATCs**

11 **3.4.1** The Work shall include all ATCs identified in Exhibit 2-1 (Developer’s Schematic  
12 Design Including Alternative Technical Concepts).

13 **3.4.2** If this Agreement incorporates any ATCs which require Governmental Approvals,  
14 analysis, assessment, review, approvals, permits or findings before implementation, Developer  
15 shall:

16 (a) obtain all Governmental Approvals other than the NEPA Categorical Exclusion  
17 which ADOT shall be responsible for obtaining;

18 (b) except for potential extension of Completion Deadlines pursuant to clause (m) of  
19 the definition of Relief Event, be solely responsible for the cost, risk and schedule  
20 impact of any Governmental Approvals, analysis, assessment, review, approvals,  
21 permits and findings (including the risk that any approvals, permits or findings are  
22 not (or are not timely) granted, issued, approved or obtained); and

23 (c) except for potential extension of Completion Deadlines pursuant to clause (m) of  
24 the definition of Relief Event, not be entitled to any Claim against ADOT for any  
25 liability as a result of any delay or cost associated with additional Environmental  
26 Approvals, analysis, assessment, review, approvals, permits or findings related to  
27 or otherwise in connection with such ATC.

28 **3.4.3** If this Agreement includes ATCs in Exhibit 2-1 (Developer’s Schematic Design  
29 Including Alternative Technical Concepts) and Developer:

30 (a) does not comply with one or more ADOT conditions of pre-approval for the ATC ;  
31 or

32 (b) does not obtain the required Governmental Approvals, analysis, assessment,  
33 review, approvals, permits or findings for the ATC,

1 then Developer shall comply with the requirements in this Agreement that would have applied  
2 in the absence of such ATC and shall not be entitled to make a Claim in connection with such ATC.

3 **3.4.4** Developer agrees that ADOT may, in its sole discretion, deliver to Developer a  
4 Request for Change Proposal, incorporating alternative technical concepts contained in  
5 proposals submitted by unsuccessful proposers.

6 **3.5 Professional Services Licensing Requirements**

7 **3.5.1** ADOT does not intend to contract for, pay for, or receive any Professional  
8 Services that are in violation of any professional licensing or registration laws and, by execution  
9 of this Agreement, Developer acknowledges that ADOT has no such intent.

10 **3.5.2** The Parties agree that:

11 (a) Developer shall furnish the Professional Services of the Project through itself or  
12 Subcontracts with licensed/registered Professional Service firm(s) as provided in  
13 this Agreement;

14 (b) any reference to Developer’s responsibilities or obligations to “perform” the  
15 Professional Services portions of the Work shall be deemed to mean that  
16 Developer shall “furnish” the Professional Services for the Project as described in  
17 this Section 3.5; and

18 (c) the terms and provisions of this Section 3.5 shall control and supersede every  
19 other provision of this Agreement.

20 **3.6 Utility Services**

21 **3.6.1** Developer shall coordinate with ADOT and APS for provision of electrical facilities  
22 and related service required for the Project, as more particularly set forth in Section 15.5.  
23 Developer shall provide all other Utility service facilities and related Utility service (both on the  
24 Site and off the Site) required to carry out the Work or required for the Project. The Utility service  
25 facilities include those needed for power, gas, communications, water, sewage and drainage.  
26 Except as provided in Sections 3.6.2, 3.6.3 and 15.5, Developer is responsible for all costs of such  
27 Utility service facilities and related Utility service, including:

28 (a) Costs of Utility service facility design and construction (both on-Site and off-Site),  
29 Governmental Approvals, connection fees, testing, inspection, and certification;

30 (b) Utility service/usage fees and charges required to perform the Work;

31 (c) Water used to water plants in the Developer’s nursery for the Project and to water  
32 plants, including salvaged plants, throughout the landscape establishment period;  
33 and

1 (d) Costs of Utility service facilities and Utility service/usage fees and charges at any  
2 of Developer’s Temporary Work Areas.

3 **3.6.2** Following Project Substantial Completion or South Segment Substantial  
4 Completion, if applicable, Developer shall not be required to pay Utility service/usage fees and  
5 charges attributable to the South Segment. Following Project Substantial Completion, Developer  
6 shall not be required to pay electricity costs for the normal operation of (a) roadway and signage  
7 lighting within the O&M Limits, (b) ITS equipment within the O&M Limits and (c) the Flex Lanes  
8 System.

9 **3.6.3** Section 3.6.1 shall not preclude inclusion in any Compensation Amount of  
10 incremental additional costs of Utility service facilities and Utility service/usage fees and charges  
11 directly attributable to any Relief Event for which Developer is otherwise entitled to a  
12 Compensation Amount.  
13



1                   **SECTION 4.    REPRESENTATIONS, WARRANTIES AND COVENANTS**

2   **4.1    Representations and Warranties of Developer**

3   Developer represents and warrants to ADOT that:

4           **4.1.1**    Developer and its Subcontractors and their respective employees have all  
5   required authority, licenses, registrations, professional ability, skills and capacity to perform the  
6   Work in accordance with the requirements contained in the Contract Documents.

7           **4.1.2**    Based upon Developer’s Reasonable Investigation, Developer has evaluated the  
8   constraints affecting design and construction of the Project, including the limits of the Schematic  
9   ROW as well as the conditions of the NEPA Approval, and is satisfied that it is feasible to design  
10   and develop the Project within such constraints.

11          **4.1.3**    Developer has evaluated the feasibility of performing the D&C Work within the  
12   Completion Deadlines and for the D&C Price, accounting for constraints affecting the Project,  
13   including the maximum allowable payments for Work prior to issuance of NTP 2, and is satisfied  
14   that such performance (including achievement of Project Substantial Completion and Final  
15   Acceptance by the applicable Completion Deadlines for the D&C Price) is feasible and practicable.

16          **4.1.4**    Developer has evaluated the feasibility of performing the O&M Work throughout  
17   the O&M Period and for the O&M Price and is satisfied that such performance is feasible and  
18   practicable, subject to Developer’s right to seek relief for Necessary Schematic ROW Changes  
19   under Section 16.

20          **4.1.5**    Prior to the Proposal Due Date and in accordance with Good Industry Practice,  
21   Developer conducted a Reasonable Investigation and as a result of such Reasonable Investigation  
22   is familiar with and accepts the requirements of the Work, subject to Developer’s right to seek  
23   relief under Section 16.

24          **4.1.6**    Developer has familiarized itself with the requirements of any and all applicable  
25   Laws and the conditions of any required Governmental Approvals prior to entering into this  
26   Agreement. As of the Effective Date, Developer has no reason to believe that any Governmental  
27   Approval required to be obtained by Developer will not be granted in due course and thereafter  
28   remain in effect so as to enable the Work to proceed in accordance with the Contract Documents.

29          **4.1.7**    Developer is in compliance with all federal immigration laws and regulations and  
30   A.R.S. § 23-214, subsection A that relate to its employees and the employees of the  
31   Subcontractors. Developer agrees, warrants and acknowledges that a breach of this warranty  
32   shall be deemed a material breach of the Agreement that is subject to penalties and ADOT may  
33   terminate this Agreement. ADOT retains the legal right to inspect the documentation of  
34   Developer’s employees and of any Subcontractor employee who works on the Project to ensure  
35   that Developer or Subcontractor is complying with this warranty.

36          **4.1.8**    Developer has familiarized itself with the requirements of Local Jurisdictions

1 applicable to the Project and the conditions therein prior to entering into this Agreement, and  
2 will comply with all such requirements to enable the Work to proceed in accordance with the  
3 Contract Documents.

4 **4.1.9** All Work furnished by Developer will be performed by or under the supervision  
5 of Persons who hold all necessary and valid licenses to perform the Work in the State, by  
6 personnel who are careful, skilled, experienced and competent in their respective trades or  
7 professions, who are professionally qualified to perform the Work in accordance with the  
8 Contract Documents and who shall assume professional responsibility for the accuracy and  
9 completeness of the Design Documents, Construction Documents and other documents  
10 prepared or checked by them.

11 **4.1.10** As of the Effective Date, Developer is a joint venture duly formed and validly  
12 existing under the laws of the state of Delaware with all requisite power and all required licenses  
13 to carry on its present and proposed obligations under the Contract Documents and has full  
14 power, right and authority to execute and deliver the Contract Documents and the Subcontracts  
15 to which Developer is (or will be) a party and to perform each and all of the obligations of  
16 Developer provided for herein and therein.

17 **4.1.11** Developer is duly qualified to do business, and is in good standing in the State as  
18 of the Effective Date, and will remain in good standing throughout the Term and for as long  
19 thereafter as any obligations remain outstanding under the Contract Documents.

20 **4.1.12** At any time a Guaranty is required to be in place pursuant to the Contract  
21 Documents, the applicable Guarantor is duly organized, validly existing and in good standing  
22 under the laws of the state of its organization, will remain in good standing in the state of its  
23 organization for as long as any obligations guaranteed by such Guarantor remain outstanding  
24 under the Contract Documents, is not engaged in the conduct of business in the State of Arizona  
25 and therefore has not qualified to do business in the State of Arizona, and has all requisite power  
26 and all required licenses to carry on its present and proposed obligations under the Contract  
27 Documents.

28 **4.1.13** At any time a Guaranty is required to be in place pursuant to the Contract  
29 Documents, all required approvals have been obtained with respect to the execution, delivery  
30 and performance of such Guaranty, and performance of such Guaranty will not result in a breach  
31 of or a default under the applicable Guarantor's organizational documents, or any indenture,  
32 loan or credit agreement or other agreement or instrument to which the applicable Guarantor is  
33 a party or by which its properties and assets may be bound or affected.

34 **4.1.14** Each Guaranty has been duly authorized by all necessary corporate action, has  
35 been duly executed and delivered by each Guarantor, and constitutes the legal, valid and binding  
36 obligation of such Guarantor, enforceable in accordance with its terms, subject only to applicable  
37 bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors  
38 generally and the general principles of equity.

1           **4.1.15** The execution, delivery and performance of the Contract Documents and the  
2 Subcontracts to which Developer is (or will be) a party have been (or will be) duly authorized by  
3 all necessary corporate action of Developer; each person executing the Contract Documents and  
4 the Subcontracts on behalf of Developer has been (or at the time of execution will be) duly  
5 authorized to execute and deliver each such document on behalf of Developer; and the Contract  
6 Documents and the Subcontracts have been (or will be) duly executed and delivered by  
7 Developer.

8           **4.1.16** Neither the execution and delivery by Developer of the Contract Documents or  
9 the Subcontracts to which Developer is (or will be) a party, nor the consummation of the  
10 transactions contemplated hereby or thereby, is (or at the time of execution will be) in conflict  
11 with or has resulted or will result in a default under or a violation of the governing instruments  
12 or organizational documents of Developer or a breach or default under any credit agreement or  
13 other material agreement or instrument to which Developer is a party or by which its properties  
14 and assets may be bound or affected.

15           **4.1.17** Each of the Contract Documents and the Subcontracts to which Developer is (or  
16 will be) a party constitutes (or at the time of execution and delivery will constitute) the legal,  
17 valid and binding obligation of Developer, enforceable against Developer, in accordance with its  
18 terms, subject only to applicable bankruptcy, insolvency and similar laws affecting the  
19 enforceability of the rights of creditors generally and to general principles of equity.

20           **4.1.18** As of the Effective Date, there is no action, suit, proceeding, investigation or  
21 litigation pending and served, or of which Developer is otherwise aware, against Developer which  
22 challenges Developer's authority to execute, deliver or perform, or the validity or enforceability  
23 of, the Contract Documents or the Subcontracts to which Developer is a party, or which  
24 challenges the authority of any of Developer's officials that are executing the Contract  
25 Documents or the Subcontracts, and Developer has disclosed to ADOT prior to the Effective Date  
26 any pending, un-served or threatened action, suit, proceeding, investigation or litigation with  
27 respect to such matters of which Developer is aware.

28           **4.1.19** As of the Proposal Due Date, Developer disclosed to ADOT in writing all  
29 organizational conflicts of interest of Developer and its Subcontractors of which Developer was  
30 actually aware; and between the Proposal Due Date and the Effective Date, Developer has not  
31 obtained knowledge of any additional organizational conflict of interest, and there have been no  
32 organizational changes to Developer or its Subcontractors identified in its Proposal which have  
33 not been approved in writing by ADOT. For this purpose, organizational conflict of interest has  
34 the meaning set forth in the RFP.

35           **4.1.20** To the extent the Lead Contractor, Lead Engineering Firm or the Lead O&M Firm  
36 is not Developer, Developer represents and warrants, as of the effective date of the relevant  
37 Subcontract, as follows:

- 38           (a) Each of the Lead Contractor, Lead Engineering Firm and the Lead O&M Firm is duly  
39 organized, validly existing and in good standing under the laws of the state of its

1 organization and is duly qualified to do business, and is in good standing, in the  
2 State;

3 (b) The ownership interests of each of them that is a single purpose entity formed for  
4 the Project (including options, warrants and other rights to acquire ownership  
5 interests) is owned by the Persons whom Developer has set forth in a written  
6 certification delivered to ADOT prior to the Effective Date;

7 (c) Each of them has the power and authority to do all acts and things and execute  
8 and deliver all other documents as are required to be done, observed or  
9 performed by it in connection with its engagement by Developer;

10 (d) Each of them has (i) obtained and will maintain all necessary or required  
11 registrations, permits, licenses and approvals required under applicable Law and  
12 (ii) expertise, qualifications, experience, competence, skills and know-how to  
13 perform the D&C Work and O&M Work, as applicable, in accordance with the  
14 Contract Documents;

15 (e) Each of them will comply with all health, safety and environmental Laws in the  
16 performance of any work activities for, or on behalf of, Developer for the benefit  
17 of ADOT; and

18 (f) None of them is in breach of any applicable Law that would have a material  
19 adverse effect on any aspect of the Work.

## 20 **4.2 Representations and Warranties of ADOT**

21 ADOT represents and warrants to Developer that:

22 **4.2.1** ADOT has full power, right and authority to execute, deliver and perform its  
23 obligations under, in accordance with and subject to the terms and conditions of the Contract  
24 Documents to which it is a Party;

25 **4.2.2** Each Person executing on behalf of ADOT the Contract Documents to which  
26 ADOT is a Party has been or at the time of execution will be duly authorized to execute each such  
27 document on behalf of ADOT;

28 **4.2.3** The Section 404 MOA is in full force and effect as of the Effective Date, and ADOT  
29 has designated the Project as a priority federal-aid highway project under the Section 404 MOA;  
30 and

31 **4.2.4** ADOT will not revoke or cancel the Section 404 MOA or the designation of the  
32 Project as a priority federal-aid highway project under the Section 404 MOA, and absent  
33 unforeseen circumstances ADOT intends to negotiate for renewal of the Section 404 MOA prior  
34 to the expiration date stated therein.  
35

1                                   **SECTION 5.    MANAGEMENT SYSTEMS AND OVERSIGHT**

2   **5.1    Submittal, Review and Approval Terms and Procedures**

3                   **5.1.1    General**

4           This Section 5.1 sets forth uniform terms and procedures that shall govern all Submittals  
5 to ADOT pursuant to the Contract Documents or the Project Management Plan, Operations and  
6 Maintenance Management Plan and component plans thereunder. In the event of any  
7 irreconcilable conflict between the provisions of this Section 5.1 and any other provisions of the  
8 Contract Documents or the Project Management Plan, Operations and Maintenance  
9 Management Plan and component plans thereunder concerning submission, review and  
10 approval procedures, this Section 5.1 shall exclusively govern and control, except to the extent  
11 that the conflicting provision expressly states otherwise.

12                   **5.1.2    Time Periods**

13           (a)    Except as otherwise provided in this Section 5.1.2 or in Section 9.5, whenever  
14 ADOT is entitled to review, comment on or to affirmatively approve or accept, a  
15 Submittal, ADOT will have a period of ten Business Days to act after the date ADOT  
16 acknowledges receipt of an accurate and complete Submittal in conformity with  
17 the Contract Documents, together with a completed transmittal form in a form to  
18 be mutually agreed by the Parties and all necessary or requested information and  
19 documentation concerning the subject matter. If ADOT determines that a  
20 Submittal is not complete, ADOT will notify Developer of such determination  
21 within ten Business Days of the date ADOT acknowledges receipt of such  
22 Submittal. ADOT’s review period for Developer’s re-submission of a previously  
23 submitted, complete Submittal shall be ten Business Days for each such re-  
24 submission. The Parties shall agree in good faith upon any necessary extensions  
25 of the review-comment-and-approval period to accommodate particularly  
26 complex or comprehensive Submittals.

27           (b)    If any other provision of the Contract Documents expressly provides a longer or  
28 shorter period for ADOT to act, such period shall control over the time periods set  
29 forth in Section 5.1.2(a). If the time period for ADOT to act should end on a non-  
30 Business Day, the time period shall automatically be extended to the next  
31 succeeding Business Day.

32           (c)    All time periods for ADOT to act shall be extended by the period of any delay  
33 caused by any Developer Act.

34           (d)    During any time there exists a Persistent Developer Default, the applicable period  
35 for ADOT to respond to any Submittals received during such time, and not related  
36 to curing the Persistent Developer Default shall automatically be extended by 15  
37 Business Days.

1 (e) ADOT may, in its sole discretion, accommodate a written request from Developer  
2 for expedited action on a specific Submittal, within the practical limitations on  
3 availability of ADOT personnel appropriate for acting on the types of Submittal in  
4 question; provided Developer sets forth in its request specific, abnormal  
5 circumstances, not caused by a Developer-Related Entity, demonstrating the need  
6 for expedited action. This provision shall not apply, however, during any time  
7 described in Section 5.1.2(c) or 5.1.2(d). If Developer submits a request under this  
8 Section 5.1.2(e), ADOT may, in its sole discretion, implement an extension of  
9 ADOT's time to respond to other then-outstanding Submittals by up to ten  
10 Business Days per Submittal, and such extension shall not constitute an ADOT-  
11 Caused Delay, ADOT-Directed Change, Relief Event or other basis for an increase  
12 in the Contract Price, adjustment of a Completion Deadline or any other Claim.

13 **5.1.3 ADOT Discretionary Approvals**

14 (a) If a Submittal is one for which the Contract Documents state that approval or  
15 consent or acceptance is required from ADOT in its sole discretion or absolute  
16 discretion, then ADOT's lack of approval, determination, decision or other action  
17 within the applicable time period described in Section 5.1.2 shall be deemed  
18 disapproval. If approval is subject to the sole discretion or absolute discretion of  
19 ADOT, then ADOT's decision shall be final, binding and not subject to the Dispute  
20 Resolution Procedures and such decision shall not constitute an ADOT-Caused  
21 Delay, ADOT-Directed Change, Relief Event or other basis for an increase in the  
22 Contract Price, adjustment of a Completion Deadline or any other Claim.

23 (b) If a Submittal is one for which the Contract Documents state that approval or  
24 consent or acceptance is required from ADOT in its good faith discretion and ADOT  
25 delivers no approval, consent, determination, decision or other action within the  
26 applicable time period under Section 5.1.2, then Developer may deliver to ADOT  
27 a written notice stating the date within which ADOT was to have decided or acted.  
28 If ADOT does not decide or act within five Business Days after receipt of such  
29 notice, delay from and after lapse of such five Business Day period may constitute  
30 ADOT-Caused Delay for which Developer is be entitled to issue a Relief Event  
31 Notice under Section 16.1.2, and thereafter pursue relief subject to the  
32 requirements of Section 16. If the approval is subject to the good faith discretion  
33 of ADOT, then ADOT's decision shall be binding unless it is finally determined by  
34 clear and convincing evidence that such decision was arbitrary or capricious. If the  
35 decision is determined to be arbitrary and capricious and causes delay, it will  
36 constitute and be treated as an ADOT-Caused Delay.

37 **5.1.4 Other ADOT Approvals**

38 (a) Whenever the Contract Documents provide that a Submittal or other matter is  
39 subject to ADOT's approval or consent but the approval or consent is one not

1 governed by Section 5.1.3 concerning discretionary approvals, then the standard  
2 shall be reasonableness.

- 3 (b) Whenever the reasonableness standard applies and ADOT delivers no approval,  
4 consent, determination, decision or other action within the applicable time period  
5 under Section 5.1.2, then Developer may deliver to ADOT a written notice stating  
6 the date within which ADOT was to have decided or acted. If ADOT does not decide  
7 or act within five Business Days after receipt of such notice, delay from and after  
8 lapse of such five Business Day period may constitute ADOT-Caused Delay for  
9 which Developer is entitled to issue a Relief Event Notice under Section 16.1.2,  
10 and thereafter pursue relief subject to the requirements of Section 16.

### 11 **5.1.5 ADOT Review and Comment**

12 Whenever the Contract Documents provide that a Submittal or other matter is subject to  
13 ADOT's review, comment, disapproval or similar action not entailing a prior approval and ADOT  
14 delivers no comments, exceptions, objections, rejections or disapprovals within the applicable  
15 time period under Section 5.1.2, then Developer may proceed thereafter at its election and risk,  
16 without prejudice to ADOT's rights to later object or disapprove in accordance with Section  
17 5.1.7(a). No such failure or delay by ADOT in delivering comments, exceptions, objections,  
18 rejections or disapprovals within the applicable time period under Section 5.1.2 shall constitute  
19 an ADOT-Caused Delay, ADOT-Directed Change, Relief Event or other basis for an increase in the  
20 Contract Price, adjustment of a Completion Deadline or any other Claim. When used in the  
21 Contract Documents, the phrase "completion of the review and comment process", "comments  
22 have been addressed", "responded to the comments", "comments (are) (have been) resolved"  
23 or similar terminology means either (a) ADOT has reviewed, provided comments, exceptions,  
24 objections, rejections or disapprovals, and all the same have been fully resolved, or (b) the  
25 applicable time period has passed without ADOT providing any comments, exceptions,  
26 objections, rejections or disapprovals.

### 27 **5.1.6 Submittals Not Subject to Prior Review, Comment or Approval**

28 Whenever the Contract Documents provide that Developer is to deliver a Submittal to  
29 ADOT but express no requirement for ADOT review, comment, disapproval, prior approval or  
30 other ADOT action, then Developer is under no obligation to provide ADOT any period of time to  
31 review the Submittal or obtain approval of it before proceeding with further Work contained in  
32 or relating to the particular Submittal; however ADOT will have the right, but is not obligated, to  
33 at any time review, comment on, take exception to, object to, reject or disapprove the Submittal  
34 in accordance with Section 5.1.7(a). No failure or delay by ADOT in delivering comments,  
35 exceptions, objections, rejections or disapprovals with respect to the Submittal shall constitute  
36 an ADOT-Caused Delay, ADOT-Directed Change, Relief Event or other basis for an increase in the  
37 Contract Price, adjustment of a Completion Deadline or any other Claim.

1           **5.1.7    Resolution of ADOT Comments and Objections**

2           (a)    If the Submittal is not governed by Section 5.1.3, then ADOT’s exception,  
3           objection, rejection or disapproval shall be deemed reasonable, valid and binding  
4           if based on any of the following grounds or other grounds set forth elsewhere in  
5           the Contract Documents:

6                   (i)    The Submittal or a component thereof fails to comply, or is inconsistent,  
7                   with the Contract Documents or any Project Plan;

8                   (ii)   The Submittal or subject component thereof does not comply with the  
9                   standards of Good Industry Practice;

10                  (iii)   Developer has not provided all content or information required or  
11                  reasonably requested in respect of the Submittal or a component thereof;

12                  (iv)   Adoption of the Submittal or a component thereof, or of any proposed  
13                  course of action thereunder, would result in a conflict with or violation of  
14                  any Law or Governmental Approval; or

15                  (v)    In the case of a Submittal that is to be delivered to a Governmental Entity  
16                  as a proposed Governmental Approval, or to obtain, modify, amend,  
17                  supplement, renew, extend, waive or carry out a Governmental Approval,  
18                  it proposes commitments, requirements, actions, terms or conditions that  
19                  are (i) inconsistent with the Contract Documents, any Project Plan,  
20                  applicable Law, the requirements of Good Industry Practice, or ADOT  
21                  practices for public-private contracting, or (ii) not usual and customary  
22                  arrangements that ADOT offers or accepts for addressing similar  
23                  circumstances affecting its projects.

24           (b)    Developer shall respond in writing to all of ADOT’s comments, exceptions,  
25           disapprovals and objections to a Submittal and, except as provided below, make  
26           modifications to the Submittal as necessary to fully reflect and resolve all such  
27           comments, exceptions, disapprovals and objections, in accordance with the  
28           review processes set forth in this Section 5.1 and Section GP 110.10 in the  
29           Technical Provisions. However, if the Submittal is not governed by Section 5.1.3,  
30           the foregoing shall in no way be deemed to obligate Developer to incorporate any  
31           comments or resolve exceptions, disapprovals or objections that: (a) are not on  
32           any of the grounds set forth in Section 5.1.7(a) (and not on any other grounds set  
33           forth elsewhere in the Contract Documents); and (b) would result in a delay to the  
34           Critical Path on the Project Schedule, in Extra Work Costs or in Delay Costs, except  
35           pursuant to an ADOT-Directed Change. If Developer does not resolve any  
36           comment, exception, disapproval or objection, Developer shall deliver to ADOT  
37           within 15 days after receipt of ADOT’s comments, exceptions, disapprovals or  
38           objections, a written explanation why modifications based on such comment,



1 exception, disapproval or objection are not required.

2 (c) If Developer fails to notify ADOT within the time period set forth in Section  
3 5.1.7(b), in addition to constituting a Noncompliance Event as set forth in Exhibit  
4 14 (Noncompliance Event Tables), ADOT may deliver to Developer a written notice  
5 stating the date by which Developer was to have addressed ADOT's comments. If  
6 Developer does not address those comments within five Business Days after  
7 receipt of such notice, then Developer's failure shall constitute Developer's  
8 agreement to make all changes necessary to accommodate and resolve the  
9 comment or objection at issue and full acceptance of all responsibility for such  
10 changes without right to an ADOT-Caused Delay, Supplemental Agreement, Relief  
11 Event or other basis for an increase in the Contract Price, adjustment of a  
12 Completion Deadline or any other Claim.

13 (d) After ADOT receives Developer's explanation as to why the modifications are not  
14 required as provided in Sections 5.1.7(b) and (c) and Section GP 110.10 of the  
15 Technical Provisions, if ADOT disagrees with Developer's explanation, the Parties  
16 shall attempt in good faith to informally resolve the dispute. If the Parties are  
17 unable to informally resolve the dispute within 15 days of receipt of Developer's  
18 explanation, and the Submittal is not one governed by Section 5.1.3(a), the  
19 dispute shall be resolved according to the Dispute Resolution Procedures;  
20 provided, however, that if ADOT elects to issue a Directive Letter pursuant to  
21 Section 17.3 with respect to the matter in dispute, Developer shall proceed in  
22 accordance with such Directive Letter while retaining any Claim as to the matter  
23 in dispute.

#### 24 **5.1.8 Limitations on Developer's Right to Rely**

25 (a) No review, comment, objection, rejection, approval, disapproval, acceptance,  
26 concurrence, certification (including certificates of South Segment Substantial  
27 Completion, Project Substantial Completion and Final Acceptance), or Oversight  
28 by or on behalf of ADOT, including review and approval of the Project  
29 Management Plan and Operations and Maintenance Management Plan, and no  
30 lack thereof by ADOT, shall constitute acceptance by ADOT of materials or Work  
31 or waiver of any legal or equitable right under the Contract Documents, at Law, or  
32 in equity. ADOT will be entitled to complete and accurate Submittals, to remedies  
33 for unapproved Deviations, Nonconforming Work and Developer Defaults, and to  
34 identify and require additional Work to bring the Work and Project into  
35 compliance with requirements of the Contract Documents, regardless of whether  
36 previous review, comment, objection, rejection, approval, disapproval,  
37 acceptance, concurrence, certification or Oversight were conducted or provided  
38 by ADOT. Without regard to any such activity or failure to conduct any such activity  
39 by ADOT, Developer at all times shall have an independent duty and obligation to  
40 fulfill the requirements of the Contract Documents. Developer agrees and

- 1 acknowledges that any such activity or failure to conduct any such activity by  
2 ADOT:
- 3 (i) Is solely for the benefit and protection of ADOT;
  - 4 (ii) Does not relieve Developer of its responsibility for the selection of, and the  
5 competent performance by, all Developer-Related Entities performing any  
6 Work;
  - 7 (iii) Does not create or impose upon ADOT any duty, standard of care or  
8 obligation toward Developer to cause it to fulfill the requirements of the  
9 Contract Documents or toward any other Person, all of which are hereby  
10 expressly disclaimed;
  - 11 (iv) Shall not be deemed or construed as any form of warranty, express or  
12 implied, by ADOT;
  - 13 (v) May not be relied upon by Developer or used as evidence in determining  
14 whether Developer has fulfilled the requirements of the Contract  
15 Documents;
  - 16 (vi) Shall not be deemed or construed as any assumption of risk by ADOT as to  
17 design, construction, operations, maintenance, performance or quality of  
18 Work or materials; and
  - 19 (vii) May not be asserted by Developer against ADOT as a defense, legal or  
20 equitable, to, or as a waiver of or relief from, Developer's obligation to  
21 fulfill the requirements of the Contract Documents.
- 22 (b) Developer shall not be relieved or entitled to reduction of its obligations to  
23 perform the Work in accordance with the Contract Documents, or any of its other  
24 liabilities and obligations, including its indemnity obligations, as the result of any  
25 activity identified in Section 5.1.8(a) or failure to conduct any such activity by  
26 ADOT. Such activity or failure to conduct such activity by ADOT will not relieve  
27 Developer from liability for, and responsibility to cure and correct, without the  
28 right to an increase in the Contract Price, a Completion Deadline adjustment or  
29 any other Claim, any unapproved Deviations, Nonconforming Work or Developer  
30 Defaults.
- 31 (c) To the maximum extent permitted by Law, Developer hereby releases and  
32 discharges ADOT from any and all duty and obligation to cause Developer's Work,  
33 Submittals or the Project to comply with the Applicable Standards and other  
34 requirements of the Contract Documents.
- 35 (d) Notwithstanding the provisions of this Section 5.1.8:

- 1 (i) Developer shall be entitled to rely on written approvals and acceptances  
2 from ADOT (A) for the limited purpose of establishing that ADOT’s approval  
3 or acceptance occurred, or (B) that are within ADOT’s sole discretion or  
4 absolute discretion, but only to the extent that Developer is prejudiced by  
5 a subsequent decision of ADOT to rescind such approval or acceptance;
- 6 (ii) Developer shall be entitled to rely on specific written Deviations ADOT  
7 approves under Section 8.2.5 or 10.5, subject to any conditions therein;
- 8 (iii) Developer shall be entitled to rely on the certificates of South Segment  
9 Substantial Completion, Project Substantial Completion and Final  
10 Acceptance from ADOT for the limited purpose of establishing that South  
11 Segment Substantial Completion, Project Substantial Completion and Final  
12 Acceptance, as applicable, have occurred, and the respective dates  
13 thereof, without prejudice to any rights and remedies available to ADOT in  
14 relation to unapproved Deviations, Nonconforming Work and Developer  
15 Defaults; and
- 16 (iv) ADOT is not relieved from any liability arising out of a knowing and  
17 intentional material misrepresentation under any written statement ADOT  
18 delivers to Developer in relation to the Submittals.

## 19 **5.2 Role of General Engineering Consultant and ADOT Consultants**

20 The General Engineering Consultant will assist ADOT in the management and oversight of the  
21 Project, including administration of the Contract Documents. ADOT may retain other consultants  
22 to provide services to ADOT relating to the Project. Developer shall cooperate with the General  
23 Engineering Consultant and other ADOT consultants, to the same extent Developer shall  
24 cooperate with ADOT, in the exercise of their respective duties and responsibilities in connection  
25 with the Project.

## 26 **5.3 Role of and Cooperation with FHWA**

27 Developer acknowledges and agrees that FHWA will have certain approval rights with respect to  
28 the Project (including rights to approve the Project design and certain Supplemental  
29 Agreements), as well as the right to provide certain oversight and technical services with respect  
30 to the Project. Developer shall cooperate with FHWA in the reasonable exercise of FHWA’s duties  
31 and responsibilities in connection with the Project.

## 32 **5.4 Project Management Plan**

33 **5.4.1** Developer is responsible for all quality assurance and quality control activities  
34 necessary to manage the Professional Services as well as certain public involvement activities of  
35 Developer as specified in Section CR 425 of the Technical Provisions. Developer is responsible  
36 for all quality control activities necessary to manage all other Work, including the Utility

1 Adjustment Work. Developer shall undertake all aspects of its quality assurance and quality  
2 control activities in accordance with the Technical Provisions, Project Management Plan, Quality  
3 Management Plan, Good Industry Practice and applicable Law.

4 **5.4.2** Developer shall develop the Project Management Plan and its component parts,  
5 plans and other documentation in accordance with the requirements set forth in Section GP  
6 110.04 of the Technical Provisions and Good Industry Practice. The Project Management Plan  
7 shall include all the parts, component plans and other documentation identified in Table 110-6  
8 of Section GP 110.04 of the Technical Provisions.

9 **5.4.3** Developer shall ensure that the Project Management Plan meets all  
10 requirements of Good Industry Practice, including those for quality assurance (for Professional  
11 Services) and quality control, and all FHWA oversight requirements (if any). Developer  
12 acknowledges that FHWA has designated the Project as a “Project of Division Interest” under 23  
13 USC § 106, which requires submission and approval of a project management plan and annual  
14 updates thereto, as provided in 23 USC § 106, and that the Project Management Plan and the  
15 annual updates thereto required under the Contract Documents are intended to fulfill these  
16 requirements.

17 **5.4.4** Developer shall submit to ADOT, in accordance with the procedures described in  
18 Section 5.1 and the timeline set forth in Table 110-7 of Section GP 110.04 of the Technical  
19 Provisions, each component part, plan and other documentation of the Project Management  
20 Plan and any proposed changes or additions to or revisions of any such component part, plan or  
21 other documentation. The same shall be subject to ADOT’s approval, review and comment, or  
22 other disposition as set forth in Table 110-7 of Section GP 110.04 of the Technical Provisions. To  
23 the extent there are any components of the Project Management Plan that are subject to ADOT’s  
24 reasonable approval, Section 5.1.4 shall apply in determining whether ADOT’s objection,  
25 rejection or disapproval was reasonable.

26 **5.4.5** Developer shall not commence or permit the commencement of any aspect of  
27 the Project’s construction, operation or maintenance before the relevant component parts, plans  
28 and other documentation of the Project Management Plan applicable to such Work have been  
29 submitted to and approved by ADOT in accordance with the procedures described in Section 5.1  
30 and the applicable timelines set forth in Table 110-7 of Section GP 110.04 of the Technical  
31 Provisions. The applicable schedule for submitting each component part, plan and other  
32 documentation of the Project Management Plan is set forth in the corresponding section of the  
33 Technical Provisions describing the requirements for each such component part, plan and other  
34 documentation.

35 **5.4.6** If any part, plan or other documentation of the Project Management Plan refers  
36 to, relies on or incorporates any manual, plan, procedure or like document, then all such  
37 referenced or incorporated materials shall be submitted to ADOT for approval at the time that

1 the relevant part, plan or other documentation of the Project Management Plan or change,  
2 addition or revision to the Project Management Plan is submitted to ADOT.

3 **5.4.7** Developer shall carry out internal audits of Developer’s compliance with the  
4 Project Management Plan in accordance with the Project Management Plan. The Project  
5 Management Plan shall specify the extent of such audits and the frequency with which such  
6 audits will occur, which shall be subject to ADOT’s approval in its good faith discretion. Developer  
7 shall bear the sole responsibility for keeping all documents and materials evidencing its  
8 compliance with, and adherence to, the Project Management Plan.

9 **5.4.8** Developer shall cause each of its Subcontractors at every level to comply with  
10 the applicable requirements of the approved Project Management Plan.

11 **5.4.9** Developer shall ensure the Quality Manager has the authority from Developer  
12 to (a) establish and maintain the Project Management Plan, and (b) report to ADOT on the  
13 performance of the Project Management Plan, and (c) stop Work. The Quality Manager shall have  
14 authority independent of the Project Manager and at least equivalent in level of authority to that  
15 of the Project Manager. The Quality Manager shall have direct reporting obligations to superiors  
16 that are above the level of the Project Manager.

17 **5.4.10** Developer shall ensure that Professional Services Quality Manager (a) has  
18 authority independent of the Project Manager, (b) has direct reporting responsibility to the  
19 Quality Manager, (c) is collocated with the designer and engineers performing the Design Work  
20 whenever design activities are being performed, including design activities related to field design  
21 changes, and (d) has the authority to stop Work.

22 **5.4.11** Developer shall ensure that the Construction Quality Manager (a) has authority  
23 independent of the Project Manager, (b) has direct reporting responsibility to the Quality  
24 Manager, (c) is present on Site whenever Construction Work is being performed, and (d) has the  
25 authority to stop Work.

26 **5.4.12** Developer shall ensure the O&M Manager has the authority from Developer to  
27 (a) establish and maintain the Operations and Maintenance Quality Management Plan, (b) report  
28 to ADOT on the performance of the Project Management Plan during the O&M Period, and (c)  
29 stop or suspend O&M Work. Developer shall ensure that the O&M Manager, as part of his or her  
30 functions, regularly reviews a sample of O&M Work and related work processes to verify that  
31 Developer is in compliance with the Contract Documents and Project Management Plan during  
32 the O&M Period.

33 **5.4.13** The Project Management Plan, including the Professional Services Quality  
34 Management Plan and Construction Quality Management Plan, shall be consistent with  
35 Sections 5.4.9, 5.4.10 and 5.4.11. Refer to Sections GP 110.08.2 and GP 110.08.3 of the Technical  
36 Provisions for additional terms and conditions applicable to the Quality Manager, Professional  
37 Services Quality Manager, Construction Quality Manager, and Developer’s other quality  
38 management personnel.

1 **5.5 Traffic Management**

2 **5.5.1 Developer’s Obligation During D&C Period**

3 Commencing with NTP 2 and continuing until the end of the D&C Period, Developer shall  
4 be responsible for the management of traffic on the Project or impacted by the Work. Developer  
5 shall carry out such traffic management on the Project in accordance with applicable Technical  
6 Provisions, Laws, Governmental Approvals and the Transportation Management Plan and  
7 updates thereto, if any.

8 **5.5.2 Transportation Management Plan**

9 Developer shall prepare the Transportation Management Plan in accordance with Section  
10 DR 462.2.3 of the Technical Provisions. In accordance with Section 9.4.1, preparation of the initial  
11 Transportation Management Plan and resolution of all ADOT comments thereon shall be a  
12 condition precedent to issuance of NTP 2.

13 **5.5.3 ADOT’s Rights**

14 Notwithstanding the foregoing, ADOT will have at all times, and without obligation or  
15 liability to Developer, the right to provide traffic management and operations on the Project,  
16 including via dynamic message signs or other means, traveler and driver information, and other  
17 public information (e.g., AMBER alerts).]

18 **5.6 Oversight, Inspection and Testing**

19 **5.6.1** ADOT will have the right at all times to conduct Oversight to: (a) comply with  
20 FHWA or other applicable federal agency requirements; and (b) verify Developer’s compliance  
21 with the Contract Documents, Project Management Plan and any applicable Law. ADOT may  
22 designate any Person or Persons, including its consultants and independent auditors, to carry out  
23 any Oversight on ADOT’s behalf. ADOT will conduct Oversight in accordance with Developer’s  
24 safety procedures and manuals, and in a manner that does not unreasonably interfere with  
25 normal Project construction activity or normal Project operation and maintenance activity. The  
26 foregoing shall not be construed to limit ADOT’s Oversight or prevent ADOT from conducting any  
27 Oversight that ADOT, in its sole discretion, deems necessary.

28 **5.6.2** ADOT’s Oversight rights shall include the following:

- 29 (a) Monitoring and auditing Developer, Developer-Related Entities and their Books  
30 and Records as more particularly set forth in Sections 25.4 and 25.5;
- 31 (b) Conducting periodic reviews of Project documentation and files;
- 32 (c) Conducting material tests, according to ADOT’s test methods, to verify:
  - 33 (i) Developer’s compliance with all testing frequencies and requirements,

- 1 including performance and acceptance testing, set forth in the Contract  
2 Documents and the approved Project Management Plan;
- 3 (ii) the accuracy of the tests, inspections and audits performed by or on behalf  
4 of Developer pursuant to the Professional Services Quality Management  
5 Plan and Construction Quality Management Plan; and
- 6 (iii) compliance of materials incorporated into the Project with the Applicable  
7 Standards and other applicable requirements, standards and conditions of  
8 the Contract Documents, Governmental Approvals, the Project  
9 Management Plan and Law;
- 10 (d) Reviewing and commenting on, and giving recommendations, objections or  
11 exceptions, regarding Submittals;
- 12 (e) Reviewing records and conducting interviews as necessary to verify compliance  
13 with federal, State, and local laws and regulations;
- 14 (f) Participating in meetings described in Section 5.10 to discuss design progress,  
15 construction progress, Developer’s quality assurance and control processes, audit  
16 activities, and other Project Management Plan issues;
- 17 (g) Conducting its own surveillance and inspections, including the Inspections related  
18 to Handback, assessing Developer’s records of inspections, O&M Work and  
19 Project conditions, and assessing the condition of Elements;
- 20 (h) Attending and witnessing Developer’s other tests and inspections, including  
21 system start-up and acceptance tests and inspections of the equipment and the  
22 Flex Lanes System;
- 23 (i) Reviewing Developer’s certification of Record Drawings and surveys and As-Built  
24 Schedule;
- 25 (j) Auditing and monitoring the activities described in the Project Plans to assess  
26 Developer’s compliance with the Project Plans; and
- 27 (k) Investigating and confirming Developer’s compliance with the Safety  
28 Management Plan and Operations and Maintenance Safety Management Plan.

29 **5.6.3** ADOT has the right, in its sole discretion, to conduct formal reviews of every  
30 Design Document and Construction Document. ADOT will have the right to conduct “over-the-  
31 shoulder” reviews of Design Documents and other Submittals in accordance with Section GP  
32 110.10 of the Technical Provisions. However, no “over-the-shoulder” review by or on behalf of  
33 ADOT shall constitute acceptance by ADOT of materials or Work or waiver of any legal or  
34 equitable right under the Contract Documents, at Law, or in equity. Whether or not over-the-  
35 shoulder reviews are conducted, Developer at all times shall have an independent duty and

1 obligation to fulfill the requirements of the Contract Documents.

2           **5.6.4** Nothing in the Contract Documents shall preclude, and Developer shall not  
3 interfere with, any review, surveillance, inspection or oversight of Submittals, Work or the Project  
4 that ADOT desires to conduct, or that the FHWA or any regulatory agency with jurisdiction may  
5 desire to conduct.

## 6 **5.7 Rights of Cooperation and Access**

7           **5.7.1** Developer at all times shall coordinate and cooperate, and require its  
8 Subcontractors and Developer-Related Entities to coordinate and cooperate, with ADOT, its  
9 Authorized Representative and its designees to facilitate ADOT Oversight activities. Developer  
10 shall cause its representatives to be available during normal business hours and at all other  
11 reasonable times for consultation with ADOT and its designees.

12           **5.7.2** Without limiting the foregoing, ADOT, its Authorized Representative and its  
13 designees shall have the right to, and Developer shall afford them:

- 14           (a) safe and unrestricted access to the Project at all times;
- 15           (b) safe access during normal business hours to Developer’s Project offices and  
16 operations buildings and those of its Subcontractors;
- 17           (c) safe access during normal business hours to Developer’s Temporary Work Areas;  
18 and
- 19           (d) unrestricted access to data respecting the Project design, Project ROW acquisition,  
20 construction, operations and maintenance, and the Utility Adjustment Work.

## 21 **5.8 Testing and Test Results**

22 ADOT, its Authorized Representative and its designees shall have the right to attend and witness  
23 any tests and verifications to be conducted pursuant to the Technical Provisions and applicable  
24 component plans of the Project Management Plan. Developer shall provide to ADOT all test  
25 results and reports (which may be provided in electronic format in accordance with the Technical  
26 Provisions) within the applicable time period set forth in the Technical Provisions.

## 27 **5.9 Interpretive Engineering Decisions**

28           **5.9.1** Developer may apply in writing to ADOT for approval of an interpretive  
29 engineering decision concerning the meaning, scope, interpretation and application of the  
30 Technical Provisions (an “**Interpretive Engineering Decision**”). If, however, meaning, scope,  
31 interpretation or application of the Technical Provisions is uncertain because of irreconcilable  
32 conflict, ambiguity or inconsistency among the Contract Documents or provisions within other  
33 Contract Documents, then this Section 5.9 shall not apply and, instead, the provisions of Section  
34 1.1.2 shall apply. ADOT may approve or disapprove of Developer's proposed Interpretive



1 Engineering Decision or issue its own Interpretive Engineering Decision. No document, including  
2 any field directive, shall be valid, effective or enforceable as an Interpretive Engineering Decision  
3 unless expressly identified as an “Interpretive Engineering Decision” and signed by ADOT’s design  
4 manager, construction manager or project manager for the Project.

5 **5.9.2** Within ten Business Days after Developer applies for an Interpretive Engineering  
6 Decision, or such other time period as ADOT and Developer may agree to at the time of such  
7 application, ADOT will provide its written determination including explanation of any disapproval  
8 of such application or any differing interpretation. If ADOT does not respond within such time  
9 period, the request shall be deemed disapproved. If Developer disputes ADOT’s disposition of  
10 the application, such dispute shall be subject to resolution in accordance with the Dispute  
11 Resolution Procedures.

12 **5.9.3** Accepted Interpretive Engineering Decisions shall constitute provisions of the  
13 Technical Provisions and shall not constitute an ADOT-Directed Change or entitle Developer to  
14 an increase in the Contract Price, adjustment of a Completion Deadline or other Claim or Relief  
15 Event. Subsequent ADOT written orders and directives that are issued in accordance with this  
16 Agreement but are contrary to the Interpretive Engineering Decision shall constitute an ADOT-  
17 Directed Change.

18 **5.10 Meetings**

19 **5.10.1** Developer shall conduct or participate in various Project meetings with ADOT  
20 during the D&C Period and O&M Period, in accordance with Section GP 110.02 of the Technical  
21 Provisions. In addition, each Party shall conduct or participate in any other meeting set forth in  
22 other sections of the Technical Provisions or other Contract Document. At ADOT’s request,  
23 Developer shall require the Lead O&M Firm, other Subcontractors and engineers of record to  
24 attend any such meetings.

25 **5.10.2** Developer shall conduct regular progress meetings with ADOT at least once each  
26 month (or as otherwise mutually agreed by ADOT and Developer) during the course of the D&C  
27 Work.

28 **5.10.3** Developer shall conduct regular DBE/OJT meetings with the Compliance  
29 Oversight Committee at least once each month during the design and construction, as more  
30 particularly set forth in Section 13.02 of Exhibit 6 (ADOT’s DBE Special Provisions) and Section 8.0  
31 of Exhibit 7 (ADOT’s OJT Special Provisions).

32 **5.10.4** Further, ADOT and Developer, through their respective Authorized  
33 Representatives, shall meet from time to time at the other Party’s request to discuss and resolve  
34 matters relating to the Design Work, Construction Work, O&M Work or the Project in general.

35 **5.10.5** Developer shall provide at least five Business Day advance notice to ADOT prior  
36 to meeting with any Utility Company or any Governmental Entity, and ADOT shall have the right  
37 to participate in such meetings.

1           **5.10.6** For all meetings that ADOT will attend, Developer shall conduct the meetings at  
2 the collocated office or ADOT field office, unless otherwise authorized by ADOT, and shall  
3 schedule the meetings on dates and at times reasonably convenient to both Parties. Except in  
4 the case of urgency, Developer shall provide ADOT with written notice and a meeting agenda as  
5 set forth in Section GP 110.02 of the Technical Provisions.

6           **5.10.7** ADOT will have the right to include representatives of FHWA or other  
7 Governmental Entities in any ADOT meetings with Developer or Subcontractors. Such  
8 representatives shall have the right to participate in such meetings and to raise questions,  
9 concerns and opinions without restriction; provided, however, that such representatives shall  
10 not have the right to direct or control such meetings, and Developer shall take direction (if any)  
11 only from ADOT regarding performance of the Work.

## 12 **5.11 Software Compatibility**

13           **5.11.1** Unless otherwise specifically stated in the Contract Documents, all software that  
14 Developer uses for any aspect of the Project shall be compatible with software used by ADOT,  
15 including the software requirements specified in the Technical Provisions. Prior to using any  
16 software or version of software not then in use by ADOT or compatible with software then in use  
17 by ADOT, Developer must obtain approval from ADOT. In addition, Developer shall provide to  
18 ADOT staff, at Developer's cost, working electronic copies of the software, any necessary licenses  
19 for ADOT's use of the software required under Section 25.7.3(a), and any training reasonably  
20 necessary to ensure that ADOT is able to use the same or compatible software as Developer.

21           **5.11.2** Developer shall submit all documents, correspondence and Submittals to ADOT  
22 through ADOT's project management information system.  
23

1                   **SECTION 6.    PROJECT PLANNING, GOVERNMENTAL APPROVALS;**  
2                   **ENVIRONMENTAL COMPLIANCE; PUBLIC INFORMATION**

3   **6.1    Planning and Engineering Activities**

4           **6.1.1**    Developer, through the qualified and licensed design professionals identified in  
5 the Project Management Plan, shall perform or cause to be performed all Professional Services  
6 necessary to develop the Project and the Utility Adjustments included in the D&C Work in  
7 accordance with the Contract Documents and Good Industry Practice.

8           **6.1.2**    Before commencing any Work on any portion or aspect of the Project, Developer  
9 shall:

- 10           (a)    verify all governing dimensions of the Site;
- 11           (b)    examine and account for all existing and future highways, streets and roads,  
12 including upgrades and expansions thereof, that are or will be adjacent to,  
13 connecting with or crossing under or over the Project; and
- 14           (c)    examine and account for any project, work, improvement or development that (i)  
15 is planned, under construction or developed, (ii) is located on property contiguous  
16 with the Project and (iii) could or does impact the Project or such Work.

17           **6.1.3**    Developer shall ensure that any Design Documents and Construction Documents  
18 furnished as part of the Work accurately depict all governing and adjoining dimensions.

19   **6.2    Site Conditions**

20           **6.2.1**    Developer shall bear the risk of any incorrect or incomplete review, examination  
21 and investigation by Developer of the Site and surrounding locations (even if Developer  
22 conducted a Reasonable Investigation), and of any incorrect or incomplete information resulting  
23 from preliminary engineering activities conducted by Developer, ADOT or any other Person.

24           **6.2.2**    The provisions of this Section 6.2 do not apply to, and shall not adversely affect,  
25 the specific relief available to Developer under Section 16 for Relief Events under clauses (f), (g),  
26 (i), (j), (k), (p), (s) and (t) of the definition of Relief Event.

27   **6.3    Governmental Approvals**

28           **6.3.1**    ADOT obtained for the Project the NEPA Approval, based on the Schematic  
29 Design. Developer acknowledges it received and is familiar with the NEPA Approval and  
30 supporting documentation, as contained in the Reference Information Documents.

31           **6.3.2**    Developer hereby assumes responsibility for obtaining, and shall obtain:

- 32           (a)    All Environmental Approvals, other than the NEPA Approval, required in

1 connection with Developer's Schematic Design or Final Design, the Project, the  
2 Project ROW, the Developer-Designated ROW, the Work or a Relief Event;

3 (b) All reevaluations, amendments and supplements of the NEPA Approval required  
4 in connection with Developer's Schematic Design or Final Design, the Project, the  
5 Project ROW, the Developer-Designated ROW, the Work or a Relief Event; and

6 (c) All other Governmental Approvals required in connection with Developer's  
7 Schematic Design or Final Design, the Project, the Project ROW, Developer-  
8 Designated ROW or the Work.

9 **6.3.3** Developer shall deliver to ADOT true and complete copies of all new or amended  
10 Governmental Approvals, including reevaluations, amendments and supplements of the NEPA  
11 Approval.

12 **6.3.4** Prior to submitting to a Governmental Entity any Governmental Approval  
13 Package, Developer shall submit the same to ADOT for appropriate action, if any, in accordance  
14 with Section DR 420.2.6 of the Technical Provisions. ADOT assumes no duty, obligation or liability  
15 regarding completeness or correctness of any Governmental Approval Package, regardless of  
16 ADOT's approval, review and comment, or lack thereof.

17 **6.3.5** Developer shall be responsible for all necessary actions, and Developer shall bear  
18 all risk of delay and all risk of increased cost, attributable to, resulting from or arising out of: (1)  
19 any differences between Developer's Final Design for any portion of the Project and the  
20 Schematic Design or Developer's Schematic Design, including differences due to any Alternative  
21 Technical Concepts set forth in Exhibit 2-1 (Developer's Schematic Design Including Alternative  
22 Technical Concepts), but excluding any differences due to an ADOT-Directed Change; or (2)  
23 differences between the construction means and methods (including temporary works)  
24 Developer chooses for any portion of the Project and those set forth, referred to or contemplated  
25 in the NEPA Approval, excluding any differences due to an ADOT-Directed Change. Such actions  
26 and risks that Developer assumes shall include:

27 (a) Any associated with change in the Project location due to Developer's design;

28 (b) Conducting all necessary environmental studies and re-evaluations and preparing  
29 all necessary environmental documents in compliance with applicable  
30 Environmental Laws;

31 (c) Obtaining and complying with all necessary new Governmental Approvals subject,  
32 however to potential extension of Completion Deadlines pursuant to clause (m)  
33 of the definition of Relief Event;

34 (d) Obtaining and complying with all necessary modifications, renewals and  
35 extensions of the NEPA Approval or other existing Governmental Approvals,  
36 subject, however to potential extension of Completion Deadlines pursuant to

1                    clause (m) of the definition of Relief Event; and

2                    (e)      All risk and cost of litigation by Persons other than ADOT.

3                    **6.3.6**      If Developer is unable to obtain any of the items described in Sections 6.3.5(c) or  
4 6.3.5(d), then Developer shall be obligated to design and construct the Project based on the  
5 Schematic Design (with changes as necessary to comply with the Technical Provisions) and the  
6 construction means and methods (including temporary works) set forth, referred to or  
7 contemplated in the NEPA Approval, or such other design, means and methods for which  
8 Developer is able to obtain Governmental Approvals and that comply with the Contract  
9 Documents. None of the foregoing circumstances described in this Section 6.3.6 shall:

10                  (a)      constitute an ADOT-Caused Delay or ADOT-Directed Change, Relief Event or other  
11 basis for an increase in the Contract Price, adjustment of a Completion Deadline  
12 or any other Claim; or

13                  (b)      result in any representation or warranty by ADOT as to the feasibility, accuracy or  
14 completeness of, or absence of errors in, the Schematic Design.

15                  **6.3.7**      Developer shall first comply with, and obtain any consent or waiver required  
16 pursuant to, then-existing agreements between ADOT and other Governmental Entities if  
17 Developer pursues:

18                  (a)      Developer-Designated ROW;

19                  (b)      Temporary Construction Easements or Developer’s Temporary Work Areas other  
20 than those ADOT will provide as set forth in Section DR 470 of the Technical  
21 Provisions;

22                  (c)      Replacement Utility Property Interests; or

23                  (d)      any other modification of or Deviation from any Governmental Approvals,  
24 including the NEPA Approval.

25                  **6.3.8**      At Developer’s request and subject to this Section 6.3.8, ADOT will reasonably  
26 assist and cooperate with Developer in obtaining the Governmental Approvals (including any  
27 modifications, renewals and extensions of existing Governmental Approvals) that Developer is  
28 required to obtain under the Contract Documents. ADOT’s obligation to assist and cooperate  
29 shall not require ADOT to:

30                  (a)      Take a position which it believes to be inconsistent with the Contract Documents,  
31 the Project Management Plan (and component plans thereunder), applicable Law,  
32 Governmental Approval(s), the requirements of Good Industry Practice, or ADOT  
33 practices for public-private partnership contracting;

34                  (b)      Take a position that is not usual and customary for ADOT to take in addressing

1 similar circumstances affecting its own projects (except if usual and customary for  
2 ADOT regarding its projects delivered via public-private partnership contracting);  
3 or

- 4 (c) Refrain from concurring with a position taken by a Governmental Entity if ADOT  
5 believes that position to be correct.

6 **6.3.9** Litigation involving Environmental Approvals shall be subject to the following  
7 provisions.

- 8 (a) In the event any pending Environmental Approval is denied, then (a) the Parties  
9 shall promptly confer to analyze the circumstances and determine what further  
10 action to take, and (b) either Party may elect to appeal such denial and to bring  
11 legal action challenging the denial. If either Party elects, or both Parties elect, to  
12 appeal and bring legal action, then the Parties shall reasonably assist and  
13 cooperate with one another, each at its own expense, in the conduct of such  
14 appeal and legal action. The Parties may mutually choose, but are not obligated,  
15 to be jointly represented by legal counsel or to enter into a joint prosecution  
16 agreement in such appeal and legal action.

- 17 (b) In the event any administrative proceeding, litigation or other legal action is or has  
18 been brought by a third party challenging the issuance of an Environmental  
19 Approval for the Project, excluding the NEPA Approval, the Parties shall actively  
20 assist and cooperate with one another, each at its own expense, to defend their  
21 interests and the subject Environmental Approval and to settle such  
22 administrative proceeding, litigation or other legal action. The Parties may  
23 mutually choose, but are not obligated, to be jointly represented by legal counsel  
24 or to enter into a joint defense agreement in such administrative proceeding,  
25 litigation or other legal action.

- 26 (c) In the event a third party brings or has brought any administrative proceeding,  
27 litigation or other legal action challenging the issuance of the NEPA Approval,  
28 Developer shall, at the request of ADOT, reasonably and actively assist and  
29 cooperate with ADOT to defend ADOT's interest and the NEPA Approval.  
30 Developer's assistance and cooperation shall be at ADOT's expense unless the  
31 administrative proceeding, litigation or other legal action is based, in whole or in  
32 part, on Developer's design, but only to the extent Developer's design differs from  
33 the Schematic Design.

34 **6.3.10** Certain Governmental Entities may require that Governmental Approvals be  
35 applied for or issued in ADOT's name, or that ADOT directly coordinate with such Governmental  
36 Entities in connection with obtaining the Governmental Approvals. In such event, Developer at  
37 its expense shall provide all necessary support and efforts to prepare the Governmental Approval  
38 Package and apply for and obtain the Governmental Approvals in ADOT's name. Such support  
39 shall include conducting necessary field investigations, preparing mitigation analyses and studies

1 and plans, preparing surveys, and preparing any required reports, applications and other  
2 documents in form approved by ADOT. Such support also may include joint coordination and  
3 joint discussions and attendance at meetings with the applicable Governmental Entity. Refer to  
4 Section DR 420.2.6.2 of the Technical Provisions for more specific provisions on applications for  
5 Environmental Approvals filed in ADOT’s name.

6 **6.3.11** Developer shall be solely responsible for compliance with all applicable Laws in  
7 relation to Developer’s Temporary Work Areas and for obtaining any Environmental Approval or  
8 other Governmental Approval required in connection with Developer’s Temporary Work Areas.

9 **6.3.12** The Contract Price includes, and Developer shall be solely responsible for paying,  
10 all application fees, in-lieu mitigation fees and other charges incident to obtaining Governmental  
11 Approvals, including ASLD charges incident to removing earthen material from ASLD lands as  
12 described in Section CR 417.3.4 of the Technical Provisions. If any such fees or charges are  
13 imposed on ADOT, ADOT will have the right to debit its payment against the D&C Price or O&M  
14 Price, as applicable.

15 **6.4 Environmental Compliance**

16 **6.4.1** Except as provided otherwise in Section 6.4.2, ADOT delegates to Developer, and  
17 Developer accepts, all ADOT obligations, commitments and responsibilities under all  
18 Environmental Approvals. Except as provided otherwise in Section 6.4.2, Developer shall, at its  
19 sole cost and expense:

- 20 (a) Comply with all Environmental Laws;
- 21 (b) Comply with all conditions and requirements imposed by all Environmental  
22 Approvals;
- 23 (c) Perform all commitments and mitigation measures set forth in all Environmental  
24 Approvals; and
- 25 (d) Undertake all actions required by, or necessary to maintain in full force and effect,  
26 all Environmental Approvals.

1           **6.4.2** ADOT retains sole responsibility for payment and performance of the  
2 environmental obligations, commitments and responsibilities expressly identified as not  
3 delegated to Developer in the Project Environmental Commitment Requirements.

4           **6.4.3** Developer shall perform or cause to be performed all environmental mitigation  
5 measures required under the Contract Documents.

6           **6.4.4** Developer shall comply with the provisions, requirements and obligations  
7 regarding environmental compliance set forth in Sections DR 420 and CR 420 of the Technical  
8 Provisions.

9           **6.4.5** Developer expressly acknowledges that the Project Environmental Commitment  
10 Requirements may not contain an exhaustive or accurate list of all environmental obligations,  
11 commitments and responsibilities that apply to the Project. ADOT does not warrant or represent  
12 the completeness or accuracy of the Project Environmental Commitment Requirements, which  
13 are made available to Developer as a convenience to assist Developer in preparing the  
14 Environmental Management Plan. Developer is solely responsible for the completeness and  
15 accuracy of the Environmental Management Plan, including the correction of any errors or  
16 omissions in Attachment 420-1 of the Technical Provisions. Neither incompleteness nor  
17 inaccuracy of the Project Environmental Commitment Requirements shall alter or limit the scope  
18 of Developer's environmental compliance obligations as set forth in the Contract Documents or  
19 entitle Developer to an increase in the Contract Price, a Completion Deadline adjustment or any  
20 other Claim.

## 21 **6.5 Community Outreach and Public Information**

22 Developer's obligations regarding public outreach, stakeholder communications and  
23 construction relations are set forth in Section CR 425 of the Technical Provisions.  
24



1       **SECTION 7.     RIGHT OF WAY ACQUISITION; ACCESS TO PROJECT RIGHT OF WAY; UTILITY**  
2                   **ADJUSTMENTS; RELATED FACILITIES AND WORK; USE OF ADOT PROPERTY**

3       **7.1     Project ROW Acquisition**

4       ADOT shall acquire all Project ROW in accordance with Section DR 470 of the Technical Provisions.  
5       Developer shall assist ADOT with ROW acquisition to the extent necessary for ADOT to acquire  
6       the Project ROW.

7       **7.2     Temporary Construction Easements and Developer-Designated ROW**

8           **7.2.1    Temporary Construction Easements**

9           (a)     Within 30 days following ADOT’s issuance of NTP 1, Developer shall submit to  
10           ADOT an initial request for any additional property outside the Schematic ROW  
11           for which Developer seeks Temporary Construction Easements (“**Additional TCE**  
12           **Property**”); provided that ADOT hereby approves acquisition of Additional TCE  
13           Property that is contiguous to the Schematic ROW, owned by the BLM and not  
14           within any boundary of the Agua Fria National Monument. For all other requests,  
15           ADOT shall respond to Developer’s request for Temporary Construction  
16           Easements on Additional TCE Property within 30 days following ADOT’s receipt of  
17           such request from Developer.

18           (b)     ADOT shall acquire Temporary Construction Easements over all Additional TCE  
19           Property that is requested by Developer and approved by ADOT. ADOT’s response  
20           to be provided under Section 7.2.1(a) shall identify the Additional TCE Property  
21           over which it agrees to acquire Temporary Construction Easements for Developer,  
22           the conditions to use thereof, and the cost of acquisition for which Developer is  
23           responsible, if any.

24           (c)     Developer shall be responsible for the costs described in Section 7.2.5 that ADOT  
25           incurs to acquire Temporary Construction Easements over Additional TCE  
26           Property.

27           (d)     Grounds for ADOT to reject Developer’s request to acquire Temporary  
28           Construction Easements over Additional TCE Property not pre-approved under  
29           Section 7.2.1(a) include:

30                   (i)     The acquisition would require changes to the environmental documents,  
31                   including the NEPA Approvals, such as the need for a supplemental  
32                   environmental assessment;

33                   (ii)    The acquisition would require a public hearing regarding environmental  
34                   impacts;

- 1 (iii) The Additional TCE Property contains or could affect Known Cultural  
2 Resource Sites or other archeological, paleontological or cultural  
3 resources; or
- 4 (iv) Successful timely completion of the acquisition is not likely.
- 5 (e) Following the initial 30-day period to request TCEs set forth in Section 7.2.1(a),  
6 Developer may thereafter request that ADOT obtain TCEs over further Additional  
7 TCE Property as needed. Such request for TCEs over further Additional TCE  
8 Property shall be subject to the provisions of this Section 7.2.1.

9 **7.2.2 Developer-Designated ROW**

10 ADOT shall acquire all Developer-Designated ROW subject to the following terms and  
11 conditions:

- 12 (a) Acquisition of Developer-Designated ROW shall be subject to ADOT’s prior written  
13 approval, provided that ADOT hereby approves acquisition of Developer-  
14 Designated ROW that (i) is contiguous to the Schematic ROW, owned by the BLM  
15 and not within any boundary of the Agua Fria National Monument or (ii) is  
16 identified in an ADOT-approved ATC.
- 17 (b) Grounds for ADOT to disapprove shall consist of those described in Section  
18 7.2.1(d)(i) through (iv).
- 19 (c) Developer shall be responsible for the costs of Developer-Designated ROW,  
20 including the costs of ADOT’s acquisition of Developer-Designated ROW, in  
21 accordance with Section 7.2.5.

22 **7.2.3 Developer’s Temporary Work Areas**

- 23 (a) Developer shall acquire, or cause to be acquired, all of Developer’s Temporary  
24 Work Areas in its own name. Developer shall comply with all applicable  
25 Governmental Approvals and Laws in acquiring, maintaining or disposing of any of  
26 Developer’s Temporary Work Areas.
- 27 (b) ADOT will not exercise its power of eminent domain in connection with  
28 Developer's acquisition of any such property right or interest for Developer’s  
29 Temporary Work Areas.
- 30 (c) Developer shall be responsible for and shall pay directly all costs and expenses in  
31 connection with acquiring, renting, using, maintaining, insuring, and disposing of  
32 Developer’s Temporary Work Areas. Developer shall not be entitled to an increase  
33 in the Contract Price, adjustment of a Completion Deadline or any other Claim due  
34 to such costs and expenses. ADOT will have no obligations or liabilities with  
35 respect to the acquisition, maintenance or disposition of Developer’s Temporary

1 Work Areas, including no liability for unexpected costs or delay that Developer  
2 experiences relating to its acquisition of or inability to acquire Developer's  
3 Temporary Work Areas. No such delay shall constitute an ADOT-Caused Delay or  
4 other Relief Event, or otherwise entitle Developer to an increase in the Contract  
5 Price, adjustment of a Completion Deadline or other Claim.

6 (d) Developer shall have no obligation to submit information to ADOT concerning, or  
7 obtain ADOT's approval of Developer's acquisition of, any property right or  
8 interest for Developer's Temporary Work Areas.

9 (e) Developer shall cause the lease, license or other agreement by which Developer  
10 acquires a property right or interest in a Developer's Temporary Work Area to  
11 contain the granting party's express acknowledgment that ADOT shall have no  
12 liability with respect thereto. Developer shall promptly deliver a copy of such  
13 documentation to ADOT.

14 **7.2.4 Replacement Utility Property Interests**

15 ADOT will acquire ROW necessary for Replacement Utility Property Interests, subject to  
16 the following terms and conditions:

17 (a) Both Developer and the Utility Company shall provide evidence reasonably  
18 satisfactory to ADOT that:

19 (i) acquisition of the subject Replacement Utility Property Interest is  
20 necessary because it is not physically possible, including through  
21 commercially reasonable design modifications, to perform the subject  
22 Utility Adjustment within the Schematic ROW or to use Protection in Place;  
23 and

24 (ii) the Utility Company either lacks the power to acquire the Replacement  
25 Utility Property Interest or has been unsuccessful in negotiating the  
26 acquisition.

27 (b) Except in circumstances where Developer is entitled to compensation under  
28 Section 16.4.4(b), Developer shall be responsible for the costs of Replacement  
29 Utility Property Interests, including the costs of ADOT's acquisition of  
30 Replacement Utility Property Interests, in accordance with Section 7.2.5.

31 (c) ADOT's acquisition of Replacement Utility Property Interests shall not relieve  
32 Developer of its sole responsibility for satisfactory compliance with its obligations  
33 respecting Utility Adjustment Work and timely completion thereof.

34 (d) ADOT will not be obligated to take title to the Replacement Utility Property  
35 Interest unless otherwise required by Law in connection with ADOT's exercise of  
36 its power to acquire. If ADOT is obligated by Law to take title, then it will do so on

1 the condition that the Utility Company concurrently accepts conveyance of title  
2 from ADOT to the Utility Company, without warranty or representation and with  
3 the Utility Company’s written indemnification against any third-party liability that  
4 may arise out of ADOT’s status as title holder.

5 (e) Except in circumstances where Developer is entitled to relief under Section  
6 16.4.4(b), ADOT will have no risk or liability whatsoever due to delay in its  
7 completing acquisition of any Replacement Utility Property Interest, and no such  
8 delay shall constitute an ADOT-Caused Delay or other Relief Event, or otherwise  
9 entitle Developer to an increase in the Contract Price, adjustment of a Completion  
10 Deadline or other Claim.

11 **7.2.5 Costs of ADOT Right-of-Way Acquisition**

12 (a) Developer shall be responsible for all costs and expenses that ADOT incurs to  
13 acquire Developer-Designated ROW, Temporary Construction Easements over  
14 Additional TCE Property, and Replacement Utility Property Interests, excluding  
15 ADOT’s internal costs of administration and management and fees of the Arizona  
16 Attorney General or private attorneys for the State involved in the purchases or  
17 acquisitions. Such costs and expenses include:

18 (i) The purchase or acquisition prices, severance damages (including cost-to-  
19 cure damages) and court awards or judgments for all Developer-  
20 Designated ROW, Temporary Construction Easements over Additional TCE  
21 Property, and Replacement Utility Property Interests;

22 (ii) The cost of permitting;

23 (iii) Fees and costs of appraisers and other experts;

24 (iv) Fees and costs to prepare or produce materials, transcripts, photos,  
25 exhibits and other documentation;

26 (v) Closing costs associated with purchases or acquisitions, in accordance with  
27 the Uniform Act and ADOT policies, including title insurance premiums;

28 (vi) Relocation assistance payments and costs, in accordance with the Uniform  
29 Act;

30 (vii) Property management expenses, including demolition and clearance  
31 costs;

32 (viii) Costs of Hazardous Materials Management;

33 (ix) Title insurance premiums;

- 1 (x) Any uneconomic remnants resulting from the acquisition of Developer-  
2 Designated ROW; and
- 3 (xi) any and all other out-of-pocket costs (excluding attorneys' fees) incurred  
4 by ADOT in connection with the acquisition of Developer-Designated ROW,  
5 Temporary Construction Easements over Additional TCE Property, and  
6 Replacement Utility Property Interests.
- 7 (b) Developer shall not be entitled to an increase in the Contract Price, adjustment of  
8 a Completion Deadline or any other Claim due to such costs and expenses.
- 9 (c) If ADOT incurs any such costs and expenses on Developer's behalf, ADOT may  
10 deduct the amount of such costs and expenses from progress payments and/or  
11 Monthly O&M Payments to Developer until ADOT is fully reimbursed.
- 12 (d) At Developer's request, which shall be no more frequent than once a month,  
13 ADOT shall provide periodic updates on estimated acquisition costs described in  
14 Section 7.2.5(a).

15 **7.2.6** Developer shall not be entitled to any increase in the Contract Price (except to  
16 the extent provided otherwise in Section 16.4.4(b) regarding compensation for certain  
17 Replacement Utility Property Interests), a Completion Deadline adjustment (except to the extent  
18 provided otherwise in Sections 16.4.19 and 16.6.4 regarding Completion Deadline adjustment)  
19 or any other Claim, as a result of Site conditions (including those relating to Hazardous Materials,  
20 Differing Site Conditions or Utilities) associated with any Temporary Construction Easements,  
21 Developer-Designated ROW, Developer's Temporary Work Areas or Replacement Utility Property  
22 Interests.

23 **7.3 Access to Project ROW**

24 **7.3.1** ADOT will notify Developer of the availability of Project ROW within five Business  
25 Days after the later of the date ADOT issues NTP 1 or the date ADOT obtains possession of such  
26 Project ROW. Developer shall be responsible for being informed of and complying with any access  
27 restrictions that may be set forth in any documents granting possession of any Project ROW.

28 **7.3.2** Upon obtaining knowledge of any anticipated delay in the dates for acquisition  
29 of any Project ROW, ADOT shall promptly notify Developer in writing. In such event, Developer  
30 shall immediately determine whether the delay impacts the Critical Path and, if so, to what extent  
31 it might be possible to avoid such delay through re-sequencing, reallocation or other alternative  
32 construction methods or otherwise (which, in the case of a Relief Event, shall be subject to  
33 Section 16.9.3). Developer shall promptly meet with ADOT to determine the best course of action  
34 and prepare a written report setting forth its recommendations, which recommendations shall  
35 be subject to ADOT's written approval.

36 **7.3.3** Where Developer makes a written request for access or a temporary entry

1 agreement for any Project ROW for which access has not yet been acquired, ADOT will consider  
2 in good faith whether to negotiate (in accordance with applicable Law, including the Uniform Act)  
3 with property owners or occupants for early access or temporary use of land. At ADOT's request,  
4 Developer shall assist ADOT with such negotiations, without additional charge to ADOT. All  
5 temporary entry agreements must be approved by, and are subject to the approval of, FHWA.

## 6 **7.4 Utility Adjustments**

### 7 **7.4.1 Developer's Responsibility**

- 8 (a) Developer shall coordinate and cause to be completed all Utility Adjustments  
9 necessary to accommodate timely construction, operation, maintenance and use  
10 of the Project, as located under the Final Design.
- 11 (b) Except as otherwise provided in Section 16, Developer shall cause all Utility  
12 Adjustment Work, whether performed by Developer or a Utility Company, to  
13 proceed and be completed in accordance with the Project Schedule, in  
14 coordination with the Work, and in compliance with the Contract Documents.

### 15 **7.4.2 Utility Agreements**

- 16 (a) In performing the Utility Adjustments, Developer shall comply with Section DR 430  
17 of the Technical Provisions.
- 18 (b) Subject to Sections 7.4.2(f) and (g), for all Utility Adjustments, Developer is  
19 responsible for preparing, negotiating, and entering into instruction-specific,  
20 construction-detailed Utility Agreements with all Utility Companies, regardless of  
21 whether the Utility Companies are identified in the Technical Provisions or  
22 Reference Information Documents. The general procedures, framework and  
23 forms for preparing the Utility Agreements and processing Utility issues shall  
24 follow the standard practices, procedures and forms of the respective Utility  
25 Companies for such Utility Agreements, subject to:
- 26 (i) The requirement that the Utility Agreement comply with Section DR  
27 430.2.4.2 of the Technical Provisions; and
- 28 (ii) Developer's right to negotiate with Utility Companies for variations from  
29 standard terms, provided the variations comply with Section DR 430.2.4.2  
30 of the Technical Provisions.
- 31 (c) ADOT agrees to cooperate, at its own cost, as reasonably requested by Developer  
32 in pursuing Utility Agreements, including attendance at negotiation sessions and  
33 review of Utility Agreements. Developer shall keep ADOT informed of the status  
34 of any such negotiations and shall deliver to ADOT, within ten days after  
35 execution, a true and complete original of each Utility Agreement entered into by  
36 Developer.

