

## Exhibit A

### DEFINITIONS AND ACRONYMS

“**Addenda/Addendum**” means supplemental additions, deletions, and modifications to the provisions of the RFP after the release date of the RFP.

“**Alternative Technical Concepts**” or “**ATCs**” means the concepts described in ITP Section 3.1.

“**Assumptions Book**” means the data book Proposers must submit with their Financial Models, pursuant to Section 5.4 of Exhibit C to the ITP, which must fully describe all assumptions underlying the financial projections within the Financial Model.

“**Benchmark Rate(s)**” has the meaning set forth in ITP Section 5.11.4.

“**Commission**” means the Texas Transportation Commission.

“**Concession Payment**” has the meaning set forth in Section 6.2 of Exhibit C to the ITP.

“**Cost and Pricing Data**” has the meaning set forth in Section 5.7 of Exhibit C to the ITP.

“**Delivery**” means Proposer’s obligation to execute and deliver to TxDOT the CDA and all documents required by Section 6.1.1.

“**Development Plan Evaluation Subcommittee**” or “**DPES**” means the subcommittee that performs the initial review of the Technical Proposal and provides evaluation recommendations to the ESRC as set forth in ITP Section 5.0.

“**Equity Participant**” means (a) each entity with a direct equity interest in Proposer (whether as a member, partner, joint venture member, or otherwise), (b) each entity proposed to have a direct equity interest in Developer, and (c) each entity that will hold a 10% or greater indirect interest in Proposer. Notwithstanding the foregoing, if Proposer is a publicly traded company, shareholders with less than a 10% interest in Proposer shall not be considered Equity Participants.

“**Escrow Agreement**” means the agreement entered into between Proposer and Escrow Agent, with TxDOT as a named, intended third party beneficiary, concerning the protection of the Escrowed Materials in the form of Form M.

“**Escrowed Materials**” has the meaning set forth in ITP Section 4.4.4.

“**Evaluation and Selection Recommendation Committee**” or “**ESRC**” means the committee that will review and evaluate the Proposals and make a recommendation to the Steering Committee as set forth in ITP Section 5.0.

“**Evaluation Score**” means the overall total score for the for the Project Development Plan, with 100 maximum possible points, as described in ITP Section 5.4.2.

“**Financial Model**” means the tool described at Section 5.0 of Exhibit C to the ITP that a Proposer will use to calculate projections in support of its Financial Proposal.

“**Financial Proposal**” means the portion of the Proposal described in Exhibit C to the ITP.

“**Financial Proposal Evaluation Subcommittee**” or “**FPES**” means the subcommittee that performs the initial evaluation of the Financial Proposal and provides evaluation recommendations to the ESRC as set forth in ITP Section 5.0.

“**Financing Plan**” means the information that Proposers must provide pursuant to Section 3.0 of Exhibit C to the ITP, which must describe the strength of financial commitments from Lenders and equity investors in detail, including information about timing, amount, terms and conditions of each commitment.

“**Instructions to Proposers**” or “**ITP**” means the documents and information contained in Volume I and described in ITP Section 1.4.

“**Major Participant**” means each Equity Participant and each member of Proposer’s organization with: (a) primary responsibility for design; (b) primary responsibility for construction; (c) primary responsibility for providing and/or arranging Project finance; (d) primary responsibility for operations (except that NTTA shall not be considered a Major Participant for purposes of the Proposal); (e) primary responsibility for maintenance; (f) primary responsibility for designing toll collection systems, ITS, and software; or (g) a proposed subcontract with a value greater than or equal to \$10 million (excluding subcontracts with Suppliers).

“**Major Professional Services Firm**” has the meaning set forth in Section 3.2.2 of Exhibit B to the ITP.

“**Maximum Available Funds**” has the meaning set forth in Section 6.1.1 of Exhibit C to the ITP.

“**Payment and Performance Letter of Credit**” means the letter of credit in lieu of the Payment and Performance Bonds meeting the requirements set forth in Attachment 1 to Form K-1 and ITP Section 6.1.1(k)(ii).

“**Payment and Performance Letter of Credit Option**” means the option to submit a Form K-1 for a Payment and Performance Letter of Credit, as set forth in ITP Section 5.5.2.

“**Post-Selection Deliverables**” means the documents identified in ITP Section 5.12.

“**Pre-Proposal Submittal**” means each submittal required or otherwise permitted prior to the Proposal Due Date as identified in Section 1.6.1 and described in Section 2.11

(regarding changes in a Proposer’s organization); Section 5.11.3 (regarding the Model Auditor (optional)); Section 5.11.4 (regarding Benchmark Rate(s)); Section 4.4.4 (regarding Proposer’s selected Escrow Agent); Section 3.5 (regarding draft tolling plan); Exhibit B, Section 3.2.5.1 (regarding Key Personnel); Section 3.2 (regarding ATCs); and Section 3.6 (regarding AFCs).

“**Price Score**” has the meaning set forth in ITP Section 5.2.

“**Proposal Due Date**” means the submission deadline for the Proposal to TxDOT, as set forth in ITP Section 1.6.1.

“**Proposal Revision**” has the meaning set forth in ITP Section 5.8.

“**Proposal Security**” means the proposal bond or letter of credit as described in Section 3.3 of Exhibit B to the ITP.

“**Proposer**” means the entity submitting a Proposal for the Project in response to the RFP.

“**Public Funds Request**” has the meaning set forth in Section 6.1.2 of Exhibit C to the ITP.

“**Qualifications Submittal**” or “**QS**” means the submission made by a Proposer in response to the RFQ, including all clarifications thereto submitted in response to requests by TxDOT.

“**Reference Information Documents**” means the documents and information included in Volume III and described in ITP Section 1.4.

“**Request for Qualifications**” or “**RFQ**” means TxDOT’s Request for Qualifications issued on May 23, 2005, as amended.

“**Request for Proposals**” or “**RFP**” means the set of documents identifying the Project and its Work to be performed and materials to be furnished in response to which a Proposal may be submitted by a Proposer/Developer. The RFP includes the ITP, CDA Documents, and Reference Information Documents. The RFP is issued only to Proposers that have been shortlisted following RFQ review.

“**Stakeholder**” means parties that may have a stake in the Project by virtue of their location or funding, including the North Central Texas Council of Governments, NTTA, DART, cities, counties, United States Department of Transportation, and FHWA and their officers, directors, and employees. For purposes of ITP Section 2.2.3(d), the Texas Department of Public Safety and any other public law enforcement agency with jurisdiction to provide traffic patrol or traffic law enforcement and other police and public safety services in accordance with applicable Laws and agreements with State and local agencies will not be considered Stakeholders.

“**Steering Committee**” has the meaning set forth in ITP Section 5.9.

**“Technical Proposal”** means the portion of the Proposal described in Exhibit B to the ITP.

**“Technical Score”** has the meaning set forth in ITP Section 5.2.

For definitions of other initially capitalized terms, see the CDA Documents.

## Exhibit B

### TECHNICAL PROPOSAL INSTRUCTIONS

#### **1.0 General Instructions**

The required contents and organization of the Technical Proposal are presented in this Exhibit B and summarized in the Proposal checklist provided in Exhibit E. Proposers are to provide all the information set out in this Exhibit B in the organization and format specified herein and in the order set forth in Exhibit E. A copy of the checklist for the Technical Proposal shall be included in the Technical Proposal. Proposer shall not amend the order or change the contents of the checklist except to provide the required cross reference to its Proposal.

#### **2.0 Format**

The Technical Proposal shall be limited to an aggregate of 150 pages (if double-sided, 75 sheets), plus the executive summary, resumes, appendices and exhibits containing required forms, graphs, matrices, schedule, drawings and other pertinent data.

#### **3.0 Contents of the Technical Proposal**

The Technical Proposal shall consist of the following major elements:

- (a) Executive Summary;
- (b) Proposer Information, Certifications and Documents (including required Forms A through J, L, M, R and S);
- (c) )Proposal Security;
- (d) Escrow Agreement;
- (e) Proposer Election and Provision of CDA Terms; and
- (f) Project Development Plan.

#### **3.1 Executive Summary**

The Executive Summary shall be written in a non-technical style and shall contain sufficient information for reviewers with both technical and non-technical backgrounds to become familiar with Proposer's Proposal and its ability to satisfy the financial and technical requirements of the Project. The Executive Summary shall not exceed fifteen single-sided pages. The Executive Summary shall not include any information regarding pricing. It shall, at a minimum, include the following:

- (a) An explanation of the organization and contents of the Proposal;
- (b) A summary of any changes to Proposer's QS;

- (c) A summary of all Major Participants and identification of any changes in Proposer's organization, equity owners (category (f) of the definition of Major Participants), other Major Participants, and Key Personnel since submission of the QS;
- (e) A summary of the Project Development Plan including:
- A summary of the proposed management, decision making, and day-to-day operation structure of Proposer;
  - A summary of Proposer's approach to quality management of the Project throughout the duration of the CDA;
  - A summary describing Proposer's approach for working with TxDOT and third parties, including the approach to resolving conflicts;
  - A summary of Proposer's approach to addressing public information and communications for the Project;
  - A summary of Proposer's approach to satisfy the safety, environmental and DBE requirements of the Project;
  - A summary of Proposer's preliminary Project Baseline Schedule, milestones for design, construction, Service Commencement, and operations and maintenance;
  - A summary of Proposer's approach for delivering the design and construction components of the Project;
  - A summary description of Proposer's schematic and any innovative concepts and approved ATCs;
  - A summary of Proposer's approach to construction sequencing, traffic management and mobility during construction;
  - A summary of Proposer's approach to addressing toll operations, enforcement, and interoperability with other toll agencies; and
  - A summary of Proposer's approach to operations, maintenance, and renewal work.

### **3.2 Proposer Information, Certifications, and Documents**

#### **3.2.1 Proposal Letter and Additional Documentation**

The Proposal shall include the Proposal Letter (Form A). Proposer shall attach to the Proposal Letter the documents and information described on pages 5 and 6 of Form A

and shall identify\_its authorized representative(s) for all purposes relating to the Proposal, including the Proposer's rights and obligations under the RFP, negotiations of the CDAs and receipt of any documents returned to the Proposer, including the Proposal Security.

### **3.2.2 Information About Proposer, Major Participants, and Other Subcontractors**

The Proposal shall include a completed chart on Form B-1, including the names, contact information, role in organization, licensing information, and description of work (if applicable) for the Proposer, Equity Participants and Major Participants.

The Proposal shall include a completed Form B-2 providing information about the Proposer and its team as specified therein.

The Proposal shall include a completed Form B-3 providing information regarding (i) each Major Participant (excluding Equity Participants that do not fall into categories (a) through (g) of the definition of Major Participants); (ii) each firm that will provide engineering, architectural, surveying, planning, quality assurance, and/or other professional services for development of the Project valued at \$2 million or more (“Major Professional Services Firms”); and (iii) all other subcontractors identified by the Proposer as of the Proposal Due Date. The Proposer is advised that all Major Professional Services Firms must be identified at the time of the Proposal, and that, as a condition to final award and execution of the CDA, the successful Proposer must provide evidence that it and its Major Participants hold all necessary licenses and professional registrations.

### **3.2.3 Responsible Proposer Questionnaire**

The Proposal shall include Form C, the “Responsible Proposer Questionnaire,” signed by the Proposer. As noted on the form, it may be provided by the Proposer on its own behalf and on behalf of the Developer and Equity Participants, or it may be provided by the Proposer on its own behalf and the individual Equity Participants on their own behalf. The form executed by the Proposer shall be signed by the same individual(s) who sign the Proposal Letter. The forms signed by Equity Participants shall be signed by an authorized representative of such Equity Participant and the Proposal shall include evidence of signature authorization for such individual.

### **3.2.4 Industrial Safety Record**

The Proposal shall include an industrial safety record on Form D for each member of the Proposer’s team that will perform or supervise installation and/or construction Work on the Project, including information for any entity in which such team member holds a substantial interest. If any such entity does not have an industrial safety history (for example if the firm is newly formed), Form D is not required for such entity, but a statement shall be provided explaining why the form is not included. Should any of these parties have been a member of a joint venture on past projects, the safety record of the joint venture in full shall be included as part of Form D.

### **3.2.5 Key Personnel**

#### **3.2.5.1 Designation of Key Personnel**

The Proposal may not include any Key Personnel not previously approved by TxDOT in writing.

Proposer may not make any changes in its Key Personnel after receipt of TxDOT approval as specified in this Section 3.2.5.1, except as provided in the CDA.

#### **3.2.5.2 Information Regarding Key Personnel in the Proposal**

The individuals with direct responsibility for each of the following categories of Work are considered Key Personnel:

- (a) Overall management of the Project (typically called the Project Manager or Deputy Project Manager);
- (b) Overall management and/or control of the Project's finances (typically called the Financial Manager);
- (c) Public relations and community outreach (typically called the Public Relations Manager or the Public Information Coordinator);
- (d) Design of the Project (typically called the Design Manager);
- (e) Construction, coordination of subcontractors, and scheduling (typically called the Construction Manager);
- (f) The control of quality, and the implementation and operation of the Project's quality systems (typically called the Quality Manager);
- (g) Environmental compliance (typically called the Environmental Manager or the Environmental Compliance Manager);
- (h) Project operations (such as traffic control and toll collection) (typically called the Operations Manager); and
- (i) Project maintenance (typically called the Maintenance Manager).

The Proposal shall identify the pre-approved Key Personnel and shall include Form E identifying personnel work assignments, as well as a statement signed by Proposer and the employer of each designated key person, committing to maintain such individual's availability for and active involvement in the Project. Refer to the CDA for information regarding time commitment requirements for Key Personnel and TxDOT rights if it determines that any such personnel are not devoting sufficient time to the prosecution and performance of the work required for the Project. The Proposal shall also include



copies of the resumes and contact information for each of the identified Key Personnel in Form E

### **3.2.6 Letter Approving Key Personnel and Changes in Proposer's Organization**

The Proposal shall include a copy of the letter(s) issued by TxDOT pursuant to ITP Section 2.11.2 approving the Key Personnel. If Proposer's organization has changed since submission of the QS, Proposer shall specifically describe such changes and, if applicable, include a copy of TxDOT's approval letter provided under ITP Section 2.11.1.