- 1 (d) Except as provided in Section 7.4.2(e), ADOT shall not be a party to Utility  
2 Agreements to which Developer is a party, and Developer shall cause each Utility  
3 Agreement to expressly provide that ADOT will have no liability under the Utility  
4 Agreement unless and until ADOT receives a written assignment of the  
5 Developer's interests in the Utility Agreement and assumes in writing Developer's  
6 obligations thereunder; provided, however, that Developer shall cause the Utility  
7 Agreements to designate ADOT as an intended third-party beneficiary thereof and  
8 to permit assignment of Developer's right, title, and interest thereunder to ADOT  
9 without necessity for Utility Company consent. Developer shall not enter into any  
10 agreement with a Utility Company that purports to bind ADOT in any way.
- 11 (e) If a Utility Company has proper Prior Rights Documentation in connection with a  
12 Utility Adjustment or otherwise claims that it has Prior Rights Documentation  
13 concerning real property affected by a Utility Adjustment, then Developer shall  
14 follow the process set forth in Sections DR 430.2.4.1 and DR 430.3.4 of the  
15 Technical Provisions. If it is determined that the Utility Company has Prior Rights  
16 Documentation in connection with a Utility Adjustment, then at Developer's  
17 request ADOT will join with Developer as a party to the corresponding Utility  
18 Agreement, but for the sole purpose of indicating ADOT's consent thereto and  
19 agreement to the terms and conditions in the Utility Agreement respecting such  
20 prior rights.
- 21 (f) If Developer has prepared and negotiated an instruction-specific, construction-  
22 detailed Utility Agreement with a Utility Company and such Utility Company  
23 refuses to enter into the Utility Agreement with Developer but is willing to enter  
24 into the Utility Agreement with ADOT, ADOT will enter into the Utility Agreement  
25 directly with the Utility Company and delegate its obligations to Developer, in  
26 which case Developer shall accept such delegation and assume such obligations.
- 27 (g) If a Utility Company is unwilling to negotiate a Utility Agreement with Developer  
28 but is willing to do so with ADOT, then ADOT will use reasonable efforts to enter  
29 into a reasonably acceptable form of Utility Agreement and delegate its  
30 obligations thereunder to Developer, in which case Developer shall accept such  
31 delegation and assume such obligations. Developer acknowledges and agrees that  
32 a Utility Agreement substantially similar to a form of Utility Agreement typically  
33 used by ADOT and the Utility Company on other ADOT projects shall be deemed  
34 acceptable for the purpose of Developer's assumption of such delegated  
35 obligations.
- 36 (h) Developer shall be solely responsible for the terms and conditions of all Utility  
37 Agreements into which it enters or for which it assumes obligations. Developer  
38 shall comply with and timely perform all obligations imposed on Developer by any  
39 Utility Agreement to which it is a party or which it assumes.

- 1 (i) Developer shall ensure that the Utility Adjustment Work is completed in  
2 accordance with the Contract Documents, regardless of the nature or provisions  
3 of the Utility Agreements and regardless of whether Developer or its  
4 Subcontractors, or the Utility Company or its contractors, performs the Utility  
5 Adjustment Work.

### 6 **7.4.3 Requirements**

7 Each Utility Adjustment (whether performed by Developer or by the Utility Company)  
8 shall comply with the Adjustment Standards, including applicable Changes in Adjustment  
9 Standards. If there is no Utility Memorandum of Understanding that provides terms or conditions  
10 to limit a Utility Company's Changes in Adjustment Standards, then Developer shall be solely  
11 responsible for negotiating any such terms and conditions in the corresponding Utility  
12 Agreement. In addition, all Utility Adjustment Work shall comply with all applicable Laws, the  
13 applicable Utility Agreement(s), and all other requirements specified in Sections DR 430.2, DR  
14 430.3 and CR 430.3 of the Technical Provisions.

### 15 **7.4.4 Utility Adjustment Risk**

- 16 (a) Except with respect to Developer's rights to claim a Relief Event for Utility  
17 Company Delays pursuant to Section 16.4.3, for Inaccurate Utility Information  
18 pursuant to Section 16.4.4, or for certain Changes in Adjustment Standards  
19 pursuant to clause (l) of the definition of Relief Event, Developer shall not be  
20 entitled to an increase in the Contract Price, a Completion Deadline adjustment or  
21 any other Claim or Relief Event in connection with the Utility Adjustment Work,  
22 inaccuracy of the Utility Information or Utilities located within or outside the  
23 Project ROW or otherwise impacted by, or having an impact on, the Project or the  
24 Work.

- 25 (b) Developer shall:

26 (i) perform at its own cost (subject to payments out of the Contract Price) the  
27 Utility Adjustment Work itself, if permitted by the Utility Company (except  
28 that any assistance provided by any Developer-Related Entity to the Utility  
29 Company in the acquisition of Replacement Utility Property Interests shall  
30 be provided outside of the Work); or

31 (ii) reimburse (out of the Contract Price or otherwise) the Utility Company for  
32 its Utility Adjustment Work within the time and in the manner required by  
33 the applicable Utility Agreement.

34 However, Developer has no obligation to reimburse a Utility Company for Utility  
35 Adjustment costs for any Service Line Adjustment for which the affected property  
36 owner has been compensated in connection with Project ROW acquisition.



- 1 (c) Developer is solely responsible for collecting directly from the Utility Company any  
2 reimbursement due to Developer for Betterment costs or other costs incurred by  
3 Developer for which the Utility Company is responsible under applicable Law.
- 4 (d) For each Utility Adjustment, the eligibility of Utility Company costs (both indirect  
5 and direct) for reimbursement by Developer, as well as the determination of any  
6 Betterment or other costs due to Developer, shall be established in accordance  
7 with applicable Law and the applicable Utility Agreement(s).
- 8 (e) Developer shall reimburse (out of the Contract Price or otherwise) costs incurred  
9 by Utility Companies and billed to either ADOT or Developer for monitoring  
10 Developer's blasting activities (including test blasts).
- 11 (f) For each Utility Adjustment, Developer shall compensate the Utility Company for  
12 each Existing Utility Property Interest relinquished, to the extent ADOT would be  
13 required to do so by applicable Law or to the extent required by the applicable  
14 Utility Agreement and provided that ADOT has approved the Utility Company's  
15 claim for compensation. Developer is advised that in some cases reimbursement  
16 of the Utility Company's acquisition costs for a Replacement Utility Property  
17 Interest will satisfy this requirement.
- 18 (g) ADOT may declare a Developer Default under Section 21.1.1(h) if Developer  
19 breaches any covenant in this Section 7.4.4 respecting reimbursement of Utility  
20 Company costs.
- 21 (h) If for any reason Developer is unable to collect any amounts due to Developer  
22 from any Utility Company, then:
- 23 (i) ADOT will have no liability for such amounts;
- 24 (ii) Developer shall have no right to collect such amounts from ADOT or to  
25 offset such amounts against amounts otherwise owing from Developer to  
26 ADOT; and
- 27 (iii) Developer shall have no right to stop Work or to exercise any other  
28 remedies against ADOT on account of such failure to pay.
- 29 (i) If any Local Jurisdiction is participating in any portion of Utility Adjustment costs,  
30 Developer shall coordinate with ADOT and such Local Jurisdiction regarding  
31 accounting for and approval of those costs.
- 32 (j) Developer shall maintain a complete set of records for the costs of each Utility  
33 Adjustment (whether incurred by Developer or by the Utility Company), in a  
34 format compatible with the estimate attached to the applicable Utility Agreement  
35 and in detail sufficient to permit an audit. Developer shall obtain from the Utility  
36 Company a complete set of records of the Utility Company's costs incurred for

1 such Utility Adjustment Work. For both Utility Company costs and Developer  
2 costs, the totals for each cost category shall be shown in such manner as to permit  
3 comparison with the categories stated on the estimate. Developer also shall  
4 indicate in these records the source of funds used for each Utility Adjustment. All  
5 records with respect to Utility Adjustment Work shall comply with the record  
6 keeping and audit requirements of the Contract Documents and applicable Law,  
7 including 23 C.F.R. Part 645, Subpart A.

8 **7.4.5 FHWA Utility Requirements**

9 (a) Unless ADOT advises Developer otherwise:

10 (i) The Project will be subject to 23 C.F.R. Part 645 Subpart A (including its  
11 requirements as to plans, specifications, estimates, charges, tracking of  
12 costs, credits, billings, records retention, and audit) and FHWA's associated  
13 policies;

14 (ii) Utility Agreements for Utilities shall incorporate by reference 23 C.F.R Part  
15 645 Subparts A and B and assign the obligations arising thereunder;

16 (iii) Developer shall comply (and shall require the Utility Companies to comply)  
17 with 23 C.F.R Part 645 Subparts A and B as necessary for any Utility  
18 Adjustment costs to be eligible for reimbursement from any federal  
19 financing or funding; and

20 (iv) Each Utility Agreement shall include the requirement for the Utility  
21 Company to meet the Buy America requirements (as specified in 23 U.S.C  
22 313, 23 C.F.R § 635.410 and Exhibit 2-7 (Buy America Certification)), except  
23 to the extent such requirements establish an exemption for the particular  
24 Utility Adjustment. Each such Utility Agreement shall require a definitive  
25 statement to be provided by Developer, the Utility Company or contractor  
26 performing any relocation work about the origin of all products  
27 permanently incorporated into the Project and covered under the Buy  
28 America requirements.

29 (b) Developer acknowledges, however, that Developer will not have any share in any  
30 reimbursement from FHWA or other federal financing or funding that ADOT may  
31 receive on account of Utility Adjustments.

32 **7.4.6 Betterments and Utility Company Projects**

33 (a) Developer shall address any requests by Utility Companies that Developer design  
34 or construct Betterments or Utility Company Projects. Developer may, but is not  
35 obligated to, design and construct Betterments or Utility Company Projects. Any  
36 Betterment performed as part of a Utility Adjustment, whether by Developer or

1 by the Utility Company, shall be subject to the same standards and requirements  
2 as Utility Adjustments included in the Work, and shall be addressed in the  
3 appropriate Utility Agreement. Developer shall perform any work on a Utility  
4 Company Project only by separate contract outside of the Work, and such work  
5 shall be subject to Section 7.4.10.

6 (b) Under no circumstances shall Developer proceed with any Betterment or Utility  
7 Company Project that is incompatible with the Project in its final configuration or  
8 is not in compliance with applicable Law, the Governmental Approvals or the  
9 Contract Documents, including the Completion Deadlines. Developer shall be  
10 liable to ADOT for any Betterments or Utility Company Projects that Developer  
11 undertakes and that adversely affect the Project.

12 (c) Under no circumstances will Developer be entitled to an increase in the Contract  
13 Price, a Completion Deadline adjustment or any other Claim in connection with  
14 any Betterment or Utility Company Project, whether performed by Developer or  
15 by the Utility Company.

16 **7.4.7 Failure of Utility Companies to Cooperate**

17 (a) Developer shall use diligent efforts to obtain the cooperation of each Utility  
18 Company as necessary for Utility Adjustments. Developer shall notify ADOT  
19 immediately if Developer becomes aware of any failure or refusal of a Utility  
20 Company to cooperate that, if it continues, could ripen into a Utility Company  
21 Delay, including if:

22 (i) Developer is unable (or anticipates that it will be unable), after diligent  
23 efforts, to reach agreement with a Utility Company on a necessary Utility  
24 Agreement within a reasonable time;

25 (ii) Developer reasonably believes for any other reason that any Utility  
26 Company will not undertake or permit a Utility Adjustment in a manner  
27 consistent with the timely completion of the Project or in accordance with  
28 Law, the Governmental Approvals or the Contract Documents;

29 (iii) Developer becomes aware that any Utility Company is not cooperating in  
30 a timely manner to provide agreed-upon or necessary work, reviews or  
31 approvals; or

32 (iv) Any other dispute arises between Developer and a Utility Company with  
33 respect to the Project, despite Developer's diligent efforts to obtain such  
34 Utility Company's cooperation or otherwise resolve such dispute.

35 (b) Developer's notice may include a request that ADOT assist in resolving the dispute  
36 or in otherwise obtaining the Utility Company's timely cooperation. Developer

1 shall provide ADOT with such information as ADOT requests regarding the Utility  
2 Company's failure to cooperate and the effect of any resulting delay on the Project  
3 Schedule. After delivering to ADOT any notice or request for assistance, Developer  
4 shall continue to use diligent efforts to pursue the Utility Company's cooperation.

5 (c) If Developer requests ADOT's assistance pursuant to Section 7.4.7(b), then, the  
6 following provisions shall apply:

7 (i) Developer shall provide evidence reasonably satisfactory to ADOT that: (A)  
8 the subject Utility Adjustment is necessary; (B) the time for completion of  
9 the Utility Adjustment in the Project Schedule was, in its inception, a  
10 reasonable amount of time for completion of such work, including  
11 scheduling sufficient time for Utility Company reviews of Developer's  
12 design submittals; (C) Developer has made diligent efforts to obtain the  
13 Utility Company's cooperation; and (D) the Utility Company is not  
14 cooperating as evidenced by any circumstance described in Section  
15 7.4.7(a).

16 (ii) Following ADOT's receipt of satisfactory evidence, ADOT will take  
17 reasonable measures to assist Developer in obtaining the cooperation of  
18 the Utility Company or resolving the dispute; provided, however, that  
19 ADOT will have no obligation to prosecute eminent domain or other legal  
20 proceedings, or to exercise any other remedy available to it under  
21 applicable Law or existing contract, unless ADOT elects to do so in its sole  
22 discretion.

23 (iii) If ADOT holds contractual or property rights that might be used to enforce  
24 the Utility Company's obligation to cooperate, and if ADOT elects in its  
25 good faith discretion not to exercise those rights, and if such rights are  
26 assignable, then ADOT may assign those rights to Developer upon  
27 Developer's request; provided, however, that such assignment shall be  
28 without any representation or warranty as to the enforceability or  
29 effectiveness of such rights.

30 (iv) Any assistance ADOT provides shall not relieve Developer of its sole  
31 responsibility for satisfactory compliance with its obligations respecting  
32 Utility Adjustment Work and timely completion thereof, except as  
33 otherwise expressly set forth herein.

34 (d) If ADOT objects in writing to a request for assistance made pursuant to Section  
35 7.4.7(b) based on Developer's failure to satisfy the conditions to assistance  
36 described in Section 7.4.7(a), then Developer shall take such action as is  
37 appropriate to satisfy the condition(s) and shall then have the right to submit  
38 another request for assistance on the same subject matter. If ADOT objects in  
39 writing to a request for assistance made pursuant to Section 7.4.7(b) based on

1 Developer's failure to satisfy the conditions to assistance described in Section  
2 7.4.7(c)(i), then Developer shall take such action as Developer deems advisable  
3 during the ten days following receipt of ADOT's objection to obtain the Utility  
4 Company's cooperation and shall then have the right to submit another request  
5 for assistance on the same subject matter. Notwithstanding the foregoing, no  
6 resubmittal will be accepted unless all of ADOT's objections have been addressed  
7 in accordance with the preceding two sentences. This process shall be followed  
8 until Developer succeeds in obtaining the Utility Company's cooperation or in  
9 otherwise resolving the dispute or until ADOT determines, based on evidence  
10 Developer presents, that the conditions to assistance have been satisfied.  
11 Developer shall have the right to submit a dispute concerning the reasonableness  
12 of ADOT's determination for resolution under the Dispute Resolution Procedures.

13 (e) In certain cases where a Utility Company is not cooperating with Developer or  
14 ADOT, ADOT may, in its sole discretion and where applicable Law authorizes ADOT  
15 to take unilateral action, issue a Directive Letter directing Developer to proceed  
16 with a Utility Adjustment without a Utility Agreement or other written consent by  
17 the Utility Company. If ADOT directs Developer to perform work pursuant to this  
18 Section 7.4.7(e), then Developer, without the right to an increase in the Contract  
19 Price, adjustment of a Completion Deadline or any other Claim, shall proceed with  
20 such work as if Developer has entered into a Utility Agreement providing for  
21 Developer to perform such work, and shall perform such work in accordance with  
22 applicable Adjustment Standards and the requirements of the Contract  
23 Documents otherwise applicable to Developer's performance of Utility  
24 Adjustment Work.

25 **7.4.8 Protection of ADOT Broadband Initiative for I-17 Facilities**

26 (a) Notwithstanding any contrary provision of the Contract Documents, Developer  
27 shall undertake Protection in Place of the facilities of the ADOT Broadband  
28 Initiative for I-17 within the Site and shall have no right to undertake any other  
29 method of Utility Adjustment or Betterment respecting such facilities.

30 (b) Protection in Place of such facilities shall include compliance with Section DR  
31 430.3.2 of the Technical Provisions.

32 (c) If any Developer-Related Entity cuts, damages or destroys any conduit, fiber or  
33 other component of the ADOT Broadband Initiative for I-17 within the Site, then:

34 (i) Developer shall immediately notify ADOT of the event;

35 (ii) Developer shall not undertake to perform repairs;

36 (iii) Developer shall fully cooperate with any third party or parties assigned to  
37 effect repairs, including providing such third party or parties with

1 immediate access to the affected facilities to effect investigation and  
2 repair;

3 (iv) Developer shall immediately suspend its Work in the vicinity of the  
4 affected facilities until such third party or parties have completed their  
5 investigation and repair and ADOT has authorized Developer to resume  
6 such Work; and

7 (v) Developer shall reimburse ADOT within 30 days after demand for all actual  
8 internal and third party costs ADOT incurs in connection with investigation  
9 and repair of the affected facilities.

10 **7.4.9 Security for Utility Adjustment Costs; Insurance**

11 (a) Developer shall satisfy all requirements in Utility Memoranda of Understanding  
12 and Utility Agreements to provide security for reimbursement of Utility  
13 Adjustment costs to which the Utility Company is entitled, in form, type and  
14 amount, and on terms provided by Utility Memoranda of Understanding and  
15 Utility Agreements.

16 (b) Developer shall satisfy all requirements in Utility Memoranda of Understanding  
17 and Utility Agreements to provide liability insurance for the protection of the  
18 Utility Company.

19 **7.4.10 Applications for Utility Permits**

20 (a) Utility Companies may apply to ADOT for utility permits and other agreements and  
21 approvals to install new Utilities that would cross or longitudinally occupy the  
22 Project ROW, or to modify, upgrade, relocate or expand existing Utilities within  
23 the Project ROW for reasons other than to accommodate the Project. The  
24 provisions of this Section 7.4.10 shall govern such Utility Company applications.

25 (b) For all Utility Company applications described in Section 7.4.10(a) and pending as  
26 of or submitted after the Effective Date, Developer shall:

27 (i) Furnish to the applicants the most recent pertinent Project design  
28 information or Record Drawings, as applicable;

29 (ii) Assist the applicants with information regarding the location of other  
30 proposed and existing Utilities; and

31 (iii) Use commercially reasonable efforts to coordinate work schedules with  
32 the applicants so that the applicants' activities do not interfere with the  
33 Project Schedule.

- 1 (c) Developer shall assist ADOT in deciding whether to approve a permit or other  
2 agreement or approval applied for by a Utility Company. Within ten Business Days  
3 after receiving an application for a utility permit or other agreement or approval,  
4 Developer shall analyze the application and provide to ADOT a recommendation  
5 (together with supporting analysis) as to whether it should be approved, denied,  
6 or approved subject to conditions. Developer shall limit the grounds for its  
7 recommendation of denial or conditions to approval to (i) the grounds (as ADOT  
8 communicates to Developer from time to time) on which ADOT is legally entitled  
9 to deny or condition approval of the application or (ii) demonstration that  
10 approval of the permit would entail a location and timing of work in the Project  
11 ROW by the Utility Company that is likely to result in unavoidable delay to the  
12 Critical Path.
- 13 (d) If Developer demonstrates such unavoidable delay to the Critical Path is likely to  
14 result but ADOT issues the permit, then such permit issuance shall be treated as  
15 an ADOT-Directed Change, provided that:
- 16 (i) Developer uses commercially reasonable efforts to coordinate work  
17 schedules with the permittee so that the permittee's activities do not  
18 interfere with Developer's Critical Path activities;
- 19 (ii) Such unavoidable delay to the Critical Path nevertheless actually results;  
20 and
- 21 (iii) Developer satisfies all other requirements for relief under Section 16.
- 22 (e) To the extent permitted by Law, ADOT will impose conditions in any approved  
23 permit or other agreement or approval:
- 24 (i) Prohibiting the Utility Company from interfering with Developer's  
25 schedule for D&C Work or Developer's performance of the D&C Work;
- 26 (ii) Requiring the Utility Company to compensate Developer for the adverse  
27 impact to Developer of any prohibited interference;
- 28 (iii) Requiring the Utility Company and its contractors to cooperate and  
29 coordinate with Developer and its Subcontractors; and
- 30 (iv) Requiring the Utility Company to adhere to Developer's on-site safety  
31 standards and procedures whenever the Utility Company or its  
32 subcontractors are in any active work zone of Developer or its  
33 Subcontractors.
- 34 (f) If Developer and ADOT disagree on the response to a utility application, such  
35 disagreement shall be resolved according to the Dispute Resolution Procedures;  
36 provided, however, that if Developer recommends against issuance of the permit

1 or other agreement or approval and ADOT determines issuance is appropriate or  
2 required, then:

3 (i) ADOT’s determination shall control unless issuance is arbitrary and  
4 capricious and not required by Law;

5 (ii) ADOT may elect to issue the utility permit or other agreement or approval  
6 in advance of resolution of the Dispute, but if it is finally determined that  
7 such issuance was arbitrary and capricious and not required by Law, such  
8 issuance shall be deemed an ADOT-Directed Change (and therefore a  
9 potential Relief Event); and

10 (iii) If ADOT elects to delay issuance of a utility permit or other agreement or  
11 approval pending final resolution of the Dispute, Developer’s indemnity  
12 under Section 23.1.1(j) shall be deemed to apply with respect to any  
13 applicant claim of wrongful delay or denial.

14 (g) No work or services required of Developer, and no accommodation of new Utilities  
15 or of modifications, upgrades, relocations or expansions of existing Utilities,  
16 pursuant hereto, shall entitle Developer to an increase in the Contract Price, a  
17 Completion Deadline adjustment or other Claim or relief, except to the extent  
18 provided otherwise in Section 7.4.10(d). Developer shall keep records of its costs  
19 related to new Utilities separate from other costs.

20 **7.4.11 Assignment of Rights against Utility Companies**

21 If Developer is damaged or claims to be damaged by the wrongful actions or inactions of  
22 a Utility Company within the Project ROW, upon receipt of a written request from Developer,  
23 ADOT may, in its sole discretion, assign to Developer ADOT’s rights of recovery, as such may exist,  
24 under any existing agreement between ADOT and a Utility Company, including any utility permits,  
25 utility relocation agreements, or other agreements.

26 **7.5 Use of Designated ADOT Property**

27 **7.5.1** ADOT will make the following property, for which it owns an easement from the  
28 BLM as set forth in the RIDs (for purposes of this Section 7.5, “the property”), available for a  
29 Developer’s Temporary Work Area, including use for Developer’s collocated office or field office,  
30 on the terms and conditions set forth in this Section 7.5:  
31

| Parcel APN  | Description                                                                                                                                                                           |
|-------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 800-20-061K | Located northeast of the Velda Rose Road traffic interchange off Velda Rose Road. See location maps in “ADOT Parcel in Black Canyon City.PDF” in the Reference Information Documents. |



1           **7.5.2**    Developer may exercise its right to use the property for a Developer’s Temporary  
2 Work Area by delivering to ADOT written notice electing to use the property. The written notice  
3 shall identify the date Developer is willing to take possession and use. Developer is prohibited  
4 from using the property for (a) materials production or processing or (b) any other use prohibited  
5 by the easement. Developer is also prohibited from using the existing buildings on the property.

6           **7.5.3**    If Developer elects to use the property, ADOT will conduct an inspection of the  
7 property to document pre-existing conditions before Developer takes use and occupancy.  
8 Developer shall review and comment on the pre-existing conditions documentation, and the  
9 Parties shall sign such documentation, after resolution of any comments, to create a record of  
10 pre-existing conditions. Developer shall be obligated to return the property to ADOT upon  
11 cessation of its use and possession in a condition at least equal to the pre-existing conditions as  
12 set forth in the signed documentation of pre-existing conditions.

13           **7.5.4**    Developer shall be obligated to vacate the property and return possession to  
14 ADOT not later than the Final Acceptance Date, unless Section 7.5.5 applies.

15           **7.5.5**    Developer may elect to use the property for offices or a maintenance yard during  
16 the O&M Period beyond the Final Acceptance Date. Developer may exercise its right to use the  
17 property for such purposes by delivering to ADOT written notice electing to use the property by  
18 not later than 60 days prior to the Final Acceptance Date. If Developer is not then using the  
19 property pursuant to Section 7.5.2, then the written notice also shall identify the date Developer  
20 is willing to take possession and use. The prohibitions on use of the property set forth in Section  
21 7.5.2 shall apply during the O&M Period.

22           **7.5.6**    Developer shall take the property as is, with all faults, defects, and conditions,  
23 known or unknown. ADOT shall have no obligation to provide utility services to, or maintain utility  
24 services for, the property. Developer shall have the responsibility to maintain the property in a  
25 good and safe condition and in accordance with all Laws and Governmental Approvals.

26           **7.5.7**    For guidance in determining the procedures for granting use of the property,  
27 documenting the rights of use, and determining terms and conditions, ADOT will refer to Chapter  
28 3, “Renting and Leasing Operations” in the 2018 ADOT Infrastructure Delivery and Operations  
29 Division, Right of Way Procedures Manual, Property Management Section, Unit 4947, which is  
30 included in the Reference Information Documents.



1           **8.1.7** Developer may proceed, at its sole risk, with final design or construction of  
2 Elements or portions of the Project before the final design of the entire Project has been  
3 completed. Developer shall be solely responsible for correcting any Nonconforming Work at its  
4 sole expense and at the direction of ADOT.

5           **8.1.8** Developer is responsible for the safety and security of the Project and the  
6 workers and the public thereon during all D&C Period construction and other activities under the  
7 control of any Developer-Related Entity, as more particularly provided in Section GP 110.09 of  
8 the Technical Provisions.

9           **8.2 Performance, Design and Construction Standards; Deviations**

10           **8.2.1** Developer shall construct the Project and Utility Adjustments included in the  
11 Construction Work as designed, free from Defects in construction. Further, Developer shall  
12 furnish all aspects of Design Work and all Design Documents and shall perform the Construction  
13 Work in accordance with the following:

- 14           (a) the Basic Configuration;
- 15           (b) Good Industry Practice;
- 16           (c) the requirements, terms and conditions set forth in the Contract Documents  
17 applicable to the D&C Work, including the Applicable Standards and approved  
18 Project Plans and approved updates and amendments thereof;
- 19           (d) the Project Schedule;
- 20           (e) all Laws (including Environmental Laws and Changes in Law);
- 21           (f) the requirements, terms and conditions set forth in all Governmental Approvals;  
22 and
- 23           (g) the Federal Requirements.

24           **8.2.2** Developer also shall construct the Project and Utility Adjustments in accordance  
25 with (a) the approved RFC Submittals, and (b) the Construction Documents, in each case taking  
26 into account the Project ROW limits and other constraints affecting the Project.

27           **8.2.3** The Project design and construction shall be subject to certification pursuant to  
28 the procedure contained in the Quality Management Plan.

29           **8.2.4** The Construction Materials shall be of good quality and new when installed.  
30 Equipment furnished for the Project shall incorporate the most current technology and design  
31 and be in good working condition.

32           **8.2.5** Developer may apply for ADOT approval of Deviations from applicable Technical

1 Provisions regarding the design or construction of the Project. The Deviation approval process  
2 shall be as follows:

3 (a) All applications for Deviations shall be in writing. Where Developer applies for a  
4 Deviation as part of the submittal of a component plan of the Project Management  
5 Plan, Developer shall specifically identify and label the proposed Deviation.

6 (b) ADOT will consider, in its sole discretion, but have no obligation to approve, any  
7 such application. Developer shall bear the burden of establishing that the  
8 Deviation sought constitutes sound and safe engineering consistent with Good  
9 Industry Practice, achieves ADOT’s applicable safety standards and criteria, and  
10 satisfies the purpose or intent of the applicable Technical Provisions.

11 (c) No Deviation shall be deemed approved or be effective unless and until stated  
12 expressly in a writing signed by ADOT’s Authorized Representative. ADOT’s  
13 affirmative approval of a component plan of the Project Management Plan shall  
14 constitute: (i) approval of the Deviations expressly identified and labeled as  
15 Deviations therein, unless ADOT takes exception to any such Deviation, and (ii)  
16 disapproval of any Deviations not expressly identified and labeled as Deviations  
17 therein.

18 (d) ADOT’s lack of issuance of an approval for any Deviation within ten Business Days  
19 after Developer applies therefor shall be deemed a disapproval of such  
20 application.

21 (e) ADOT’s denial or disapproval of a requested Deviation shall be final and not  
22 subject to the Dispute Resolution Procedures.

23 **8.2.6** The approval of a Deviation by ADOT shall not relieve Developer of its obligations  
24 with respect to any other component or requirement of the Contract Documents, and shall not  
25 operate as a waiver by ADOT of the right to seek relief from Developer, including by asserting a  
26 Claim against Developer, for any failure of Developer’s design or construction to comply with any  
27 other requirement of the Contract Documents. Developer shall be responsible for ensuring that  
28 any Deviation does not affect Developer’s ability to comply with any other requirement of the  
29 Contract Documents.

30 **8.2.7** Developer shall be responsible for all costs associated with implementation of a  
31 Deviation. Developer shall not be entitled to an increase in the Contract Price, Completion  
32 Deadline adjustment or any other Claim arising out of an approved Deviation or Developer’s  
33 inability to comply with any other provision of the Contract Documents due to an approved  
34 Deviation.

35 **8.2.8** If an approved Deviation reduces Developer’s cost of performing the Work,  
36 ADOT shall be entitled to 100% of such cost savings. ADOT will obtain its share of the cost savings  
37 in the manner described in Section 17.1.6(c). If an approved Deviation results in time savings,

1 such time savings shall be incorporated into the Project Schedule and taken into account in  
2 determining available Float.

3 **8.2.9** Except as set forth in Section 8.2.5, any changes to the Technical Provisions that  
4 materially affect the Design Work or Construction Work prior to the Project Substantial  
5 Completion Date shall be subject to the Supplemental Agreement process in accordance with  
6 Section 17.

### 7 **8.3 Changes in Basic Configuration**

8 **8.3.1** Developer shall not make any change in the Basic Configuration of the Project,  
9 except as approved by ADOT in its sole discretion and authorized by a Supplemental Agreement  
10 in accordance with Section 17. Except as provided in Section 8.3.2, a Supplemental Agreement is  
11 required regardless of the reason underlying the change and regardless of whether the change  
12 increases, decreases or has no effect on Developer's costs.

13 **8.3.2** No Supplemental Agreement shall be required for any non-material changes in  
14 the Basic Configuration that ADOT approves in writing as part of the design review process, unless  
15 the proposed change constitutes a Change Request described in Section 17.2.3. Developer  
16 acknowledges and agrees that constraints set forth in the NEPA Approval, Technical Provisions  
17 and other Contract Documents, as well as Site conditions and the Schematic Design, will impact  
18 Developer's ability to make non-material changes in the Basic Configuration.

19 **8.3.3** If a Change Request results in a change in the Basic Configuration, any cost or  
20 time savings that result from such Change Request shall be treated in accordance with Sections  
21 17.2.6 and 17.2.7.

### 22 **8.4 Design Requirements; Responsibility for Design**

#### 23 **8.4.1 Design Implementation and Submittals**

24 (a) Developer, through the qualified and licensed design professionals identified in  
25 Exhibit 8 (Key Subcontractors and Key Personnel) and the Project Management  
26 Plan, shall prepare Plans and specifications in accordance with the Contract  
27 Documents. Developer shall cause the engineers of record, as applicable, for the  
28 Project to sign and seal all RFC Submittals.

29 (b) Developer shall deliver to ADOT accurate and complete duplicates of all interim,  
30 revised and final Design Documents (including the RFC Submittals), Plans and  
31 Construction Documents within seven days after Developer completes  
32 preparation thereof. Developer shall construct the Project in accordance with the  
33 RFC Submittals and the Construction Documents. Developer may modify the RFC  
34 Submittals and Construction Documents, subject to ADOT's review and comment  
35 and resolution of ADOT comments respecting the modifications in advance of  
36 performance of the applicable D&C Work.

1           **8.4.2    Developer Responsibility for Design**

2           Developer agrees that it has full responsibility for the design of the Project and that  
3 Developer will furnish the design of the Project, regardless of the fact that aspects of the  
4 Schematic Design have been provided to Developer as a preliminary basis for Developer’s design.  
5 Developer specifically acknowledges and agrees that:

6           (a)    Developer is not entitled to rely on: (i) the Schematic Design; or (ii) any other  
7 documents or information provided by ADOT, except to the extent specifically  
8 permitted in the Contract Documents;

9           (b)    Developer is responsible for correcting any Errors in the Schematic Design through  
10 the design or construction process;

11           (c)    Developer shall not be entitled to any increase in the Contract Price, a Completion  
12 Deadline adjustment or any other Claim arising from Errors in the Schematic  
13 Design, except only for the right to a Supplemental Agreement with respect to  
14 Necessary Schematic ROW Changes as set forth in Section 16.4.15, and subject to  
15 the requirements and limitations of Section 16;

16           (d)    Developer’s warranties and indemnities hereunder cover Errors in the Project  
17 even though they may arise from or be related to Errors in the Schematic Design;  
18 and

19           (e)    Developer is responsible for verifying all calculations and quantity takeoffs  
20 contained in the RFP Documents or otherwise provided by ADOT. Developer shall  
21 not be entitled to an increase in the Contract Price, a Completion Deadline  
22 adjustment or any other Claim based on an Error in any calculations or quantity  
23 takeoffs contained in the RFP Documents or otherwise provided by ADOT.

24           **8.4.3    Changes to Schematic Design and Schematic ROW**

25           (a)    Developer acknowledges and agrees that the requirements and constraints set  
26 forth in the Contract Documents and in the Governmental Approvals, as well as  
27 Site conditions, will impact Developer’s ability to revise the concepts contained in  
28 the Schematic Design. Developer, however, may modify the Schematic Design  
29 without ADOT’s prior written approval if the proposed modification:

30                   (i)    Meets the requirements of the Technical Provisions;

31                   (ii)   Requires no revision, modification or amendment to the NEPA Approval,  
32 as determined in accordance with Section DR 420.2.6.1 of the Technical  
33 Provisions;

34                   (iii)   Does not constitute a Design Exception or Design Variance; and

- 1 (iv) Does not deviate from the design concepts included in the Proposal.
- 2 (b) Developer may rely on the Schematic ROW limits, as shown on the Schematic  
3 Design, and that it is feasible to design and develop the Basic Configuration within  
4 said Schematic ROW limits. Accordingly, Developer shall have the right to certain  
5 relief due to Necessary Schematic ROW Changes, to the extent provided in Section  
6 16.4.15; provided, however that Developer acknowledges that “feasible to design  
7 and develop the Basic Configuration” is not intended to mean or be limited to  
8 Developer’s design approach set forth in its Proposal or Developer’s preferred  
9 design approach.
- 10 (c) Developer acknowledges that the Schematic Design is preliminary and subject to  
11 refinement through the Final Design process, and that Developer is not entitled to  
12 an increase in the Contract Price, a Completion Deadline adjustment or any other  
13 Claim in connection with changes in the Schematic Design, except to the extent  
14 provided for Necessary Schematic ROW Changes under Section 16.4.15.

## 15 **8.5 Cooperation with Other Contractors**

### 16 **8.5.1 Developer Duty of Cooperation**

- 17 (a) Developer acknowledges that ADOT and other Persons may award contracts for  
18 construction and other work at or near the Site. A list of such future contracts and  
19 projects is contained in Table 110-1 in Section GP 110.01.2.2.1 of the Technical  
20 Provisions.
- 21 (b) Developer shall, and shall cause the Developer-Related Entities to, cooperate and  
22 coordinate the D&C Work with other contractors, whether the contractors work  
23 for ADOT or other Persons, whose projects or work may affect the Project or the  
24 D&C Work. Developer shall schedule and sequence the D&C Work as reasonably  
25 necessary to accommodate the projects and work of such contractors. Further,  
26 Developer shall conduct its D&C Work and perform its obligations under the  
27 Contract Documents without interfering with or hindering the progress,  
28 completion or operation of the projects or work being performed by other  
29 contractors. Without limiting the foregoing, Developer shall comply with Section  
30 105.09 of the ADOT Standard Specifications.
- 31 (c) Developer shall closely coordinate and interface with the ADOT contractor  
32 responsible for installation of the ADOT Broadband Initiative for I-17 facilities to  
33 accurately locate such facilities before performing Construction Work in the  
34 vicinity of such facilities, in compliance with Section GP 110.01.2.2.1 of the  
35 Technical Provisions.
- 36 (d) ADOT agrees to include or incorporate Section 105.09 of the ADOT Standard  
37 Specifications in its contract with the contractor for the ADOT Broadband Initiative

1 for I-17 facilities and in contracts with other contractors entered into subsequent  
2 to the Effective Date.

3 **8.5.2 Closures and Interference by Other Contractors**

4 (a) After Developer completes training as provided in Section DR 462.3.3.1 of the  
5 Technical Provisions, ADOT will make its Event Reporting System available to  
6 Developer electronically, with read only access, so that Developer can track  
7 Closure reservations by ADOT's other contractors. Developer understands and  
8 acknowledges that the reservation of Closures via the Event Reporting System is  
9 on a first-come, first-served basis, that ADOT will protect the priority of Closure  
10 reservations based on the time reservations are entered into the Event Reporting  
11 System, absent Emergency or other unusual circumstance and except as provided  
12 below, and that Closures by other contractors elsewhere may constrain feasibility  
13 of Closures by Developer on the Project. Accordingly:

14 (i) ADOT will protect from interference by ADOT's other contractors, and  
15 prioritize over conflicting Closures requested by such other contractors,  
16 planned Closures that Developer reserves on the Event Reporting System  
17 prior to ADOT's other contractors, provided that in any event Closures  
18 required by the contractor for constructing the ADOT Broadband Initiative  
19 for I-17 facilities shall have priority over Developer's planned Closures; and

20 (ii) Developer shall have no right to ADOT's approval of Closures that cannot  
21 be accommodated because of conflict with prior Closure reservations by  
22 other contractors on the Event Reporting System.

23 (b) Provided that Developer adheres to its Project Schedule as disclosed to ADOT, and  
24 excluding the contractor for the ADOT Broadband Initiative for I-17, ADOT will  
25 manage ADOT's other contractors to avoid their working simultaneously in  
26 Developer's work zones.

27 (c) Developer shall comply with other restrictions concerning Closures set forth in  
28 Section DR 462.3.3 of the Technical Provisions.

29 **8.5.3 Coordination with Utility Companies and Adjacent Property Owners**

30 Developer shall coordinate with Utility Companies and owners of property adjoining the  
31 Project, and with their respective contractors, as more particularly described in the Contract  
32 Documents.



1 **8.6 Project Substantial Completion; Punch List; South Segment Substantial Completion;**  
2 **Final Acceptance**

3 **8.6.1 Project Substantial Completion**

4 (a) Except as provided in Section 8.6.2, the Project shall not be opened to vehicular  
5 traffic, and the O&M Period shall not commence, until ADOT issues to Developer  
6 a Certificate of Project Substantial Completion. Subject to Section 8.6.1(b) below,  
7 ADOT will issue a Certificate of Project Substantial Completion on the date that all  
8 the following conditions precedent to Project Substantial Completion have been  
9 met at all locations on the Site:

10 (i) All major safety features are installed and functional. For purposes of this  
11 clause (a)(i), such major safety features include shoulders, guard rails,  
12 striping and delineations, concrete traffic barriers, bridge railings, cable  
13 safety systems, metal beam guard fences, safety end treatments, terminal  
14 anchor sections and crash attenuators;

15 (ii) All required illumination is installed and functional;

16 (iii) All required signs are installed and functional and relocation of existing  
17 signs is completed;

18 (iv) The need for temporary traffic controls or for Closures at any time has  
19 ceased, except for (A) any then required for O&M Work, so long as  
20 Developer has complied with the notice requirements set forth in Section  
21 8.6.1(b) and such need for controls or Closures is not due to any act or  
22 failure to act by any Developer-Related Entity, and (B) temporary Closures  
23 during hours of low traffic volume in accordance with and as permitted by  
24 the Transportation Management Plan solely to complete Punch List items;

25 (v) All lanes of traffic (including ramps, interchanges, overpasses,  
26 underpasses, other crossings, frontage roads and the Flex Lanes) set forth  
27 in the Design Documents are in their final configuration and traffic can  
28 move unimpeded through the Project at the normal, posted speed;

29 (vi) Developer has updated Attachment 500-1 of the Technical Provisions at  
30 least 90 days prior to Project Substantial Completion as required by Section  
31 OMR 400.1 of the Technical Provisions, and each Element meets the Target  
32 as set forth in such updated Attachment 500-1 of the Technical Provisions;

33 (vii) The Flex Lanes System and all its components are installed and functional,  
34 and all required testing has been successfully completed in accordance  
35 with Section CR 466 of the Technical Provisions;

- 1 (viii) Developer has otherwise completed the D&C Work in accordance with the  
2 Contract Documents and Design Documents, such that the Project is in a  
3 condition that it can be used for safe vehicular travel in all lanes at the  
4 normal, posted speed and at all points of entry and exit, subject only to  
5 Punch List items and other items of D&C Work that do not affect the ability  
6 to safely (A) open for normal use by the traveling public and (B) operate  
7 the Flex Lanes in both directions;
- 8 (ix) Developer has satisfied all O&M Conditions Precedent as provided in  
9 Section 8.6.4; and
- 10 (x) All aesthetic and landscaping features for the Project have been completed  
11 in accordance with Sections DR 450 and CR 450 of the Technical Provisions  
12 and the Plans and designs prepared in accordance therewith.
- 13 (b) If Developer elects to achieve South Segment Substantial Completion and ADOT  
14 issues a Certificate of South Segment Substantial Completion prior to Project  
15 Substantial Completion, ADOT will issue a Certificate of Project Substantial  
16 Completion on the date that all conditions precedent listed in Sections 8.6.1(a)(i)  
17 through (x) have been met at all locations on the Site other than the portion of  
18 the South Segment that was in its final configuration at the time of South Segment  
19 Substantial Completion.
- 20 (c) The procedures for notification of Project Substantial Completion are as follows.
- 21 (i) Developer shall provide ADOT with not less than 60 days prior Notice of  
22 the date Developer determines it will satisfy all conditions to Project  
23 Substantial Completion. During such 60-day period, Developer and ADOT  
24 will meet and confer and exchange information as needed for ADOT to  
25 determine whether Developer will achieve Project Substantial Completion  
26 at the close of the 60-day period.
- 27 (ii) During such 60-day period, ADOT will conduct an inspection of the Project  
28 and its components, a review of the applicable RFC Submittals and  
29 Construction Documents and such other investigation as may be necessary  
30 to evaluate whether Project Substantial Completion is achieved.
- 31 (d) Developer shall provide ADOT a subsequent Notice when Developer determines  
32 it has satisfied all conditions to Project Substantial Completion. Within five days  
33 after expiration of the 60-day period and ADOT's receipt of such Notice, ADOT will  
34 either: (i) issue the Certificate of Project Substantial Completion; or (ii) notify  
35 Developer that one or more conditions to achieving Project Substantial  
36 Completion have not been satisfied and provide reasons.

- 1 (e) If ADOT provides Notice that one or more conditions have not been satisfied and  
2 Developer does not dispute ADOT’s assessment, then the processes set forth in  
3 clause (c) above shall be repeated until (i) ADOT issues a Certificate of Project  
4 Substantial Completion, or (ii) the Parties’ disagreement either as to (A) whether  
5 one or more criteria for Project Substantial Completion have been met or (B) the  
6 date of Project Substantial Completion is referred to and resolved according to the  
7 Dispute Resolution Procedures.

8 **8.6.2 South Segment Substantial Completion**

- 9 (a) At its option, Developer may achieve South Segment Substantial Completion in  
10 advance of Project Substantial Completion. Developer shall continue to bear all  
11 responsibilities for traffic management, safety and risk of damage or destruction  
12 under Section 13.3.1 respecting the South Segment, until ADOT issues to  
13 Developer a Certificate of South Segment Substantial Completion or a Certificate  
14 of Project Substantial Completion. Terms for cessation of Developer’s  
15 responsibility for Maintenance During Construction respecting the South Segment  
16 are set forth in Section 8.11.1(a). Once ADOT issues a Certificate of South Segment  
17 Substantial Completion or a Certificate of Project Substantial Completion, ADOT  
18 shall have the right to open the South Segment to vehicular traffic.

- 19 (b) ADOT will issue a Certificate of South Segment Substantial Completion on the date  
20 that:

21 (i) All the conditions precedent set forth in Section 8.6.1 have been met at all  
22 locations on the South Segment; provided, however, that the provisions  
23 set forth in Sections 8.6.1(a)(iv)(A), (a)(v) (with respect to the Flex Lanes  
24 only), (a)(vii), (a)(viii)(B) and (a)(ix) shall not apply;

25 (ii) All Punch List items respecting the South Segment have been completed  
26 and delivered to the reasonable satisfaction of ADOT;

27 (iii) All Utility Adjustment Work and other Work that Developer is obligated to  
28 perform for or on behalf of third parties with respect to the South Segment  
29 has been accepted by such third parties; and

30 (iv) All personnel, equipment, waste materials, rubbish and temporary  
31 facilities of each Developer-Related Entity have been removed from the  
32 Project ROW for the South Segment, Developer has restored and repaired  
33 all damage or injury arising from such removal to the satisfaction of ADOT,  
34 and the Site for the South Segment is in good working order and condition.

- 35 (c) If Developer elects to request a Certificate of South Segment Substantial  
36 Completion, it shall initiate the request by delivering a Notice pursuant to Section  
37 8.6.1(c)(i) stating the date Developer determines it will satisfy all conditions to

1 South Segment Substantial Completion. Thereafter, the Parties shall follow the  
2 same terms and procedures set forth in Sections 8.6.1(c), (d) and (e) as they relate  
3 to the South Segment.

- 4 (d) Not later than 100 days after ADOT issues the South Segment Certificate of  
5 Substantial Completion, Developer shall deliver to ADOT:
- 6 (i) the Final Design Documents Submittal for the South Segment required by  
7 Section GP 110.10.2.6.7 of the Technical Provisions; and
  - 8 (ii) a complete, indexed set of all Proprietary Intellectual Property pertaining  
9 to the South Segment pursuant to Section 25.7.1(b).
- 10 (e) If Developer does not meet the deadline set forth in Section 8.6.2(d), then ADOT  
11 shall have the right to withhold 6% from each payment due thereafter until  
12 Developer delivers the required documentation. ADOT will pay the withheld  
13 amounts, without interest, within 20 days after it receives all such documentation.

#### 14 **8.6.3 Punch List**

15 The Project Management Plan shall establish procedures and schedules for preparing a  
16 Punch List and completing Punch List work. Such procedures and schedules shall conform to the  
17 following provisions.

- 18 (a) The schedule for preparation of the Punch List shall be consistent and coordinated  
19 with the inspections to verify that Developer has achieved Project Substantial  
20 Completion as set forth in Section 8.6.1 or South Segment Substantial Completion  
21 as set forth in Section 8.6.2, as applicable.
- 22 (b) Developer shall prepare and maintain the Punch List and deliver to ADOT a true  
23 and complete copy of it, and each modification of it, as soon as prepared.  
24 Developer shall provide ADOT not less than five days' prior Notice of the date  
25 when Developer will commence Punch List field inspections and Punch List  
26 preparation. ADOT may, but is not obligated to, participate in the development of  
27 the Punch List. If ADOT participates in the development of the Punch List, each  
28 Party shall have the right to add items to the Punch List, but neither shall remove  
29 any item added by the other Party without such other Party's express permission.
- 30 (c) The Punch List shall solely consist of items of D&C Work requiring correction, fine-  
31 tuning, adjustment, or completion. The Punch List cannot contain any items of  
32 D&C Work that Developer is performing for the first time, regardless of whether  
33 Developer contends that the item of D&C Work does not need to be commenced  
34 to achieve the conditions to Project Substantial Completion or South Segment  
35 Substantial Completion.

1 (d) Periodically, as Developer finishes work on Punch List items, ADOT will coordinate  
2 with Developer to inspect such items to verify they are completed and delivered  
3 in accordance with the Contract Documents.

4 **8.6.4 O&M Conditions Precedent**

5 Project Substantial Completion is subject to and conditioned upon satisfaction of the  
6 following O&M Conditions Precedent:

7 (a) Developer demonstrates to ADOT’s reasonable satisfaction that Developer has  
8 completed training of operations and maintenance personnel, which  
9 demonstration shall consist of:

10 (i) Delivery to ADOT of a written certificate, in form acceptable to ADOT,  
11 executed by Developer that it and its Subcontractors are fully staffed with  
12 such trained personnel and are ready, willing and able to perform the O&M  
13 Work in accordance with the terms and conditions of the Contract  
14 Documents and Project Management Plan pertaining to the O&M Period;  
15 and

16 (ii) Delivery to ADOT of training records and course completion certificates  
17 issued to each of the subject personnel;

18 (b) ADOT has approved the Operations and Maintenance Management Plan,  
19 Operations and Maintenance Quality Management Plan, Operations and  
20 Maintenance Safety Management Plan, Environmental Management Plan,  
21 Operations Manual and generic Traffic Control Plans in accordance with  
22 Sections 10.2 and 10.10.1 and Section OMR 400.2.1 of the Technical Provisions;

23 (c) Developer has received, and paid all associated fees for, all applicable  
24 Governmental Approvals and other third-party approvals required for entry onto  
25 the Project and performance of the O&M Work, such Governmental Approvals  
26 and other third-party approvals are in full force and effect, and there exists no  
27 uncured material violation of the terms and conditions of any such Governmental  
28 Approval or other third-party approvals;

29 (d) All Insurance Policies required during the O&M Period have been obtained and  
30 are in full force and effect and Developer has delivered to ADOT verification  
31 thereof as required under Section 13;

32 (e) Any security for Developer’s performance and payment obligations in connection  
33 with the O&M Work under this Agreement, including the O&M Performance Bond  
34 and O&M Payment Bond required under Section 12.2 and any O&M Guaranty  
35 required under Section 12.7, have been obtained, are in full force and effect and  
36 Developer has delivered the same to ADOT; and

1 (f) Developer has satisfied any other requirements or conditions for commencement  
2 of the O&M Work after Project Substantial Completion set forth in the Technical  
3 Provisions.

4 **8.6.5 Final Acceptance**

5 (a) ADOT will issue a Certificate of Final Acceptance at such time as all of the following  
6 conditions have been satisfied in respect of the Project:

7 (i) ADOT has issued

8 (1) a Certificate of Project Substantial Completion pursuant to Section  
9 8.6.1(a); or

10 (2) a Certificate of South Segment Substantial Completion pursuant to  
11 Section 8.6.2 and a Certificate of Project Substantial Completion  
12 pursuant to Section 8.6.1(b);

13 (ii) All Punch List items shall have been completed and delivered to the  
14 reasonable satisfaction of ADOT;

15 (iii) ADOT has received the As-Built Schedule for the Project required by  
16 Section GP 110.06.2.12 of the Technical Provisions;

17 (iv) ADOT has received a complete set of the Record Drawings in form and  
18 content required by Section GP 110.10.2.7.4 of the Technical Provisions,  
19 the Electronic Document Management System records required by Section  
20 GP 110.04.2 of the Technical Provisions, and a complete, indexed set of all  
21 Proprietary Intellectual Property pursuant to Section 25.7.1(b);

22 (v) All Utility Adjustment Work and other Work that Developer is obligated to  
23 perform for or on behalf of third parties with respect to the Project has  
24 been accepted by such third parties, ADOT has received all Record  
25 Drawings for the Utility Adjustment Work, ADOT has received all  
26 completed permits for the Utility Adjustment Work, and Developer has  
27 paid for all work by third parties that Developer is obligated to pay for,  
28 other than disputed amounts and amounts owed to Utility Companies that  
29 have not yet been invoiced to Developer, provided that Developer has  
30 made diligent efforts to obtain invoices therefor;

31 (vi) Developer has submitted to ADOT the DBE Certification of Final Payments,  
32 Construction and Professional Services, together with a Summary of Final  
33 Payments for Construction and a Summary of Final Payments for  
34 Professional Services, as required by Section 20 of Exhibit 6 (ADOT's DBE  
35 Special Provisions);

- 1 (vii) All component parts, plans and documentation of the Project  
2 Management Plan required to be prepared, submitted and approved prior  
3 to Final Acceptance have been so prepared, submitted and approved;
- 4 (viii) All Submittals required by the Project Management Plan or Contract  
5 Documents to be submitted to and approved by ADOT prior to Final  
6 Acceptance have been submitted to and approved by ADOT, in the form  
7 and with the content required by the Project Management Plan or  
8 Contract Documents;
- 9 (ix) All personnel, equipment, waste materials, rubbish and temporary  
10 facilities of each Developer-Related Entity have been removed from the  
11 Project ROW, Developer has restored and repaired all damage or injury  
12 arising from such removal to the satisfaction of ADOT, and the Site is in  
13 good working order and condition;
- 14 (x) Developer has delivered to ADOT a certification representing that there  
15 are no outstanding Claims (for purposes of this certification, the term  
16 "Claim" shall include all facts which may give rise to a Claim) of Developer  
17 or claims or stop notices of any Subcontractor, Supplier, laborer, Utility  
18 Company or other Persons with respect to the D&C Work, other than:
- 19 (1) Any previously submitted unresolved claims of Developer and any  
20 Claims or stop notices of a Subcontractor, Supplier, laborer, Utility  
21 Company or other Persons being contested by Developer (in which  
22 case the certification shall include a list of all such matters with  
23 such detail as is requested by ADOT and, with respect to all claims  
24 or stop notices of a Subcontractor, Supplier, laborer, Utility  
25 Company and other Person, shall include a representation by  
26 Developer that it is diligently and in good faith contesting such  
27 matters by appropriate legal proceedings which shall operate to  
28 prevent the enforcement or collection of the same); and
- 29 (2) Amounts owed to Utility Companies that have not yet been  
30 invoiced to Developer, provided Developer has made diligent  
31 efforts to obtain invoices therefor;
- 32 (xi) Developer has paid in full all Liquidated Damages (including  
33 Noncompliance Charges) that are owing to ADOT pursuant to this  
34 Agreement and are not in Dispute, and has provided to ADOT security for  
35 the full amount of Liquidated Damages that may then be the subject of an  
36 unresolved Dispute;
- 37 (xii) There exist no uncured Developer Defaults other than those that would be  
38 cured by the achievement of Final Acceptance;

- 1 (xiii) ADOT has received from Developer and accepted the Final DBE Utilization  
2 Summary Report as required by Section 18.02.4 of Exhibit 6 (ADOT's DBE  
3 Special Provisions);
- 4 (xiv) Developer has submitted all ITS Certifications to ADOT as required by  
5 Section CR 466.3.5 of the Technical Provisions;
- 6 (xv) ADOT has received from Developer and accepted the Final OJT Summary  
7 Report, and, if applicable, Good Faith Effort documentation, as required by  
8 Section 7.0 of Exhibit 7 (ADOT's OJT Special Provisions); and
- 9 (xvi) All of Developer's other obligations under the Contract Documents (other  
10 than obligations which by their nature are required to be performed after  
11 Final Acceptance) shall have been satisfied in full or waived by ADOT.
- 12 (b) Developer shall provide ADOT with 30 days' prior Notice of the date when  
13 Developer expects to satisfy all conditions to Final Acceptance. During the 30-day  
14 period following receipt of such Notice, Developer and ADOT will meet and confer  
15 and exchange information on a regular cooperative basis with the goal being the  
16 orderly, timely inspection and review of the Project and the Record Drawings, and  
17 ADOT's issuance of a Certificate of Final Acceptance.
- 18 (c) During such 30-day period, ADOT will conduct an inspection of the remaining  
19 Punch List items, a review of the Record Drawings and such other investigation as  
20 may be necessary to evaluate whether the conditions to Final Acceptance are  
21 satisfied.
- 22 (d) Within five Business Days after expiration of such 30-day period, ADOT will either  
23 (i) issue a Certificate of Final Acceptance for the Project or (ii) notify Developer  
24 that one or more conditions to achieving Final Acceptance have not been satisfied.
- 25 (e) If ADOT provides Notice that one or more conditions have not been satisfied and  
26 Developer does not dispute ADOT's assessment, then the processes set forth in  
27 clauses (b) through (d) above shall be repeated until (i) ADOT issues a certificate  
28 that Final Acceptance has been achieved, or (ii) the Parties' disagreement as to  
29 whether one or more conditions precedent have been met or the date of Final  
30 Acceptance is referred to, and resolved according to, the Dispute Resolution  
31 Procedures.
- 32 (f) ADOT will not separately certify Final Acceptance of the South Segment in advance  
33 of a Certificate of Final Acceptance for the Project. For clarity, ADOT will issue a  
34 single Certificate of Final Acceptance for the entire Project.



1 **8.7 Nonconforming and Defective Work**

2 **8.7.1** If Nonconforming Work is discovered, ADOT will have the right, exercisable in its  
3 sole discretion, to direct Developer, at Developer’s sole cost and without Claim of any kind  
4 against ADOT, to rectify the Nonconforming Work so that it complies with the Contract  
5 Documents. For the avoidance of doubt, (a) ADOT's sole discretion applies to its decision whether  
6 to require rectification of Nonconforming Work, and (b) whether Nonconforming Work has  
7 occurred is not a matter within ADOT’s sole discretion.

8 **8.7.2** If, at Developer’s request, ADOT elects to accept Nonconforming Work, then the  
9 following provisions shall apply.

10 (a) ADOT shall be entitled to compensation from Developer in the amount equal to  
11 the greater of:

12 (i) (A) 100% of the cost savings, if any, of Developer associated with its failure  
13 to perform the D&C Work in accordance with requirements of the Contract  
14 Documents (in addition to any other adjustment of the Contract Price);  
15 plus (B) the net present value of 100% of any increase in costs, including  
16 future operation, maintenance, replacement and other costs, attributable  
17 to the Nonconforming Work that ADOT will incur during the reasonably  
18 expected design life (absent the Nonconforming Work) of the affected  
19 Elements; or

20 (ii) the amount of the D&C Price allocated to the Nonconforming Work.

21 (b) In determining Developer’s cost savings, the Parties shall take into account all  
22 avoided costs of Developer, including avoided design, material, equipment, labor,  
23 construction, testing, commissioning, acceptance and overhead costs and avoided  
24 costs due to time savings.

25 (c) Net present value shall be determined by using as the discount rate the then-  
26 applicable yield on U.S. Treasury bonds having a tenor of seven years, as most  
27 recently issued as of the date ADOT issues its Notice to Developer of the  
28 Nonconforming Work.

29 (d) ADOT will have the right to deduct such compensation from any sums owed by  
30 ADOT to Developer pursuant to this Agreement.

31 **8.7.3** Subject to Sections 22.9 and 22.10, nothing contained in the Contract  
32 Documents shall in any way limit the right of ADOT to assert claims for damages resulting from  
33 patent or latent Defects in the D&C Work for the period of limitations prescribed by applicable  
34 Law, and the foregoing shall be in addition to any other rights or remedies ADOT may have

1 hereunder or under Law. This Section 8.7 shall have no effect on ADOT’s right to declare a  
2 Developer Default under Section 21.1.1 for any Nonconforming Work.

3 **8.8 Hazardous Materials Management**

4 **8.8.1** Without limiting ADOT’s role or responsibilities set forth in Sections 8.8.5, 8.8.7  
5 and 16.4.5, and except as provided otherwise below, commencing with NTP 2 and continuing  
6 until the end of the D&C Period, Developer shall undertake Hazardous Materials Management of  
7 all Hazardous Materials and Recognized Environmental Conditions, including contaminated  
8 groundwater, in accordance with applicable Law, Governmental Approvals, the Hazardous  
9 Materials Management Plan, and all applicable provisions of the Contract Documents.

10 **8.8.2** Developer shall have the following duties to avoid or mitigate adverse financial  
11 and schedule impacts of Hazardous Materials and Recognized Environmental Conditions.

12 (a) Without additional cost to ADOT, Developer shall adopt, using Good Industry  
13 Practice, design and construction techniques for the Project that to the maximum  
14 extent possible avoid the need for Hazardous Materials Management.

15 (b) If, having met its obligation under Section 8.8.2(a), Developer is unable to avoid  
16 Hazardous Materials or Recognized Environmental Conditions, Developer shall  
17 use Good Industry Practice, including design modifications and construction  
18 techniques, to minimize costs of Hazardous Materials Management, including  
19 minimization of ADOT’s long-term costs for Hazardous Materials Management.

20 (c) Where Hazardous Materials Management is unavoidable or is required by  
21 applicable Law, Developer shall utilize appropriately trained and licensed  
22 personnel to conduct the Hazardous Materials Management activities.

23 **8.8.3** If at any time during the Term Developer encounters Hazardous Materials or  
24 Recognized Environmental Conditions in connection with the Project, the Site or Work, Developer  
25 shall promptly notify ADOT of such fact. If the Hazardous Materials or Recognized Environmental  
26 Conditions are in an amount, type, quality or location that would require reporting or notification  
27 to any Governmental Entity or other Person or taking any preventive or remedial action, in each  
28 case under applicable Law, Governmental Approvals, the Hazardous Materials Management Plan  
29 or any applicable provision of the Contract Documents, Developer shall promptly notify ADOT in  
30 writing and advise ADOT of any obligation to notify State or federal agencies under applicable  
31 Law. If ADOT discovers Hazardous Materials or Recognized Environmental Conditions in  
32 connection with the Project, the Site or the Work, ADOT will promptly notify Developer in writing  
33 of such fact.

1           **8.8.4** The rights of ADOT to step in and carry out the Hazardous Materials  
2 Management obligations of Developer are as set forth in below.

3           (a) If, within a reasonable time after discovery of Hazardous Materials or Recognized  
4 Environmental Conditions, taking into consideration the nature and extent of the  
5 contamination, the type and extent of action required and the potential impact  
6 upon Developer's schedule to perform the D&C Work, Developer has not  
7 undertaken the Hazardous Materials Management required of it under Section  
8 8.8.1, ADOT may provide Developer with Notice that ADOT will undertake the  
9 Hazardous Materials Management itself. ADOT thereafter may undertake the  
10 Hazardous Materials Management actions it deems necessary and appropriate.  
11 Without limiting ADOT's role or responsibilities set forth in Section 8.8.7,  
12 Developer shall reimburse to ADOT on a current basis within ten days of request  
13 therefor, the reasonable costs, including ADOT's Recoverable Costs, that ADOT  
14 incurs in carrying out such Hazardous Materials Management actions. ADOT will  
15 have no liability or responsibility to Developer arising out of ADOT's Hazardous  
16 Materials Management actions and such actions shall in no event constitute the  
17 basis of a Relief Event or other Claim or otherwise entitle Developer to an increase  
18 in the Contract Price or adjustment of a Completion Deadline.

19           (b) Notwithstanding Section 8.8.4(a), if Developer notifies ADOT that Developer  
20 desires to preserve claims against other potentially responsible parties, then  
21 ADOT will undertake all commercially reasonable efforts to preserve such claims  
22 consistent with either the National Oil and Hazardous Substances Pollution  
23 Contingency Plan, 40 C.F.R. § 300, or comparable State regulations and standards.

24           **8.8.5** Developer shall have no responsibility or obligation to engage in Hazardous  
25 Materials Management with respect to Release of Hazardous Materials onto the Project or  
26 Project ROW during the D&C Period from a vehicle operating or located within the Project ROW  
27 or from such vehicle's cargo, unless the vehicle is owned or operated by a Developer-Related  
28 Entity in the course of performing Work, provided that Developer shall be responsible for  
29 repairing damage to Project improvements caused by Release of Hazardous Materials from  
30 vehicles operating within the Project ROW. For purposes hereof, "vehicle" has the meaning set  
31 forth in A.R.S. § 28-101.

32           **8.8.6** Sections 16.4.5 and 16.6 address Developer's rights to compensation and  
33 Completion Deadline adjustment with respect to Hazardous Materials.

34           **8.8.7** Off-site disposal of Hazardous Materials is subject to the provisions set forth  
35 below.

36           (a) As between Developer and ADOT, ADOT will be considered the sole generator and  
37 arranger under 40 C.F.R. Part 262 and will sign manifests for the off-site disposal  
38 of Hazardous Materials other than for:

- 1 (i) Developer Release of Hazardous Materials;
- 2 (ii) Hazardous Materials that migrate from points of origin located outside the
- 3 boundaries of the Project ROW where the source of such Hazardous
- 4 Materials is a Developer-Related Entity in the course of performing Work;
- 5 (iii) Hazardous Materials that Developer handles and disposes of negligently;
- 6 and
- 7 (iv) Hazardous Materials present in or on Developer’s Temporary Work Areas.

8 Notwithstanding the foregoing, ADOT may elect, by Notice to Developer, to have  
9 another responsible party (instead of ADOT, and other than a Developer-Related  
10 Entity) assume generator and arranger status and liability, or sign manifests, for  
11 which ADOT is otherwise responsible under this Section 8.8.7(a). The foregoing  
12 shall not preclude or limit any rights or remedies that ADOT may have against  
13 Developer-Related Entities (other than Developer), Governmental Entities or  
14 other third parties, including prior owners, lessees, licensees and occupants of any  
15 parcel of land that is or becomes part of the Project ROW.

- 16 (b) ADOT has exclusive decision-making authority regarding selection of the
- 17 destination facility to which Hazardous Materials will be transported whenever it
- 18 acts as generator or arranger.
- 19 (c) To the extent permitted by applicable Law, as between ADOT and Developer,
- 20 ADOT will take and assume sole responsibility and liability for third party claims,
- 21 causes of action and Losses arising out of or resulting from the off-site disposal of
- 22 Hazardous Materials for which ADOT is the generator pursuant to Section 8.8.7(a),
- 23 specifically excluding liability for off-site disposal that ADOT elects to have a
- 24 responsible party assume as provided in Section 8.8.7(a). It is the intent of the
- 25 Parties that Developer have no exposure to any such third party claims, causes of
- 26 action and Losses
- 27 (d) As between Developer and ADOT, Developer shall be considered the sole
- 28 generator and arranger and shall sign manifests for the off-site disposal of
- 29 Hazardous Materials for:

- 30 (i) each Developer Release of Hazardous Materials;
- 31 (ii) Hazardous Materials that migrate from points of origin located outside the
- 32 boundaries of the Project ROW where the source of such Hazardous
- 33 Materials is a Developer-Related Entity in the course of performing Work;
- 34 (iii) Hazardous Materials that Developer handles or disposes of negligently;
- 35 and

1 (iv) Hazardous Materials present in or on Developer’s Temporary Work Areas.

2 The foregoing shall not preclude or limit any rights or remedies that Developer  
3 may have against any Governmental Entity or any other third parties, including  
4 existing or prior owners, lessees, licensees and occupants of any parcel of land  
5 that is or becomes part of the Project ROW, excluding, however, the State, ADOT  
6 and their respective agents.

7 (e) To the extent permitted by applicable Law, Developer shall indemnify, save,  
8 protect and defend ADOT from claims, demands, causes of action and Losses  
9 arising out of or resulting from the off-site disposal of Hazardous Materials for  
10 which Developer is considered the generator or arranger pursuant to Section  
11 8.8.7(d). The foregoing indemnity shall survive the expiration or termination of  
12 this Agreement.

13 **8.9 Title**

14 Developer warrants that it owns, or will own, and has, or will have, good and marketable title to  
15 all materials, equipment, tools and supplies furnished, or to be furnished, by it and its  
16 Subcontractors that become part of the Project or are purchased for ADOT for the operation,  
17 maintenance or repair thereof, free and clear of all Liens. Title to all of such materials, equipment,  
18 tools and supplies that are delivered to the Site shall pass to ADOT, free and clear of all Liens,  
19 upon the sooner of: (a) incorporation into the Project, or (b) payment by ADOT to Developer of  
20 invoiced amounts pertaining thereto. Notwithstanding any such passage of title, Developer shall  
21 retain sole care, custody and control of such materials, equipment, tools and supplies and shall  
22 exercise due care with respect thereto until Project Substantial Completion or, with respect to  
23 such materials, equipment, tools and supplies that are necessary for Developer to satisfy its  
24 obligations under the Agreement, including South Segment Substantial Completion, until such  
25 obligations are satisfied or until Developer is terminated pursuant to Sections 21 or 26.

26 **8.10 Site Security**

27 Commencing upon issuance of NTP 2 and continuing thereafter throughout the D&C Period,  
28 Developer shall provide appropriate security for the Site, and shall take all reasonable  
29 precautions and provide protection to prevent Loss to the D&C Work and materials and  
30 equipment to be incorporated therein, as well as all other property at or on the Site, whether  
31 owned by Developer, ADOT, or any other Person; provided, however, that Developer’s  
32 obligations under this Section 8.10 shall cease with respect to the South Segment if and when  
33 ADOT issues a Certificate of South Segment Substantial Completion, except that Developer shall  
34 continue to be responsible under this Section 8.10 for the temporary transition zone within the  
35 South Segment until ADOT issues the Certificate of Project Substantial Completion. Developer  
36 shall comply with ADOT’s security requirements and protocols.

1 **8.11 Maintenance During Construction**

2 **8.11.1** Commencing upon issuance of NTP 2 and continuing thereafter during the D&C  
3 Period, Developer shall be responsible for Maintenance During Construction to the extent set  
4 forth in Section GP 110.12 of the Technical Provisions; provided, however, that:

5 (a) Developer’s responsibility for Maintenance During Construction respecting the  
6 South Segment shall cease if and when ADOT issues a Certificate of South Segment  
7 Substantial Completion in advance of the Certificate of Project Substantial  
8 Completion, except that Developer shall continue to be responsible for  
9 Maintenance During Construction of the temporary transition zone within the  
10 South Segment until ADOT issues the Certificate of Project Substantial  
11 Completion; and

12 (b) Developer’s maintenance responsibility for portions of such improvements owned  
13 by third parties shall extend until the control of and maintenance responsibility  
14 for such portions are officially transferred to the respective third parties.

15 **8.11.2** ADOT may determine that Maintenance During Construction in addition to that  
16 described in Section GP 110.12 of the Technical Provisions is required during the D&C Period for  
17 the portions of the Project ROW being used by the traveling public during the D&C Period, in  
18 order to ensure the safety of the traveling public. If ADOT orders any such additional  
19 Maintenance During Construction, Developer will be paid therefor through an ADOT-Directed  
20 Change and Supplemental Agreement. Such additional Maintenance During Construction may  
21 include, but is not limited to, additional sweeping, roadway and subgrade repair, safety feature  
22 repair, debris removal, repair of pedestrian features and other maintenance necessary to provide  
23 a smooth and safe traveled way. Notwithstanding the foregoing, Developer shall repair any  
24 damage caused by its operations and activities without the right to an increase in the Contract  
25 Price, a Completion Deadline adjustment or any other Claim.

26 **8.12 Aesthetics and Landscaping**

27 **8.12.1** Developer shall perform, or cause to be performed, all aesthetics and  
28 landscaping D&C Work for the Project, including landscape establishment, in accordance with  
29 Sections DR 450 and CR 450 of the Technical Provisions, as applicable.

30 **8.12.2** The Contract Price includes all costs of Developer relating to the aesthetics and  
31 landscaping D&C Work for the Project, including landscape establishment and costs of water  
32 supply during landscape establishment.

33 **8.12.3** With respect to landscape establishment:

34 (a) Developer shall meet, or cause to be met, the landscape establishment  
35 requirements, including plant watering, set forth in Section DR 450 and CR 450 of  
36 the Technical Provisions, as applicable.

1 (b) In addition to the regular plant inspections required under Section CR 450.3.4.3 of  
2 the Technical Provisions, on or about 360 days after Project Substantial  
3 Completion, ADOT and Developer will jointly inspect plant materials installed as  
4 part of the landscaping Work. No later than 20 Days after completing this  
5 Inspection, Developer shall prepare a written report describing what (if any) of  
6 such installed plant materials (i) died, (ii) failed to establish a root system  
7 reasonably expected for plant materials of a similar type, nature and maturity, and  
8 (iii) failed to show a growth habit reasonably expected for plant materials of a  
9 similar type, nature and maturity.

10 (c) If Developer elects to achieve South Segment Substantial Completion in advance  
11 of Project Substantial Completion, then:

12 (i) the Parties shall also follow the procedures set forth in Section 8.12.3(b)  
13 with respect to the South Segment; and

14 (ii) as a result, there will be two landscape establishment periods, one  
15 applicable to the South Segment and measured from the date of South  
16 Segment Substantial Completion, and the other applicable to the balance  
17 of the Project and measured from the Project Substantial Completion  
18 Date.

19 **8.13 Clayton Act Assignment**

20 Developer shall assign to ADOT all right, title and interest in and to all claims and causes of action  
21 it may have under Section 4 of the Clayton Act (15 U.S.C. § 15), arising from purchases of goods,  
22 services or materials pursuant to the Contract Documents or any Subcontract. This assignment  
23 shall become automatically effective when ADOT tenders Final D&C Payment to Developer,  
24 without further documentation or acknowledgment by the Parties.  
25

1           **SECTION 9.    TIME; NOTICES TO PROCEED; PROJECT SCHEDULE AND PROGRESS**

2    **9.1    Time of Essence**

3           **9.1.1**    Developer shall develop the Project in accordance with the time periods set forth  
4 in this Agreement. Except where this Agreement expressly provides for an extension of time, the  
5 time limitations set forth in the Contract Documents for Developer's performance of its  
6 covenants, conditions and obligations are of the essence, and Developer waives any right at law  
7 or in equity to tender or complete performance beyond the applicable time period, or to require  
8 ADOT to accept such performance. If Developer does not complete performance within the  
9 applicable time period, Developer shall remain responsible for completing the Project subject to  
10 ADOT's right to exercise any remedies available to it.

11           **9.1.2**    The time periods set forth in this Agreement for payments from one Party to the  
12 other Party are of the essence, and each Party waives any right at law or in equity to tender  
13 payment beyond the applicable time period, except to the extent of the cure periods provided in  
14 this Agreement.

15    **9.2    Notices to Proceed**

16           **9.2.1**    Authorization allowing Developer to proceed with D&C Work shall be provided  
17 through ADOT's issuance of NTPs. Developer acknowledges and agrees that:

- 18           (a)    ADOT has no obligation to issue an NTP for D&C Work under this Agreement;
- 19           (b)    Unless and until ADOT issues NTP 1, ADOT will have no liability to Developer under  
20 this Agreement except as provided otherwise in Section 26.4; and
- 21           (c)    ADOT's liability under this Agreement shall be limited to payment owing for D&C  
22 Work authorized under NTPs actually issued.

23           **9.2.2**    Refer to Sections 16.4.11 and 16.4.12 regarding Price adjustments to be made  
24 for certain delays in issuance of NTP 1 and NTP 2, respectively, and to Section 26.4 regarding  
25 Developer's right to terminate and Termination Compensation for certain delays in issuance of  
26 NTP 1.

27    **9.3    Issuance of NTP 1**

28    ADOT will issue NTP 1 within ten Business Days after the Effective Date. Issuance of NTP 1  
29 authorizes Developer to do only the following:

- 30           (a)    Mobilize, including establishing Developer's Temporary Work Areas, the  
31 collocated office and ADOT field office;
- 32           (b)    Prepare or continue preparing all component parts, plans and documentation of  
33 the Project Management Plan relevant to the D&C Work, including: (i) volumes I,



- 1 II and III of the Quality Management Plan, (ii) Environmental Management Plan,  
2 and (iii) Safety Management Plan;
- 3 (c) Prepare the Transportation Management Plan and Storm Water Pollution  
4 Prevention Plan;
- 5 (d) Prepare the Project Baseline Schedule;
- 6 (e) Prepare the Segment Limits Map;
- 7 (f) Prepare the Design Submittal Schedule;
- 8 (g) Prepare a Schedule of Values for pre-NTP 2 Design Work;
- 9 (h) Prepare the final DBE Utilization Plan;
- 10 (i) Prepare the final OJT Utilization Plan;
- 11 (j) Enter the Project ROW to which ADOT has made access available in order to  
12 conduct surveys and site investigations, including geotechnical, Hazardous  
13 Materials and Utilities investigations, subject to satisfying all applicable conditions  
14 to and limitations on surveying and Site investigation work in the Contract  
15 Documents;
- 16 (k) Assist with ADOT's ROW acquisition, and prepare and submit to ADOT the parcels  
17 that Developer requests ADOT to acquire for Temporary Construction Easements  
18 and Developer-Designated ROW;
- 19 (l) Commence negotiating Utility Agreements with Utility Companies;
- 20 (m) At Developer's option, commence Design Work, provided that (i) ADOT will not  
21 pay for or commence review of Design Documents until Developer satisfies all  
22 conditions precedent set forth in Section 9.5;
- 23 (n) Prepare the Basis of Design Report described in Section GP 110.01.1.2 of the  
24 Technical Provisions;
- 25 (o) Prepare the bulletin boards described in Section GP 110.05.1 of the Technical  
26 Provisions;
- 27 (p) Prepare the sample Vehicle Project Logo described in Section GP 110.05.4.3 of the  
28 Technical Provisions;
- 29 (q) Prepare the Existing Conditions Site Documentation described in Section GP  
30 110.11.1 of the Technical Provisions;

- 1 (r) Prepare the Utility Coordination Plan described in Section DR 430.2.2.1 of the  
2 Technical Provisions;
- 3 (s) Prepare the Plant Inventory described in Section DR 450.2.3 of the Technical  
4 Provisions;
- 5 (t) Prepare the Sign Inventory described in Section DR 460.2.3 of the Technical  
6 Provisions; and
- 7 (u) Prepare the ITS Inventory described in Section DR 466.2.3 of the Technical  
8 Provisions.

9 **9.4 Issuance of NTP 2**

10 **9.4.1** ADOT anticipates issuing NTP 2 when all of the following conditions have been  
11 satisfied:

- 12 (a) If applicable under this Agreement, each D&C Guaranty in favor of ADOT required  
13 under Section 12.7 has been executed and delivered to ADOT and are in full force  
14 and effect;
- 15 (b) All Insurance Policies required in connection with the D&C Work have been  
16 obtained and are in full force and effect, and Developer has delivered to ADOT  
17 written binding verifications of coverage from the relevant issuers of such  
18 Insurance Policies;
- 19 (c) Developer has developed and delivered to ADOT, and ADOT has approved, in  
20 accordance with Section 5.4, the component parts, plans and documentation of  
21 the Project Management Plan designated “Required Prior to NTP 2” in Table 110-  
22 5 of Section GP 110.03 of the Technical Provisions;
- 23 (d) Developer has developed and delivered to ADOT the Collocated Office Layout Plan  
24 and all ADOT comments thereon have been resolved, and Developer has  
25 completed the improvements for, and made available to ADOT for occupancy, the  
26 ADOT office space in the collocated office space;
- 27 (e) Developer has developed and delivered to ADOT the Field Office Layout Plan and  
28 all ADOT comments thereon have been resolved, and Developer has completed  
29 the improvements for, and made available to ADOT for occupancy, the ADOT field  
30 office space;
- 31 (f) Developer has developed and delivered to ADOT the Network Administration Plan  
32 and all ADOT comments thereon have been resolved;
- 33 (g) Developer has developed and delivered to ADOT and ADOT has approved the  
34 Project Baseline Schedule;

- 1 (h) Developer has developed and delivered to ADOT and ADOT has approved the  
2 Segment Limits Map;
- 3 (i) Developer has developed and delivered to ADOT and ADOT has approved the  
4 Design Submittal Schedule;
- 5 (j) Developer has developed and delivered to ADOT and ADOT has approved the Basis  
6 of Design Report;
- 7 (k) Developer has developed and delivered to ADOT and ADOT has approved the draft  
8 SWPPP;
- 9 (l) Developer has developed and delivered to ADOT the Transportation Management  
10 Plan and all ADOT comments thereon have been resolved;
- 11 (m) Developer has developed and delivered to ADOT the Utility Coordination Plan and  
12 all ADOT comments thereon have been resolved;
- 13 (n) Developer has developed and delivered to ADOT the Plant Inventory and all ADOT  
14 comments thereon have been resolved;
- 15 (o) Developer has developed and delivered to ADOT and ADOT has approved the final  
16 DBE Utilization Plan;
- 17 (p) Developer has developed and delivered to ADOT and ADOT has approved the final  
18 OJT Utilization Plan;
- 19 (q) Developer has developed and delivered to ADOT and ADOT has approved the  
20 Vehicle Project Logo;
- 21 (r) Developer has developed and delivered to ADOT the Sign Inventory;
- 22 (s) Developer has developed and delivered to ADOT the ITS Inventory;
- 23 (t) The Parties have conducted the initial partnering workshop as set forth in Section  
24 24.1.2(b)(i);
- 25 (u) All representations and warranties of Developer set forth in Section 4 shall be and  
26 remain true and correct in all material respects;
- 27 (v) There exists no uncured Developer Default for which Developer has received  
28 Notice from ADOT;
- 29 (w) Developer has conducted field meetings with ADOT to review and document the  
30 preconstruction condition of the existing lighting system, FMS and drainage

1 system in accordance with Section GP 110.12 of the Technical Provisions and has  
2 resolved all issues identified; and

3 (x) Developer has satisfied any other requirements or conditions for commencing  
4 Design Work or any other Work authorized by NTP 2 set forth in the Technical  
5 Provisions.

6 **9.4.2** Issuance of NTP 2 authorizes Developer to perform D&C Work not authorized  
7 under Section 9.3, and related activities pertaining to the Project.

## 8 **9.5 Conditions to Design Work Review and Payment**

9 **9.5.1** Notwithstanding any contrary provision of Section 5.1.2, ADOT will have no  
10 obligation to commence its review of, or pay Developer for, any Design Work until all of the  
11 following conditions precedent have been satisfied:

12 (a) ADOT has issued NTP 1;

13 (b) ADOT has received and approved, as provided in the Technical Provisions, the  
14 Professional Services Quality Management Plan, final DBE Utilization Plan with  
15 respect to Developer’s plan to meet the Professional Services DBE Goal, the Design  
16 Submittal Schedule, a Schedule of Values for the pre-NTP 2 Design Work, and the  
17 Basis of Design Report; and

18 (c) ADOT has received from Developer all the Professional Services DBE Intended  
19 Participation Affidavit Summaries then required under Section 12.02 of the DBE  
20 Special Provisions.

21 **9.5.2** ADOT may reject, without review, any Design Document submitted to ADOT  
22 before the date that the conditions precedent set forth in Section 9.5.1 are satisfied. All time  
23 periods available to ADOT for review or approval of any Design Document submitted to ADOT  
24 shall not commence running until Developer satisfies the conditions set forth in Section 9.5.1.

## 25 **9.6 Conditions to Commencement of Construction**

### 26 **9.6.1 Construction Work Generally**

27 Developer shall not commence or permit commencement of Construction Work until  
28 ADOT issues NTP 2 and all of the following conditions have been satisfied:

29 (a) All Governmental Approvals necessary to begin Construction Work in the  
30 applicable portion of the Project have been obtained, and Developer has furnished  
31 to ADOT fully executed copies of such Governmental Approvals;

- 1 (b) Developer has satisfied for the applicable portion of the Project all applicable pre-  
2 construction requirements contained in the Environmental Approvals and other  
3 Governmental Approvals;
- 4 (c) ADOT has (i) obtained an order for immediate possession, (ii) closed the  
5 acquisition of the parcel, or (iii) otherwise obtained permanent right of entry  
6 through settlement, negotiation, the condemnation process or otherwise for  
7 Project ROW necessary to commence construction of the applicable portion of the  
8 Project;
- 9 (d) Developer has caused to be developed and delivered to ADOT, and ADOT has  
10 approved, in accordance with Section 5.4, the component parts, plans and  
11 documentation of the Project Management Plan designated as “Required Prior to  
12 NTP 2” in Table 110-5 of Section GP 110.03 of the Technical Provisions;
- 13 (e) Developer has submitted to ADOT an OJT Schedule containing all the information  
14 specified in Section 7.0 of Exhibit 7 (ADOT’s OJT Special Provisions);
- 15 (f) Developer has erected in a location approved by ADOT the bulletin boards  
16 described in Section GP 110.05.1 of the Technical Provisions;
- 17 (g) Developer has delivered to ADOT all Submittals relating to the applicable  
18 Construction Work required by the Project Management Plan or Contract  
19 Documents, in the form and with the content required by the Project  
20 Management Plan or Contract Documents;
- 21 (h) Developer has adopted written policies establishing ethical standards of conduct  
22 for all Developer-Related Entities, including Developer’s supervisory and  
23 management personnel in dealing with (i) ADOT and the General Engineering  
24 Consultant and (ii) employment relations, in accordance with Section 11.8; and
- 25 (i) Developer has provided to ADOT at least ten days advance written notification of  
26 the date Developer determines that it will satisfy all of the conditions set forth in  
27 this Section 9.6.1.

28 **9.6.2 Utility Adjustments**

29 Developer shall not commence or permit or suffer commencement of construction of a  
30 Utility Adjustment included in the Construction Work until ADOT issues NTP 2, all of the  
31 conditions set forth in Section 9.6.1 that are applicable to the Utility Adjustment (reading such  
32 provisions as if they referred to the Utility Adjustment) have been satisfied, and the following  
33 additional requirements have been satisfied:

- 34 (a) Except as otherwise provided in Section 7.4.7(e), the Utility Adjustment is covered  
35 by an executed Utility Agreement;

- 1 (b) Developer has submitted to ADOT the Submittals described in Sections DR 430  
2 and CR 430 of the Technical Provisions concerning the Utility Adjustment; and
- 3 (c) Developer has obtained ADOT review and approval of any other matters  
4 respecting the Utility Adjustment that are required under any applicable federal  
5 requirements.

6 **9.7 Completion Deadlines**

7 **9.7.1 Project Substantial Completion Deadline**

8 Developer shall achieve Project Substantial Completion not later than the Project  
9 Substantial Completion Deadline.

10 **9.7.2 Final Acceptance Deadline**

11 Developer shall achieve Final Acceptance of the Project not later than the Final  
12 Acceptance Deadline.

13 **9.7.3 No Completion Deadline Adjustment**

14 Except as otherwise specifically provided in Sections 0 and 17, ADOT shall have no  
15 obligation to adjust a Completion Deadline and Developer shall not be relieved of its obligation  
16 to comply with the Project Schedule and to achieve Project Substantial Completion and Final  
17 Acceptance of the Project by the applicable Completion Deadlines.

18 **9.8 Scheduling of Design, Construction and Payment**

19 **9.8.1 Project Schedule**

20 Developer shall undertake and complete the Work in accordance with the Project  
21 Schedule prepared in conformance with Section GP 110.06 of the Technical Provisions. The  
22 Parties shall use the Project Schedule for planning and monitoring the progress of the Work and  
23 as the basis for determining the amount of monthly progress payments to be made to Developer.

24 **9.8.2 Float**

25 All Float contained in the Project Schedule, as shown in the Preliminary Project Baseline  
26 Schedule or as generated thereafter, shall be a shared, jointly owned Project resource available  
27 to either Party or both Parties as needed to absorb delay caused by Relief Events or any other  
28 event. All Float and corresponding Controlling Work Items shall be shown as such in the Project  
29 Schedule on each affected schedule path. ADOT will have the right to examine the identification  
30 of (or failure to identify) Float and Controlling Work Items on the Project Schedule in determining  
31 whether to approve the Project Schedule. Once identified, Developer shall monitor, account for  
32 and maintain Float in accordance with critical path methodology and Section GP 110.06.2.2F of  
33 the Technical Provisions.

1 **9.9 Recovery Schedule**

2 **9.9.1** If at any time the Work on any Critical Path item is delayed for a period that  
3 exceeds the time set forth in Section GP 110.06.2.10 of the Technical Provisions (including delays  
4 for which Developer may be entitled to a Completion Deadline adjustment under Section 16),  
5 then Developer shall prepare and submit to ADOT for review and approval a Recovery Schedule  
6 meeting the requirements set forth in Section GP 110.06.2.10 of the Technical Provisions. In  
7 addition, if Developer fails to meet any Completion Deadline, as the same may be extended  
8 pursuant to this Agreement, then Developer shall prepare and submit to ADOT for review and  
9 approval a Recovery Schedule meeting the requirements set forth in Section GP 110.06.2.10 of  
10 the Technical Provisions and demonstrating Developer’s proposed plan to achieve Project  
11 Substantial Completion and Final Acceptance with as little additional delay as possible.

12 **9.9.2** Except as otherwise provided in Section 16, all costs incurred by Developer in  
13 preparing, implementing and achieving the Recovery Schedule shall be borne by Developer and  
14 shall not result in a change to the Contract Price.

15 **9.9.3** If Developer fails to provide an acceptable Recovery Schedule as required herein  
16 and in Section GP 110.06.2.10 of the Technical Provisions, then, in addition to any other rights  
17 and remedies in favor of ADOT arising out of such failure, ADOT will have the right to withhold  
18 5% of progress payments until such time as Developer has prepared and ADOT has approved  
19 such Recovery Schedule. Payment of any such amounts withheld by ADOT shall be due from  
20 ADOT to Developer not later than the Developer Cycle Key Date first occurring after the date  
21 ADOT approves the corresponding Recovery Schedule. Any failure or delay in Developer’s  
22 submittal or ADOT’s approval of a Recovery Schedule shall not entitle Developer to an increase  
23 in the Contract Price, any Completion Deadline adjustment or any other Claim under the Contract  
24 Documents.  
25





- 1 (c) Training of ADOT staff in the operation of the Flex Lanes System;
- 2 (d) Coordination and cooperation, and requiring its Developer-Related Entities to  
3 coordinate and cooperate, with ADOT in its performance of functions and services  
4 respecting the Project during the Term that are not the responsibility of Developer  
5 under this Agreement, and with third parties with statutory duties or functions in  
6 relation to the Project;
- 7 (e) The maintenance, compliance with and renewal of Governmental Approvals  
8 necessary and incidental to the foregoing activities; and
- 9 (f) The other O&M Work set forth in Section OMR 400.1 of the Technical Provisions.

10 **10.1.4** During the O&M Period, Developer shall provide an O&M Manager approved by  
11 ADOT who:

- 12 (a) will have full responsibility for the prosecution and quality management of the  
13 O&M Work;
- 14 (b) must attend (either in person or by telephone or other electronic means of  
15 communication) the monthly and annual meetings as provided in Section GP  
16 110.02.8 and Sections OMR 400.3.3C and 400.3.3D of the Technical Provisions;
- 17 (c) will act as agent and be a single point of contact in all matters on behalf of  
18 Developer; and
- 19 (d) must be available and on-call to respond telephonically to ADOT or ADOT's  
20 Authorized Representatives within 30 minutes after telephonic contact.

21 **10.1.5** Developer shall, at its sole cost and expense, comply with Section OMR 400.2 of  
22 the Technical Provisions during the O&M Period.

23 **10.1.6** Attachment 500-1 of the Technical Provisions sets forth minimum Performance  
24 Requirements related to the O&M Work. Developer's failure to comply with such requirements  
25 shall entitle ADOT to the rights and remedies set forth in the Contract Documents, including the  
26 assessment of Noncompliance Charges, deductions from payments otherwise owed to  
27 Developer, and termination for uncured Developer Default.

28 **10.1.7** In addition to performing all other requirements of the Contract Documents,  
29 Developer shall cooperate with ADOT and Governmental Entities with jurisdiction in all matters  
30 relating to the O&M Work, including their review, inspection and oversight of the operation and  
31 maintenance of the Project.

1 **10.2 Project Plans and Manual for O&M Period**

2 **10.2.1** Developer shall submit to ADOT the drafts of the Operations and Maintenance  
3 Management Plan, Operations and Maintenance Quality Management Plan, Operations and  
4 Maintenance Safety Management Plan, Environmental Management Plan and Operations  
5 Manual described in Section OMR 400.2.1 of the Technical Provisions, and generic Traffic Control  
6 Plans described in Section 10.10.1, not less than 120 days prior to the date set forth in the Project  
7 Schedule for Project Substantial Completion. ADOT will review and provide comments to  
8 Developer within 30 days after receiving such draft plans. Developer’s cost to prepare and obtain  
9 approval of such Project Plans is deemed to be included in the D&C Price.

10 **10.2.2** Not later than 15 days after ADOT delivers its comments to Developer on the  
11 drafts of the Operations and Maintenance Management Plan, Operations and Maintenance  
12 Quality Management Plan, Operations and Maintenance Safety Management Plan,  
13 Environmental Management Plan, Operations Manual and generic Traffic Control Plans,  
14 Developer and ADOT will meet to address the comments. Developer shall resolve all comments  
15 to the satisfaction of ADOT in its good faith discretion and submit the final versions of such  
16 Project Plans and Manual for ADOT’s approval in its good faith discretion not less than 30 days  
17 prior to the date set forth in the Project Schedule for Project Substantial Completion. ADOT’s  
18 approval of the final versions of the Operations and Maintenance Management Plan, Operations  
19 and Maintenance Quality Management Plan, Operations and Maintenance Safety Management  
20 Plan, Environmental Management Plan, Operations Manual and generic Traffic Control Plans  
21 shall be one of the O&M Conditions Precedent, as set forth in Section 8.6.4.

22 **10.2.3** Developer shall submit revisions to the Operations and Maintenance  
23 Management Plan, Operations and Maintenance Quality Management Plan, Operations and  
24 Maintenance Safety Management Plan, Environmental Management Plan, Operations Manual  
25 and generic Traffic Control Plans, as required and not less than annually, prior to the annual O&M  
26 Work meeting as described in Section OMR 400.3.3D of the Technical Provisions.

27 **10.3 Non-Routine Maintenance Work**

28 **10.3.1** Developer shall diligently perform and complete Non-Routine Maintenance  
29 Work as and when required, including as and when required to comply with the Applicable  
30 Standards and Performance Requirements triggering Non-Routine Maintenance Work set forth  
31 in Section OMR 200.2 and Attachment 500-1 of the Technical Provisions.

32 **10.3.2** Developer is not obligated to conduct monitoring, inspection or surveillance of  
33 the O&M Elements in order to determine whether Non-Routine Maintenance Work is necessary.  
34 If, however, in the course of performing O&M Work or inspections pursuant to Section OMR  
35 400.3 of the Technical Provisions Developer discovers or has reason to suspect the existence of  
36 a condition that requires Non-Routine Maintenance Work, Developer shall promptly report such  
37 discovery or suspicion to ADOT.

38 **10.3.3** ADOT may, but is not obligated to, conduct remote and in-the-field monitoring,

1 inspection and surveillance of the O&M Elements at such frequencies as ADOT determines in its  
2 sole discretion. Developer shall cooperate with ADOT to accommodate ADOT’s monitoring,  
3 inspection and surveillance of the O&M Elements.

4 **10.3.4** Within ten Business Days after discovering a condition or situation requiring  
5 Non-Routine Maintenance Work with an estimated cost of \$250,000 or more, whether through  
6 written notice from ADOT or its own discovery, Developer shall submit to ADOT a work plan and  
7 schedule for undertaking the Non-Routine Maintenance Work. Depending on the circumstances,  
8 ADOT may grant extensions of time to submit a work plan and schedule. The work plan and  
9 schedule shall describe the proposed Non-Routine Maintenance Work in reasonable detail,  
10 describe how the planned Non-Routine Maintenance Work will restore compliance with  
11 Applicable Standards and Performance Requirements, set forth any proposed Closures, set forth  
12 a schedule for completing the work, and set forth such other information and analysis as ADOT  
13 reasonably requests. The work plan and schedule shall be subject to ADOT approval in its good  
14 faith discretion.

15 **10.3.5** No work plan or schedule is required for Non-Routine Maintenance Work with  
16 an estimated cost less than \$250,000. Developer shall perform and complete such Non-Routine  
17 Maintenance Work on a schedule consistent with applicable required temporary and permanent  
18 response times set forth in Attachment 500-1 of the Technical Provisions.

19 **10.3.6** Notwithstanding Sections 10.3.4 and 10.3.5, if Non-Routine Maintenance Work  
20 is necessary to end a Closure within the O&M Limits or to deal with an Incident or Emergency,  
21 Developer shall immediately undertake all interim or permanent Non-Routine Maintenance  
22 Work that is necessary to open the roadway or mitigate the Incident or Emergency as soon as  
23 possible. Developer shall immediately notify ADOT’s Northwest District permit office of any Non-  
24 Routine Maintenance Work being undertaken to deal with an Emergency.

25 **10.3.7** With respect to Non-Routine Maintenance Work in response to an Emergency:

26 (a) Developer shall solicit competitive bids for such work if FHWA or FEMA  
27 regulations, policies or procedures require competitive bidding in order to obtain  
28 reimbursement for eligible costs;

29 (b) ADOT will provide oversight relating to such Emergency-related Non-Routine  
30 Maintenance Work in accordance with the Contract Documents; and

31 (c) Developer shall ensure that such repair work is performed in accordance with the  
32 Contract Documents and State and federal Law applicable to such Emergency-  
33 related Non-Routine Maintenance Work, including the requirements of the FHWA  
34 Emergency Relief Manual as most recently published by FHWA  
35 (<http://www.fhwa.dot.gov/reports/erm/>). Further, Developer shall maintain  
36 estimates, cost records and supporting documentation in accordance with such  
37 Laws, and in a form and content to enable ADOT to seek reimbursement for  
38 eligible costs from FHWA or FEMA, if applicable.

1           **10.3.8** Notwithstanding any contrary provision of this Section 10.3, Developer shall not  
2 be obligated to perform Non-Routine Maintenance Work to correct damage to O&M Elements  
3 that results from an Incident or Emergency or response thereto if:

4           (a) The Incident or Emergency occurs during the last 30 days of the Term; and

5           (b) Even with diligent efforts, Developer would not be able to complete the necessary  
6 maintenance and repairs by the end of the Term.

7 The foregoing provision shall not, however, excuse Developer from undertaking as soon as  
8 possible interim Non-Routine Maintenance Work that is necessary to open the roadway or  
9 mitigate an Incident or Emergency.

10           **10.3.9** Developer shall deliver to ADOT weekly progress reports on Non-Routine  
11 Maintenance Work until such Work is completed. The weekly progress reports shall contain such  
12 information as ADOT reasonably requests.

13           **10.3.10** Developer shall deliver to ADOT a written report of the Non-Routine  
14 Maintenance Work performed in the immediately preceding year as part of the Annual O&M  
15 Work Report required under Section OMR 400.3.3B of the Technical Provisions. The report shall  
16 describe:

17           (a) by location, the O&M Element for which Non-Routine Maintenance Work was  
18 performed;

19           (b) the type of Non-Routine Maintenance Work performed;

20           (c) each specific item replaced;

21           (d) any warranty information associated with any replacement item;

22           (e) the dates of commencement and completion of such Non-Routine Maintenance  
23 Work;

24           (f) the total cost incurred in the immediately preceding year and cumulatively in the  
25 O&M Period through the end of the immediately preceding year on Non-Routine  
26 Maintenance Work to correct damage to O&M Elements that results from an  
27 Incident or Emergency or response thereto, calculated as set forth in Section  
28 15.6.4; and

29           (g) such other information as ADOT reasonably requests.

## 30 **10.4 O&M Changes**

31           **10.4.1** ADOT shall have the right, in its sole discretion, to adopt at any time O&M  
32 Changes; and Developer acknowledges it must comply with all O&M Changes. ADOT shall provide

1 Developer with prompt Notice of such O&M Changes, whereupon they shall constitute  
2 amendments, and become part of the Technical Provisions and replace and supersede provisions  
3 of the Technical Provisions that would otherwise have been inconsistent with the change. ADOT  
4 will use reasonable efforts to identify any superseded provisions in its Notice to Developer.

5 **10.4.2** Developer shall implement an O&M Change only after ADOT issues a  
6 Supplemental Agreement or Directive Letter therefor pursuant to Section 17. If an O&M Change  
7 requires major repair, reconstruction, rehabilitation, restoration, renewal or replacement of any  
8 O&M Element during the O&M Period, or requires construction or installation of new  
9 improvements, Developer shall perform the major repair, reconstruction, rehabilitation,  
10 restoration, renewal or replacement or the new improvement work according to the schedule  
11 therefor adopted in the Supplemental Agreement for such work. If an O&M Change requires  
12 implementation not entailing such work, Developer shall implement it from and after the date  
13 ADOT issues the Supplemental Agreement.

14 **10.4.3** For clarity, if Developer has notice or knows of the O&M Change on or prior to  
15 the date Developer commences operation, maintenance, routine repair or routine replacement  
16 of damaged, worn or obsolete components or materials of the O&M Elements, then Developer  
17 shall comply with such O&M Change in carrying out such operation, maintenance, routine repair  
18 or replacement.

19 **10.5 Deviations**

20 **10.5.1** Developer may submit a written request for ADOT approval of Deviations from  
21 applicable Technical Provisions regarding the O&M Work. Where Developer requests a Deviation  
22 as part of the submittal of a component plan of the Operations and Maintenance Management  
23 Plan, Developer shall specifically identify and label the Deviation.

24 **10.5.2** ADOT will consider in its sole discretion, but have no obligation to approve, any  
25 such request, and Developer shall bear the burden of persuading ADOT that the Deviation sought  
26 constitutes sound and safe practices consistent with Good Industry Practice and achieves or  
27 substantially achieves ADOT's applicable safety requirements.

28 **10.5.3** No Deviation shall be deemed approved or be effective unless and until  
29 approved in a writing signed by ADOT's Authorized Representative. ADOT's affirmative written  
30 approval of a component plan of the Operations and Maintenance Management Plan shall  
31 constitute: (a) approval of the Deviations expressly identified and labeled as Deviations therein,  
32 unless ADOT takes exception to any such Deviation; and (b) disapproval of any Deviations not  
33 expressly identified and labeled as Deviations therein.

34 **10.5.4** If ADOT does not issue a written Deviation within ten Business Days after its  
35 receipt of Developer's request for a Deviation, such request shall be deemed disapproved.  
36 ADOT's denial or disapproval of a requested Deviation shall be final and not subject to the Dispute  
37 Resolution Procedures.

1           **10.5.5** ADOT may elect to process the application as a Change Request under Section 17  
2 rather than as an application for a Deviation.

3 **10.6 Safety and Security**

4           **10.6.1 Safety**

5           Developer is responsible for the safety and security of the O&M Limits and the workers  
6 and the public thereon during all construction, operation and maintenance activities under the  
7 control of any Developer-Related Entity.

8           **10.6.2 Policing**

9           (a) Developer acknowledges that the Arizona Department of Public Safety, the City of  
10 Phoenix Police Department, Maricopa County Sheriff's Department and Yavapai  
11 County Sheriff's Department are empowered to enforce all applicable Laws and to  
12 enter the Project and Project ROW at any and all times to carry out their law  
13 enforcement duties. No provision of this Agreement is intended to surrender,  
14 waive or limit any police powers of the Arizona Department of Public Safety, the  
15 City of Phoenix Police Department, Maricopa County Sheriff's Department,  
16 Yavapai County Sheriff's Department or any other Governmental Entity with  
17 jurisdiction to provide traffic patrol, traffic law enforcement and other police and  
18 public safety services, and all such powers are hereby expressly reserved.

19           (b) Neither Party will have any liability or obligation to the other Party resulting from,  
20 arising out of or relating to the failure, negligence or misconduct in providing  
21 police and public safety services by the Arizona Department of Public Safety, the  
22 City of Phoenix Police Department, Maricopa County Sheriff's Department,  
23 Yavapai County Sheriff's Department or any other Government Entity with  
24 jurisdiction to provide traffic patrol, traffic law enforcement and other police and  
25 public safety services.

26           (c) ADOT and third parties with responsibility for traffic regulation and enforcement  
27 shall have the right to install, operate, maintain and replace cameras or other  
28 equipment on the Project that relate to traffic regulation or enforcement.  
29 Developer shall coordinate and cooperate, and require its Subcontractors to  
30 coordinate and cooperate, with any such installation, maintenance and  
31 replacement activities.

32           **10.6.3 Incident and Emergency Response**

33           (a) Developer shall comply with all applicable Laws and all rules, directives and  
34 guidance of the U.S. Department of Homeland Security and comparable State  
35 agency.

36           (b) Developer shall coordinate and cooperate with all Governmental Entities

1 providing security, first responder and other public emergency response services.

2 (c) Developer shall perform and comply with the provisions of Section OMR 400.4 of  
3 the Technical Provisions concerning Incident and Emergency response, safety and  
4 security.

## 5 **10.7 Hazardous Materials**

6 **10.7.1** Developer shall not be required to engage in Hazardous Materials Management  
7 with respect to Release of Hazardous Materials onto the Project or Project ROW at any time  
8 during the O&M Period except (a) for completing any Hazardous Materials Management  
9 obligations that may first arise during the D&C Period and (b) with respect to any Developer  
10 Release of Hazardous Materials. The provisions of Section 8.8 in respect of Hazardous Materials  
11 Management shall apply throughout the O&M Period to any instances described in clauses (a)  
12 and (b) above.

13 **10.7.2** Developer's obligations with respect to Hazardous Materials set forth in Sections  
14 8.8.3 and 8.8.7 shall apply during the O&M Period.

## 15 **10.8 Utility Accommodation**

16 **10.8.1** It is anticipated that from time to time during the course of the O&M Period,  
17 Utility Companies will apply for additional utility permits to install new Utilities that would cross  
18 or longitudinally occupy the O&M Limits, or to modify, repair, upgrade, relocate or expand  
19 existing Utilities within the O&M Limits. ADOT will provide Developer reasonable advance  
20 written notice of any such Utility work within the O&M Limits.

21 **10.8.2** Developer shall (a) reasonably accommodate Utility Company construction of  
22 new Utilities or modifications, upgrades, relocations or expansions of existing Utilities, (b)  
23 coordinate and cooperate with the applicable Utility Company and its contractors, and (c) adjust  
24 its work schedules to avoid or minimize interference with such Utility work. No work or services  
25 required of Developer, and no accommodation of new Utilities or of modifications, upgrades,  
26 relocations or expansions of existing Utilities, pursuant hereto shall entitle Developer to an  
27 increase in the O&M Price or other Claim or relief.

## 28 **10.9 Accommodation of Third-Party Signage and Lighting**

29 **10.9.1** In addition to the warning, regulatory, and guide signs within the O&M Limits,  
30 Developer shall accommodate within the O&M Limits third-party signs, including logo type signs  
31 and "Adopt a Highway" signs. Developer shall coordinate and cooperate with any third party  
32 performing such work. ADOT will retain sole authority for approving installation of these signs.  
33 All costs associated with fabricating, installing and maintaining third-party signs shall be borne  
34 by the sign applicant. Developer shall not be responsible for maintenance of third-party signs.

35 **10.9.2** All third-party requests for lighting within the O&M Limits shall be subject to  
36 ADOT approval, and ADOT retains sole authority for approving installation of such lighting.

1 Developer shall not be responsible for operations or maintenance of such lighting.

2 **10.9.3** No work or services required of Developer, and no accommodation of third party  
3 signage or lighting within the O&M Limits, pursuant hereto shall entitle Developer to an increase  
4 in the O&M Price or other Claim or relief.

## 5 **10.10 Traffic Management**

### 6 **10.10.1 Traffic Control Plans**

7 (a) Developer shall prepare generic Traffic Control Plans for use during the O&M  
8 Period, in accordance with the requirements set forth in Section DR 462.3.2 of the  
9 Technical Provisions and the applicable requirements of the Transportation  
10 Management Plan. Developer shall prepare generic Traffic Control Plans for  
11 shoulder, mainline single lane, mainline full, Flex Lanes, ramp full and crossroad  
12 Closures. Prior to implementing traffic control during the O&M Period, Developer  
13 shall submit the generic Traffic Control Plans to ADOT for review and comment,  
14 and shall modify the submitted generic Traffic Control Plans as necessary to  
15 resolve ADOT's comments.

16 (b) If no generic Traffic Control Plan is suitable or sufficient to safely implement a  
17 particular Closure, then Developer shall prepare and submit to ADOT an individual  
18 Traffic Control Plan for such Closure prior to commencing the Closure. Developer  
19 shall prepare the individual Traffic Control Plan in accordance with the  
20 requirements set forth in Section DR 462.3.2 of the Technical Provisions. The  
21 individual Traffic Control Plan may be a modified generic Traffic Control Plan in  
22 order to address the particular circumstances of the Closure.

23 (c) Developer shall implement the generic and individual Traffic Control Plans in  
24 connection with all full and partial Closures during the O&M Period, to promote  
25 safe and efficient operation of the Flex Lanes.

### 26 **10.10.2 Traffic Operation Restrictions**

27 (a) Section 8.5.2(a) (concerning reservation of Closures on ADOT's Event Reporting  
28 System) shall apply during the O&M Period for planned O&M Work requiring  
29 Closures. Accordingly, ADOT's approval of the timing of planned Closures pursuant  
30 to Section 8.5.2(a) is a condition precedent to commencement of the  
31 corresponding O&M Work. For Non-Routine Maintenance Work requiring  
32 Closures, Developer shall first notify ADOT as set forth in Sections DR 462.3.3 and  
33 OMR 400.2.7 of the Technical Provisions.

34 (b) When performing O&M Work, Developer shall keep the number of Closures to a  
35 minimum and shall keep each Lane Closure to the shortest time necessary for safe  
36 and efficient operations. The requirements for and restrictions on Closures are set



1                   forth in Sections DR 462.3.3 and OMR 400.2.7 of the Technical Provisions. If  
2                   Developer violates such requirements and restrictions, Developer shall be subject  
3                   to Liquidated Damages in accordance with Section 22.3 and other remedies as set  
4                   forth in this Agreement.

5                   (c)     ADOT has the authority to deny a Closure in the case of an Emergency, evacuation,  
6                   a special event or any other public activities.

7                   (d)     ADOT will have at all times, without obligation or liability to Developer, the right  
8                   to: (a) issue Directive Letters to Developer regarding traffic management and  
9                   control (with which Developer shall comply), or directly assume traffic  
10                  management and control of the Project during any period that ADOT determines  
11                  such action will be in the public interest as a result of an Emergency or natural  
12                  disaster; and (b) provide on the Project, via message signs or other means  
13                  consistent with Good Industry Practice, traveler and driver information, and other  
14                  public information (e.g., AMBER alerts).

## 15     **10.11 Coordination of Operation and Maintenance with ADOT**

16                  **10.11.1** Developer recognizes and acknowledges that upon Project Substantial  
17     Completion ADOT will control:

18                  (a)     All operation and maintenance of the Project outside the O&M Limits;

19                  (b)     Monitoring of traffic within the O&M Limits;

20                  (c)     Inspection of the Flex Lanes for determining when it is safe to initiate the Flex  
21     Lanes Direction Change;

22                  (d)     Decisions on when to implement the Flex Lanes Direction Change;

23                  (e)     Operation of ITS, including the Flex Lanes System; and

24                  (f)     Incident and Emergency detection and response within the O&M Limits, except  
25     for Developer’s obligation to carry out Non-Routine Maintenance Work to repair  
26     damage to the O&M Elements resulting from an Incident or Emergency or  
27     response thereto.

28                  **10.11.2** Developer and ADOT will cooperate and coordinate regarding their respective  
29     responsibilities in order to minimize disruptions of traffic on and adjacent to the Project and  
30     ensure that such responsibilities are carried out in accordance with then-current operations and  
31     maintenance standards and then-current traffic management standards, practices and  
32     procedures.

33                  **10.11.3** Any interference with or disruption of traffic because of activities on, or the  
34     management, operation, maintenance, expansion or improvement of, any portion of the Project

1 that is not included in the O&M Limits shall not entitle Developer to any Claim, Supplemental  
2 Agreement or relief from withholdings from or deductions to the O&M Price; provided, however,  
3 that if Developer is prevented from implementing a Closure to perform O&M Work that was  
4 previously approved by ADOT due solely to ADOT's traffic management activities on any portion  
5 of the Project that is not included in the O&M Limits, the applicable cure period for any resulting  
6 Noncompliance Event shall be extended if such Noncompliance Event is not reasonably capable  
7 of being cured within the applicable cure period. The extension shall be for a reasonable period  
8 of time under the circumstances, taking into account the scope of the efforts necessary to cure,  
9 the effect of ADOT's traffic management activities on Developer's ability to cure, availability of  
10 temporary remedial measures, and need for rapid action due to impact of the Noncompliance  
11 Event on safety or traffic movement.

## 12 **10.12 Developer O&M Reporting**

13 Developer shall prepare and submit to ADOT Monthly O&M Work Reports, Annual O&M Work  
14 Reports and other reports relating to the O&M Work as required by Section OMR 400.3.3 of the  
15 Technical Provisions. Developer shall submit all reports relating to the O&M Work in the form,  
16 with the content and within the time required under the Contract Documents.

## 17 **10.13 Safety Compliance**

18 **10.13.1** ADOT is entitled from time to time to issue Safety Compliance Orders to  
19 Developer with respect to the Project (both within and outside the O&M Limits).

20 **10.13.2** ADOT will use good faith efforts to inform Developer at the earliest practicable  
21 time of any circumstance or information relating to the Project that in ADOT's reasonable  
22 judgment is likely to result in a Safety Compliance Order. Except in the case of Emergency, ADOT  
23 will consult with Developer prior to issuing a Safety Compliance Order concerning the risk to  
24 public or worker safety, alternative compliance measures, cost impacts, and the availability of  
25 Developer resources to fund the Safety Compliance work.

26 **10.13.3** Subject to conducting such prior consultation (unless excused in the case of  
27 Emergency), ADOT may issue Safety Compliance Orders to Developer at any time from and after  
28 the Effective Date provided the Safety Compliance work can reasonably be completed during the  
29 Term.

30 **10.13.4** Developer shall implement each Safety Compliance Order as expeditiously as  
31 reasonably possible following its issuance. Developer shall diligently prosecute the work  
32 necessary to achieve such Safety Compliance until completion. In no event shall Developer be  
33 entitled to claim that any Force Majeure Event relieves Developer from compliance with any  
34 Safety Compliance Order except where Developer's compliance with such Safety Compliance  
35 Order is delayed due to an ongoing Force Majeure Event and only so long as such Force Majeure  
36 Event is continuing.

37 **10.13.5** Issuance by ADOT of a Safety Compliance Order shall be deemed an ADOT-

1 Directed Change, and Developer shall be entitled to the corresponding additional compensation  
2 or Completion Deadline adjustment in accordance with the terms of Section 16; provided,  
3 however, that for any Safety Compliance Order that is caused by or arises out of a Developer Act,  
4 including Nonconforming Work, Noncompliance Events and Developer Defaults, such Safety  
5 Compliance Order shall be completed by Developer at its sole cost and Developer shall not be  
6 entitled to any additional compensation or Completion Deadline adjustment.

7 **10.14 Handback**

8 **10.14.1** Prior to the end of the O&M Period, Developer shall diligently perform and  
9 complete all Work and improvements necessary to render all O&M Elements in a condition at  
10 the end of the Term that meets the standards and requirements set forth in Section OMR 501 of  
11 the Technical Provisions.

12 **10.14.2** The Parties shall conduct Inspections of the O&M Elements and prepare a punch  
13 list of the required Work at the time and according to the terms and procedures specified in  
14 Section OMR 501.2 of the Technical Provisions.

15 **10.14.3** Developer shall perform all Work required pursuant to this Section 10.14 and  
16 Section OMR 501 of the Technical Provisions at no additional charge to ADOT beyond that in the  
17 O&M Price.

18 **10.15 Requirements Applicable to Design and Construction Work**

19 To the extent that Developer performs any material reconstruction work as part of the O&M  
20 Work, Developer shall comply with the requirements and specifications for D&C Work set forth  
21 in the Technical Provisions and in the applicable sections of this Agreement, except as otherwise  
22 set forth herein or approved in advance by ADOT.

23 **10.16 Future Improvements**

24 The scope of this Agreement is limited to the performance of the Work set out in the Contract  
25 Documents and does not pertain to the development, design, construction, operation or  
26 maintenance of any Project reconfiguration, expansion or extension. Developer acknowledges  
27 that any Project reconfiguration, expansion or extension shall be undertaken by ADOT in its sole  
28 discretion and that contracts for the design, construction, operation, maintenance or  
29 rehabilitation of any such Project reconfiguration, expansion or extension may be awarded to  
30 Persons other than Developer pursuant to such process as ADOT may determine.  
31 Notwithstanding the foregoing, Developer shall perform its obligations under this Agreement and  
32 work cooperatively with ADOT with a view to minimizing the cost to ADOT of integrating and  
33 coordinating such work with the Work.

1                                   **SECTION 11. SUBCONTRACTING AND LABOR PRACTICES**

2   **11.1 Non-Discrimination; Equal Employment Opportunity**

3           **11.1.1** Developer shall comply, and shall cause the Developer-Related Entities to  
4 comply, with all applicable state and federal civil rights laws.

5           **11.1.2** Developer shall not, and shall cause the Developer-Related Entities not to,  
6 discriminate on the basis of race, age, color, religion, sex or national origin in the performance of  
7 the Work under the Contract Documents.

8           **11.1.3** Developer and the Developer-Related Entities will not discriminate against any  
9 employee or applicant for employment because of race, age, color, religion, sex or national origin.  
10 Developer will take affirmative action to ensure that applicants are employed and that  
11 employees are treated during employment without regard to their race, age, color, religion, sex  
12 or national origin. Such action shall include, but is not limited to, the following: employment,  
13 upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination,  
14 rates of pay or other forms of compensation, and selection for training, including apprenticeship.  
15 Developer shall post in conspicuous places, available to employees and applicants for  
16 employment, notices setting forth the provisions of this non-discrimination clause.

17           **11.1.4** Developer shall include Sections 11.1.1, 11.1.2 and 11.1.3 in every Subcontract.  
18 Developer shall additionally require that all Subcontractors include Sections 11.1.1, 11.1.2 and  
19 11.1.3 in each further subcontract (with appropriate changes in the names of the parties), so that  
20 such provisions will be binding upon each Subcontractor and every entity that performs any Work  
21 on the Project.

22   **11.2 DBE Requirements and Small Business Concerns**

23           **11.2.1** ADOT has established goals for DBE utilization (“**DBE Goals**”) for different parts  
24 of the D&C Work on the Project. DBE Goals for the Project, which Developer commits to achieve  
25 or use Good Faith Efforts to achieve, are calculated and shall be credited in relation to the portion  
26 of the total D&C Price, allocated to the following components of the Work:

27           (a) Professional Services DBE Goal – 10.16% of the total D&C Price allocated to  
28 Professional Services, consisting of the portion of the D&C Price from Parts A and  
29 B of Exhibit 2-4.1 (D&C Price Breakdown) other than “Initial Core Office Lease and  
30 Equipment” in Part A of Exhibit 2-4.1 (D&C Price Breakdown); and

31           (b) Construction DBE Goal – 10.88% of the total D&C Price allocated to Construction  
32 Work, consisting of the portion of the D&C Price in Part C of Exhibit 2-4.1 (D&C  
33 Price Breakdown) and “Initial Core Office Lease and Equipment” in Part A of Exhibit  
34 2-4.1 (D&C Price Breakdown).

35           **11.2.2** For purposes of Sections 11.2.1(a) and 11.2.1(b), the D&C Price shall be allocated  
36 between Professional Services and Construction Work according to the allocations in the ADOT-

1 approved Project Baseline Schedule; and the sum of such allocations shall equal the total D&C  
2 Price.

3 **11.2.3** ADOT strongly encourages Developer to use additional DBEs above the DBE  
4 Goals in an effort to help ADOT meet its overall DBE goals and help ADOT meet the maximum  
5 feasible portion of its DBE goals through race neutral means as outlined in 49 C.F.R. Part 26.

6 **11.2.4** ADOT's DBE Special Provisions, applicable to the Project, are set forth in Exhibit  
7 6 (ADOT's DBE Special Provisions). The purpose of ADOT's DBE Special Provisions is to ensure that  
8 DBEs shall have an equal opportunity to participate in the performance of contracts financed in  
9 whole or in part with federal funds. Developer shall comply with all applicable requirements set  
10 forth in ADOT's DBE Special Provisions and the provisions in Developer's approved DBE Utilization  
11 Plan.

12 **11.2.5** Within 30 days after issuance of NTP 1, Developer shall (1) revise and convert its  
13 Preliminary DBE Utilization Plan, included in Developer's Proposal, into a more detailed, final DBE  
14 Utilization Plan and (2) submit it to ADOT for approval in ADOT's good faith discretion.

15 (a) The final DBE Utilization Plan shall affirmatively respond to ADOT's comments on  
16 and revisions to the draft final DBE Utilization Plan.

17 (b) The final DBE Utilization Plan shall include the following components:

18 (i) Updated Proposal Forms H-3 and H-4 listing additional DBEs secured to  
19 work on the Project, including a complete list of all DBE Professional  
20 Services firms identified to meet the Professional Services DBE Goal;

21 (ii) Professional Services DBE Intended Participation Affidavits Individual, from  
22 each DBE identified to work on the Project's Design Work;

23 (iii) DBE Subcontractor Intended Participation Affidavits, in the form attached  
24 to Exhibit 6 (ADOT's DBE Special Provisions), for each DBE identified to  
25 work on the Project's Construction Work;

26 (iv) Updated Proposal Forms H-6 and H-7 identifying additional scopes of Work  
27 for future DBE participation, with more detailed information;

28 (v) Expanded descriptions of the types of proactive DBE and small business  
29 bid-specific marketing, recruitment, outreach and community  
30 engagement efforts that Developer will implement while preparing for and  
31 undertaking the D&C Work in order to include DBEs and small businesses  
32 on the Project. Include processes for timely communications and outreach  
33 methods that Developer will use, and a process that Developer will use to  
34 keep track of potential DBEs, small businesses and other Subcontractors  
35 on the Project. Include proposed innovative methods for (A) involving new  
36 and emerging DBEs, and (B) identifying firms that might potentially be

- 1 certified as DBEs and assisting them to become DBE-certified and be  
2 involved in the Project. Discuss how these efforts will flow through tiers of  
3 Subcontractors on the Project;
- 4 (vi) Description of efforts Developer has made and will make to recruit and  
5 utilize non-engineering design and construction related DBE firms such as  
6 graphic design and printing, marketing, outreach, training, employment  
7 services and catering companies to help meet the DBE Goals for the D&C  
8 Work;
- 9 (vii) Description of proposed DBE capacity-building efforts to be implemented  
10 throughout the D&C Work, including methods to assist DBEs with record-  
11 keeping and compliance, bonding, financing, access to supplies and other  
12 capabilities;
- 13 (viii) Description of the estimated DBE participation schedule for each segment  
14 of the D&C Work that Developer identifies pursuant to the Preliminary  
15 Project Baseline Schedule, including anticipated Subcontracts and  
16 estimated dollar amounts to be awarded to DBEs in each segment. Include  
17 a table or diagram of an estimated schedule that illustrates projected work  
18 sequencing of DBE utilization in each segment;
- 19 (ix) Description of processes and procedures that Developer will use to  
20 monitor, track, document and report DBE progress and DBE utilization, and  
21 to maintain and adjust the DBE participation schedule to help ensure  
22 achievement of the DBE Goals. Include time intervals at which Developer  
23 will employ these processes and procedures;
- 24 (x) Description of specific measures that Developer will undertake throughout  
25 the duration of the D&C Work to achieve the DBE Goals, including training  
26 workshops, technical and financial assistance, support services,  
27 mentor/protégé relationships, recruiting and encouraging potential DBEs  
28 to obtain certification, etc. Include a proposed schedule of  
29 events/activities;
- 30 (xi) Description of Developer’s data collection and monitoring systems. Include  
31 how Developer will track DBE recruitment and awards during each  
32 segment of the D&C Work, and how Developer will report DBE payments  
33 and utilization to ADOT. Describe the expected frequency and  
34 comprehensiveness of the efforts;
- 35 (xii) Description of how Developer will manage DBEs and small business  
36 Subcontractors on the Project, including processes for project  
37 management, technical performance reviews, feedback and dispute  
38 resolution to resolve issues that may arise;

1 (xiii) Description of other procedures and processes for meeting DBE  
2 requirements, such as documenting and submitting affidavits for  
3 additional DBEs committed to the Project to meet or exceed the DBE Goals,  
4 prompt pay requirements and substitution/replacement of DBEs; and

5 (xiv) Description of any other innovative or additional Good Faith Efforts  
6 activities already undertaken or ones Developer plans to undertake that  
7 are not listed above or listed in 49 C.F.R. Part 26.

8 (c) The approved DBE Utilization Plan shall be considered a Contract Document, with  
9 an order of precedence as provided by Section 1.1.2.

10 **11.2.6** Developer shall provide information and documentation that demonstrates its  
11 continued Good Faith Efforts throughout the D&C Period to meet the DBE Goals in accordance  
12 with 49 C.F.R. Part 26, Appendix A and the ADOT-approved DBE Utilization Plan. The efforts  
13 employed must at a minimum include those that one could reasonably expect a contractor to  
14 take if the contractor were actively and aggressively trying to obtain DBE participation sufficient  
15 to meet the DBE Goals (See 49 C.F.R. Part 26, Appendix A).

16 **11.2.7** Developer shall not cancel or terminate any Subcontract with a DBE firm except  
17 in accordance with all requirements and provisions applicable to cancellation or termination of  
18 Subcontracts with DBE firms set forth in Exhibit 6 (ADOT's DBE Special Provisions).

19 **11.2.8** For purposes of measuring achievement of or Good Faith Efforts to achieve the  
20 DBE Goals, the dollar amount of Supplemental Agreements or Directive Letters that:

21 (a) Is attributable to an increase in the scopes of Work in DBE Subcontracts or  
22 intended for performance by DBE Subcontractors shall be added to the base D&C  
23 Price;

24 (b) Is attributable to a reduction in the scopes of Work in DBE Subcontracts or  
25 intended for performance by DBE Subcontractors shall be subtracted from the  
26 base D&C Price; and

27 (c) Is not related to the scopes of D&C Work in DBE Subcontracts or intended for  
28 performance by DBE Subcontractors shall not be added to or subtracted from the  
29 base D&C Price.

30 **11.2.9** Developer shall carry out, and shall cause the Subcontractors to carry out,  
31 applicable requirements of 49 C.F.R. Part 26 in the award and administration of USDOT assisted  
32 contracts. Failure by Developer to carry out these requirements is a material breach of this  
33 Agreement, which may result in such remedies available under applicable Law as ADOT deems  
34 appropriate (subject to Developer's rights to notice and opportunity to cure set forth in this  
35 Agreement). Remedies ADOT deems appropriate are more particularly provided in this  
36 Agreement, which may include:

- 1 (a) Withholding certain monthly progress payments;
- 2 (b) Assessing sanctions set forth in Exhibit 6 (ADOT’s DBE Special Provisions);
- 3 (c) Liquidated Damages;
- 4 (d) Termination of this Agreement; and
- 5 (e) Disqualifying Developer and its Affiliates from future bidding as non-responsible.

6 **11.2.10** Pursuant to 49 C.F.R. Part 26.39 ADOT’s DBE program includes an element to  
7 incorporate contracting requirements to facilitate participation by Small Business Concerns in  
8 federally funded contracts. SBCs are for-profit businesses registered to do business in the State  
9 and that meet the U.S. Small Business Administration size standards for average annual revenue  
10 criteria for its primary North American Industry Classification System code. While the SBC  
11 component of ADOT’s DBE program does not require utilization goals on projects, ADOT strongly  
12 encourages Developer to utilize small businesses that are registered in AZ UTRACS, in addition to  
13 DBEs meeting the certification requirement. Visit AZ UTRACS at <https://utracs.azdot.gov/> to search  
14 for registered SBCs that can be used on the Project. SBC utilization on the Project must also be  
15 tracked and reported to ADOT on a monthly basis along with required DBE outreach efforts and  
16 utilization.

17 **11.3 On-the-Job Training**

18 **11.3.1** ADOT has established goals for OJT participation in the Construction Work (“**OJT**  
19 **Goals**”). The OJT Goals for the Project, which Developer commits to achieve or use Good Faith  
20 Efforts to achieve, are:

- 21 (a) Minimum of 10,800 OJT Trainee hours on the Project, with a minimum required  
22 number of training hours of 600 for each OJT Trainee;
- 23 (b) Minimum of two OJT Trainees must each complete at least 2,000 hours on the  
24 Project in the same trade or work classification; and
- 25 (c) Minimum of one OJT Trainee must complete hours solely on the Project necessary  
26 to achieve Journeyman status (a minimum of 2,000 must be completed by this OJT  
27 Trainee solely on the Project).

28 **11.3.2** ADOT’s OJT Special Provisions, applicable to the Project, are set forth in Exhibit  
29 7 (ADOT’s OJT Special Provisions). The purpose of ADOT’s OJT Special Provisions is to ensure that  
30 inexperienced and untrained workers have a substantial opportunity to participate in the  
31 performance of the Construction Work through apprenticeships, training and similar measures  
32 to maintain and grow a diverse, skilled work force. Developer shall perform and comply with all  
33 requirements set forth in the OJT Special Provisions and the provisions in Developer’s approved  
34 OJT Utilization Plan.



1           **11.3.3** Within 30 days after issuance of NTP 1, Developer shall: (a) revise and convert  
2 its Preliminary OJT Utilization Plan, included in the Proposal, into a more detailed, final OJT  
3 Utilization Plan; and (b) submit this plan to ADOT for approval in ADOT’s good faith discretion.  
4 Issuance of NTP 2 is conditioned on obtaining such ADOT approval.

5           (a)     The OJT Utilization Plan shall affirmatively respond to ADOT’s comments on and  
6           revisions to the draft final OJT Utilization Plan.

7           (b)     The OJT Utilization Plan shall include the following components:

8           (i)     Overview of Developer’s understanding of the Project’s OJT requirements,  
9           Developer’s commitment to meeting or using Good Faith Efforts to meet  
10           the OJT Goals and all other OJT requirements, and Developer’s overall OJT  
11           implementation strategy;

12           (ii)    Updated description of Developer’s OJT team/staff that will be working on  
13           the Project. Include names, experience and responsibilities of Developer’s  
14           OJT compliance team members (including the DBE/OJT Outreach and  
15           Compliance Manager included in the Proposal) responsible for  
16           implementing and complying with the OJT Utilization Plan and all OJT  
17           requirements. Include an updated description of how the DBE/OJT  
18           Outreach and Compliance Manager and his/her staff plans to work with  
19           the Compliance Oversight Committee;

20           (iii)   Description of the types of proactive OJT marketing, recruitment, outreach  
21           and community engagement efforts Developer made prior to the Effective  
22           Date and will make throughout the D&C Period to secure the participation  
23           of women, minority, veteran and disadvantaged trainees for the Project.  
24           Include information about Developer’s OJT Trainee screening, hiring and  
25           processes to retain OJT Trainees;

26           (iv)    Description of specific Good Faith Efforts measures that Developer will  
27           undertake throughout the D&C Period to achieve the OJT Goals;

28           (v)     Description of Developer’s OJT program, which Developer will use to train  
29           and educate minority, women and disadvantaged individuals in various  
30           construction related crafts during each segment of the Construction Work,  
31           as such segment is identified in the Preliminary Project Baseline Schedule.  
32           Developer’s OJT program shall include training goals and details for on-site  
33           and off-site training, estimated training schedule time frames specific to  
34           each job classification, number of OJT Trainees per classification and the  
35           estimated start dates for each classification;

36           (vi)    An estimated OJT participation schedule for each phase/segment of the  
37           Construction Work, and a description of processes and procedures

1 Developer will use to document changes/adjustments to the OJT  
2 participation schedule to achieve the OJT Goals. Include time intervals at  
3 which these processes and procedures will be employed; and

4 (vii) Description of Developer’s data collection and monitoring systems,  
5 including tracking of OJT Trainee recruits and reporting of OJT hours and  
6 trainee completion/graduation/termination to ADOT for each  
7 phase/segment of the Construction Work. Include information about the  
8 expected frequency and comprehensiveness of these efforts.

9 (c) The approved OJT Utilization Plan shall be considered a Contract Document with  
10 an order of precedence as provided by Section 1.1.2.

11 **11.3.4** The foregoing shall not preclude the same individual OJT Trainees from satisfying  
12 each of the OJT Goals. Developer shall distribute the number of OJT Trainees among work  
13 classifications on the basis of Developer’s need and the availability of Journeyman persons in the  
14 various classifications. Developer will be credited for each OJT Trainee employed on the Project  
15 in an ADOT or State approved apprenticeship program.

16 **11.3.5** Developer shall complete and submit to ADOT the OJT documentation and  
17 reports as and when required under Section 923-3.01 of Exhibit 7 (ADOT’s OJT Special Provisions).  
18 Failure to submit the required documentation and reports within the specified deadline shall be  
19 cause to (a) deny credit for any work performed by the OJT Trainee prior to approval and (b)  
20 delay approval of Developer’s monthly progress payment.

21 **11.4 Subcontracts**

22 **11.4.1** Developer shall retain or cause to be retained only Subcontractors who are  
23 qualified, experienced and capable in the performance of the portion of the Work assigned.  
24 Developer shall ensure that each Subcontractor has at the time of execution of the corresponding  
25 Subcontract, and maintains at all times during performance of the assigned Work, all licenses  
26 required by applicable Laws and all Insurance Policies. Developer shall retain, employ and utilize  
27 the firms and organizations specifically listed in the Project Management Plan to fill the  
28 corresponding Subcontractor positions listed therein.

29 **11.4.2** Developer shall comply with the following Subcontractor reporting  
30 requirements.

31 (a) For each Subcontract (regardless of tier), Developer shall submit to ADOT a  
32 completed Professional Services Subcontractor Request Form (Exhibit 5-1) and  
33 Construction Work Subcontractor Request Form (Exhibit 5-2), as applicable,  
34 before the Subcontractor commences work.

35 (b) For each Subcontractor (regardless of tier) that performs Work, Developer shall  
36 submit to ADOT written notice of the Subcontractor’s start date not later than 48

1 hours before the Subcontractor commences work or, for those Subcontractors  
2 identified in the Proposal and starting on or within 48 hours of the Effective Date,  
3 not later than 48 hours after the start date.

4 (c) Except for DBE Subcontracts, Developer shall submit to ADOT a copy of each  
5 executed Subcontract (regardless of tier) not later than 60 days after the  
6 Subcontractor commences work. For each DBE Subcontractor, however,  
7 Developer shall submit to ADOT a copy of the executed Subcontract, not later than  
8 when required in Section 12.03 of Exhibit 6 (ADOT's DBE Special Provision).

9 (d) For each Subcontractor (DBE and non-DBE), Developer shall comply with the  
10 prompt payment requirements and payment and payroll reporting requirements  
11 set forth in Sections 15.9 and 15.10.

12 **11.4.3** The following requirements shall apply to Subcontracts.

13 (a) Developer shall, prior to soliciting any bids for performance of work or labor or  
14 rendering of services relating to the design, construction, operation or  
15 maintenance of the Project, submit to ADOT for its review and comment a  
16 procedure for the conduct of the bidding process applicable to Subcontracts.  
17 Developer may use procedures set forth in the ADOT Standard Specifications or  
18 may submit alternative procedures to ADOT for approval in ADOT's sole  
19 discretion. Developer shall not enter into any Subcontract except in accordance  
20 with the foregoing procedure; provided that this clause (a) shall not apply to  
21 Subcontracts entered into between Developer and a Subcontractor identified in  
22 Developer's Proposal and listed in Exhibit 8-1 (Key Subcontractors).

23 (b) As soon as Developer identifies a potential Subcontractor for a potential  
24 Subcontract, but in no event later than five days after executing the Subcontract,  
25 Developer shall provide in writing to ADOT the Subcontractor's name, address,  
26 phone number and license number with the Arizona Registrar of Contractors, the  
27 name of the Subcontractor's authorized representative, and a description of work  
28 to be performed by such Subcontractor.

29 (c) Within each executed Subcontract, Developer shall clearly and expressly identify  
30 where each of the requirements set forth in Section 11.4.5 are located.

31 **11.4.4** The following additional requirements shall apply to Key Subcontractors.

32 (a) Developer shall not terminate a Key Subcontract, or permit or suffer any  
33 substitution or replacement of a Key Subcontractor (as applicable), unless the Key  
34 Subcontractor:

35 (i) Is no longer in business, is unable to fulfill its legal, financial, or business  
36 obligations, or can no longer meet the terms of the teaming agreement

- 1 with Developer;
- 2 (ii) Voluntarily removes itself from Developer's team;
- 3 (iii) Fails to provide a sufficient number of qualified personnel to fulfill the  
4 duties identified during the Proposal stage;
- 5 (iv) Fails to timely cure a material default under the applicable Key  
6 Subcontract; or
- 7 (v) Solely for any Key Subcontractor for which a teaming agreement instead  
8 of a Subcontract was provided as of the Effective Date, such Key  
9 Subcontractor fails to negotiate in good faith a Subcontract in a timely  
10 manner in accordance with provisions established in such teaming  
11 agreement.
- 12 (b) Each proposed substitute or replacement Key Subcontractor shall be subject to  
13 ADOT's prior written approval. Developer shall submit to ADOT the name of and  
14 contact information for the proposed substitute or replacement Key  
15 Subcontractor, information on its experience and suitability for the scope of work  
16 under the proposed Subcontract, the proposed Key Subcontract, and such other  
17 information as ADOT may request.
- 18 (c) In the case of the Key Subcontract with the Lead O&M Firm, ADOT's prior approval  
19 shall be within ADOT's good faith discretion; and if Developer intends to self-  
20 perform the O&M Work, Developer shall obtain ADOT's prior written approval in  
21 ADOT's good faith discretion of the personnel proposed who will direct, supervise,  
22 manager or administer its performance of the O&M Work. If Developer has not  
23 obtained ADOT's prior written approval pursuant to this clause (c) within six  
24 months after the Effective Date, then ADOT may elect, in its sole discretion, to:
- 25 (i) Withhold 5% of the D&C Draw Request for the next month;
- 26 (ii) If applicable, withhold 10% of the D&C Draw Request for the immediately  
27 following month; and
- 28 (iii) If applicable, withhold 100% of all further D&C Draw Requests,  
29 until Developer obtains ADOT's prior written approval. Payment of any such  
30 amounts withheld by ADOT shall be due from ADOT to Developer, without  
31 interest, not later than the Developer Cycle Key Date first occurring after the date  
32 ADOT issues its approval.
- 33 (d) If Developer makes changes to a Key Subcontractor in violation of clause (a), then,  
34 in addition to any other remedies available to ADOT, Developer shall pay to ADOT  
35 100% of (i) any cost incurred by ADOT as a result of such change and (ii) any cost

1 savings to Developer resulting from such change. ADOT may bar any proposed  
2 Key Subcontractor from the Site and from performing any Work until ADOT has  
3 approved of the Key Subcontractor in writing.

4 **11.4.5** Each Subcontract shall:

5 (a) set forth a standard of professional responsibility or a standard for commercial  
6 practice equal to the requirements of the Contract Documents and Good Industry  
7 Practice for work of similar scope and scale and shall set forth effective procedures  
8 for claims and change orders;

9 (b) require the Subcontractor to carry out its scope of Work in accordance with the  
10 Contract Documents, the Governmental Approvals and applicable Law, including  
11 the applicable requirements of the DBE Utilization Plan;

12 (c) expressly include Form FHWA-1273, except to the extent provided otherwise in  
13 Part I, General, of Form FHWA-1273;

14 (d) expressly include the general wage decisions applicable to the Project and set  
15 forth in Attachment 3 to Exhibit 4 (Federal Requirements) (Federal Prevailing  
16 Wage Rates), except to the extent provided otherwise in Part I, General, of Form  
17 FHWA-1273 or in Section 11.10.1;

18 (e) without cost to Developer or ADOT, expressly permit assignment to ADOT or its  
19 successor, assign or designee of all Developer's rights under the Subcontract,  
20 contingent only upon delivery of request from ADOT following termination of this  
21 Agreement, allowing ADOT or its successor, assign or designee to assume the  
22 benefit of Developer's rights (including the benefit of all Subcontractor warranties,  
23 indemnities, guaranties and professional responsibility), with liability only for  
24 those remaining obligations of Developer accruing after the date of assumption;

25 (f) expressly state that any acceptance of assignment of the Subcontract to ADOT or  
26 its successor, assign or designee shall not operate to make the successor, assignee  
27 or designee responsible or liable for any breach of the Subcontract by Developer  
28 or for any amounts due and owing under the Subcontract for work or services  
29 rendered prior to assumption (but without restriction on the Subcontractor's  
30 rights under the Subcontract to suspend work or demobilize due to Developer's  
31 breach);

32 (g) expressly include (i) a covenant to recognize and attorn to ADOT upon receipt of  
33 notice from ADOT that it has exercised its rights under this Agreement, without  
34 necessity for consent or approval from Developer or to determine whether ADOT  
35 validly exercised its rights, and (ii) Developer's covenant to waive and release any  
36 claim or cause of action against the Subcontractor arising out of or relating to its  
37 recognition and attornment in reliance on any such notice;

- 1 (h) not be assignable by the Subcontractor to any Person other than ADOT (or its  
2 successor, assignee or designee) without Developer’s prior consent;
- 3 (i) expressly require that the Subcontractor will: (i) maintain usual and customary  
4 Books and Records for the type and scope of business operations in which it is  
5 engaged (e.g., constructor, equipment Supplier, designer, operator, service  
6 provider etc.); (ii) permit audit thereof with respect to the Project or Work by each  
7 of Developer and ADOT pursuant to Section 25.5 and; (iii) provide progress reports  
8 to Developer appropriate for the type of work it is performing sufficient to enable  
9 Developer to provide the reports it is required to furnish ADOT under this  
10 Agreement;
- 11 (j) include the right of Developer to terminate the Subcontract in whole or in part  
12 upon any Termination for Convenience of this Agreement without liability of  
13 Developer or ADOT for the Subcontractor’s lost profits or business opportunity,  
14 except, if applicable, the lost profit represented by the element of Termination  
15 Compensation under Section 26.2.1(c);
- 16 (k) expressly require the Subcontractor to participate in meetings between Developer  
17 and ADOT, upon ADOT’s request, concerning matters pertaining to such  
18 Subcontract or the work thereunder, provided that all direction to such  
19 Subcontractor shall be provided by Developer, and provided further that nothing  
20 in this clause (k) shall limit the authority of ADOT to give such direction or take  
21 such action which, in its sole opinion, is necessary to remove an immediate and  
22 present threat to the safety of life or property;
- 23 (l) include an agreement by the Subcontractor to give evidence in any dispute  
24 resolution proceeding pursuant to Section 24, if such participation is requested by  
25 either ADOT or Developer;
- 26 (m) expressly include a provision prohibiting cross-contract offset between the parties  
27 thereto, meaning that if a Subcontractor is performing work on multiple contracts  
28 for the other party to the Subcontract or such other party’s affiliates, the other  
29 party or its affiliate shall not withhold any payment from the Subcontractor on its  
30 Subcontract because of disputes or claims on another contract;
- 31 (n) expressly include Sections 11.1.1 through 11.1.4 (with appropriate changes in the  
32 names of the parties);
- 33 (o) expressly include in every Subcontract (including purchase orders and in every  
34 Subcontract of any Developer-Related Entity for the Work), provisions to  
35 effectuate the DBE requirements and require that they be included in all  
36 Subcontracts at lower tiers, so that such provisions will be binding upon each  
37 Subcontractor. All Subcontracts of any tier, including those with DBE firms, and all  
38 contracts with Suppliers, shall require compliance with 49 C.F.R. Part 26 and

- 1 include Exhibit 6 (ADOT’s DBE Special Provision). The requirements of this clause  
2 (o) shall not apply to Subcontracts at any tier with ADOT or Governmental Entities;
- 3 (p) expressly include in every Subcontract for Construction Work (including purchase  
4 orders and in every Subcontract of any Developer-Related Entity for Construction  
5 Work), provisions to effectuate the OJT requirements, and require that they be  
6 included in all Subcontracts at lower tiers, so that such provisions will be binding  
7 upon each such Subcontractor. All Subcontracts for Construction Work of any tier,  
8 including those with DBE firms, shall include Exhibit 7 (ADOT’s OJT Special  
9 Provisions) and require compliance with the provisions of Form FHWA-1273, 23  
10 U.S.C. § 140(a) and 23 C.F.R. §230.111. The requirements of this clause (p) shall  
11 not apply to Subcontracts at any tier with ADOT or Governmental Entities;
- 12 (q) expressly require the Subcontractor to make payments to its lower tier  
13 Subcontractors, and be liable for interest payments to such Subcontractors, as set  
14 forth in Sections 15.9.1 and 15.9.2, respectively;
- 15 (r) contain no waiver of the prompt payment protections for the Subcontractor  
16 provided under Section 15.9 and A.R.S. § 28-411C, D and E;
- 17 (s) expressly provide that all claims and charges of the Subcontractor and its  
18 Subcontractors at any tier shall not attach to any interest of ADOT in the Project  
19 or the Project ROW;
- 20 (t) expressly include a covenant, expressly stated to survive termination of the  
21 Subcontract, to promptly execute and deliver to ADOT a new contract between  
22 the Subcontractor and ADOT on the same terms and conditions as the  
23 Subcontract, in the event: (i) the Subcontract is rejected by Developer in  
24 bankruptcy or otherwise wrongfully terminated by Developer; and (ii) ADOT  
25 delivers request for such new contract following such rejection or termination of  
26 this Agreement;
- 27 (u) expressly include the provision set forth in Section 25.3.3;
- 28 (v) expressly include the provisions set forth in Section 26.3;
- 29 (w) be consistent in all other respects with the terms and conditions of the Contract  
30 Documents to the extent such terms and conditions are applicable to the scope of  
31 work of the Subcontractor, and include all provisions required by this Agreement;  
32 and
- 33 (x) expressly include paragraphs 1 through 5 of Attachment 6 to Exhibit 4 (Federal  
34 Requirements) (Appendix A to DOT Standard Title VI Assurances and Non-  
35 Discrimination Provisions: Contractor Assurances).

1           **11.4.6** Each Key Subcontract also shall expressly include the provision set forth in  
2 Section 25.3.2.

3           **11.4.7** Without the prior written consent of ADOT in its sole discretion, Developer shall  
4 not:

5           (a) amend any Subcontract with respect to any of the matters described in Sections  
6 11.4.5 and 11.4.6; or

7           (b) include in any Subcontract any terms or conditions that may have adverse impact  
8 on the Contract Documents or Developer’s ability to comply with the Contract  
9 Documents.

10           **11.4.8** Developer shall not enter into any Subcontracts with any Person then debarred  
11 or suspended from submitting bids by any agency of the State or the U.S. federal government.

12           **11.4.9 Additional Requirements for Subcontracts for O&M Work**

13           (a) Before entering into any Subcontract for O&M Work or any supplement or  
14 amendment thereto, Developer shall submit a true and complete copy of the  
15 proposed Subcontract to ADOT for review and comment. ADOT may disapprove  
16 only if such proposed Subcontract for the O&M Work (i) does not comply, or is  
17 inconsistent, in any material respect with the applicable requirements of the  
18 Contract Documents, including that it does not comply or is inconsistent with this  
19 Section 11 or with the applicable requirements of Section 25.4 regarding  
20 maintenance of Books and Records, does not incorporate the applicable Federal  
21 Requirements set forth in Exhibit 4 (Federal Requirements), or is inconsistent with  
22 the requirements of the relevant scope of Work, (ii) increases ADOT’s liability or  
23 (iii) adversely affects ADOT’s step-in rights.

24           (b) The Subcontract for O&M Work also shall expressly require the services of the  
25 Lead O&M Firm not be assignable by the Lead O&M Firm without Developer’s and  
26 ADOT’s prior written consent.

27           **11.5 Responsibility for Developer-Related Entities**

28 The retention of Subcontractors by Developer will not relieve Developer of its responsibility  
29 hereunder or for the quality of the Work or materials provided by it. Developer shall supervise  
30 and be responsible for the acts, omissions, negligence, intentional misconduct, or breach of  
31 applicable Law, contract or Governmental Approval by any Developer-Related Entity, as though  
32 Developer directly employed all such Persons. No Subcontract entered into by Developer will  
33 impose any obligation or liability upon ADOT to any such Subcontractor or any of its employees.  
34 Nothing in this Agreement creates any contractual relationship between ADOT and any  
35 Subcontractor.



1 **11.6 Key Personnel**

2 **11.6.1 Availability of Key Personnel**

3 (a) Except as provided in Section 11.6.3(a), (i) Developer represents, warrants and  
4 covenants that all Key Personnel are and will be available at the respective times,  
5 and will perform the respective roles, identified for them in Exhibit 8 (Key  
6 Subcontractors and Key Personnel) and Section GP 110.08.2 of the Technical  
7 Provisions, and (ii) Developer shall not replace or permit replacement of any  
8 individual filling a Key Personnel position without ADOT’s prior written approval.

9 (b) Developer shall cause the individuals filling Key Personnel positions to maintain  
10 active involvement in the prosecution and performance of the Work sufficient for  
11 satisfactory performance of the tasks to be performed by such Key Personnel.  
12 Developer shall cause each Key Personnel to comply with the required time  
13 commitments specified in Section GP 110.08.2 of the Technical Provisions. ADOT  
14 has the right to require a greater time commitment, up to full time commitment,  
15 from any individual filling a Key Personnel position during the D&C Period or O&M  
16 Period, as applicable, if ADOT, in its good faith discretion, determines such  
17 additional commitment of time is necessary for satisfactory prosecution and  
18 performance of the Work.

19 (c) ADOT must be able to contact any Key Personnel or an on-call back up individual  
20 with fully delegated authority 24 hours a day, seven days a week. Developer shall  
21 provide to ADOT phone, e-mail addresses and mobile telephone numbers for all  
22 Key Personnel and all such back-up individuals.

23 **11.6.2 Liquidated Damages for Key Personnel**

24 (a) If individuals filling certain Key Personnel positions (i) are not performing the roles  
25 identified for those individuals in Section GP 110.08.2 of the Technical Provisions,  
26 (ii) do not maintain active involvement in the prosecution and performance of the  
27 Work, or (iii) do not commit the amount of time specified in Section GP 110.08.2  
28 of the Technical Provisions for the particular Key Personnel role, Developer  
29 acknowledges that ADOT, the Work, and the Project will suffer significant and  
30 substantial Losses due to the unavailability of that individual.

31 (b) Developer and ADOT acknowledge that it is impracticable and extremely difficult  
32 to determine the actual Losses that would accrue to ADOT in the event of such  
33 unavailability of Key Personnel. Accordingly, and subject to Section 11.6.3, if at  
34 any time an individual filling a Key Personnel position shown in the table below is  
35 (i) not performing the role identified for that individual in Section GP 110.08.2 of  
36 the Technical Provisions, (ii) not actively involved in the prosecution and  
37 performance of the Work (regardless of whether the individual is replaced by  
38 another individual approved by ADOT), or (iii) not committing the amount of time

1 specified in Section GP 110.08.2 of the Technical Provisions for the particular Key  
 2 Personnel role, Developer shall pay ADOT Liquidated Damages in the amount set  
 3 forth in the table below based on the individual's Key Personnel position.  
 4

| Key Personnel Position                  | Liquidated Damages |
|-----------------------------------------|--------------------|
| Project Manager                         | \$200,000          |
| Construction Manager                    | \$150,000          |
| Design Manager                          | \$150,000          |
| Maintenance of Traffic Manager          | \$50,000           |
| Quality Manager                         | \$10,000           |
| Safety Manager                          | \$10,000           |
| Public Relations Manager                | \$0                |
| DBE/OJT Outreach and Compliance Manager | \$0                |

5 (c) Developer understands and agrees that any Liquidated Damages payable under  
 6 clause (b) above are not a penalty and that such sums are reasonable under the  
 7 circumstances existing as of the Effective Date. The Parties have agreed to the  
 8 Liquidated Damages under this Section 11.6.2 in order to fix and limit Developer's  
 9 costs and to avoid later disputes over what amounts of damages that ADOT has  
 10 suffered and are properly chargeable to Developer.

11 **11.6.3 Limitations on Liquidated Damages for Unavailability of Key Personnel**

12 (a) Developer shall not be liable for Liquidated Damages under Section 11.6.2 under  
 13 the following conditions:

14 (i) Developer removes or replaces an individual filling a Key Personnel  
 15 position with ADOT's written consent, which shall be provided or withheld  
 16 in ADOT's sole discretion, or at ADOT's written direction; or

17 (ii) An individual filling a Key Personnel position is unavailable because of  
 18 death, retirement, injury or termination of employment with the  
 19 applicable Developer-Related Entity (except where the individual moves to  
 20 an Affiliated entity in which case the Liquidated Damages under Section  
 21 11.6.2 will be assessed);

1 provided, however, that in each such case, Developer shall, within 15 days of the  
2 individual becoming unavailable, propose to ADOT a replacement individual for  
3 the Key Personnel position, which individual shall be subject to ADOT's approval.  
4 In determining whether to approve, ADOT may take into consideration the  
5 experience target, and will determine whether Developer has satisfied the  
6 requirements, for the Key Personnel position specified in Section GP 110.08.2 of  
7 the Technical Provisions. Developer shall be liable for the Liquidated Damages  
8 specified in Section 11.6.2 if Developer does not propose an individual that meets  
9 the requirements of the Key Personnel position within the time specified in this  
10 clause (a).