### **3.2.7 Non-Collusion Affidavit**

The Proposal shall include Form F, certifying that the Proposal is not the result of and has not been influenced by collusion.

### **3.2.8 Certification Regarding Buy America**

The Proposal shall include Form G, regarding Buy America requirements.

### **3.2.9 DBE Requirements**

The Proposal shall include a Certification of DBE Goal Attainment or Good Faith Efforts (Form H) confirming, among other things, that Proposer will obtain DBE commitments equal to or exceeding the DBE participation goal or will exercise good faith efforts to substantiate its attempts to meet the goal.

### **3.2.10 Child Support Statement for Negotiated Contracts and Grants**

The Proposal shall include Form I regarding child support obligations, for Proposer and each Major Participant.

### **3.2.11 Organizational Conflict of Interest Disclosure**

The Proposal shall include a certification on Form J describing potential organizational conflicts of interest, including disclosure of all relevant facts concerning any past, present, or currently planned interest that may present an organizational conflict of interest.

### **3.2.12 Certification Regarding NTTA Communications**

The Proposal shall include Form R, certifying that from December 21, 2006 through the Proposal Due Date, Proposer has not had any communications with NTTA regarding the Project, including the procurement and services potentially to be provided by NTTA, except as expressly authorized under ITP Section 2.2.3.

### **3.2.13 Certification Regarding Equal Employment Opportunity**

The Proposal shall include Form S, regarding participation in contracts or subcontracts subject to the equal opportunity clause and the filing of required reports.

### **3.3 Proposal Security**

The Proposal shall include either a proposal bond or irrevocable standby letter of credit as specified below.

Forfeiture of Proposal Security in accordance with Section 4.7 of the ITP will constitute liquidated damages. By submitting its Proposal, the Proposer agrees and acknowledges that such liquidated damages are reasonable in order to compensate TxDOT for damages it will incur as a result of the Proposer's failure to satisfy the obligations under the RFP to which Proposer agreed when submitting its Proposal. Such damages include potential harm to the credibility and reputation of TxDOT's transportation improvement program, including the CDA program, with policy makers and with the general public, delays to the Project and additional costs of administering this or a new procurement (including engineering, legal, accounting, overhead and other administrative costs). By submitting its Proposal, the Proposer further acknowledges that these damages would be difficult and impracticable to measure and prove, are incapable of accurate measurement because of, among other things, the unique nature of the Project and the efforts required to receive and evaluate proposals for it, and the unavailability of a substitute for those efforts. The amounts of liquidated damages stated herein represent good faith estimates and evaluations as to the actual potential damages that TxDOT would incur as a result of Proposer's failure to satisfy the obligations under the RFP to which the Proposer agreed when submitting its Proposal, and do not constitute a penalty. By submitting its Proposal, the Proposer agrees to such liquidated damages in order to fix and limit the Proposer's costs and to avoid later Disputes over what amounts of damages are properly chargeable to the Proposer.

#### **3.3.1 Proposal Bond**

If a proposal bond is provided, it shall be in the amount of \$50 million and in the form of Form L-1 from a Surety rated in the top two categories by two nationally recognized rating agencies or at least A minus (A-) or better and Class VIII or better by A.M. Best and Company. If conditional award is made, the successful Proposer will be required to increase the proposal bond to \$75 million within the timeframe set forth in ITP Section 5.12.2. In the event TxDOT commences finalization or negotiation of the CDA with the next highest ranking Proposer, such Proposer will be required to increase its proposal bond to \$75 million within five Business Days of notification by TxDOT. The proposal bond shall be forfeited and the funds represented by its proposal bond shall be released to TxDOT and become and remain the property of TxDOT, as set forth in ITP Section 4.7.

### **3.3.2 Letter of Credit**

If a letter of credit is provided it shall be in the amount of \$50 million, which shall be in the form of Form L-2 issued by a financial institution with a credit rating of “A” or better according to Standard & Poor’s and with an office in Austin, Dallas, Houston or San Antonio at which the letter of credit can be presented for payment. If conditional award is made, the successful Proposer will be required to increase the letter of credit to \$75 million within the timeframe set forth in ITP Section 5.12.2. In the event TxDOT commences finalization or negotiation of the CDA with the next highest ranking Proposer, then such Proposer will be required to increase the letter of credit to \$75 million within five Business Days of notification by TxDOT. TxDOT may draw against the letter of credit and the funds represented by the letter of credit shall be released to TxDOT and become and remain the property of TxDOT, as set forth in ITP Section 4.7.

### **3.3.3 Return of Proposal Security**

After final award has occurred or this RFP has been canceled, the Proposal Security for each unsuccessful Proposer, except the Proposal Security which has been forfeited, will be returned to the respective Proposers.

The Proposal Security for the successful Proposer shall be returned at such time as the Proposer has satisfied all conditions set forth in ITP Sections 6.1 and 6.1.1.

TxDOT may elect to return Proposal Security at an earlier date at its sole discretion.

### **3.3.4 Financial Close Security**

If Proposer exercises its option to extend financial close in accordance with ITP Section 5.11.6, then as a condition to final award, Proposer shall obtain financial close security either in the form of (i) a financial close bond in the amount of \$75 million and in the form of Form L-3 from a Surety rated in the top two categories by two nationally recognized rating agencies or at least A minus (A-) or better and Class VIII or better by A.M. Best and Company, or (ii) a letter of credit in the amount of \$75 million and in the form of Form L-4 issued by a financial institution with a credit rating of “A” or better according to Standard & Poor’s and with an office in Austin, Dallas, Houston or San Antonio at which the letter of credit can be presented for payment. Either form of financial close security shall be valid for a period of 180 days after the original deadline of financial close set forth in ITP Section 1.6.3.

## **3.4 Escrow Agreement**

A copy of the executed Escrow Agreement (Form M) shall be provided with the Technical Proposal, in a separate envelope labeled “[Proposer Name]: Escrow Agreement for the IH 635 Managed Lanes Project.”

## **3.5 Proposer Election and Provision of CDA Terms**

### **3.5.1 Election of Terms for Termination Compensation**

Exhibit 23 to the form of CDA in the RFP Documents includes two alternative versions of Section G.1, concerning the timing of payment for Termination for Convenience. Proposer shall indicate whether it will use Option A or Option B.

### **3.5.2 Provision of Terms for the Allocation of the Concession Payment**

Proposer shall provide the language for paragraph 4 of Part A of Exhibit 7 to the CDA, indicating how the Concession Payment should be allocated for federal income tax purposes.

## **4.0 Project Development Plan**

Proposer shall present a Project Development Plan, which shall consist of three components: General Project Management (Section 4.1), Design-Build Management and Technical Solutions (Section 4.2) and Operations and Maintenance Management and Technical Solutions (Section 4.3). The Project Development Plan shall describe the project management philosophy, the plan and schedule for executing the Project (including each Section) and any related contract administration, and how Proposer plans to achieve and satisfy the Project requirements.

### **4.1 General Project Management**

General Project Management shall set out Proposer's organizational structure and management approach to coordination of all Project activities including design, construction, operations, maintenance (routine and capital), quality, handback, documentation, scheduling, testing and auditing/reporting for the Project, risk analysis and mitigation, and community outreach. Information presented shall apply to all phases of the Work. The General Project Management approach shall address the information requested in Sections 4.1.1 through 4.1.7.

#### **4.1.1 Management Structure and Personnel**

The General Project Management approach shall describe the proposed overall Project management organization, identifying participating firms/organizations and individuals. It shall include:

- (a) An organization chart outlining the structure of Proposer's Project management organization (including the design, construction, operations, maintenance, and quality sub-organizations) and a description of the roles allocated, responsibilities, interrelation and Work to be accomplished by each member of the management team and each sub-organization, including identified subcontractors and suppliers (at all tiers);
- (b) Information describing how each of the Key Personnel will fit into the organization, including a description of each key person's function and

responsibility relative to the Project, and indicating the percent of time that he/she will devote to the Project;

- (c) Names and resumes of task managers in each sub-organization reporting to the Key Personnel; and
- (d) Information regarding the current and projected workload and backlog of Proposer team (including all Major Participants), and a description of Proposer's plan and overall ability to provide the experienced personnel, equipment, and facilities required to successfully complete all aspects of the Project on a timely basis and within any applicable time frames set forth in the CDA and/or the Technical Provisions.

#### **4.1.2 Organizational Systems**

The General Project Management approach shall describe the organizational systems to be used by the Proposer, and shall include:

- (a) A detailed description of how Proposer's team members will work together to provide a unified design, construction, operations, maintenance, and quality approach to all elements of the Work;
- (b) A description of Proposer's team decision-making process, how internal disputes between team members will be resolved, and how Proposer will avoid adverse impacts to the Project (cost, schedule, or quality) in the event of such disputes;
- (c) A description of the methods to be used to establish lines of communication and documentation within Proposer's team, including communication among the sub-organizations and management personnel;
- (d) A description of how the quality process will be structured for the Project, and how the quality process will function independently of design, construction, operations and maintenance; and
- (e) A description of how Proposer intends to interface with TxDOT, its consultants, applicable third parties, and relevant federal, State, and local agencies.

#### **4.1.3 Public Information and Communications**

The public information and communications component of the General Project Management approach shall include:

- (a) Qualifications and experience of proposed staff members who will be engaged for purposes of public information and community outreach;

- (b) A preliminary Public Information and Communications Plan (PICP) which presents the approach to addressing all items of the PICP as referred to in the Technical Provisions.

#### **4.1.4 Environmental Management**

The General Project Management approach shall describe the management approach to environmental compliance and permitting. The management approach shall:

- (a) Describe applicable qualifications and experience of the Environmental Compliance Manager and the Environmental Team described in the Technical Provisions;
- (b) Describe the approach to develop the component parts of the Comprehensive Environmental Protection Program described in the Technical Provisions;
- (c) Identify applicable laws, rules and regulations;
- (d) Identify the environmental commitments, permits, mitigation, potential re-evaluations and documentation, necessary to complete the Project;
- (e) Describe Proposer's methods to develop Environmental Permit, Issues and Commitment (EPIC) sheets and ensure those permits, issues and commitments are integrated into design, construction, operations and maintenance; and
- (f) Identify potential environmental risk and describe the approach to mitigate, eliminate or reduce those risks.

#### **4.1.5 Schedule, Cost Control, and Risk Management**

The General Project Management approach shall:

- (a) Describe the proposed Project schedule methodology and include at least the following:
  - A description of the approach used for preparing, controlling and updating the Project Schedule, for calculating progress performance on a monthly basis, and preparing quarterly payment requests;
  - A completed Schedule of Values and a description of the approach used for preparing and updating the Schedule of Values;
  - A description of the approach to integrate subcontract activities into Proposer's scheduling and reporting system;

- A description of the approach to managing resources and activities, both its own and subcontractors, in order to achieve Project Schedules, and if necessary to recover schedule slippage;
- A developed Work Breakdown Structure (WBS) in accordance with the requirements set forth at Section 2.1.1.1 and Attachment 02-1A of the Technical Provisions;
- A preliminary Project Baseline Schedule and narrative for all portions of the Project. The preliminary Project Baseline Schedule shall be a high level Critical Path Method schedule representing the Proposer's plan for completing the Work between NTP2 and Service Commencement, including meeting the five-year construction schedule and other Milestone Schedule requirements set forth in CDA Exhibit 9. Proposer's preliminary Project Baseline Schedule submission shall not limit, modify or alter TxDOT's ability to review and approve the preliminary Project Baseline Schedule, and selection of a Proposer shall not be deemed to be acceptance or approval of Proposer's preliminary Project Baseline Schedule;
- The preliminary Project Baseline Schedule shall be in the form described in the Technical Provisions and include at least the following:
  - a. Narrative which describes the proposed execution of the Work for the term of the CDA.
  - b. Schedule Activities representing all Design Work at least at WBS Level V detail.
  - c. Schedule Activities representing all Construction Work at least at WBS Level VI detail.
  - d. Individual cost loaded Schedule Activities, designated as a Payment Activity at WBS Level VI.
  - e. Sets of cost loaded Schedule Activities summarized to designated Payment Activities at WBS Level VI.
  - f. When the entire preliminary Project Baseline Schedule is summarized the sum of the Payment Activity prices equals the Total Project Construction Costs (Box A) plus Mobilization Costs (Box B) of Form P.
  - g. A separate copy of the preliminary Project Baseline Schedule with the unit costs deleted but still containing any assigned resources at WBS Level VI for the Design-Build phase prior to Service Commencement.

- A preliminary Renewal Work Schedule to include all Renewal Work and all O&M Work prior to and subsequent to Service Commencement at least at WBS Level IV detail.
- (b) Describe Proposer's document, cost control, and schedule management system to be used to control, review and coordinate the cost and schedule of the Work during the term of the CDA, including during design, construction, installation, operations, and maintenance;
- (c) Describe the approach to identify, assess, manage, mitigate and allocate Project-specific risks. The Proposal shall include at a minimum:
  - Identify significant risk categories, such as, capacity, planning, design, construction completion, operations, maintenance, demand, inflation, financing, legislative policy, technology, and residual value;
  - Describe the potential consequences of the identified risks;
  - Describe the probability of identified risks;
  - Propose procedures and tools to conduct a risk sensitivity analysis; and
  - Provide a proposed or desirable allocation of risks among Proposer and its team members.

#### **4.1.6 Safety**

The safety component of the General Project Management approach shall include:

- (a) A description of the preliminary Safety Plan meeting the requirements set forth in the Technical Provisions; and
- (b) A description of how Proposer proposes to coordinate with the Fire, Security and Life Safety Committee (FSLSC) and other Participating Agencies on issues related to fire, security, and life safety.

#### **4.1.7 Mentoring and Job Training**

The General Project Management approach shall include:

- (a) A description of Proposer's concept to utilize and train DBEs, including:
  - A description of standard subcontracting methods to effectively manage subcontractor performance as they relate to the Technical Provisions;
  - An outline of areas of work where DBEs may be utilized; and



- A description of the training program to be utilized to educate and train employees in various job functions as well as training for environmental and Site specific issues.
- (b) A description of Proposer's approach to mentor DBEs and other small businesses, including:
- Eligibility criteria for participation in the program;
  - Program goals for mentoring on Public Private Partnerships, design, construction, operations, and maintenance;
  - A mentoring program for educational workshops, including the following:
    - A description of targeted technical disciplines;
    - Identification of specific audiences;
    - Development of a short-term plan;
    - Development of a long-term plan;
    - Identification of workshop administrative procedures; and
    - Identification of frequency of the workshops.
  - Educational workshops for bonding and insurance requirements;
  - Procedures and methodologies for dividing work into economically feasible units to encourage small business participation; and
- (c) Criteria for evaluating effectiveness of the small business program.
- (d) A description of Proposer's individual job training program to assist with developing women and minorities in the "critical crafts" designated annually by TxDOT. The program shall include training goals for on-site and off-site, the cost of training, and a schedule for training. The schedule for training shall include job classifications, number of trainees per classification, and the anticipated start times in each classification.

## **4.2 Design-Build Management and Technical Solutions**

Design-Build Management and Technical Solutions shall present Proposer's approach to Design-Build Management, Design-Build Quality Management, and Proposer's Design-Build Technical Solutions as required in Section 4.2.1 through 4.2.3.

#### **4.2.1 Design-Build Management**

The Design-Build Management approach shall provide a description of Proposer's approach for performing design and construction on the Project, including at a minimum the following:

- (a) A description of the management approach for development and coordination of design, including integrating related issues such as right of way, survey, environmental permitting, utilities, and community relations;
- (b) A description of the proposed approach for delivering the design for the Project, including where the designers will be located and how designs developed by different firms and offices will be integrated and coordinated to ensure consistency and quality;
- (c) A description of the management approach for construction, including how design will be integrated with construction, and how the Work will be divided and controlled;
- (d) A description of how Proposer will manage staged construction, including how it will simultaneously manage construction with ongoing operation and maintenance activities.

#### **4.2.2 Design-Build Quality Management**

The Design-Build Quality Management approach shall describe Proposer's quality approach to design and construction for the Project, including at least the following:

- (a) For the design quality component of the preliminary Quality Management Plan, a description of the design deliverable process, a description of the internal process for design reviews, a description of quality assurance and quality control functions, and an explanation of how the Independent Engineer will be involved. The design quality component shall also present Proposer's approach to reporting relationships and responsibilities, including TxDOT oversight procedures to be implemented; conformance with federal oversight requirements; how design quality management will be documented; and how changes will be made to correct design deficiencies; and
- (b) For the construction quality component of the preliminary Quality Management Plan, a description of the approach to acceptance testing and inspection, an explanation of how the Independent Engineer will be involved, and how construction deficiencies and non-compliance issues will be documented and corrected. The construction component of the preliminary Quality Management Plan shall also describe how the program will integrate with the design activities, including TxDOT oversight and all quality-related activities and conformance with federal oversight requirements.

### **4.2.3 Design-Build Technical Solutions**

The Design-Build Technical Solutions shall include information identified herein relevant to Proposer's schematic and proposed approach to construction sequencing and traffic management, drainage and utilities, subsurface elements, roadways, bridges and surface structures, managed lane tolling system, Intelligent Transportation Systems (ITS), signing, delineation, pavement markings, signalization and lighting, building and enclosed facilities and aesthetics that meet the requirements set forth in Sections 4.2.3.1 through 4.2.3.9.

Proposer's schematic shall be presented in English units on 18-inch by 120-inch scroll plots at a scale of 1 inch = 200 feet and shall clearly identify the Work to be completed. Proposer must specifically state whether any approved ATCs are included, with reference to the ATC identification number assigned by TxDOT, and shall describe how the ATC is used and provide cross-references to other elements of the Proposal that are affected by the ATC. Each Proposer shall also identify characteristics of its Proposal and schematic which vary from TxDOT's Schematic (provided in the Reference Information Documents) or which exceed Project requirements. Further Proposer may provide supporting documentation for the change outlining the overall benefits to the Project. Changes in alignments or other elements proposed by Proposer's schematic to the extent they will require an evaluation for compliance with the NEPA Approvals and possibly re-evaluations and delays associated with such re-evaluations will be at Proposer's risk.

#### **4.2.3.1 Roadway**

Roadway concepts shall include:

- (a) Proposer's approach to pavement design including details of the proposed design method, material types, roadway classifications, traffic loading and design life considerations; and
- (b) A description of all existing roadways and structures to be closed, demolished, left as is, or incorporated into the Project.

Proposer's schematic shall include:

- (a) General Project roadway information including Project limits, design speeds, functional classification(s), and minimum design values met;
- (b) Project and ultimate configuration horizontal alignments including PI station/location, degree of curve, radius, length of curve, PC and PT (graphical location) and bearings;
- (c) Project and ultimate configuration planimetrics including curbs and barriers, driveways, edge of pavement, and surface roadways' edge of shoulders;

- (d) Directional arrows indicating the number of lanes;
- (e) Proposed right-of-way (ROW) limits and control of access limits;
- (f) Existing/natural ground and project and ultimate configuration profiles including vertical clearance, grades, VPI station, vertical curve length and K-values;
- (g) Typical sections including existing ground, pavement cross slope, super elevation, lane and shoulder widths, and slope ratio for fills and cuts;
- (h) The location and text of the project general purpose and managed lanes guide signs; and
- (i) The horizontal and vertical configuration of the Joe Ratcliff walkway.

#### **4.2.3.2 Construction Sequencing and Traffic Management**

The Proposal shall include a description of the construction staging and traffic control and sequencing proposed to accommodate traffic during the construction of the Project. The construction traffic control shall include the following:

- (a) The overall traffic management and control and sequencing approach;
- (b) Conceptual construction staging diagrams including initial and ultimate proposed treatment of ramps and staging of major drainage trunk line(s);
- (c) A description of how business and residential accesses will be provided;
- (d) A narrative description of how Proposer intends to schedule and sequence the construction to minimize impacts on the environment, communities and traveling public while still providing acceptable construction performance;
- (e) A description of the intended laydown, recycling, staging, disposal and maintenance locations to be used during construction; and
- (f) A description of how the right of way and adjacent roads and properties will be maintained and protected, including the intended measures to be used to mitigate and minimize noise, vibration, light, dust, erosion/run-off and local road damage.

#### **4.2.3.3 Drainage and Utilities**

The Proposal shall provide a description of the drainage and utilities for the Project. The information shall include at least the following:

- (a) For drainage related to the Project, the Proposal is to include:

- A description of the overall surface water collection system identifying the proposed location of major drainage trunk lines and outfall locations to accommodate the Project and ultimate configurations;
  - Exhibit drawings (scale: 1 inch = 200 feet) of Proposer's design for conveying runoff through the following areas:
    - The IH 635/DNT interchange;
    - The DART line section NW-3 (Northwest-3) transit facility; west of Denton Drive; and
    - Exhibit drawing(s) defining the approximate limits of temporary construction easements and drainage easements necessary for completion of the Project drainage work.
- (b) For utilities related to the Project, Proposer is to include:
- Proposer's approach to identifying, verifying and documenting the presence and locations of subsurface utilities that may impact or be impacted by the Work.
  - The intended means of communication and planning of construction to keep Utility Owners informed of the construction schedule, the means of construction and changes that may affect their facilities.

#### **4.2.3.4 Subsurface Elements**

Information shall be provided pertaining to all subsurface managed lane facilities including tunnels, depressed managed lanes, and ancillary facilities, and for all disciplines associated with the subsurface Project components. The information shall include at least the following:

- (a) The Technical Documents proposed for design, design criteria, assumptions, and approach to be implemented for all Project subsurface components, systems, elements and configurations.
- (a) The basic structural configurations, including typical representative sections for each structural system along the length of the Project, their limits, and depiction of space allocation for anticipated systems and ancillary items.
- (b) The approach to addressing geotechnical related issues for the Project, including the presence of swelling soil and rock; and identification of the scope and objectives of future investigations, if applicable;

- (c) A description of subsurface element excavation methods and construction approaches.
- (d) A description of the proposed waterproofing and permanent groundwater control systems.
- (e) The approach to and material selection for the finish of all subsurface elements.
- (f) The proposed approach to power supply and distribution; and backup power for the tunnel components, if applicable.
- (g) A description of how Proposer's design will incorporate fire protection, security, and life safety requirements into the design and functionality of the subsurface facilities, including:
  - o The ventilation configuration and operating methodology to control smoke, gases and temperature under normal and emergency operating conditions, including a preliminary ventilation design report, which presents the results of modeling analyses;
  - o The proposed fire suppression features, systems configuration and operating methodology;
  - o The proposed security, monitoring and control features, and operating methodology, for providing security and proper functioning of all subsurface facilities, equipment, and life safety systems;
- (h) The approach to lighting for all subsurface configurations, and a description of how Proposer's design will provide a safe visual environment within the subsurface managed lanes during all hours of operation, including the approach to mitigating the effect of varying levels of natural and artificial light in the subsurface managed lanes.

#### **4.2.3.5 Bridges and Surface Structures**

The Proposal shall provide a description of the bridges and surface structures (representative retaining and noise walls) for the Project. The information shall include at least the following:

- (a) Proposer's schematic shall include:
  - o Sufficient detail to indicate bridge locations and limits, bridge types, foundation types, controlling vertical clearances, and typical span arrangements.

- Preliminary wall types, proposed locations and limits for retaining and noise walls.
- (b) Additionally, Proposer shall include the following:
- Drawings detailing the proposed structures' conformance to the aesthetic requirements of the Project;
  - A description of the methods of construction for build-out of the Ultimate Configuration on existing and proposed structures; and
  - A description of how retaining walls/noise walls would be affected in construction of the Ultimate Configuration.

#### **4.2.3.6 Tolling and ITS Systems**

The Proposal shall include the following information pertaining to tolling and ITS systems:

- (a) A description of the managed lane tolling system for the Project. The information shall include at least the following:
- A toll collection methodology that includes a schematic plan showing tolling points, informational signing, and other pertinent information.
  - A preliminary approach to the Electronic Tolling Collection System (ETCS) Plan, including how the ETCS meets or exceeds the functional requirements. The description shall also include hardware and software specifications to describe all of the aspects of the system and its functionality.
  - A description of the proposed secure network communications system.
- (b) A description of the Intelligent Transportation Systems for the Project. The information shall include at least the following:
- A schematic plan and layout showing the locations of ITS equipment, including cameras, DMS signs, traffic monitoring stations, and lane marking points.
  - A description of how the system will be monitored and connected to area traffic management centers to maintain interoperability for monitoring and control of subsurface systems.

- A description of the approach to coordinating information with TxDOT and other ITS systems in the region and for the incorporation into the North Texas Regional ITS Architecture.

#### **4.2.3.7 Signing, Delineation, Pavement Markings, Signalization and Lighting**

The Proposal shall provide a description of the signing, delineation, pavement markings, signalization and lighting for the Project. The information shall include at least the following:

- (a) A preliminary operational guide signing schematic formatted for TxDOT approval; and
- (b) A general description of the approach for striping, signalization and lighting of the facility.

#### **4.2.3.8 Buildings and Enclosed Facilities**

The Proposal shall provide a description of the buildings and enclosed facilities for the Project. The information shall include at least the following:

- (a) Identification of all proposed buildings, enclosed facilities and associated items, along with a general description of the function of each of the facilities.
- (b) A description of the proposed use of the three TxDOT owned properties available for Proposer's conditional use (see Section 7.1.3 of the Technical Provisions). If Proposer is not planning on using any of the TxDOT owned facilities, it is to be specifically stated.
- (c) A description of the proposed approach to minimize the impact that each of the buildings, enclosed facilities and associated items may have on the surrounding communities.

#### **4.2.3.9 Aesthetic Design**

The Proposal shall provide the following related to the aesthetic design for the Project:

- (a) A description and concept drawings of additional aesthetics items proposed to be completed as a portion of Proposer's work; and
- (b) A description of how Proposer plans to work with TxDOT to enhance the design and aesthetic details.



### **4.3 Operations and Maintenance Management and Technical Solutions**

Operations and Maintenance Management and Technical Solutions shall present Proposer's approach to Operations and Maintenance Management, Operations and Maintenance Quality Management, and Proposer's Operations and Maintenance Technical Solutions as required in Sections 4.3.1 through 4.3.3.

#### **4.3.1 Operations and Maintenance Management**

The Operations and Maintenance Management approach shall provide a description of the proposed approach to operating and maintaining the Project, including at least the following:

- (a) A preliminary Operations Management Plan, which presents Proposer's approach to meeting the Project's operations obligations as described in the Technical Provisions, and a description of the procedures to be established for monitoring the condition and operational performance of the Project.
- (b) A preliminary Maintenance Management Plan, which presents Proposer's approach to meeting the Project's maintenance obligations as described in the Technical Provisions, and the approach to processes and procedures for the maintenance of the Project over the Term of the Agreement.
- (c) The approach to operations and maintenance prior to and following Service Commencement, and specifically during transition from the end of the Design-Build phase to the Operating Period.