11 (b) Developer may replace the individual filling a Key Personnel position for the D&C  
12 Period with another individual approved by ADOT one time for each such Key  
13 Personnel position without incurring Liquidated Damages under Section 11.6.2,  
14 but only if:

15 (i) Developer has completed at least 70% of the D&C Work;

16 (ii) the D&C Work is progressing on schedule and no delay will result from such  
17 replacement;

18 (iii) there exist no uncured Developer Defaults; and

19 (iv) the Key Personnel position being replaced shall not be vacated at any given  
20 point in time due to such replacement.

21 Subsequent replacements of individuals filling any such position shall be subject  
22 to Liquidated Damages under Section 11.6.2. Replacement of an individual filling  
23 a Key Personnel position due to unavailability, as set forth in clause (a) above shall  
24 not be considered a prior replacement that would preclude a substitution under  
25 this clause (b).

26 (c) If an individual filling a Key Personnel position is unavailable because ADOT does  
27 not issue NTP 1 within 180 days after the Proposal Due Date, through no  
28 Developer Act, then Developer shall have 30 days after issuance of NTP 1 to  
29 identify a replacement for such Key Personnel position without incurring  
30 Liquidated Damages under Section 11.6.2. Developer shall use diligent efforts to  
31 identify a replacement that meets the applicable targets for Key Personal  
32 qualifications set forth in Section GP 110.08 of the Technical Provisions. Upon  
33 ADOT's approval of the replacement individual(s), such individual(s) shall be  
34 considered Key Personnel under this Agreement, including for purposes of Section  
35 11.6.2 relative to Liquidated Damages.

#### 36 **11.6.4 Liquidated Damages for Failure to Timely Replace Key Personnel**

1 (a) In addition to any Liquidated Damages that may apply under Section 11.6.2,  
2 Developer shall pay ADOT Liquidated Damages in the amount of \$2,000 for each  
3 day that any Key Personnel position is not replaced, commencing on the 60<sup>th</sup> day  
4 that the Key Personnel position remains unfilled and ending on the day that  
5 Developer fills the Key Personnel position in accordance with this Agreement. The  
6 Liquidated Damages payable under this Section 11.6.4 shall be applicable  
7 regardless of the reason for the departure of the individual previously filling the  
8 Key Personnel role, and regardless of whether Liquidated Damages are applicable  
9 under Section 11.6.2 or excused under Section 11.6.3(a).

10 (b) Developer understands and agrees that any Liquidated Damages payable under  
11 this Section 11.6.4 are not a penalty and that such sums are reasonable under the  
12 circumstances existing as of the Effective Date. The Parties have agreed to  
13 Liquidated Damages under this Section 11.6.4 to fix and limit Developer's costs  
14 and to avoid later disputes over the amount of damages that ADOT has suffered  
15 and are properly chargeable to Developer due to Developer's failure to timely  
16 replace Key Personnel members.

17 **11.6.5 Liquidated Damages for Unavailability of On-Call Key Personnel**

18 (a) If ADOT delivers a telephonic message pursuant to Section 11.6.1(c) indicating that  
19 the matter is urgent and ADOT does not receive an appropriate response from  
20 Developer within 30 minutes or any longer time period that ADOT indicates in its  
21 message, then Developer shall be liable for Liquidated Damages in the amount of  
22 \$500 per hour or pro rata portion thereof that Developer is late in appropriately  
23 responding.

24 (b) Developer understands and agrees that any Liquidated Damages payable under  
25 this Section 11.6.5 are not a penalty and that such sums are reasonable under the  
26 circumstances existing as of the Effective Date. The Parties have agreed to  
27 Liquidated Damages under this Section 11.6.5 to fix and limit Developer's costs  
28 and to avoid later disputes over the amount of damages that ADOT has suffered  
29 and are properly chargeable to Developer due to Developer's failure to make the  
30 on-call Key Personnel available to ADOT.

31 **11.7 Subcontracts with Affiliates**

32 **11.7.1** Developer shall have the right to have Work and related services performed by  
33 Affiliates only in accordance with the following terms and conditions (in addition to all other  
34 general requirements for Subcontracts set forth in this Agreement):

35 (a) Developer shall execute a written Subcontract with the Affiliate;

36 (b) The Subcontract shall comply with all applicable provisions of this Section 11, and  
37 be in form and substance substantially similar to Subcontracts then being used by

1 Developer or Affiliates for similar Work or services with non-Affiliated  
2 Subcontractors;

3 (c) The Subcontract shall set forth the scope of work and services and all the pricing,  
4 terms and conditions respecting the scope of work and services;

5 (d) The pricing, scheduling and other terms and conditions of the Subcontract shall  
6 be no less favorable to Developer than those that Developer could reasonably  
7 obtain in an arm's length, competitive transaction with a Subcontractor that is not  
8 an Affiliate of Developer. Developer shall bear the burden of proving compliance  
9 with this clause (d); and

10 (e) No Affiliate shall be engaged to perform any Work or services that any Contract  
11 Documents or the Project Management Plan or any component part, plan or other  
12 documentation thereunder require to be performed by an independent party or  
13 a party that is not an Affiliate of Developer.

14 **11.7.2** In addition to compliance with Section 11.4.2, before entering into a written  
15 Subcontract with an Affiliate or any supplement or amendment thereto, Developer shall submit  
16 a true and complete copy of the proposed Subcontract to ADOT for review and comment. ADOT  
17 will have 20 days after receipt to deliver its comments to Developer, and ADOT may in its sole  
18 discretion condition its approval of the Subcontract or any supplement or amendment thereto  
19 on Developer's compliance with ADOT's comments. This Section 11.7.2 shall not apply to  
20 Subcontracts entered into prior to the Proposal Due Date between Developer and Affiliates  
21 identified in Developer's Proposal.

22 **11.7.3** Developer shall make no payments to Affiliates for work or services in advance  
23 of provision of such work or services, except for reasonable mobilization payments or other  
24 payments consistent with arm's length, competitive transactions of similar scope. ADOT shall not  
25 be liable to Developer for any payments made in violation of this Section 11.7.3.

## 26 **11.8 Labor Standards**

27 **11.8.1** Developer shall, at all times, comply, and require by Subcontract that all  
28 Subcontractors and Suppliers comply, with all applicable federal and State labor, occupational  
29 safety and health standards, rules, regulations and federal and State orders.

30 **11.8.2** If any individual employed by Developer or any Subcontractor is not performing  
31 the Work in a proper, safe and skillful manner, then Developer shall, or shall cause such  
32 Subcontractor to, remove such individual and such individual shall not be re-employed on the  
33 Work. If, after notice and reasonable opportunity to cure, such individual is not removed or if  
34 Developer fails to ensure that skilled and experienced personnel are furnished for the proper  
35 performance of the Work, then ADOT may suspend the affected portion of the Work by delivery  
36 of notice of such suspension to Developer. Such suspension shall be considered a suspension for  
37 cause and shall in no way relieve Developer of any obligation contained in the Contract

1 Documents or entitle Developer to an increase in the Contract Price, a Completion Deadline  
2 adjustment or any other Claim hereunder.

3 **11.9 Ethical Standards**

4 **11.9.1** Within 90 days after the Effective Date, Developer shall adopt written policies  
5 establishing ethical standards of conduct applicable to all Developer-Related Entities, including  
6 Developer’s supervisory and management personnel, in dealing with: (1) ADOT and the General  
7 Engineering Consultant; and (2) employment relations. Such policy shall be subject to review and  
8 comment by ADOT prior to adoption. Such policy shall include standards of ethical conduct  
9 concerning the following:

- 10 (a) Restrictions on gifts and contributions to, and lobbying of, ADOT, the Arizona State  
11 Transportation Board, the General Engineering Consultant and any of the  
12 respective commissioners, directors, officers and employees of any of the  
13 foregoing;
- 14 (b) Protection of employees from unethical practices in selection, use, hiring,  
15 compensation or other terms and conditions of employment, or in promotion and  
16 termination of employees;
- 17 (c) Protection of employees from retaliatory actions (including discharge, demotion,  
18 suspension, threat, harassment, pay reduction or other discrimination in the  
19 terms and conditions of employment) in response to reporting of illegal (including  
20 the making of a false claim), unethical or unsafe actions or failures to act by any  
21 Developer-Related Entity;
- 22 (d) Restrictions on directors, members, officers or supervisory or management  
23 personnel of any Developer-Related Entity engaging in any transaction or activity,  
24 including receiving or offering a financial incentive, benefit, loan or other financial  
25 interest, that is, or to a reasonable person appears to be, in conflict with or  
26 incompatible with the proper discharge of duties or independence of judgment or  
27 action in the performance of duties, or adverse to the interests of the Project or  
28 employees;
- 29 (e) Restrictions on use of office or job position for a purpose that is, or would to a  
30 reasonable person appear to be, primarily for the private benefit of a director,  
31 member, officer or supervisory or management person, rather than primarily for  
32 the benefit of Developer or the Project, or primarily to achieve a private gain or  
33 an exemption from duty or responsibility for a director, member, officer or  
34 supervisory or management person; and
- 35 (f) Restrictions on directors, members, officers or employees of any Developer-  
36 Related Entity performing any of the Work if the performance of such services

1 would be prohibited under ADOT’s published conflict of interest rules and policies  
2 applicable to the Project, or would be prohibited under applicable Laws.

3 **11.9.2** Developer shall cause its directors, members, officers and supervisory and  
4 management personnel, and include contract provisions requiring those of all other Developer-  
5 Related Entities, to adhere to and enforce the adopted policy on ethical standards of conduct.  
6 Developer shall establish systems and procedures to promote and monitor compliance with the  
7 policy.

## 8 **11.10 Prevailing Wages**

9 **11.10.1** Developer shall pay or cause to be paid to all applicable workers employed by it  
10 or its Subcontractors performing Construction Work or Non-Routine Maintenance Work that  
11 entails construction activity not less than the wage rates and benefits prevailing in the locality as  
12 predetermined by the Secretary of Labor under the Davis-Bacon Act (40 U.S.C. §§ 276a et seq.)  
13 and regulations (29 C.F.R. Part 5) promulgated thereunder, as provided in Attachment 3 to Exhibit  
14 4 (Federal Requirements) (Federal Prevailing Wage Requirements) (“**Federal Prevailing Wage**  
15 **Rates**”); provided, however, that the minimum prevailing wage rates and benefits that the Lead  
16 O&M Firm shall be required to pay to all applicable workers performing construction activities (if  
17 any) shall be the lesser of: (a) the federal prevailing wage rate and benefits in effect on the  
18 commencement date of the O&M Period then in effect and (b) the Federal Prevailing Wage Rates  
19 multiplied by a fraction the numerator of which is the CPI most recently published prior to the  
20 commencement date of the O&M Period and the denominator of which is the Base CPI.  
21 Developer shall comply and cause its Subcontractors to comply with all Laws pertaining to federal  
22 prevailing wage rates and benefits. For the purpose of applying such Laws, the Project shall be  
23 treated as a public work paid for in whole or in part with public funds. The foregoing shall not  
24 apply to Routine Maintenance.

25 **11.10.2** It is Developer’s sole responsibility to determine the wage rates required to be  
26 paid. If rates of wages and benefits change while this Agreement is in effect, Developer shall bear  
27 the cost of such changes and shall not be entitled to an increase in the Contract Price or  
28 adjustment of a Completion Deadline, and shall have no other Claim against ADOT on account of  
29 such changes. Without limiting the foregoing, no Claim will be allowed that is based upon  
30 Developer’s lack of knowledge or a misunderstanding of any such requirements or Developer’s  
31 failure to include in the Contract Price adequate increases in such wages over the duration of this  
32 Agreement.

33 **11.10.3** Developer shall comply and cause its Subcontractors to comply with all Laws  
34 regarding notice and posting of intent to pay prevailing wages, of prevailing wage requirements  
35 and of prevailing wage rates.

## 36 **11.11 Immigration Law**

37 **11.11.1** Pursuant to A.R.S. § 41-4401, Developer:

- 1 (a) Warrants that it is in compliance with all federal immigration Laws that relate to  
2 their employees and with A.R.S. § 23-214, subsection A;
- 3 (b) Shall require all Subcontractors to warrant that they are in compliance with all  
4 federal immigration Laws that relate to their employees and with A.R.S. § 23-214,  
5 subsection A;
- 6 (c) Acknowledges and agrees that ADOT has the legal right to inspect the Books and  
7 Records of Developer and any Subcontractor to ensure that Developer and its  
8 Subcontractors are in compliance with the foregoing warranties; and
- 9 (d) Acknowledges and agrees that a breach by Developer of this Section 11.11 or a  
10 breach by any Subcontractor of the aforementioned warranty shall be deemed a  
11 material breach that is subject to penalties and ADOT may, at its sole discretion,  
12 terminate the Agreement.

13 **11.11.2** ADOT may, at any time, without prior notice, inspect the documentation of any  
14 Developer or Subcontractor employee who works on the Project to ensure that Developer or  
15 such Subcontractor is complying with the foregoing warranty.

16 **11.12 Uniforms**

17 Any uniforms, badges, logos and other identification worn by personnel of Developer-Related  
18 Entities shall bear colors, lettering, design or other features to ensure clear differentiation from  
19 those of ADOT and its employees.



1                   **SECTION 12. PERFORMANCE AND PAYMENT BONDS; GUARANTIES**

2   **12.1 Provision of Bonds during D&C Period**

3 Developer shall provide to ADOT performance and payment bonds securing Developer’s  
4 obligations during the D&C Period, and Developer shall maintain such bonds in full force and  
5 effect as described in this Section 12.1.

6           **12.1.1 D&C Performance Bond**

7           (a) On or before the Effective Date, Developer shall have delivered to ADOT the D&C  
8 Performance Bond in the amount of \$150,000,000.

9           (b) ADOT will provide a release of the D&C Performance Bond on the date that is one  
10 year after Final Acceptance, provided that (and upon such date thereafter that) all  
11 of the following have occurred:

12                   (i) There exists no disputed Claim by ADOT against Developer relating to the  
13 D&C Work or other obligations of Developer arising during the D&C Period;

14                   (ii) There exists no Developer Default; and

15                   (iii) No event has occurred that with the giving of notice or passage of time, or  
16 both, would constitute a Developer Default.

17           **12.1.2 D&C Payment Bond**

18           (a) On or before the Effective Date, Developer shall have delivered to ADOT the D&C  
19 Payment Bond in the amount of \$150,000,000.

20           (b) ADOT will provide a release of the D&C Payment Bond upon:

21                   (i) Receipt of (i) evidence satisfactory to ADOT that all Persons eligible to file  
22 a claim against the D&C Payment Bond have been fully paid, and  
23 (ii) unconditional releases of claims and stop notices from all  
24 Subcontractors who filed preliminary notices of claims against the D&C  
25 Payment Bond (or evidence satisfactory to ADOT that any such claims and  
26 stop notices have been secured by a separate bond(s) issued by a Surety  
27 that meets the requirements of Section 12.3); and

28                   (ii) Expiration of the statutory period for Subcontractors to file a claim against  
29 the D&C Payment Bond, if no claims have been filed.

30   **12.2 Provision of Bonds during O&M Period**

31 As an O&M Condition Precedent pursuant to Section 8.6.4, Developer shall provide to ADOT

1 O&M Bonds securing Developer’s performance and payment obligations during the O&M Period,  
 2 and Developer shall maintain such O&M Bonds in full force and effect in accordance with this  
 3 Section 12.2.

4 **12.2.1 O&M Performance Bond**

5 (a) Developer shall deliver to ADOT, as an O&M Condition Precedent, and shall  
 6 maintain in place for the duration of the O&M Period an O&M Performance Bond  
 7 in the form attached hereto as Exhibit 9-1 (Form of O&M Performance Bond) and  
 8 in compliance with the provisions set forth herein.

9 (b) The O&M Performance Bond shall take effect as of the Project Substantial  
 10 Completion Date and shall either (i) cover the entire O&M Period or (ii) cover the  
 11 first two years of the O&M Period and thereafter be renewed on an annual basis.

12 (c) The amount of the O&M Performance Bond shall equal 50% of the total escalated  
 13 amounts of Annual O&M Payments scheduled for the O&M Period, as set forth in  
 14 Exhibit 2-4.2 (O&M Price Breakdown), and shall secure performance of all  
 15 Developer’s obligations during the O&M Period. For clarity, if Developer chooses  
 16 to provide an O&M Performance Bond pursuant to Section 12.2.1(b)(ii), each Bond  
 17 nevertheless shall be in the full amount set forth in the preceding sentence.

18 (d) To calculate the escalated amounts of the Annual O&M Payments described in  
 19 Section 12.2.1(c), the corresponding payments set forth in Exhibit 2-4.2 (O&M  
 20 Price Breakdown) for the O&M Period shall be escalated to the date that is 60 days  
 21 prior to the first date the O&M Performance Bond is required, using CPI, in the  
 22 same manner as applied to the O&M Price in Section 15.6.2(a) (i.e., by multiplying  
 23 by the CPI Adjustment Formula), and then at an annual rate of 3% for each  
 24 succeeding year. The following table applies such escalation terms to determine  
 25 the amount of the O&M Performance Bond, represented by factor “P”.  
 26

| Required O&M Performance Bond Amount   |                            |                                    |                                    |
|----------------------------------------|----------------------------|------------------------------------|------------------------------------|
| O&M Payments from <u>Exhibit 2-4.2</u> | Year 1 O&M Payment (A)     | Year 2 O&M Payment (D)             | Year 3 O&M Payment (G)             |
| Escalation Factor                      | CPI Adjustment Formula (B) | CPI Adjustment Formula x 1.030 (E) | CPI Adjustment Formula x 1.061 (H) |
| Adjusted Annual Amount                 | C=(A x B)                  | F=(D x E)                          | I=(G x H)                          |

|                                                 |                           |
|-------------------------------------------------|---------------------------|
| <b>Required O&amp;M Performance Bond Amount</b> | $P = 50\% \times (C+F+I)$ |
|-------------------------------------------------|---------------------------|

- 1 (e) ADOT will provide a release of the O&M Performance Bond on the later of:
- 2 (i) The date that is one year after the end of the term of the O&M
- 3 Performance Bond; or
- 4 (ii) The date that all outstanding Developer Defaults, and Claims made against
- 5 Developer within one year after the end of the term of the O&M
- 6 Performance Bond, arising out of the failure to perform obligations
- 7 guaranteed by the O&M Performance Bond, have been finally resolved.

8 For clarity, the foregoing provides a tail period for notifying the Surety of claims, but does not

9 extend the O&M Performance Bond to Developer obligations to be performed beyond the end

10 of the term of the O&M Performance Bond.

11 **12.2.2 O&M Payment Bond**

- 12 (a) Developer shall deliver to ADOT, as an O&M Condition Precedent, a payment bond
- 13 in the same amount, at the same time, and for the same term as required for the
- 14 corresponding O&M Performance Bond pursuant to Section 12.2.1 in the form
- 15 attached hereto as Exhibit 9-3 (Form of O&M Payment Bond).
- 16 (b) ADOT will provide a release of an O&M Payment Bond upon the first to occur of:
- 17 (i) Receipt of (i) evidence satisfactory to ADOT that all Persons eligible to file
- 18 a claim against the O&M Payment Bond have been fully paid, and
- 19 (ii) unconditional releases of claims and stop notices from all
- 20 Subcontractors who filed a preliminary notice of a claim against the O&M
- 21 Payment Bond (or evidence satisfactory to ADOT that any such claims and
- 22 stop notices have been separately bonded around); or
- 23 (ii) Expiration of the statutory period for Subcontractors to file a claim against
- 24 the O&M Payment Bond, if no claims have been filed; provided, however,
- 25 that if no statute applies, then this clause (ii) shall be disregarded.

26 For clarity, the foregoing provides a tail period for notifying the Surety of claims, but does not

27 extend the O&M Payment Bond to Developer payment obligations first arising beyond the end

28 of the bond term.

1 **12.3 Surety Qualifications**

2 **12.3.1** Each Project Bond shall be issued by a Surety that is:

- 3 (a) licensed and authorized to do business in the State;
- 4 (b) listed on the “Department of the Treasury’s Listing of Approved Sureties  
5 (Department Circular 570)” (found at  
6 [www.fiscal.treasury.gov/fsreports/ref/suretybnd/c570.htm](http://www.fiscal.treasury.gov/fsreports/ref/suretybnd/c570.htm)); and
- 7 (c) rated in one of the top two categories by at least two nationally-recognized rating  
8 agencies (Fitch Ratings, Moody’s Investor Service and Standard & Poor’s); or rated  
9 at least A minus (“A-”) or better and Class VIII or better according to A.M. Best and  
10 Company’s Financial Strength Rating and Financial Size Category, or as otherwise  
11 approved by ADOT in its sole discretion.

12 **12.3.2** If any Project Bond previously provided becomes ineffective, or if the Surety that  
13 provided the Project Bond no longer meets the foregoing requirements, Developer shall provide  
14 a replacement Project Bond in the same form and, if applicable, with the same multiple obligee  
15 rider, issued by a Surety meeting the foregoing requirements, or other assurance satisfactory to  
16 ADOT in its sole discretion. If any Project Bond is provided by co-Sureties and at least one of the  
17 co-Sureties meets the foregoing requirements and is liable for the full amount of such Project  
18 Bond, then no replacement bond shall be required so long as such co-Surety continues to meet  
19 the foregoing requirements and remains liable for the full amount of such Project Bond.

20 **12.4 Increase Due to Supplemental Agreements**

21 If the D&C Price or the O&M Price is increased in connection with a Supplemental Agreement,  
22 ADOT may, in its sole discretion, require a corresponding and proportionate increase in the  
23 amount of the relevant Project Bonds, or alternative security that will secure such increased  
24 amount in the D&C Price or the O&M Price, as applicable. A reduction in the Contract Price in  
25 connection with a Supplemental Agreement shall not result in any decrease to the amount of  
26 each Project Bond.

27 **12.5 Party Providing O&M Bonds; Multiple Obligees**

28 **12.5.1** Developer may elect to:

- 29 (a) Procure the O&M Bonds directly, so that they are security, as applicable, for  
30 Developer’s (i) performance obligations under the Contract Documents respecting  
31 the O&M Work, and (ii) Developer’s payment obligations to the designated  
32 Persons supplying labor or materials respecting the O&M Work; or
- 33 (b) Subject to Sections 12.5.2 and 12.5.3, deliver O&M Bonds from each Lead O&M  
34 Firm and other Subcontractors having a direct Subcontract with Developer for  
35 performance of any portion of the O&M Work, so that each such O&M Bond, as

1 applicable, is security for (i) performance of the Lead O&M Firm’s or such other  
2 Subcontractor’s obligations under its Subcontract for O&M Work, and (ii) payment  
3 to the designated Persons supplying labor or materials.

4 **12.5.2** If Developer makes the election under Section 12.5.1(b), then:

5 (a) Developer shall deliver to ADOT, as an O&M Condition Precedent, multiple obligee  
6 riders, in the forms attached as Exhibit 9-2 (Form of Multiple Obligee Rider for  
7 O&M Performance Bond) and Exhibit 9-4 (Form of Multiple Obligee Rider for O&M  
8 Payment Bond), respectively, in which ADOT is named as an additional obligee and  
9 all rights of Developer are subordinated to ADOT;

10 (b) The language of the bond form set forth in Exhibit 9-1 (Form of O&M Performance  
11 Bond) and Exhibit 9-3 (Form of O&M Payment Bond) shall be adjusted to reflect  
12 this election, but only as necessary to (i) identify the Subcontract for the O&M  
13 Work as the bonded contract, (ii) identify the Lead O&M Firm or other firm, as  
14 applicable, as the principal, and (iii) change the obligee to Developer; and

15 (c) Such bonds shall otherwise conform to the requirements set forth in this Section  
16 12.5.

17 **12.5.3** If Developer makes the election under Section 12.5.2 and there are two or more  
18 parties providing the O&M Bonds, then the aggregate sum of the O&M Bonds shall equal the  
19 required bond amount set forth in this Section 12 and the size of each bond shall be in proportion  
20 to the scope and cost of the O&M Work to be provided under each bonded Subcontract.

## 21 **12.6 No Relief of Liability**

22 Notwithstanding any other provision in the Contract Documents, performance by a Surety or  
23 Guarantor of any of the obligations of Developer under the Contract Documents shall not relieve  
24 Developer of any of its other obligations hereunder, including the payment of Liquidated  
25 Damages.

## 26 **12.7 Guaranties**

27 **12.7.1** Kiewit Infrastructure Group Inc. is the Guarantor guaranteeing Developer’s  
28 obligations under the Contract Documents as of the Effective Date and has provided a guaranty  
29 in accordance with the form attached as Exhibit 10-1 (Form of D&C Guaranty) (the “**D&C**  
30 **Guaranty**”). Developer shall cause Kiewit Infrastructure Group Inc. to execute and deliver the  
31 O&M Guaranty, in the form set forth in Exhibit 10-2 (Form of O&M Guaranty) (the “**O&M**  
32 **Guaranty**”), as of and as a condition to Project Substantial Completion.

33 **12.7.2** If at any time during the D&C Period, the total combined Tangible Net Worth of  
34 Developer and the Guarantor under the D&C Guaranty is less than \$75,000,000.00, Developer  
35 shall provide, not later than 30 days thereafter, one or more guaranties so that the combined  
36 Tangible Net Worth of Developer and the applicable Guarantors is at least \$75,000,000.00 at all

1 times during the D&C Period. This minimum Tangible Net Worth amount of \$75,000,000.00 shall  
2 be adjusted annually on the first anniversary of the Effective Date and continuing on each  
3 anniversary thereafter during the D&C Period to equal \$75,000,000.00 multiplied by a fraction  
4 the numerator of which is the CCI most recently published prior to the applicable anniversary  
5 and the denominator of which is the Base CCI, and then rounded to the nearest \$100,000.00.

6 **12.7.3** If at any time during the O&M Period, the total combined Tangible Net Worth of  
7 Developer and the Guarantor under the O&M Guaranty is less than \$30,000,000.00, Developer  
8 shall provide, not later than 30 days thereafter, one or more guaranties so that the combined  
9 Tangible Net Worth of Developer and the applicable Guarantors is at least \$30,000,000.00. This  
10 minimum Tangible Net Worth amount of \$30,000,000.00 shall be adjusted annually on the first  
11 anniversary of the Project Substantial Completion Date and continuing on each anniversary  
12 thereafter during the O&M Period to equal \$30,000,000.00 multiplied by a fraction the  
13 numerator of which is the CPI most recently published prior to the applicable anniversary and  
14 the denominator of which is the Base CPI, and then rounded to the nearest \$100,000.00.

15 **12.7.4** If Developer proposes (a) to assign or transfer Developer’s interest in or to the  
16 Contract Documents, (b) a Change of Control or (c) to change the form of its organization, then  
17 ADOT may, in its sole discretion, require a new, additional or replacement Guaranty or Guaranties  
18 as a condition to approving such transaction.

19 **12.7.5** Each joint venture member of Developer or any permitted assignee of Developer  
20 shall be held jointly and severally liable for any and all of the duties and obligations of Developer  
21 under the Contract Documents. In addition, ADOT may, in its sole discretion, require any or all  
22 joint venture members to execute and deliver a Guaranty.

23 **12.7.6** Each Guaranty shall be in the applicable form attached as Exhibit 10 (Guaranty  
24 Forms) together with appropriate evidence of authorization, execution, delivery and validity  
25 thereof, and shall guarantee the Guaranteed Obligations. Developer shall provide an opinion  
26 from the Guarantor’s legal counsel, in form and substance acceptable to ADOT, concerning due  
27 authorization, execution, delivery, validity and enforceability of each Guaranty.

28 **12.7.7** Developer may replace an existing Guaranty with a new Guaranty only with prior  
29 approval by ADOT.

30 **12.7.8** Any new, additional or replacement Guaranty shall be provided in the applicable  
31 form attached as Exhibit 10-1 (Form of D&C Guaranty) or Exhibit 10-2 (Form of O&M Guaranty)  
32 together with appropriate evidence of authorization, execution, delivery and validity thereof, and  
33 with legal opinions, and shall guarantee the Guaranteed Obligations. Any Guaranty being  
34 replaced shall remain in effect until the approved replacement Guaranty becomes effective.  
35

1                   **SECTION 13. INSURANCE; RISK OF LOSS; CLAIMS AGAINST THIRD PARTIES**

2   Developer shall procure and keep in effect the Insurance Policies, or cause them to be procured  
3   and kept in effect, and in each case, satisfy the requirements for such Insurance Policies set forth  
4   in this Section 13 and Exhibit 11 (Insurance Coverage Requirements).

5   **13.1   General Insurance Requirements**

6                   **13.1.1   Qualified Insurers**

7                   Each of the Insurance Policies required hereunder shall be procured from an insurer that,  
8   at the time coverage under the applicable Insurance Policy commences:

9                   (a)    is licensed or authorized to do business in the State pursuant to A.R.S. Title 20,  
10                   Chapter 2, Article 1, or is a surplus lines insurer approved and identified by the  
11                   director of the Arizona Department of Insurance pursuant to A.R.S., Title 20,  
12                   Chapter 2, Article 5;

13                   (b)   has a current policyholder’s management and financial size category rating of not  
14                   less than “A–, VII” according to A.M. Best and Company’s Insurance Reports Key  
15                   Rating Guide or, with respect only to worker’s compensation insurance, is duly  
16                   authorized to transact such insurance in the State; or

17                   (c)    is otherwise approved in writing by ADOT in its good faith discretion.

18                   **13.1.2   Premiums, Deductibles and Self-Insured Retentions**

19                   Developer shall timely pay, or cause to be paid, the premiums for all insurance required  
20   under this Agreement. Subject to Section 13.3, Section 15 and Section 16, Developer shall be  
21   responsible for, and ADOT will have no liability for, any deductibles, self-insured retentions, and  
22   amounts or damages in excess of the coverage provided, except to the extent of ADOT’s sole  
23   negligence or willful misconduct. If any required coverage is provided under a self-insured  
24   retention, Developer shall ensure that the entity responsible for the self-insured retention has  
25   an authorized representative issue a letter to ADOT, at the same time the insurance policy is to  
26   be procured, stating that it shall protect and defend ADOT to the same extent as if a commercial  
27   insurer provided coverage for ADOT.

28                   **13.1.3   Primary Coverage**

29                   Each Insurance Policy shall provide that the coverage thereof is primary and  
30   noncontributory coverage with respect to all named or additional insureds, except for coverage  
31   that by its nature cannot be written as primary. Any insurance or self-insurance beyond that  
32   specified in this Agreement that is maintained by an insured or any such additional insured shall  
33   be excess of such insurance and shall not contribute with it.

1           **13.1.4 Project-Specific Insurance**

2           Except as expressly provided otherwise in Exhibit 11 (Insurance Coverage Requirements),  
3 all Insurance Policies required hereunder shall be purchased specifically and exclusively for the  
4 Project and extend to all aspects of the Work, with coverage limits devoted solely to the Project.  
5 Insurance coverages under corporate insurance programs with dedicated Project-specific limits  
6 (except as otherwise provided in Exhibit 11 (Insurance Coverage Requirements)) and identified  
7 allocation of funds to the Project are acceptable, provided that they otherwise meet all  
8 requirements described in this Section 13 and Exhibit 11 (Insurance Coverage Requirements).

9           **13.1.5 Verification of Coverage; ADOT Right to Remedy Developer Failure to Insure**

10          (a)     At each time Developer is required to initially obtain or cause to be obtained each  
11 Insurance Policy (including insurance coverage required of Key Subcontractors),  
12 and thereafter not later than ten Business Days prior to the expiration date of each  
13 Insurance Policy, Developer shall deliver to ADOT an up-to-date certificate of  
14 insurance. Each required certificate must:

15               (i)     be in standard form;

16               (ii)    state the identity of all carriers, named insureds and additional insureds;

17               (iii)   state the type and limits of coverage, deductibles and cancellation  
18 provisions of the policy;

19               (iv)   include as attachments all applicable additional insured endorsements,  
20 including endorsements consistent with Sections 13.1.7 and 13.1.8; and

21               (v)    be signed by an authorized representative of the insurance company  
22 shown on the certificate or its agent or broker.

23          (b)     Each such certificate of insurance shall be accompanied by:

24               (i)     proof that the signer is an authorized representative or agent of the  
25 insurance companies named on the certificate;

26               (ii)    proof that the signer is authorized to bind such insurance companies to the  
27 coverage, limits and termination provisions shown on the certificate; and

28               (iii)   a letter signed by Developer confirming that the insurances represented in  
29 the certificate of insurance fully comply with all provisions of this  
30 Section 13 and Exhibit 11 (Insurance Coverage Requirements).

31          (c)     If Developer has not provided ADOT with the foregoing proof of coverage and  
32 payment within five days after ADOT delivers to Developer a written request  
33 therefor or Notice of a Developer Default under Section 21.1.1 and demand for



1 the foregoing proof of coverage, ADOT may, in addition to any other available  
2 remedy, without obligation or liability and without further inquiry as to whether  
3 such insurance is actually in force:

- 4 (i) Obtain such an Insurance Policy; and Developer shall reimburse ADOT for  
5 the cost thereof upon demand; and
- 6 (ii) Suspend all or any portion of the Work and close the Project until ADOT  
7 receives from Developer such proofs of coverage in compliance with this  
8 Section 13 (or until ADOT obtains an Insurance Policy, if it elects to do so).

- 9 (d) Developer shall provide ADOT with certified copies of all Insurance Policies and all  
10 endorsements thereto, including renewal Insurance Policies, within 90 days of  
11 their date of effectiveness, together with evidence of payment of any premium  
12 then due that is satisfactory to ADOT. ADOT reserves the right to request copies  
13 of Insurance Policies.

#### 14 **13.1.6 Subcontractor Insurance Requirements**

- 15 (a) Developer shall comply with the obligations regarding Subcontractor's insurance  
16 set forth in Exhibit 11 (Insurance Coverage Requirements). Developer shall cause  
17 each Subcontractor to provide to ADOT insurance coverage and proof of such  
18 coverage in the manner and in the form consistent with the requirements of this  
19 Agreement.
- 20 (b) If any Subcontractor fails to procure and keep in effect the insurance required of  
21 such Subcontractor specified in Exhibit 11 (Insurance Coverage Requirements),  
22 and ADOT asserts the same as a Developer Default hereunder, then Developer  
23 may, within the applicable cure period, cure such Developer Default by:
  - 24 (i) Causing such Subcontractor to obtain the requisite insurance and  
25 providing to ADOT proof of insurance;
  - 26 (ii) Procuring the requisite insurance for such Subcontractor and providing to  
27 ADOT proof of insurance; or
  - 28 (iii) Terminating the Subcontractor and removing its personnel from the Site.
- 29 (c) ADOT may pursue the remedies available to it for a Developer Default if Developer  
30 fails to cure a Subcontractor's failure to procure and keep in effect the insurance  
31 required of such Subcontractor.

#### 32 **13.1.7 Policies with Insureds in Addition to Developer**

33 All Insurance Policies that are required to insure multiple named insureds or to insure  
34 additional insureds in addition to Developer shall comply with or be endorsed to comply with the

1 following provisions:

- 2 (a) The Insurance Policy shall be written or endorsed so that no acts or omissions of  
3 an insured shall terminate or otherwise adversely impact the coverage of the  
4 other insureds. Without limiting the foregoing, the policy shall be written or  
5 endorsed so that any failure on the part of a named insured to comply with  
6 reporting provisions or other conditions of the Insurance Policies, any breach of  
7 warranty, any action or inaction of a named insured or others, or any change in  
8 ownership of all or any portion of the Project shall not affect coverage provided  
9 to the other named insureds or additional insureds (and their respective  
10 members, directors, officers, employees, agents and, if applicable, ADOT  
11 Consultants); and
- 12 (b) All endorsements adding ADOT and the other additional insureds as required by  
13 the Contract Documents to the required Insurance Policies shall contain no  
14 limitations, conditions, restrictions or exceptions to coverage in addition to those  
15 that apply under the Insurance Policy generally, and shall state that the interests  
16 and protections of each such additional insured shall not be affected by any  
17 misrepresentation, act or omission of a named insured or any breach by a named  
18 insured of any provision in the policy that would otherwise result in forfeiture or  
19 reduction of coverage. Additional insureds under the policy shall continue to be  
20 named as additional insureds for a period of five years after Final Acceptance to  
21 ensure completed operations coverage.

22 **13.1.8 Additional Terms and Conditions**

- 23 (a) Each Insurance Policy shall be endorsed to state that coverage cannot be canceled,  
24 voided, suspended, adversely modified, or reduced in coverage or in limits  
25 (including for non-payment of premium) except after 30 days' prior notice (or ten  
26 days in the case of cancellation for non-payment of premium) by registered or  
27 certified mail, return receipt requested, has been given to, at a minimum, ADOT,  
28 Developer and the Lead O&M Firm; provided, however, that (i) no such notice  
29 from the insurer shall be required for reduction in limits due to claims payments,  
30 and (ii) if Developer establishes that an endorsement compliant with this clause  
31 (a) is not available as set forth in Section 13.1.13, Developer may obtain an  
32 endorsement that is as comparable as possible. The endorsement required by this  
33 clause (a) shall not include any limitation of liability of the insurer for failure to  
34 provide the required notice.
- 35 (b) The Insurance Policy for commercial general liability shall cover liability arising out  
36 of the acts or omissions of Developer's employees engaged in the Work as well as  
37 employees of Subcontractors if Subcontractors are covered by a Developer-  
38 controlled insurance program. If any Subcontractor is not covered by such  
39 Developer-controlled insurance program, then such Subcontractor shall provide  
40 commercial general liability insurance to cover liability arising out of the activities

1 of Subcontractor’s employees engaged in the Work.

2 (c) If Developer’s or any Subcontractor’s activities involve transportation of  
3 Hazardous Materials that require MCS 90 (as described below), the automobile  
4 liability Insurance Policy for Developer or such Subcontractor shall be endorsed to  
5 include for private, non-commercial vehicles Motor Carrier Act Endorsement-  
6 Hazardous Materials Clean Up (MCS-90) or equivalent and shall be endorsed to  
7 provide coverage for liability arising from release of pollutants (CA 99 48 –  
8 Pollution Liability – Broadened Coverage for Covered Autos – Business Auto,  
9 Motor Carrier and Truckers Coverage Form or equivalent).

10 (d) Each Insurance Policy shall provide coverage on an “occurrence” basis and not a  
11 “claims made” basis (with the exception of any pollution or professional liability  
12 Insurance Policies).

13 **13.1.9 Waivers of Subrogation**

14 ADOT waives all rights of recovery against the Developer-Related Entities, and Developer  
15 waives all rights of recovery against the Indemnified Parties, for any claims to the extent covered  
16 (i.e., not excluded) by insurance obtained pursuant to this Section 13, except such rights as they  
17 may have to the proceeds of such insurance. If Developer is deemed to self-insure a claim or loss  
18 under Section 13.2.4, then Developer’s waiver shall apply as if it carried the required insurance.  
19 Developer shall require all Subcontractors to provide similar waivers in writing each in favor of  
20 all other Persons enumerated above. Subject to Section 13.1.12, each policy, including workers’  
21 compensation if permitted under the applicable worker’s compensation insurance laws, shall  
22 include a waiver of any right of subrogation against the Indemnified Parties or the insurer’s  
23 consent to the insured’s waiver of recovery in advance of loss. However, no waiver of subrogation  
24 rights under any policy providing professional liability coverage to the insureds shall be required  
25 of any party.

26 **13.1.10 No Recourse for Premium or Other Insurance Payments**

27 Developer shall have no recourse against ADOT for payment of premiums or other  
28 amounts with respect to the insurance required to be provided by Developer hereunder, except  
29 to the extent of ADOT’s obligation to pay the Contract Price or to the extent such costs are  
30 recoverable as a Compensation Amount or as Termination Compensation.

31 **13.1.11 Support of Indemnifications**

32 The insurance coverage provided, or caused to be provided, hereunder by Developer shall  
33 not limit Developer’s indemnification and defense obligations under the Contract Documents.

34 **13.1.12 Insurer Insolvency and Inadequacy of Required Coverages**

35 (a) ADOT makes no representation that the minimum required insurer rating is  
36 sufficient to protect Developer from potential insurer insolvency.

1 (b) ADOT makes no representation that the coverage limits specified in the Contract  
2 Documents for any Insurance Policy or approved variances therefrom are  
3 adequate to protect Developer from or against its potential liabilities under the  
4 Contract Documents to ADOT or to any other Person. No such coverage limits or  
5 approved variances therefrom shall, in any way, affect or change ADOT's rights  
6 and remedies provided in the Contract Documents or otherwise at Law. Developer  
7 shall have no Claim or other recourse against ADOT on the basis of coverage limits  
8 specified for any Insurance Policy or approved variances therefrom.

9 **13.1.13 Unavailability of Required Coverages**

10 (a) If any Insurance Policy required to be maintained pursuant to this Section 13  
11 (including the limits, deductibles or any other terms under such Insurance Policy)  
12 ceases to be available on a commercially reasonable basis, Developer will provide  
13 Notice to ADOT accompanied by a letter from Developer's Insurance Advisor  
14 stating that such insurance is unavailable anywhere in the global market on a  
15 commercially reasonable basis. Developer shall deliver such Notice not later than  
16 30 days prior to the scheduled date for renewal of any such Insurance Policy. Upon  
17 ADOT's receipt of such Notice, Developer and ADOT shall immediately enter into  
18 good faith negotiations regarding the matters set forth in clause (b) below and  
19 regarding temporary adjustments to applicable insurance requirements in this  
20 Section 13 in order for Developer to place alternative insurance coverage.

21 (b) Developer will not be excused from satisfying the insurance requirements of this  
22 Section 13 merely because premiums for an Insurance Policy are higher than  
23 anticipated. To establish that the required coverages (or required terms of such  
24 coverages, including Insurance Policy limits) are not available on commercially  
25 reasonable terms, Developer will bear the burden of proving that either (i) the  
26 same is not available at all in the global insurance and reinsurance markets or (ii)  
27 the premiums for the same exceed 200% of the benchmark for the Insurance  
28 Policy as described in Section 13.1.14. For the purpose of clause (ii), the only  
29 increases in premiums that may be considered are those caused by changes in  
30 general market conditions in the insurance industry. No increase in insurance  
31 premiums attributable to particular conditions of the Project, or to claims or loss  
32 experience of any Developer-Related Entity or Affiliate, whether under an  
33 Insurance Policy or in connection with any unrelated work or activity of Developer-  
34 Related Entities or Affiliates, shall be considered.

35 (c) Developer shall not be entitled to any increase in the D&C Price, any extension of  
36 the Completion Deadlines, or any other Claim resulting from or arising out of the  
37 unavailability of any coverage or acceptable alternatives during the D&C Period.

38 (d) Except for premium increases that Developer is entitled to include in a  
39 Compensation Amount pursuant to Section 16, Developer shall bear the full risk

1 of any insurance premium increases for Insurance Policies required during the  
2 D&C Period, including increases:

3 (i) due to deductibles less than the maximum deductibles set forth in this  
4 Section 13 or Exhibit 11 (Insurance Coverage Requirements);

5 (ii) due to additional or extended coverages beyond those required under this  
6 Section 13 or Exhibit 11 (Insurance Coverage Requirements);

7 (iii) that result from market-based factors; and

8 (iv) that result from other factors.

9 (e) Developer shall be entitled to an increase in the O&M Price resulting from the  
10 unavailability of coverage and acceptable alternatives solely in the manner set  
11 forth in Section 13.1.14 for increased costs of the Insurance Policies required to  
12 be maintained at any time during the O&M Period pursuant to this Section 13 and  
13 Exhibit 11 (Insurance Coverage Requirements).

14 (f) ADOT will be entitled to a reduction in the D&C Price if it agrees to accept  
15 alternative Insurance Policies providing less than equivalent coverage during the  
16 D&C Period and Developer is not obligated to self-insure such risks. The amount  
17 of reduction of the D&C Price shall equal 115% of the reduction in premium that  
18 Developer obtains, using as a baseline the insurance quotes or estimates included  
19 in the DPDs (or based on other evidence of insurance premiums as of the Proposal  
20 Due Date if the DPDs do not provide adequate information). The Parties  
21 acknowledge that a 115% reduction is appropriate in order for ADOT to recover  
22 an approximation of Developer's markup on insurance premiums for indirect  
23 expenses, overhead and profit.

24 (g) ADOT will be entitled to a reduction in the O&M Price with respect to the  
25 Insurance Policies required to be maintained throughout the O&M Period in the  
26 manner set forth in Section 13.1.14.

27 **13.1.14 Insurance Premium Benchmarking**

28 (a) Solely with respect to Insurance Policies required to be maintained throughout  
29 the O&M Period under this Section 13 and Exhibit 11 (Insurance Coverage  
30 Requirements), ADOT and Developer will allocate the risk of significant increases  
31 in insurance premiums through an insurance benchmarking process as set forth in  
32 this Section 13.1.14.

33 (b) Not later than 45 days prior to the anticipated Project Substantial Completion  
34 Date, and not later than 45 days prior to each insurance renewal period thereafter,  
35 Developer shall submit a report ("**Insurance Review Report**") to ADOT that  
36 includes the following elements:

- 1 (i) Firm quotes from three established and recognized insurance providers for  
2 the Insurance Policies required under Exhibit 11 (Insurance Coverage  
3 Requirements) to be maintained during the O&M Period, without variation  
4 from required terms (“**Required Minimum O&M Insurance Policies**”);  
5 provided that Developer may provide only one quote in the initial  
6 Insurance Review Report. The quotes shall represent the current and fair  
7 market cost of providing the Required Minimum O&M Insurance Policies;
- 8 (ii) For any allocation to the Project of premiums for corporate policies, (A) a  
9 comprehensive explanation of the methodology applied to make the  
10 allocations, in compliance with clause (g) below, (B) detailed calculations  
11 that follow such methodology, and (C) written certification from an  
12 authorized officer of each of Developer and the corporate entity placing  
13 the policies certifying that the allocated amount has been fairly and  
14 accurately determined in compliance with clause (g) below; and
- 15 (iii) Except with respect to the initial Insurance Review Report, a  
16 comprehensive written explanation of any effect that Developer’s loss  
17 experience has had on the premiums for the Required Minimum O&M  
18 Insurance Policies. The explanation shall include: (A) an assessment by  
19 Developer’s Insurance Advisor addressing industry trends in premiums for  
20 the Required Minimum O&M Insurance Policies and analysis (if applicable)  
21 of any Project-specific reasons for the increase in premiums; and (B)  
22 detailed analysis of any claims (paid or reserved) since the last review  
23 period, with claim date(s), description of incident(s), claims amount(s), and  
24 the level of deductibles provided.
- 25 (c) ADOT retains the right to independently assess the accuracy of the information in  
26 the Insurance Review Report, and perform its own independent insurance review,  
27 which may include retaining advisors, obtaining independent quotes for the  
28 Required Minimum O&M Insurance Policies, performing its own calculation of  
29 corporate policy premium allocations consistent with clause (g) below, or  
30 performing its own assessment as to the impact of claims history on renewal costs.
- 31 (d) The “**Starting O&M Period Insurance Benchmarking Premiums**” shall be the  
32 higher of:
- 33 (i) Premium information obtained from the initial Insurance Review Report;  
34 or
- 35 (ii) Premium information included in the Detailed Pricing Documents.
- 36 (e) The Starting O&M Period Insurance Benchmarking Premiums shall be used in the  
37 benchmarking process for the remainder of the Term in accordance with the  
38 following procedures.

- 1 (i) ADOT will determine the change in premium costs on a coverage-by-  
2 coverage basis for the Required Minimum O&M Insurance Policies.
- 3 (ii) ADOT will use the Starting O&M Period Insurance Benchmarking Premiums  
4 to measure changes in premium costs at each renewal period for each of  
5 the Required Minimum O&M Insurance Policies. The Starting O&M Period  
6 Insurance Benchmarking Premiums shall be escalated based on the  
7 percentage increase, if any, in the CPI between the CPI most recently  
8 published prior to the Setting Date and the CPI most recently published  
9 prior to the beginning of the applicable insurance renewal period  
10 (“Escalated Benchmark O&M Period Insurance Premiums”).
- 11 (iii) For purposes of the benchmarking process described in this Section  
12 13.1.14, the premiums for the Required Minimum O&M Insurance Policies  
13 at each renewal shall be the lower of:
- 14 (1) Premium information obtained from the Insurance Review Report  
15 for the subject renewal period; or
- 16 (2) If ADOT reasonably deems appropriate, premium information  
17 obtained pursuant to clause (c) above.
- 18 (iv) Broker’s fees and agent’s commissions will not be considered as part of the  
19 benchmarking exercise described in this Section 13.1.14, and are the  
20 exclusive responsibility of Developer.
- 21 (v) In no event shall premium increases that are caused by Project-specific  
22 losses to the extent caused by matters within Developer’s control, changes  
23 in deductibles, switches from a corporate policy to a project-specific policy  
24 or vice versa, or other matters within the control of Developer or any  
25 Developer-Related Entity be subject to the benchmarking exercise or risk  
26 sharing described in this Section 13.1.14. Developer may voluntarily  
27 choose to procure an insurance package that varies from (but complies  
28 with) the Required Minimum O&M Insurance Policies (with for example  
29 lower deductibles, higher coverage limits, fewer exclusions, etc.), in which  
30 case both Parties recognize that: (A) the actual variations in Developer’s  
31 insurance premiums may not necessarily reflect the variations in the  
32 minimum insurance requirements; and (B) ADOT will disregard the actual  
33 insurance package and will rely upon the analysis from the Insurance  
34 Review Report and its own independent analysis of the effect on the  
35 minimum insurance requirements. Any insurance beyond the Required  
36 Minimum O&M Insurance Policies shall not be subject to the insurance  
37 benchmarking process and O&M Price adjustment described in this  
38 Section 13.1.14.

1 (vi) If ADOT elects to retain its own Insurance Advisor to analyze the extent of  
2 eligible premium increases, Developer shall cooperate in good faith with  
3 any reasonable requests for additional information from ADOT's Insurance  
4 Advisor. No later than 30 days after Developer's submission of the  
5 Insurance Review Report, ADOT will make its determination of the eligible  
6 premium increases subject to the risk-allocation described in clause (f)  
7 below. In the event of a dispute, ADOT's determination shall be subject to  
8 the Dispute Resolution Procedures.

9 (f) If the annual insurance premiums for the Required Minimum O&M Insurance  
10 Policies, as such premiums are determined pursuant to clauses (e) above, are in  
11 excess of 120% of the applicable Escalated Benchmark O&M Period Insurance  
12 Premiums, ADOT will increase the O&M Price for the applicable year an amount  
13 equal to 85% of such premiums that are in excess of 120% of the applicable  
14 Escalated Benchmark O&M Period Insurance Premiums until the next  
15 benchmarking period. If the annual insurance premiums for the Required  
16 Minimum O&M Insurance Policies, as such premiums may be adjusted pursuant  
17 to clauses (e) above, are below 80% of the applicable Escalated Benchmark O&M  
18 Period Insurance Premiums, ADOT will reduce the O&M Price for the applicable  
19 year in an amount equal to 85% of the difference between such premiums and  
20 80% of the applicable Escalated Benchmark Insurance Premiums until the next  
21 benchmarking period.

22 (g) If any insurance coverage is provided via dedicated Project-specific limits under  
23 corporate insurance programs, Developer shall account to ADOT for the portion  
24 of premiums allocated to the Project for the purpose of applying these insurance  
25 benchmarking provisions. Developer shall consistently apply the corporate  
26 methodology used for premium allocation to all calculations necessary to  
27 determine whether any increase or decrease in the O&M Price is to be made  
28 under this Section 13.1.14. If Developer switches from a project-specific policy to  
29 dedicated Project-specific limits under a corporate insurance program, then for  
30 purposes of applying these insurance benchmarking provisions ADOT shall have  
31 the right to approve the corporate methodology used for Developer's premium  
32 allocations to the Project, and thereafter all corporate conditions, facts and  
33 circumstances that are the approved basis for such premium allocations shall be  
34 assumed to hold constant at all times, without regard to changes over time in such  
35 conditions, facts and circumstances.

### 36 **13.1.15 Defense Costs**

37 No defense costs shall be included within or erode the limits of coverage of any of the  
38 Insurance Policies, except that:

39 (a) litigation and mediation defense costs may be included within the limits of  
40 coverage of professional and pollution liability policies;



1 (b) investigation and expert defense costs may also be included within the limits of  
2 coverage of professional liability policies; and

3 (c) other defense costs may be included within the limits of coverage of professional  
4 and pollution liability policies with ADOT’s prior written approval.

5 **13.1.16 Stacking of Policies**

6 Developer shall have the right to satisfy the requisite insurance coverage amounts for  
7 liability insurance through a combination of primary policies and umbrella or excess policies.  
8 Umbrella and excess policies shall comply with the required form of underlying policies and shall  
9 comply with all insurance requirements, terms and provisions set forth in this Agreement for the  
10 applicable type of coverage.

11 **13.1.17 Additional Insurance Policies**

12 If Developer carries insurance coverage in addition to that required under this  
13 Agreement, then Developer shall include ADOT and its members, directors, officers, employees,  
14 agents and ADOT Consultants as additional insureds thereunder, if and to the extent they have  
15 an insurable interest, unless ADOT grants an exception in writing. The additional insured  
16 endorsements shall be as described in Section 13.1.7(b); and Developer shall provide to ADOT  
17 the proofs of coverage and copy of the policy described in Section 13.1.5. The provisions of  
18 Sections 13.1.5, 13.1.7, 13.1.9, 13.1.10 and 13.2 shall apply to all such policies of insurance  
19 coverage.

20 **13.1.18 Contractor-Controlled Insurance Program**

21 Nothing in this Agreement, including in Exhibit 11 (Insurance Coverage Requirements), is  
22 intended or shall be construed to preclude use of a contractor-controlled insurance program to  
23 fulfill the insurance requirements under this Agreement.

24 **13.2 Prosecution of Claims and Denials of Coverage**

25 **13.2.1** Unless otherwise directed by ADOT in writing, Developer shall be responsible for  
26 reporting and processing all potential claims by ADOT or Developer against the Insurance Policies.  
27 Developer agrees to report timely to the insurer(s) under such Insurance Policies any and all  
28 matters that may give rise to an insurance claim by Developer or ADOT or another Indemnified  
29 Party, and to promptly and diligently pursue such insurance claims in accordance with the claims  
30 procedures specified in such Insurance Policies, whether for defense or indemnity or both.  
31 Developer shall enforce all legal rights against the insurer under the applicable Insurance Policies  
32 and applicable Laws to collect thereon, including pursuing necessary litigation and enforcement

1 of judgments, provided that, Developer shall be deemed to have satisfied this obligation if a  
2 judgment is not collectible after exhausting all lawful and diligent means.

3 **13.2.2** Developer shall immediately notify ADOT, and thereafter keep ADOT fully  
4 informed, of any incident, potential claim, claim or other matter of which Developer becomes  
5 aware that involves or could conceivably involve an Indemnified Party.  
6

1           **13.2.3** ADOT agrees to promptly notify the Arizona Department of Administration to,  
2 on behalf of ADOT, tender to the insurer under applicable Insurance Policies defense of claims  
3 against ADOT that may be covered under such Insurance Policies, and to cooperate with  
4 Developer as necessary for Developer to fulfill its duties hereunder.

5           **13.2.4** If in any instance Developer has not performed its obligations respecting  
6 insurance coverage set forth in this Agreement or is unable to enforce and collect any such  
7 insurance for failure to assert claims in accordance with the terms of the Insurance Policies or to  
8 prosecute claims diligently, then for purposes of determining Developer’s liability and the limits  
9 thereon or determining reductions in compensation due from ADOT to Developer on account of  
10 available insurance, Developer shall be treated as if it elected to self-insure up to the full amount  
11 of insurance coverage that would have been available had Developer performed such obligations  
12 and not committed such failure. Nothing in the Contract Documents shall be construed to treat  
13 Developer as electing to self-insure where Developer is unable to collect due to the bankruptcy  
14 or insolvency of any insurer that at the time the Insurance Policy is written meets the rating  
15 qualifications set forth in this Section 13, provided that the loss of coverage due to such  
16 bankruptcy or insolvency could not have been avoided through Developer’s compliance with  
17 Section 13.6.

18           **13.2.5** If in any instance Developer has not promptly performed its obligation to report  
19 to applicable insurers and process any potential insurance claim tendered by ADOT or another  
20 Indemnified Party, then ADOT or the other Indemnified Party may, but is not obligated to:

- 21           (a)     notify Developer of ADOT’s or the other Indemnified Party’s intent to report or  
22                   tender the claim directly to the insurer; and
- 23           (b)     proceed with reporting and processing the claim if ADOT or the other Indemnified  
24                   Party does not receive from Developer, within five days after so notifying  
25                   Developer, written proof that Developer has reported the claim directly to the  
26                   insurer.

27 ADOT or the other Indemnified Party may dispense with such notice to Developer if ADOT or the  
28 other Indemnified Party has a good faith belief that reporting the claim to the applicable insurer  
29 is necessary to preserve the claim or is in the best interest of ADOT or the Indemnified Party.

30           **13.2.6** Developer shall deliver to ADOT a report, on a type of coverage basis , within 60  
31 days after cumulative payments made by the insurer(s) under any type of coverage with an  
32 aggregate limit exceed (a) 25% of the aggregate limit (inclusive of primary and excess policies),  
33 and (b) each additional 10% increment of the aggregate limit (inclusive of primary and excess  
34 policies) thereafter. The report shall identify the affected policy or policies and limit of coverage,  
35 state the amount and nature of each claim paid, and state the balance of the coverage limit  
36 remaining available.

37           **13.2.7** If any insurance carrier for an Insurance Policy denies coverage with respect to  
38 any claims of ADOT or other Indemnified Parties reported to such carrier, upon Developer’s

1 request, ADOT and, to the extent necessary, the other Indemnified Parties shall cooperate in  
2 good faith to establish whether and to what extent to contest, and how to fund the cost of  
3 contesting, the denial of coverage; provided that if the reported claim is a matter covered by an  
4 indemnity in favor of an Indemnified Party, then Developer shall bear all costs of contesting the  
5 denial of coverage. Developer shall not be entitled to an increase in the Contract Price, a  
6 Completion Deadline adjustment or any other Claim arising from such denial of coverage, nor  
7 shall Developer be relieved of any liability to ADOT or of its indemnity obligations to the  
8 Indemnified Parties.

9 **13.2.8** ADOT may, but is not obligated to, contest an insurance carrier’s denial of  
10 coverage where ADOT believes it is entitled to:

- 11 (a) Coverage that could reduce or reimburse in whole or in part a Compensation  
12 Amount or Termination Compensation;
- 13 (b) Defense or coverage against liability; or
- 14 (c) Coverage of harm or loss to ADOT property.

15 **13.3 Risk of Loss or Damage to Project; Use of Insurance Proceeds**

16 **13.3.1** Developer shall rebuild, repair, restore or replace all loss, damage or destruction  
17 occurring during the D&C Period to the Project, or to materials, equipment, supplies and  
18 maintenance equipment purchased for permanent installation in, or for use during construction,  
19 operations or maintenance of, the Project, whether within or outside the Project ROW,  
20 regardless of who has title thereto under the Contract Documents and regardless of the cause of  
21 the loss, damage or destruction; provided, however, that Developer shall not be responsible for  
22 rebuilding, repairing, restoring or replacing Project-related property:

- 23 (a) Within the South Segment, commencing upon the date ADOT issues a Certificate  
24 of South Segment Substantial Completion, if applicable; or
- 25 (b) That will be maintained by a third party, upon its acceptance of such property;

26 in each case unless such property is damaged due to Developer Act.

27 **13.3.2** Developer shall not be responsible for rebuilding, repairing, restoring or  
28 replacing loss, damage or destruction to the Project during the O&M Period, except:

- 29 (a) To the extent provided otherwise in the Contract Documents, including Section  
30 10.3; and
- 31 (b) That the foregoing does not affect or limit any lawful remedies that may be  
32 available to ADOT for defective design or construction by Developer or loss,  
33 damage or destruction to the Project resulting therefrom, including portions of  
34 the Project outside the O&M Limits.

1           **13.3.3** Developer shall ensure that ADOT (a) is named as loss payee under all builder’s  
2 risk Insurance Policies and (b) will have the exclusive right to receive claims payments from the  
3 insurers under such policies. ADOT will hold all insurance proceeds it receives as loss payee or  
4 otherwise for any insured loss under such Insurance Policies in a separate insurance proceeds  
5 account for the purposes of, and to be applied in accordance with, this Section 13.3.3. If loss,  
6 damage or destruction to the Project is deemed to be self-insured by Developer under Section  
7 13.2.4, then, within 30 days after ADOT’s written request, Developer shall pay to ADOT, as loss  
8 payee, the amount of insurance proceeds deemed owing. ADOT will hold and dispense such  
9 payment from Developer in the same manner it would hold proceeds from a third-party insurer.

10           **13.3.4** If the loss, damage or destruction to the Project is from a risk or event covered  
11 by a builder’s risk Insurance Policy or by deemed self-insurance under Section 13.2.4 and such  
12 loss, damage or destruction is not attributable to a Relief Event for which ADOT owes  
13 compensation to Developer under Section 16, then:

14           (a) ADOT will remit to Developer all claims payments paid to ADOT, as loss payee,  
15 from the insurer under the builder’s risk Insurance Policy within ten Business Days  
16 after ADOT receives each such payment; provided, however, that remittance of  
17 such insurance proceeds to Developer shall not be a condition precedent to  
18 Developer’s obligation to perform the repair or replacement Work and shall not  
19 be deemed approval or acceptance by ADOT of the repair or replacement Work;  
20 and

21           (b) Developer shall bear all costs, including delay and disruption costs, of repair or  
22 replacement Work not covered by available insurance proceeds, including the  
23 amount of deductibles or self-insured retentions and any costs in excess of  
24 insurance coverage limits.

25           **13.3.5** If the loss, damage or destruction to the Project is from a risk or event covered  
26 by a builder’s risk Insurance Policy or by deemed self-insurance under Section 13.2.4 and such  
27 loss, damage or destruction is attributable to a Relief Event, then:

28           (a) Subject to the terms and conditions of Section 16, ADOT will pay the applicable  
29 Compensation Amount for the repair or replacement Work to the Project  
30 performed by Developer, regardless of the amount of insurance proceeds or the  
31 timing of claims payments by the insurers, subject, however, to (i) any Claim  
32 Deductibles payable by Developer and (ii) ADOT’s right to set off such payment by  
33 any deemed self-insurance that Developer fails to pay to ADOT;

34           (b) If there are any insurance or deemed self-insurance proceeds available after  
35 paying or reimbursing ADOT for such Compensation Amount paid to Developer,  
36 ADOT will next apply such available insurance proceeds to reimburse Developer  
37 for its costs to repair or replace the items of property described in Section 13.3.8;  
38 and

1 (c) Developer shall bear all the costs described in Section 13.3.8 not covered under  
2 clause (b) above.

3 **13.3.6** Subject to Sections 13.3.1 and 13.3.2, if the loss, damage or destruction to the  
4 Project is from a risk or event that this Agreement does not require to be covered by a builder's  
5 risk Insurance Policy and such loss, damage or destruction is not attributable to a Relief Event for  
6 which ADOT owes compensation to Developer under Section 16, then Developer shall bear all  
7 schedule risk and all costs, including delay and disruption costs, for the repair or replacement  
8 Work to the Project, subject, however, to Developer's rights under Section 13.4.

9 **13.3.7** If the loss, damage or destruction to the Project is from a risk or event that this  
10 Agreement does not require to be covered by a builder's risk Insurance Policy and such loss,  
11 damage or destruction is attributable to a Relief Event, then:

12 (a) Subject to the terms and conditions of Section 16, ADOT will pay the applicable  
13 Compensation Amount for the repair or replacement Work to the Project  
14 performed by Developer, subject, however, to any Claim Deductibles payable by  
15 Developer; and

16 (b) Developer shall bear all the costs described in Section 13.3.8.

17 **13.3.8** Except to the extent there are available insurance proceeds as provided in  
18 Section 13.3.4 or 13.3.5(b), to the extent caused by ADOT's gross negligence, recklessness or  
19 willful misconduct, or as set forth in Section 13.3.9, Developer shall bear all costs, including Extra  
20 Work Costs and Delay Costs, to repair or replace, and shall not be entitled to an increase in the  
21 Contract Price or any other Claim arising from any loss, damage or destruction caused by a Relief  
22 Event or any other event to:

23 (a) Any tools, machinery, equipment, facilities, protective fencing, job trailers,  
24 scaffolding or other items of any Developer-Related Entity used in the  
25 performance of the Work but not intended for permanent installation into the  
26 Project;

27 (b) Any machinery, equipment, facilities, materials, inventory, supplies and other  
28 property of any Developer-Related Entity outside the Project ROW; or

29 (c) Any machinery, equipment, facilities, materials, inventory, supplies and other  
30 property of any Developer-Related Entity while in transit to the Site.

31 **13.3.9** Section 13.3.8 shall not preclude a Claim for a Completion Deadline extension  
32 where the subject loss, damage or destruction is caused by a Relief Event, subject to the  
33 applicable provisions of Section 16.

34 **13.3.10** Developer's rights, if any, to a Completion Deadline adjustment in the event of  
35 any loss, damage or destruction to the Project shall be limited to situations where such loss,

1 damage or destruction is caused by a Relief Event and shall be subject to the applicable provisions  
2 of Section 16.

### 3 **13.4 Claims Against Third Parties**

4 **13.4.1** Developer shall not pursue claims against third parties for damage caused to the  
5 Project that Developer is obligated to repair, including damage due to a vehicle collision,  
6 vandalism or other acts of damage or destruction by third parties. All rights to pursue third  
7 parties for such claims are reserved to ADOT.

8 **13.4.2** Developer shall provide reasonable assistance to ADOT regarding such claims.  
9 Such assistance shall include providing to ADOT on a monthly basis detailed documentation of  
10 actual costs Developer incurs to repair damage to the Project caused by third parties, including  
11 where such costs are not compensable under Section 15.6.4 or as a Relief Event.

### 12 **13.5 General Insurance Disclaimer**

13 Developer and each Subcontractor have the sole responsibility to acquire and maintain insurance  
14 coverage suitable for the Work to be performed under the Contract Documents, whether or not  
15 specified herein.

### 16 **13.6 Bankrupt Insurer**

17 If an insurer providing any of the Insurance Policies becomes the subject of bankruptcy  
18 proceedings, becomes insolvent, or is the subject of an order or directive limiting its business  
19 activities relating to or affecting the Insurance Policies given by any Governmental Entity,  
20 including the Arizona Department of Insurance, or has its rating lowered by A.M. Best and  
21 Company below A-, VII as required in Section 13.1.1, then Developer shall use its best efforts to  
22 promptly and at its own cost and expense secure alternative coverage in compliance with the  
23 insurance requirements contained in this Section 13 so as to avoid any lapse in insurance  
24 coverage.

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**SECTION 14. WARRANTIES**

Developer shall obtain manufacturer’s or producer’s warranties on all items, materials, products, equipment and supplies installed or incorporated into the Project, consistent with those provided as customary trade practice. The form of warranty or guaranty must include a provision that it may be transferred to ADOT without necessity for consent of the warranting party. Except with respect to the Flex Lanes, Developer shall assign, and cause all Subcontractors to assign, to ADOT all warranties received or otherwise acquired in connection with the items, materials, products, equipment and supplies installed or incorporated into the Project. With respect to the Flex Lanes, at the end of the Term Developer shall assign, and cause all Subcontractors to assign, to ADOT all such warranties that remain in effect. This Section 14 shall not apply to standard, pre-specified manufacturer warranties of mass-marketed materials, products, equipment or supplies where the warranty cannot be extended to ADOT using commercially reasonable efforts, in which case Developer shall prosecute any remedies available under such warranties for as long as such warranties may be valid throughout the Term. Upon notice from ADOT, Developer shall pursue any necessary remedies under such warranties to cause the repair of any defects in the warranted items, materials, products, equipment or supplies until such time as the applicable warranty expires.





1           **15.1.3 Payment Based on Progress**

2           ADOT will pay the D&C Price solely on the basis of progress of the D&C Work, subject to  
3 each cap on allowable payments for pre-NTP 2 Work set forth in Exhibit 2-4.1 (D&C Price  
4 Breakdown) prior to issuance of NTP 2. The Project Schedule shall provide for payment of the  
5 D&C Price on the basis of progress of the D&C Work.

6           **15.2 Invoicing and Payment for the D&C Price**

7           The following process shall apply to invoicing and payment of the D&C Price:

8           **15.2.1 NTP 1 Work**

9           (a) Any Design Work that Developer performs prior to satisfaction of the conditions  
10 precedent set forth in Section 9.5 shall be at Developer’s risk, as ADOT will have  
11 no obligation to pay for or review any Design Work prior to satisfaction of such  
12 conditions precedent.

13           (b) ADOT will pay Developer for work authorized by NTP 1 not more often than  
14 monthly based on approved D&C Draw Requests and subject to the maximum  
15 amounts payable for such Work prior to issuance of NTP 2 set forth in Exhibit 2-  
16 4.1 (D&C Price Breakdown), as follows:

17           (i) For NTP 1 mobilization, in one installment with the first D&C Draw Request  
18 after NTP 1, as set forth in Section 15.2.9(b)(i);

19           (ii) For each item that is a Submittal under “NTP 1 Work Effort” in Exhibit 2-  
20 4.1 (D&C Price Breakdown), other than Design Documents, (i) 50% of the  
21 amount shown for that Submittal in Exhibit 2-4.1 (D&C Price Breakdown)  
22 with the next D&C Draw Request after ADOT receives a complete draft of  
23 the Submittal, unless ADOT determines the draft is inadequate, and (ii) the  
24 remaining payment with the next D&C Draw Request after ADOT approves  
25 the final Submittal;

26           (iii) For Design Work, monthly according to a D&C Draw Request for progress  
27 made and the approved Schedule of Values for pre-NTP 2 Design Work;

28           (iv) For the premiums for bonds and insurance associated with NTP 1 Work, in  
29 accordance with Section 15.2.9(c); and

30           (v) For all other items, monthly according to actual documented costs  
31 incurred and included in a D&C Draw Request, with any balance of the bid  
32 item total remaining at issuance of NTP 2 payable in the next D&C Draw  
33 Request thereafter.

34           (c) Invoices for work authorized by NTP 1 shall comply with the provisions of this

1            Section 15.2.1. Invoices for premiums for bonds and insurance for NTP 1 Work  
2 shall comply with the provisions of Section 15.2.9.

3            **15.2.2 Draft D&C Draw Request Package for D&C Work and Monthly Progress Meeting**

4            (a) On or about the 22<sup>nd</sup> day of each month following the issuance of NTP 1 and  
5 continuing through the D&C Draw Request for the Final D&C Payment, Developer  
6 shall deliver to ADOT a draft D&C Draw Request for the prior monthly period, in  
7 the form required by ADOT, together with drafts of all materials, reports,  
8 schedules, certifications and other submittals for that month listed in Section  
9 15.2.3(b).

10           (b) At each monthly progress meeting held pursuant to Section 5.10.2, Developer’s  
11 and ADOT’s Authorized Representatives shall ascertain the progress of the Work  
12 and verify the quantities for any unit priced Work. Each monthly progress meeting  
13 shall be attended by Developer and ADOT and its consultants. Developer’s and  
14 ADOT’s Authorized Representatives shall review the draft D&C Draw Request  
15 reflecting the value of Work completed as of the date of the progress meeting.  
16 They shall determine and calculate the value of Work completed:

17           (i) As provided in Section 15.2.1(b) for NTP 1 Work;

18           (ii) Based on quantities and unit prices for unit priced Work;

19           (iii) Based on time and materials for Force Account Work; and

20           (iv) For all other Work, based on the percentage completion of Project  
21 Schedule activities and the values distributed to such activities in the  
22 Monthly Progress Schedule for the prior monthly period.

23           (c) Developer’s and ADOT’s Authorized Representatives shall sign the draft D&C Draw  
24 Request, indicating the portions of it that have been approved and setting forth  
25 the proposed total payment amount, which shall be the approved value of the  
26 Work then completed less progress payments previously made.

27           (d) Concurrent with the delivery of the draft D&C Draw Request, Developer shall  
28 submit a draft current Monthly Progress Schedule for approval by ADOT, in its  
29 good faith discretion, that it meets the requirements set forth in Section GP  
30 110.06.2.7 of the Technical Provisions. To the extent ADOT provides any  
31 comments to the draft Monthly Progress Schedule, Developer shall incorporate  
32 such comments prior to submission of the Monthly Progress Schedule pursuant to  
33 Section 15.2.3(b)(i)(3).

1           **15.2.3 Delivery of D&C Draw Request for Payment of D&C Price**

2           (a)     Within seven days after each monthly progress meeting, Developer shall submit  
3                   to ADOT one electronic copy and two hard copies of a D&C Draw Request for the  
4                   Work performed under the Contract Documents during the immediately  
5                   preceding month, in a form acceptable to ADOT and meeting all the requirements  
6                   specified herein, except as otherwise approved by ADOT. Each D&C Draw Request  
7                   shall be based upon and use the amounts set forth in the approved draft D&C  
8                   Draw Request and may not include any amounts not approved by ADOT in the  
9                   monthly progress meeting reviewing such draft D&C Draw Request.

10          (b)     Each D&C Draw Request:

11           (i)     Must contain the following items:

12                   (1)     D&C Draw Request cover sheet;

13                   (2)     An updated Schedule Narrative as described in Section GP  
14                   110.06.2.4 of the Technical Provisions;

15                   (3)     A current Monthly Progress Schedule as described in Section GP  
16                   110.06.2.7 of the Technical Provisions;

17                   (4)     Certification by Developer that all D&C Work that is the subject of  
18                   the D&C Draw Request fully complies with the requirements of the  
19                   Contract Documents subject to any exceptions identified in the  
20                   certification;

21                   (5)     Monthly report of personnel hours;

22                   (6)     D&C Draw Request data sheet(s) and supporting documents, as  
23                   required by ADOT to support and substantiate the amount  
24                   requested (based on invoices, receipts and other evidence  
25                   establishing the number of units delivered for unit priced Work;  
26                   based on Section 1.2 of Exhibit 13 (Compensation Amount  
27                   Specifications) for Force Account Work; and based on the Project  
28                   Schedule for all other D&C Work) and, with respect to draws prior  
29                   to issuance of NTP 2, showing the maximum amounts payable  
30                   under Exhibit 2-4.1 (D&C Price Breakdown);

31                   (7)     DBE Monthly Utilization Progress Report in a format reasonably  
32                   satisfactory to ADOT as required in Section 18.02.2 of Exhibit 6  
33                   (ADOT's DBE Special Provisions);

- 1 (8) The monthly reports regarding OJT enrollment, schedule, progress,  
2 utilization and status, each in the form and content required by  
3 Exhibit 7 (ADOT's OJT Special Provisions);
- 4 (9) To the extent applicable, comparison of amounts for items of Work  
5 prior to NTP 2 to the maximum allowable amounts for such Work  
6 set forth in Exhibit 2-4.1 (D&C Price Breakdown);
- 7 (10) If the D&C Draw Request includes Utility Adjustment Work, a  
8 summary narrative of the Utility Adjustment Work performed  
9 during the applicable month, and for Utility Adjustment Work  
10 performed by a Utility Company, invoices and records showing that  
11 Developer has paid the Utility Company for such Utility Adjustment  
12 Work;
- 13 (11) Information showing all amounts for which ADOT is withholding  
14 payment, including outstanding items in the Noncompliance  
15 Reports and other bases for withholding payment under the  
16 Contract Documents, and the amount of payment withheld; and
- 17 (12) Such other items as ADOT reasonably requests; and
- 18 (ii) Shall be considered complete only if it:
- 19 (1) Describes in detail the status of completion as it relates to the  
20 Project Schedule;
- 21 (2) Sets forth separately and in detail the related payments that are  
22 then due in accordance with the Project Schedule, as of the end of  
23 the prior month;
- 24 (3) Sets forth in detail the amounts paid to Subcontractors and  
25 Suppliers (including those at lower tiers) from the payments made  
26 by ADOT to Developer with respect to the D&C Draw Request  
27 submitted two months prior;
- 28 (4) Includes affidavits of payment and unconditional waivers of claims  
29 in form satisfactory to ADOT executed by Developer and each  
30 Subcontractor with respect to all amounts paid in connection with  
31 the D&C Draw Request submitted two months prior; and
- 32 (5) Sets forth in detail the total amount due from Utility Companies for  
33 (A) Utility Betterments and (B) any other Work for which the Utility  
34 Company is responsible for the cost.