#### **4.3.2 Operations and Maintenance Quality Management**

The Operations and Maintenance Quality Management approach shall describe Proposer's quality program approach to operations and maintenance for the Project, including at least the following:

- (a) Proposer's approach to operations quality management, including a description of quality assurance and quality control functions, an explanation of how the Independent Engineer will be involved, and Proposer's approach to reporting relationships and responsibilities, including TxDOT oversight procedures. The approach shall also include a description of the internal process for preparing and reviewing incident reports, non-conformance reports, traffic reports and maintenance work reports, and how non-compliance issues will be documented and corrected; and
- (b) Proposer's approach to maintenance quality management, including a description of quality assurance and quality control functions, an explanation of how the Independent Engineer will be involved, and Proposer's approach to reporting relationships and responsibilities,

including TxDOT oversight procedures. The approach shall also include a description of how the quality process will be integrated into maintenance inspections to effect changes, as necessary, in maintenance procedures and performance.

### **4.3.3 Operations and Maintenance Technical Solutions**

The Operations and Maintenance Technical Solutions shall include information identified herein relevant to Proposer's approach to roadway operations, managed lanes tolling operations, routine maintenance, and renewal work as set forth in Sections 4.3.3.1 through 4.3.3.4.

#### **4.3.3.1 Roadway Operations**

The Proposal shall describe how the daily roadway operations functions will be handled including:

- (a) The detection and response to emergencies, hazardous weather, breakdowns, accidents, and incidents;
- (b) The approach for liaising and handling emergency services;
- (c) The approach to traffic management and operation of ITS systems;
- (d) A description of the approach to accident analysis and implementation of improvements to user safety; and
- (e) The approach to policing the roadway.

#### **4.3.3.2 Managed Lanes Tolling Operations**

The Proposal shall provide a preliminary tolling plan, which shall include, at a minimum, the following items:

- (a) A description of the managed lanes tolling operations;
- (b) The limits of proposed toll segments;
- (c) The locations of toll gantries;
- (d) Proposed toll rates after the first 180 days;
- (e) Declaration zone locations;
- (f) Location of enforcement zones;
- (g) Required enforcement equipment;
- (h) A description of the methods for performance monitoring; and

- (i) A description of the parameters to be used for setting, increasing, and decreasing tolls to optimize traffic volumes in the managed lanes.

#### **4.3.3.3 Routine Maintenance**

For routine maintenance, the following maintenance items shall be addressed, including:

- (a) A description of the approach used for life cycle cost analysis over the duration of the CDA, including how material durability will be determined and price variation (i.e. future energy costs, future labor costs, etc.) will be assessed;
- (b) Details and locations of maintenance yard(s) and facilities;
- (c) A preliminary list of specialized maintenance equipment proposed for use throughout the life of the Project;
- (d) A description of the approach to supply and management of maintenance spare parts;
- (e) The approach to general sweeping, cleaning, and removal of debris, abandoned vehicles, and graffiti;
- (f) The approach to traffic management during maintenance work;
- (g) The approach to inspection and testing of Project items, and the identification, classification and rectification of defects and inspection failures; and
- (h) A description of the system to be used for maintaining accurate as-built records, and records of inspections and maintenance activities.

#### **4.3.3.4 Renewal Work**

The Proposal shall describe the approach to Renewal Work, including the processes that will be employed for developing a rolling program of major maintenance repairs and/or replacements. The information shall describe the approach to programming of works and costing and ensuring that handback requirements will be met.

## Exhibit C

### FINANCIAL PROPOSAL INSTRUCTIONS

#### **1.0 General Instructions**

The required contents and organization of the Financial Proposal are presented in this Exhibit C and summarized in the Proposal checklist provided in Exhibit E. Proposers are to provide all the information set out in this Exhibit C in the organization and format specified herein and in the order set forth in Exhibit E. A copy of the checklist for the Financial Proposal shall be included in the Financial Proposal. Proposer shall not amend the order or change the contents of the checklist except to provide the required cross reference to its Proposal.

#### **1.1 Format of Financial Proposal**

All financial information provided in the Financial Proposal shall be in U.S. Dollar currency only and all amounts shall be clearly identified as real or nominal dollars.

If there are any discrepancies between the hard copy and electronic copy of any quantitative information provided in the Financial Proposal, the hard copy version will prevail. If there are any differences between individual line amounts and totals, the individual line amounts will prevail.

#### **1.2 Contents of Financial Proposal**

All parts of the Proposal that indicate price and financial terms are to be included in the Financial Proposal, except the cost loading and control information described in Exhibit B, Section 4.1.5.

#### **2.0 Financial Capacity Information**

Proposers shall clearly identify any differences between the financial capacity information submitted in the Proposal and the information submitted in the QS. Financial Statements for non-public entities may be submitted with the Escrowed Materials.

The Financial Proposal shall include the following information for Proposer and all Equity Participants:

- Audited financial statements for all periods subsequent to those included in the QSs, audited by a certified public accountant in accordance with U.S. GAAP.
- In addition, interim unaudited statements for the period since the most recent completed fiscal year for Proposer and Equity Participants are to be provided.

The Financial Statements, whether for the most recent completed fiscal year or for the period since the most recent completed fiscal year, must meet the following requirements:

- 1) Financial Statement information must include:
  - i. Opinion Letter (Auditor's Report)
  - ii. Balance Sheet
  - iii. Income Statement
  - iv. Statement of Changes in Cash Flow
  - v. Footnotes audited by a certified public accountant in accordance with U.S. GAAP.
  
- 2) Financial Statements must meet the following requirements:
  - a. **U.S. GAAP** – Financial Statements must be prepared in accordance with U.S. GAAP. If financial statements are prepared in accordance with principles other than U.S. GAAP, a letter from the certified public accountant of the applicable entity, discussing the areas of the financial statements that would be affected by a conversion to U.S. GAAP.
  - b. **U.S. Dollars** - Financial statements must be provided in **U.S. dollars**. If financial statements are not available in U.S. dollars, Proposer must include summaries of the Income Statements and Balance Sheets for the applicable time periods converted to U.S. dollars by a certified public accountant.
  - c. **Audited** – Fiscal year end financial Statements must be audited by an independent party qualified to render audit opinions (e.g. Certified Public Accountant). If audited financials are not available for an Equity Participant, include unaudited financial statements for such member, certified as true, correct and accurate by the chief financial officer or treasurer of the entity.
  - d. **English** – Financial Statement information must be prepared in English. If audited financial statements are prepared in a language other than English, translations of all Financial Statement information must be accompanied with the original financial statement information.
  
- 3) Other information and requirements:
  - a. **Newly Formed Entity.** If Proposer is a newly formed entity and does not have independent financial statements, financial statements for the Equity Participants shall be provided (and Proposer shall expressly state that Proposer is a newly formed entity and does not have independent financial statements).

- b. Guarantor Letter of Support.** If Financial Statements of a parent company or affiliate company (“Guarantor”) are provided to demonstrate financial capability of Proposer or Equity Participants, an appropriate letter from the Guarantor must be provided confirming that it will guarantee all the obligations of Proposer or Equity Participants with respect to the Project. Proposers shall note that TxDOT may, in its discretion based upon the review of the information provided, specify that an acceptable guarantor is required as a condition of shortlisting.
- c. SEC Filings.** If the team or any other entity for whom financial information is submitted hereby files reports with the Securities and Exchange Commission, then such financial statements shall be provided through a copy of their annual report on Form 10K. For all subsequent quarters, provide a copy of any report filed on Form 10Q or Form 8-K which has been filed since the latest filed 10K.
- d. Credit Ratings.** Appropriate credit ratings must be supplied for each Proposer and Equity Participant, and Guarantor to the extent such entities have credit ratings. If no credit ratings exist, include a statement specifying that no credit ratings exist for that entity.
- e. Material Changes in Financial Condition.** A letter from the chief financial officer or treasurer, providing information on any material changes in financial condition since submission of the Qs and those that are pending. Additionally, Proposers shall be required to provide updated information following the Proposal Due Date as such information becomes public.

The following list identifies certain items that TxDOT would consider a material change in financial condition. This list is intended to be indicative only. At the discretion of TxDOT, any failure to disclose a prior or pending material change may result in disqualification from further participation in the selection process. In instances where a material change has occurred, or is anticipated, the affected entity shall provide a statement describing each material change in detail, the likelihood that the developments will continue during the period of performance of the Project development, and the projected full extent of the changes likely to be experienced in the periods ahead. Estimates of the impact on revenues, expenses and the change in equity shall be provided separately for each material change as certified by the CFO or treasurer. References to the notes in the financial statements are not sufficient to address the requirement to discuss the impact of material changes. The affected entity shall also provide a discussion of measures that would be undertaken to insulate the Project from any recent material adverse changes, and those currently in progress or reasonably anticipated in the future. If the financial statements indicate that expenses and losses exceed income in the fiscal periods between submission of the Qs and the most recent completed periods (even if there has not been a material change), the affected entity shall provide a discussion of measures that will be

undertaken to make the entity profitable in the future and an estimate of when the entity will be profitable.

#### List of Representative Material Changes

- A. An event of default or bankruptcy involving the affected entity, a related business unit within the same corporation, or the parent corporation of the affected entity;
  - B. A downward change in tangible net worth of 10% of shareholder equity;
  - C. A sale, merger or acquisition exceeding 10% of the value of shareholder equity prior to the sale, merger or acquisition which in any way involves the affected entity, a related business unit, or parent corporation of the affected entity;
  - D. A downward change in credit rating for the affected entity, a related business unit, or parent corporation of the affected entity;
  - E. Inability to meet conditions of loan or debt covenants by the affected entity, a related business unit or parent corporation of the affected entity which has required or will require a waiver or modification of agreed financial ratios, coverage factors or other loan stipulations, or additional credit support from shareholders or other third parties;
  - F. The affected entity, a related business unit in the same corporation, or the parent corporation of the affected entity either: (i) incurred a net operating loss; (ii) sustained charges exceeding 5% of the then shareholder equity due to claims, changes in accounting, write-offs or business restructuring; or (iii) implemented a restructuring/reduction in salaried personnel exceeding 200 positions or involving the disposition of assets exceeding 10% of the then shareholder equity; and
  - G. Other events known to the affected entity, a related business unit or parent corporation of the affected entity which represents a material change in financial condition since submission of the QS or may be pending for the next reporting period.
- f. Off-Balance Sheet Liabilities.** A letter from the certified public accountant, chief financial officer, treasurer or certified public accountant for each entity for which financial information is submitted, identifying all material off balance sheet liabilities.

The information required under this Section 2.0 shall be packaged separately for each separate entity with a cover sheet identifying the name of the organization and its role in Proposer's organization (i.e., Equity Participant, lead design firm, subcontractor, etc.).

### **3.0 Financing Plan**

### **3.1 Identity of Financial Institution**

The Financial Proposal shall identify the financial institution that will provide any letter of credit required under the CDA and its rating information. Provide a statement certified by the chief financial officer or treasurer of the Proposer that it will be able to obtain the required letter of credit.

### **3.2 Range of Financing Sources**

Proposers shall describe their Financing Plan and provide supporting evidence of the strength of commitments from Lenders and Equity Participants. This is to include, at a high level:

- Senior debt finance:
- Mezzanine debt finance;
- Equity and quasi-equity finance (including subordinated debt or loan stock);
- Any other forms of finance;
- Identity of the investors;
- Identity of lead arrangers, lead managers and/or underwriting banks and/or quasi-equity providers that have given indications/commitments;
- Type and purpose of each funding source and facility; and
- The proposed steps and timeframes for reaching financial close.

### **3.3 Details for Lenders and Lender Support Letters**

For each separate loan facility or other debt instrument (including capital market debt, working capital, guarantee and standby facilities), Proposers shall provide:

- Identity of lead arrangers, lead managers and/or underwriting banks and/or quasi-equity providers that have given indications/commitments;
- Type and purpose of facility;
- Amounts to be provided/committed by each Lender and currency in which it will be provided;
- Terms and conditions attaching to the loan such as conditions precedent to drawdown, principal covenants (including details of cover ratios) and default provisions;



- Drawdown schedule, capital repayment moratorium, repayment schedule and final maturity date, events of default, security required (including any guarantees), any reserve accounts;
- Interest rates (whether fixed or floating) specifying base rate and margins and the reference interest rates that are relevant to the Proposal;
- Any proposed hedging arrangements in respect of interest rates;
- Average life of debt;
- Arrangement and other fees;
- Any indicative credit rating letters that may be required for specific forms of debt finance included in the base financial plan, including information on the assumptions used (e.g. T&R scenarios, facility size) in establishing the rating;
- Any lenders' T&R and technical due diligence reports that are available;
- Any other information which would be relevant to specific forms of debt finance; and
- A detailed timetable setting out the expected period for negotiation and signing of the facilities.

The Financial Proposal is to include one or more support letters from proposed Lenders confirming the Lender's willingness to provide the funding described in the Proposer's Financing Plan and shall describe any conditions that will need to be met prior to receipt of funds. Such support letters must include evidence of authorization from the Lender's board or credit committee as appropriate.

### **3.4 Details of Equity Source and Equity Participant Members Letters**

For each equity source, Proposers shall provide:

- Identity of the investors;
- The amount of funds the shareholder is to commit and the timing of such subscription; and
- The terms and conditions of the subscription, including dividend rights attaching to shares, the extent to which funds are committed and the length of time funds will remain in the project vehicle.

If the total amount of equity finance (including quasi equity), is expected to change during the life of the Project, the terms and conditions of any further planned equity subscription, including the expected timing and amount, and whether this will be provided by the existing shareholders or by third party investors.

The Proposal shall include certified copies of the board minutes or other written evidence of approval of the contents of the Financial Proposal by each Equity Participant, together with appropriate evidence of the authorization of the person/body giving the approval. Sufficient documentation must be provided that provides appropriate assurance that private equity will be in place, including letters from the Equity Participants evidencing their commitment to provide equity funding.