- 1 (c) Developer shall not be entitled to payment from ADOT for Utility Adjustment  
2 Work performed by a Utility Company until Developer has paid the Utility  
3 Company for such Utility Adjustment Work.
- 4 (d) Developer acknowledges that ADOT will obtain funding for portions of the Work  
5 from various sources, and agrees to segregate billings for all such Work in a format  
6 reasonably requested by ADOT and with detail and information as reasonably  
7 requested by ADOT.

8 **15.2.4 D&C Draw Request Cover Sheet Contents**

9 The D&C Draw Request cover sheet shall include (a) Project number and title, (b) D&C  
10 Draw Request number (numbered consecutively starting with “1”), (c) Total amount paid to  
11 Developer as of the date on which the D&C Draw Request is submitted, and (d) authorized  
12 signature, title of signer, and date of signature.

13 **15.2.5 Certification by Professional Services Quality Manager and Construction**  
14 **Quality Manager**

15 Each D&C Draw Request shall include a certificate signed and sealed by the Professional  
16 Services Quality Manager and the Construction Quality Manager, as appropriate, in a form  
17 acceptable to ADOT, certifying that:

- 18 (a) Except as specifically noted in the certification, all Work that is the subject of the  
19 D&C Draw Request, including that of Professional Services firms, Subcontractors,  
20 and Suppliers, has been checked or inspected by the Professional Services Quality  
21 Manager, with respect to Professional Services, and the Construction Quality  
22 Manager, with respect to the Construction Work;
- 23 (b) Except as specifically noted in the certification, all Work that is the subject of the  
24 D&C Draw Request conforms to the requirements of the Contract Documents;
- 25 (c) All of the measures and procedures provided in the Professional Services Quality  
26 Management Plan are functioning properly and are being followed;
- 27 (d) The Professional Services percentages and construction percentages stated are  
28 accurate; and
- 29 (e) All quantities for which payment is requested on a unit price basis are accurate.

30 **15.2.6 Payment by ADOT**

- 31 (a) Within ten Business Days after ADOT receives the D&C Draw Request (including  
32 all materials and reports required under Section 15.2.3(b)) and the related D&C  
33 Draw Request certificate, ADOT will review the same for consistency with the draft  
34 D&C Draw Request package prepared at the most recent monthly progress

1 meeting and conformity with all requirements of the Contract Documents, and  
2 notify Developer of the amount approved for payment and specify the reason for  
3 disapproval of any remaining invoiced amounts. Developer may include such  
4 disapproved amounts in the next month's D&C Draw Request after correction of  
5 the deficiencies noted by ADOT.

6 (b) No later than the Developer Cycle Key Date first occurring after the ten Business  
7 Day period described in clause (a), ADOT will pay Developer the amount of the  
8 D&C Draw Request approved for payment less any amounts that ADOT is  
9 otherwise entitled to withhold or deduct.

10 (c) For Work authorized by NTP 1, ADOT will not have any obligation to pay Developer  
11 any amount that:

12 (i) Is inconsistent with Section 15.2.1(b);

13 (ii) Was not approved during the monthly progress meeting reviewing the  
14 draft invoice for such month; or

15 (iii) Would result in aggregate payments prior to issuance of NTP 2 in excess of  
16 that allowed under Section 15.2.1(b).

17 (d) For Work authorized by NTP 2, in no event shall ADOT have any obligation to pay  
18 Developer any amount that:

19 (i) Would result in payment for any activity in excess of the value of the  
20 completed percentage of such activity (for non-unit priced Work);

21 (ii) Was not approved during the monthly progress meeting review of the  
22 draft invoice for such month; or

23 (iii) Would result in aggregate payments in excess of the overall completion  
24 percentage for the Project multiplied by the Contract Price (for non-unit  
25 priced Work).

26 **15.2.7 Monthly Progress Schedule**

27 If a D&C Draw Request for any month is incomplete due to lack of ADOT approval of the  
28 Monthly Progress Schedule, ADOT may elect, in its sole discretion, to:

29 (a) Withhold 10% of the D&C Draw Request for such month;

30 (b) If applicable, withhold 10% of the D&C Draw Request for the immediately  
31 following month; and

32 (c) If applicable, withhold 100% of all further D&C Draw Requests,

1 until ADOT approves of the Monthly Progress Schedule as described in Section 15.2.2(d) and  
2 Section GP 110.06.2.7 of the Technical Provisions. Developer may include any previously withheld  
3 amounts in the D&C Draw Request for the month in which the Monthly Progress Schedule  
4 receives ADOT approval.

5 **15.2.8 Unincorporated Materials; Long Lead Items**

6 ADOT will not pay Developer for Construction Materials not yet incorporated in the Work  
7 unless all of the following conditions are met:

8 (a) Construction Materials shall be: (i) delivered to the Site; (ii) delivered to Developer  
9 and promptly stored by Developer in bonded storage at a location approved by  
10 ADOT in its good faith discretion; or (iii) stored at a Supplier’s fabrication site,  
11 which must be a bonded commercial location approved by ADOT, in its good faith  
12 discretion;

13 (b) The owner or operator of the storage location shall agree in writing to allow ADOT  
14 agents or representatives to access the stored Construction Materials during  
15 regular business hours in order to inspect and verify quantities and condition;

16 (c) The Quality Manager has certified that the quantity and quality of the  
17 Construction Materials comply with the requirements of the Contract Documents;

18 (d) Developer shall submit certified bills for such Construction Materials with the D&C  
19 Draw Request, as a condition to payment for such Construction Materials. The  
20 certifications must certify in favor of ADOT (i) the date and location of delivery for  
21 storage and (ii) that the Construction Materials are stored in compliance with the  
22 requirement set forth in this Section 15.2.8. ADOT will allow only such portion of  
23 the amount represented by these bills as, in its good faith discretion, is consistent  
24 with the reasonable cost of such Construction Materials; and

25 (e) Developer at its own cost shall promptly execute, acknowledge and deliver to  
26 ADOT proper bills of sale or other instruments in writing in a form acceptable to  
27 ADOT conveying and assuring to ADOT title to such Construction Materials  
28 included in any D&C Draw Request, free and clear of all Liens. Developer, at its  
29 own cost, shall conspicuously mark such Construction Materials as the property of  
30 ADOT, shall not permit such Construction Materials to become commingled with  
31 non-ADOT-owned property or with materials that do not conform with the  
32 Contract Documents, and shall take such other steps, if any, as ADOT may require  
33 or regard as necessary to vest title to such material in ADOT free and clear of Liens.

34 If Construction Materials are stored at any site not approved by ADOT, Developer shall accept  
35 full responsibility for any cost of, and any loss or damage to, such Construction Materials and pay  
36 all personal and property taxes that may be levied against ADOT by any state or subdivision  
37 thereof on account of such storage of such Construction Materials.



1           **15.2.9 Mobilization Payments; Bond and Insurance Premiums**

2           (a)     Developer shall not be entitled to payment for mobilization until Developer has  
3           obtained all Insurance Policies and has provided proof of coverage thereof to  
4           ADOT as required by Section 13.

5           (b)     Upon compliance with clause (a), Developer shall be entitled to payment for  
6           mobilization in an amount equal to the lesser of (1) the bid item price for  
7           mobilization set forth in Exhibit 2-4.1 (D&C Price Breakdown) or (2) 5% of the D&C  
8           Price (other than mobilization). This amount shall be fixed and not be subject to  
9           adjustment by any Relief Event, Claim or Supplemental Agreement, and shall be  
10          paid in installments as follows:

11          (i)     The first payment for mobilization shall be in an amount not to exceed 30%  
12          of the total payment for mobilization, payable as part of the first D&C Draw  
13          Request occurring after the issuance of NTP 1;

14          (ii)    The second payment for mobilization shall be in an amount not to exceed  
15          20% of the total payment for mobilization, payable as part of the first D&C  
16          Draw Request occurring after the issuance of NTP 2;

17          (iii)   The third payment for mobilization shall be in an amount not to exceed  
18          25% of the total payment for mobilization, payable as part of the first D&C  
19          Draw Request occurring after the issuance of NTP 2 and after 5% of the  
20          D&C Price is earned on items other than mobilization; and

21          (iv)    The fourth payment for mobilization shall be in the remaining amount of  
22          the total payment for mobilization, payable as part of the first D&C Draw  
23          Request occurring after the issuance of NTP 2 and after 10% of the D&C  
24          Price is earned on items other than mobilization.

25          (c)     ADOT will pay Developer as part of the first D&C Draw Request occurring after the  
26          issuance of NTP 1 the portion of the D&C Price allocable to bond and insurance  
27          premiums incurred as of the date of such D&C Draw Request and as set forth in  
28          Exhibit 2-4.1 (D&C Price Breakdown).

29           **15.2.10 Equipment**

30           Except as part of Compensation Amounts or Termination Compensation, ADOT will not  
31           pay for the costs of acquiring, purchasing or leasing any equipment. Costs of equipment, whether  
32           new, used or rented, and to the extent not included in the mobilization payments under Section  
33           15.2.9, shall be allocated to and paid for as part of the activities with which the equipment is  
34           associated, in a manner which is consistent with the requirements of Section 1.2.3 of Exhibit 13  
35           (Compensation Amount Specifications).

1 **15.3 Final D&C Payment**

2 Final D&C Payment for all D&C Work will be made as follows.

3 **15.3.1 Application for Final D&C Payment**

4 (a) No earlier than 15 days prior to the date on which Developer reasonably believes  
5 it will satisfy the conditions of Final Acceptance, Developer shall prepare and  
6 submit to ADOT a proposed Application for Final D&C Payment showing the  
7 proposed total amount due to Developer as of the date of Final Acceptance,  
8 including any amounts owing from Supplemental Agreements.

9 (b) The Application for Final D&C Payment shall list all outstanding Relief Event  
10 Notices and Relief Requests, stating the claimed Compensation Amount  
11 associated with each such Relief Event Notice and Relief Request.

12 (c) The Application for Final D&C Payment shall also be accompanied by:

13 (i) Information detailing the status of all existing or threatened claims and  
14 stop notices of Subcontractors, Suppliers, laborers, Utility Companies  
15 and/or other third parties against Developer, ADOT or the Project;

16 (ii) Consent of each Guarantor and Surety to the proposed payment schedule;

17 (iii) Such other documentation as ADOT may reasonably require; and

18 (iv) The release described in Section 15.3.3, executed by Developer.

19 (d) Prior applications and payments shall be subject to correction in the Application  
20 for Final D&C Payment. Relief Event Notices and Relief Requests filed concurrently  
21 with the Application for Final D&C Payment must be otherwise timely and meet  
22 all requirements under Section 16.

23 **15.3.2** ADOT's obligation to make payment to Developer based on the Application for  
24 Final D&C Payment is conditioned on ADOT's receipt of an executed release meeting the  
25 requirements of Section 15.3.3 and otherwise satisfactory in form and content to ADOT. The  
26 payment amount will be reduced by any amounts that are deductible under Section 15.8.

27 **15.3.3** Developer shall execute a release agreement that (i) releases ADOT from any and  
28 all Claims arising from the D&C Work, and (ii) releases and waives any claims against the  
29 Indemnified Parties, excluding only those matters identified in any Relief Event Notices and Relief  
30 Requests, or in written notices of other specific Claims, that in each case were previously timely  
31 delivered to ADOT and are listed as outstanding in the Application for Final D&C Payment. The  
32 release shall be accompanied by a sworn affidavit from Developer certifying that:

33 (a) All D&C Work complies with the requirements of the Contract Documents;

- 1 (b) Developer has resolved any claims made by Subcontractors, Suppliers, Utility
- 2 Companies, laborers, or other third parties against Developer, ADOT or the Project
- 3 (except those listed by Developer in accordance with Section 15.3.1(c)(i));
- 4 (c) Developer has no reason to believe that any Person has a valid claim against
- 5 Developer, ADOT or the Project which has not been communicated in writing by
- 6 Developer to ADOT as of the date of the certificate; and
- 7 (d) All guaranties, the D&C Payment Bond, the D&C Performance Bond, the O&M
- 8 Payment Bond, and the O&M Performance Bond are in full force and effect.

9 **15.3.4** Relief Requests submitted prior to the Application for Final Payment that are not  
 10 in Dispute shall be included in the Application for Final D&C Payment.

11 **15.3.5** ADOT will review Developer’s proposed Application for Final D&C Payment, and  
 12 within 20 Business Days after receipt, will deliver to Developer any changes or corrections. Any  
 13 changes or corrections made pursuant to this Section 15.3.5 will be reflected in an updated  
 14 payment schedule showing the amount owed to Developer for the applicable period.

15 **15.4 Incentive Payment**

16 **15.4.1** ADOT will pay Developer an incentive payment for early South Segment  
 17 Substantial Completion equal to the lesser of (a) \$400,000 or (b) the amount calculated pursuant  
 18 to the following table.

19

| Bands             |                 | A                                                                                                                               | B                       | C                                             |
|-------------------|-----------------|---------------------------------------------------------------------------------------------------------------------------------|-------------------------|-----------------------------------------------|
|                   |                 | # Days per Band that the date ADOT issues Certificate of South Segment Substantial Completion Precedes the Adjusted Target Date | Daily Incentive Payment | Cumulative Incentive Payment (A x B) per Band |
| 1                 | Days 1 - 30     |                                                                                                                                 | \$3,000                 | \$                                            |
| 2                 | Days 31 - 60    |                                                                                                                                 | \$4,000                 | plus \$                                       |
| 3                 | Days 61 or more |                                                                                                                                 | \$5,000                 | plus \$                                       |
| <b>Total Days</b> |                 |                                                                                                                                 | <b>Total \$:</b>        | \$                                            |

20 Example: If Developer obtains Certificate of South Segment Substantial Completion 100 days  
 21 before the adjusted target date, the incentive payment will equal:

22 Band 1: 30 days x \$3,000 = \$ 90,000  
 23 Band 2: 30 days x \$4,000 = \$ 120,000  
 24 Band 3: 40 days x \$5,000 = \$ 200,000  
 25 Total = \$ 410,000  
 26 Incentive payment = \$ 400,000

1           **15.4.2** For purposes of the foregoing calculation, the “**adjusted target date**” means:

2           (a) 825 days after the date ADOT issues NTP 1 (the “**target date**”); plus

3           (b) The number of days (if any) that the end of the critical path to South Segment  
4           Substantial Completion is extended due to any Relief Event Delay that:

5                   (i) is not concurrent with any other delay that is not caused by a Relief Event;

6                   (ii) Developer cannot reasonably avoid through mitigation as required under  
7                   Section 16.9; and

8                   (iii) is directly attributable only to a Relief Event under clause (a), (b), (c), (d) or  
9                   (g) (but only due to an ADOT Release of Hazardous Materials) of the  
10                  definition of Relief Event,

11                  but only if the date for South Segment Substantial Completion absent such a Relief  
12                  Event Delay, as indicated in the then Project Schedule accepted by ADOT, is earlier  
13                  than the target date.

14           **15.4.3** If Developer is entitled to an incentive payment for early South Segment  
15           Substantial Completion pursuant to Sections 15.4.1 and 15.4.2, then Developer shall include the  
16           amount as a separate line item in its Application for Final D&C Payment, and ADOT shall pay the  
17           amount earned concurrently with payment of the Final D&C Payment.

## 18   **15.5 Point of Service Agreement and Allowance for APS Facilities**

19           **15.5.1** Within a reasonable period of time after Developer has provided, and APS has  
20           approved, a service request letter that includes the locations and associated lock down sheets  
21           necessary to establish one or more points of electrical service for the Project (collectively, “**APS**  
22           **Facilities**”) in accordance with the Contract Documents, ADOT will negotiate and enter into a  
23           point of service agreement (“**Point of Service Agreement**”) with Arizona Public Service Electric  
24           (“**APS**”) for provision of APS Facilities. ADOT will attempt to include in such agreement the  
25           following provisions:

26           (a) APS will provide all planning, permitting, design, construction, materials and  
27           equipment to supply power up to and including the points of electrical service  
28           consistent with Developer’s design for the Project (which, together with related  
29           change orders approved by ADOT and APS, are referred to as the “**APS Scope of**  
30           **Work**”);

31           (b) Developer will be designated as ADOT’s coordinator for the design and  
32           construction of the APS Facilities;

33           (c) APS will cooperate and coordinate with ADOT and Developer during design  
34           development and construction, including providing interim and final designs to

1 ADOT and Developer for their review and comment, with the objective of reaching  
2 the most cost efficient design for the APS Facilities;

3 (d) APS will perform the APS Scope of Work consistently with the Project Baseline  
4 Schedule, subject to events and circumstances beyond APS’ reasonable control,  
5 provided, however, that APS will not start final design work for APS Facilities until  
6 APS confirms Developer has provided the service request letter that includes  
7 lockdown sheets showing points of service locations, addresses and power  
8 requirements, and other information needed to start such final design of APS  
9 Facilities;

10 (e) APS will price and charge for the APS Scope of Work according to APS’ standard  
11 practices;

12 (f) ADOT will directly pay APS for the costs of the APS Scope of Work; and

13 (g) APS will comply with applicable statutory and regulatory requirements, including  
14 Buy America.

15 **15.5.2** ADOT will provide to Developer a copy of each Point of Service Agreement with  
16 APS and any subsequent amendments thereto.

17 **15.5.3** Developer shall use diligent efforts, working with ADOT and APS, to adjust  
18 Developer’s Project design in order to enable cost-efficient design and construction of the APS  
19 Facilities. Such efforts shall include evaluation of alternatives to minimize the number and  
20 location of the APS points of electrical service. ADOT and Developer will work with APS to obtain  
21 refined and detailed cost estimates based on consideration of design alternatives and design  
22 development until approval of final designs for the APS Scope of Work. Developer’s design for all  
23 points of electrical service must provide APS with ready access to APS meters, as approved by  
24 APS.

25 **15.5.4** Developer shall diligently cooperate with APS regarding construction of the APS  
26 Facilities. Generally, APS will have one or two crews to install poles and wire. Developer shall  
27 work with APS to efficiently manage the crew availability and schedule. Developer shall work with  
28 APS on location and details to enable APS to make the final meter connection within the Project  
29 ROW. As an example, Developer will provide a conduit from the “last pole” to the meter and APS  
30 will pull the wire and make the meter connection.

31 **15.5.5** ADOT hereby establishes an allowance for payments for the APS Scope of Work,  
32 including payments for change orders, in the amount of \$1,500,000 (the “**APS Allowance**”).  
33 Developer shall share in savings in expenditures from the APS Allowance and in expenditures  
34 exceeding the APS Allowance as follows:  
35

|   | Expenditure Savings<br>(% of APS Allowance) | Excess Expenditures<br>(% of APS Allowance) | Allocation<br>to Developer |
|---|---------------------------------------------|---------------------------------------------|----------------------------|
| A | Up to - 5%                                  | Up to + 5%                                  | 0% of A                    |
| B | < - 5% to - 20%                             | > +5% to + 20%                              | 20% of B                   |
| C | < - 20%                                     | > + 20%                                     | 30% of C                   |

1 Example: The APS Allowance is \$1,500,000. The total amount paid to APS for the APS Scope of  
2 Work is \$1,000,000, for a total expenditure savings of \$500,000. Result: Developer receives  
3 \$105,000:

4 \$0 from the first \$75,000 of the expenditure savings (i.e. 5% of \$1.5M);  
5 \$45,000 from the next \$225,000 (i.e. 15% of \$1.5M) of the expenditure savings; and  
6 \$60,000 from the \$200,000 balance of the expenditure savings.

7 **15.5.6** If there are any savings in expenditures from the APS Allowance, then Developer  
8 shall include its share of such savings as a separate line item in its Application for Final D&C  
9 Payment, and ADOT shall pay the amount allocated to Developer concurrently with payment of  
10 the Final D&C Payment.

11 **15.5.7** If ADOT's expenditures on the APS Scope of Work exceed the APS Allowance,  
12 then ADOT may invoice Developer not more often than monthly for the amount allocated to  
13 Developer of the excess expenditures incurred. ADOT shall have the right to deduct the invoiced  
14 amounts from ADOT's payments to Developer of the D&C Price as set forth in Section 15.8.1.

15 **15.5.8** ADOT will submit to Developer on a monthly basis copies of APS' invoices and  
16 ADOT's record of payments to APS for the APS Scope of Work.

17 **15.5.9** No Developer costs or markups are chargeable to or payable from the APS  
18 Allowance.

## 19 **15.6 Operations and Maintenance Price**

20 **15.6.1** During the O&M Period, in full consideration for the performance by Developer  
21 of its duties and obligations related to the O&M Work (except as provided otherwise in Section  
22 15.6.4), ADOT will pay to Developer the O&M Price. ADOT will pay the O&M Price in accordance  
23 with this Section 15.5 and Section 15.7.

24 **15.6.2** The O&M Price is composed of Annual O&M Payments. Each Annual O&M  
25 Payment will be:

26 (a) Escalated or reduced in accordance with the CPI Adjustment Formula, which  
27 escalations or reductions shall be documented in Supplemental Agreements, or as  
28 otherwise mutually agreed; and

1 (b) Subject to deductions as set forth in Sections 11.6.2(b), 15.8.2, 17, 19 and 22,  
2 including deductions for Liquidated Damages.

3 **15.6.3** Every month during the O&M Period, subject to deductions as permitted herein,  
4 ADOT will pay Developer for O&M Work performed under this Agreement a “**Monthly O&M**  
5 **Payment**” equal to one-twelfth of the Annual O&M Payment owing to Developer in the  
6 applicable year. Such Monthly O&M Payments shall be payable pursuant to O&M Draw Requests  
7 submitted in accordance with Section 15.7.

8 **15.6.4** The O&M Price does not include Developer’s costs to perform Non-Routine  
9 Maintenance Work solely to correct damage to O&M Elements that results from an Incident or  
10 Emergency or response thereto to the extent such costs cumulatively exceed \$250,000 during  
11 the O&M Period. The following terms apply to such costs:

12 (a) For purposes of calculating such costs, Developer shall apply the Force Account  
13 Extra Work Cost provisions in Section 1.2 of Exhibit 13 (Compensation Amount  
14 Specifications) to the Agreement, except Section 1.2.1.2(c) thereof.

15 (b) ADOT will pay Developer for such costs that exceed such cap, in addition to the  
16 O&M Price; provided that Developer includes detailed information on such costs  
17 in its O&M Draw Requests.

18 (c) Developer shall keep complete and accurate books and records that track in detail  
19 all costs to perform such Non-Routine Maintenance Work. Developer shall include  
20 in its Monthly O&M Work Reports the amount of such costs incurred for the  
21 subject month and a running total of such costs.

22 (d) Notwithstanding the foregoing, no costs are chargeable to the \$250,000 cap or to  
23 ADOT where the Incident or Emergency is attributable to (i) a Developer Act or (ii)  
24 a collision involving a vehicle owned, leased or operated by a Developer-Related  
25 Entity when used in furtherance of the Work.

26 **15.6.5** The obligation of ADOT to pay the O&M Price to Developer shall commence upon  
27 the start of the O&M Period. No portion of the O&M Price shall be payable on account of services  
28 provided (a) as part of the D&C Work, (b) prior to the Project Substantial Completion Date, or (c)  
29 after the termination or expiration this Agreement.

30 **15.6.6** Each of year 1 through 3 as listed in Exhibit 2-4.2 (O&M Price Breakdown) means  
31 the 12-month period beginning on the Project Substantial Completion Date and each anniversary  
32 of the Project Substantial Completion Date thereafter during the O&M Period. If the O&M Period  
33 is less than three years because the Project Substantial Completion Date occurs later than the

1 Project Substantial Completion Deadline, then the portion of the Annual O&M Payments falling  
2 beyond the end of the O&M Period shall be null and void and shall not be owing to Developer.

3 **15.7 Invoicing and Payment for the O&M Price**

4 The process described in this Section 15.7 shall apply to invoicing and payment of the O&M Price.

5 **15.7.1** No earlier than the 25<sup>th</sup> day of each month, Developer shall submit to ADOT one  
6 electronic copy and two hard copies of an O&M Draw Request in the form required by ADOT for  
7 a Monthly O&M Payment for O&M Work performed and to be performed for such month  
8 satisfying all requirements specified herein. Each O&M Draw Request shall be executed by  
9 Developer’s Authorized Representative and O&M Manager. Developer acknowledges that ADOT  
10 may obtain funding for portions of the O&M Work from the federal government, local agencies  
11 and other third parties, and Developer agrees to segregate O&M Draw Requests for all such O&M  
12 Work in a format reasonably requested by ADOT and with detail and information as reasonably  
13 requested by ADOT. The O&M Draw Request for a Monthly O&M Payment must be accompanied  
14 by an attached report containing information that ADOT can use to verify the information  
15 included in the O&M Draw Request, the amount of the Monthly O&M Payment, and all  
16 components of Liquidated Damages accrued since the immediately preceding O&M Draw  
17 Request (or, for the first O&M Draw Request, since inception of the O&M Period) (the “**prior**  
18 **period**”). Such attached report shall include:

- 19 (a) A description of any Noncompliance Events, Noncompliance Points assessed  
20 during the prior period and any Noncompliance Charges owed for assessed  
21 Noncompliance Points;
- 22 (b) A description of any other Liquidated Damages assessed against Developer during  
23 the prior period in relation to the O&M Work, including the date and time of  
24 occurrence and a description of the events and duration of the events for which  
25 the Liquidated Damages were assessed;
- 26 (c) Any adjustments to reflect previous over-payments or under-payments;
- 27 (d) A detailed calculation of any interest payable in respect of any amounts owed; and
- 28 (e) Any other amount due and payable from Developer to ADOT or from ADOT to  
29 Developer under this Agreement, including any deductions related to the O&M  
30 Work that ADOT is entitled to make and any carry-over deductions or other prior  
31 adjustments not yet paid by Developer.

32 **15.7.2** ADOT will not be required to pay any Monthly O&M Payment unless and until  
33 Developer also submits to ADOT, in addition to the O&M Draw Request:

- 34 (a) The then applicable report(s) and update(s) regarding O&M Work required under  
35 Section OMR 400.3.3 of the Technical Provisions;



- 1 (b) The Noncompliance Report then required under Section 19.2.1(c); and
- 2 (c) If applicable, the monthly update on the status of any dispute with a
- 3 Subcontractor as required under Section 15.9.6.

4 **15.7.3** Within ten Business Days after ADOT’s receipt of a complete O&M Draw Request  
5 and the then-required reports, updates and information, ADOT will review the O&M Draw  
6 Request and all attachments and certificates thereto, and shall notify Developer of the amount  
7 approved for payment and the reason for disapproval of any remaining invoiced amounts or of  
8 any other information set forth in the O&M Draw Request. Developer may include such  
9 disapproved amounts in the next month’s O&M Draw Request after correction of the deficiencies  
10 or errors noted by ADOT and satisfaction of the requirements of the Contract Documents related  
11 thereto.

12 **15.7.4** No later than the Developer Cycle Key Date first occurring after the ten Business  
13 Day period described in Section 15.7.3, ADOT will pay Developer the Monthly O&M Payment in  
14 the amount of the O&M Draw Request approved for payment less any amounts that ADOT is  
15 otherwise entitled to withhold or deduct. No payment by ADOT will, at any time, preclude ADOT  
16 from showing that such payment was incorrect, or from recovering any money paid in excess of  
17 those amounts due hereunder.

18 **15.7.5** The Annual O&M Payment payable for any partial year shall be prorated; and  
19 the Monthly O&M Payment payable for any partial month shall be prorated.

20 **15.7.6** ADOT will have the right to dispute, in good faith, any amount specified in the  
21 O&M Draw Request submitted pursuant to this Section 15.7. ADOT will pay the amount of the  
22 O&M Draw Request that is not in Dispute. Developer and ADOT will use their reasonable efforts  
23 to resolve any such Dispute within 30 days after the Dispute arises. If they fail to resolve the  
24 Dispute within that time period, then the Dispute shall be resolved according to the Dispute  
25 Resolution Procedures.

26 **15.8 Limitations, Deductions and Withholdings**

27 **15.8.1** ADOT may deduct (1) from each payment of the D&C Price, including the Final  
28 D&C Payment, any of the following applicable to the D&C Work or accruing prior to Final  
29 Acceptance, and (2) from each payment of the O&M Price, any of the following applicable to the  
30 O&M Work or accruing during the O&M Period:

- 31 (a) Any ADOT or third party Losses for which Developer is responsible hereunder and  
32 which are not covered by the proceeds of the Insurance Policies, provided that if  
33 the underlying claim against Developer is still the subject of a legitimate Dispute,  
34 then:
  - 35 (i) ADOT may withhold the disputed amount pending resolution of the  
36 Dispute; and

- 1 (ii) once the Dispute is resolved, ADOT may deduct the amount of such Losses  
2 (if any) from the withheld amount and shall pay to Developer the balance  
3 of the withheld amount (if any);
- 4 (b) Any Liquidated Damages that have accrued as of the date of the application for  
5 payment (without duplication of any Liquidated Damages previously deducted  
6 under clause (c) below);
- 7 (c) Starting at two months prior to the date of Substantial Completion shown in the  
8 current Project Schedule as updated by any ADOT-approved Recovery Schedule,  
9 any Liquidated Damages that are anticipated to accrue based on reasonably  
10 anticipated failure to meet the Project Substantial Completion Deadline or Final  
11 Acceptance Deadline shown in the then current Project Schedule as updated by  
12 any ADOT-approved Recovery Schedule, provided that after Project Substantial  
13 Completion or Final Acceptance, as applicable, ADOT shall pay to Developer any  
14 such withheld amounts that do not ultimately accrue;
- 15 (d) Any sums expended by or owing to ADOT as a result of Developer's failure to  
16 maintain the Record Drawings;
- 17 (e) Any sums expended by ADOT in performing any of Developer's obligations under  
18 the Contract Documents which Developer has failed to perform;
- 19 (f) Any sums ADOT deems necessary to cover any amount which may become owing  
20 to ADOT by Developer, including costs to complete or remediate uncompleted  
21 Work or Nonconforming Work;
- 22 (g) Any sums Developer owes to ADOT for excess costs of the APS Scope of Work as  
23 set forth in Section 15.5; and
- 24 (h) Any other sums that ADOT is entitled to recover from Developer under the terms  
25 of this Agreement, including any carry-over deductions (including for Liquidated  
26 Damages) or other adjustments from prior months not yet paid by Developer.

27 The failure by ADOT to deduct any of the sums set forth in this Section 15.8.1 from a payment  
28 shall not constitute a waiver of ADOT's right to such sums.

29 **15.8.2** Any Liquidated Damages or offsets related to the D&C Work shall be deducted  
30 solely from the D&C Price; and any Liquidated Damages or offsets related to the O&M Work shall  
31 be deducted solely from the O&M Price.

32 **15.8.3** ADOT may withhold from Monthly O&M Payments for the last three months of  
33 the Term 105% of its reasonably estimated cost for Developer to properly perform and complete

1 by the end of the Term any Work required pursuant to Section 10.14 that is not yet properly  
2 performed and completed.

3 (a) As Developer progresses with such Work and reports such progress in its O&M  
4 Draw Requests, ADOT shall remit to Developer withheld amounts that exceed  
5 105% of the estimated cost of such remaining Work, including remaining punch  
6 list items.

7 (b) In addition to all other lawful remedies (including resort to the O&M Performance  
8 Bond and any Guaranty), ADOT may retain withheld amounts, as deductions from  
9 the O&M Price under this Section 15.8.3, to fund or reimburse ADOT for the cost  
10 to perform any such Work that Developer fails to properly perform and complete  
11 by the end of the Term.

12 **15.9 Prompt Payment to Subcontractors**

13 **15.9.1** Developer shall pay each Subcontractor with which it holds a direct Subcontract  
14 within seven days after Developer receives payment from ADOT, the amount to which such  
15 Subcontractor is entitled, less any retainage provided for in the Subcontract. Developer shall pay  
16 retainage, if any, on a Subcontractor's Work within ten days after:

17 (a) The Subcontractor has fulfilled the Subcontract requirements and the  
18 requirements under the Contract Documents for all the subcontracted Work,  
19 including the submission of all submittals required by the Subcontract and the  
20 relevant Contract Documents; and

21 (b) The Work done by the Subcontractor has been inspected and approved by  
22 Developer.

23 **15.9.2** If Developer fails to pay a Subcontractor within the time periods set forth in  
24 Section 15.9.1, Developer shall pay the Subcontractor interest on the unpaid balance, beginning  
25 on the eighth day or eleventh day, as applicable, at a rate of 0.5% per month or fraction of a  
26 month.

27 **15.9.3** A.R.S. §§ 28-411C, D and E shall apply to all Work.

28 **15.9.4** If Developer submits an invoice for the Work performed by a Subcontractor to  
29 ADOT for payment, such invoice constitutes a representation that the work of such Subcontractor  
30 included in the invoice was satisfactorily performed.

31 **15.9.5** Except for retainage, if any, Developer may exclude from its D&C Draw Request,  
32 Application for Final D&C Payment or O&M Draw Request, as applicable, and thereby withhold,  
33 payments to a Subcontractor only if, in Developer's reasonable determination, the  
34 Subcontractor's work is deficient, incomplete or otherwise not in compliance with the terms of  
35 the Contract Documents applicable to the Subcontractor's work or the Subcontract between  
36 Developer and the Subcontractor. If any Subcontractor is not paid promptly, Developer shall

1 provide to the Subcontractor and to ADOT via the comment section of the DOORS a written  
2 explanation of the reasons and when payment can be expected. Developer shall provide such  
3 explanation within seven days after the time the Subcontractor was otherwise entitled to  
4 payment.

5 **15.9.6** If a dispute arises between Developer and a Subcontractor regarding timely  
6 payment or withholding thereof, Developer shall immediately provide to ADOT a written  
7 explanation of the matter in dispute with supporting evidence and update ADOT monthly on the  
8 status of the dispute until it is resolved. Developer shall implement and use the dispute resolution  
9 process in the applicable Subcontract to resolve payment disputes as quickly as possible.

10 **15.9.7** ADOT reserves the right to request and receive documents from Developer, all  
11 Subcontractors of any tier, and Suppliers to determine whether timely payment requirements  
12 were met.

13 **15.10 Subcontractor Payment and Payroll Reporting**

14 **15.10.1 Subcontractor Payment Reporting**

15 (a) Developer shall report on a monthly basis, throughout the D&C Period, the  
16 amounts earned by and paid to all DBE and non-DBE Subcontractors working on  
17 the D&C Work. Developer shall enter this payment information by the 15<sup>th</sup> day of  
18 each month into the DOORS for payments made to DBEs and other Subcontractors  
19 for the previous month. This includes all lower-tier subcontracting regardless of  
20 whether the Subcontractor is a DBE under a Subcontract with another DBE.  
21 Developer shall separately submit information on payments made for Professional  
22 Services and Construction Work into the DOORS.

23 (b) Developer shall require that all DBE and non-DBE Subcontractors verify payments  
24 using the DOORS by responding to automated emails generated by the DOORS  
25 each month. Developer shall actively monitor the DOORS on a regular basis to  
26 ensure that all DBE and non-DBE Subcontractors verify receipt of payment by the  
27 last day of each month for the previous month's payment. Furthermore,  
28 Developer shall proactively work to resolve any payment discrepancies in the  
29 DOORS, between payment amounts it reports and payment confirmation  
30 amounts reported by DBE and non-DBE Subcontractors on a monthly basis.

31 (c) If no payments are made to any Subcontractor, DBE or non-DBE, during a given  
32 month, Developer shall enter the dollar value "0" for that month and indicate  
33 clearly that (a) no Work was done that required any payment to any  
34 Subcontractor, (b) no invoices were submitted by any Subcontractor requiring  
35 payment during that month, or (c) the Work performed by a Subcontractor was  
36 and remains deficient, incomplete or otherwise not in compliance with the terms  
37 of the Contract Documents or the applicable Subcontract.

1           **15.10.2 Subcontractor Payroll Reporting**

2           No later than the 15<sup>th</sup> day of every month, Developer shall submit complete and accurate  
3 payrolls to ADOT’s web-based certified payroll tracking system (LCPtracker) for all Work  
4 performed by all Subcontractors (regardless of tier) during the previous month. If ADOT does not  
5 receive all such payrolls by this deadline, ADOT will identify in a written notice to Developer any  
6 missing payrolls and other discrepancies or inaccuracies, and the following shall apply:

7           (a)     If Developer does not submit the missing or corrected payrolls within ten days of  
8 the notice date, ADOT will have the right to withhold \$1,000.00 per missing or  
9 inaccurate payroll, as applicable, from each subsequent progress payment until  
10 Developer cures;

11          (b)     If Developer cures within 90 days of the notice date, ADOT will pay any  
12 corresponding, accumulated withholdings with the next progress payment; and

13          (c)     If Developer does not cure within 90 days after the notice date, then, with respect  
14 to each missing or inaccurate payroll, ADOT will have the right to retain the  
15 accumulated withholdings as Liquidated Damages. These Liquidated Damages  
16 shall be in addition to any other rights or remedies ADOT may have hereunder or  
17 at Law.  
18

1 **SECTION 16. RELIEF EVENTS**

2 This Section 16 sets forth the requirements for obtaining monetary and schedule relief under the  
3 Contract Documents due to Relief Events. Developer hereby acknowledges and agrees that the  
4 D&C Price, O&M Price and compensation provided in Sections 15.1, Section 15.6 and 15.4 (if any)  
5 provide for full compensation for performance of all the Work, and the Completion Deadlines  
6 provide reasonable and adequate time to perform the Work required within the Completion  
7 Deadlines, subject only to those exceptions specified in this Section 16. The Compensation  
8 Amounts, Completion Deadline adjustments and performance relief specified in this Section 16  
9 shall represent the sole and exclusive right against ADOT, the State and their respective  
10 successors, assigns, agencies, divisions, officeholders, officers, directors, commissioners, agents,  
11 representatives, consultants and employees to compensation, damages, deadline extension and  
12 performance relief for the adverse financial and schedule effects of any event affecting the Work,  
13 the Project or Developer. No award of compensation or damages shall be duplicative. Developer  
14 unconditionally and irrevocably waives the right to any claim against ADOT, the State and their  
15 respective successors, assigns, agencies, divisions, officeholders, officers, directors,  
16 commissioners, agents, representatives, consultants and employees for any monetary  
17 compensation, Completion Deadline adjustment or other relief except to the extent specifically  
18 provided in this Section 16. The foregoing waiver encompasses all theories of liability, whether  
19 in contract, tort (including negligence), strict liability, equity, *quantum meruit* or otherwise, and  
20 encompasses all theories to extinguish contractual obligations, including impracticability, mutual  
21 or unilateral mistake, and frustration of purpose. Notwithstanding anything to the contrary  
22 herein, no liability of Developer that arose before the occurrence of the Relief Event giving rise  
23 to a claim under this Section 16 shall be excused as a result of the occurrence of such Relief Event.  
24 Nothing in the Technical Provisions shall have the intent or effect or shall be construed to create  
25 any right of Developer to any claim for additional monetary compensation, Completion Deadline  
26 adjustment or other relief. The provisions of this paragraph shall not affect Developer’s rights  
27 and protections under Section 8.8 or 13.1.14, Developer’s rights and protections under Section  
28 GP 110.05.2.5 or GP 110.05.3.5 of the Technical Provisions, or Developer’s remedies under the  
29 Contract Documents in the event of non-payment by ADOT or termination of this Agreement  
30 prior to the stated expiration of the Term.

31 **16.1 Relief Event Claim Process**

32 **16.1.1 General Provisions**

33 (a) This Section 16.1 applies to all Relief Events; provided that with respect to Relief  
34 Events that are ADOT-Directed Changes:

35 (i) If there is no Dispute regarding an ADOT-Directed Change, then this  
36 Section 16.1 shall not apply and instead the process for it shall be through  
37 a Supplemental Agreement or Directive Letter pursuant to Sections 17.1  
38 and 17.3, respectively; and

39 (ii) If the Parties disagree as to whether a Relief Event is an ADOT-Directed

1 Change or the extent of a Relief Event that the Parties agree is an ADOT-  
2 Directed Change, then this Section 16.1 shall apply.

- 3 (b) No Subcontractor shall have the right to request relief due to a Relief Event  
4 directly from ADOT. To the extent that a Subcontractor claims relief from  
5 Developer due to a Relief Event, any such request shall be deemed to have been  
6 directly incurred by Developer for purposes of evaluating the merits of any Relief  
7 Event Notice, Relief Request or other Claim against ADOT for such Relief Event. All  
8 such claims by Subcontractors must be submitted by Developer and Developer  
9 shall be responsible for pursuing such claims on behalf of its Subcontractors.

10 **16.1.2 Relief Event Notice**

- 11 (a) If at any time Developer determines that a Relief Event has occurred or is  
12 imminent, Developer shall promptly submit a written Relief Event Notice to ADOT  
13 and ADOT shall acknowledge receipt of such Relief Event Notice.

- 14 (b) The Relief Event Notice shall include, to the maximum extent of the information  
15 then available:

16 (i) A description of the Relief Event and its date of occurrence or inception in  
17 reasonable detail;

18 (ii) The provisions of the Contract Documents applicable to, governing or  
19 otherwise affecting or affected by the Relief Event;

20 (iii) Developer's preliminary good faith estimate of the anticipated adverse  
21 and beneficial effects (including cost impacts) of the Relief Event and the  
22 basis for such estimate;

23 (iv) Developer's preliminary good faith estimate of the Critical Path impact  
24 directly attributable to the Relief Event and the basis for such estimate;

25 (v) Developer's initial analysis of any adverse effect of the Relief Event on its  
26 ability to perform its obligations under this Agreement;

27 (vi) The actions Developer has taken prior to the Relief Event Notice to  
28 prevent, and proposes to take thereafter to mitigate, the cost, delay, and  
29 other consequences of the Relief Event; and

30 (vii) The type and amount of Insurance Policies that may be applicable and  
31 amounts that have been or are anticipated to be collected under such  
32 Insurance Policies.

- 33 (c) The nature and scope of the potential Claim stated in the Relief Event Notice shall  
34 remain consistent (except for reductions) for the remainder of the Relief Event

1 claim process and, if applicable, during any subsequent Dispute Resolution  
2 Procedures, except with respect to consequences of a Relief Event that (i) are of a  
3 different nature or scope from the consequences originally stated in the Relief  
4 Event Notice, (ii) first arise or occur after Developer delivers the Relief Event  
5 Notice to ADOT, and (iii) could not have been anticipated through the exercise of  
6 reasonable diligence and Good Industry Practice prior to delivering the Relief  
7 Event Notice to ADOT. If any such new consequences arise or occur prior to  
8 submission of the Relief Request, Developer shall report them to ADOT by a  
9 supplemental Relief Event Notice, and if any such new consequences arise or  
10 occur after the submission of the Relief Request, Developer shall follow the  
11 procedure set forth in Section 16.1.3(c).

12 (d) Developer shall submit the Relief Event Notice on a standardized form approved  
13 by ADOT. Prior to submission of the first Relief Event Notice, Developer shall  
14 prepare a draft Relief Event Notice form that includes all of the information  
15 required by Section 16.1.2(b) for ADOT's review and approval.

16 (e) Developer shall assign an exclusive identification number for each Relief Event  
17 Notice, starting with one and thereafter in chronological sequence. The exclusive  
18 identification number shall be used on each of the following corresponding  
19 documents: (a) Relief Request; (b) supplemental Relief Event Notices and  
20 submissions; and (c) final documentation of the Relief Event claim.

21 (f) If a single Relief Event is the cause of a continuing delay, only one Relief Event  
22 Notice shall be necessary.

### 23 **16.1.3 Relief Request**

24 (a) Developer shall, within 60 days after the date of the Relief Event Notice, submit  
25 to ADOT a Relief Request that provides Developer's complete reasoning for  
26 additional compensation for Extra Work Costs or Delay Costs, Completion  
27 Deadline adjustments and other requested relief relating to the Relief Event.  
28 ADOT will promptly acknowledge receipt of each Relief Request. The Relief  
29 Request shall include the following information, to the maximum extent then  
30 available:

31 (i) Full details of the Relief Event, including its nature, the date of its  
32 occurrence, its duration (to the extent that the Relief Event and the effects  
33 thereof have ceased, or estimated duration to the extent that the Relief  
34 Event and the effects thereof have not ceased), affected locations, and  
35 items of Work affected. Impacts to the O&M Work, if any, shall be stated  
36 by Fiscal Year;

37 (ii) Identification of all documents and a summary of any material verbal  
38 communications between ADOT and Developer, if any, relating to the



- 1 Relief Event and the name of the person or persons making such material  
2 verbal communications;
- 3 (iii) Identification of the specific provisions of the Contract Documents that  
4 Developer claims entitles Developer to the relief sought, and a detailed  
5 statement that explains the reasons why the provisions entitle Developer  
6 to that relief. If Developer seeks relief for ADOT’s alleged breach of the  
7 Contract Documents, then Developer shall identify the specific provisions  
8 of the Contract Documents that ADOT allegedly breached and the actions  
9 constituting such breach;
- 10 (iv) A detailed, itemized estimate of all Compensation Amounts claimed to the  
11 extent such amounts are eligible for compensation under this Section 16  
12 for the Relief Event in question. All such amounts shall be broken down in  
13 terms of the eligible direct costs for labor (including hourly wage rates,  
14 fringe benefits rates and audited burden), materials, equipment, third  
15 party fees and charges, extra insurance and performance and payment  
16 security (e.g., bonds and letters of credit), as applicable, and other direct  
17 costs, including expenses and profit, and any other cost category or  
18 categories ADOT reasonably specifies. The estimate shall include, to the  
19 extent applicable, the Extra Work Costs for future O&M Work, stated by  
20 Fiscal Year and in present value dollars as of the time of the estimate (i.e.,  
21 as if the future O&M Work were to be performed and the Extra Work Costs  
22 thereof paid for in the year of the estimate);
- 23 (v) Where Developer makes a request for a Completion Deadline adjustment,  
24 a Time Impact Analysis of the Project Schedule, in accordance with Section  
25 GP 110.06.2.11 of the Technical Provisions;
- 26 (vi) An analysis, and detailed, itemized estimate of all costs, of potential  
27 acceleration, re-sequencing, re-scheduling and other work-around or  
28 mitigation measures and a comparison of the estimated costs thereof to  
29 the estimated savings in the Compensation Amount and, if applicable,  
30 Completion Deadline adjustment that would result. If Developer requests  
31 a Completion Deadline adjustment and reasonably believes that it is not  
32 feasible to recover under the existing Completion Deadlines or reduce the  
33 Completion Deadline adjustment, or that the costs associated with such  
34 recovery or reduction are prohibitive, then Developer shall so state and  
35 provide supporting analysis and evidence;
- 36 (vii) The effect of the Relief Event on Developer’s ability to perform any of its  
37 obligations under this Agreement, including details of the relevant  
38 obligations, and the likely duration of that effect;
- 39 (viii) An explanation of the measures that Developer has previously taken to

1 prevent, and proposes to undertake to mitigate, the costs, delay and other  
2 consequences of the Relief Event; and

3 (ix) The type and amount of the Insurance Policies that may be applicable and  
4 amounts that have been or are anticipated to be collected under such  
5 Insurance Policies. Developer shall provide a copy of every notice letter  
6 and/or claim submitted to an insurer or other party that may be liable to  
7 reimburse or indemnify Developer due to the Relief Event. If the Relief  
8 Event may be covered by Developer's self-insurance or a Developer-  
9 controlled insurance program, Developer shall provide documentation of  
10 any claim against such insurance that it prepares in the ordinary course of  
11 business.

12 (b) Developer shall submit the Relief Request on a standardized form approved by  
13 ADOT. Prior to submission of the first Relief Request, Developer shall submit a  
14 draft form of Relief Request to ADOT for its review and approval.

15 (c) If, following submission of any Relief Request, Developer receives or becomes  
16 aware of (i) further information or estimates relating to the Relief Event or (ii)  
17 consequences of the Relief Event that (A) are of a different nature or scope from  
18 the consequences originally stated in the Relief Request, (B) first arise or occur  
19 after Developer delivers the Relief Request to ADOT, and (C) could not have been  
20 anticipated through the exercise of reasonable diligence and Good Industry  
21 Practice prior to delivering the Relief Request to ADOT, then Developer shall  
22 submit to ADOT a supplement setting forth such further information, estimates or  
23 new consequences. ADOT shall submit the supplement within the time limit set  
24 forth in Section 16.1.7(c). ADOT may request from Developer any additional  
25 information that ADOT may reasonably require, and Developer shall supply the  
26 same within the time period specified in ADOT's request for such additional  
27 information.

28 (d) Neither the fact that Developer submits to ADOT a Relief Request, nor the fact  
29 that ADOT keeps account of the costs of labor, materials, or equipment or time,  
30 shall in any way be construed as establishing the validity of the Relief Request or  
31 the Claims therein or method of computing any Compensation Amount or  
32 extension of Completion Deadlines.

#### 33 **16.1.4 ADOT Evaluation and Response to Relief Request; Negotiations**

34 (a) ADOT will evaluate the information presented in the Relief Request or in any  
35 supplement thereto pursuant to Section 16.1.3(c), and provide a written response  
36 to Developer within 45 days after receipt by ADOT, or any extension thereof  
37 agreed by the Parties.

- 1 (b) If ADOT does not provide Developer a written response within such 45-day period,  
2 and Developer has complied with all requirements of Sections 16.1.2 and 16.1.3,  
3 then the Relief Request or any supplements thereto shall be considered a Dispute  
4 for which Developer may initiate the Dispute Resolution Procedures in Section 24.  
5 ADOT's time to respond before a matter is eligible for resolution by the Dispute  
6 Resolution Procedures provided by Section 16.1.4(c) shall commence only when  
7 Developer submits all information required by Sections 16.1.2 and 16.1.3, unless  
8 ADOT agrees otherwise in writing.
- 9 (c) If ADOT provides a written response within such 45-day period stating that there  
10 are matters in dispute regarding the Relief Request or any supplement thereto,  
11 such matters in dispute shall be considered a Dispute for which Developer may  
12 initiate the Dispute Resolution Procedures in Section 24.
- 13 (d) ADOT may respond to Developer that the Relief Request does not fully comply  
14 with the content or format requirements of Sections 16.1.3(a) and (b) and reject  
15 the Relief Request for this reason. If ADOT provides any such response, Developer  
16 shall have the option to withdraw the Relief Request or to correct the deficiencies  
17 therein and re-submit it for ADOT's consideration. Developer's right to re-submit  
18 the Relief Request shall be subject to the time limitations provided in Section  
19 16.1.7(b).

#### 20 **16.1.5 Final Documentation of Relief Event**

- 21 (a) Within 30 days of the completion of Work related to a Relief Event that is the  
22 subject of a Relief Request which has not been resolved (whether by the Dispute  
23 Resolution Procedures or otherwise), Developer shall submit to ADOT the full and  
24 final documentation of the Relief Event. Pertinent information, references,  
25 arguments, and data to support the Relief Event shall be included in the full and  
26 final documentation, including updated analyses, descriptions, actual amounts  
27 and impacts, specific dates for Completion Deadline adjustments, and other  
28 documentation covering the same scope of information as required in Section  
29 16.1.3(a) for the Relief Request.
- 30 (b) Without limiting the foregoing, if Developer claims compensation under Section  
31 16.2, and except to the extent that such compensation is the subject of a previous  
32 written agreement by the Parties to be paid as a negotiated fixed price, Developer  
33 shall provide an itemized accounting of the actual direct costs. The accounting  
34 shall break down such costs in terms of labor (including audited burden),  
35 materials, equipment, third party fees (e.g., permit fees, plan check fees and  
36 charges) and other direct costs and indirect costs, field office overhead and profit,  
37 and any other cost category reasonably requested by ADOT. The documentation  
38 also shall include, to the extent applicable, the Extra Work Costs for future O&M  
39 Work, stated by Fiscal Year and in present value dollars as of the time of the  
40 estimate (i.e., as if the future O&M Work were to be performed and the Extra

1 Work Costs thereof paid for in the year of the estimate). The labor, materials, and  
2 equipment cost categories shall account for the following items:

- 3 (i) As to labor: a listing of individuals, classifications, regular hours and  
4 overtime hours worked, dates worked, and other pertinent information  
5 related to the requested payment of labor costs;
- 6 (ii) As to materials: invoices, purchase orders, location of materials either  
7 stored or incorporated into the Project, dates materials were transported  
8 to the Site or incorporated into the Project, and other pertinent  
9 information related to the requested payment of material costs; and
- 10 (iii) As to equipment: a detailed description (including make, model, and serial  
11 number) of the affected equipment, hours of use, dates of use, and  
12 equipment rates. Equipment rates shall be determined pursuant to Section  
13 1.2.3 of Exhibit 13 (Compensation Amount Specifications) as of the first  
14 date when the affected work related to the Relief Event claim was  
15 performed.

16 (c) Developer shall submit the full and final documentation of the Relief Event on a  
17 standardized form approved by ADOT, and shall certify the Relief Event claim to  
18 be accurate, truthful, and complete. Information submitted subsequent to the full  
19 and final documentation submittal will not be considered. No full and final  
20 documentation of the Relief Event claim will be considered that does not have the  
21 same nature, scope (except for reductions) and circumstances, and basis of the  
22 Relief Event claim, as those specified (i) in the Relief Event Notice and any  
23 supplements submitted in accordance with Section 16.1.2(c) and (ii) in the Relief  
24 Request and any additional information submitted in accordance with Section  
25 16.1.3(c).

26 **16.1.6 ADOT Response to Final Documentation; Supplemental Agreement**

- 27 (a) ADOT’s failure to respond to a full and final documentation of a Relief Event claim  
28 arising out of a Relief Event within 45 days after receipt shall constitute ADOT’s  
29 rejection of the Relief Event claim, which shall thereafter constitute a Claim  
30 subject to the Dispute Resolution Procedures.
- 31 (b) If ADOT finds the Relief Event claim or any part thereof to be valid, or if the Relief  
32 Event claim or any part thereof is deemed to be valid as a result of completion of  
33 the Dispute Resolution Procedures, ADOT will:
  - 34 (i) Deliver to Developer notice authorizing such partial or whole Relief Event;
  - 35 (ii) Pay the Compensation Amount with respect to such Relief Event by one of  
36 the methods set forth in Section 16.2.3); and

1 (iii) Grant a commensurate Completion Deadline adjustment, if applicable, as  
2 provided in the Contract Documents.

3 (c) The Parties shall thereafter promptly execute a Supplemental Agreement  
4 documenting the Relief Event claim or part thereof that ADOT finds to be valid or  
5 that is upheld through the Dispute Resolution Procedures.

6 **16.1.7 Waiver**

7 Time is of the essence in Developer’s delivery of its written Relief Event Notice,  
8 supplemental Relief Event Notice, Relief Request and any additional information, estimates or  
9 new consequences to be provided under Section 16.1.3(c).

10 (a) If for any reason Developer fails to deliver the Relief Event Notice or supplement  
11 thereto in compliance with all applicable requirements:

12 (i) Within 45 days following the date (for purposes of this Section 16.1.7, the  
13 “starting date”) on which Developer first became aware (or should have  
14 been aware, using all reasonable due diligence) of the Relief Event (or, in  
15 the case of a supplement, the new consequences described in Section  
16 16.1.2(c)), Developer shall be deemed to have irrevocably and forever  
17 waived and released the portion of any Claim or right to relief for any  
18 adverse effect attributable or related to the Relief Event accruing after  
19 such 45-day deadline and until the date Developer submits the written  
20 Relief Event Notice or supplement thereto; and

21 (ii) Within 90 days following the starting date, Developer shall be deemed to  
22 have irrevocably and forever waived and released any and all Claim or right  
23 to relief for any adverse effect attributable or related to such Relief Event;  
24 and

25 (b) If for any reason Developer fails to deliver the Relief Request in compliance with  
26 all applicable requirements in Section 16.1.3 within 60 days after the date of the  
27 Relief Event Notice, Developer shall be deemed to have irrevocably and forever  
28 waived and released any and all Claim or right to relief for any adverse effect  
29 attributable or related to such Relief Event, provided, however, that with respect  
30 to any re-submittal of the Relief Request pursuant to Section 16.1.4(d), such  
31 deadline shall be the later of (i) 15 days after Developer receives ADOT’s rejection  
32 of the Relief Request or (ii) 60 days after the date of the Relief Event Notice.

33 (c) If for any reason Developer fails to deliver additional information, estimates or  
34 new consequences required under Section 16.1.3(c) within 60 days after receiving  
35 or becoming aware of such additional information, estimates or new  
36 consequences, Developer shall be deemed to have irrevocably and forever waived

1 and released any and all additional Claim or right to relief based on or included in  
2 such additional information, estimates or new consequences.

3 **16.1.8 Open Book Basis**

4 Developer shall share with ADOT all data, documents and information, and shall conduct  
5 all discussions and negotiations pertaining to a claimed Relief Event on an Open Book Basis.

6 **16.2 Payment for Extra Work Costs and Delay Costs**

7 **16.2.1** Except as provided otherwise in this Agreement, ADOT will pay to Developer the  
8 Compensation Amount directly attributable to occurrence of a Relief Event.

9 **16.2.2** ADOT will provide Developer with Notice of the method chosen for paying  
10 Developer for the Compensation Amount owed. ADOT may choose any method set forth in  
11 Section 16.2.3, or a combination of such methods, in its sole discretion.

12 **16.2.3** Following receipt of complete and conforming Claim documentation pursuant to  
13 Section 16.1, if ADOT chooses to pay the Compensation Amount owed under this Section 16.2:

14 (a) As a lump sum payment other than a negotiated fixed price, then payment of all  
15 undisputed amounts will be due and owing not later than the Developer Cycle Key  
16 Date first occurring after ADOT's receipt of all pertinent data, documents and  
17 information with respect to the Extra Work Costs or Delay Costs, as applicable;

18 (b) As a lump sum payment that is a negotiated fixed price, then payment(s) of all  
19 undisputed amounts will be due and owing not later than the Developer Cycle Key  
20 Date first occurring after ADOT receives from Developer all documentation  
21 required pursuant to the negotiated fixed price terms in order to receive  
22 scheduled payments under the negotiated fixed price terms with respect to such  
23 Extra Work Costs or Delay Costs, as applicable; and

24 (c) As progress payments invoiced as Work is completed, then payment of all  
25 undisputed amounts will be due and owing not later than the Developer Cycle Key  
26 Date first occurring after each date ADOT receives from Developer an invoice of  
27 such Extra Work Costs or Delay Costs incurred, as applicable, for such Work during  
28 the previous month, which invoice shall be itemized as set forth in Section 16.1.5  
29 and by the components of Extra Work Costs or Delay Costs, as applicable,  
30 allowable under Exhibit 13 (Compensation Amount Specifications) .

31 **16.2.4** If any portion of the Compensation Amount consists of costs of design or  
32 construction not then performed, then ADOT will have no obligation to make advance payments  
33 and shall have the right to pay such portion in monthly progress payments in accordance with

1 Section 15 and ADOT’s standard practices and procedures for paying its contractors and  
2 applicable Laws.

3 **16.2.5** If ADOT elects to make monthly or other periodic payments, at any later time it  
4 may choose to complete compensation through a lump sum payment of the present value,  
5 determined in accordance with Section 16.2.6, of the remaining Extra Work Costs and Delay  
6 Costs.

7 **16.2.6** For the purpose of any discounting of future cost impacts, the Parties shall use  
8 as the discount rate the then-applicable yield on U.S. Treasury bonds having a tenor of seven  
9 years, as most recently issued as of the date ADOT issues its notice under Section 16.2.2, plus 150  
10 basis points.

11 **16.2.7** The Compensation Amount attributable to a Relief Event shall:

12 (a) Exclude:

13 (i) Third-party entertainment costs, lobbying and political activity costs, costs  
14 of alcoholic beverages, costs for first or business class travel in excess of  
15 prevailing economy travel costs, and costs of club memberships, in each  
16 case to the extent that such costs would not be reimbursed to an employee  
17 of ADOT in the regular course of business; and

18 (ii) Unallowable costs under the following provisions of the federal Contract  
19 Cost Principles, 48 C.F.R §§ 31.205: 31.205-8 (contributions or donations),  
20 31.205-13 (employee morale, health, welfare, food service, and dormitory  
21 costs and credits), 31.205-14 (entertainment costs), 31.205-15 (fines,  
22 penalties, and mischarging costs), 31.205-27 (organization costs), 31.205-  
23 34 (recruitment costs), 31.205-35 (relocation costs), 31.205-43 (trade,  
24 business, technical and professional activity costs), 31.205-44 (training and  
25 education costs), and 31.205-47 (costs related to legal and other  
26 proceedings);

27 (b) Exclude amounts paid or to be paid to Affiliates in excess of the pricing Developer  
28 could reasonably obtain in an arm’s length, competitive transaction with a non-  
29 Affiliated Subcontractor;

30 (c) Exclude costs incurred in investigating, analyzing, asserting, pursuing or enforcing  
31 any Claim or Dispute, including:

32 (i) legal, accounting, financial advisory, and technical advisory fees and  
33 expenses; and

34 (ii) costs in connection with preparing Relief Event Notices, Relief Requests,  
35 final documentation of Claims in respect of Relief Events, and materials  
36 prepared for the Dispute Resolution Procedures;

- 1 (d) Take into account any savings in costs or time resulting from the Relief Event;
- 2 (e) Be subject to Developer’s obligation to prevent and to mitigate cost increases and  
3 augment cost decreases in accordance with Section 16.9;
- 4 (f) Exclude any amounts covered by applicable Insurance Policies or deemed self-  
5 insurance, as more particularly provided in Section 16.5; and
- 6 (g) Exclude loss, damage or destruction caused by a Relief Event or any other event  
7 to the tools, machinery, equipment and other items listed in, and to the extent  
8 provided in, Section 13.3.8.

9 **16.2.8** ADOT, at its election, may offset any Compensation Amount against any  
10 amounts due and owing to ADOT from Developer pursuant to this Agreement, such offset rights  
11 being in addition to ADOT’s offset rights under Section 21.2.5.

12 **16.3 Claim Deductible**

13 **16.3.1** Except as provided in this Section 16.3, each separate occurrence during the D&C  
14 Period of a Relief Event for which Developer makes a Claim for a Compensation Amount shall be  
15 subject to the Claim Deductible. The Claim Deductible reflects the Parties’ agreement that:

- 16 (a) Developer shall bear the financial risks for Extra Work Costs and Delay Costs, as  
17 applicable, for each separate occurrence during the D&C Period of a Relief Event,  
18 up to the Claim Deductible; and
- 19 (b) except as otherwise provided in this Section 16, ADOT will pay to Developer the  
20 applicable Compensation Amount in excess of the Claim Deductible; provided,  
21 however, that each Claim complies with Section 16.1.

22 **16.3.2** The Claim Deductible shall not apply to a Claim seeking recovery for:

- 23 (a) A Relief Event set forth in clauses (a), (b), (c), (g) (but only as to ADOT Releases of  
24 Hazardous Materials), (p), (s) or (t) of the definition of Relief Event; or
- 25 (b) A Relief Event first occurring during the O&M Period.

26 **16.3.3** For purposes of applying the Claim Deductible to each separate occurrence of a  
27 Relief Event, the occurrence of the Relief Event is determinative rather than the amount, number,  
28 locations or duration of consequences from the occurrence. For example, regarding clause (j) of  
29 the Force Majeure Event definition, a vehicle collision or traffic accident involving multiple  
30 vehicles and/or damage to multiple Elements shall be treated as a single Relief Event occurrence  
31 subject to one Claim Deductible. As an additional example, a Flood Event (clause (g) of the Force



1 Majeure Event definition) that results in flooding of three separate locations of the Project shall  
2 be treated as a single Relief Event occurrence subject to one Claim Deductible.

3 **16.4 Other Deductibles; Special Provisions**

4 Developer’s rights and remedies respecting certain Relief Events and Losses are subject to the  
5 provisions of this Section 16.3.3. The provisions of this Section 16.3.3 supersede any contrary  
6 provisions of this Agreement, but do not replace or supersede the other conditions and  
7 requirements for obtaining relief under this Section 16.

8 **16.4.1 Acquisition of Project ROW**

9 If a Relief Event occurs under clause (c) of the definition of Relief Event (concerning ADOT-  
10 Caused Delay) where the ADOT-Caused Delay is under clause (d) or (e) of such definition  
11 (concerning a time period to make available to Developer parcels being acquired for Project  
12 ROW), then the following provisions shall apply.

13 (a) If such Relief Event concerns Project ROW other than Developer-Designated ROW  
14 and Temporary Construction Easements, then Developer shall be eligible for a  
15 Compensation Amount, Completion Deadline adjustment and any other  
16 applicable relief specified in this Section 16.

17 (b) If such Relief Event concerns Developer-Designated ROW or a Temporary  
18 Construction Easement, then Developer’s relief shall be limited to any applicable  
19 Completion Deadline adjustment (and Developer shall not be entitled to any  
20 increase in the Contract Price or any other related Claim); provided that Developer  
21 shall have the sole risk of delay to Completion Deadlines arising out of the holding  
22 by the court in any condemnation action for the taking of the requested  
23 Developer-Designated ROW or Temporary Construction Easement over Additional  
24 TCE Property to the effect that (i) ADOT’s power of eminent domain does not  
25 extend to such requested Developer-Designated ROW or Temporary Construction  
26 Easement, or (ii) the proposed condemnation does not satisfy legal requirements  
27 for necessity of the taking.

28 (c) The refusal of any Governmental Entity that owns or controls Developer-  
29 Designated ROW or Additional TCE Property to grant necessary rights of access,  
30 entry and use to ADOT after ADOT makes diligent efforts to negotiate acquisition  
31 thereof shall not be grounds for any Claim other than any applicable Completion  
32 Deadline adjustment.

33 (d) To the extent that ADOT has not provided Developer with access to portions of  
34 the Project ROW on or prior to the later of the date provided in the Project  
35 Schedule or the date provided in TP Attachment 470-1 of the Technical Provisions,  
36 Developer shall work around such Project ROW and minimize delay to the  
37 completion of the Project.

1           **16.4.2 Force Majeure Events**

2           (a)     If (i) a Force Majeure Event as described in clause (j) of the definition thereof  
3           (certain vehicle collisions during D&C Period) occurs, (ii) the damage or  
4           destruction is to a bridge structure, noise wall, retaining wall, pavement section  
5           or overhead sign structure (including the DMS overhead structure at Sunset Point)  
6           that is part of the Existing Improvements, and (iii) ADOT elects to issue an ADOT-  
7           Directed Change or Directive Letter authorizing Developer to repair or replace  
8           such damage or destruction, then Developer shall be entitled to Extra Work Costs  
9           for the repair or replacement work. For clarity, occurrence of such a Force  
10          Majeure Event may entitle Developer to Delay Costs and a Completion Deadline  
11          adjustment with or without an ADOT-Directed Change or Directive Letter.

12          (b)     If a Force Majeure Event as described in clause (k) of the definition thereof occurs,  
13          then:

14                 (i)     Notwithstanding any contrary provision of this Agreement, any resulting  
15                 Pandemic Law shall be treated as part of such Force Majeure Event and  
16                 shall not be treated as a Change in Law;

17                 (ii)    Developer shall be entitled to the Compensation Amount and a Relief  
18                 Event Delay only to the extent directly attributable to (A) unavailability or  
19                 untimely delivery of equipment or material caused by such Force Majeure  
20                 Event, (B) unavailability of labor due to sickness or quarantine in  
21                 connection with such Force Majeure Event, or (C) Pandemic Law that  
22                 directly adversely impacts jobsite productivity; and

23                 (iii)   Developer shall, as part of its mitigation efforts under Section 16.9,  
24                 implement applicable measures set forth in the Safety Management Plan.

25           **16.4.3 Utility Company Delay**

26          (a)     Developer shall not be entitled to Extra Work Costs relating to Utility Company  
27          Delay, except for Extra Work Costs allowable under Section 16.9.3 to mitigate  
28          Delay Costs.

29          (b)     Except as provided otherwise in Section 7.2.6, Developer shall be entitled to  
30          Completion Deadline adjustment for delay to the Critical Path that is directly  
31          attributable to Utility Company Delay.

32          (c)     Developer shall not be entitled to any Claim for Delay Costs relating to a Utility  
33          Company Delay described in clause (c) of the definition of Utility Company Delay  
34          unless the applicable Utility Agreement precludes an adequate damages remedy  
35          to Developer for Utility Company delays.

1           **16.4.4 Inaccurate Utility Information**

2           The following limitations apply to the Relief Event set forth in clause (f) of the definition  
3 thereof concerning Inaccurate Utility Information:

4           (a)     Developer’s compensation for Extra Work Costs shall be limited to the aggregate  
5 Extra Work Costs of the Utility Adjustment Work (including reimbursements  
6 payable to Utility Companies) that are directly attributable to the Inaccurate  
7 Utility Information.

8           (b)     Developer shall be entitled to compensation for reasonable and necessary costs  
9 to acquire Replacement Utility Property Interests for Utility Adjustments due to  
10 Inaccurate Utility Information only where:

11           (i)     The Utility Information fails to indicate, and none of the Developer-Related  
12 Entities has actual knowledge as of the Setting Date, that the Utility  
13 Company holds or is assumed to hold Prior Rights Documentation with  
14 respect to the subject Utility;

15           (ii)    It is not physically possible, including through commercially reasonable  
16 design modifications as described in Section 7.2.4(a), to perform the  
17 subject Utility Adjustment within the Schematic ROW or to use Protection  
18 in Place; and

19           (iii)   The Utility Company is not legally responsible under Law for the acquisition  
20 costs, such as in the case of a Replacement Utility Property Interest that is  
21 not for a Betterment or Utility Company Project.

22           (c)     Developer shall be entitled to Delay Costs and a Completion Deadline adjustment  
23 due to Inaccurate Utility Information only if the subject Utility is not a Service Line.

24           (d)     Developer shall be entitled to relief for Inaccurate Utility Information with respect  
25 to any Temporary Construction Easement in accordance with Section 16.4.20.

26           **16.4.5 Hazardous Materials**

27           (a)     If there occurs any Relief Event under clause (g) or (h) of the definition of Relief  
28 Event, and if Developer timely satisfies the terms and conditions for asserting a  
29 Relief Event set forth in Section 16.1, then ADOT will pay the applicable  
30 Compensation Amount directly attributable to Developer’s Hazardous Materials  
31 Management of such Hazardous Materials, subject to each of the following.

32           (i)     The Compensation Amount shall be limited as set forth in clause (b) below  
33 and shall be subject to adjustment as provided in Section 16.5.

1 (ii) If (A) the Hazardous Materials are contained in soils or other solid materials  
2 or objects that may be returned to trenches or other areas of excavation  
3 within or adjacent to the Project ROW pursuant to regulations, policies or  
4 approvals of applicable Governmental Entities, and (B) the excavation of  
5 such contaminated soils or other solid materials or objects is undertaken  
6 for any purpose or reason other than the fact of contamination, then Extra  
7 Work Costs for which ADOT is liable shall be limited to the reasonable  
8 incremental increase in out-of-pocket costs incurred in handling such  
9 contaminated soils, materials and objects in excess of the out-of-pocket  
10 costs Developer would incur to handle the same if they did not contain  
11 Hazardous Materials.

12 (iii) If the Hazardous Materials are contained in soils or other solid materials or  
13 objects that are removed from the location where found for any purpose  
14 or reason other than the fact of contamination, then Extra Work Costs for  
15 which ADOT is liable shall be limited to the reasonable incremental  
16 increase in out-of-pocket costs incurred to excavate, handle, contain, haul,  
17 transport, remove, remediate and dispose of the soils or other solid  
18 materials or objects in excess of the out-of-pocket cost Developer would  
19 incur to do the same if they did not contain Hazardous Materials.

20 (iv) If avoidance or remediation of such Hazardous Materials is capable of  
21 being accomplished under applicable Laws and Governmental Approvals  
22 through measures less costly than excavation, removal and off-site  
23 disposal of contaminated soil and groundwater, or less costly than return  
24 to trenches and other areas of excavation, then ADOT will only be liable  
25 for the least costly alternate measure. Such alternate, less costly measures  
26 may include (A) design modifications and construction techniques to avoid  
27 such Hazardous Materials or reduce the quantities to be excavated,  
28 handled, contained, hauled, transported, removed, remediated and  
29 disposed of off-site, and (B) on-site containment and institutional controls.  
30 If, however, Developer demonstrates that the total cost of any alternate  
31 measure, including Delay Costs to be borne by Developer, will exceed the  
32 total cost of excavation, removal and off-site disposal or return to trenches  
33 and other areas of excavation, including Delay Costs to be borne by  
34 Developer, then Developer shall not be obligated to implement such  
35 alternate measure. Developer shall respond to all reasonable requests by  
36 ADOT for supporting information regarding such cost comparison.

37 (v) The Compensation Amount available under this clause (a) is subject to the  
38 Claim Deductible, except with respect to ADOT Releases of Hazardous  
39 Materials.

- 1 (b) None of the following liabilities, costs, expenses and Losses shall be chargeable  
2 against or reimbursable by ADOT, including with respect to any Relief Event under  
3 clause (g) or (h) of the definition of Relief Event:
- 4 (i) Liabilities, costs, expenses and Losses to the extent attributable to  
5 Developer Releases of Hazardous Materials;
- 6 (ii) Delay Costs arising out of Releases of Hazardous Materials from vehicles  
7 operating within the Project ROW or the need to repair damage to Project  
8 improvements caused thereby. For purposes hereof, “vehicle” has the  
9 meaning set forth in A.R.S. § 28-101, and also means aircraft;
- 10 (iii) Liabilities, costs, expenses and Losses that could be avoided by the exercise  
11 of Good Industry Practice to mitigate and reduce cost, including exercise  
12 of Developer’s duties to avoid and mitigate set forth in Section 8.8.2;
- 13 (iv) Administrative and overhead expenses and profit of Developer or its  
14 Subcontractors arising out of or relating to performance of Hazardous  
15 Materials Management, except for (A) if Developer performs the  
16 investigation, characterization and remediation itself, then reasonable  
17 indirect costs and field office overhead expenses (but not profit) of  
18 Developer, in any case not exceeding 10% of the direct costs of such Work,  
19 and (B) if a Subcontractor directly performs investigation and  
20 characterization of Hazardous Materials or directly performs remediation  
21 of the Hazardous Materials, then reasonable indirect costs, field office  
22 overhead expenses and profit of such Subcontractor, in any case not  
23 exceeding the 15% markup as set forth in Section 1.1.2 of Exhibit 13  
24 (Compensation Amount Specifications), and a 5% markup by Developer as  
25 set forth in Section 1.1.3 of Exhibit 13 (Compensation Amount  
26 Specifications);
- 27 (v) Liabilities, costs, expenses and Losses incurred attributable to Developer  
28 Releases of Hazardous Materials;
- 29 (vi) Liabilities, costs, expenses and Losses incurred attributable to any  
30 Developer Act that exacerbates or increases the Release of Hazardous  
31 Materials or the costs to undertake Hazardous Materials Management;
- 32 (vii) Liabilities, costs, expenses and Losses incurred to the extent ADOT is not  
33 afforded the opportunity to inspect sites containing Hazardous Materials  
34 (including ADOT Releases of Hazardous Materials) before Developer takes  
35 any action that would inhibit ADOT’s ability to ascertain the nature and  
36 extent of the Hazardous Materials, except for Developer’s Emergency  
37 actions necessary to stabilize and contain a sudden release or otherwise  
38 required by Law to address the Emergency immediately;

1 (viii) Liabilities (except generator liability to the extent assumed by ADOT under  
2 Section 8.8.7(a)), costs, expenses and Losses with respect to Hazardous  
3 Materials in, on or under Developer-Designated ROW, Temporary  
4 Construction Easements, Replacement Utility Property Interests (except if  
5 Section 16.4.4(b) applies) or Developer’s Temporary Work Areas; and

6 (ix) Liabilities, costs, expenses and Losses with respect to Hazardous Materials  
7 in, on or under locations Developer is required to avoid pursuant to the  
8 Technical Provisions.

9 (c) Extra Work Costs for off-Site disposal of soils contaminated with Hazardous  
10 Materials for which ADOT is liable under this Section 16.4.5 shall be determined  
11 by applying the same unit price (per ton or cubic yard) that applies to Developer  
12 under the Subcontract for off-site disposal of Hazardous Materials of similar  
13 character for which Developer is not compensated by ADOT. If no such  
14 Subcontract exists, or if no such unit price is stated in such Subcontract, then the  
15 unit price shall not exceed the unit price ADOT could obtain through competitive  
16 low bid from a qualified contractor for such work.