### **3.5 Financial Advisor Letter**

The Proposal shall include an opinion letter from the Proposer's financial advisor (or if one has not been appointed by the Proposer as of the Proposal Due Date, by the Proposer's Chief Financial Officer) indicating the debt funding is achievable and sufficient to fulfill the Proposer's commitments as set out in the Proposal.

### **3.6 Schedule for Commercial and Financial Close**

The Financing Plan shall include a schedule for completing activities and deliverables necessary to reach commercial and financial close, taking into consideration the review period for deliverables set forth in ITP Section 5.12.3. The schedule shall reflect Proposer's estimated date for commercial and financial close, which may not be after the last applicable deadlines set forth ITP Sections 1.6.2 and 1.6.3.

### **3.7 Financial Summary Form**

Proposer shall submit its completed Form U to TxDOT with the Proposal in a sealed envelope, clearly labeled "[Proposer's Name] - Form U for the TxDOT IH 635 Managed Lanes Project -- Financial Summary".

## **4.0 Feasibility of Financing Plan**

Proposers shall ensure that their Financing Plans are sufficiently developed and have attracted sufficient support and commitment from Lenders and investors, to satisfy TxDOT that there is no material risk on financial grounds that:

- Proposer will fail to enter into a CDA on the terms in the RFP;
- Proposer will fail to provide the Concession Payment to TxDOT (if applicable) in accordance with the dates and terms set forth in the CDA; and
- Senior lenders will not accept the terms of any proposed TIFIA financing substantially as set forth in the indicative term sheet. If such assurance regarding acceptability of TIFIA financing is not available, Proposer shall describe its alternative approach to achieve financial close.

Subject to compliance with the RFP, the suitability or desirability of different funding solutions in each Proposal to be submitted is Proposer's responsibility. A Proposer may submit a Proposal based on one financing option, while reserving a right, with the approval of TxDOT, to change to an alternative financing structure at a later stage in the

procurement process in the event that Proposer becomes the successful Proposer. Notwithstanding the foregoing, if the Financing Plan does not include TIFIA and/or PABs funding and the successful Proposer changes its financing structure prior to financial close to include TIFIA and/or PABs funding, TxDOT will be entitled to receive 100% of the incremental benefit realized due to the change in financing structure. In such circumstances, Proposer will be required to provide TxDOT with a revised Financial Model, amended only to incorporate the TIFIA and/or PABs financing requirements in order to confirm the revised Public Funds Request or Concession Payment payable to TxDOT, as applicable. TxDOT will not accept such changes to the financing structure if such financing structure results in an increase in the Public Funds Request or a reduction in the Concession Payment.

## **5.0 Financial Model Submittal Requirements**

### **5.1 General Financial Model Requirements**

Proposers shall submit a Financial Model, which shall be delivered into escrow as described in ITP Section 4.4.4. The format of the Financial Model is at the discretion of Proposers, but must comply with the requirements set out in this Section 5.0.

### **5.2 Financial Model Structure and Supporting Documents**

#### **5.2.1 Financial Model Format Requirements**

The Financial Model shall be compatible with Microsoft Excel Version 2000 for Windows 2000 or later. The file name of the Financial Model shall clearly identify the Financial Model version (e.g., IH 635 Financial Model\_001.xls) and shall change with each successive version of the Financial Model issued. Where additional Financial Models based on the same version are issued (i.e. where the additional Financial Model is generated by changing input cells only) the file name shall reflect that the same version is being used (e.g., IH 635 Financial Model\_001b.xls).

The Financial Model shall also contain as a minimum the following on a title page in a separate worksheet:

- Model name;
- Proposer's name;
- Model author;
- Version;
- Date (Financial Model date and run date);
- Key to formats (e.g. yellow for inputs); and

- Key to sheet names (i.e. “Inputs” for input sheets, “Calculations” for calculation sheets etc.).

Each output sheet of the Financial Model shall identify the Financial Model version and the date of issue.

No password protection may be included in the Financial Model (including password protected macros, or hidden rows columns, cells or sheets). The Financial Model shall be formatted to facilitate printing.

## **5.2.2 Financial Model Consistency**

The Financial Model shall have time periods across the columns and calculations down the rows. This shall be consistent in all sheets of the Financial Model. There are two areas where consistency is most important:

- Columns – a column shall be used for the same period in each of its occurrence in model worksheets; and
- Rows – a row shall contain only one formula, copied across all columns.

## **5.2.3 Financial Model Integrity**

All calculations shall be coded to provide exactly what they purport to represent, i.e. no balancing figures. Use of a macro is acceptable provided it is appropriately documented in the model and the Assumptions Book.

## **5.2.4 Financial Model Linearity**

The Financial Model shall calculate in one pass (i.e., no circular references).

## **5.3 Financial Model Organization**

### **5.3.1 Elements of Financial Model**

The Financial Model shall have three distinct elements:

- Inputs – which shall include data and assumptions but **NO** calculations;
- Calculations – individual calculations that support each line of all outputs and reports. There shall be no duplication of calculations nor shall input cells be hard-coded in calculations sheets; and
- Outputs – no input cells hard-coded in output sheets and no calculations except for simple formulae such as sums and check totals.

### **5.3.2 Financial Model Inputs and Specifications**

Models shall be developed with reference to the following key inputs and assumptions:

- Specific Project Dates – All milestone dates for the Project set in the RFP shall be met;
- Periods – Financial Model shall be constructed using semi-annual periods from financial close until two years after the end of the Lease and shall use a 31<sup>st</sup> December reporting year end;
- Revenues – All demand and toll rate assumptions shall be clearly stated in the Financial Model, with supporting detail being provided in the supporting Assumptions Book. The level of detail in the Assumptions Book shall be sufficient to enable independent verification of individual revenue assumptions. While aggregate revenue estimates may be used as an input within the Financial Model, a detailed breakdown, supported by any traffic and revenue studies undertaken by Proposer, shall be supplied as an annex to the Assumptions Book, such that there is a transparent relationship between demand, toll rates and toll revenues;
- Expenditure – All cost assumptions shall be clearly stated in the Financial Model, with additional detail being provided in the supporting Assumptions Book. The level of detail in the Assumptions Book shall be sufficient to enable independent verification of individual cost assumptions. Where aggregate costs are used as an input within the Financial Model, a detailed breakdown shall be supplied as an annex to the Assumptions Book, such that there is a transparent relationship between costs and the price of the service to TxDOT;
- Contingencies and Profit Margins – The Financial Model shall make clear where contingencies and profit margins have been included so that the financial evaluation can be based on an appropriate understanding of the levels of risk assumed by Proposers;
- Macroeconomic Assumptions – All macroeconomic assumptions used within the Financial Model shall be clearly stated;
- Inflation – If inflation indices other than CPI are used within the model (e.g., to inflate wages) then these shall be clearly stated as separate inputs;
- U.S. GAAP – The Financial Model shall be compliant with U.S. GAAP;
- Taxation Rates – The Financial Model shall use the appropriate rates for tax in force at the submission date; and
- Tax Allowances – The Financial Model shall clearly show the assumptions regarding tax allowances being claimed.

### 5.3.3 Financial Model Outputs

The Financial Model shall be provided and will include:

- A summary sheet which includes a sources and applications of funds statement, graphs of cover ratios, a profile of cash balances (that confirms the financial feasibility of the Project, including all required reserves as prescribed by lenders), and the Concession Payment or Public Funds Request, as applicable, and revenue sharing amount payable to TxDOT;
- Financial statements (cash flow, balance sheet and profit and loss), in nominal terms for each period;
- A schedule outlining calculation of taxes payable in each period, and showing tax carry forward and un-depreciated balances;
- Cash cascade in order of seniority (consistent with the CDA);
- Return on pre- and post-tax equity and quasi-equity/subordinated debt in both real and nominal terms and a blended equity return, incorporating all sub-senior debt finance;
- Debt to equity ratio at the time of Substantial Completion, defined as the ratio of total debt to total equity and quasi-equity;
- Weighted average cost of capital (the average cost of equity and debt weighted by the prevailing proportions of debt to equity for the initial design and construction) over the Term of the CDA;
- Net present value of construction costs, O&M costs, public funds and revenue share, separately and in total, discounted to the Service Commencement Date (using 5% as the discount rate);
- For each annual period of each loan, show all actual and average ratios required by the Lender's term sheets, including as a minimum, the debt service cover ratio, loan life cover ratio (LLCR), being the net present value of future net cash flow available to service debt over the loan life including cash balances but excluding the balance of the lifecycle maintenance reserve, divided by the senior debt outstanding;
- Appropriate reserves as required by funder's term sheets, which may include a debt service reserve account and a maintenance reserve account. TxDOT will expect the Financial Model to incorporate the benefit of interest earned on all project company cash balances; and
- The impact of all claims for tax allowances made **by the project company**.

### **5.3.4 Financial Model Functionality and Sensitivity Analysis**

The Financial Model is to provide the ability to run sensitivities to absolute or percentage changes, whichever is appropriate, in each of the following areas:

- traffic and revenue;
- inflation rates;
- interest rates;
- capital costs; and
- operating cost, maintenance cost and rehabilitation costs.

Running a sensitivity analysis shall only require change to a single model input. TxDOT anticipates that when an input variable is changed the effect will flow through the model to all relevant outputs.

### **5.4 Financial Model Assumptions Book**

Proposers shall submit an Assumptions Book describing fully all the assumptions underlying the financial projections within the Financial Model and at a minimum include the items listed below:

- Dates as listed in the RFP documents;
- Assumptions relating to general inflation and, where different, specific inflation relating to each component of expenditure, including construction costs and revenue for each year;
- Forecast capital expenditure, presented in prices at the Proposal Due Date and classified in accordance with the construction cost categories outlined in Form P (Detailed Costing Form);
- Depreciation assumptions – split between the various categories of fixed asset;
- O&M costs, presented in prices at the Proposal Due Date analyzed in the categories outlined in Form P (Detailed Costing Form);
- Traffic assumptions underlying the revenue forecasts;
- Average actual tolls for each year of the Term of the Lease; and
- All financing assumptions, including but not limited to drawdowns, capital repayment moratoria, repayment schedules and maturity, interest rates and margin, and arrangement and other fees (all must be referenced to the relevant credit provider term sheet).

Any third party reports developed to support the revenue and cost estimates used in developing the financial offer shall be appended to the Assumptions Books.

## **5.5 Financial Model Instructions Guide**

Proposers shall provide details of how the Financial Model operates.

The instructions shall include step by step instructions on the procedure to run and to optimize the Financial Model, including any constraints imposed by the credit providers on results of downside sensitivities. The instructions shall also explain how to print the model.

## **5.6 Detailed Costing Form**

Proposer shall complete Form P (Detailed Costing Form), and include the completed form in the Financial Proposal. The units and unit costs included on Form P will be used to create the schedule of values (see Technical Provisions, Section 2.1). Mobilization costs to be included on Form P shall not exceed 10% of Total Project Construction Costs.

## **5.7 Detailed Cost and Pricing Data**

Proposer shall also provide the detailed back-up information regarding the basis for Proposer's cost estimates for development, operations and maintenance of the Project, meeting all requirements of this Section 5.7 (the "Cost and Pricing Data"). The Cost and Pricing Data shall be separately sealed, and shall include copies of all offers and all data and information received from all Contractors (at all tiers) identified in the Proposal and any other potential Contractors that provided data and information used as the basis for Form P (Detailed Costing Form). The Cost and Pricing Data shall include supporting data, technical memoranda, calculations, formulas, unit and materials prices (if applicable) and such other cost, charge and fee information used by Proposer in the creation and derivation of its Proposal. Proposer shall submit its Cost and Pricing Data in hard copy and whenever possible shall also provide electronic copies. Proposer shall submit the Cost and Pricing Data in such format as is used by Proposer and its Contractors in connection with the Proposal. The Cost and Pricing Data provided with the Proposal shall be personally examined by an authorized officer of Proposer prior to delivery who shall ensure that they meet the requirements of this Section 5.7.



**5.8 Inclusion of AFCs**

Proposer must specifically state whether any approved AFCs are included, with reference to the AFC identification number assigned by TxDOT, and shall describe how the AFC is used and provide cross-references to other elements of the Proposal that are affected by the AFC. Each Proposer shall also identify characteristics of its Proposal which vary from the RFP requirements, due to the use of the AFC.

**6.0 Request for Public Funds; Offer of Concession Payment to TxDOT**

If Proposer is requesting public funds during the construction phase from TxDOT, then Proposer shall complete Sections A and B of Form K (Financial Request/Offer Form) as described in Section 6.1. If Proposer is offering to make a Concession Payment to TxDOT or is otherwise not requesting public funds, then Proposer shall complete Section C of Form K as described in Section 6.2.

**6.1 Request for Public Funds**

**6.1.1 Availability of Public Funds**

Up to \$700 million of public funds are available to pay for the Project’s capital costs in accordance with the following fund availability schedule (the “Maximum Available Funds”):

	NTP2 +											
	3 mos.	6 mos.	9 mos.	12 mos.	15 mos.	18 mos.	21 mos.	24 mos.	27 mos.	30 mos.	33 mos.	36 mos.
Maximum Available Funds (\$ million)	58.33	116.67	175	233.33	291.67	350	408.33	466.67	525	583.33	641.67	700

Thus, Proposer may request no more than \$58.33 million for the first quarterly payment period, no more than \$116.67 million for the first two quarterly payment periods, no more than \$175 million for the first three quarterly payment periods, no more than \$233.33 million for the first four quarterly payment periods, no more than \$291.67 million for the first five quarterly payment periods, no more than \$350 million for the first six quarterly payment periods, no more than \$408.33 million for the first seven quarterly payment periods, no more than \$466.67 million for the first eight quarterly payment periods, no more than \$525 million for the first nine quarterly payment periods, no more than \$583.33 million for the first ten quarterly payment periods, no more than \$641.67 million for the first eleven quarterly payment periods and no more than \$700 million for the first twelve quarterly payment periods (and no more than \$700 million in total). Note that while the Maximum Available Funds are available over five years, Proposer may not draw the Maximum Available Funds in under three years. Proposer is required to achieve Service Commencement within five years from NTP2.