17 **16.4.6 Cultural Resources**

18 Developer shall not be entitled to any increase in the Contract Price in connection with  
19 the Relief Event under clause (i) of the definition of Relief Event to the extent affecting (i)  
20 Developer-Designated ROW or (ii) Temporary Construction Easements.

21 **16.4.7 Differing Site Conditions**

22 Developer’s entitlement to the Compensation Amount and Completion Deadline  
23 adjustment for Differing Site Conditions shall be subject to the following conditions:

24 (a) During the D&C Work, if Developer encounters Differing Site Conditions,  
25 Developer shall immediately notify ADOT.

26 (b) Developer shall bear the burden of proving that a Differing Site Condition exists  
27 and that Developer could not reasonably have worked around the Differing Site  
28 Condition so as to avoid additional cost or delay.

29 (c) Each Relief Request relating to a Differing Site Condition shall include a statement  
30 by a Professional Engineer setting forth all relevant assumptions made by  
31 Developer with respect to the condition of the affected area, justifying the basis  
32 for such assumptions, explaining exactly how the existing conditions differ from  
33 those assumptions, and stating the efforts Developer undertook to find  
34 alternative design or construction solutions to eliminate or minimize the effect of  
35 the conditions and the associated costs.

1 (d) Unless Developer proves that a Differing Site Condition exists, Developer shall not  
2 be entitled to any increase in the Contract Price, Completion Deadline adjustment  
3 or any other Claim in connection with Work stoppages in the affected area during  
4 the period of time Developer investigates conditions in the affected area.

5 (e) Developer shall not be entitled to any increase in the Contract Price or Completion  
6 Deadline adjustment for Differing Site Conditions in, on or under (i) Developer-  
7 Designated ROW (except to the extent provided otherwise in Section 16.6.4  
8 regarding Completion Deadline adjustment), (iii) Temporary Construction  
9 Easements (except to the extent provided otherwise in Section 16.6.4 regarding  
10 Completion Deadline adjustment), (iv) Replacement Utility Property Interests  
11 (except if Section 16.4.4(b) applies) or (v) Developer's Temporary Work Areas.

12 (f) Developer shall be responsible for determining the appropriate action to be  
13 undertaken, subject to approval by ADOT. If any Governmental Approvals specify  
14 a procedure to be followed, Developer shall follow the procedure set forth in such  
15 Governmental Approvals.

#### 16 **16.4.8 Endangered and Threatened Species**

17 Developer shall not be entitled to any increase in the Contract Price in connection with  
18 the Relief Event under clause (k) of the definition of Relief Event to the extent affecting (i)  
19 Developer-Designated ROW or (ii) Temporary Construction Easements.

#### 20 **16.4.9 Change in Law**

21 (a) New or revised State statutes adopted after the Setting Date that change, add to  
22 or replace Applicable Standards, criteria, requirements, conditions, procedures  
23 and specifications, including Safety Standards, relating to the D&C Work or O&M  
24 Work, as well as revisions to the Technical Provisions to conform to such new or  
25 revised State statutes, shall be treated as a Change in Law (clause (l) of the  
26 definition of Relief Event) rather than an ADOT-Directed Change to Technical  
27 Provisions; provided, however, that (i) changes in Adjustment Standards  
28 attributable to the new or revised State statutes shall constitute neither a Change  
29 in Law nor an ADOT-Directed Change, and (ii) no Pandemic Law resulting from the  
30 occurrence of a Force Majeure Event as described in clause (k) thereof shall be  
31 treated as a Change in Law.

32 (b) If there is a Change in Law as described in Section 16.4.9(a) relating to the O&M  
33 Work, then Developer shall be entitled to capital and non-capital Extra Work Costs  
34 of performing the O&M Work necessary to comply with the Change in Law;  
35 provided that Developer shall not be entitled to any such Extra Work Costs if  
36 Developer in any case must replace or rectify defects in an affected Element in  
37 order to comply with the Contract Documents.

- 1 (c) If there is a Change in Law as described in Section 16.4.9(a) relating to the O&M  
 2 Work, then ADOT shall be entitled to a credit from Developer for any decrease in  
 3 the costs of O&M Work attributable to such Change in Law. The amount of the  
 4 decrease shall include a 6% markup on the cost savings for overhead and profit.
- 5 (d) The exclusion set forth in clause (b)(v) of the definition of Change in Law shall not  
 6 adversely impact the relief Developer is entitled to under this Section 16 in  
 7 connection with Pandemic Law pursuant to clause (d) of the definition of the Relief  
 8 Event.

9 **16.4.10 Change in Adjustment Standards**

10 Developer shall not be entitled to any Delay Costs due to a Change in Adjustment  
 11 Standards.

12 **16.4.11 D&C Price Adjustment Due to Delay in NTP 1**

- 13 (a) If there is an ADOT-Caused Delay under clause (a) of the definition of ADOT-  
 14 Caused Delay (delayed issuance of NTP 1), the D&C Price shall be subject to  
 15 adjustment, as described in this Section 16.4.11.
- 16 (b) The adjusted D&C Price shall take effect on the date of issuance of NTP 1.
- 17 (c) The D&C Price shall be adjusted pursuant to a Supplemental Agreement solely by  
 18 adding to the portion of the D&C Price for D&C Work performed on and after the  
 19 date that such ADOT-Caused Delay becomes effective the “adjustment amount”  
 20 (or “Δ”), calculated in accordance with this clause (c), and without the right to any  
 21 additional compensation pursuant to the Supplemental Agreement.

22 
$$\Delta = N \times (\text{D\&C Price}) \times (([A-B]/B)/T)$$

23 Where:

24 “Δ” is the adjustment amount distributed on a *pro rata* basis over the  
 25 remaining payments of the D&C Price set forth in Exhibit 2-4.1 (D&C Price  
 26 Breakdown);

27 “N” is the number of days in the period starting on the 101st day after the  
 28 Proposal Due Date and ending on the effective date of NTP 1;

29 “A” is the CCI value published for the month in which the effective date of  
 30 NTP 1 occurs;

31 “B” is the CCI published for the month which contains the day which is N  
 32 +15 days prior to the 15th day of the month which contains the effective date of  
 33 NTP 1; and





1 "T" is the number of days between the 15th of the month for which  
2 the CCI value for "A" was taken and the 15th of the month for which the CCI value  
3 for "B" was taken.

- 4 (d) In the event of a delay to NTP 2 as described in this Section 16.4.12, Developer will  
5 be entitled to request a Supplemental Agreement to extend a Completion  
6 Deadline in accordance with Section 16.6.

#### 7 **16.4.13 Delayed Governmental Approval**

8 Developer shall not be entitled to any increase in the Contract Price in connection with  
9 the Relief Event under clause (m) of the definition of Relief Event.

#### 10 **16.4.14 Delayed Issuance of Section 404 Permit**

11 Developer shall not be entitled to any increase in the Contract Price in connection with  
12 the Relief Event under clause (n) of the definition of Relief Event, provided, however, that this  
13 Section 16.4.14 shall not apply to Delay Costs to the extent directly attributable to delay, beyond  
14 the 180 days specified in clause (n) of the definition of Relief Event, in issuance of a Section 404  
15 Individual Permit for the Project where such delay is due solely to the U.S. Army Corps of  
16 Engineers' action to generally suspend processing Section 404 Permits.

#### 17 **16.4.15 Necessary Schematic ROW Changes**

- 18 (a) A Necessary Schematic ROW Change shall arise only where Developer establishes  
19 with clear and convincing evidence that it is not physically possible, including  
20 through commercially reasonable design modifications, to deliver the Basic  
21 Configuration within the Schematic ROW. The Parties stipulate that it is not  
22 commercially reasonable to require the following as a design modification:

23 (i) Retaining walls where retaining walls are not shown in the Schematic  
24 Design;

25 (ii) An added structure not shown in the Schematic Design;

26 (iii) Fill slopes steeper than 2:1; or

27 (iv) Cut slopes steeper than 0.75:1.

- 28 (b) A Necessary Schematic ROW Change shall not include areas outside the Schematic  
29 ROW for Temporary Construction Easements.

- 30 (c) Developer shall be entitled to Delay Costs and Completion Deadline adjustment  
31 attributable to a Necessary Schematic ROW Change, in the respective amounts set  
32 forth in clause (d) below, only if:

- 1 (i) Developer notifies ADOT, by Relief Event Notice, of the Necessary  
2 Schematic ROW Change, including a reasonable identification of the  
3 subject property, within 180 days after NTP 2;
- 4 (ii) ADOT is unable to deliver access to the necessary additional ROW within  
5 180 days after ADOT reviews and approves the subject property as  
6 qualifying for a Necessary Schematic ROW Change; and
- 7 (iii) The delay affects the Critical Path.
- 8 (d) The percentage of Delay Costs and Completion Deadline adjustment to which  
9 Developer shall be entitled shall vary based on when Developer delivers to ADOT  
10 the appropriate Relief Event Notice, as follows:
- 11 (i) 100% if Developer notifies ADOT within 120 days, inclusive, of NTP 2;
- 12 (ii) 75% if Developer notifies ADOT within 150 days, inclusive, of NTP 2;
- 13 (iii) 50% if Developer notifies ADOT within 180 days, inclusive, of NTP 2; and
- 14 (iv) No compensation for Delay Costs and no Completion Deadline adjustment  
15 if Developer notifies ADOT on or after the 181st day after NTP 2.
- 16 (e) Developer shall bear Extra Work Costs for any re-design and construction for the  
17 additional ROW required for a Necessary Schematic ROW Change; and ADOT will  
18 bear Extra Work Costs for Environmental Approvals, Utility Adjustments,  
19 Hazardous Materials Management and costs to acquire the additional ROW  
20 required for a Necessary Schematic ROW Change.

#### 21 **16.4.16 Latent Defects of Existing Improvements**

22 Developer's entitlement to the Compensation Amount and Completion Deadline  
23 adjustment for the Relief Event claim under clause (t) of the definition of Relief Event (Latent  
24 Defects in Existing Improvements) shall be subject to the following conditions:

- 25 (a) During the D&C Work, if Developer encounters any Defect in the Existing  
26 Improvements, Developer shall immediately notify ADOT.
- 27 (b) Developer shall bear the burden of proving that a latent Defect in the Existing  
28 Improvements exists and that Developer could not reasonably have worked  
29 around such latent Defect so as to avoid additional cost or delay.
- 30 (c) Each Relief Request shall include a statement by a Professional Engineer setting  
31 forth all relevant assumptions made by Developer with respect to the Existing  
32 Improvements, justifying the basis for such assumptions, explaining exactly how  
33 the Existing Improvements differ from those assumptions, and stating the efforts

1 Developer undertook to find alternative design or construction solutions to  
2 eliminate or minimize the effect of latent Defects of the Existing Improvements  
3 and the associated costs.

4 (d) Unless Developer proves that a latent Defect of the Existing Improvements exists,  
5 Developer shall not be entitled to any increase in the Contract Price, Completion  
6 Deadline adjustment or any other Claim in connection with Work stoppages in the  
7 affected area during the period of time Developer investigates conditions in the  
8 affected area.

9 (e) Developer shall not be entitled to any increase in the Contract Price or Completion  
10 Deadline adjustment for a latent Defect of the Existing Improvements in, on or  
11 under (i) Developer-Designated ROW, (iii) Temporary Construction Easements, (iv)  
12 Replacement Utility Property Interests (except if Section 16.4.4(b) applies) or (v)  
13 Developer's Temporary Work Areas.

14 **16.4.17 APS Delay**

15 (a) Developer shall not be entitled to any increase in the Contract Price in connection  
16 with the Relief Event under clause (u) of the definition of Relief Event.

17 (b) Developer may be entitled to a Completion Deadline adjustment due to  
18 occurrence of the Relief Event under clause (u) of the definition of Relief Event,  
19 provided that only the period of delay beyond the date described in clause (u) of  
20 the definition of Relief Event shall be taken into consideration in determining  
21 whether the Critical Path is affected by such Relief Event.

22 **16.4.18 ADOT Broadband Initiative for I-17**

23 (a) Developer shall not be entitled to any increase in the Contract Price in connection  
24 with the Relief Event under clause (v) of the definition of Relief Event.

25 (b) Developer may be entitled to a Completion Deadline adjustment due to  
26 occurrence of the Relief Event under clause (v) of the definition of Relief Event,  
27 but only to the extent that Developer cannot reasonably avoid or mitigate such  
28 interruption or interference to the Construction Work through coordination and  
29 cooperation required under Section 8.5.1, including through re-sequencing and  
30 work arounds. Only the period of interruption or interference beyond the date  
31 described in clause (v) of the definition of Relief Event shall be taken into  
32 consideration in determining whether the Critical Path is affected by such Relief  
33 Event.

34 **16.4.19 Approach Slab, Bridge Deck, Expansion Joint and Culvert Repairs**

35 If ADOT requires approach slab repairs pursuant to Section DR 455.3.2.7 of the Technical  
36 Provisions, requires bridge deck repairs pursuant to Section DR 455.3.2.8 of the Technical

1 Provisions, requires additional expansion joint repairs pursuant to Section DR 455.3.2.8 of the  
2 Technical Provisions, or requires culvert repairs pursuant to Section DR 445.2.2 of the Technical  
3 Provisions, then ADOT will pay the Extra Work Cost pursuant to an ADOT-Directed Change, but  
4 Developer shall not be entitled to schedule relief or Delay Costs. ADOT shall not be liable,  
5 however, for any costs and schedule impacts that Developer incurs to repair damage to bridge  
6 decks, approach slabs, joints or other elements attributable to Developer's removal of AC overlay  
7 on bridge decks and approach slabs pursuant to Section DR 455.3.2.8 of the Technical Provisions.

#### 8 **16.4.20 Conditions Affecting Temporary Construction Easements**

9 If a condition described in clause (f), (i), (k) or (p) of the definition of Relief Event is  
10 discovered within a Temporary Construction Easement, Developer:

- 11 (a) Shall not be entitled to any increase in the Contract Price; and
- 12 (b) May be entitled to Completion Deadline adjustment only where:
  - 13 (i) Such condition adversely impacts the Construction Work required to be  
14 carried out, or the detour routes, within the affected Temporary  
15 Construction Easement; and
  - 16 (ii) Such Construction Work or detour routes are incapable of being relocated  
17 to an alternate location not impacted by such condition.

#### 18 **16.5 Insurance Adjustments**

19 **16.5.1** Application of insurance proceeds in the event of any loss, damage or  
20 destruction to the Project is governed by Section 13.3.

21 **16.5.2** In all other circumstances, each Claim seeking the payment of a Compensation  
22 Amount shall be net of all insurance available to Developer, or deemed to be self-insured by  
23 Developer under Section 13.2.4, with respect to the Relief Event giving rise to the Compensation  
24 Amount. The amount of such insurance or deemed self-insurance shall be netted out before  
25 determining the Compensation Amount to be charged against the Claim Deductible.

#### 26 **16.6 Effect of Relief Events on Completion Deadlines**

27 **16.6.1** Subject to Sections 16.6.2, 16.6.3 and 16.6.4 and satisfaction of any conditions  
28 or requirements set forth in the Contract Documents, including in Section 16.3.3, Developer shall  
29 be entitled to extension of applicable Completion Deadlines by the period that the end of the  
30 Critical Path extends beyond the original Completion Deadline due to any Relief Event Delay that  
31 Developer cannot reasonably avoid through mitigation as required under Section 16.9.  
32 Notwithstanding the foregoing, Developer shall not be entitled to extension of applicable  
33 Completion Deadlines to the extent that the Relief Event Delay is concurrent with any other delay  
34 that is not caused by a Relief Event, except that, where the Relief Event Delay is directly  
35 attributable to existence or occurrence of a Relief Event under clause (a), (b), (c) or (p) of the

1 definition of Relief Event, Developer may be entitled to an extension of applicable Completion  
2 Deadlines attributable to the impact on the Critical Path of such Relief Event Delay even if  
3 concurrent with another delay not caused by a Relief Event.

4 **16.6.2** Developer’s entitlement to a Completion Deadline adjustment under Section  
5 16.6.1 is subject to Developer demonstrating that the Project Schedule in the absence of the  
6 Relief Event contained a reasonable amount of time to complete the Work that is the subject of  
7 the Relief Event.

8 **16.6.3** As an alternative to the Completion Deadlines extensions to which Developer is  
9 otherwise entitled under Section 16.6.1, ADOT, in its sole discretion, may pay Developer  
10 acceleration costs based on the information received pursuant to Sections 16.1.3(a)(vi) and  
11 17.1.3(e), in which case such election shall be documented in the applicable Supplemental  
12 Agreement.

13 **16.6.4** Cumulative extensions of a Completion Deadline under Section 16.6.1 due to  
14 Relief Event Delays directly attributable to existence or occurrence of the following Relief Events  
15 shall not exceed 120 days:

- 16 (a) Relief Events under clauses (g), (i), (j), (k) and (p) of the definition of Relief Event  
17 on or directly affecting Developer-Designated ROW or Temporary Construction  
18 Easements;
- 19 (b) Relief Events under clause (m) of the definition of Relief Event; and
- 20 (c) Relief Events under clause (c) of the definition of Relief Event (concerning  
21 ADOT-Caused Delay) where the ADOT-Caused Delay is under clause (e) of such  
22 definition and arises out of the refusal of any Governmental Entity that owns or  
23 controls the requested Developer-Designated ROW or Additional TCE Property to  
24 grant necessary rights of access, entry and use to ADOT after ADOT makes diligent  
25 efforts to negotiate acquisition of such requested Developer-Designated ROW or  
26 Additional TCE Property.

27 The foregoing extension of applicable Completion Deadlines shall be the exclusive remedy for a  
28 Relief Event described in clauses (a), (b) and (c) of this Section 16.6.4. Developer shall not be  
29 entitled to any increase in the Contract Price or any other Claim in connection with such Relief  
30 Events.

1           **16.6.5** All Completion Deadline adjustments are subject to this Section 16.6,  
2 notwithstanding anything to the contrary in the Contract Documents.

3 **16.7 Effect of Relief Events on Developer Performance, Developer Default, Noncompliance**  
4 **Points and Deductions**

5           **16.7.1** Occurrence of a Relief Event shall not excuse Developer from:

6           (a) timely payment of monetary obligations under this Agreement irrespective of  
7 whether Developer is owed a Compensation Amount for the Relief Event; or

8           (b) compliance with the Contract Documents or applicable Laws, except temporary  
9 inability to comply due solely and directly to the Relief Event.

10           **16.7.2** Subject to the requirements set forth in Section 16.9, Developer shall be entitled  
11 to rely upon the occurrence of a Relief Event as a defense against a Developer Default where the  
12 Relief Event causes the Developer Default.

13           **16.7.3** Refer to Section 19.5 regarding the effect of a Relief Event on the accrual of  
14 Noncompliance Events and Noncompliance Points and assessment of Noncompliance Charges  
15 for Noncompliance Events.

16           **16.7.4** Refer to Sections 22.2.4 and 22.2.5 regarding the effect of a Relief Event on  
17 Liquidated Damages for Closures.

18 **16.8 Exclusive Relief; Release of Claims**

19 The relief provided pursuant to this Section 16 or pursuant to the Dispute Resolution Procedures  
20 for a Relief Event shall represent the sole right to compensation, damages, and other relief from  
21 the adverse effects of a Relief Event. As a condition precedent to ADOT’s obligation to pay any  
22 Compensation Amount or abide by such relief, Developer shall execute a full, unconditional,  
23 irrevocable waiver and release, in form reasonably acceptable to ADOT, of any other Claims,  
24 Losses or rights to relief or compensation associated with such Relief Event that is not the subject  
25 of a Dispute.

26 **16.9 Prevention and Mitigation**

27           **16.9.1** Developer shall be entitled to the relief, compensation, time extension and  
28 protection provided under this Section 16 only if the occurrence of a Relief Event and the effects  
29 of such occurrence:

30           (a) Are beyond the reasonable control of Developer-Related Entities;

31           (b) Are not due to a Developer Act; and

- 1 (c) Could not have been avoided by the exercise of caution, due diligence or  
2 reasonable efforts by Developer-Related Entities.

3 **16.9.2** Subject to Developer’s right to compensation under Section 16.9.3, Developer  
4 shall take all steps reasonably necessary to mitigate the consequences of any Relief Event,  
5 including all steps that would generally be taken in accordance with Good Industry Practice.

6 **16.9.3 Re-sequencing and Re-scheduling of Work; Other Mitigation Measures**

- 7 (a) Developer shall not be entitled to submit a claim for Compensation Amounts,  
8 Completion Deadline adjustments or other relief that could have been avoided  
9 through accelerating, re-sequencing and re-scheduling of the Work or other work-  
10 around or mitigation measures the cost of which is justified by equal or greater  
11 savings in the Compensation Amount claimed.

- 12 (b) After submitting the information required by Section 16.1.3(a)(vi), Developer shall  
13 cooperate with ADOT thereafter to identify the acceleration, re-sequencing, re-  
14 scheduling and other work-around or mitigation measures that will maximize  
15 mitigation of costs to ADOT and of any Completion Deadline adjustment, taking  
16 into account the cost of the potential acceleration, re-sequencing, re-scheduling  
17 and other work-around or mitigation measures.

- 18 (c) ADOT will compensate Developer for the reasonable costs of acceleration, re-  
19 sequencing, re-scheduling and other work-around or mitigation measures  
20 authorized in writing by ADOT pursuant to this Section 16.9.3, in the same manner  
21 it pays the Compensation Amount under Section 16.2.

- 22 (d) If Developer incurs incremental additional costs to prepare, implement and  
23 achieve a Recovery Schedule pursuant to Section 9.9 and it is later determined  
24 that the circumstances addressed by the Recovery Schedule are a Relief Event  
25 Delay for which Developer is entitled to compensation under this Section 16, then  
26 the Compensation Amount shall include such costs.

27 **16.9.4** Without limiting Section 16.9.3, if any claim is asserted or administrative  
28 proceeding, litigation or other legal action is brought against Developer by any third party (other  
29 than a Developer-Related Entity) seeking relief that would or could entitle Developer to a  
30 Compensation Amount or Completion Deadline adjustment if determined adversely to  
31 Developer, then Developer, at its expense, shall defend against such claim, administrative  
32 proceeding, litigation or other legal action diligently and professionally, shall not interfere with  
33 or resist ADOT’s intervention in the claim negotiations or administrative proceeding, litigation or  
34 other legal action, and shall actively assist and cooperate with ADOT in its defense against the  
35 claim, administrative proceeding, litigation or other legal action. At the request of either Party,  
36 both Parties shall enter into, or cause their respective legal counsel to enter into, a joint defense  
37 agreement setting forth terms for their joint cooperation and defense. The Parties may mutually



1 choose, but are not obligated, to be jointly represented by legal counsel in such administrative  
2 proceeding, litigation or other legal action.

3           **16.9.5** For further mitigation obligations of Developer respecting Hazardous Materials  
4 and Recognized Environmental Conditions, refer to Section 8.8.2.

1           **SECTION 17. ADOT-DIRECTED CHANGES; DEVELOPER CHANGES; DIRECTIVE LETTERS**

2   **17.1 ADOT-Directed Changes**

3           **17.1.1 ADOT’s Right to Issue Supplemental Agreement**

4           (a) ADOT may, at any time and from time to time, without notice to any Surety,  
5 authorize or require, pursuant to a Supplemental Agreement, changes in the Work  
6 (including reductions in the scope of the D&C Work or O&M Work) or in terms and  
7 conditions of the Technical Provisions (including changes in the Applicable  
8 Standards and Safety Standards), except that ADOT has no right to require any  
9 change that:

10           (i) Requires the Work to be performed in a way that violates applicable Law;

11           (ii) Materially increases risk to the health or safety of any Person; or

12           (iii) Materially and adversely changes the nature of the Project as a whole.

13           (b) ADOT also shall have the right to issue a Supplemental Agreement for any other  
14 event that the Contract Documents expressly state shall be treated as an ADOT-  
15 Directed Change.

16           (c) ADOT’s changes to the Work shall be documented through the issuance of an  
17 ADOT-Directed Change or Directive Letter. No document, including any field  
18 directive, comment to a Submittal, correspondence discussing the Contract  
19 Documents or the Work or otherwise shall be valid, effective or enforceable as an  
20 ADOT-Directed Change unless expressly identified and agreed to in a  
21 “**Supplemental Agreement**” and signed by:

22           (i) the ADOT project director;

23           (ii) the ADOT construction manager for ADOT-Directed Changes with a value  
24 of less than \$350,000; or

25           (iii) another ADOT individual identified in a written notice from the project  
26 director or construction manager to Developer as having authority to  
27 execute Supplemental Agreements.

28           (d) ADOT may in its discretion unilaterally issue a Supplemental Agreement that  
29 amends this Agreement if (i) there is no effect on the Developer’s costs or  
30 schedule and (ii) such amendment is limited to ministerial and administrative  
31 changes necessary for ADOT’s proper administration of this Agreement.

1           **17.1.2 Request for Change Proposal**

2           (a)     If ADOT desires to issue an ADOT-Directed Change or to evaluate whether to  
3           initiate such a change, then ADOT may, in its sole discretion, issue a Request for  
4           Change Proposal. The Request for Change Proposal shall set forth the nature,  
5           extent and details of the proposed ADOT-Directed Change. ADOT may, in its sole  
6           discretion, determine whether to implement the proposed change after  
7           consideration of Developer’s response.

8           (b)     Within five Business Days after Developer receives a Request for Change Proposal,  
9           or such longer period to which the Parties may mutually agree, ADOT and  
10          Developer shall consult to define the proposed scope of the change. Within five  
11          Business Days after the initial consultation, or such longer period to which the  
12          Parties may mutually agree, ADOT and Developer shall consult concerning the  
13          estimated financial, schedule and other impacts.

14          **17.1.3 Response to Request for Change Proposal**

15                 As soon as possible through the exercise of diligent efforts, and in any event within 60  
16          days, following ADOT’s delivery to Developer of a Request for Change Proposal, Developer shall  
17          provide ADOT with a response that contains a detailed assessment of the cost, schedule, and  
18          other impacts of the proposed ADOT-Directed Change, including the following:

19          (a)     A scope of work which shall be described in sufficient detail and broken down into  
20          suitable components and activities to enable pricing. The work breakdown shall  
21          include all activities associated with the proposed modification, including a  
22          description of additions, deletions and modifications to the Technical Provisions;

23          (b)     Developer’s detailed estimate of the impacts on costs of carrying out the proposed  
24          ADOT-Directed Change, including any Extra Work Costs, Delay Costs or reduction  
25          in costs to Developer. The cost estimate shall include a pricing form identifying  
26          which Work items have been priced based on estimated quantities and unit rates  
27          and which items have been priced on another basis, with reasons;

28          (c)     Any consents or permits required;

29          (d)     If the Change Notice is issued prior to the Final Acceptance Date, the effect of the  
30          proposed ADOT-Directed Change on the Project Schedule, including achievement  
31          of the Completion Deadlines, taking into consideration Developer’s duty to  
32          mitigate any delay or any time saved by implementation of the proposed ADOT-  
33          Directed Change;

34          (e)     If so requested by ADOT, in its sole discretion, an alternative cost and schedule  
35          proposal showing the acceleration costs associated with meeting the Completion  
36          Deadlines without any adjustment, as well as any additional costs permitted

- 1 hereunder;
- 2 (f) The effect (if any) of the proposed ADOT-Directed Change on the Performance  
3 Requirements; and
- 4 (g) Any other relevant information related to carrying out the proposed ADOT-  
5 Directed Change.

6 **17.1.4 Negotiation and Directed Changes**

- 7 (a) Following ADOT's receipt of Developer's response to the Request for Change  
8 Proposal and of such further assessment by ADOT and its consultants of the cost,  
9 schedule, and other impacts of the proposed ADOT-Directed Change, if ADOT  
10 decides, in its sole discretion, to proceed with such change, ADOT and Developer  
11 shall exercise good faith efforts to negotiate a mutually acceptable Supplemental  
12 Agreement, including, to the extent applicable:
- 13 (i) any adjustment of the Completion Deadlines; and
- 14 (ii) either (A) any Compensation Amount to which Developer is entitled, and  
15 the timing and method for payment of such Compensation Amount (in  
16 accordance with Section 16.2.2) or (B) any net cost savings and schedule  
17 savings to which ADOT is entitled under Section 17.1.6 and the timing and  
18 method for realizing such cost savings.
- 19 (b) If ADOT and Developer are unable to reach agreement on a Supplemental  
20 Agreement, ADOT may, in its sole discretion, elect to resolve the related Dispute  
21 according to the Dispute Resolution Procedures, with or without issuing a  
22 Directive Letter.
- 23 (i) If ADOT elects not to issue a Directive Letter, Developer shall not  
24 implement the proposed ADOT-Directed Change until resolution by the  
25 Dispute Resolution Procedures.
- 26 (ii) If ADOT delivers to Developer a Directive Letter pursuant to Section 17.3.1  
27 directing Developer to proceed with performance of the Work in question  
28 notwithstanding such disagreement, then:
- 29 (A) Developer shall implement and perform the Work in question as  
30 directed by ADOT; and
- 31 (B) if applicable, ADOT will make interim payments to Developer on a  
32 monthly progress payment basis for the reasonable documented  
33 Compensation Amount that is not disputed by ADOT, subject to  
34 subsequent adjustment through the Dispute Resolution  
35 Procedures.

1           **17.1.5 Payment and Schedule Adjustment**

2           In connection with an ADOT-Directed Change:

- 3           (a)     ADOT will pay (through one of the payment mechanisms set forth in Section  
4                    16.2.3) the Compensation Amount agreed upon or determined through the  
5                    Dispute Resolution Procedures as having resulting from the ADOT-Directed  
6                    Change; and
- 7           (b)     the Project Schedule and Completion Deadlines shall be adjusted as agreed upon  
8                    or determined through the Dispute Resolution Procedures, and in accordance  
9                    with Section 16.6, to reflect the effects of the ADOT-Directed Change.

10          **17.1.6 Reductive ADOT-Directed Changes**

11          (a)     In addition to a Request for Change Proposal, ADOT may deliver to Developer a  
12                    written notice that, in ADOT’s opinion, the ADOT-Directed Change will reduce  
13                    Developer costs, or save time. In such event, ADOT may prepare an analysis and a  
14                    detailed assessment of the cost and schedule impacts of the proposed ADOT-  
15                    Directed Change, either independently of or in reply to Developer’s written  
16                    response to a Request for Change Proposal, including the following:

- 17                   (i)     ADOT’s estimate of the saved costs resulting from the implementation of  
18                    the proposed ADOT-Directed Change;
- 19                   (ii)    If the written notice is issued prior to the Final Acceptance Date, the effect  
20                    of the proposed ADOT-Directed Change on shortening the Project  
21                    Schedule and Completion Deadlines;
- 22                   (iii)   The effect, if any, of the proposed ADOT-Directed Change on Performance  
23                    Requirements; and
- 24                   (iv)    Any other relevant information related to carrying out the proposed ADOT-  
25                    Directed Change.

26          (b)     Developer and ADOT thereafter shall cooperate in good faith to determine the  
27                    estimated net cost savings and time savings, if any, attributable to the proposed  
28                    ADOT-Directed Change. Any dispute regarding such savings shall be resolved  
29                    according to the Dispute Resolution Procedures.

30          (c)     ADOT will be entitled to 100% of the estimated net cost savings, if any,  
31                    attributable to any reductive ADOT-Directed Change. Such net cost savings shall  
32                    include the net reduction, if any, in labor, material, equipment and overhead costs  
33                    associated with the ADOT-Directed Change.

34          (d)     ADOT shall receive such savings:

- 1 (i) as periodic payments from Developer, which, if selected, shall be due and  
2 owing to ADOT monthly on the last day of each month;
- 3 (ii) as an adjustment to the D&C Price;
- 4 (iii) as an adjustment to the O&M Price;
- 5 (iv) as a credit against any sums owed by ADOT to Developer under the  
6 Contract Documents; or
- 7 (v) through any combination of the foregoing, as selected by ADOT.
- 8 (e) Any time savings resulting from a reductive ADOT-Directed Change shall be  
9 incorporated into the Project Schedule and taken into account in determining  
10 available Float.

## 11 **17.2 Developer Changes**

12 **17.2.1** By submittal of a written Change Request, Developer may request ADOT to  
13 approve:

- 14 (a) Modifications to the Technical Provisions; or
- 15 (b) Modifications to Developer's Proposal Commitments.

16 **17.2.2** Any such Change Request shall only request an adjustment to the foregoing that  
17 is of equal or better quality than the original Technical Provisions or Developer's Proposal  
18 Commitments, unless ADOT agrees otherwise, which decision shall be in ADOT's sole discretion.  
19 The Change Request shall set forth Developer's detailed estimate of net impacts (positive and  
20 negative) on costs and schedule attributable to the requested change, including the following:

- 21 (a) The proposed change to the Work in sufficient detail to enable ADOT to evaluate  
22 it in full and the reasons for proposing such change to the Work;
- 23 (b) Any implications of the change to the Work including details regarding proposed  
24 variations to the O&M Price, if any;
- 25 (c) All other information required by Section DR 440.3.2 of the Technical Provisions  
26 with respect to any Change Request that constitutes a Design Exception; and
- 27 (d) All of the information described in Section 17.1.3.

28 **17.2.3** ADOT, in its sole discretion (and, if ADOT so elects, after receiving a  
29 comprehensive report from an independent engineer regarding the proposed Change Request,  
30 the cost of which shall be borne by Developer), may accept or reject any Change Request  
31 proposed by Developer. If ADOT accepts such Change Request, Developer shall execute a

1 Supplemental Agreement and shall implement such change in accordance with the Supplemental  
2 Agreement, applicable Technical Provisions, the Project Management Plan, Good Industry  
3 Practice and all applicable Laws. No Change Request shall be binding or deemed accepted unless  
4 documented in a written Supplemental Agreement signed by ADOT’s Authorized Representative  
5 or by his/her designee appointed in writing. No such Supplemental Agreement shall constitute  
6 an ADOT-Directed Change regardless of its title, designation or wording.

7 **17.2.4** Developer shall solely bear the risk of any increase in the costs of the Work or  
8 other costs, and for any additional risks, resulting from a Change Request accepted by ADOT.  
9 Developer shall not be entitled to any increase in the Contract Price, adjustment of a Completion  
10 Deadline or any other Claim for delays or other impacts resulting from a Change Request  
11 accepted by ADOT.

12 **17.2.5** Without limiting the foregoing, Developer shall compensate ADOT for any  
13 incremental increase in ADOT’s overhead, administrative and out-of-pocket costs resulting from  
14 a Change Request accepted by ADOT. Developer shall make payment in the amount and at the  
15 time or times agreed upon in the Supplemental Agreement. If ADOT and Developer are unable  
16 to agree to the terms of such Supplemental Agreement, ADOT has the right, in its sole discretion,  
17 to reject the Change Request or refer the disagreement to the Dispute Resolution Procedures.

18 **17.2.6** To the extent a Change Request accepted by ADOT results in a net cost savings  
19 to Developer, ADOT will be entitled to 50% of such savings that the analysis indicates will occur  
20 during the remainder of the Term after approval of the Change Request. ADOT will obtain its  
21 share of the savings in the manner described in Section 17.1.6(c).

22 **17.2.7** To the extent a Change Request accepted by ADOT results in a time savings, such  
23 time savings shall be incorporated into the Project Schedule and taken into account in  
24 determining available Float.

25 **17.2.8** Developer may implement and permit a Utility Company to implement, without  
26 a Change Request or Supplemental Agreement, changes to a Utility Adjustment design that do  
27 not vary from the Technical Provisions.

28 **17.2.9** Developer may request as a Deviation certain minor changes in the Work that  
29 do not result in significant cost savings. ADOT, in its sole discretion, may approve such changes  
30 as Deviations, as described in Sections 8.2.5 and 10.5.3, in which case a Supplemental Agreement  
31 is not required. Any other request for a change in the requirements of the Contract Documents  
32 shall require a Change Request and a Supplemental Agreement.

33 **17.3 Directive Letters**

34 **17.3.1** ADOT may at any time issue a Directive Letter to Developer:

- 35 (a) regarding any matter for which a Supplemental Agreement can be issued; or
- 36 (b) in the event of any Dispute regarding the scope of the Work or whether Developer

1 has performed in accordance with the requirements of the Contract Documents.

2 **17.3.2** ADOT shall state in each Directive Letter whether the directive therein is Work  
3 that is within, in addition to, or a reduction of the scope of Work set forth in the Contract  
4 Documents.

5 **17.3.3** No document, including any field directive, comment to a Submittal,  
6 correspondence discussing the Contract Documents or the Work, or otherwise, shall be valid,  
7 effective or enforceable as a Directive Letter unless:

8 (a) expressly identified as a “**Directive Letter**”; and

9 (b) signed by:

10 (i) the ADOT project director;

11 (ii) the ADOT construction manager for Directive Letters pertaining to Work  
12 with a value of less than \$350,000; or

13 (iii) another ADOT individual identified in a written notice from the project  
14 director or construction manager to Developer as having authority to  
15 execute Directive Letters.

16 **17.3.4** The Directive Letter will:

17 (a) state that it is issued under this Section 17.3;

18 (b) describe the Work in question; and

19 (c) if the Directive Letter concerns a matter for which a Supplemental Agreement can  
20 or will be issued, provide for payment of any Compensation Amount, reductions  
21 in compensation and/or schedule adjustment, as applicable, directly attributable  
22 to such matters.

23 **17.3.5** Developer shall proceed immediately as directed in the Directive Letter,  
24 including by commencing any Work described therein within the time specified in the Directive  
25 Letter.

26 **17.3.6** If the Directive Letter states that the Work therein is an addition to the scope of  
27 Work in the Contract Documents, but ADOT and Developer disagree as to the extent of the  
28 addition to the scope of Work, Developer shall have the right to assert that an ADOT-Directed  
29 Change has occurred. In such situation, Developer shall comply with and be subject to the  
30 procedures under Section 16.1 for Relief Event claims and the remainder of Section 16 to the  
31 extent of the disagreement of the change in the scope of the Work.

32 **17.3.7** If the Directive Letter states that the Work is within Developer’s original scope



1 of Work set forth in the Contract Documents or is necessary to comply with the requirements of  
2 the Contract Documents, but Developer disagrees, Developer shall have the right to assert that  
3 an ADOT-Directed Change has occurred. In such situation, Developer shall comply with and be  
4 subject to the procedures under Section 16.1 for Relief Event claims and the remainder of  
5 Section 16.

6 **17.3.8** The fact that ADOT issued a Directive Letter shall not be considered evidence  
7 that an ADOT-Directed Change occurred.

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**SECTION 18. RESERVED**

1                   **SECTION 19. NONCOMPLIANCE EVENTS AND NONCOMPLIANCE POINTS**

2   **19.1 Noncompliance Points System**

3           **19.1.1** Noncompliance Points shall be used to measure Developer’s performance of  
4 certain obligations listed in the Noncompliance Event Tables in Exhibit 14 (Noncompliance Event  
5 Tables) to this Agreement and trigger remedies described in this Section 19 for breaches and  
6 failures to perform any such obligations. The Noncompliance Event Tables list separately the  
7 Noncompliance Events that apply during the D&C Period and O&M Period, and the corresponding  
8 cure period that is available to Developer for each Noncompliance Event. Inclusion in the  
9 Noncompliance Event Tables of a Noncompliance Event bears no implication regarding the  
10 materiality of the underlying breach or failure to perform. For purposes of this Section 19.1,  
11 references to “cure periods” shall mean those cure periods and repair response times listed or  
12 referenced in the Noncompliance Event Tables.

13           **19.1.2** The Noncompliance Event Tables contain a representational, but not exhaustive,  
14 list of Noncompliance Events possible under the Contract Documents. Accordingly, ADOT, from  
15 time to time, may add new Noncompliance Events to the Noncompliance Event Tables, or modify  
16 existing Noncompliance Events, subject to the terms and conditions of this Section 19.1.2.

17           (a) Additions to or modifications of Noncompliance Events and Noncompliance Event  
18 Tables shall be done in consultation with and subject to the prior approval of  
19 Developer. Developer shall cooperate in good faith, and shall not unreasonably  
20 withhold or delay approval, and approval shall be conclusively deemed given if  
21 Developer does not disapprove in writing within the time period set forth in clause  
22 (b) below. Notwithstanding the foregoing, if an addition or modification addresses  
23 any existing or pre-existing Noncompliance Event or breach or failure to perform  
24 obligations under the Contract Documents, Developer acknowledges and agrees  
25 ADOT shall have the right to implement such addition or modification without  
26 necessity for Developer’s approval, provided ADOT has first consulted in good  
27 faith with Developer in accordance with clause (b) below and the addition or  
28 modification otherwise satisfies the terms and conditions in this Section 19.1.2.

29           (b) ADOT shall initiate the consultation process for additions to or modifications of  
30 Noncompliance Events and Noncompliance Tables by issuing to Developer a  
31 Request for Change Proposal. ADOT and Developer shall thereafter follow the  
32 procedures set forth in Section 17.1, provided that Developer’s time period to  
33 respond with written comments and, if applicable, approval or disapproval shall  
34 not exceed 30 days after receipt of the Request for Change Proposal. If  
35 Developer’s approval is required and given, the Parties shall promptly execute a  
36 Supplemental Agreement making the additions or modifications to Attachment  
37 500-1 of the Technical Provisions, whereupon they shall take effect. If an  
38 affirmative approval from Developer is not required, ADOT will consider in good  
39 faith Developer’s comments and then decide whether and on what terms to  
40 incorporate the proposed additions or modifications into Attachment 500-1 of the

1 Technical Provisions and the O&M Period Noncompliance Event Table. ADOT will  
2 provide a written notice to Developer of its decision, whereupon the addition or  
3 modification shall take effect provided that it otherwise satisfies the terms and  
4 conditions in this Section 19.1.2.

5 (c) For any new Noncompliance Event to be added to the D&C Period Noncompliance  
6 Event Table or “Planning and Reporting” section of the O&M Period  
7 Noncompliance Event Table, ADOT will establish (with Developer’s approval  
8 where applicable) the applicable assessment category (“A” or “B,” as more fully  
9 described in Section 19.3), number of Noncompliance Points, Noncompliance  
10 Charges, and cure period. ADOT’s right to make additions to the D&C Period  
11 Noncompliance Event Table and “Planning and Reporting” section of the O&M  
12 Period Noncompliance Event Table shall not be exercised in a manner to expand,  
13 nor shall it be deemed to expand, Developer’s obligations under the Contract  
14 Documents; but rather to add to or eliminate from the D&C Period Noncompliance  
15 Event Table and “Planning and Reporting” section of the O&M Period  
16 Noncompliance Event Table existing contractual obligations for which  
17 Noncompliance Points may be assessed. Developer shall not be entitled to an  
18 increase in the Contract Price, Completion Deadline adjustment or any other Claim  
19 for additions or adjustments ADOT makes under this clause (c), provided that the  
20 addition or adjustment complies with clause (d) below (if applicable) and clause  
21 (e) below.

22 (d) In order for ADOT to add new, or to modify, Noncompliance Events under the  
23 “Attachment 500-1” section of the O&M Period Noncompliance Event Table,  
24 ADOT shall have the right to make additions or modifications to any applicable  
25 part of Attachment 500-1 of the Technical Provisions, subject to the following  
26 provisions.

27 (i) In the case of an addition, ADOT’s Request for Change Proposal shall set  
28 forth (A) for Attachment 500-1 of the Technical Provisions the Element,  
29 Performance Requirement, repair response times, Inspection method and  
30 frequency, Measurement Record and Target, and (B) the Noncompliance  
31 Points applicable to such Element.

32 (ii) In the case of a modification, ADOT’s Request for Change Proposal shall set  
33 forth the proposed modifications to (A) the number of Noncompliance  
34 Points, and (B) the Noncompliance Charges. ADOT’s right to modify any  
35 applicable part of Attachment 500-1 of the Technical Provisions is limited  
36 such that the repair response times set forth in the O&M Period  
37 Noncompliance Event Table, as it exists on the Effective Date, shall not  
38 decrease unless justified by the need to better protect public safety.

39 (iii) If the sole purpose of the addition or modification under this clause (d) is  
40 to address an aspect of Developer’s design (including materials selection)

1 not originally addressed in Attachment 500-1 of the Technical Provisions  
2 because the design (including materials selection) differs from that  
3 assumed in the Schematic Design, then:

4 (A) the terms for the addition or modification in Attachment 500-1 of  
5 the Technical Provisions shall be generally consistent with the  
6 terms for comparable Elements already in Attachment 500-1 of the  
7 Technical Provisions; and

8 (B) Developer shall not be entitled to (1) any compensation for any  
9 increase in the number of Noncompliance Points, (2) any  
10 compensation for any increase in the risk of incurring  
11 Noncompliance Points and Noncompliance Charges, (3) any  
12 adjustment to the triggers for Persistent Developer Default, or (4)  
13 Completion Deadline adjustment for such additions or  
14 modifications.

15 This clause (iii) supersedes any contrary provisions of Section 17.1.

16 (iv) No modification or addition to Noncompliance Events under the  
17 "Attachment 500-1" section of the O&M Period Noncompliance Event  
18 Table may have an assessment category of "B".

19 (v) If Developer proves, in its written comments, that ADOT's addition or  
20 modification to Attachment 500-1 of the Technical Provisions under this  
21 clause (d), other than those pursuant to clause (iii) above, will result in  
22 Extra Work Costs to perform the O&M Work, then such addition or  
23 modification shall entitle Developer to an additional Compensation  
24 Amount in the amount equal to such Extra Work Costs; provided, however,  
25 that ADOT shall have the right to reduce or eliminate such Extra Work  
26 Costs by further modifying Attachment 500-1 of the Technical Provisions.  
27 Under no circumstances, however, will Developer be entitled to:

28 (A) any compensation for any increase in the risk of incurring  
29 Noncompliance Points and Noncompliance Charges;

30 (B) any adjustment to the triggers for Persistent Developer Default; or

31 (C) Completion Deadline adjustment for such additions or  
32 modifications.

33 This clause (v) supersedes any contrary provisions of Section 17.1.

34 (e) ADOT's right to add existing contractual obligations to the Noncompliance Event  
35 Tables, or to make additions or modifications to Attachment 500-1 of the  
36 Technical Provisions, is limited such that the total number of Noncompliance

1 Points and total Noncompliance Charges set forth in each Noncompliance Event  
2 Table, as it exists on the Effective Date, shall not increase; provided that this  
3 limitation does not apply to additions or modifications made pursuant to clause  
4 (d)(iii) above. In order to avoid a net increase in the total number of  
5 Noncompliance Points and total Noncompliance Charges, ADOT may elect to:

6 (i) remove contractual obligations and reduce Noncompliance Points  
7 allocated to listed contractual obligations;

8 (ii) remove or reduce Noncompliance Charges allocated to listed contractual  
9 obligations; or

10 (iii) remove Elements from Attachment 500-1 of the Technical Provisions.

11 (f) ADOT will have no right to assess Noncompliance Points or Noncompliance  
12 Charges on account of a Noncompliance Event that occurs prior to the addition of  
13 the subject existing contractual obligation(s) to the Noncompliance Event Tables.

14 **19.2 Assessment Notification and Cure Process**

15 **19.2.1 Notification Initiated by Developer; Monthly Reporting**

16 (a) Developer shall establish within 60 days after NTP 1 and thereafter maintain an  
17 electronic database of all Noncompliance Events throughout the Term. During the  
18 O&M Period, Developer shall incorporate such electronic database into the  
19 Maintenance Information System. Developer shall enter each Noncompliance  
20 Event into the database in real time upon discovery (whether through self-  
21 monitoring or ADOT Notice during the D&C Period, and whether through its own  
22 discovery or ADOT Notice during the O&M Period). The electronic database shall  
23 at a minimum provide the following information for each Noncompliance Event:

24 (i) Description of the Noncompliance Event, including its item number set  
25 forth in the first column of the applicable Noncompliance Event Table;

26 (ii) Date and time the Noncompliance Event commenced;

27 (iii) Location of the Noncompliance Event (if applicable);

28 (iv) Applicable cure period;

29 (v) Whether the Noncompliance Event can be cured during the applicable  
30 cure period;

31 (vi) Expected date and time of cure (if any);

32 (vii) Status of Noncompliance Event, including actual date and time of cure;

- 1 (viii) The number of Noncompliance Points (if any) to be assessed; and
- 2 (ix) The amount of Noncompliance Charges to be assessed.
- 3 (b) Developer shall retain each Noncompliance Event entry in the electronic database
- 4 until at least three years after the date of cure.
- 5 (c) Commencing on the Effective Date, Developer shall deliver to ADOT a monthly
- 6 report (the “**Noncompliance Report**”) of all Noncompliance Events that occur
- 7 during the immediately preceding month, and any Noncompliance Events from
- 8 previous months that remain uncured as of the start of the preceding month.
- 9 During the D&C Period, Developer shall incorporate the monthly Noncompliance
- 10 Report into the Monthly Progress Report. During the O&M Period, Developer shall
- 11 incorporate the monthly Noncompliance Report into the Monthly O&M Work
- 12 Report. For each such Noncompliance Event, the monthly Noncompliance Report
- 13 must provide the same information required in the electronic database, as
- 14 described in clause (a) above.
- 15 (d) Within a reasonable time after receiving the monthly Noncompliance Report,
- 16 ADOT will deliver to Developer a written notice setting forth:
- 17 (i) ADOT’s determination whether the Noncompliance Events reported as
- 18 cured were cured within the applicable cure periods; and
- 19 (ii) The Noncompliance Points and Noncompliance Charges to be assessed for
- 20 the Noncompliance Events that are not cured within the applicable cure
- 21 periods.

## 22 **19.2.2 Notification Initiated by ADOT**

23 If ADOT believes that a Noncompliance Event specified in the Noncompliance Event

24 Tables has occurred but has not been entered into the electronic database, ADOT may deliver to

25 Developer a Notice thereof, in writing or via electronic email. ADOT’s Notice shall describe the

26 Noncompliance Event, including its approximate location (if applicable).

## 27 **19.2.3 Cure Periods**

- 28 (a) Developer shall cure Noncompliance Events by the end of the applicable cure
- 29 periods set forth in the applicable Noncompliance Event Table.
- 30 (b) Except as provided otherwise in Section 19.3.3, for each Noncompliance Event
- 31 identified by the assessment category “A” in the Noncompliance Event Tables,
- 32 Developer’s cure period with respect to the Noncompliance Event shall be
- 33 deemed to start upon the date Developer first obtained knowledge or had reason
- 34 to know of the Noncompliance Event. For this purpose, if the Notice of the
- 35 Noncompliance Event is initiated by ADOT, Developer shall be deemed to first

1 obtain knowledge of the Noncompliance Event not later than the date of delivery  
2 of the Notice to Developer.

3 (c) For each Noncompliance Event identified by the assessment category “B” in the  
4 Noncompliance Event Tables, Developer’s initial cure period shall be deemed to  
5 start upon the date the Noncompliance Event occurred, regardless of whether  
6 ADOT has delivered a Notice to Developer.

7 (d) Each of the cure periods set forth in the Noncompliance Event Tables shall be the  
8 only cure period available to Developer for the corresponding Noncompliance  
9 Event, and shall control if it differs from any cure period that is set forth in Section  
10 21.1.2 and might otherwise apply to the Noncompliance Event.

#### 11 **19.2.4 Notification of Cure**

12 (a) When Developer determines it has cured any Noncompliance Event, Developer  
13 shall enter in the electronic database, as well as in the next monthly report, notice  
14 identifying the Noncompliance Event, stating that Developer has completed cure  
15 and briefly describing the cure, including any modifications to the Project  
16 Management Plan to protect against future, similar Noncompliance Events.  
17 Thereafter, ADOT will have the right, but not the obligation, to inspect and verify  
18 completion of the cure.

19 (b) ADOT may reject any Developer notice of cure if ADOT determines that Developer  
20 has not fully cured the Noncompliance Event. Upon making this determination,  
21 ADOT will deliver a written notice of rejection to Developer either in a separate  
22 writing or electronic mail. Any Dispute regarding rejection of cure may be resolved  
23 according to the Dispute Resolution Procedures.

#### 24 **19.3 Assessment of Noncompliance Points**

25 Upon notification of a Noncompliance Event, whether initiated by Developer under Section  
26 19.2.1 or ADOT under Section 19.2.2, ADOT may assess Noncompliance Points in accordance with  
27 Exhibit 14-1 (D&C Period Noncompliance Event Table) or Exhibit 14-2 (O&M Period  
28 Noncompliance Event Table), as applicable, and subject to the terms and conditions set forth in  
29 this Sections 19.3.

30 **19.3.1** Subject to Section 19.3.3, for each Noncompliance Event identified by the  
31 assessment category “A” in the Noncompliance Event Tables, if it is cured by the end of the first  
32 cure period, no Noncompliance Points shall be assessed; but if it is not cured by the end of the  
33 first cure period, the Noncompliance Points shall be assessed at the end of the first cure period,



1 and shall be assessed again at the end of each subsequent cure period, unless cured by the end  
2 of the subsequent cure period.

3 **19.3.2** For each Noncompliance Event identified by the assessment category “B” in the  
4 Noncompliance Event Tables, the Noncompliance Points shall first be assessed on the date the  
5 Noncompliance Event occurred (the start of the first cure period). Provided that the  
6 Noncompliance Event is not then cured, Noncompliance Points shall be assessed again at the end  
7 of the first and each subsequent cure period.

8 **19.3.3** If a Noncompliance Event that is listed in the D&C Period Noncompliance Event  
9 Table occurs, for which ADOT has initiated a Notice of determination pursuant to Section 19.2.2,  
10 and such Noncompliance Event is not subject to the special provisions set forth in Section 19.5,  
11 then ADOT may assess Noncompliance Points as if assessment category “B” applies even if the  
12 Noncompliance Event is identified by assessment category “A” in the applicable Noncompliance  
13 Event Table, provided that this Section 19.3.3 shall not apply to items 14.1-02, 14.1-07, 14.1-08,  
14 14.1-09, 14.1-13 (but only with respect to correcting any defective Work under the warranties),  
15 14.1-14 and 14.1-16 (but only with respect to temporary repair responses) of the D&C Period  
16 Noncompliance Event Table.

17 **19.3.4** Continuation of any Noncompliance Event identified by the assessment category  
18 “A” or “B” in the Noncompliance Event Tables beyond the initial cure period into subsequent  
19 cure periods shall be treated as a separate Noncompliance Event.

20 (a) With respect to a Noncompliance Event in assessment category “A”, a new cure  
21 period equal to the prior cure period shall commence upon expiration of the prior  
22 cure period, without necessity for further notice.

23 (b) With respect to a Noncompliance Event in assessment category “B”, successive  
24 new cure periods shall arise and each shall equal the initial cure period but shall  
25 be measured starting upon the later of (i) the expiration of the initial cure period  
26 or (ii) the date that Developer first obtained knowledge or had reason to know of  
27 the Noncompliance Event. For this purpose, if ADOT initiates Notice of the  
28 Noncompliance Event, Developer shall be deemed to first obtain knowledge of the  
29 Noncompliance Event not later than the date of delivery of the Notice to  
30 Developer. (For example, if the initial cure period is ten days and Developer first  
31 obtains knowledge of the Noncompliance Event 30 days after it occurs, then the  
32 initial cure period shall expire at ten days, the next separate Noncompliance Event  
33 shall take effect day 30 and initiate a new ten-day cure period ending day 40, and  
34 each successive Noncompliance Event and cure period shall take effect every ten  
35 days thereafter until cure.).

36 **19.3.5** To the extent that any breach or failure to perform obligations under the  
37 Contract Documents would cause simultaneous occurrence of more than one Noncompliance  
38 Event, ADOT may assess Noncompliance Points only with respect to the Noncompliance Event  
39 that carries the highest number of Noncompliance Points and each other Noncompliance Event

1 that simultaneously occurred as a result of the same breach or failure shall be disregarded;  
2 provided that nothing in this Section 19.3.5 shall be deemed to excuse Developer from diligently  
3 pursuing notification of any Noncompliance Event.

4 **19.3.6** Notwithstanding Section 19.3.5, nothing in this Agreement shall prevent the  
5 accrual of Noncompliance Points for both the occurrence of a Noncompliance Event and the  
6 failure to notify ADOT of the same Noncompliance Event in accordance with this Agreement.

7 **19.3.7** The number of points listed in the Noncompliance Event Tables for any particular  
8 Noncompliance Event, as such number of points may be adjusted pursuant to Section 19.1.2, is  
9 the maximum number of Noncompliance Points that may be assessed for each occurrence or  
10 circumstance that constitutes a Noncompliance Event. ADOT may, but is not obligated to, assess  
11 less than the maximum number of points.

12 **19.3.8** Noncompliance Charges shall be assessed against and payable by Developer in  
13 accordance with Section 22.4.

14 **19.3.9** Regardless of the continuing assessment of Noncompliance Points under this  
15 Section 19.3, ADOT will be entitled to exercise its step-in rights in accordance with Section 21.5  
16 and, if applicable, its work suspension rights in accordance with Section 20, after expiration of  
17 the initial cure period available to Developer.

18 **19.3.10** Upon either Party's request at any time after ADOT has assessed Noncompliance  
19 Points three or more successive times for failure to cure the same occurrence or circumstance  
20 that constitutes a Noncompliance Event, the Parties will meet and confer to discuss the  
21 occurrence or circumstance and measures to mitigate continuation of such assessments and to  
22 effect cure. This provision shall not be construed to imply that ADOT is obligated to waive the  
23 Noncompliance Event or Developer's obligation to cure.

24 **19.4 Trigger Points for Persistent Developer Default**

25 **19.4.1** A "Persistent Developer Default", entitling ADOT to require submittal of  
26 Developer's remedial plan under Section 21.2.3, shall exist on any date when:

- 27 (a) 60 Noncompliance Points have been assessed in any consecutive 365-day period  
28 during the D&C Period;
- 29 (b) 80 Noncompliance Points have been assessed in any consecutive 720-day period  
30 during the D&C Period;
- 31 (c) 60 Noncompliance Points have been assessed in any consecutive 365-day period  
32 during the O&M Period; or
- 33 (d) 80 Noncompliance Points have been assessed in any consecutive 720-day period  
34 during the O&M Period.

1           **19.4.2** The number of Noncompliance Points that would otherwise be counted under  
2 Section 19.4.1 is subject to reduction in accordance with Section 21.2.3(c).

3 **19.5 Special Provisions for Certain Noncompliance Events**

4           **19.5.1** This Section 19.5 applies only to a Noncompliance Event that has an assessment  
5 category of “A” or “B,” as set forth in the Noncompliance Event Tables and is directly attributable  
6 to:

- 7           (a) A Relief Event;
- 8           (b) A traffic accident on the Project ROW not caused by a Developer Act; or
- 9           (c) Unexpected loss, disruption, break, explosion, leak or other damage of a Utility  
10 serving or in the vicinity of the Project but not within the maintenance  
11 responsibility of Developer.

12           **19.5.2** If a Noncompliance Event set forth in Section 19.5.1 occurs, then:

- 13           (a) The applicable cure period shall be extended if the Noncompliance Event is not  
14 reasonably capable of being cured within the applicable cure period due solely to  
15 an occurrence set forth in Section 19.5.1. The extension shall be for a reasonable  
16 period of time under the circumstances, taking into account the scope of the  
17 efforts necessary to cure, the effect of such occurrence on Developer’s ability to  
18 cure, availability of temporary remedial measures, and need for rapid action due  
19 to impact of the Noncompliance Event on safety or traffic movement;
- 20           (b) The Noncompliance Event shall not be counted toward a Persistent Developer  
21 Default for purposes of Section 19.4, provided the Noncompliance Event is cured  
22 within the applicable cure period, as it may be extended pursuant to clause (a)  
23 above;
- 24           (c) Regardless of which Party initiates notification of the Noncompliance Event, no  
25 Noncompliance Points shall be assessed if Developer cures such Noncompliance  
26 Event within the applicable cure period provided or extended pursuant to clause  
27 (a) above; and
- 28           (d) The Noncompliance Event shall not result in Noncompliance Charges under  
29 Section 22.4 if the Noncompliance Event is cured within the applicable cure  
30 period, as it may be extended pursuant to clause (a) above.

1 **19.6 Special Provisions for ADOT Step-in**

2 **19.6.1** If ADOT exercises a suspension right under Section 20 or a step-in right under  
3 Section 21.5, with respect to any portion of the Project (the “**affected Project portion**”), then:

4 (a) During the period that ADOT is in control of the Work for the affected Project  
5 portion (the “**step-in or suspension period**”), neither the condition of the affected  
6 Project portion nor the performance of or failure to perform Work respecting the  
7 affected Project portion shall result in a new Noncompliance Event, assessment of  
8 new Noncompliance Points or new Noncompliance Charges under Section 22.4;

9 (b) All cure periods that are available for Noncompliance Events respecting the  
10 affected Project portion and that arose prior to and are pending as of the date the  
11 step-in or suspension period commences shall be deemed forfeited by Developer;

12 (c) During the step-in or suspension period for the affected Project portion, Section  
13 19.3.4 shall not be applied to Noncompliance Events that arose prior to the date  
14 such step-in or suspension period commences; and

15 (d) The step-in or suspension period for the affected Project portion shall be  
16 disregarded for purposes of determining a Persistent Developer Default under  
17 Section 19.4. For avoidance of doubt, this means that (i) such step-in or suspension  
18 period shall not be included in counting the consecutive time periods set forth in  
19 Section 19.4 and (ii) such consecutive time periods shall be treated as consecutive  
20 notwithstanding the intervening step-in or suspension period.

21 **19.7 Provisions Regarding Dispute Resolution**

22 **19.7.1** Developer may object to the assessment of Noncompliance Points or the starting  
23 point for or duration of the cure period respecting any Noncompliance Event by delivering to  
24 ADOT written notice of such objection not later than five days after ADOT delivers its  
25 corresponding notice of determination. Such notice also shall constitute notice for purposes of  
26 Section 24.2.

27 **19.7.2** Developer may object to ADOT’s rejection of any notification of completion of a  
28 cure given pursuant to Section 19.2.4(b) by delivering to ADOT written Notice of such objection  
29 not later than 15 days after ADOT delivers its Notice of rejection. Such Notice also shall constitute  
30 Notice for purposes of Section 24.2.

31 **19.7.3** If for any reason Developer fails to deliver its Notice of objection within the  
32 applicable time periods set forth in Sections 19.7.1 and 19.7.2, Developer shall be conclusively

1 deemed to have accepted the matters set forth in the applicable Notice from ADOT, and shall be  
2 forever barred from challenging them.

3 **19.7.4** If Developer gives timely written Notice of objection, either Party may refer the  
4 matter for resolution according to the Dispute Resolution Procedures.

5 **19.7.5** In the case of any Dispute as to the number of Noncompliance Points to assign  
6 for Noncompliance Events added to the Noncompliance Event Tables, the sole issue for  
7 resolution shall be how many Noncompliance Points should be assigned in comparison with the  
8 number of Noncompliance Points set forth in the Noncompliance Event Tables for  
9 Noncompliance Events of equivalent severity.

10 **19.7.6** Pending resolution of any Dispute arising under this Section 19.7, the provisions  
11 of this Section 19 shall take effect as if ADOT's determinations were not in Dispute. If the final  
12 decision regarding the Dispute is that (a) the Noncompliance Points should not have been  
13 assessed, (b) the number of Noncompliance Points must be adjusted, (c) the starting point or  
14 duration of the cure period must be adjusted, or (d) a Noncompliance Event has been cured, then  
15 the number of Noncompliance Points assigned or assessed, the Noncompliance Points balance  
16 and the related liabilities of Developer shall be adjusted to reflect such decision.

17 **19.7.7** For the purpose of determining whether ADOT may declare an Event of Default  
18 under clause (q) of Section 21.1.1 for failure to timely submit or comply with the remedial plan,  
19 the number of Noncompliance Points in Dispute:

20 (a) Shall not be counted pending resolution of the Dispute if Developer delivers  
21 Notice of objection within the applicable time limit set forth in Section 19.7.1 or  
22 19.7.2; and

23 (b) Shall be counted if Developer for any reason does not deliver Notice of objection  
24 within the applicable time limit set forth in Section 24.2, or does not diligently  
25 pursue Dispute Resolution Procedures to conclusion (and in any such case  
26 Developer shall be deemed to have irrevocably waived the Dispute).

27 **19.7.8** Any Noncompliance Charges determined to be due pursuant to the Dispute  
28 Resolution Procedures shall be paid within 20 days following the resolution of the Dispute,  
29 together with interest thereon.  
30



- 1 (f) Failure to carry out and comply with Directive Letters, where such failure is not  
2 cured within 15 days after ADOT delivers written notice thereof to Developer;
- 3 (g) Failure to replace or remove personnel as set forth in Sections 11.6 and 11.8.2, as  
4 applicable, where such failure is not cured within 30 days after ADOT delivers  
5 written notice thereof to Developer;
- 6 (h) Failure to provide proof of required insurance coverage as set forth in Section  
7 13.1.15 (and ADOT shall have the right to suspend for such failure following a  
8 written request rather than notice of a Developer Default as set forth in Section  
9 13.1.5(c));
- 10 (i) Any additional failure to perform the Work in compliance with, or other breach of,  
11 the Contract Documents, except for Noncompliance Events while there is no  
12 ongoing Persistent Developer Default, where such failure is not cured within 15  
13 days after ADOT delivers notice thereof to Developer;
- 14 (j) Failure to deliver or maintain the D&C Payment Bond, D&C Performance Bond,  
15 O&M Performance Bond, O&M Payment Bond and any other bonds or other  
16 security required hereunder;
- 17 (k) Failure to comply with any provision of the Construction Quality Management  
18 Plan, Professional Services Quality Management Plan or Operations and  
19 Maintenance Quality Management Plan, where such failure is not cured within 15  
20 days after ADOT delivers written notice thereof to Developer;
- 21 (l) If at any time ADOT gives Developer notice of ADOT's determination that  
22 Developer is in violation of any of its DBE or OJT commitments and obligations,  
23 that Developer's DBE or OJT utilization and Good Faith Efforts to meet the DBE  
24 Goals or OJT Goals are inconsistent with Developer's DBE or OJT commitments  
25 and obligations, or that Developer is failing to undertake Good Faith Efforts with  
26 respect to either the DBE Goals or OJT Goals, and the matter is not cured or the  
27 determination is not reversed upon any administrative reconsideration pursuant  
28 to Section 21.6.1(c); or
- 29 (m) If, at any time during the D&C Work, Developer does not have on Site a Quality  
30 Manager who has been approved by ADOT.

31 **20.2.2** Developer shall promptly comply with any such suspension order, even if  
32 Developer disputes the grounds for suspension. ADOT will lift the suspension order promptly  
33 after Developer fully cures and corrects the applicable breach or failure to perform or all other  
34 reasons for the suspension order permanently cease to exist. Developer shall promptly  
35 recommence the Work upon receipt of notice from ADOT directing Developer to resume work.

1           **20.2.3** ADOT will have no liability to Developer, and Developer shall have no right to any  
2 increase in the Contract Price or Completion Deadline adjustment in connection with any  
3 suspension of Work properly founded on any of the grounds set forth in Section 20.2.1. If ADOT  
4 orders suspension of Work on one of the foregoing grounds but it is finally determined under the  
5 Dispute Resolution Procedures that such grounds did not exist, the suspension shall be treated  
6 as a suspension for ADOT’s convenience under Section 20.1, and the amount of any  
7 compensation or Completion Deadline adjustment may be determined by the Dispute Resolution  
8 Procedures without the need to comply with the Relief Event claims process set forth in  
9 Section 16.

10   **20.3 Responsibilities of Developer during Suspension Periods**

11 During periods in which Work is suspended, whether partially or entirely, Developer shall make  
12 passable, place in a maintainable condition and shall open to traffic such portions of the Project  
13 and temporary roadways as may be agreed upon between ADOT and Developer for temporary  
14 accommodation of traffic during the anticipated period of suspension. Additionally, if ADOT does  
15 not suspend the Work in its entirety, Developer shall continue other Work that has been and can  
16 be performed at the Site or off the Site during the period a portion of the Work is suspended.  
17





- 1 owing to ADOT under this Agreement;
- 2 (i) Developer fails to timely observe or perform or cause to be observed or performed  
3 any other covenant, agreement, obligation, term or condition required to be  
4 observed or performed by Developer under the Contract Documents;
- 5 (j) Any representation or warranty in the Contract Documents made by Developer or  
6 any Guarantor, or any certificate, schedule, report, instrument or other document  
7 delivered by or on behalf of Developer to ADOT pursuant to the Contract  
8 Documents is false or materially misleading or inaccurate when made or omits  
9 material information when made;
- 10 (k) Any Insolvency Event occurs with respect to:
- 11 (i) Developer; or
- 12 (ii) The Lead Contractor, Lead O&M Firm or any Guarantor unless Developer  
13 enters into a replacement contract or a replacement Guaranty with a  
14 reputable and financially sound entity reasonably acceptable to ADOT  
15 within 90 days of the inception of the Insolvency Event.
- 16 (l) Any Guarantor revokes or attempts to revoke its obligations under its Guaranty or  
17 otherwise takes the position that its Guaranty is no longer in full force and effect;
- 18 (m) Any Key Subcontract is terminated (other than a non-default termination on the  
19 scheduled termination thereof) and Developer has not entered into a replacement  
20 Key Subcontract with a reputable counterparty reasonably acceptable to ADOT  
21 within 90 days after the termination of such Key Subcontract;
- 22 (n) Whether in connection with the Project or otherwise, any final judgment is issued  
23 holding Developer or any Guarantor liable for an amount in excess of \$100,000  
24 based on a finding of intentional or reckless misconduct or violation of a state or  
25 federal false claims act;
- 26 (o) Developer fails to resume performance that has been suspended or stopped,  
27 within the time specified in the originating notification after receipt of notice from  
28 ADOT to do so, or (if applicable) after cessation of the event preventing  
29 performance;
- 30 (p) After exhaustion of all rights of appeal, there occurs any disqualification,  
31 suspension or debarment (distinguished from ineligibility due to lack of financial  
32 qualifications), or there goes into effect an agreement for voluntary exclusion,  
33 from bidding, proposing or contracting with any federal or State department or  
34 agency of (i) Developer, (ii) any affiliate of Developer (as “affiliate” is defined in 29  
35 C.F.R. § 16.105 or successor regulation of similar import), (iii) any Equity Member  
36 or (iv) any Key Subcontractor whose work is not completed;

- 1 (q) There occurs any Persistent Developer Default, ADOT delivers to Developer notice  
 2 of the Persistent Developer Default, and either: (i) Developer fails to deliver to  
 3 ADOT, within 15 days after such notice is delivered, a remedial plan meeting the  
 4 requirements for approval set forth in Section 21.2.3; or (ii) Developer fails to fully  
 5 comply with the schedule or specific elements of, or actions required under, the  
 6 approved remedial plan;
- 7 (r) Except as expressly permitted or excused under this Agreement, the Technical  
 8 Provisions or the ADOT-approved Transportation Management Plan, there occurs  
 9 any Closure;
- 10 (s) Developer fails to comply with ADOT's written suspension of Work order issued in  
 11 accordance with Section 20.2.1 within the time stated in such order; or
- 12 (t) There occurs any use of the Project or any portion thereof in violation of this  
 13 Agreement, the Technical Provisions, Governmental Approvals or Laws (except  
 14 violations of Law by Persons other than Developer-Related Entities).

15 **21.1.2 Notice and Opportunity to Cure**

16 For Developer breaches or failures listed in the Noncompliance Event Tables, the cure  
 17 periods set forth therein shall exclusively govern for the sole purpose of assessing Noncompliance  
 18 Points and Noncompliance Charges. For the purpose of ADOT's exercise of other remedies, and  
 19 subject to remedies that this Section 21 expressly states may be exercised before lapse of a cure  
 20 period, Developer shall have the following cure periods with respect to the following Developer  
 21 Defaults:

- 22 (a) Respecting a Developer Default under clauses (q) and (s) of Section 21.1.1, a  
 23 period of five days after ADOT delivers to Developer written notice of the  
 24 Developer Default;
- 25 (b) Respecting a Developer Default under clauses (a), (d), (f), (g), (h) and (o) of Section  
 26 21.1.1, a period of 15 days after ADOT delivers to Developer notice of the  
 27 Developer Default; provided, however, that with respect to a Developer Default  
 28 under clause (f) of Section 21.1.1:
- 29 (i) ADOT will have the right, but not the obligation, to effect cure, at  
 30 Developer's expense, if such Developer continues beyond five days after  
 31 such notice is delivered; and
- 32 (ii) Developer may effect a temporary cure of failure to deliver replacement  
 33 Project Bonds, and obtain an additional 120 days to effect full cure, by  
 34 providing interim security as and when provided in Section 21.5.2;
- 35 (c) Respecting a Developer Default under clauses (c), (e), (i), (j), (p) and (t) of Section  
 36 21.1.1, a period of 30 days after ADOT delivers to Developer notice of the

1 Developer Default; provided, however, that:

2 (i) if the Developer Default is of such a nature that the cure cannot with  
3 diligence be completed within such time period and Developer has  
4 commenced meaningful steps to cure immediately after receiving the  
5 default notice, Developer shall have such additional period of time, up to  
6 a maximum cure period of 60 days (90 days in the case of a Developer  
7 Default under clause (p)), as is reasonably necessary to diligently effect  
8 cure; and

9 (ii) as to clause (i) of Section 21.1.1, cure will be regarded as complete when  
10 the adverse effects of the breach are remedied; and

11 (d) Respecting a Developer Default under clauses (b), (k), (l), (m), (n) and (r) of Section  
12 21.1.1, no cure period, and there shall be no right to notice of such Developer  
13 Default.

### 14 **21.1.3 Declaration of Event of Default**

15 If any event or condition described in Section 21.1.1 occurs and is either not subject to  
16 cure or is not cured within the period specified in Section 21.1.2, ADOT may declare that an  
17 “**Event of Default**” has occurred and provide a written notice to Developer to the extent required  
18 under Section 21.1.2.

## 19 **21.2 ADOT Remedies for Developer Default**

### 20 **21.2.1 Termination for Default**

21 ADOT shall have the right to terminate for Developer Default that is or becomes an Event  
22 of Default in accordance with Section 26.5.

### 23 **21.2.2 Other Remedies**

24 (a) With or without termination of this Agreement, Developer shall owe and pay to  
25 ADOT, and ADOT shall otherwise be entitled to deduct from payments it owes to  
26 Developer, all reimbursements owing, Liquidated Damages, amounts ADOT  
27 deems advisable to cover any existing or threatened claims and stop notices of  
28 Subcontractors, laborers or other Persons, amounts of any Losses that have  
29 accrued, the cost to complete or remediate uncompleted Work or Nonconforming  
30 Work, interest under this Agreement, and other damages and amounts that ADOT  
31 has determined are or may be payable to ADOT under the Contract Documents.

32 (b) ADOT may (i) appropriate any or all materials, supplies and equipment on the Site,  
33 (ii) direct the Surety to complete the Work, (iii) enter into an agreement for the  
34 completion of the Work or portion thereof according to the terms and provisions  
35 hereof with another contractor or Surety, or (iv) use such other methods as may

1 be required for the completion of the Work and the requirements of the Contract  
2 Documents, including completion of the Work by ADOT.

3 (c) ADOT will have the right, but not the obligation, to pay such amount or perform  
4 such act as may then be required from Developer under the Contract Documents  
5 or Subcontracts. If ADOT exercises any right to perform any obligations of  
6 Developer, ADOT may, but is not obligated to, among other things:

7 (1) Perform or attempt to perform, or cause to be performed, the  
8 remaining Work;

9 (2) Spend such sums as ADOT deems necessary to employ and pay  
10 such architects, engineers, consultants and contractors and obtain  
11 materials and equipment as may be required for the purpose of  
12 completing the Work;

13 (3) Execute all applications, certificates and other documents as may  
14 be required for completing the Work;

15 (4) Modify or terminate any contractual arrangements;

16 (5) Take any and all other actions that it may in its good faith discretion  
17 consider necessary to complete the Work; and

18 (6) Prosecute and defend any action or proceeding incident to the  
19 Work.