### **6.1.2 Proposer’s Public Funds Request**

Proposer shall indicate the maximum allowable nominal amount of public funds it may receive during each quarterly period over the development phase by completing Section A of Form K (Financial Request/Offer Form). The Proposer shall insert the amount of public funds requested for each quarter (the “Public Funds Request”). Proposer is instructed to complete Form K to include the cost of the Payment and Performance Bonds required under the CDA Documents.

The net present value of Proposer’s Public Funds Request (Form K, Box 2) will be used to calculate Proposer’s Price Score under ITP Section 5.2.

### **6.1.3 Maximum Payment Curve**

Form K will automatically generate the Maximum Payment Curve by calculating the cumulative quarterly totals of Proposer’s Public Funds Request (i.e., the first quarterly Maximum Payment Curve amount will equal the first quarterly Public Funds Request amount, the second quarterly Maximum Payment Curve amount will equal the sum of the first two quarterly Public Funds Request amounts, the third quarterly Maximum Payment Curve amount will equal the sum of the first three quarterly Public Funds Request amounts, etc.). The Maximum Payment Curve will be attached to the executed CDA as Attachment 3 to Exhibit 7.

Payment of the Public Funds Request (if any) by TxDOT to Developer will be subject to the limitations set forth in the CDA, including:

- (a) the Maximum Payment Curve (see CDA Exhibit 7); and
- (b) TxDOT’s prorata share of the capital costs (see CDA Exhibit 7, Part E, Section 2.4).

### **6.1.4 Public Funds Escrow Account**

Payment of the Public Funds Request, if applicable, shall be made pursuant to an escrow account, whereby TxDOT deposits the funds into escrow and the funds are then released to Developer by the escrow agent pursuant to the terms of an escrow agreement for the disbursement of the Public Funds. Developer shall establish this escrow, if applicable, at Developer’s sole cost and expense, prior to financial close with an escrow service and form of escrow agreement that has been approved by TxDOT in writing.

Developer shall provide TxDOT with the name, address, contact information and account information of Developer’s selected escrow service with the executed CDA. Developer shall also provide TxDOT with a copy of the proposed escrow agreement between Developer and the selected escrow service with the executed CDA. The escrow service chosen by Developer must be unaffiliated with Proposer and otherwise must be free of any conflict of interest. TxDOT shall be entitled to all interest accruing on the Public Funds while held in escrow.

## **6.2 Concession Payment**

If Proposer does not request public funds and/or offers to make a payment to TxDOT, then Proposer shall complete Section C of Form K (Financial Request/Offer Form). The financial offer must be in the form of an upfront lump sum payment to TxDOT (the “Concession Payment”).

The Concession Payment (Form K, Box 3) will be used to calculate Proposer’s Price Score under ITP Section 5.2.

## **6.3 Financial Request/Offer – Payment and Performance Letter of Credit Option Form**

Proposer may, in its sole discretion, submit a financial request for a Payment and Performance Letter of Credit Option (Form K-1) with its Proposal. The submission of Form K-1 shall not excuse Proposer from the requirement of submitting a completed Form K.

Proposer is instructed to complete Form K-1 in the same manner described above for Form K (see Sections 6.1 and 6.2), except that Form K-1 shall exclude the cost of the Payment and Performance Bonds and include the cost of the Payment and Performance Letter of Credit.

If conditional award is made using the successful Proposer’s Payment and Performance Letter of Credit, Proposer is advised that the provisions of Attachment 1 to Form K-1 will be included in the final form of CDA prior to execution, as described therein.

## **7.0 Revenue Payment**

Proposer shall complete Form T (Revenue Payment Table).

## **8.0 Verification**

Each Proposer shall satisfy itself as to the revenues, costs and tax consequences of entering into a CDA and becoming a Developer. TxDOT makes no representations or warranties, express or implied, and assumes no liability whatsoever, with respect to revenues, costs or the consequences of federal or state income tax treatment of Developer under the CDA.

**Exhibit D**  
**REQUIRED FORMS**

(see attached)

**Exhibit E**

**SUMMARY AND ORDER OF PROPOSAL CONTENTS**

## Technical Proposal

Proposers shall follow the order of the Technical Checklist in their submissions. A referenced copy of this document shall be submitted with the Technical Proposal.

Proposal Component	Form (if any)	ITP Section Cross-Reference	Technical Proposal Page Reference
<b>A. Executive Summary</b>			
Executive Summary ( <b>Exclude price information</b> )	No forms are provided	<u>Exhibit B, Section 3.1</u>	
<b>B. Proposer Information, Certifications &amp; Documents</b>			
Proposal Letter	Form A	<u>Exhibit B, Section 3.2.1</u>	
Authorization Documents	No forms are provided	<u>Exhibit B, Section 3.2.1</u>	
Identification of Proposer and Equity Participants	Form B-1	<u>Exhibit B, Section 3.2.2</u>	
Information About Proposer Organization	Form B-2	<u>Exhibit B, Section 3.2.2</u>	
Information About Major Participants, Major Professional Services Firms and Identified Subcontractors	Form B-3	<u>Exhibit B, Section 3.2.2</u>	
Responsible Proposer Questionnaire	Form C	<u>Exhibit B, Section 3.2.3</u>	

<b>Proposal Component</b>	<b>Form (if any)</b>	<b>ITP Section Cross-Reference</b>	<b>Technical Proposal Page Reference</b>
Industrial Safety Record for Team Members Performing Installation or Construction Work	Form D	<u>Exhibit B, Section 3.2.4</u>	
Personnel Work Assignment Form	Form E	<u>Exhibit B, Section 3.2.5</u>	
Key Personnel statement of availability	No forms are provided	<u>Exhibit B, Section 3.2.5</u>	
Letters Approving Key Personnel	No forms are provided	<u>Exhibit B, Section 3.2.6</u>	
Letters Approving Changes in Proposer's Organization	No forms are provided	<u>Exhibit B, Section 3.2.6</u>	
Non-Collusion Affidavit	Form F	<u>Exhibit B, Section 3.2.7</u>	
Buy America Certification	Form G	<u>Exhibit B, Section 3.2.8</u>	
DBE Certification	Form H	<u>Exhibit B, Section 3.2.9</u>	
Child Support Statement for State Grants, Loans and Contracts	Form I	<u>Exhibit B, Section 3.2.10</u>	
Conflict of Interest Disclosure Statement	Form J	<u>Exhibit B, Section 3.2.11</u>	

<b>Proposal Component</b>	<b>Form (if any)</b>	<b>ITP Section Cross-Reference</b>	<b>Technical Proposal Page Reference</b>
Certification Regarding NTTA Communications	Form R	<u>Exhibit B, Section 3.2.12</u>	
Equal Opportunity Employment Certification	Form S	<u>Exhibit B, Section 3.2.13</u>	
<b>C. Project Development Plan</b>			
General Project Management	No forms are provided	<u>Exhibit B, Section 4.1</u>	
Design-Build Management and Technical Solutions	No forms are provided	<u>Exhibit B, Section 4.2</u>	
Operations and Maintenance Management and Technical Solutions	No forms are provided	<u>Exhibit B, Section 4.3</u>	
<b>D. Appendices</b>			
Key Personnel Resumes and References	No forms are provided	<u>Exhibit B, Section 3.2.5.2</u>	
Proposer's Schematic	No forms are provided	<u>Exhibit B, Section 4.2.3</u>	
Preliminary Project Baseline Schedule	No forms are provided	<u>Exhibit B, Section 4.1.5</u>	
<b>E. Proposal Security (Proposal will include either a Proposal Bond or Letter of Credit in a form listed below)</b>			
Proposal Bond	Form L-1	<u>Exhibit B, Section 3.3.1</u>	
Letter of Credit (Proposal)	Form L-2	<u>Exhibit B, Section 3.3.2</u>	
<b>F. Escrow Agreement</b>			
Escrow Agreement	Form M	<u>Exhibit B, Section 3.4</u>	



Proposal Component	Form (if any)	ITP Section Cross-Reference	Technical Proposal Page Reference
<b>G. Proposer Election and Provision of CDA Terms</b>			
Election of Terms for Termination Compensation	No forms are provided	<u>Exhibit B, Section 3.5.1</u>	
Provision of Terms for the Allocation of the Concession Payment	No forms are provided	<u>Exhibit B, Section 3.5.2</u>	

Proposers shall follow the order of the Financial Checklist in their submissions. A referenced copy of this document shall be submitted with the Financial Proposal.

	Proposal No:	Location of information within submission documentation	
		Document Reference	Financial Model Sheet Reference
<b>A.</b>	Updated financial information Proposer must provide the corporate and financial information identified in <u>Section 2.0</u> of <u>Exhibit C</u> , for Proposer and Equity Participants	N/A	
<b>A1</b>	Audited Financial Statements for all periods subsequent to QS and unaudited interim financial statements ( <u>Exhibit C</u> , <u>Section 2.0</u> ) <b>[NOTE: FINANCIAL STATEMENTS FOR NON-PUBLIC ENTITIES MAY BE SUBMITTED DIRECTLY INTO ESCROW.]</b>		
<b>A2</b>	Guarantor letters of support (as required) ( <u>Exhibit C</u> , <u>Section 2.0</u> )		
<b>A3</b>	For publicly held companies, most recent SEC 10-K and 10-Q reports and any 8-Ks filed since the PQSs ( <u>Exhibit C</u> , <u>Section 2.0</u> )		
<b>A4</b>	Credit Ratings ( <u>Exhibit C</u> , <u>Section 2.0</u> )		

	Proposal No:	Location of information within submission documentation	
		Document Reference	Financial Model Sheet Reference
<b>A5</b>	Letter regarding material change in financial condition since submission of the QS and for next reporting period ( <u>Exhibit C, Section 2.0</u> )		
<b>A6</b>	Letter disclosing all material off balance sheet liabilities ( <u>Exhibit C, Section 2.0</u> )		
<b>B</b>	Financing Plan ( <u>Exhibit C, Section 3.0</u> )	N/A	N/A
<b>B1</b>	Identity of Financial Institution ( <u>Exhibit C, Section 3.1</u> )		
<b>B2</b>	Range of Financing Sources ( <u>Exhibit C, Section 3.2</u> )		
<b>B3</b>	Details for Lenders and Lender Support Letters ( <u>Exhibit C, Section 3.3</u> )		
<b>B4</b>	Details of Equity Source and letters from Equity Participants ( <u>Exhibit C, Section 3.4</u> )		
<b>B5</b>	Financial Advisor letter ( <u>Exhibit C, Section 3.5</u> )		
<b>B6</b>	Schedule for Commercial and Financial Close ( <u>Exhibit C, Section 3.6</u> )		
<b>B7</b>	Financial Summary Form ( <u>Form U</u> ) ( <u>Exhibit C, Section 3.7</u> )		

	Proposal No:	Location of information within submission documentation	
		Document Reference	Financial Model Sheet Reference
	<b>TO BE SUBMITTED WITH PROPOSAL TO TxDOT IN SEALED AND CLEARLY LABELED ENVELOPE</b>		
<b>C</b>	Feasibility of Financing Plan ( <u>Exhibit C, Section 4.0</u> )	N/A	N/A
<b>D</b>	Financial Model ( <u>Exhibit C, Section 5.0</u> ) <b>TO BE SUBMITTED DIRECTLY INTO ESCROW</b>	N/A	N/A
<b>D1</b>	Financial Model outputs ( <u>Exhibit C, Section 5.3.3</u> ) <b>TO BE SUBMITTED DIRECTLY INTO ESCROW</b>		
<b>D2</b>	Financial Model Assumptions Book ( <u>Exhibit C, Section 5.4</u> ) <b>TO BE SUBMITTED DIRECTLY INTO ESCROW</b>		
<b>D3</b>	Instructions on operations of the Financial Model ( <u>Exhibit C, Section 5.5</u> ) <b>TO BE SUBMITTED DIRECTLY INTO ESCROW</b>		
<b>D4</b>	Detailed Costing Form (Form P) ( <u>Exhibit C, Section 5.6</u> )		

	Proposal No:	Location of information within submission documentation	
		Document Reference	Financial Model Sheet Reference
	<b><i>TO BE SUBMITTED DIRECTLY INTO ESCROW</i></b>		
<b>D5</b>	Cost and Pricing Data (separately sealed) ( <u>Exhibit C, Section 5.7</u> ) <b><i>TO BE SUBMITTED DIRECTLY INTO ESCROW</i></b>		
<b>D6</b>	Inclusion of AFCs ( <u>Exhibit C, Section 5.8</u> ) <b><i>TO BE SUBMITTED DIRECTLY INTO ESCROW</i></b>		
<b>E</b>	Financial Request/Offer Form ( <u>Form K</u> ) ( <u>Exhibit C, Section 6.0</u> ) <b><i>TO BE SUBMITTED DIRECTLY INTO ESCROW</i></b>		
	Financial Request/Offer – Payment and Performance Letter of Credit Option Form ( <u>Form K-1</u> ) ( <u>Exhibit C, Section 6.3</u> ) <b><i>TO BE SUBMITTED DIRECTLY INTO ESCROW</i></b> <b><i>[NOTE: SUBMISSION OF THIS FORM IS OPTIONAL.]</i></b>		
<b>F</b>	Revenue Payment Table ( <u>Form T</u> ) ( <u>Exhibit C,</u>		

	Proposal No:	Location of information within submission documentation	
		Document Reference	Financial Model Sheet Reference
	<u>Section 7.0)</u> <b>TO BE SUBMITTED DIRECTLY INTO ESCROW</b>		

**Exhibit F**

[RESERVED]

**Exhibit G**

NTTA Tolling Services Agreement

[to be provided]



Exhibit H-1

INDEPENDENT ENGINEER SERVICES

**SUPPLEMENTAL AGREEMENT TO CONTRACT FOR ENGINEERING  
SERVICES**

**and**

**AGREEMENT FOR INDEPENDENT ENGINEERING SERVICES  
FOR IH 635 MANAGED LANES PROJECT**

**THIS SUPPLEMENTAL AGREEMENT TO CONTRACT FOR ENGINEERING SERVICES and AGREEMENT FOR INDEPENDENT ENGINEERING SERVICES FOR IH 635 MANAGED LANES PROJECT** (“Agreement”) is made on this \_\_\_\_ day of \_\_\_\_\_, 200\_, by and among the State of Texas acting by and through the Texas Department of Transportation (“TxDOT”), \_\_\_\_\_, a \_\_\_\_\_ (“Developer”), and \_\_\_\_\_, a \_\_\_\_\_ (“Independent Engineer”) (together with TxDOT and Developer, each a “Party” and collectively the “Parties”), for the purpose of contracting for independent engineering services.

**WHEREAS**, TxDOT and Developer have entered into a Comprehensive Development Agreement dated \_\_\_\_\_, 200\_ (as amended from time to time, the “CDA”) for the IH 635 Managed Lanes Project (the “Project”), and

**WHEREAS**, TxDOT and the Independent Engineer have previously entered into an indefinite delivery/indefinite quantity contract (“Master Agreement”) obligating the Independent Engineer to provide certain project-specific services as described therein, and

**WHEREAS**, TxDOT and Developer desire to contract for engineering services generally described as independent engineering services for the Project, consistent with the Master Agreement and as contemplated by the CDA and Master Agreement; and

**WHEREAS**, Developer is not a party to the Master Agreement and is therefore not subject to the terms of the Master Agreement except to the extent expressly set forth herein, but the terms of the Master Agreement continue to apply as between TxDOT and the Independent Engineer, except as specifically modified herein, without affecting the rights of the Developer under this Agreement against TxDOT or the Independent Engineer; and

**WHEREAS**, this Agreement serves multiple purposes in that it (1) establishes among the Parties the detailed terms for providing the project-specific Independent Engineer services for the Project, (2) establishes the agreement for sharing the costs of the Independent Engineer's services as contemplated by the CDA, and (3) serves as a supplemental agreement to the Master Agreement between the Independent Engineer and TxDOT; and

**WHEREAS**, all of the services provided by the Independent Engineer pursuant to this Agreement are professional services involving advice, judgment or opinion;

**NOW, THEREFORE**, TxDOT, the Developer and the Independent Engineer, in consideration of the mutual covenants and agreements herein contained, do hereby agree as follows.

## **AGREEMENT**

### **ARTICLE 1. DEFINITIONS, CONTRACT DOCUMENTS AND ORDER OF PRECEDENCE**

#### **1.1 Definitions and Contract Language**

**1.1.1.** Definitions for the capitalized terms used but not otherwise defined in this Agreement are contained in Exhibit 1 to the CDA.

**1.1.2.** The text in parentheses after citations to CDA Documents is for reference use only.

**1.1.3.** This Agreement constitutes the Independent Engineer Agreement referred to in the CDA, and the Independent Engineer shall serve as the Independent Engineer under the CDA.

**1.1.4.** In this Agreement, the term "Audit" means a review of Developer's processes and procedures to perform required work or review of Submittals, for the purpose of assessing and reporting on Developer's compliance with the CDA Documents and the Project Management Plan.

#### **1.2 Contract Documents and Order of Precedence**

The following documents comprise the contract documents for this Agreement. In the event of any conflict, ambiguity or inconsistency among the contract documents, the order of precedence shall be as follows:

1. Supplemental agreements and addenda to this Agreement;
2. This Agreement;

3. The CDA Documents listed in Section 1.2 of the CDA, in the order of precedence specified in the CDA, to the extent that CDA provisions are referenced and incorporated into this Agreement;

4. With respect to the relationship between the Independent Engineer and TxDOT, the Master Agreement; and

5. Work Authorizations.

Notwithstanding any of the foregoing to the contrary, to the extent this Agreement and any supplemental agreements or addenda to this Agreement, or the IE QAP (as defined below in Section 2.1.1.1) or any Work Authorizations (as defined below in Section 2.1.1), may be inconsistent with or contrary to the CDA Documents as they relate to involvement of the Independent Engineer, the CDA Documents shall control and the parties agree that this Agreement shall be interpreted to conform in all respects to the provisions of the CDA. In order to implement the foregoing, the Parties agree to amend this Agreement or any supplemental agreements, or addendum to this Agreement, or the IE QAP or any Work Authorization as appropriate to resolve any such inconsistency and conform to the CDA.

If any changes to the CDA occur that materially affect the rights or responsibilities of the Independent Engineer under this Agreement, TxDOT or Developer shall provide notice of the change to the Independent Engineer. The Independent Engineer shall not be responsible for implementing those changes under this Agreement until it has received such notice.

### **1.3 No Effect on CDA**

Nothing in this Agreement amends or modifies any of the Developer's and TxDOT's obligations to each other under the CDA Documents.

### **1.4 Independence of the Independent Engineer**

The Independent Engineer shall act as an independent professional and not as a representative of either TxDOT or Developer in the performance of its duties under this Agreement. Any certification, decision or exercise of discretion by the Independent Engineer in the performance of its duties under this Agreement shall be applied fairly to TxDOT and Developer. The Parties acknowledge that the Independent Engineer's duties under the Master Agreement include the obligation to perform certain other services as TxDOT's representative, and that those duties of the Independent Engineer are not considered to be performed hereunder.

### **1.5 Standards**

The Independent Engineer shall perform all services under this Agreement in accordance with applicable rules and regulations of the Texas Engineering Practices Act and the rules of the Texas Board of Professional Engineers. The Independent

Engineer shall also perform its services hereunder in accordance with Good Industry Practice, to the extent not in conflict with documents described in Section 1.2 above, the Texas Engineering Practices Act and the rules of the Texas Board of Professional Engineers.

## **ARTICLE 2. SCOPE OF SERVICES**

### **2.1 General Scope**

**2.1.1.** The Independent Engineer shall provide all personnel, equipment, material, and resources to perform services hereunder in accordance with the detailed Work Authorizations issued jointly by TxDOT and Developer from time to time in accordance with the terms of this Agreement (“Work Authorizations”). Except where TxDOT’s or Developer’s unilateral issuance of a Work Authorization is otherwise expressly permitted under Section 4.1.3, below, the Independent Engineer shall not proceed under a Work Authorization unless it has been signed by the Authorized Representatives of both TxDOT and Developer. Work Authorizations issued under this Agreement shall (a) be consistent with the form attached as Attachment D to the Master Agreement, (b) include the contents required by Article 1, Section B of Attachment A to the Master Agreement, (c) include a Work Authorization Budget that meets the requirements set forth in Article 1, Section C of Attachment A to the Master Agreement, and (d) provide for compensation in accordance with the Fee Schedule attached to the Master Agreement as Attachment E, which Fee Schedule is also set forth in Exhibit 1 hereto.

**2.1.1.1** The initial Work Authorization under this Agreement, when issued, shall include the scope of work set forth in Exhibit 2 hereto, and will authorize and direct the Independent Engineer to submit to Developer and TxDOT for review and approval a comprehensive Independent Engineer Quality Assurance Plan (the “IE QAP”), taking into account the requirements of the CDA Documents and Developer’s Project Management Plan. The Independent Engineer shall amend the IE QAP with each change approved by the Parties necessary to comply with Good Industry Practice or to reflect a change approved by the Parties in working practice implemented by the Independent Engineer. In no event shall the IE QAP amend or modify the rights and obligations of the Developer under the FMP or CDA.

**2.1.1.2** Work Authorizations will be issued from time to time and shall set forth a detailed scope of services and compensation terms, consistent with the requirements of this Agreement.

**2.1.2.** The Independent Engineer shall report all matters jointly to TxDOT and the Developer. The Independent Engineer shall provide the following simultaneously to TxDOT and the Developer in writing: progress reports, quality reports, regular Audit reports, reports on performance requirements, targets and defects, other reports, and findings, opinions, evaluations, comments, objections and recommendations. The Independent Engineer acknowledges and agrees that such documents are created on a

work-for-hire basis and are the intellectual property of TxDOT and Developer for use by each of them on an unrestricted basis.

**2.1.3.** The Independent Engineer has no authority to issue stop work orders or otherwise alter, suspend or delay the progress of the Work (except to give direction or order or take such action as in its opinion is necessary to remove an immediate and present threat to the safety of life or property) and therefore is not responsible for the Developer's progress of the Work. In the performance of its duties hereunder, the Independent Engineer will exercise due diligence not to interfere, disrupt, delay or otherwise impede the efficient and timely planning, approval and execution of all aspects of the Work or the resolution of any questions or disagreements concerning the Work, and the Independent Engineer will exercise due diligence to avoid any delay or disruption of any design, construction, operation and maintenance of the Project.

**2.1.4.** The Independent Engineer shall review and comment on all Submittals for which TxDOT review, comment, or approval is authorized under the CDA, unless waived in writing by TxDOT and the Developer for a specific Submittal or type of Submittal. The Independent Engineer shall perform compliance Audits in accordance with the CDA Documents and Work Authorizations issued hereunder.

**2.1.4.1** Attached as Exhibit 4 to this Agreement is an initial list of the Submittals required under the CDA (as it may be amended, the "Submittal List"). The Parties agree that the Submittal List is not necessarily a conclusive list of all Submittals contemplated under the CDA and that the CDA shall be the source for determining the Submittals covered by this Agreement. The Independent Engineer shall review and comment on all Submittals on the Submittal List except to the extent the Submittal List states that review and comment is not required. If the Submittal List states that review and comment is at the option of TxDOT or the Developer, the Independent Engineer shall review and comment on the Submittal if requested to do so in writing by either TxDOT or the Developer. The Independent Engineer, TxDOT and Developer shall update the Submittal List annually, or as otherwise agreed, to conform to the CDA during the Term of this Agreement.

**2.1.5.** The Independent Engineer shall conduct the monitoring, reviewing, inspection, testing, reporting, Auditing and other oversight functions set forth in the CDA Documents and this Agreement.

**2.1.6.** The Independent Engineer shall monitor and Audit Developer and its books and records to assess compliance with requirements of the CDA Documents and the approved Project Management Plan, including (i) Audit review of Design Documents, Plans, Construction Documents and other Submittals and (ii) Audit review regarding Patron Confidential Information; as provided in CDA Section 8.8.7.

**2.1.7.** Wherever in the CDA Documents it is stated that the Independent Engineer shall or may perform an action, function or task, TxDOT and the Developer agree that the Independent Engineer is given the right and obligation to perform the same under this Agreement.

**2.1.8.** The Independent Engineer shall increase the type and level of oversight as directed by TxDOT in accordance with the provisions set forth in CDA Section 9.3.3.

**2.1.9.** The Independent Engineer shall have the right and responsibility to attend and witness any tests and verifications to be conducted pursuant to the Technical Provisions and Project Management Plan, to the extent appropriate as determined by the Independent Engineer for purposes of monitoring Developer's compliance with the requirements of the CDA Documents, and shall provide comments to TxDOT and Developer concerning any such tests and verifications attended.

**2.1.10.** The Independent Engineer shall have the right to, and shall, observe the business operations of Developer and its Contractors to assess the accuracy of books and records.

**2.1.11.** The Independent Engineer shall have the right of access and inspection of the contents of the Intellectual Property Escrow, to the extent necessary to carry out its duties under this Agreement, and subject to terms and conditions of the Intellectual Property Escrow Agreement and subject to the terms and conditions otherwise reasonably necessary to protect the confidentiality and proprietary nature of the contents of the Intellectual Property Escrow, including execution of a confidentiality agreement in substantially the form required by the Intellectual Property Escrow Agreement.

**2.1.12.** The Independent Engineer shall Audit and monitor the activities described in the Developer's Project Management Plan to assess the Developer's compliance with the commitments contained in the Project Management Plan and the requirements of the CDA Documents.

**2.1.13.** The Independent Engineer shall advise TxDOT and the Developer of any repeating or fundamental Nonconforming Work and of any deficiencies in the manner the Work is inspected or tested.

#### **2.1.14. Payment Requests**

**2.1.14.1** The Independent Engineer shall review and report to TxDOT and the Developer on each draft Payment Request Developer submits pursuant to Part E, Section 2 of Exhibit 7 to the CDA. The Independent Engineer shall review each draft Payment Request (a) for conformity to the required form and content under Part E, Section 2 of Exhibit 7 to the CDA, including required back-up documentation, and (b) for verification that the listed Payment Activities have been completed and that the amount stated for each listed Payment Activity does not exceed the amount shown in the approved Schedule of Values.

**2.1.14.2** The Independent Engineer shall attend each Payment Request review and progress status meeting that TxDOT and Developer hold pursuant to Part E, Section 3 of Exhibit 7 to the CDA.

**2.1.14.3** The Independent Engineer shall review and report to TxDOT and Developer on each Payment Request Developer submits pursuant to Part E, Section 4 of Exhibit 7 of the CDA. The Independent Engineer shall review each Payment Request (a) for conformity to the required form and content under Part E, Section 2 of Exhibit 7 to the CDA, including required back-up documentation, and (b) for verification that it is consistent with the corresponding draft Payment Request signed and approved or conditionally approved by TxDOT.

## **2.2 Project Development**

The Independent Engineer shall perform oversight, inspection, testing and Auditing respecting the Work in accordance with CDA Section 9.3 and as more particularly described in the IE QAP.