20 (d) Developer and each Guarantor shall be jointly and severally liable to ADOT for all  
21 costs reasonably incurred by ADOT or any Person acting on ADOT's behalf in  
22 completing the Work or having the Work completed by another Person (including  
23 any re-procurement costs, throw away costs for unused portions of the completed  
24 Work and any financing costs). ADOT will be entitled to withhold all or any portion  
25 of further payments to Developer until such time as ADOT is able to determine (i)  
26 the amount that remains payable to Developer (if any) and (ii) the amount payable  
27 by Developer to ADOT in connection with ADOT's damages and Claims against  
28 Developer-Related Entities or as otherwise required by the Contract Documents.  
29 ADOT will determine the total cost of all completed Work and will notify Developer  
30 and each Guarantor of the amount, if any, that Developer and each Guarantor, as  
31 applicable, shall pay ADOT or ADOT will pay Developer or its Surety with respect  
32 thereto. ADOT's Recoverable Costs will be deducted from any moneys due or  
33 which may become due to Developer or its Surety. If ADOT's Recoverable Costs  
34 exceeds the sum then payable to Developer under this Agreement, then  
35 Developer and each Guarantor shall be jointly and severally liable therefor and  
36 shall pay to ADOT the amount of such excess.

1 (e) In lieu of the provisions of this Section 20.2.2 for terminating this Agreement for  
2 an Event of Default and completing the Work, ADOT may, in its sole discretion,  
3 pay Developer for the portion of the Work already done according to the  
4 provisions of the Contract Documents and ADOT may treat the remaining Work as  
5 if it had never been included in, or contemplated by, this Agreement. No Claim  
6 under this clause (e) will be allowed for prospective profits on, or any other  
7 compensation relating to, the remaining Work uncompleted by Developer.

8 **21.2.3 Remedial Plan Delivery and Implementation Upon Persistent Developer**  
9 **Default**

10 (a) Developer recognizes, agrees and acknowledges that the measures for  
11 determining the existence of a Persistent Developer Default under Section 19.4.1  
12 are a fair and appropriate objective basis to conclude that (i) there is a pattern and  
13 practice of continuing, repeated and numerous Noncompliance Events and (ii)  
14 such pattern and practice will have a material, cumulative adverse impact on the  
15 value of this Agreement to ADOT if systematic changes in Developer's  
16 performance are not implemented.

17 (b) Upon the occurrence of a Persistent Developer Default in accordance with Section  
18 19.4, Developer shall, within 30 days after notice of the Persistent Developer  
19 Default, prepare and submit a remedial plan for ADOT approval in its good faith  
20 discretion. The remedial plan shall set forth a schedule and specific actions to be  
21 taken by Developer to improve its performance, reduce the number, frequency  
22 and severity of Noncompliance Events, and reduce the assessment of  
23 Noncompliance Points to the point that such Persistent Developer Default will not  
24 continue. ADOT may require that such actions include improving Developer's  
25 quality management practices, plans and procedures, revising and restating the  
26 Project Management Plan, changing organizational and management structure,  
27 increasing monitoring and inspections, changing Key Personnel and other  
28 important personnel, replacing Subcontractors, and delivering additional security  
29 to ADOT.

30 (c) If (i) Developer complies in all material respects with the schedule and specific  
31 elements of, and actions required under, the approved remedial plan; (ii) as a  
32 result of Developer satisfying paragraph (i), ADOT reduces the Noncompliance  
33 Points in accordance with Section 19.4 to the point that such Persistent Developer  
34 Default is no longer ongoing; and (iii) as of the date it satisfies the requirements  
35 in (i) and (ii), there exist no other uncured Developer Defaults for which a Notice  
36 was given, then ADOT will reduce the number of Noncompliance Points that would  
37 otherwise then be counted toward Persistent Developer Default by 25%. Such  
38 reduction shall be taken from the earliest assessed Noncompliance Points that  
39 would otherwise then be counted toward Persistent Developer Default.

40 (d) Developer's failure to deliver to ADOT the required remedial plan within such 30-

1 day period shall constitute a material Developer Default that may result in ADOT’s  
2 issuance of a Notice of Developer Default triggering a five-day cure period. Failure  
3 to comply in any material respect with the schedule or specific elements of, or  
4 actions required under, the remedial plan shall constitute a material Developer  
5 Default that may result in ADOT’s issuance of a Notice of Developer Default  
6 triggering a 30-day cure period. If either of the events remains uncured within the  
7 period specified in this clause (d), then ADOT may declare that an Event of Default  
8 has occurred in accordance with Section 21.1.3.

9 **21.2.4 Developer Defaults Related to Safety**

10 (a) Notwithstanding anything to the contrary in this Agreement, if in the good faith  
11 judgment of ADOT, a Developer Default results in an Emergency or danger to  
12 persons or property, and if Developer is not then diligently taking all necessary  
13 steps to rectify or mitigate such Emergency or danger, ADOT may, without notice  
14 and without awaiting lapse of the period to cure any breach, and in addition and  
15 without prejudice to its other remedies, but is not obligated to:

16 (i) Immediately take such action as may be reasonably necessary to rectify or  
17 mitigate the Emergency or danger, in which event Developer shall pay to  
18 ADOT on demand the cost of such action, including ADOT’s Recoverable  
19 Costs; or

20 (ii) Suspend the Work or close or cause to be closed any and all portions of  
21 the Project affected by the Emergency or danger.

22 (b) So long as ADOT undertakes such action in good faith, even if under a mistaken  
23 belief in the occurrence of such Developer Default or existence of an Emergency  
24 or danger as a result thereof, such action shall not be deemed unlawful or a breach  
25 of this Agreement, shall not expose ADOT to any liability to Developer and shall  
26 not entitle Developer to an increase in the Contract Price, Completion Deadline  
27 adjustment or other Claim, it being acknowledged that ADOT has a high priority,  
28 paramount public interest in protecting the public and worker safety at the Project  
29 and the adjacent and connecting areas.

30 (c) ADOT’s good faith determination of the existence of such a failure, Emergency or  
31 danger shall be deemed conclusive in the absence of clear and convincing  
32 evidence to the contrary.

33 (d) Immediately following rectification or mitigation of such Emergency or danger, as  
34 determined by ADOT, ADOT will allow the Work to continue or such portions of  
35 the Project to reopen, as the case may be.

1           **21.2.5 Damages; Offset**

2           (a)     Subject to Section 22, ADOT will be entitled to recover any and all damages  
3           available at Law for any and all causes of action ADOT may have against Developer,  
4           including for the damages caused by a Developer Default. Developer shall owe any  
5           such damages that accrue after the occurrence of the Developer Default  
6           regardless of whether the Developer Default is subsequently cured or ripens into  
7           an Event of Default.

8           (b)     Subject to Section 22.1.2, ADOT’s notification of a Developer Default, ADOT’s  
9           declaration of an Event of Default, or any action taken by ADOT under this Section  
10           21.2 shall not relieve Developer, Sureties and Guarantors of their respective  
11           liability for the Liquidated Damages which continue to accrue after such  
12           notification, declaration or action.

13           (c)     ADOT’s remedies with respect to Nonconforming Work shall include the right to  
14           accept such Work and receive payment as provided in Section 8.7 in lieu of the  
15           remedies specified in this Section 21.2.

16           (d)     Where this Agreement is not terminated, damages include:

17                   (i)     Costs ADOT incurs to complete the D&C Work in excess of the D&C Price;

18                   (ii)    Compensation and reimbursements due but unpaid to ADOT under the  
19                   Contract Documents;

20                   (iii)   Costs to remedy any defective part of the Work; and

21                   (iv)   Costs to rectify any breach or failure to perform by Developer or to bring  
22                   the condition of the Project to that required by the Contract Documents.

23           (e)     If the amount of damages ADOT incurs in relation to any Developer Default or  
24           Event of Default is not liquidated or known with certainty at the time a payment  
25           is due from ADOT to Developer, ADOT may withhold, deduct and offset up to 105%  
26           of the amount it reasonably estimates will be due, subject to ADOT’s obligation to  
27           adjust such withholding, deduction or offset when the amount of damages owing  
28           to ADOT is liquidated or becomes known with certainty.

29           **21.2.6 Resort to Performance Security**

30           Upon the occurrence of an Event of Default, without waiving or releasing Developer from  
31           any obligations, ADOT will be entitled to make demand upon and enforce any Project Bond, and  
32           make demand upon, draw on and enforce and collect any letter of credit, Guaranty or  
33           performance security available to ADOT under this Agreement with respect to the Event of  
34           Default in question in any order in ADOT’s sole discretion. If ADOT suffers damages due to an  
35           Event of Default, ADOT will be entitled to make demand, draw, enforce and collect regardless of



1 whether the Event of Default is subsequently cured. ADOT will apply the proceeds of any such  
2 action to the satisfaction of Developer’s obligations under this Agreement, including payment of  
3 amounts due to ADOT. The foregoing does not limit or affect ADOT’s right to give notice to or  
4 make demand upon and enforce any Project Bond, and make demand upon, draw on and enforce  
5 and collect any letter of credit, Guaranty or other performance security, immediately after ADOT  
6 is entitled to do so under the Project Bond, letter of credit, Guaranty or other performance  
7 security. No prior Notice from ADOT shall be required if it would preclude draw on the Project  
8 Bond, letter of credit, Guaranty or other payment or performance security before its expiration  
9 date.

10 **21.2.7 Other Rights and Remedies; Cumulative Remedies**

11 Subject to Sections 22.9 and 22.10:

- 12 (a) ADOT will also be entitled to exercise any other rights and remedies available  
13 under this Agreement, or available at Law or in equity;
- 14 (b) Each right and remedy of ADOT hereunder shall be cumulative and shall be in  
15 addition to every other right or remedy provided herein or now or hereafter  
16 existing at law or in equity or by statute or otherwise; and
- 17 (c) The exercise or beginning of the exercise by ADOT of any one or more of any of  
18 such rights or remedies shall not preclude the simultaneous or later exercise by  
19 ADOT of any or all other such rights or remedies.

20 **21.3 Event of Default Due Solely to Developer’s Failure to Achieve Completion Deadlines**

21 **21.3.1** If an Event of Default consists solely of Developer’s failure to achieve Project  
22 Substantial Completion or Final Acceptance by the applicable Completion Deadline, then ADOT  
23 agrees not to terminate or seek damages respecting the delay except its right to Liquidated  
24 Damages so long as (a) the ADOT-approved Project Schedule (incorporating any ADOT-approved  
25 Recovery Schedule) demonstrates that Developer is capable of meeting such Completion  
26 Deadline within 270 days of the Project Substantial Completion Deadline or 120 days of the Final  
27 Acceptance Deadline, as applicable, and (b) Developer diligently performs the Work in  
28 accordance with such schedule. Nothing in this Section 21.3 shall prejudice any other rights or  
29 remedies that ADOT may have due to any other Event of Default during such 270-day period or  
30 120-day period, as applicable.

31 **21.3.2** If Project Substantial Completion or Final Acceptance of the Project has not  
32 occurred within 270 days or 120 days, respectively, of the applicable Completion Deadline, ADOT  
33 will have the right to exercise any other right or remedy under this Agreement, at law or in equity,  
34 including termination of this Agreement.

1 **21.4 Immediate ADOT Entry to Cure Wrongful Use or Closure**

2 **21.4.1** Without prior notice and without awaiting lapse of the period to cure, if any  
3 Developer Default occurs under Section 21.1.1(r) or (t), ADOT may enter and take control of the  
4 relevant portion of the Project to reopen and continue traffic operations or remedy the wrongful  
5 use for the benefit of the public and restore the permitted uses, until such time as such Developer  
6 Default is cured or ADOT terminates this Agreement.

7 **21.4.2** Developer shall pay to ADOT on demand ADOT’s Recoverable Costs in  
8 connection with ADOT’s exercise of its rights under Section 21.4.1.

9 **21.4.3** So long as ADOT undertakes such action in good faith, even if under a mistaken  
10 belief in the occurrence of such a Developer Default, ADOT’s action shall not be deemed unlawful  
11 or a breach of this Agreement, shall not subject ADOT to any liability to Developer, and shall not  
12 entitle Developer to any increase in the Contract Price, Completion Deadline adjustment or other  
13 Claim, unless ADOT’s action constitutes gross negligence, recklessness or willful misconduct.  
14 Developer acknowledges that ADOT has a high priority, paramount public interest in maintaining  
15 continuous public access to the Project and maintaining the authorized uses of the Project.  
16 ADOT’s good faith determination that such action is needed shall be deemed conclusive in the  
17 absence of clear and convincing evidence to the contrary.

18 **21.4.4** Immediately following rectification of such Developer Default, as determined by  
19 ADOT, ADOT will relinquish control of the relevant portion of the Project back to Developer.

20 **21.5 ADOT Step-in Rights**

21 **21.5.1** Without necessity for declaration of an Event of Default, ADOT may exercise its  
22 step-in rights on the terms and conditions set forth in this Section 21.5:

- 23 (a) If a Developer Default has occurred; and  
24 (b) If the cure period, if any, available to Developer under Section 21.1.2, has expired  
25 without full and complete cure by Developer.

26 **21.5.2** ADOT will have the right, but not the obligation, to pay, perform and enter into  
27 an agreement with another Person to perform, all or any portion of Developer's obligations and  
28 the Work that are the subject of such Developer Default, as well as any other then-existing  
29 Developer Defaults or failures to perform for which Developer received prior written Notice from  
30 ADOT but has not commenced or does not continue diligent efforts to cure. Exercise of such  
31 ADOT’s rights shall not waive or release Developer from any obligations.

32 **21.5.3** ADOT may, to the extent reasonably required for or incident to curing such  
33 Developer Default or any other Developer Defaults or failures to perform:

- 34 (a) Perform or attempt to perform, or caused to be performed, such Work;

- 1 (b) Employ security guards and other safeguards to protect the Project;
- 2 (c) Incur such costs as ADOT deems reasonably necessary to employ and pay such  
3 architects, engineers, consultants and contractors and obtain materials and  
4 equipment as may be required to perform such Work, without obligation or  
5 liability to Developer or any Subcontractors for loss of opportunity to perform  
6 such Work or supply the same materials and equipment;
- 7 (d) In accordance with Section 21.2.6, draw on and use proceeds from the Project  
8 Bonds and any other available security to the extent such instruments provide  
9 recourse to pay such sums;
- 10 (e) Execute all applications, certificates and other documents as may be required;
- 11 (f) Make decisions respecting, assume control over, and continue, such Work as may  
12 be reasonably required;
- 13 (g) Modify or terminate any contractual arrangements in ADOT's good faith  
14 discretion, without liability on the part of ADOT for termination fees, costs or  
15 other charges;
- 16 (h) Meet with, coordinate with, direct and instruct contractors and suppliers, process  
17 invoices and applications for payment from contractors and suppliers, pay  
18 contractors and suppliers, and resolve claims of contractors, Subcontractors and  
19 suppliers, and for this purpose Developer irrevocably appoints ADOT as its  
20 attorney-in-fact with full power and authority to act for and bind Developer in its  
21 place and stead for the duration of the Term;
- 22 (i) Take any and all other actions it may in its good faith discretion consider necessary  
23 to effect cure and perform such Work; and
- 24 (j) Prosecute and defend any action or proceeding incident to such Work.

25 **21.5.4** Developer shall reimburse ADOT, within 30 days of receiving an invoice, for  
26 ADOT's Recoverable Costs in connection with the performance of any act or Work permitted  
27 under this Section 21.5. In lieu of reimbursement, ADOT may elect, in its sole discretion, to deduct  
28 such amounts from any amounts payable to Developer under this Agreement. Developer  
29 acknowledges that amounts owing from Developer to ADOT as Noncompliance Charges are not  
30 intended to liquidate or reimburse ADOT's Recoverable Costs.

31 **21.5.5** Neither ADOT nor any of its Authorized Representatives, contractors,  
32 subcontractors, vendors and employees shall be liable to Developer in any manner for any  
33 inconvenience or disturbance arising out of its entry onto the Project, Project ROW or  
34 Developer's Temporary Work Areas in exercising its rights under this Section 21.5, unless caused  
35 by the gross negligence, recklessness, intentional misconduct or bad faith of such Person. If any  
36 Person exercises any right to pay or perform under this Section 21.5, it nevertheless shall have

1 no liability to Developer for the sufficiency or adequacy of any such payment or performance, or  
2 for the manner or quality of design, construction, operation or maintenance, unless caused by  
3 the gross negligence, recklessness, intentional misconduct or bad faith of such Person.

4 **21.5.6** ADOT’s rights under this Section 21.5 are subject to the right of any Surety under  
5 payment and performance bonds to assume performance and completion of all bonded work.

6 **21.5.7** In the event ADOT takes action described in this Section 21.5 and it is later finally  
7 determined that there did not occur such Developer Default and expiration, without full and  
8 complete cure, of the cure period, if any, available to Developer, then ADOT’s action shall be  
9 treated as a Directive Letter for an ADOT-Directed Change. Developer shall comply with the Relief  
10 Event claims process under Section 16 if Developer seeks a Compensation Amount, a Completion  
11 Deadline adjustment or to assert any other Claim arising therefrom.

## 12 **21.6 DBE and OJT Special Remedies**

13 **21.6.1** Notwithstanding any contrary provision in any other Section of this Section 21,  
14 if ADOT determines at any time that Developer is in violation of any of its DBE or OJT  
15 commitments and obligations, or that Developer is not making Good Faith Efforts with respect  
16 to the DBE Goals or OJT Goals, then:

17 (a) ADOT may require Developer to submit in writing a proposed corrective plan for  
18 ADOT’s approval, and Developer shall diligently undertake the approved  
19 corrective action;

20 (b) If Developer does not submit such corrective plan within ten Business Days of  
21 request, if the corrective plan is disapproved as inadequate, or if Developer fails  
22 to diligently carry out the approved corrective plan, then ADOT will have the right  
23 to withhold (i) in the case of DBE, 1% of progress payments, until cure, and (ii) in  
24 the case of OJT, \$10,000 for each of the first two progress payments occurring  
25 thereafter, and \$50,000 for each subsequent progress payment occurring  
26 thereafter, until cure. Developer may request such withheld amounts in the next  
27 month’s D&C Draw Request after Developer effects cure to ADOT’s satisfaction;

28 (c) Except as provided in Sections 21.6.2, 21.6.3, 21.6.4 and 22.5, before exercising  
29 other remedies, ADOT will provide Developer an opportunity for administrative  
30 reconsideration, by an ADOT official who did not take part in the original  
31 determination that Developer is in violation of its DBE Goals or OJT Goals.  
32 Developer shall have the right to provide written documentation to such official  
33 to support its case no later than ten Business Days after ADOT gives written notice  
34 of such determination and, upon request, to meet in person with such ADOT  
35 official at a date and time the ADOT official designates. ADOT will then consider  
36 the findings and opinions of such ADOT official and issue a written decision on  
37 reconsideration to Developer within 30 days after receiving Developer’s written

1 documentation and conclusion of any meeting with such ADOT official. ADOT's  
2 decision is not administratively appealable to the USDOT; and

- 3 (d) If as a result of such administrative process, ADOT does not reverse its  
4 determination, then ADOT may issue a notice of Developer Default, withhold (or  
5 continue to withhold) progress payments, issue an order to suspend Work and, if  
6 Developer's failure continues without cure within the applicable cure period,  
7 terminate this Agreement for an Event of Default. In addition, if ADOT does not  
8 reverse its determination, and reasonably determines that Developer acted in bad  
9 faith in not making Good Faith Efforts with respect to the DBE Goals or OJT Goals,  
10 then ADOT may elect to pursue proceedings to disqualify or debar Developer from  
11 future bidding as non-responsible, as well as any Subcontractor or Supplier that  
12 has violated or participated in violation of DBE or OJT requirements.

13 **21.6.2** If Developer fails to (a) timely deliver to ADOT in complete form any DBE Monthly  
14 Utilization Progress Report required under Section 18.02.2 of the Exhibit 6 (ADOT's DBE Special  
15 Provisions), (b) enter the same information by the 15th day of each month into the DOORS, or (c)  
16 accurately complete and submit any other required reports, forms and documentation required  
17 by Exhibit 6 (ADOT's DBE Special Provisions) within the applicable time specified therein, and  
18 Developer does not cure such failure within ten Business Days after ADOT delivers to Developer  
19 notice of such failure, then ADOT will have the right to withhold 1% of progress payments payable  
20 thereafter, until cure. Developer may request such withheld amounts in the next month's D&C  
21 Draw Request after Developer effects cure to ADOT's satisfaction.

22 **21.6.3** If Developer fails to (a) timely deliver to ADOT in complete form any OJT monthly  
23 report required under Section 923-6 of Exhibit 7 (ADOT's OJT Special Provisions), or (b) accurately  
24 complete and submit any other required reports, forms and documentation required by Exhibit  
25 7 (ADOT's OJT Special Provisions) within the applicable time specified therein, and Developer  
26 does not cure such failure within ten Business Days after ADOT delivers to Developer notice of  
27 such failure, then ADOT will have the right to withhold \$10,000 for each of the first two progress  
28 payments occurring thereafter, and \$50,000 for each subsequent progress payment occurring  
29 thereafter, until cure. Developer may request such withheld amounts in the next month's D&C  
30 Draw Request after Developer effects cure.

31 **21.6.4** If at any time during the performance of the Construction Work, the use of OJT  
32 Trainees is not in conformance with the schedule or supplemental schedule as submitted and  
33 approved pursuant to Exhibit 7 (ADOT's OJT Special Provisions), then ADOT will have the right to  
34 withhold \$10,000 for each of the first two progress payments occurring thereafter, and \$50,000  
35 for each subsequent progress payment occurring thereafter until Developer conforms to the  
36 schedule or supplemental schedule. Conformance with the schedule or supplemental schedule

1 will be considered acceptable when the OJT Trainee utilization to date is at least 90% of that  
2 shown on the schedule or supplemental schedule, for the Construction Work performed to date.

3 **21.7 Right to Suspend Work for Failure by ADOT to Make Undisputed Payment**

4 Subject to Section 15.3.1, Developer shall have the right to suspend Work if ADOT fails to  
5 make an undisputed payment due hereunder (including failure due to non-appropriation) within  
6 15 Business Days after ADOT's receipt of written notice of nonpayment from Developer and its  
7 plan to suspend Work. Any such work suspension shall be considered a suspension for  
8 convenience under Section 20.1 and shall be considered an ADOT-Directed Change. Developer  
9 shall not have the right to terminate this Agreement for any failure by ADOT to make an  
10 undisputed payment due hereunder; provided, however, that if such nonpayment continues for  
11 more than 90 days after ADOT's receipt of such written notice, such nonpayment may be deemed  
12 a Termination for Convenience pursuant to Section 26.1. Upon such termination, the Parties'  
13 rights and obligations shall be as set forth in Section 26.2.

14

1                   **SECTION 22. LIQUIDATED DAMAGES; NONCOMPLIANCE CHARGES**  
2                                           **AND LIMITATION OF LIABILITY**

3   **22.1   Liquigated Damages Respecting Delays**

4           **22.1.1**   Developer shall be liable for and pay to ADOT Liquigated Damages with respect  
5 to any failure to achieve Project Substantial Completion or Final Acceptance of the Project by the  
6 applicable Completion Deadline, as the same may be extended pursuant to this Agreement. The  
7 amounts of such Liquigated Damages are as follows, respectively:

- 8           (a)     \$44,000 for each day that Project Substantial Completion is delayed beyond the  
9                   Project Substantial Completion Deadline; and
- 10          (b)     \$12,000 for each day that Final Acceptance is delayed beyond the Final  
11                   Acceptance Deadline.

12          **22.1.2**   The Liquigated Damages described in this Section 22.1 shall commence on the  
13 applicable Completion Deadline, as the same may be extended pursuant to this Agreement, and  
14 shall continue to accrue until the date of the applicable Project Substantial Completion or Final  
15 Acceptance, measured as of the date on which ADOT issues the Certificate of Project Substantial  
16 Completion or the Certificate of Final Acceptance (as applicable), or until termination of this  
17 Agreement. Subject to Sections 21.3 and 23.1, such Liquigated Damages shall constitute ADOT’s  
18 sole right to damages against Developer for such delay.

19          **22.1.3**   Developer agrees and acknowledges that:

- 20          (a)     If Developer fails to achieve Project Substantial Completion or Final Acceptance of  
21 the Project by the applicable Completion Deadline, ADOT will incur substantial  
22 damages;
- 23          (b)     As of the Effective Date, the amounts of Liquigated Damages under this Section  
24 22.1 represent good faith estimates and evaluations by the Parties as to the actual  
25 potential damages that ADOT would incur as a result of delayed Project  
26 Substantial Completion or delayed Final Acceptance of the Project, as applicable,  
27 and do not constitute a penalty;
- 28          (c)     Actual potential damages include loss of use, enjoyment and benefit of the Project  
29 and connecting ADOT transportation facilities by the general public, injury to the  
30 credibility and reputation of ADOT’s transportation improvement program with  
31 policy makers and with the general public who depend on and expect availability  
32 of service of the Project by the Project Substantial Completion Deadline, and  
33 additional costs of administering this Agreement (including engineering, legal,  
34 accounting, overhead and other administrative costs);
- 35          (d)     The Parties have agreed to Liquigated Damages under this Section 22.1 in order  
36 to fix and limit Developer’s costs and to avoid later Disputes over what amounts

- 1 of damages are properly chargeable to Developer;
- 2 (e) Such sums are reasonable in light of the anticipated or actual harm caused by  
 3 delayed Project Substantial Completion or delayed Final Acceptance of the  
 4 Project, the difficulties of the proof of loss, and the inconvenience or infeasibility  
 5 of otherwise obtaining an adequate remedy;
- 6 (f) Such Liquidated Damages are not intended to, and do not, liquidate Developer’s  
 7 liability under the indemnification provisions of Section 23.1, even though third  
 8 party claims against Indemnified Parties may arise out of the same event, breach  
 9 or failure that gives rise to the Liquidated Damages; and
- 10 (g) Such Liquidated Damages are not intended to, and do not, liquidate damages for  
 11 cost to complete the Project or any other damages except damages due to delay  
 12 in Project Substantial Completion or Final Acceptance.

13 **22.2 Liquidated Damages for D&C Period Closures**

14 **22.2.1** Subject to Sections 22.2.4 and 22.2.5, for any full or partial Closure of traffic lanes  
 15 that occurs on the Project during the D&C Period at a time not approved by ADOT under Section  
 16 DR 462.3.3 of the Technical Provisions, Developer shall be liable for and pay to ADOT Liquidated  
 17 Damages in the following amounts for every 15-minute interval, or portion thereof, that an  
 18 initially approved Closure of traffic lanes persists outside the approved time periods, as  
 19 applicable:  
 20

|               | One Lane Closure | Two Lane Closure |
|---------------|------------------|------------------|
| I-17 mainline | \$2,000          | \$5,000          |
| Ramps         | \$100            | Not applicable   |
| Crossroads    | \$100            | Not applicable   |

21 **22.2.2** Subject to Section 22.2.4, for any Major Closure that violates the restriction in  
 22 Section DR 462.3.3.1 of the Technical Provisions stating that the traffic queue due to a Major  
 23 Closure must clear completely before Developer implements another Major Closure in the same  
 24 direction, or violates the restriction stating that traffic queues at one Major Closure must not be  
 25 captured at another Major Closure within the Project limits, Developer shall be liable for and pay  
 26 to ADOT Liquidated Damages in the amount of \$40,000.

27 **22.2.3** Developer acknowledges and agrees that:

- 28 (a) the Liquidated Damages described in this Section 22.2 are reasonable in order to  
 29 compensate ADOT for damages ADOT will incur by reason of the matters that  
 30 result in Liquidated Damages for Closures of traffic lanes;
- 31 (b) such damages include loss of use, enjoyment and benefit of the Project, and  
 32 connection to ADOT transportation facilities, by the general public, injury to the



1 credibility and reputation of ADOT's transportation improvement program with  
2 policy makers and with the general public who depend on and expect availability  
3 of service, and additional costs of administering this Agreement (including  
4 engineering, legal, accounting, overhead and other administrative costs);

5 (c) such damages are incapable of accurate measurement because of, among other  
6 things, the unique nature of the Project and the unavailability of a substitute for  
7 it; and

8 (d) the Parties have agreed to Liquidated Damages under this Section 22.2 in order to  
9 fix and limit Developer's costs and to avoid later Disputes over what amounts of  
10 damages are properly chargeable to Developer.

11 **22.2.4** No Liquidated Damages shall be assessed for Closures of traffic lanes that are  
12 necessary because of damage or destruction to a traffic lane, ramp, structure, cross road or  
13 shoulder directly attributable to a Relief Event; provided that such waiver of Liquidated Damages  
14 will continue only for so long as necessary, taking into account Developer's duty to mitigate under  
15 Section 16.9, to repair or replace the damage or destruction and reopen the affected traffic lane.

16 **22.2.5** No Liquidated Damages shall be assessed for any full or partial Closure of traffic  
17 lanes to the extent it persists beyond the end of the approved time period as a result of any of  
18 the following, provided that (1) such waiver of Liquidated Damages shall only apply to the  
19 minimum extra time period that would be required to end the Closure through use of diligent  
20 efforts, and (2) Developer shall immediately notify ADOT if any such event occurs that Developer  
21 believes will delay ending the Closure within the approved time period:

22 (a) A Relief Event that occurs during the Closure and directly adversely impacts the  
23 ability to end the Closure on time;

24 (b) An Incident or Emergency that occurs during the Closure and directly adversely  
25 impacts the ability to end the Closure on time, provided that the Incident or  
26 Emergency is not caused by a Developer Act; or

27 (c) Unexpected loss, disruption, break, explosion, leak or other damage of a Utility  
28 that occurs during the Closure and directly adversely impacts the ability to end the  
29 Closure on time, provided that the same is not caused by a Developer Act.

30 **22.2.6** Assessment of Liquidated Damages for Closures of traffic lanes shall not preclude  
31 ADOT's exercise of its right to remove an unpermitted Closure at Developer's expense under  
32 Section 21.4.

### 33 **22.3 Liquidated Damages for O&M Period Closures**

34 **22.3.1** Subject to Sections 22.3.2 and 22.3.4, for any full or partial Closure of traffic lanes  
35 on the Project that occurs during the O&M Period at a time not approved by ADOT under Sections  
36 DR 462.3.3 and OMR 400.2.7 of the Technical Provisions, Developer shall be liable for and pay to

1 ADOT Liquidated Damages in the following amounts for every 15-minute interval, or portion  
2 thereof, that an initially approved Closure of traffic lanes persists outside the approved time  
3 periods, as applicable:  
4

|                                        | One Lane Closure | Two Lane Closure |
|----------------------------------------|------------------|------------------|
| SB general purpose lanes or Flex Lanes | \$500            | \$1,250          |

5 **22.3.2** The Liquidated Damages set forth in Section 22.3.1 shall be adjusted annually on  
6 the first anniversary of the Effective Date and continuing on each anniversary thereafter during  
7 the Term to equal the original Liquidated Damages amount multiplied by the greater of 1.0 or a  
8 fraction the numerator of which is the CPI most recently published prior to the applicable  
9 anniversary and the denominator of which is the Base CPI.

10 **22.3.3** Developer acknowledges and agrees that the Liquidated Damages described in  
11 this Section 22.3 are reasonable in order to compensate ADOT for damages it will incur by reason  
12 of the matters that result in Liquidated Damages for Closures of traffic lanes. Such damages  
13 include loss of use, enjoyment and benefit of the Project, and connection to ADOT transportation  
14 facilities, by the general public, injury to the credibility and reputation of ADOT’s transportation  
15 improvement program with policy makers and with the general public who depend on and expect  
16 availability of service, and additional costs of administering this Agreement (including  
17 engineering, legal, accounting, overhead and other administrative costs). Developer further  
18 acknowledges that these damages are incapable of accurate measurement because of, among  
19 other things, the unique nature of the Project and the unavailability of a substitute for it. The  
20 Parties have agreed to Liquidated Damages under this Section 22.3 in order to fix and limit  
21 Developer’s costs and to avoid later Disputes over what amounts of damages are properly  
22 chargeable to Developer.

23 **22.3.4** The waiver of Liquidated Damages under Sections 22.2.4 and 22.2.5 shall apply  
24 to Liquidated Damages for Closures of traffic lanes during the O&M Period.

25 **22.3.5** Assessment of such Liquidated Damages shall not preclude ADOT’s exercise of  
26 its right to remove an unpermitted Closure at Developer’s expense under Section 21.4.

27 **22.4 Noncompliance Charges for Noncompliance Points**

28 **22.4.1** Developer shall be liable for and pay to ADOT amounts to compensate ADOT for  
29 damages due to the occurrence of Noncompliance Events, as described in the applicable  
30 Noncompliance Event Tables. The amounts owing from Developer to ADOT as Noncompliance  
31 Charges do not liquidate the costs to ADOT to rectify the corresponding Noncompliance Event.

32 **22.4.2** For each assessed Noncompliance Point, Developer shall be subject to  
33 Liquidated Damages in the amount of \$3,000 (the “**Noncompliance Charges**”). The  
34 Noncompliance Charges will not be adjusted during the D&C Period. The Noncompliance

1 Charges, however, shall be adjusted (up or down, as applicable) commencing on the  
2 commencement date of the O&M Period and on each anniversary of such date thereafter  
3 throughout the O&M Period by a fraction, the numerator of which is the CPI most recently  
4 published prior to the commencement date or anniversary thereof, as applicable, and the  
5 denominator of which is the Base CPI.

6 **22.4.3** ADOT will waive Noncompliance Charges assessed for Noncompliance Events set  
7 forth in Exhibit 14-2 (O&M Period Noncompliance Event Table), subject to the following terms  
8 and conditions:

9 (a) ADOT will waive such Noncompliance Charges first accruing in a calendar month  
10 only if the total of such monthly Noncompliance Charges does not exceed \$45,000  
11 (the “**monthly waiver limit**”). The monthly waiver limit shall be adjusted (up or  
12 down, as applicable) commencing on the commencement date of the O&M Period  
13 and on each anniversary of such date thereafter throughout the O&M Period by a  
14 fraction, the numerator of which is the CPI most recently published prior to the  
15 commencement date or anniversary thereof, as applicable, and the denominator  
16 of which is the Base CPI. The monthly waiver limit for a partial calendar month  
17 during the O&M Period shall be prorated;

18 (b) For clarity, if Noncompliance Charges first accruing in a calendar month exceed  
19 the monthly waiver limit, none of such Noncompliance Charges may be waived;

20 (c) Noncompliance Charges that accrue due to (i) a second or further failure to cure  
21 the corresponding Noncompliance Event as provided in Section 19.3.4 or (ii)  
22 Noncompliance Events that adversely affect the safety of the traveling public, as  
23 determined by ADOT, will not be waived even if Developer does not exceed the  
24 monthly waiver limit, and will count toward whether the monthly waiver limit is  
25 exceeded; and

26 (d) Waiver of Noncompliance Charges does not waive the corresponding  
27 Noncompliance Event or Noncompliance Points; and ADOT shall have all other  
28 rights and remedies under the Contract Documents regarding such  
29 Noncompliance Event or Noncompliance Points.

30 **22.4.4** Developer shall pay ADOT the amount of the Noncompliance Charges accrued  
31 within 20 days after ADOT requests payment from time to time. Alternatively, ADOT shall have  
32 the right to deduct the Noncompliance Charges from payments of the D&C Price or the O&M  
33 Price, as applicable, in accordance with Section 15.

34 **22.4.5** Developer acknowledges that the Noncompliance Charges assessed in  
35 accordance with the Contract Documents are reasonable liquidated amounts in order to  
36 compensate ADOT for damages it will incur by reason of Developer’s failure to comply with the

1 applicable provisions of the Contract Documents. The damages addressed by the Noncompliance  
2 Charges consist of:

3 (a) ADOT's increased costs of administering this Agreement, including the increased  
4 costs of engineering, legal, accounting, monitoring, oversight and overhead, and  
5 obligations to pay or reimburse Governmental Entities with regulatory jurisdiction  
6 over the O&M Limits for violation of applicable Governmental Approvals or for  
7 their increased costs of monitoring and enforcing Developer's compliance with  
8 applicable Governmental Approvals;

9 (b) Potential harm and future costs to ADOT from reduction in the condition and  
10 useful life of the Elements;

11 (c) Potential harm to the credibility and reputation of ADOT with other Governmental  
12 Entities, with policy makers and with the general public who depend on and  
13 expect timely and quality delivery and availability of service;

14 (d) Potential harm and detriment to those using the Project, which may include loss  
15 of use, enjoyment and benefit of the Project and of facilities connecting to the  
16 Project, additional wear and tear on vehicles, and increased costs of congestion,  
17 travel time and accidents; and

18 (e) ADOT's increased costs of addressing potential harm to the environment,  
19 including increased harm to air quality caused by congestion, and harm to water  
20 quality, soils conditions, historic structures and other environmental resources  
21 caused by Noncompliance Events.

22 **22.4.6** Developer further acknowledges that the damages described in Section 22.4.5  
23 would be difficult and impracticable to measure and prove, because, among other things:

24 (a) The Project is of a unique nature and no substitute for it is available;

25 (b) The costs of monitoring and oversight will be variable and extremely difficult to  
26 quantify;

27 (c) The nature and level of increased monitoring and oversight will be variable  
28 depending on the circumstances; and

29 (d) The variety of factors that influence use of and demand for the Project makes it  
30 difficult to quantify actual damages.

1           **22.4.7** The Parties have agreed to Liquidated Damages under this Section 22.4 in order  
2 to fix and limit Developer’s costs and to avoid later Disputes over what amounts of damages are  
3 properly chargeable to Developer.

4           **22.5 Liquidated Damages Respecting DBEs and OJT**

5           **22.5.1 DBEs**

6           (a) If Developer replaces or substitutes, or allows or suffers replacement or  
7 substitution, for a Committed DBE in violation of Section 19.0 of Exhibit 6 (ADOT’s  
8 DBE Special Provisions), then Developer shall be liable for and pay to ADOT  
9 Liquidated Damages in an amount equal to 1.5 times the unpaid portion of the  
10 Subcontract amount under the Subcontract with the wrongfully replaced  
11 Committed DBE.

12           (b) If, following Project Substantial Completion, ADOT determines that Developer has  
13 not met the DBE Goals for Professional Services and Construction Work and did  
14 not exercise Good Faith Efforts to meet such DBE Goals, then Developer shall be  
15 liable for and pay to ADOT Liquidated Damages in an amount equal to the total  
16 contract value that would have had to be paid to DBEs performing commercially  
17 useful functions (as described in Section 16.05 of Exhibit 6 (ADOT’s DBE Special  
18 Provisions)) to meet each of the DBE Goals, minus the total contract value of Work  
19 actually performed by DBEs and credited toward each of the DBE Goals.

20           (c) Developer acknowledges and agrees that the Liquidated Damages respecting  
21 DBEs described in this Section 22.5.1 are reasonable to compensate ADOT for  
22 damages ADOT will incur by reason of the violations or failures described in this  
23 Section 22.5.1. Such damages include jeopardizing attainment of ADOT’s overall  
24 DBE goals, injury to the credibility and reputation of ADOT’s DBE program,  
25 potential loss of federal funding equal to or exceeding the value of Work denied  
26 to DBEs, imposition of other costly measures and requirements by the FHWA, and  
27 additional costs of administering this Agreement and enforcing Developer’s  
28 compliance with its DBE obligations. Further, the severity of such damages is  
29 expected to vary with the portion of the Subcontract amount denied to the  
30 Committed DBE or the portion of the DBE Goal not attained. Developer further  
31 acknowledges that these damages are incapable of accurate measurement  
32 because of, among other things, their imprecise nature. The Parties have agreed  
33 to Liquidated Damages under this Section 22.5.1 in order to fix and limit  
34 Developer’s costs and to avoid later Disputes over what amounts of damages are  
35 properly chargeable to Developer.

36           **22.5.2 OJT**

37           (a) If, following Project Substantial Completion, ADOT determines that Developer has  
38 not met the OJT Goals and did not exercise Good Faith Efforts to meet the OJT

1 Goals, then Developer shall be liable for and pay to ADOT Liquidated Damages in  
2 the amount that ADOT is then holding pursuant to Sections 21.6.3 and 21.6.4.

3 (b) Developer acknowledges and agrees that the Liquidated Damages respecting OJT  
4 described in this Section 22.5.2 are reasonable to compensate ADOT for damages  
5 it will incur by reason of the violations or failures described in this Section 22.5.2.  
6 Such damages include jeopardizing the attainment of ADOT's overall OJT goals,  
7 injury to the credibility and reputation of ADOT's OJT program, potential loss of  
8 federal funding equal to or exceeding the value of Work denied to OJT Trainees,  
9 imposition of other costly measures and requirements by the FHWA, and  
10 additional costs of administering this Agreement and enforcing Developer's  
11 compliance with its OJT obligations. Further, the severity of such damages is  
12 expected to vary with the portion of the employment work denied to OJT Trainees.  
13 Developer further acknowledges that these damages are incapable of accurate  
14 measurement because of, among other things, their imprecise nature. The Parties  
15 have agreed to Liquidated Damages under this Section 22.5.2 in order to fix and  
16 limit Developer's costs and to avoid later Disputes over what amounts of damages  
17 are properly chargeable to Developer.

## 18 **22.6 Liquidated Damages for Unavailability of Key Personnel**

19 Developer shall be subject to Liquidated Damages for the failure or unavailability of Key  
20 Personnel to work on the Project, as set forth in Section 11.6.2(b).

## 21 **22.7 Liquidated Damages Respecting Subcontractor Payroll Reporting**

22 **22.7.1** Developer shall be subject to Liquidated Damages if Developer does not comply  
23 with certain requirements of Subcontractor payroll reporting, as set forth in Section 15.10.2(c).

24 **22.7.2** Developer acknowledges that ADOT requires timely receipt of the Subcontractor  
25 payrolls described in Section 15.10.2 for ADOT to comply with applicable federal and State labor  
26 laws. Developer further acknowledges that the Liquidated Damages described in Section  
27 15.10.2(c) are reasonable to compensate ADOT for damage it will incur if ADOT fails to comply  
28 with these laws. Such damages include potential loss of federal funding, the imposition of other  
29 sanctions by the U.S. Department of Labor or FHWA, and additional costs of administering this  
30 Agreement and enforcing Developer's compliance with applicable requirements herein.  
31 Developer further acknowledges that these damages are incapable of accurate measurement  
32 because of, among other things, their imprecise nature. The Parties have agreed to Liquidated

1 Damages under this Section 22.7 in order to fix and limit Developer’s costs and to avoid later  
2 Disputes over what amounts of damages are properly chargeable to Developer.

3 **22.8 Payment; Satisfaction; Waiver; Non-Exclusive Remedy**

4 **22.8.1** Developer shall pay any Liquidated Damages owing under this Section 22 within  
5 20 days after ADOT delivers to Developer ADOT’s invoice or demand therefor.

6 **22.8.2** To satisfy Liquidated Damages not paid when due, ADOT shall have the right to:

7 (a) deduct and offset Liquidated Damages from any amounts owing from ADOT to  
8 Developer; and

9 (b) demand payment under, draw on and collect from, any Project Bond, certificate  
10 of deposit, letter of credit, Guaranty or other security provided by Developer  
11 pursuant to this Agreement.

12 **22.8.3** Permitting or requiring Developer to continue and finish the Work or any part  
13 thereof after a Completion Deadline, as applicable, shall not act as a waiver of ADOT’s right to  
14 receive Liquidated Damages hereunder or any rights or remedies otherwise available to ADOT.

15 **22.8.4** Subject to Section 21.3, ADOT’s right to, and imposition of, Liquidated Damages  
16 are in addition, and without prejudice, to any other rights and remedies available to ADOT under  
17 this Agreement, at law or in equity respecting the breach, failure to perform or Developer Default  
18 that is the basis for the Liquidated Damages, except for recovery of the monetary damages that  
19 the Liquidated Damages are intended to compensate.

20 **22.9 Limitation on Developer’s Liability**

21 **22.9.1 D&C Work**

22 (a) Notwithstanding any other provision of the Contract Documents and except as set  
23 forth in clause (c) below, to the extent permitted by applicable Law, ADOT will not  
24 seek to recover damages from Developer resulting from breach of this Agreement  
25 with respect to the D&C Work (whether arising in contract, negligence or other  
26 tort, or any other theory of law) in excess of \$30,000,000, which amount shall  
27 specifically include any delay Liquidated Damages paid pursuant to Section 22.1).

28 (b) Notwithstanding any other provision of the Contract Documents and except as set  
29 forth in clause (c) below, to the extent permitted by applicable Law, ADOT will not  
30 seek to recover from Developer Liquidated Damages for delay pursuant to Section  
31 22.1 in excess of \$13,000,000.

32 (c) The foregoing limitation on Developer’s liability to ADOT respecting the D&C Work  
33 shall not apply to or limit any right of recovery ADOT may have respecting the  
34 following:

- 1 (i) Costs reasonably incurred by ADOT, or any Person acting on ADOT's behalf,  
2 to complete or correct the D&C Work, or have the D&C Work completed  
3 or corrected by another Person, in excess of the sum otherwise payable to  
4 Developer under this Agreement for the D&C Work, provided that any  
5 amounts ADOT receives from the surety under the D&C Performance Bond  
6 on account of such costs shall be credited toward the amounts payable by  
7 Developer hereunder, unless subsequently refunded, set-aside, returned  
8 or disgorged for any reason;
- 9 (ii) Amounts paid by or on behalf of Developer with respect to the D&C Work  
10 that are covered by insurance proceeds, including any amounts Developer  
11 is deemed to self-insure pursuant to Section 13.2.4;
- 12 (iii) Losses incurred by any Indemnified Party relating to or arising out of  
13 Developer's indemnities set forth in Sections 8.8.7(e) and 23.1, related to  
14 the D&C Work or occurring during the D&C Period;
- 15 (iv) Losses arising out of recklessness, gross negligence, fraud, criminal  
16 conduct, illegal activity, bad faith or intentional misconduct (which does  
17 not include an intentional Event of Default) on the part of any Developer-  
18 Related Entity; and
- 19 (v) Losses arising out of Developer Releases of Hazardous Materials.
- 20 (d) Liabilities of Developer to Subcontractors, laborers and other third parties arising  
21 out of the D&C Work, including liabilities paid from the D&C Payment Bond and  
22 liabilities to third-party owners of facilities or improvements within the D&C Work,  
23 shall not reduce or erode the amount described in Section 22.9.1(a) or (b).

24 **22.9.2 O&M Work**

- 25 (a) Notwithstanding any other provision of the Contract Documents and except as set  
26 forth in clauses (b) and (c) below, to the extent permitted by applicable Law, ADOT  
27 will not seek to recover damages from Developer resulting from breach of this  
28 Agreement with respect to the O&M Work (whether arising in contract,  
29 negligence or other tort, or any other theory of law) in excess of \$1,000,000.
- 30 (b) The foregoing limitation on Developer's liability respecting the O&M Work shall  
31 apply only if the liability is solely and exclusively caused by a breach of Developer's  
32 obligations respecting the O&M Work. If (i) a liability arises in part out of a breach  
33 of Developer's obligations respecting the D&C Work and in part out of a breach of  
34 Developer's obligations respecting the O&M Work, or (ii) a liability arises in whole  
35 or in part out of any Defects with slopes and embankments, then the terms  
36 respecting limitation on Developer's liability set forth in Section 22.9.1 shall  
37 control and apply.



- 1 (c) The foregoing limitation on Developer’s liability respecting the O&M Work shall  
2 not apply to or limit any right of recovery ADOT may have respecting the following:
- 3 (i) Costs reasonably incurred by ADOT, or any Person acting on ADOT’s behalf,  
4 to perform the O&M Work, or have the O&M Work performed by another  
5 Person, for the balance of the Term in excess of the sum otherwise payable  
6 to Developer under this Agreement for the O&M Work for the balance of  
7 the Term, provided that any amounts ADOT receives from the surety under  
8 the O&M Performance Bond on account of such costs shall be credited  
9 toward the amounts payable by Developer hereunder, unless  
10 subsequently refunded, set-aside, returned or disgorged for any reason;
- 11 (ii) Amounts paid by or on behalf of Developer with respect to the O&M Work  
12 that are covered by insurance proceeds, including any amounts Developer  
13 is deemed to self-insure pursuant to Section 13.2.4;
- 14 (iii) Losses incurred by any Indemnified Party relating to or arising out of  
15 Developer’s indemnities set forth in Sections 8.8.7(e) and 23.1, related to  
16 the O&M Work or occurring during the O&M Period;
- 17 (iv) Losses arising out of recklessness, gross negligence, fraud, criminal  
18 conduct, illegal activity, bad faith or intentional misconduct (which does  
19 not include an intentional Event of Default) on the part of any Developer-  
20 Related Entity; and
- 21 (v) Losses arising out of Developer Releases of Hazardous Materials.
- 22 (d) Liabilities of Developer to Subcontractors, laborers and other third parties arising  
23 out of the O&M Work, including liabilities paid from the O&M Payment Bond, shall  
24 not reduce or erode the amount described in Section 22.9.2(a).

25 **22.10 Limitation on Punitive and Consequential Damages**

26 **22.10.1** Notwithstanding any other provision of the Contract Documents and except as  
27 set forth in Section 22.10.2, to the extent permitted by applicable Law, neither Party shall be  
28 liable to the other for punitive damages or indirect or incidental consequential damages, whether  
29 arising out of breach of this Agreement, tort (including negligence) or any other theory of liability,  
30 and each Party hereby releases the other party from any such liability.

31 **22.10.2** The foregoing limitations on Developer’s liability for consequential damages  
32 shall not apply to or limit any right of recovery ADOT may have respecting the following:

- 33 (a) Losses (including defense costs) to the extent (i) covered by the proceeds of  
34 insurance required to be carried pursuant to Section 13, (ii) covered by the  
35 proceeds of insurance actually carried by or insuring any Developer-Related Entity  
36 under policies solely with respect to the Project and the Work, regardless of

1 whether required to be carried pursuant to Section 13, or (iii) Developer is  
2 deemed to have self-insured the Loss pursuant to Section 13.2.4;

- 3 (b) Losses arising out of recklessness, gross negligence, fraud, criminal conduct, illegal  
4 activity, bad faith or intentional misconduct (which does not include an intentional  
5 Event of Default) on the part of any Developer-Related Entity;
- 6 (c) Developer’s indemnities set forth in Sections 8.8.7(e) and 23.1;
- 7 (d) Developer’s obligation to pay Liquidated Damages in accordance with Sections  
8 11.6.2 and 15.10.2(c) and this Section 22;
- 9 (e) Losses arising out of Developer Releases of Hazardous Materials; and
- 10 (f) Amounts Developer may owe or be obligated to reimburse to ADOT under the  
11 express provisions of the Contract Documents, including, subject to any agreed  
12 scope of work and budget, ADOT’s Recoverable Costs.

13 **22.10.3** The foregoing limitations on ADOT’s liability for consequential damages shall not  
14 apply to or limit any right of recovery Developer may have respecting the following:

- 15 (a) Losses arising out of ADOT’s recklessness, gross negligence, fraud, criminal  
16 conduct, illegal activity, bad faith or intentional misconduct (which does not  
17 include an intentional Event of Default);
- 18 (b) Losses arising out of Release of Hazardous Materials by ADOT;
- 19 (c) ADOT’s liabilities set forth in Section 8.8.7(c); and
- 20 (d) Amounts ADOT may owe or be obligated to reimburse to Developer under the  
21 express provisions of the Contract Documents.  
22

1 **SECTION 23. INDEMNIFICATION**

2 **23.1 Indemnity by Developer**

3 **23.1.1** Subject to Section 23.1.2, to the fullest extent permitted by applicable Law,  
4 Developer shall release, protect, defend, indemnify and hold harmless the Indemnified Parties  
5 from and against any and all claims, causes of action, suits, judgments, investigations, legal or  
6 administrative proceedings, demands and Losses, in each case if asserted or incurred by or  
7 awarded to any third party, arising out of, relating to or resulting from:

- 8 (a) The breach or alleged breach of any of the Contract Documents by any Developer-  
9 Related Entity;
- 10 (b) The failure or alleged failure by any Developer-Related Entity to comply with the  
11 Governmental Approvals, any applicable Environmental Laws or other Laws  
12 (including laws regarding Hazardous Materials Management);
- 13 (c) Any alleged patent or copyright infringement or other allegedly improper  
14 appropriation or use of trade secrets, patents, proprietary information, know-  
15 how, copyright rights or inventions in performance of the Work, including the  
16 Proprietary Intellectual Property, or arising out of any use in connection with the  
17 Project of methods, processes, designs, information, or other items furnished or  
18 communicated to ADOT or another Indemnified Party pursuant to this Agreement;  
19 provided, however, that this indemnity shall not apply to any infringement to the  
20 extent resulting from ADOT’s failure to comply with specific written instructions  
21 regarding such Intellectual Property rights provided to ADOT by Developer;
- 22 (d) The actual or alleged Developer Act in or associated with performance of the  
23 Work;
- 24 (e) Any and all claims by any governmental or taxing authority claiming taxes based  
25 on gross receipts, purchases or sales, or the use of any property or income of any  
26 Developer-Related Entity with respect to any payment for the Work made to or  
27 earned by any Developer-Related Entity;
- 28 (f) The failure or alleged failure by any Developer-Related Entity to pay sums due for  
29 the work or services of Subcontractors, laborers, or Suppliers, provided that ADOT  
30 has paid all undisputed amounts owing to Developer with respect to such Work;
- 31 (g) Any actual or threatened Developer Release of Hazardous Materials;
- 32 (h) The claim or assertion by any other ADOT contractor or developer: (i) that any  
33 Developer-Related Entity failed to cooperate reasonably with such other ADOT  
34 contractor or developer, so as to cause inconvenience, disruption, delay or loss,  
35 except where the Developer-Related Entity was not in any manner engaged in  
36 performance of the Work or (ii) that any Developer-Related Entity interfered with

1 or hindered the progress or completion of work being performed by such other  
2 ADOT contractor or developer, so as to cause inconvenience, disruption, delay or  
3 loss, to the extent such claim arises out of the actual or alleged culpable act, error,  
4 omission, negligence, breach or misconduct of any Developer-Related Entity;

5 (i) Developer’s performance of, or failure to perform and comply with, the  
6 obligations under any Utility Agreement to which it is a party or of which it  
7 assumes obligations, (ii) any dispute between Developer and a Utility Company  
8 arising out of Utility Adjustments, (iii) any Betterment or (iv) any Utility Company  
9 Project;

10 (j) (i) Any Developer-Related Entity’s breach of or failure to perform an obligation  
11 that ADOT owes to a third person, including Governmental Entities, under Law or  
12 under any agreement between ADOT and a third person, where ADOT has  
13 delegated performance of the obligation to Developer under the Contract  
14 Documents or (ii) the acts or omissions of any Developer-Related Entity that  
15 render ADOT unable to perform or abide by an obligation that ADOT owes to a  
16 third person, including Governmental Entities, under any agreement between  
17 ADOT and a third person, where the agreement was disclosed or known to  
18 Developer;

19 (k) Inverse condemnation, trespass, nuisance or similar taking of or harm to real  
20 property by reason of: (i) the failure of any Developer-Related Entity to comply  
21 with Good Industry Practices, requirements of the Contract Documents, the  
22 Project Management Plan or Governmental Approvals respecting control and  
23 mitigation of construction activities and construction impacts, (ii) the negligence  
24 or intentional misconduct of any Developer-Related Entity, or (iii) the actual  
25 physical entry onto or encroachment upon another’s property by any Developer-  
26 Related Entity; or

27 (l) Errors, inconsistencies or other defects in the design, construction, operations or  
28 maintenance of the Project or of Utility Adjustments included in the Work.

29 **23.1.2** Subject to the releases and disclaimers herein, including all the provisions set  
30 forth in Section 5.1.8 of this Agreement, Developer’s indemnity obligation shall not extend to any  
31 third party Loss to the extent directly caused by:

32 (a) The negligence, recklessness, intentional misconduct, bad faith or fraud of such  
33 Indemnified Party;

34 (b) ADOT’s breach of any of its obligations under the Contract Documents;

35 (c) An Indemnified Party’s material violation of any Laws or Governmental Approvals;  
36 or

1 (d) An unsafe requirement inherent in prescriptive design or prescriptive construction  
2 specifications of the Technical Provisions, but only where prior to occurrence of  
3 the third party Loss:

4 (i) Developer complied with such specifications and did not actually know, or  
5 would not have known, while exercising reasonable diligence, that the  
6 requirement created a potentially unsafe condition; or

7 (ii) Developer knew of and reported to ADOT the potentially unsafe  
8 requirement.

9 **23.1.3** In claims by an employee of a Developer-Related Entity, Subcontractor, anyone  
10 directly or indirectly employed by them or anyone for whose acts they may be liable, the  
11 indemnification obligation under this Section 23.1 shall not be limited by a limitation on the  
12 amount or type of damages, compensation or benefits payable under workers' compensation,  
13 disability benefit or other employee benefits laws.

14 **23.1.4** For purposes of this Section 23.1, "third party" means any person or entity other  
15 than an Indemnified Party and Developer, except that a "third party" includes any Indemnified  
16 Party's employee, agent or contractor who asserts a claim against an Indemnified Party that is  
17 within the scope of the indemnities and that is not covered by the Indemnified Party's worker's  
18 compensation program.

19 **23.1.5** Developer hereby acknowledges and agrees that it is Developer's obligation to  
20 perform the Work in accordance with the Contract Documents and that the Indemnified Parties  
21 are fully entitled to rely on Developer's performance of such obligation. Developer further agrees  
22 that any certificate, review or approval by ADOT or others hereunder shall not relieve Developer  
23 of any of its obligations under the Contract Documents or in any way diminish its liability for  
24 performance of such obligations or its obligations under this Section 23.

25 **23.1.6** The indemnity set forth in Section 23.1.1(g) is intended to operate as an  
26 agreement pursuant to the Comprehensive Environmental Response and Compensation and  
27 Liability Act, 42 U.S.C. § 9607(e), to insure, protect, hold harmless and indemnify the Indemnified  
28 Parties.

29 **23.1.7** The obligations under this Section 23 shall not be construed to negate, abridge,  
30 or reduce other rights or obligations that would otherwise exist in favor of an Indemnified Party  
31 hereunder.

## 32 **23.2 Defense and Indemnification Procedures**

33 **23.2.1** If ADOT receives notice of a claim or otherwise has actual knowledge of a claim  
34 that it believes is within the scope of the indemnities under Section 23.1, and if ADOT gives notice  
35 thereof pursuant to Section 13.2, then ADOT shall have the right to conduct its own defense

1 unless either an insurer accepts defense of the claim within the time required by Law or  
2 Developer accepts the tender of the claim in accordance with Section 23.2.3.

3 **23.2.2** Subject to Section 23.2.6, if the insurer under any applicable Insurance Policy  
4 accepts the tender of defense, ADOT and Developer shall cooperate in the defense as required  
5 by the Insurance Policy. If no insurer under potentially applicable Insurance Policies provides  
6 defense, then Section 23.2.3 shall apply.

7 **23.2.3** If the defense is tendered to Developer, then within 15 days after receipt of the  
8 tender, Developer shall notify the Indemnified Party whether Developer has tendered the matter  
9 to an insurer. If Developer does not tender the matter to an insurer, then within such 15 days, or  
10 if the insurer has rejected the tender, then within five days after such rejection, Developer shall  
11 deliver a notice to the Indemnified Party stating one of the following:

12 (a) Developer accepts the tender of defense and confirms that the claim is subject to  
13 full indemnification without any “reservation of rights” to deny or disclaim full  
14 indemnification thereafter;

15 (b) Developer accepts the tender of defense but with a “reservation of rights”, in  
16 whole or in part, to deny or disclaim indemnification thereafter; or

17 (c) Developer rejects the tender of defense based on a determination that it is not  
18 required to indemnify against the claim under the terms of this Agreement or any  
19 other agreement or obligation to provide indemnification.

20 **23.2.4** If Developer accepts the tender of defense under Section 23.2.3(a), Developer  
21 shall have the right to select legal counsel for the Indemnified Party, subject to reasonable  
22 approval by the Indemnified Party, and Developer shall otherwise control the defense of such  
23 claim, including settlement, and bear the fees and costs of defending and settling such claim.  
24 During such defense:

25 (a) Developer shall fully and regularly inform the Indemnified Party of the progress of  
26 the defense and of any settlement discussions; and

27 (b) The Indemnified Party shall fully cooperate in said defense, provide to Developer  
28 all materials and access to personnel it requests as necessary for defense,  
29 preparation and trial and which or who are under the control of or reasonably  
30 available to the Indemnified Party, and maintain the confidentiality of all  
31 communications between it and Developer concerning such defense.

32 **23.2.5** If Developer responds to the tender of defense as specified in Section 23.2.3(b)  
33 or (c), the Indemnified Party shall be entitled to select its own legal counsel and otherwise control  
34 the defense of such claim, including settlement.

35 **23.2.6** Notwithstanding Section 23.2.3(a) or (b), the Indemnified Party may assume its  
36 own defense by delivering to Developer notice of such election and the reasons therefor, if the

1 Indemnified Party, at the time it gives notice of the claim or at any time thereafter, reasonably  
2 determines that:

3 (a) A conflict exists between it and Developer that prevents or potentially prevents  
4 Developer from presenting a full and effective defense;

5 (b) Developer is otherwise not providing an effective defense in connection with the  
6 claim; or

7 (c) Developer lacks the financial capacity to satisfy potential liability or to provide an  
8 effective defense.

9 **23.2.7** If the Indemnified Party is entitled and elects to conduct its own defense, then:

10 (a) In the case of a defense conducted under Section 23.2.3(a), it shall have the right  
11 to settle or compromise the claim with Developer’s prior consent, which shall not  
12 be unreasonably withheld or delayed;

13 (b) In the case of a defense conducted under Section 23.2.3(b), it shall have the right  
14 to settle or compromise the claim (i) with Developer’s prior consent, which shall  
15 not be unreasonably withheld or delayed, or (ii) with approval of the court or  
16 arbitrator following reasonable notice to Developer and opportunity to be heard,  
17 without prejudice to the Indemnified Party’s rights to be indemnified by  
18 Developer; and

19 (c) In the case of a defense conducted under Section 23.2.3(c), it shall have the right  
20 to settle or compromise the claim without Developer’s prior consent and without  
21 prejudice to its rights to be indemnified by Developer.

22 **23.2.8** If the Indemnified Party is entitled and elects to conduct its own defense of a  
23 claim for which it is entitled to indemnification, Developer shall reimburse all reasonable costs  
24 and expenses the Indemnified Party incurs in investigating and defending, including  
25 reimbursement of reasonable attorneys’ fees and other litigation and defense costs. Except  
26 where Developer rejects defense pursuant to Section 23.2.3(c), Developer shall reimburse such  
27 defense costs and expenses on a current basis. If Developer fails to reimburse on a current basis,  
28 or if it is ultimately determined that Developer was not entitled to reject the tender of defense,  
29 then the Indemnified Party also shall be entitled to interest at the rate calculated in accordance  
30 with Section 27.14 on the amount of such defense costs and expenses as well as on any  
31 settlement amounts from the date such costs and expenses or settlement amounts are incurred  
32 by the Indemnified Party.

33 **23.2.9** A refusal of, or failure to accept, a tender of defense, as well as any Dispute over  
34 whether an Indemnified Party that has assumed control of defense is entitled to do so under  
35 Section 23.2.7, shall be resolved according to the Dispute Resolution Procedures.

1           **23.2.10** The Parties acknowledge that while Section 23.1 contemplates that Developer  
2 will have responsibility for certain claims and liabilities arising out of its obligations to indemnify,  
3 circumstances may arise in which there may be shared liability of the Parties with respect to such  
4 claims and liabilities. In such case, where either Party believes a claim or liability may entail  
5 shared responsibility and that principles of comparative negligence and indemnity are applicable,  
6 it shall confer with the other Party on management of such claim or liability. If the Parties cannot  
7 agree on an approach to representation in the matter in question, each shall arrange to represent  
8 itself and to bear its own costs in connection therewith pending the outcome of such matter.  
9 Within 30 days subsequent to the final, non-appealable resolution of the matter in question,  
10 whether by arbitration, judicial proceedings or otherwise, the Parties shall adjust the costs of  
11 defense, including reimbursement of reasonable attorney’s fees and other litigation and defense  
12 costs, in accordance with the indemnification arrangements of this Section 23.2, and consistent  
13 with the outcome of such proceedings concerning the respective liabilities of the Parties on the  
14 third-party claim.

15           **23.2.11** In determining responsibilities and obligations for defending suits pursuant to  
16 this Section 23.2, and to the extent consistent with applicable Law, specific consideration shall  
17 be given to the following factors: (a) the party performing the activity in question; (b) the location  
18 of the activity and incident; (c) contractual arrangements then governing the performance of the  
19 activity; and (d) allegations of respective fault contained in the claim.



1                   **SECTION 24. PARTNERING AND DISPUTE RESOLUTION PROCEDURES**

2   **24.1 Partnering**

3                   **24.1.1 General Provisions**

4           (a)   For the mutual benefit of the Parties, ADOT and Developer shall establish a  
5                   partnering relationship to complete the Project effectively. The purpose of the  
6                   partnering relationship is to establish and maintain effective communication  
7                   between the Parties to cooperatively identify and resolve critical Project-related  
8                   issues. Neither the partnering relationship itself, nor discussions between the  
9                   Parties addressed at the initial partnering workshop, refresher partnering  
10                  meetings or the construction closeout partnering meeting (collectively  
11                  “**Partnering Meetings**”), shall modify the terms and conditions of this Agreement.

12          (b)   In implementing and managing the partnering relationship required under this  
13                  Section 24.1, ADOT and Developer shall:

- 14                  (i)    Use early and regular communication;
- 15                  (ii)   Establish and maintain a relationship of shared trust, equity and  
16                          commitment;
- 17                  (iii)   Identify, quantify, and support attainment of mutual goals;
- 18                  (iv)   Develop strategies for using risk-management tools and concepts;
- 19                  (v)    Implement timely communication and decision making;
- 20                  (vi)   Resolve potential problems at the lowest level of responsible management  
21                          to avoid negative impacts and Disputes, including by developing a process  
22                          for the escalation of field-level issues, such as by using the Issue Resolution  
23                          Ladder informally as Disputes arise to resolve them before they materialize  
24                          into Claims and Disputes;
- 25                  (vii)   Develop a plan for periodic joint evaluation based on mutually agreed  
26                          goals;
- 27                  (viii)  Hold Partnering Meetings, as set forth in Section 24.1.2, to preserve the  
28                          partnering relationship and its benefits; and
- 29                  (ix)   Establish periodic joint evaluations of the partnering process and  
30                          attainment of mutual goals.

1           **24.1.2 Partnering Meeting Schedule; Participants**

- 2           (a)     ADOT shall designate a person of ADOT’s choice to facilitate Partnering Meetings.
- 3           (b)     The Parties shall schedule and conduct Partnering Meetings as follows:
- 4                 (i)     The initial partnering workshop prior to NTP 2;
- 5                 (ii)    Refresher partnering meetings annually thereafter during the D&C Period,
- 6                         or as mutually agreed by the Parties; and
- 7                 (iii)   The construction closeout meeting no later than 60 days after the Project
- 8                         Substantial Completion Date.
- 9           (c)     The Parties shall conduct Partnering Meetings at ADOT’s offices or at such other
- 10                        locations as the Parties mutually agree.
- 11           (d)    Key Personnel and executives from both Parties with knowledge relevant to the
- 12                        matters to be discussed shall attend Partnering Meetings.

13           **24.1.3 Partnering Team; Partnering Charter**

- 14           (a)     ADOT and Developer shall establish a partnering team for the Project, which team
- 15                        shall consist of Project-level contributors and decision-makers from ADOT,
- 16                        Developer, and, if applicable, stakeholder organizations. Each Party shall identify
- 17                        its respective members of the partnering team prior to the initial partnering
- 18                        workshop and all members of the partnering team must attend the initial
- 19                        partnering workshop.
- 20           (b)     The partnering team shall create during the initial partnering workshop a
- 21                        partnering charter that includes:
- 22                 (i)     Mutual goals (e.g., core goals that may also include Project-specific goals
- 23                         and individual goals that are jointly supported by both Parties);
- 24                 (ii)    A partnering team commitment statement signed by every member of the
- 25                         partnering team;
- 26                 (iii)   A plan for both Parties to maintain the partnering relationship for the
- 27                         duration of the D&C Period; and
- 28                 (iv)   A plan and schedule to conduct partnering evaluation surveys that
- 29                         measure the progress of mutual goals and key short-term issues as they
- 30                         arise in connection with the Project.
- 31           (c)     The members of the partnering team shall:

- 1 (i) Identify the appropriate persons in each Party’s organization who shall fill  
2 the roles of reviewers for the Issues Resolution Ladder described in Section  
3 24.2.2(c);
- 4 (ii) Identify the documentation, in addition to that specifically required by this  
5 Agreement, that the Parties desire for review of a Dispute at each level of  
6 the Issue Resolution Ladder described in Section 24.2.2(c);
- 7 (iii) Participate in a partnering evaluation survey in accordance with the  
8 schedule determined during the initial partnering meeting; and
- 9 (iv) Jointly review the results of the partnering evaluation survey and  
10 document lessons learned regarding the Work.
- 11 (d) The Parties shall comply with the requirements of this Section 24.1 when  
12 addressing potential Disputes and prior to proceeding to the Disputes Resolution  
13 Procedures set forth in Section 24.2.

14 **24.1.4 Confidentiality**

15 Subject to the requirements of the Public Records Law, any statements made or materials  
16 prepared during or relating to partnering meetings, including any statements made or documents  
17 prepared by the facilitator, shall be kept in confidence and used only for the purpose of  
18 facilitating resolution of potential Disputes via the partnering process, and shall not be utilized  
19 or revealed to others, except to officials and agents of the Parties who are authorized to act on  
20 the subject matter. However, the Parties understand that such documents may be  
21 subsequently discoverable and admissible in mediation, arbitration or court proceedings,  
22 subject to the rules of procedure therein.

23 **24.1.5 Cost Responsibility**

- 24 (a) The costs of the facilitator, the site and food for Partnering Meetings shall be  
25 shared equally by ADOT and Developer. All other costs associated with the  
26 partnering process shall be borne separately by the Party that incurs the costs.
- 27 (b) ADOT will initially pay the full costs of the facilitator, the site and food for  
28 Partnering Meetings, and thereafter deduct 50% of the qualifying costs from  
29 amounts owing to Developer under this Agreement.

30 **24.2 Disputes Resolution Procedures**

31 **24.2.1 General Provisions**

- 32 (a) Disputes shall be resolved pursuant to the multi-step Dispute Resolution  
33 Procedures described in this Section 24.2, subject to the following conditions:

- 1 (i) The matter has first been raised in compliance with the notice and  
2 information requirements set forth in this Agreement, so as to constitute  
3 a Dispute;
- 4 (ii) The Dispute is eligible for resolution under this Section 24.2; and
- 5 (iii) The Dispute is not resolved by partnering under Section 24.1.
- 6 (b) The Party bringing a Dispute shall bear the burden of proving the same, subject to  
7 any provisions of this Agreement expressly assigning the burden of proof.
- 8 (c) Resolutions of Disputes pursuant to this Section 24.2 shall be final, binding,  
9 conclusive and enforceable as set forth in this Section 24.2.
- 10 (d) The Issue Resolution Ladder and mediation processes are administrative  
11 procedures and remedies, and failure of Developer to comply with either or both  
12 of such processes in all material respects as to any Dispute or Claim shall constitute  
13 a failure to diligently pursue and exhaust such administrative procedures and  
14 remedies, and shall operate as a bar against the Dispute or Claim.
- 15 (e) The provisions of this Section 24.2 shall continue to apply after expiration or  
16 earlier termination of this Agreement to all Claims and Disputes between the  
17 Parties arising out of the Contract Documents.

18 **24.2.2 Issue Resolution Ladder**

- 19 (a) As a condition to the right to bring a Dispute to mediation, arbitration or litigation,  
20 the Party bringing the Dispute shall first attempt to resolve the Dispute directly  
21 with other Party using the Issue Resolution Ladder.
- 22 (b) The Issue Resolution Ladder is the process for elevating Disputes from the  
23 Project's field level to various levels of review, up to the Parties' executive  
24 management if necessary, with defined time limits for each level of review. The  
25 goal of the Issue Resolution Ladder is to resolve each Dispute as close to the field  
26 level as possible while recognizing the requirement to elevate the Dispute to the  
27 next level of review before the Dispute impacts cost or schedule.
- 28 (c) The Issue Resolution Ladder shall consist of three levels of review and  
29 corresponding time periods to review, as follows:  
30  
31

| Level of Review | Developer Reviewer | ADOT Reviewer                                                                        | Time Limit                                      |
|-----------------|--------------------|--------------------------------------------------------------------------------------|-------------------------------------------------|
| 3               | Executive Officer  | Senior Deputy State Engineer                                                         | 30 days, or any lesser period mutually approved |
| 2               | Project Manager    | Design Manager, Construction Manager, O&M Manager or Project Manager (as applicable) | 14 days, or any lesser period mutually approved |
| 1               | Project Level      | Technical Lead                                                                       | 7 days, or any lesser period mutually approved  |

1 (d) The Parties shall meet and commence the Issue Resolution Ladder within 20 days  
2 following the invoking Party’s written request that complies with the notice and  
3 information requirements set forth in this Agreement.

4 (e) The partnering team as set forth in Section 24.1.3 shall identify the individuals  
5 from ADOT’s and Developer’s respective organizations filling the roles of  
6 reviewers in the Issue Resolution Ladder, and the documentation required for  
7 each level of review in the Issue Resolution Ladder. The individuals filling such  
8 roles and the documentation required for each level of review may vary for the  
9 D&C Work and O&M Work, as appropriate.

10 (f) If reviewers at any level of the Issue Resolution Ladder cannot resolve a Dispute  
11 within the applicable time period set forth in clause (c) above, then they may  
12 mutually agree to continue efforts to resolve the Dispute at their level for a  
13 reasonable period of time, provided that either reviewer shall have the unilateral  
14 right after the applicable time period to elevate the Dispute to the next level of  
15 review in the Issues Resolution Ladder.

16 **24.2.3 Issue Resolution Ladder Outcome**

17 (a) If ADOT and Developer succeed in resolving a Dispute using the Issue Resolution  
18 Ladder, the Parties shall memorialize the resolution in writing, including execution  
19 of any Supplemental Agreement as appropriate, and promptly perform their  
20 respective obligations in accordance therewith.

21 (b) If the Parties do not resolve the Dispute using the Issues Resolution Ladder, then  
22 either Party shall have the right, after conclusion of the Issues Resolution Ladder,  
23 to bring the Dispute to mandatory mediation, as described in Section 24.2.4.

24 **24.2.4 Mandatory Mediation**

25 Only upon completion of the requirements of Section 24.2.2, either Party shall have the  
26 right to initiate mandatory mediation proceedings for the unresolved Dispute, as a condition to

1 bringing the Dispute to arbitration or litigation.

2 (a) **Mediation Process**

3 (i) The Party bringing the Dispute to mediation shall do so by serving the other  
4 Party with a written Notice to initiate mediation proceedings. Such notice  
5 shall be delivered within 60 days following the conclusion, without  
6 resolution, of the Issue Resolution Ladder. Failure to provide such notice  
7 to initiate mediation proceedings within this time period shall constitute a  
8 waiver of any further right to pursue the Dispute and all related issues  
9 thereunder, including any relief associated therewith. Either Party may, in  
10 its sole discretion, grant an extension of the 60-day period; provided,  
11 however, that no such extension may be in excess of 30 additional days  
12 beyond the original 60-day period.

13 (ii) Within ten Business Days after providing such notice, the Parties shall  
14 mutually select a qualified individual to serve as mediator. The mediator  
15 shall have at least ten years of experience serving as a mediator, shall have  
16 at least five years of experience mediating design, construction, operations  
17 or maintenance work disputes, as applicable, based on the nature of the  
18 Dispute, and preferably shall be an attorney at law.

19 (iii) If the Parties are unable to agree upon an individual to serve as mediator,  
20 then either Party may petition the Superior Court located in Maricopa  
21 County to appoint a mediator who meets the foregoing qualifications.

22 (iv) The Parties shall use diligent efforts to convene and conclude mediation  
23 proceedings within 30 days after the mediator is appointed, or at such  
24 other date and time as may be set by the mediator or agreed to by the  
25 Parties. Each Party shall have the right to present to the mediator such  
26 materials and documentation as it may deem relevant to the Dispute, and  
27 each Party shall provide to the mediator such further materials,  
28 documentation, and information as the mediator may reasonably request.  
29 The Parties shall meet within three days after appointment of the mediator  
30 and determine whether and to what extent the Parties will share the  
31 materials submitted to the mediator with each other. The Parties may  
32 enlist the mediator to assist in determining a process for the sharing, if any,  
33 of the materials submitted to the mediator.

34 (v) Each Party shall bring to the mediation a representative with authority to  
35 mediate and settle the Dispute, and such representative shall actively  
36 participate in the mediation process. Each Party may bring to the  
37 mediation such other persons as it chooses; provided, however, that  
38 neither Party shall be represented at the mediation by legal counsel unless  
39 both Parties consent thereto in advance of the mediation.

- 1 (vi) Each Party shall make good faith efforts to resolve the Dispute through  
2 mediation.
- 3 (vii) The venue of any mediation shall be in Phoenix, Arizona unless both Parties  
4 consent to a different venue.
- 5 (viii) Developer and ADOT will share equally the expenses of the mediator and  
6 mediation forum. Each Party shall bear its own costs of preparing for and  
7 participating in the mediation.

8 (b) **Mediation Outcome**

9 If the Parties do not resolve the Dispute through mediation or within 30 days  
10 following the conclusion of the mediation, the Party bringing the Dispute may proceed to either  
11 arbitration in accordance with Section 24.2.6 or litigation in accordance with Section 24.2.7, as  
12 applicable.

13 **24.2.5 Evidentiary Impact of Issue Resolution Ladder or Mediation**

- 14 (a) The Issue Resolution Ladder process and mediation process shall be considered  
15 settlement negotiations for the purpose of all State and federal rules that protect  
16 disclosures made during settlement negotiations from later discovery or use in  
17 evidence; provided, however, that any settlement executed by the Parties  
18 pursuant to such processes shall not be considered confidential and may be  
19 disclosed.
- 20 (b) Evidence of anything said, or of any admission made, in the course of the Issue  
21 Resolution Ladder or mediation process is without prejudice and is not admissible  
22 in evidence for any purpose and disclosure of such evidence shall not be  
23 compelled before an arbitrator or in any civil action.
- 24 (c) No document or copy thereof prepared for the purpose of, in the course of, or  
25 pursuant to the Issue Resolution Ladder or mediation process shall be admissible  
26 in evidence, and disclosure of such document or copy shall not be compelled, in  
27 any arbitration or civil action.
- 28 (d) No stenographic or other record of the Issue Resolution Ladder process or  
29 mediation session(s) shall be made except to memorialize a settlement record.
- 30 (e) To the extent permitted by the Law, all conduct, statements, promises, offers,  
31 views and opinions, oral or written, made during the Issue Resolution Ladder  
32 process or mediation by any party or agent are (i) confidential, (ii) where  
33 appropriate, considered work product and privileged, (iii) not subject to discovery,  
34 and (iv) inadmissible in evidence in any arbitration or civil action.
- 35 (f) The limitations of this Section 24.2.5 shall not affect the discovery or admissibility

1 of facts, opinions, statements, documents or other evidence existing or developed  
2 independent of the Issue Resolution Ladder or mediation process, and the  
3 discoverability or admissibility of such evidence is not changed or affected  
4 because of its use in the Issue Resolution Ladder process or mediation.

- 5 (g) The Parties may waive any of the confidentiality provisions of this Section 24.2.5  
6 through a written waiver or consent to disclosure.

## 7 **24.2.6 Binding Arbitration**

### 8 (a) **Disputes Eligible for Arbitration**

9 Either Party shall have the right to initiate binding arbitration proceedings for a  
10 Dispute, together with related or similar unresolved Disputes that arise fairly contemporaneously  
11 out of the same set of acts, events or circumstances, that:

- 12 (i) is or are unresolved;
- 13 (ii) has or have fully exhausted the processes set forth in Sections 24.1, 24.2.2,  
14 and 24.2.4;
- 15 (iii) has or have a cumulative amount in controversy not exceeding \$2,500,000;  
16 and
- 17 (iv) has or have a cumulative Completion Deadline adjustment in controversy  
18 not exceeding 45 days.

19 All unresolved Disputes that arise fairly contemporaneously out of the same set of acts, events  
20 or circumstances shall be aggregated in order to determine eligibility for arbitration under  
21 clauses (iii) and (iv) above.

### 22 (b) **Arbitration Process**

- 23 (i) The Party electing to bring an unresolved Dispute to arbitration shall serve  
24 upon the other Party a written request for mandatory and binding  
25 arbitration.
- 26 (ii) The Parties shall then seek to agree upon the arbitration process, and any  
27 other matter pertinent to arbitration not otherwise addressed in this  
28 Section 24.2.6.
- 29 (iii) If the Parties cannot agree upon an arbitration process within 30 days after  
30 service of the written request under clause (i) above, then the Party  
31 seeking arbitration shall be entitled to compel arbitration by serving on the  
32 other party and the American Arbitration Association (“**AAA**”) a demand  
33 for arbitration, in accordance with AAA rules. The Expedited Procedures of



1 the Construction Industry Arbitration Rules of the AAA shall be used for  
2 Disputes relating to D&C Work and the Commercial Dispute Resolution  
3 Procedures of the AAA shall be used for all other Disputes including the  
4 O&M Work. The arbitration shall be conducted by a single arbitrator  
5 mutually agreeable to the Parties and selected from the complex  
6 construction litigation panel developed by AAA in the case of Disputes  
7 relating to D&C Work, or from a list developed by the AAA in all other  
8 cases. If the Parties fail to appoint a mutually agreeable arbitrator within  
9 30 days, the President of the AAA shall appoint the arbitrator from the  
10 complex construction litigation panel in the case of Disputes relating to  
11 D&C Work, or from such list developed by the AAA in all other Disputes.  
12 The scope and extent of discovery shall be as determined by the arbitrator  
13 in accordance with AAA rules set forth above.

14 (iv) Notwithstanding clause (b)(iii) above, for insurance Disputes, the  
15 arbitrator(s) shall be experienced in the industry of insurance  
16 underwriting.

17 (v) The arbitrator shall render a decision by applying the pertinent provision(s)  
18 of the Contract Documents and applicable Law to the relevant facts and  
19 circumstances of the Dispute. The arbitrator shall set forth the decision  
20 and reasoning for the decision in writing.

21 (vi) If any Party acts to unreasonably delay or prevent arbitration, the other  
22 Party shall be entitled to enforce the arbitration provisions of this  
23 Agreement by petition to the Superior Court located in Maricopa County,  
24 Arizona.

25 (vii) The arbitrator shall not have the power to award punitive damages,  
26 rescind this Agreement, reform the Contract Documents, or void any  
27 limitations on liability contained in this Agreement.

28 (viii) The venue of any arbitration hearing shall be in Phoenix, Arizona unless  
29 both Parties consent to a different venue.

30 (ix) Developer and ADOT will share equally the expenses of the arbitrator and  
31 the arbitration forum. Each Party shall bear its own costs of preparing for  
32 and participating in the arbitration.

33 (c) **Arbitration Outcome**

34 (i) Subject to clause (ii) below, the decision of the arbitrator shall be binding,  
35 and the judgment rendered by the arbitrator may be entered in the  
36 Superior Court located in Maricopa County, Arizona, and thereafter, in any  
37 such jurisdiction as may be necessary to enforce the judgment.

1 (ii) The aggregate arbitration award for all unresolved Disputes described in  
2 clause (a) above shall not exceed the limitations set forth in clauses (a)(iii)  
3 and (iv) above. The portion of any arbitration award that exceeds any such  
4 limitation shall be null and void and the arbitration award shall be deemed  
5 automatically and conclusively reduced to the limitation amount without  
6 necessity for further proceedings.

7 **24.2.7 State Court Litigation; Jurisdiction and Venue**

8 (a) Either Party shall have the right to initiate litigation proceedings if (i) a Dispute,  
9 together with all related or similar unresolved Disputes that arise fairly  
10 contemporaneously out of the same set of acts, events or circumstances, is or are  
11 unresolved after having fully exhausted the processes set forth in Sections 24.1,  
12 24.2.2, and 24.2.4, and (b) such Dispute or Disputes are not eligible for arbitration  
13 under Section 24.2.6. Any such litigation proceeding shall be *de novo*.

14 (b) All litigation between the Parties concerning any Disputes shall be filed, heard and  
15 decided in the Superior Court located in Maricopa County, Arizona, which shall  
16 have exclusive jurisdiction and venue.

17 **24.2.8 Continuation of Work and Payments During Dispute**

18 (a) Failure by ADOT to pay any amount in dispute shall not alleviate, diminish or  
19 modify in any respect Developer's obligation to perform under the Contract  
20 Documents, including Developer's obligation to achieve the Completion Deadlines  
21 and perform all Work in accordance with the Contract Documents. At all times  
22 while any dispute is pending or during the Dispute Resolution Procedures,  
23 Developer shall, and shall cause all Subcontractors to, continue with the  
24 performance of the Work and their obligations, including any disputed Work or  
25 obligations, diligently and without delay or slow down, in accordance with the  
26 Contract Documents, except to the extent enjoined by order of a court or  
27 otherwise specified or directed by ADOT. Developer acknowledges that it shall be  
28 solely responsible for the results of any delaying actions or inactions that any  
29 Developer-Related Entity takes during the pendency of resolution of a dispute  
30 relating to the Work even if Developer's position in connection with the dispute  
31 ultimately prevails. In addition, during the pendency of resolution of a dispute  
32 relating to the Work, the Parties shall continue to comply with all provisions of the  
33 Contract Documents, the Project Management Plan, the Governmental Approvals  
34 and applicable Law.

35 (b) During the course of any and all Dispute Resolution Procedures, ADOT will  
36 continue to pay to Developer when due all undisputed amounts owing under this  
37 Agreement.

38 (c) Any Claim or Dispute regarding such payment shall be resolved pursuant to this

1                    Section 24. Developer shall proceed as directed by ADOT pending resolution of  
2                    the Claim or Dispute. Within 20 days following the resolution of any such Claim or  
3                    Dispute, each Party shall promptly pay to the other any amount owing (together  
4                    with interest thereon), subject to the restrictions governing payment under the  
5                    Contract Documents.

6                    **24.2.9 Attorney Fees**

7                    Except as expressly provided otherwise in this Agreement, each Party shall bear its own  
8                    attorneys' fees and expenses incurred in connection with any Dispute Resolution Procedures,  
9                    regardless of the outcome.



- 1 (ii) All Claims or Disputes regarding the D&C Work have been settled; and
- 2 (iii) The Final D&C Payment has been paid and accepted.
- 3 (c) The DPDs and index and catalogue pertaining to the O&M Work shall be held in
- 4 such cabinet or otherwise maintained until all of the following have occurred:
- 5 (i) 60 days have elapsed from the expiration or earlier termination of this
- 6 Agreement;
- 7 (ii) All Claims or Disputes regarding the O&M Work have been settled; and
- 8 (iii) All amounts owing from ADOT to Developer and from Developer to ADOT
- 9 under this Agreement have been paid and accepted.

10 **25.1.3 Availability for Review**

- 11 (a) The DPDs shall be available during business hours for joint review by (1) Developer
- 12 and ADOT, or (2) by Developer, ADOT and any dispute resolver, in accordance with
- 13 Section 24, in connection with:
  - 14 (i) approval of the Project Schedule;
  - 15 (ii) negotiation of Supplemental Agreements;
  - 16 (iii) aiding in determining appropriate Compensation Amounts and
  - 17 Termination Compensation;
  - 18 (iv) resolution of Claims or Disputes under the Contract Documents;
  - 19 (v) aiding in determining the value of terminated Work; and
  - 20 (vi) as described in Section 25.1.7.
- 21 (b) If any Claim or Dispute becomes the subject of mediation, arbitration or litigation,
- 22 then, within ten days after ADOT delivers to Developer a written request and a
- 23 confidentiality agreement pursuant to Section 25.1.4 signed by ADOT, Developer
- 24 shall deliver to ADOT in readable, electronic form all DPDs described in the
- 25 request, indexed and catalogued as required by Section 25.1.2.
- 26 (c) ADOT will be entitled to review all or any part of the DPDs to satisfy itself regarding
- 27 the applicability of the individual documents to the matter at issue.
- 28 (d) Developer shall cooperate with ADOT's request for review of the DPDs upon 24-
- 29 hour notice.

1           **25.1.4 Proprietary Information**

2           The DPDs are, and shall always remain, the property of Developer and shall be considered  
3 to be in Developer’s possession, subject to ADOT’s right to review the DPDs as provided in this  
4 Section 25.1. Developer will have and control the keys to the cabinet containing the DPDs. ADOT  
5 acknowledges that Developer may consider that the DPDs constitute trade secrets or proprietary  
6 information. ADOT will have the right to copy the DPDs for the purposes set forth in this Section  
7 25.1, provided that the Parties execute a mutually agreeable confidentiality agreement with  
8 respect to DPDs that constitute trade secrets or proprietary information, which confidentiality  
9 agreement shall explicitly acknowledge that it is subject to applicable Law (including the Public  
10 Records Act).

11           **25.1.5 Representation**

12           Developer represents and warrants that the DPDs constitute all documentary information  
13 used in the preparation of its Contract Price. Developer agrees that no other price proposal  
14 preparation information will be considered in resolving disputes or Claims. Developer further  
15 agrees that the DPDs are not part of the Contract Documents and that nothing in the DPDs shall  
16 change or modify any Contract Document.

17           **25.1.6 Form of DPDs**

18           Except as otherwise provided in the RFP, Developer shall submit the DPDs in such format  
19 as is used by Developer in connection with its Proposal. Developer represents and warrants that  
20 the DPDs provided with the Proposal were personally examined by an authorized officer of  
21 Developer prior to delivery, and that the DPDs meet the requirements of this Section 25.1.  
22 Developer further represents and warrants that all DPDs provided were or will be personally  
23 examined prior to delivery by an authorized officer of Developer, and that they shall meet the  
24 requirements of this Section 25.1.

25           **25.1.7 Supplementary DPD Information**

26           ADOT may at any time conduct a review of the DPDs to determine whether they are  
27 complete. If ADOT determines that any data is missing from a DPD, Developer shall provide such  
28 data within three Business Days after delivery of ADOT’s request for such data. At the time of its  
29 submission to ADOT, such data will be date stamped, labeled to identify it as supplementary DPD  
30 information, and added to the DPDs. Developer shall have no right to add documents to the DPDs  
31 except upon ADOT’s request. The DPDs associated with any Supplemental Agreement or Contract  
32 Price adjustment under this Agreement shall be reviewed, organized and indexed in the same  
33 manner as the original DPDs.

34           **25.2 Financial Reporting Requirements**

35           **25.2.1** Developer shall deliver or cause to be delivered to ADOT such financial and  
36 narrative reports, statements, certifications, budgets and information as ADOT may request from

1 time to time for any purpose related to the Project, the Work or the Contract Documents,  
2 including information to assist ADOT with preparing annual reports required by A.R.S. § 28-  
3 6953B. Developer shall make such delivery within ten Business Days after requested, or within  
4 any other time period specified in the Contract Documents.

5 **25.2.2** Without limiting Section 25.2.1, Developer shall deliver to ADOT the following  
6 financial statements and information for each Guarantor and each Equity Member that has joint  
7 and several liability with Developer (if any), at the times specified below.

8 (a) Within 120 days after the end of each fiscal year ending during the D&C Period, (i)  
9 the financial statements of the Guarantor or Equity Member, as applicable, and  
10 its consolidated subsidiaries at the end of such year, (which shall include a balance  
11 sheet, consolidated statement of financial condition, statements of earnings,  
12 statement of changes in financial position, and all related notes to the financial  
13 statements, setting forth in each case in comparative form the figures for the  
14 previous fiscal year), all in reasonable detail, and (ii) an opinion thereon of an  
15 independent public accountant of recognized national standing selected by the  
16 Guarantor or Equity Member, as applicable, which opinion shall state that such  
17 financial statements have been prepared in accordance with GAAP consistently  
18 applied, and that the examination of such accountants in connection with such  
19 financial statements has been made in accordance with generally accepted  
20 auditing standards, and accordingly, included such tests of the accounting records  
21 and such other auditing procedures as were considered necessary in the  
22 circumstances. If financial statements are prepared in accordance with principles  
23 other than GAAP, Developer shall concurrently deliver a letter from the certified  
24 public accountant of the applicable entity discussing the areas of the financial  
25 statements that would be affected by a conversion to GAAP; and

26 (b) Within 15 days after written request of ADOT delivered not more often than  
27 annually during the O&M Period, the most recent financial statements and  
28 opinions described in clause (a) above for the Guarantor or Equity Member, as  
29 applicable.

30 **25.2.3** Developer shall cooperate and provide, and shall cause the Subcontractors to  
31 cooperate and provide, such information as determined necessary or desirable by ADOT in  
32 connection with any ADOT financing for the Project. Without limiting the generality of the  
33 foregoing:

34 (a) Developer shall provide such information deemed necessary or desirable by ADOT  
35 for inclusion in ADOT's securities disclosure documents and in order to comply  
36 with Securities and Exchange Commission Rule 15c2-12 regarding certain periodic  
37 information and notice of material events. Developer shall provide customary  
38 representations and warranties to ADOT and the capital markets as to the  
39 correctness, completeness and accuracy of any information furnished; and

1 (b) Developer shall provide all necessary information and supporting documentation  
2 required for ADOT's preparation of quarterly reports to FHWA on progress and usage  
3 of the funding received from the USDOT under the Infrastructure for Rebuilding  
4 America (INFRA) discretionary grant program.

5 **25.2.4** Developer shall cooperate and provide, and shall cause the Subcontractors to  
6 cooperate and provide, such information as is necessary or requested by ADOT to assist or  
7 facilitate the submission by ADOT of any documentation, reports or analysis required by the  
8 State, FHWA or any other Governmental Entity with jurisdiction over the Project. Without limiting  
9 the foregoing, Developer acknowledges that ADOT is obligated to provide financial information  
10 to Maricopa County, Arizona for the costs and expenses incurred for the D&C Work performed  
11 within Maricopa County, Arizona, and agrees to provide all relevant financial information and  
12 supporting documentation including itemized costs as and when requested by ADOT.

13 **25.2.5** All reports and information delivered by Developer under this Section 25.2 shall  
14 also be delivered electronically, to the extent electronic files exist, and be suitable for posting on  
15 the web.

### 16 **25.3 Subcontract Pricing Documents**

17 **25.3.1** Developer shall require each Key Subcontractor to submit to Developer a copy  
18 of all documentary information used in determining its Subcontract price (including the price for  
19 Subcontract work included in any Supplemental Agreement), immediately prior to executing the  
20 Subcontract and each Subcontract change order. Such documentary information shall be held in  
21 the same manner as the DPDs and shall be accessible by ADOT, Developer and Dispute resolvers,  
22 on terms substantially similar to those contained herein.

23 **25.3.2** Each Key Subcontract shall include (a) a representation and warranty from the  
24 Subcontractor, for the benefit of Developer and ADOT, stating that its submission in the DPDs  
25 constitutes all the documentary information used in establishing its Subcontract price, and (b)  
26 the Subcontractor's covenant to provide a sworn certification in favor of Developer and ADOT  
27 together with each supplemental set of DPDs, stating that the information contained therein is  
28 complete, accurate and current.

29 **25.3.3** Each Subcontract shall include a provision requiring the Subcontractor to  
30 preserve all documentary information used in establishing its Subcontract price and to provide  
31 such documentation to Developer for incorporation into the DPDs or to ADOT in connection with  
32 any Claim made by Developer that involves work performed by the Subcontractor.

### 33 **25.4 Maintenance and Inspection of Books and Records**

34 **25.4.1** Except for DPDs (which shall be maintained as set forth in Section 25.1),  
35 Developer shall keep and maintain accurate and complete Books and Records, including copies  
36 of all original documents delivered to ADOT. Developer shall keep, maintain and preserve such  
37 Books and Records in accordance with applicable provisions of the Contract Documents and



1 Project Management Plan, and in accordance with Good Industry Practice. Developer shall keep  
2 the Books and Records in a secure, fireproof location in the collocated office throughout the D&C  
3 Period and thereafter in a secure, fireproof location in Maricopa County, Arizona, or in another  
4 location ADOT approves in its sole discretion. Developer shall notify ADOT where the Books and  
5 Records are kept.

6 **25.4.2** Developer shall make all its Books and Records available for inspection by ADOT  
7 and ADOT's Representatives at Developer's principal offices in Arizona, or at ADOT's project  
8 office for DPDs, at all times during normal business hours, without charge. Developer shall  
9 provide copies thereof to ADOT, or make available for review to ADOT, as and when expressly  
10 required by the Contract Documents, or, for those not expressly required, upon request and at  
11 no expense to ADOT. ADOT may conduct any such inspection upon 24-hour prior notice, or  
12 unannounced and without prior notice where ADOT has good faith suspicion of fraud. The right  
13 of inspection includes the right to make extracts and take notes. The provisions of this Section  
14 25.4.2 are subject to the following:

15 (a) They shall remain in full force and effect regardless of whether a Claim or dispute  
16 exists or whether either Party or both of the Parties have invoked the Dispute  
17 Resolution Procedures; and

18 (b) Developer reserves the right to assert exemptions from disclosure for information  
19 that would be exempt under applicable State Law from discovery in legal actions,  
20 including information protected by the attorney-client or other legal privilege  
21 based upon an opinion of counsel reasonably satisfactory to ADOT.

22 **25.4.3** Developer shall retain Books and Records for the Record Retention Period;  
23 provided, however, that if the Contract Documents specify any different period for retention of  
24 particular records, such time period shall control. Any provision of the Contract Documents  
25 establishing a stated period for retention of Books and Records means the period of time, as  
26 stated, after the date the Book or Record is generated, unless specifically provided otherwise.

27 **25.4.4** Notwithstanding the foregoing, Developer shall retain and make available all  
28 Books and Records which relate to Claims and Disputes being processed or the subject of the  
29 Dispute Resolution Procedures for a period of not less than one year after the date the dispute  
30 is finally resolved (or for any longer period required under any other applicable provision of the  
31 Contract Documents). Throughout the course of any Work that is in Dispute and the subject of  
32 the Dispute Resolution Procedures, Developer shall keep separate and complete Books and  
33 Records that provide a clear distinction between the incurred direct costs of disputed Work and  
34 that of undisputed Work, and shall permit ADOT access to these Books and Records on an Open  
35 Book Basis.

36 **25.4.5** Refer to Attachment 1 to Exhibit 4 (Federal Requirements) (Federal  
37 Requirements for Federal-Aid Construction Projects) for Federal Requirements applicable to  
38 maintenance and inspection of Books and Records, with which Developer shall comply.

1 **25.5 Audits**

2 **25.5.1** ADOT shall have the right to review and audit Developer, its Subcontractors and  
3 their respective Books and Records as and when ADOT deems necessary for purposes of verifying  
4 compliance with the Contract Documents and applicable Law. Without limiting the foregoing,  
5 ADOT shall have the right to audit the Project Management Plan and compliance therewith,  
6 including the right to inspect Work or activities and to verify the accuracy and adequacy of the  
7 Project Management Plan and its component parts, plans and other documentation. ADOT may  
8 conduct any such audit of Books and Records upon 24-hour prior notice, or unannounced and  
9 without prior notice where there is good faith suspicion of fraud.

10 **25.5.2** All Claims or disputes shall be subject to audit at any time following the filing of  
11 the Claim or dispute. The audit may be performed by employees of ADOT or by an auditor under  
12 contract with ADOT. No notice from ADOT is required before commencing any audit (1) within  
13 60 days after the Final Acceptance or (2) within 60 days after termination of this Agreement.  
14 Thereafter, ADOT will provide 20 days' Notice to Developer, any Subcontractors or their  
15 respective agents before commencing an audit. Developer, Subcontractors or their agents shall  
16 provide and cause Developer-Related Entities to provide adequate facilities, acceptable to ADOT,  
17 for the audit during normal business hours. Developer shall cooperate and cause Developer-  
18 Related Entities to cooperate with the auditors. At a minimum, the auditors shall have available  
19 to them the following documents:

- 20 (a) Daily time sheets and supervisor's daily reports;
- 21 (b) Union agreements;
- 22 (c) Insurance, welfare, and benefits records;
- 23 (d) Payroll registers;
- 24 (e) Earnings records;
- 25 (f) Payroll tax forms;
- 26 (g) Material invoices and requisitions;
- 27 (h) Material cost distribution work sheet;
- 28 (i) Equipment records (list of company equipment, rates, etc.);
- 29 (j) Subcontractors' and Suppliers' invoices;
- 30 (k) Subcontractors' and agents' payment certificates;
- 31 (l) Canceled checks (payroll, Subcontractors and Suppliers);

- 1 (m) Job cost report;
- 2 (n) Job payroll ledger;
- 3 (o) General ledger;
- 4 (p) Cash disbursements journal;
- 5 (q) Project Schedules;
- 6 (r) All documents that relate to each and every Claim or dispute, together with all  
7 documents that support the amount of damages as to each Claim or dispute; and
- 8 (s) Work sheets used to prepare the Claim or dispute establishing the cost  
9 components for items of the Claim or dispute, including labor, benefits and  
10 insurance, materials, equipment, Subcontractors, all documents that establish the  
11 time periods, individuals involved, the hours for the individuals, and the rates for  
12 the individuals.

13 **25.5.3** Failure of any Developer-Related Entity to maintain and retain sufficient records  
14 to allow the auditors to verify any portion of any Claim or dispute shall constitute a waiver, and  
15 bar any recovery or relief, regarding such portion of the Claim or dispute. Failure of any  
16 Developer-Related Entity to permit the auditor access to the Books and Records of any  
17 Developer-Related Entity, or to otherwise fully comply with the provisions of this Section 25.5  
18 shall constitute a waiver of the Claim or dispute and shall bar any recovery or relief thereunder.

19 **25.5.4** Any rights of the FHWA to review and audit Developer, its Subcontractors and  
20 their respective Books and Records are set forth in Exhibit 4 (Federal Requirements).

21 **25.5.5** Developer represents and warrants the completeness and accuracy of all  
22 information it or its agents provide in connection with ADOT audits, and shall cause all  
23 Subcontractors other than ADOT and Governmental Entities acting as Subcontractors to warrant  
24 the completeness and accuracy of all information such Subcontractors or their agents provide in  
25 connection with ADOT audits.

26 **25.5.6** ADOT's rights of audit include the right to observe the business operations of  
27 Developer and its Subcontractors to confirm the accuracy of Books and Records.

28 **25.5.7** Developer's internal and third party quality and compliance auditing  
29 responsibilities shall be set forth in the Project Management Plan, consistent with the audit  
30 requirements referred to in Sections GP 110.04.1, GP 110.07.2, GP 110.08 and GP 110.09 of the  
31 Technical Provisions.

32 **25.5.8** Nothing in the Contract Documents shall in any way limit the constitutional and  
33 statutory powers, duties and rights of elected State officials, including the independent rights of  
34 the State Auditor General, in carrying out his or her legal authority. Developer understands and

1 acknowledges that:

2 (a) The State Auditor General may conduct an audit or investigation of any Person  
3 receiving funds from the State directly under this Agreement or indirectly through  
4 a Subcontract;

5 (b) Acceptance of funds directly under this Agreement or indirectly through a  
6 Subcontract acts as acceptance of the authority of the State Auditor General,  
7 under the direction of the Joint Legislative Audit Committee, to conduct an audit  
8 or investigation in connection with those funds; and

9 (c) A Person that is the subject of an audit or investigation must provide the State  
10 Auditor General with access to any information the State Auditor General  
11 considers relevant to the investigation or audit.

## 12 **25.6 Arizona Public Records Act**

13 **25.6.1** Developer acknowledges and agrees that all records, documents, drawings,  
14 plans, specifications and other materials in ADOT's possession, including materials submitted by  
15 Developer, are subject to the provisions of the Public Records Act. To the extent that this  
16 Agreement involves the exchange or creation of "public information," as such term is defined by  
17 the Public Records Act, that ADOT collects, assembles, or maintains or has a right of access to,  
18 and is not otherwise excepted from disclosure under the Public Records Act, Developer is  
19 required, at its sole cost and expense, to make any such information available in .pdf format,  
20 which is accessible by the public.

21 **25.6.2** If Developer believes information or materials submitted to ADOT constitute  
22 trade secrets or confidential commercial, financial or proprietary information or other  
23 information that is exempted from disclosure under the Public Records Act, Proposer shall  
24 specifically and conspicuously do all of the following:

25 (a) invoke the exclusion on submission of the information or other material for which  
26 protection is sought;

27 (b) identify the data or other materials for which protection is sought with  
28 conspicuous labeling as "CONFIDENTIAL" in the center header of each such page  
29 affected, provided, however, that no such designation is necessary for the DPDs,  
30 which Developer hereby deems to be confidential;

31 (c) state the reasons why protection is necessary; and

32 (d) fully comply with any applicable state Law with respect to information that the  
33 Respondent contends should be exempt from disclosure.

34 **25.6.3** If ADOT receives a request for public disclosure of materials marked  
35 "CONFIDENTIAL," ADOT will use reasonable efforts to notify Developer of the request and give

1 Developer an opportunity to assert, in writing and at Developer’s sole expense, a claimed  
2 exception under the Public Records Act or other applicable Law within the time period specified  
3 in the notice issued by ADOT and allowed under the Public Records Act. Under no circumstances,  
4 however, will ADOT be responsible or liable to Developer or any other Person for the disclosure  
5 of any such labeled materials, whether the disclosure is required by Law, or court order, or occurs  
6 through inadvertence, mistake or negligence on the part of ADOT or its officers, employees,  
7 contractors or consultants.

8 **25.6.4** In the event of any proceeding or litigation concerning the disclosure of any  
9 material submitted by Developer to ADOT, ADOT’s sole involvement will be as a stakeholder  
10 retaining the material until otherwise ordered by a court or such other authority having  
11 jurisdiction with respect thereto, and Developer shall be fully responsible for otherwise  
12 prosecuting or defending any action concerning the materials at its sole cost and risk; provided,  
13 however, that ADOT reserves the right, in its sole discretion, to intervene or participate in the  
14 litigation in such manner as it deems necessary or desirable. Except in the case of ADOT’s  
15 voluntary intervention or participation in litigation, Developer shall pay and reimburse ADOT  
16 within 30 days after receipt of demand and reasonable supporting documentation for all costs  
17 and fees, including attorneys’ fees and costs, ADOT incurs in connection with any litigation,  
18 proceeding or request for disclosure.

19 **25.6.5** Nothing contained in this Section 25.6 shall modify or amend requirements and  
20 obligations imposed on ADOT by the Public Records Act or other applicable Law, and the  
21 provisions of the Public Records Act or other Laws shall control in the event of a conflict between  
22 the procedures described above and the applicable Law.

23 **25.7 Intellectual Property**

24 **25.7.1 Proprietary Intellectual Property**

25 (a) Developer acknowledges and agrees that all Proprietary Intellectual Property, in  
26 any medium, is specially ordered or commissioned by ADOT, including works  
27 made for hire in accordance with Section 101 of the Copyright Act of 1976. In  
28 consideration for ADOT’s obligation to pay Developer on the terms and conditions  
29 of this Agreement, Developer hereby transfers and assigns to ADOT all rights, title,  
30 ownership and interest in and to the Proprietary Intellectual Property including  
31 any and all software, work product and designs.

32 (b) As a condition of Final Acceptance, Developer shall deliver to ADOT all work  
33 product, documents, results and related materials created in the development of  
34 Proprietary Intellectual Property during the D&C Period as well as a complete,  
35 indexed collection of such materials. Without limiting the generality of the  
36 foregoing, delivery of such materials shall include Design Documents and  
37 Construction Documents. Developer may retain a copy of such work product,  
38 documents, results and related materials.

1 (c) Developer shall deliver to ADOT all work product, documents, results and related  
2 materials created in the development of Proprietary Intellectual Property during  
3 the O&M Period promptly after creation, as well as an indexed collection of such  
4 materials. Developer may retain a copy of such work product, documents, results  
5 and related materials.

6 (d) ADOT hereby grants to Developer a non-exclusive, irrevocable, perpetual, fully  
7 paid up license to use, exploit, manufacture, distribute, copy, adapt and display  
8 the Proprietary Intellectual Property, including in connection with (i)  
9 incorporation into the Project, (ii) the Work, (iii) all other services performed for  
10 or on behalf of ADOT to complete the Work, or comply with Developer's  
11 obligations under this Agreement, and (iv) other projects and work of Developer.  
12 No Intellectual Property rights of ADOT are being licensed to Developer except as  
13 otherwise expressly provided in this Section 25.7.1. Developer's use or  
14 exploitation of the licensed Proprietary Intellectual Property shall be at  
15 Developer's sole discretion and risk, and in no way shall be deemed to confer  
16 liability or indemnity obligation on ADOT. ADOT shall not be liable to Developer-  
17 Related Entity or any other person for any claim, loss, damage, cost, judgment,  
18 fee, penalty, charge or expense (including attorney's fees and costs) to the extent  
19 arising out of or resulting from use or exploitation of the licensed Proprietary  
20 Intellectual Property by Developer, any transferee of the license or any of their  
21 respective board members, officers, agents or employees. ADOT makes no  
22 warranty or representation, express or implied, regarding the licensed Proprietary  
23 Intellectual Property or its suitability for any intended purpose.

24 (e) ADOT acknowledges and agrees that:

25 (i) ADOT will bear responsibility for infringement of third party Intellectual  
26 Property rights resulting solely from ADOT's alteration of Proprietary  
27 Intellectual Property; and

28 (ii) Developer makes no warranty or representation, express or implied,  
29 regarding the suitability of the Proprietary Intellectual Property for reuse  
30 unrelated to the Project, unless such reuse is with the prior written  
31 authorization of Developer;

32 provided that the foregoing provisions do not affect or limit Developer's  
33 obligations and liabilities under Section 23.1.1(c).

## 34 **25.7.2 Developer Intellectual Property**

35 (a) Subject to Section 25.7.5, Developer hereby grants to ADOT a non-exclusive,  
36 irrevocable, perpetual, fully paid-up right and license to use, exploit, manufacture,  
37 distribute, copy, adapt and display the Developer Intellectual Property, including  
38 any enhancements thereof.

- 1 (b) Developer shall identify and disclose all Developer Intellectual Property contained  
2 or included in the Project Intellectual Property, including (when reasonably  
3 available) full and specific information detailing Intellectual Property claimed,  
4 date of authorship, creation or invention, date of application(s), application  
5 number(s) and registering entit(ies), date of registration(s), registration number(s)  
6 and registering entit(ies), if any, and owner including person or entity name and  
7 address.
  
- 8 (c) Developer shall deliver to ADOT all Developer Intellectual Property contained or  
9 included in the Project Intellectual Property promptly upon request.

10 **25.7.3 Third Party Intellectual Property**

- 11 (a) Whenever using any design, device, material, software or process protectable or  
12 protected as Third Party Intellectual Property, Developer shall obtain the right and  
13 license for such use. Without limiting the foregoing, and subject to Section 25.7.5,  
14 Developer shall secure nonexclusive, transferable, irrevocable, unconditional,  
15 royalty-free licenses in the name of ADOT to use, reproduce, modify, adapt and  
16 disclose Third Party Intellectual Property and shall pay any and all royalties and  
17 license fees required to be paid for any Intellectual Property incorporated into the  
18 Project Intellectual Property. All Third Party Intellectual Property licenses are  
19 subject to ADOT’s review and approval. The foregoing requirement shall not apply,  
20 however, to mass-marketed software products (sometimes referred to as “shrink  
21 wrap software”) owned by such a Person where such a license cannot be extended  
22 to ADOT using commercially reasonable efforts. In such case, Developer shall  
23 acquire the proper rights for ADOT to make use of such software products as  
24 necessary for Developer to comply with the Contract Documents.
  
- 25 (b) Developer shall identify and disclose all Third Party Intellectual Property contained  
26 or included in the Project Intellectual Property including (when reasonably  
27 available) full and specific information detailing Intellectual Property claimed,  
28 date of authorship, creation or invention, date of application(s), application  
29 number(s) and registering entity(ies), date of registration(s), registration  
30 number(s) and registering entity(ies), if any, and owner including person or entity  
31 name and address.

32 **25.7.4 Inclusion in Contract Price**

33 Developer acknowledges and agrees that the Contract Price includes all royalties,  
34 licensing fees and costs arising from Project Intellectual Property or in any way involved in the  
35 Work.

36 **25.7.5 Licensing Limitations**

37 Licenses granted under Sections 25.7.2 and 25.7.3 shall be limited as follows:

- 1 (a) The right to transfer the license is limited to any Governmental Entity that  
2 succeeds to the power and authority of ADOT generally or with respect to the  
3 Project, and any Governmental Entity having power and authority over any state,  
4 county, city or municipal road where the Proprietary Intellectual Property of  
5 Developer is installed, deployed or operated.
- 6 (b) The right to sublicense is limited to State, regional and local Governmental Entities  
7 that own or operate a State Highway or other road (tolled or not tolled) where the  
8 Proprietary Intellectual Property of Developer is installed, deployed or operated,  
9 and to their respective concessionaires, developers, contractors, subcontractors,  
10 employees, attorneys, consultants and agents that are retained in connection with  
11 such a State Highway or other road (tolled or untolled).
- 12 (c) ADOT will:
- 13 (i) Not disclose any Developer Intellectual Property or Third Party Intellectual  
14 Property to any Person other than authorized transferees and sublicensees  
15 who agree to be bound by any confidentiality obligations of ADOT relating  
16 thereto;
- 17 (ii) Enter into a commercially reasonable confidentiality agreement if  
18 requested by Developer with respect to the licensed Developer Intellectual  
19 Property or Third Party Intellectual Property; and
- 20 (iii) Include, or where applicable require such State, regional or local  
21 Governmental Entity to include, in the contract with the sublicensee its  
22 covenant to employ sound business practices no less diligent than those  
23 used for its own confidential information, and no less diligent than  
24 required by commercially reasonable standards of confidentiality, to  
25 protect all Developer Intellectual Property or Third Party Intellectual  
26 Property and other materials provided under the sublicense against  
27 disclosure to third parties not in receipt of a sublicense, and to use the  
28 sublicense only for the permitted purposes.

#### 29 **25.7.6 Limitation on ADOT Liability**

30 Notwithstanding any contrary provision of this Agreement, in no event shall ADOT or any  
31 of its directors, officers, employees, consultants or agents be liable to any Developer-Related  
32 Entity, any Affiliate or any Subcontractor for any damages, including loss of profit, arising out of  
33 breach of the duty of confidentiality set forth in Section 25.7.5 if such breach is not the result of  
34 recklessness or intentional misconduct. Developer hereby irrevocably waives all claims to any  
35 such damages.



1           **SECTION 26. EARLY TERMINATION OF AGREEMENT; TRANSITION AT END OF TERM**

2           **26.1 Termination for Convenience**

3           **26.1.1** ADOT may, at any time, terminate this Agreement and the performance of the  
4 Work by Developer if ADOT determines, in its sole discretion, that a termination is in ADOT’s best  
5 interest (“**Termination for Convenience**”). ADOT will terminate by delivering to Developer a  
6 Notice of Termination for Convenience specifying the termination and its effective date.

7           **26.1.2** If ADOT terminates this Agreement on grounds or in circumstances beyond  
8 ADOT’s termination rights specifically set forth in this Agreement, such termination shall be  
9 deemed a Termination for Convenience for the purpose of determining the amount of  
10 Termination Compensation due (but not for any other purpose).

11           **26.2 Termination for Convenience Compensation Amount**

12           **26.2.1** If ADOT exercises its right of Termination for Convenience, it shall owe  
13 Termination Compensation to Developer in an amount equal to the sum of the following:

- 14           (a) Payments due but not yet paid in accordance with Section 15 for all D&C Work  
15 and O&M Work performed up to the date of termination, including work in  
16 progress since the last D&C Draw Request or O&M Draw Request, as applicable;  
17 plus
- 18           (b) Developer’s actual reasonable out-of-pocket costs, including equipment costs  
19 only to the extent permitted by Section 1.2.3 of Exhibit 13 (Compensation Amount  
20 Specifications), for demobilization and for work done to preserve and protect the  
21 Project, plus 15% of such costs for overhead and profit; plus
- 22           (c) Solely with respect to the O&M Work, an amount equal to 6% of the sum of the  
23 unescalated Annual O&M Payments (prorated for any partial year) for the  
24 remaining balance of the O&M Period; plus
- 25           (d) The cost of settling and paying claims arising out of the termination of Work under  
26 Subcontracts and Utility Agreements, exclusive of the amounts paid or payable on  
27 account of supplies or materials delivered or services furnished by the  
28 Subcontractor prior to the effective date of the Notice of Termination for  
29 Convenience, which amounts shall be included in the cost for which payment is  
30 made under clause (a) above; plus
- 31           (e) The reasonable out-of-pocket cost incurred to prepare and carry out the transition  
32 plan under Section 26.9.1; plus
- 33           (f) Any other reasonable out-of-pocket cost (including overhead) incurred incidental  
34 to termination of Work under this Agreement, including the reasonable cost to  
35 Developer of handling material returned to Suppliers, delivered to ADOT or

- 1 otherwise disposed of as directed by ADOT, and including a reasonable allowance  
2 for Developer's administrative costs in determining the amount payable due to  
3 termination of this Agreement, but excluding any costs and expenses incurred in  
4 connection with any disputes or Claims; minus
- 5 (g) The cost of property, materials, supplies, equipment and other things to be  
6 retained by Developer, the agreed price for, or proceeds from, the sale of such  
7 items not otherwise delivered to ADOT, including proceeds of sales pursuant to  
8 Section 26.9.2(j), and other appropriate deductions allowed under this  
9 Agreement, including those deductions that would be permitted in connection  
10 with the Final D&C Payment and each Monthly O&M Payment; minus
- 11 (h) except for normal spoilage, and except to the extent that ADOT will have  
12 otherwise expressly assumed the risk of loss, the fair value, as determined by  
13 ADOT, of equipment, machinery, materials, supplies and property which are  
14 destroyed, lost, stolen or damaged so as to become undeliverable to ADOT; minus
- 15 (i) All unliquidated advance or other payments made to or on behalf of Developer  
16 applicable to the terminated portion of the Work; minus
- 17 (j) The cost of repairing any Nonconforming Work (or, in ADOT's sole discretion, the  
18 amount which ADOT is entitled to recover under Section 8.7.2); minus
- 19 (k) The amount of any other Claim which ADOT may have against any Developer-  
20 Related Entity in connection with this Agreement; minus
- 21 (l) Any other amounts due or payable by Developer to ADOT pursuant to this  
22 Agreement or any such amount that is in dispute; minus
- 23 (m) Amounts that ADOT reasonably deems appropriate to retain to cover any existing  
24 or threatened claims and stop notices relating to the Project, including claims by  
25 Utility Companies, provided that ADOT will promptly pay to Developer any such  
26 retained amounts remaining after the need for the retention ends.

27 **26.2.2** The Termination Compensation as determined under Section 26.2.1 shall be  
28 subject to the following limitations:

- 29 (a) Developer shall not be entitled to any Termination Compensation in excess of the  
30 value of the Work performed (determined as provided in Section 26.2.1);
- 31 (b) except to the extent provided in Sections 26.2.1(b) and (c), items such as lost or  
32 anticipated profits, unabsorbed overhead and opportunity costs of Developer  
33 shall not be recoverable;
- 34 (c) the total amount to be paid to Developer for Termination for Convenience with  
35 respect to the O&M Work, exclusive of the costs described in Sections 26.2.1(d),

1 (e) and (f), may not exceed the total Annual O&M Payment for the year in which  
2 the termination occurs; and

- 3 (d) if any refund is payable with respect to insurance or bond premiums, letter of  
4 credit fees, deposits or other items that were previously passed through to ADOT  
5 by Developer, Developer shall pay such refund to ADOT or such amount shall  
6 otherwise be credited to ADOT.

7 **26.2.3** Upon determination of the amount of the Termination Compensation, the  
8 Parties shall sign a Supplemental Agreement to reflect the agreed amount, and ADOT will pay  
9 Developer any amount that may be due.

### 10 **26.3 Subcontracts**

11 **26.3.1** Provisions shall be included in each Subcontract (at all tiers) to ensure ADOT's  
12 rights of Termination for Convenience are passed through to the Subcontractors and to establish  
13 terms and conditions relating thereto, including procedures for determining the amount payable  
14 to each Subcontractor upon a termination, consistent with this Section 26.

15 **26.3.2** Each Subcontract shall provide that, in the event of a Termination for  
16 Convenience, the Subcontractor will not be entitled to any anticipatory or unearned profit on  
17 work terminated or partly terminated, except as provided in Section 26.2.1(b) and (c), or to any  
18 payment which constitutes consequential damages or punitive damages due to the Termination  
19 for Convenience.

### 20 **26.4 Termination Based on Delayed Issuance of NTPs**

21 **26.4.1** If NTP 1 has not been issued within 180 days after the Proposal Due Date plus  
22 the number of days of any delay in such issuance attributable in whole or in part to a Developer  
23 Act, Developer shall have the right to terminate this Agreement, which right shall be exercised  
24 by delivery of notice of termination to ADOT. In such event, ADOT's sole liability to Developer is  
25 to pay Developer (a) the same payment for work product as provided to responsive, unsuccessful  
26 Proposers pursuant to Section 6.3 of the ITP, provided, however, that all other conditions for  
27 such payment are met, plus (b) reasonable out-of-pocket costs (including overhead) incurred in  
28 performing any of the activities described or required in Sections 6.1.2(g), (h) and (j) of the ITP.

29 **26.4.2** If NTP 2 has not been issued within 120 days after satisfaction of all conditions  
30 precedent to issuance of NTP 2, Developer may conditionally elect to terminate this Agreement  
31 by providing ADOT with notice of such conditional election.

- 32 (a) If Developer delivers a notice of its conditional election to terminate, ADOT will  
33 have the choice of either accepting such notice of termination or continuing this  
34 Agreement in effect by delivering to Developer notice of ADOT's choice not later  
35 than 30 days after receipt of Developer's notice.

- 36 (b) If ADOT does not deliver notice of its choice within such 30-day period, then it will

1 be deemed to have accepted Developer’s election to terminate the Agreement.  
2 In such event, the termination shall be deemed a termination for convenience and  
3 handled in accordance with this Section 26.

4 (c) If ADOT delivers timely notice choosing to continue this Agreement in effect, then  
5 the Contract Price adjustment provisions described in Section 16.4.12 shall be  
6 extended and continue in effect for the duration of the delay in issuance of NTP 2,  
7 or until earlier termination of this Agreement.

## 8 **26.5 Termination for Developer Default**

9 **26.5.1** Subject to Section 21.3 (concerning the occurrence of an Event of Default  
10 consisting solely of Developer’s failure to achieve Project Substantial Completion or Final  
11 Acceptance by the applicable Completion Deadline), in the event of any Developer Default that  
12 is or becomes an Event of Default, ADOT may terminate this Agreement or a portion thereof,  
13 including Developer’s rights of entry upon and control of the Project.

14 **26.5.2** The Agreement will terminate on the date ADOT gives Notice of termination or  
15 any other date specified in such Notice. ADOT may include Notice of termination in its  
16 declaration of the Event of Default.

17 **26.5.3** If this Agreement is terminated under this Section 26.5 and it is later determined  
18 that ADOT lacked the right to terminate for an Event of Default, such termination shall be deemed  
19 to constitute a Termination for Convenience pursuant to Section 26.1.

## 20 **26.6 Termination for Extended Force Majeure Event**

21 **26.6.1** If a Force Majeure Event occurs and such Force Majeure Event is continuing or  
22 its consequence remains such that either Party is unable to comply with its relevant obligations  
23 under this Agreement for a continuous period of more than 12 months, either Party may  
24 terminate this Agreement by giving 30 day written notice to the other Party.

25 **26.6.2** If termination occurs for an extended Force Majeure Event pursuant to this  
26 Section 26.6, then ADOT will owe Termination Compensation to Developer equal to that owing  
27 upon a Termination for Convenience, except for (a) the markup under Section 26.2.1(b), which  
28 shall be limited to 10%, and (b) the amount set forth in Section 26.2.1(c).

## 29 **26.7 Termination by Court Ruling**

30 **26.7.1** This Agreement and the other Contract Documents are subject to Termination  
31 by Court Ruling.

32 **26.7.2** Termination by Court Ruling becomes effective, and automatically terminates  
33 this Agreement, upon issuance of the final, non-appealable court order by a court of competent  
34 jurisdiction; provided, however, that where Section 27.16 applies, Termination by Court Ruling  
35 becomes effective only after the Parties determine they are unable to negotiate revisions to the

1 Contract Documents to effect their original intent.

2 **26.7.3** If both Parties agree in writing, they may elect to terminate this Agreement in  
3 part due to such court order and to continue the remainder of this Agreement in effect, to the  
4 extent it is possible to do so without violating the court order.

5 **26.7.4** If Termination by Court Ruling occurs, then ADOT will owe Termination  
6 Compensation to Developer equal to that owing upon a Termination for Convenience, except the  
7 amount set forth in Section 26.2.1(c).

## 8 **26.8 Termination Based on Statutory Grounds**

9 **26.8.1** ADOT may terminate this Agreement, without penalty or further obligation,  
10 within three years after the Effective Date, if any person significantly involved in initiating,  
11 negotiating, securing, drafting or creating this Agreement for ADOT is or becomes, at any time  
12 during such three-year period, an employee or agent of Developer. See A.R.S., Title 38, Chapter  
13 3, Article 8, and, in particular, § 38-511.

14 **26.8.2** ADOT may terminate this Agreement, without obligation or penalty, if Developer  
15 or any member of the Developer’s team violates A.R.S. § 41-2517C, regarding unlawful offering  
16 of employment to a procurement officer or procurement employee.

## 17 **26.9 Responsibilities after Notice of Termination**

18 **26.9.1** Within three days after either Party delivers to the other Party a notice of  
19 termination of this Agreement, Developer and ADOT shall meet and confer for the purpose of  
20 developing an interim transition plan for the orderly transition of the terminated Work,  
21 demobilization and transfer of the Project design, construction, operation and maintenance to  
22 ADOT. The Parties shall use diligent efforts to complete preparation of the interim transition plan  
23 within 15 days after the date of such notice of termination. The Parties shall use diligent efforts  
24 to complete a final transition plan within 30 days after such date. The final transition plan shall  
25 be in form and substance acceptable to ADOT in its good faith discretion and shall include and be  
26 consistent with the provisions and procedures set forth in Section 26.9.2.

27 **26.9.2** After either Party delivers to the other Party a notice of termination of this  
28 Agreement, and except as otherwise directed by ADOT, Developer shall timely comply with the  
29 following obligations independent of, and without regard to, the timing for preparing or  
30 implementing the transition plan or for determining, adjusting, settling and paying any amounts  
31 due Developer under this Agreement:

32 (a) Developer shall stop the Work as specified in the notice;

33 (b) Developer shall immediately notify all affected Subcontractors and Suppliers that  
34 this Agreement is being terminated and that their Subcontracts (including orders  
35 for materials, services or facilities) are not to be further performed unless  
36 otherwise authorized in writing by ADOT;

- 1 (c) Developer shall not enter into any further Subcontracts (including orders for  
2 materials, services or facilities), except as necessary to complete the continued  
3 portion of the Work;
- 4 (d) Unless instructed otherwise by ADOT, Developer shall terminate all Subcontracts  
5 and Utility Agreements to the extent they relate to the Work terminated;
- 6 (e) To the extent directed by ADOT, Developer shall execute and deliver to ADOT  
7 written assignments, in form and substance acceptable to ADOT, acting  
8 reasonably, of all of Developer's right, title, and interest in and to: (i) Subcontracts  
9 and Utility Agreements that relate to the terminated Work, provided ADOT  
10 assumes in writing all of Developer's obligations thereunder that arise after the  
11 effective date of the termination; and (ii) all assignable warranties, claims and  
12 causes of action held by Developer against Subcontractors and other Persons in  
13 connection with the terminated Work, to the extent such Work is adversely  
14 affected by any Subcontractor or other Person's breach of warranty, contract or  
15 other legal obligation; provided, however, that Developer may retain claims  
16 against Subcontractors for which ADOT has been fully compensated;
- 17 (f) Subject to the prior approval of ADOT, Developer shall settle all outstanding  
18 liabilities and claims arising from termination of Subcontracts and Utility  
19 Agreements that are required to be terminated hereunder;
- 20 (g) Within 30 days after notice of termination is delivered, Developer shall provide  
21 ADOT with a true and complete list of all materials, goods, machinery, equipment,  
22 parts, supplies and other property in inventory or storage (whether held by  
23 Developer or any Person or entity on behalf of or for the account of Developer)  
24 for use in or respecting the terminated Work, or on order or previously completed  
25 but not yet delivered from Suppliers for use in or respecting such Work. In  
26 addition, if requested by ADOT, Developer shall promptly transfer title and deliver  
27 to ADOT or ADOT's Authorized Representative, through bills of sale or other  
28 documents of title, as directed by ADOT, all such materials, goods, machinery,  
29 equipment, parts, supplies and other property, provided ADOT assumes in writing  
30 all of Developer's obligations under any contracts relating to the foregoing that  
31 arise after the effective date of termination;
- 32 (h) On or about the effective date of termination, Developer shall execute and deliver  
33 to ADOT the following, together with an executed bill of sale or other written  
34 instrument, in form and substance acceptable to ADOT, acting reasonably,  
35 assigning and transferring to ADOT all of Developer's right, title and interest in and  
36 to the following:
  - 37 (i) All completed or partially completed drawings (including plans, elevations,  
38 sections, details and diagrams), specifications, designs, Record Drawings,  
39 surveys, and other Design Documents and information pertaining to the

- 1 design or construction of the terminated Work;
- 2 (ii) All samples, borings, boring logs, geotechnical data and similar data and  
3 information relating to the terminated Work;
- 4 (iii) All books, records, reports, test reports, studies and other documents of a  
5 similar nature relating to the terminated Work; and
- 6 (iv) All other work product and Intellectual Property used or owned by  
7 Developer or any Affiliate relating to the terminated Work;
- 8 (i) For the period of time specified by ADOT in the notice of termination or until ADOT  
9 takes over the Work, Developer shall take all action that may be necessary, or that  
10 ADOT may direct, for the safety, protection and preservation of:
- 11 (i) The public, including public and private vehicular movement;
- 12 (ii) Work; and
- 13 (iii) Equipment, machinery, materials and property related to the Project that  
14 is in the possession of Developer and in which ADOT has or may acquire an  
15 interest;
- 16 (j) As authorized by ADOT in writing, Developer shall use its best efforts to sell, at  
17 reasonable prices, any property of the types referred to in clause (i) above;  
18 provided, however, that Developer: (i) is not required to extend credit to any  
19 purchaser; and (ii) may acquire the property under the conditions prescribed and  
20 at prices approved by ADOT. The proceeds of any transfer or disposition will be  
21 applied to reduce any payments to be made by ADOT under the Contract  
22 Documents or paid in any other manner directed by ADOT;
- 23 (k) Developer shall immediately safely demobilize and secure construction, staging,  
24 lay down and storage areas for the Project and Utility Adjustments included in the  
25 Work, including Developer's Temporary Work Areas, in a manner satisfactory to  
26 ADOT, and remove all debris and waste materials, except as otherwise approved  
27 by ADOT in writing;
- 28 (l) Developer shall assist ADOT in such manner as ADOT may require prior to and for  
29 a reasonable period following the effective date of termination to ensure the  
30 orderly transition of the terminated Work and its management to ADOT, and shall,  
31 if appropriate and if requested by ADOT, take all steps as may be necessary to  
32 enforce the provisions of Subcontracts pertaining to the surrender of the  
33 terminated Work;
- 34 (m) Developer shall deliver to ADOT all Books and Records and the then-current  
35 Electronic Document Management System, except for information in Books and

1 Records exempt under applicable State Law from discovery in legal actions,  
2 including information protected by the attorney-client or other legal privilege  
3 based upon an opinion of counsel reasonably satisfactory to ADOT;

4 (n) Developer shall carry out such other directions as ADOT may give for the  
5 termination of the Work; and

6 (o) Developer shall take such other actions as are necessary or appropriate to mitigate  
7 the damage and costs of termination.

8 **26.9.3** Termination of this Agreement under this Section 26 shall not relieve Developer  
9 or any Surety or Guarantor of its obligation for any Claims.

## 10 **26.10 Payment**

11 **26.10.1** ADOT will pay amounts owing to Developer under this Section 26 as follows:

12 (a) Undisputed amounts, by not later than the next Developer Cycle Key Date  
13 occurring after ADOT approves said amounts; and

14 (b) Disputed amounts, by not later than the next Developer Cycle Key Date occurring  
15 after the corresponding dispute is resolved.

16 **26.10.2** ADOT may, but is not obligated to, make advance partial payments to Developer  
17 for costs Developer incurs in connection with a termination under this Section 26, before  
18 Developer's Termination Compensation is finally determined. If the total of such advance partial  
19 payments exceeds the amount of the Termination Compensation finally determined to be owing  
20 to Developer under this Section 26, such excess shall be payable by Developer to ADOT upon  
21 demand.

## 22 **26.11 No Consequential Damages**

23 Except as provided in Section 26.2.1(b) and (c), and without limiting Section 22.10.1, under no  
24 circumstances shall Developer be entitled to anticipatory or unearned profits or consequential  
25 damages as a result of any termination under this Section 26. The payment to Developer  
26 determined in accordance with this Section 26 constitutes Developer's exclusive remedy for a  
27 termination hereunder.

## 28 **26.12 No Waiver; Release**

29 **26.12.1** Notwithstanding anything contained in this Agreement to the contrary, a  
30 termination under this Section 26 shall not waive any right or claim to damages that ADOT may  
31 have and ADOT may pursue any cause of action which it may have at Law, in equity or under the  
32 Contract Documents.

33 **26.12.2** Subject to Section 26.13, ADOT's payment to Developer of the amounts required



1 under this Section 26 shall constitute full and final satisfaction of, and upon payment ADOT will  
2 be forever released and discharged from, any and all Claims, causes of action, suits, demands and  
3 Losses, known or unknown, suspected or unsuspected, that Developer may have against ADOT  
4 arising out of or relating to the termination of this Agreement. Upon such payment, Developer  
5 shall execute and deliver to ADOT all such releases and discharges as ADOT may reasonably  
6 require to confirm the foregoing, but no such release and discharge shall be necessary to give  
7 effect to the foregoing satisfaction and release.

8 **26.13 Dispute Resolution**

9 The failure of the Parties to agree on amounts due under this Section 26 shall be a Dispute to be  
10 resolved in accordance with Section 24.

11 **26.14 Allowability of Costs**

12 All costs claimed by Developer under this Section 26 must be allowable, allocable and reasonable  
13 in accordance with the cost principles and procedures of 48 C.F.R. Part 31.

14 **26.15 Flex Lanes System Transition at the End of the Term**

15 **26.15.1** ADOT and Developer shall meet and confer between 12 and six months before  
16 the maturity of the Term for the purpose of developing a Flex Lanes Transition Plan for:

- 17 (a) Training of ADOT staff in the maintenance of the Flex Lanes System;
- 18 (b) Equipment replacements or improvements of the Flex Lanes System that would  
19 be recommended for the five-year period following the Term; and
- 20 (c) The orderly transfer of Flex Lanes System maintenance from Developer to ADOT  
21 at the maturity of the Term.

22 **26.15.2** Based on initial consultation which shall occur no later than nine months before  
23 the maturity of the Term, Developer shall prepare a draft of the Flex Lanes Transition Plan. ADOT  
24 will review and respond to the draft Flex Lanes Transition Plan within 30 days after receipt. Within  
25 ten days after ADOT delivers its response, the Parties will meet to resolve all issues to ADOT's  
26 satisfaction. Developer shall then submit the final Flex Lanes Transition Plan for approval no later  
27 than 30 days after the issue resolution meeting. The Parties shall use diligent efforts to complete  
28 preparation of the Flex Lanes Transition Plan not later than six months prior to the maturity of  
29 the Term. The Flex Lanes Transition Plan shall be in form and substance acceptable to ADOT in  
30 its good faith discretion.

31 **26.15.3** The Flex Lanes Transition Plan shall include and be consistent with the provisions  
32 and procedures set forth in (a) Sections 26.9.2(g), (h), (k) and (l), and (b) Section OMR 501 of the  
33 Technical Provisions.

34 **26.15.4** The Parties shall carry out the provisions and procedures in the Flex Lanes

- 1 Transition Plan in a timely manner in order to thoroughly train ADOT staff in the maintenance of
- 2 the Flex Lanes System and to effectuate a smooth and uninterrupted transition of Flex Lanes
- 3 System maintenance to ADOT at the maturity of the Term.



1 created, the Parties do not thereby express any intention to form or hold themselves out as a de  
2 jure or de facto partnership, joint venture or similar relationship, to share net profits or net  
3 losses, or to give ADOT control or joint control over Developer's financial decisions or  
4 discretionary actions concerning the Project and the Work.

5 **27.3.3** In no event shall the relationship between ADOT and Developer be construed as  
6 creating any relationship whatsoever between ADOT and Developer's employees. Neither  
7 Developer nor any of its employees is or shall be deemed to be an employee of ADOT. Except as  
8 otherwise specified in the Contract Documents, Developer has sole authority and responsibility  
9 to employ, discharge and otherwise control its employees and has complete and sole  
10 responsibility as a principal for its agents, for all Subcontractors and for all other Persons that  
11 Developer or any Subcontractor hires to perform or assist in performing the Work.

## 12 **27.4 Successors and Assigns; Change of Control**

13 **27.4.1** The Contract Documents shall be binding upon and inure to the benefit of ADOT  
14 and Developer and their permitted successors, assigns and legal representatives.

15 **27.4.2** ADOT may transfer and assign all or any portion of its rights, title and interests  
16 in and to the Contract Documents, including rights with respect to any Project Bond, Guaranties,  
17 letters of credit and other security for payment or performance:

18 (a) Without Developer's consent, to any other public agency or public entity as  
19 permitted by Law, provided that the successor or assignee has assumed all of  
20 ADOT's obligations, duties and liabilities under the Contract Documents then in  
21 effect;

22 (b) Without Developer's consent, to any other Person that succeeds to the  
23 governmental powers and authority of ADOT; provided, however, that such  
24 successor(s) has assumed all of ADOT's obligations, duties and liabilities under the  
25 Contract Documents then in effect; and

26 (c) To any other Person with the prior approval of Developer.

27 **27.4.3** All rights of ADOT under Section 14, as well as all other rights and claims of ADOT,  
28 insofar as they relate to Elements that will be owned by Persons other than ADOT (such as Utility  
29 Companies and Local Jurisdictions), shall be assignable to such Persons.

30 **27.4.4** In the event of ADOT's assignment of all of its rights, title and interests in the  
31 Contract Documents as permitted hereunder, Developer shall have no further recourse to ADOT  
32 under the Contract Documents or otherwise except as specifically provided by other contractual  
33 agreement or by statute.

34 **27.4.5** Developer shall not voluntarily or involuntarily sell, assign, convey, transfer,  
35 pledge, mortgage or otherwise encumber Developer's interest in and to the Contract Documents  
36 or any portion thereof without ADOT's prior approval, except to any entity that is under the same

1 ultimate management control as Developer. Developer shall not grant any right of entry, license  
2 or other special occupancy of the Project to any other Person that is not in the ordinary course  
3 of Developer performing the Work, without ADOT's prior approval. Any sale, assignment,  
4 conveyance, transfer, pledge, mortgage, encumbrance, grant of right of entry, license or other  
5 special occupancy in violation of this provision shall be null and void *ab initio* and ADOT, at its  
6 option, may declare any such attempted action to be a material Developer Default and Event of  
7 Default.

8 **27.4.6** Developer shall not voluntarily or involuntarily cause, permit or suffer any  
9 Change of Control without ADOT's prior approval. If there occurs any voluntary or involuntary  
10 Change of Control without ADOT's prior approval, ADOT, at its option, may declare it to be a  
11 material Developer Default and Event of Default.

12 **27.4.7** Where ADOT's prior approval is required for a proposed sale, assignment,  
13 conveyance, transfer, pledge, mortgage, encumbrance, sublease or grant of right of entry, license  
14 or other special occupancy, or for any proposed Change of Control, ADOT may withhold or  
15 condition its approval in its sole discretion. Any such decision of ADOT to withhold consent shall  
16 be final, binding and not subject to the Dispute Resolution Procedures.

17 **27.4.8** Assignments and transfers of Developer's interest in or to the Contract  
18 Documents permitted under this Section 27.4 or otherwise approved by ADOT will be effective  
19 only upon ADOT's receipt of notice of the assignment or transfer and a written recordable  
20 instrument executed by the transferee, in form and substance acceptable to ADOT, in which the  
21 transferee, without condition or reservation, assumes all of Developer's obligations, duties and  
22 liabilities under this Agreement and the other Contract Documents then in effect and agrees to  
23 perform and observe all provisions thereof applicable to Developer. Each transferee shall take  
24 Developer's interest in or to the Contract Documents subject to, and shall be bound by, the  
25 Project Management Plan, the Subcontracts, the Utility Agreements, the Governmental  
26 Approvals, and all agreements between the transferor and Governmental Entities with  
27 jurisdiction over the Project or the Work, except to the extent otherwise approved by ADOT in  
28 its good faith discretion.

29 **27.5 Change of Organization or Name**

30 **27.5.1** Developer shall not change its legal form of business organization without the  
31 prior approval of ADOT, which consent may be granted or withheld in ADOT's sole discretion.

32 **27.5.2** In the event either Party changes its name, such Party agrees to promptly furnish  
33 the other Party with notice of change of name and appropriate supporting documentation and  
34 take necessary steps to ensure the new name replaces the old name in all Contract Documents.

35 **27.6 Designation of Representatives; Cooperation with Representatives**

36 **27.6.1** ADOT and Developer shall each designate an individual or individuals with the  
37 authority to make decisions and bind the Parties on matters relating to the Contract Documents

1 (for each Party, its respective “**Authorized Representative**”). Exhibit 15 (Initial Designation of  
2 Authorized Representatives) hereto provides the Parties’ initial Authorized Representative  
3 designations. Either Party may change its initial Authorized Representative designation by a  
4 subsequent writing delivered to the other Party in accordance with Section 27.12.

5 **27.6.2** Developer’s Authorized Representative(s) shall have onsite field and office  
6 authority to represent and act on behalf of Developer during the Term. Such Authorized  
7 Representative(s) shall be present at the Site at all times while the D&C Work is in progress.

8 **27.6.3** The Parties may also designate technical representatives who shall be authorized  
9 to (a) investigate and report on matters relating to the design and construction of the Project and  
10 operations and maintenance of the Flex Lanes and (b) negotiate on behalf of each of the Parties,  
11 but who do not have authority to bind ADOT or Developer.

12 **27.6.4** Developer shall cooperate with ADOT and all representatives of ADOT  
13 designated as described above.

14 **27.7 Limitation on Third Party Beneficiaries**

15 It is not intended by any of the provisions of the Contract Documents to create any third party  
16 beneficiary hereunder or to authorize anyone not a Party hereto to commence any legal  
17 proceeding of any nature whatsoever based on the terms or provisions hereof, except to the  
18 extent that specific provisions (such as the indemnity provisions) identify third parties and state  
19 that they are entitled to benefits hereunder. Except as otherwise provided in this Section 27.7,  
20 the duties, obligations and responsibilities of the Parties to the Contract Documents with respect  
21 to third parties shall remain as imposed by Law. The Contract Documents shall not be construed  
22 to create a contractual relationship of any kind between ADOT and a Subcontractor or any Person  
23 other than Developer.

24 **27.8 No Personal Liability of ADOT Employees; Limitation on State’s Liability**

25 **27.8.1** ADOT’s Authorized Representatives are acting solely as agents and  
26 representatives of ADOT when carrying out the provisions of or exercising the power or authority  
27 granted to them. They shall not be liable to any Developer-Related Entity either personally or as  
28 employees of ADOT for actions in their ordinary course of employment.

29 **27.8.2** In no event shall ADOT be liable for any injury, damage or death caused by any  
30 Developer Act.

31 **27.8.3** Nothing in the Agreement waives or diminishes the protections and defense  
32 afforded to ADOT and its employees by A.R.S. Title 12, Chapter 7, Article 2 (§ 12-820 et seq).

33 **27.9 Governing Law**

34 The Contract Documents shall be governed by and construed in accordance with (a) the Laws of  
35 the State, without regard to its principles of conflicts of laws, and (b) any applicable federal Laws.

1 **27.10 Five Year Transportation Facilities Construction Program**

2 The parties acknowledge that the Project and this Agreement are subject to A.R.S., Title 28,  
3 Chapter 20, Article 3.

4 **27.11 Israel Boycott**

5 Pursuant to A.R.S. § 35-393.01, Developer hereby certifies that it is not currently engaged in, and  
6 agrees to not engage in, throughout the Term, a boycott of goods or services from Israel.

7 **27.12 Notices and Communications**

8 **27.12.1** Notices under the Contract Documents shall be in writing and: (a) delivered  
9 personally; (b) sent by certified mail, return receipt requested; (c) sent by a recognized overnight  
10 mail or courier service, with delivery receipt requested; or (d) sent by email communication  
11 followed by a hard copy and with receipt confirmed by telephone, to the addresses set forth in  
12 Sections 27.12.2 and 27.12.3, as applicable (or to such other address as may from time to time  
13 be specified in writing).

14 **27.12.2** All notices, correspondence and other communications to Developer shall be  
15 delivered to the following address or as otherwise directed by Developer's Authorized  
16 Representative:

17  
18 Allen Mills  
19 Project Manager  
20 3888 E. Broadway Rd.  
21 Phoenix, AZ 85040-2924  
22 Telephone: (602) 437-7878  
23 E-mail: [allen.mills@kiewit.com](mailto:allen.mills@kiewit.com)  
24 Facsimile: (602) 437-7719  
25

26 In addition, copies of all notices regarding disputes, suspension, termination and default shall be  
27 delivered to the following:

28  
29 Nicholas Wiatrowski  
30 Area Manager  
31 3888 E. Broadway Rd.  
32 Phoenix, AZ 85040-2924  
33 Telephone: (602) 437-7878  
34 E-mail: [nicholas.wiatrowski@kiewit.com](mailto:nicholas.wiatrowski@kiewit.com)  
35 Facsimile: (602) 437-7719

1           **27.12.3** All notices, correspondence and other communications to ADOT will be marked  
2 as regarding the I-17, Anthem Way TI to Jct. SR 69 (Cordes Junction) Project and shall be delivered  
3 to the following address or as otherwise directed by ADOT’s Authorized Representative:

4                     Arizona Department of Transportation  
5                     206 S. 17<sup>th</sup> Avenue, MD 139A  
6                     Phoenix, AZ 85007  
7                     Attn: Annette Riley  
8                     Telephone: (602) 712-4241  
9                     E-mail: ariley@azdot.gov

10 In addition, copies of all notices regarding disputes, suspension, termination and default shall be  
11 delivered to the following:

12                     Office of the Arizona Attorney General  
13                     Transportation Section  
14                     2005 N. Central Avenue  
15                     Phoenix, AZ 85004  
16                     Telephone: (602) 542-1680  
17                     E-mail: transportation@azag.gov  
18                     Facsimile: (602) 542-3646

19           **27.12.4** Notices shall be deemed received when actually received in the office of the  
20 addressee (or by the addressee if personally delivered) or when delivery is refused, as shown on  
21 the receipt of the U.S. Postal Service, private carrier or other Person making the delivery. Notices  
22 delivered by email communication shall be deemed received when actual receipt at the email  
23 address of the addressee is confirmed. Notwithstanding the foregoing, notices sent or received  
24 after 5:00 p.m. (measured as of the prevailing time in Phoenix, Arizona) shall be deemed received  
25 on the first Business Day following delivery.

26 **27.13 Taxes**

27 Developer shall pay, prior to delinquency, all applicable taxes. Developer shall have no right to  
28 any increase in the Contract Price or any other Claim due to its misinterpretation of Laws  
29 respecting taxes or incorrect assumptions regarding applicability of taxes.

30 **27.14 Interest on Amounts Due and Owing**

31           **27.14.1** Pursuant to A.R.S. § 44-1201D, neither Party shall be entitled to any prejudgment  
32 interest for any unliquidated amount.

33           **27.14.2** Subject to Section 27.14.1, amounts owed to Developer under this Agreement  
34 and not paid when due shall bear interest at a floating rate equal to the following:

- 35           (a) If not in good faith dispute, then at the Prime Rate in effect from time to time plus  
36 100 basis points, commencing on the date due and continuing until paid; and



1 (b) If subject to a good faith dispute over the amount or whether it is due, then at the  
2 Prime Rate in effect from time to time, commencing from the date ADOT responds  
3 to a Claim therefor or the date ADOT denies the Claim, whichever is earlier, and  
4 continuing until the date the amount is finally determined to be due pursuant to  
5 settlement or the Dispute Resolution Procedures, and thereafter at the Prime Rate  
6 in effect from time to time plus 100 basis points until paid.

7 **27.14.3** Subject to Section 27.14.1, any amount owed to ADOT under this Agreement,  
8 including any overpayment to Developer as a result of an inaccuracy in a D&C Draw Request or  
9 O&M Draw Request, and not paid when due shall bear interest at a floating rate equal to the  
10 following:

11 (a) If not in good faith dispute, then at the Prime Rate in effect from time to time plus  
12 100 basis points, commencing on the date of ADOT's payment of the D&C Draw  
13 Request or O&M Draw Request, or the date ADOT claims any other amount is due,  
14 and continuing until the date the overpayment or other amount due is paid to  
15 ADOT or ADOT deducts such amount from payment to Developer; and

16 (b) If the subject of a good faith dispute over whether it is due, then at the Prime Rate  
17 in effect from time to time, commencing on the date of ADOT's payment of the  
18 D&C Draw Request or O&M Draw Request, or the date ADOT claims any other  
19 amount is due, and continuing until the date the amount is finally determined to  
20 be due pursuant to settlement or the Dispute Resolution Procedures, and  
21 thereafter at the Prime Rate in effect from time to time plus 100 basis points until  
22 paid.

23 **27.14.4** ADOT will not owe interest on any sum ADOT withholds from payments to  
24 Developer pursuant to this Agreement, except for the period, if any, from the date the withheld  
25 amount becomes due and owing to Developer until paid.

26 **27.14.5** A Party's right to receive interest is without prejudice to any other rights and  
27 remedies the Party may have under this Agreement.

28 **27.15 Integration of Contract Documents**

29 ADOT and Developer agree and expressly intend that, subject to Section 27.16, this Agreement  
30 and other Contract Documents constitute a single, non-severable, integrated agreement the  
31 terms of which are interdependent and non-divisible.

32 **27.16 Severability**

33 **27.16.1** If any clause, provision, section or part of the Contract Documents is ruled invalid  
34 by a court of competent jurisdiction, then the Parties shall:

35 (a) Promptly meet and negotiate a substitute for such clause, provision, section or  
36 part, which shall, to the greatest extent legally permissible, effect the original

1 intent of the Parties to account for any change in the Work resulting from such  
2 invalidated portion; and

3 (b) If necessary or desirable, apply to the court or other decision maker (as applicable)  
4 which declared such invalidity for an interpretation of the invalidated portion to  
5 guide the negotiations.

6 **27.16.2** The invalidity or unenforceability of any such clause, provision, section or part  
7 shall not affect the validity or enforceability of the balance of the Contract Documents, which  
8 shall be construed and enforced as if the Contract Documents did not contain such invalid or  
9 unenforceable clause, provision, section or part.

10 **27.17 Headings**

11 The captions of the sections and clauses herein are inserted solely for convenience and under no  
12 circumstances are they or any of them to be treated or construed as part of this Agreement.

13 **27.18 Entire Agreement**

14 The Contract Documents contain the entire understanding of the Parties with respect to the  
15 subject matter hereof and supersede all prior agreements, understandings, statements,  
16 representations and negotiations between the Parties with respect to its subject matter.

17 **27.19 Counterparts**

18 This instrument may be executed in two or more counterparts, each of which shall be deemed  
19 an original, but all of which together shall constitute one and the same instrument.

20

21 [Signature page immediately follows]

1 IN WITNESS WHEREOF, this Agreement has been executed as of the date first set forth above.

2

KIEWIT-FANN JOINT VENTURE

ARIZONA DEPARTMENT OF  
TRANSPORTATION

By:   
Name: Stan M. Driver  
Title: Authorized Representative

By:   
Name: John S. Halikowski  
Title: Director

By: \_\_\_\_\_  
Name: Jason Fann  
Title: Authorized Representative

3

1 IN WITNESS WHEREOF, this Agreement has been executed as of the date first set forth above.

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Title: Authorized Representative

3