## **2.3 Management Systems**

The Independent Engineer shall review and comment on the Traffic Management Plans submitted by the Developer pursuant to CDA Section 9.2.

## **2.4 Project Schedule**

The Independent Engineer shall review all Project Schedule Submittals (Project Status Schedule Updates, and Project Recovery Schedules, as applicable) by the Developer and provide comments to TxDOT and the Developer in accordance with the review procedures set forth in this Agreement and the IE QAP.

## **2.5 Noncompliance Points and Reporting**

**2.5.1.** The Independent Engineer shall deliver written notice to TxDOT and Developer within one Business Day of discovery, or receipt of notification from the Developer, of the occurrence of any breach or failure specified in Attachment 1 to Exhibit 21 of the CDA (Noncompliance Points Table), and of the applicable cure period allowed under the CDA and Noncompliance Points that may be assessed with respect thereto under the terms of the CDA. No such notification from the Independent Engineer, standing alone, shall be effective to either (i) impose Noncompliance Points, which right is reserved exclusively to TxDOT or (ii) determine whether or not a breach or failure in fact occurred or has been timely cured. The notice also shall set forth the Independent Engineer's recommendation whether to assess Noncompliance Points, and reasoning and analysis in support thereof.

**2.5.2.** Within ten days of discovery by the Independent Engineer or receipt of notice from the Developer, pursuant to CDA Section 18.2.1.1, of the occurrence of any breach or failure specified in Attachment 1 to Exhibit 21 of the CDA (Noncompliance Points Table), the Independent Engineer shall deliver to both TxDOT and the Developer written notice setting forth its recommendation of whether to assess Noncompliance Points, and reasoning and analysis in support thereof.

**2.5.3.** Within ten days of receiving notice from TxDOT, pursuant to CDA Section 18.2.1.2, of any breach or failure to perform specified in Attachment 1 to Exhibit 21 of the CDA (Noncompliance Points Table), the Independent Engineer shall deliver to TxDOT and the Developer written notice setting forth its recommendation whether to assess Noncompliance Points, and reasoning and analysis in support thereof.

**2.5.4.** Upon receiving from the Developer notice, in accordance with CDA Section 18.2.3, identifying the breach or failure for which it has been assessed Noncompliance Points, stating that Developer has completed cure and briefly describing the cure, including any modifications to the Project Management Plan to protect against future similar breaches or failures, the Independent Engineer shall promptly inspect to assess the work performed to effect completion of the cure and, if satisfied that the breach or failure is fully cured, shall deliver to TxDOT and Developer a written report regarding whether the breach or failure has been cured.

**2.5.5.** The Independent Engineer shall keep current records of the number of assessed Noncompliance Points and uncured Noncompliance Points, and the date of each assessment and each cure. The Independent Engineer shall report such information to TxDOT and Developer in writing every quarter and otherwise upon written request from TxDOT or Developer.

## **2.6 Safety Compliance**

**2.6.1.** If the Developer provides to the Independent Engineer notice that a provision of the CDA Documents is erroneous, creates a potentially unsafe condition or is or becomes inconsistent with Good Industry Practice, the Independent Engineer shall provide an opinion to TxDOT and the Developer regarding the Developer's proposed cure.

**2.6.2.** The Independent Engineer shall provide personnel with expertise in quality control processes to Audit and file a report within 30 days after the end of each calendar year, until the first year after the Service Commencement Date, on (i) the Developer's design control process, with particular regard to compliance with the quality assurance/quality control requirements of the Project Management Plan, and (ii) design safety control processes in place, design safety control plans in place, and recordkeeping for compliance with the CDA.

**2.6.3.** The Independent Engineer shall review the Developer's Final Design Documents in accordance with prudent design Auditing practice and the IE QAP to assess whether the design reasonably conforms to the requirements of the CDA, including the Technical Provisions, and TxDOT's safety standards.

**2.6.4.** The Independent Engineer shall provide personnel with expertise in quality control/assurance/oversight processes that will perform Audits of the Developer's compliance with the Project Management Plan and CDA requirements and file a report within 30 days after the end of each year during which construction work has been performed regarding compliance with the CDA with respect to (a) the qualifications of



the construction staff being used, (b) construction safety control processes in place, (c) construction safety control plans in place, and (d) recordkeeping.

**2.6.5.** The Independent Engineer shall investigate, analyze and report on Safety Compliance by the Developer and the Developer's performance of Safety Compliance Orders.

**2.6.6.** The Independent Engineer shall consult with TxDOT and the Developer if requested regarding the issuance of a Safety Compliance Order.

**2.6.7.** The Independent Engineer shall monitor and inspect for the purpose of assessing whether any circumstances exist that warrant issuance of a Safety Compliance Order, and give reports and recommendations to TxDOT and Developer with respect thereto.

**2.6.8.** The Independent Engineer shall comply with the Developer's safety procedures, and those of its Contractors, but is otherwise not responsible for jobsite safety conditions except for responsibility to the Independent Engineer's own employees.

## **2.7 Field Monitoring and Inspections**

**2.7.1.** The Independent Engineer shall conduct field monitoring and inspections in accordance with the IE QAP, including in connection with TxDOT's certifications of Substantial Completion, Service Commencement and Final Acceptance.

**2.7.2.** The Independent Engineer shall make recommendations to TxDOT and the Developer on Relief Event Determinations.

**2.7.3.** The Independent Engineer shall evaluate and report to TxDOT (with a copy to Developer) on Developer's estimates of cost impacts attributable to Compensation Events, Developer's projected impacts of proposed TxDOT Changes on the Project Schedule and Milestone Schedule, and Change Requests.

**2.7.4.** The Independent Engineer shall advise TxDOT and Developer whether the Independent Engineer recommends suspension of work if circumstances exist that would entitle TxDOT to order suspension of work under CDA Section 17.3.8.

**2.7.5.** At TxDOT's written request, in the event the Developer provides a Compensation Event Notice to TxDOT, the Independent Engineer shall prepare and deliver to TxDOT and Developer within 30 days of the TxDOT request a comprehensive report as to the Developer's estimate of the cost and schedule impacts attributable to the Compensation Event.

**2.7.6.** At TxDOT's written request in the event there is a proposed TxDOT Change, the Independent Engineer shall prepare and deliver to TxDOT and Developer, at TxDOT's cost, within 30 days of the TxDOT request a comprehensive report as to the

proposed TxDOT Change, including the Independent Engineer's comments concerning Developer's estimate of the cost impacts and projected impact on the Project Schedule and Milestone Schedule.

**2.7.7.** At TxDOT's written request in the event there is a Change Request by Developer, the Independent Engineer shall prepare and deliver to TxDOT and Developer, at Developer's cost, within 30 days of the TxDOT request, a comprehensive report regarding the Change Request including the Independent Engineer's comments concerning Developer's estimate of the cost impacts and projected impact on the Project Schedule and Milestone Schedule.

## **2.8 Substantial Completion, Punch List, Service Commencement and Final Acceptance**

**2.8.1.** During the 20-Day period preceding the date the Developer anticipates it will achieve Substantial Completion, or such longer period as Developer may request after giving the notice required under Section 7.8.1.3 of the CDA, the Independent Engineer shall meet and confer with TxDOT and the Developer and exchange information on a regular cooperative basis with them, with the goal being TxDOT's and the Independent Engineer's orderly, timely inspection and review of the Project and the Final Design Documents and Construction Documents, and TxDOT's issuance of a written certificate of Substantial Completion.

**2.8.2.** During the period specified above in Section 2.8.1 preceding the date the Developer anticipates it will achieve Substantial Completion, the Independent Engineer shall conduct an inspection of the Project and its components, a review of the Final Design Documents and Construction Documents and such other investigation as may be necessary to evaluate whether Substantial Completion is achieved. The Independent Engineer shall deliver a written report of findings and recommendations to TxDOT and Developer following such inspection, review and investigation and in any case within five Days after the end of the specified period preceding the date the Developer anticipates it will achieve Substantial Completion. TxDOT may, but is not obligated to, jointly with the Independent Engineer or independently conduct such inspection, review and investigation within such specified period.

**2.8.3.** Developer shall prepare and maintain the Punch List in accordance with the CDA. Developer shall deliver to TxDOT and the Independent Engineer written notice identifying the date when Developer will commence Punch List field inspections and Punch List preparation, which notice shall be delivered not less than five Days prior to such commencement date. TxDOT may but is not obligated to and the Independent Engineer shall, at TxDOT's request, participate in the development of the Punch List. Each participant shall have the right to add items to the Punch List and none shall remove any item added by any other without such other's express permission, except that TxDOT may remove an item added to the Punch List by the Independent Engineer. If Developer objects to the addition of an item by TxDOT or the Independent Engineer, the item shall be noted as included under protest and if TxDOT and Developer

thereafter are unable to reconcile the protest, the Dispute shall be resolved according to the Dispute Resolution Procedures.

**2.8.4.** During the 20-Day period following receipt of the Developer's notification that all of the conditions precedent to Service Commencement specified in Section 7.8.3.1 of the CDA have been satisfied, the Independent Engineer shall meet and confer with TxDOT and the Developer and exchange information on a regular cooperative basis with them, with the goal being TxDOT's and the Independent Engineer's orderly, timely inspection and review of the Project and the data and documentation submitted by Developer, and TxDOT's issuance of a written certificate authorizing Service Commencement for the Project.

**2.8.5.** During the 20-Day period following receipt of the Developer's notification that the conditions precedent to Service Commencement specified in Section 7.8.3.1 of the CDA have been satisfied, the Independent Engineer shall conduct an inspection of the Project and such other review of reports, data and documentation as may be necessary to evaluate whether all of the conditions to Service Commencement have been satisfied. The Independent Engineer shall deliver a written report of findings and recommendations to TxDOT and Developer following such inspection and review and in any case within five Days after the end of such 20-Day period. TxDOT may, but is not obligated to, jointly with the Independent Engineer or independently conduct such inspection and review within such 20-Day period.

**2.8.6.** During the 15-day period following receipt of the Developer's notification that it determined it has achieved Final Acceptance for the Project, the Independent Engineer shall meet and confer with TxDOT and the Developer and exchange information on a regular cooperative basis with them, with the goal being TxDOT's and the Independent Engineer's orderly, timely inspection and review of the Project and the Record Drawings for the Project, and TxDOT's issuance of a written certificate of Final Acceptance for the Project.

**2.8.7.** During the 15-day period following receipt of the Developer's notification that it determined it has achieved Final Acceptance for the Project, the Independent Engineer shall conduct an inspection of the Punch List items, a review of the Record Drawings and such other investigation as may be necessary to evaluate whether the conditions to Final Acceptance are satisfied. The Independent Engineer shall deliver a written report of findings and recommendations to TxDOT and Developer following such inspection, review and investigation and in any case by the end of such 15-Day period. TxDOT may, but is not obligated to, jointly with the Independent Engineer or independently conduct such inspection, review and investigation within such 15-Day period.

## **2.9 Operations and Maintenance**

**2.9.1.** The Independent Engineer shall perform oversight, inspection, testing and Auditing respecting the O&M Work in accordance with CDA Section 9.3 and the approved IE QAP.

**2.9.2.** The Independent Engineer shall review and comment to TxDOT and the Developer on the Renewal Work Schedule provided by the Developer pursuant to CDA Section 8.6.1.

**2.9.3.** The Independent Engineer shall review and comment to TxDOT and the Developer on the updated Renewal Work Schedule provided by the Developer pursuant to CDA Section 8.6.3.

**2.9.4.** At TxDOT's request, the Independent Engineer shall promptly meet and confer with TxDOT to review and discuss the original or updated Renewal Work Schedule.

**2.9.5.** The Independent Engineer shall deliver to TxDOT and Developer, within 30 days after receipt of the original and each updated Renewal Work Schedule, comments, objections and recommendations with respect thereto in accordance with CDA Section 8.6.5.

**2.9.6.** The Independent Engineer shall review and comment on any schedule submitted by the Developer pursuant to Section 8.1.2.4 of the CDA.

## **2.10 Upgrades and Technology Enhancements**

**2.10.1.** The Independent Engineer shall review and comment to TxDOT and the Developer on Submittals related to Capacity Improvements submitted by the Developer as set forth in Section 12.1.1.2 of the CDA.

**2.10.2.** The Independent Engineer shall review, analyze, and provide recommendations to TxDOT and the Developer regarding the preliminary schedule submitted by the Developer pursuant to Section 12.1.1.4 of the CDA.

**2.10.3.** The Independent Engineer shall review, analyze, and provide recommendations to TxDOT and the Developer regarding the preliminary schedule to be submitted by the Developer pursuant to Section 12.1.2.3 of the CDA.

**2.10.4.** The Independent Engineer shall review and comment to TxDOT and the Developer on any proposed Capacity Improvements submitted pursuant to Section 12.3.1 of the CDA.

**2.10.5.** The Independent Engineer shall review and comment to TxDOT and the Developer on any Change Request submitted pursuant to Section 12.3.2 of the CDA.

## **2.11 Termination Services**

In any case where notice of termination of the CDA precedes the effective Early Termination Date, the Independent Engineer shall, upon the request of TxDOT, increase the level of monitoring, inspection, sampling, measuring, testing, Auditing and oversight of the Project and Developer's compliance with the obligations under this

CDA, to such level as TxDOT reasonably determines it needs in order to protect against curtailment of services, quality and performance.

## 2.12 Disputes Board

**2.12.1.** The Independent Engineer shall provide any information and reports that may be requested by the Disputes Board and prepared by the Independent Engineer prior to such request, and shall defer to any decisions made by the Disputes Board.

**2.12.2.** After receiving written notice from either TxDOT or Developer that a Dispute has been asserted, the Independent Engineer shall not, despite any request from TxDOT, the Developer or the Disputes Board, prepare any further written evaluations, opinions, reports, recommendations, objections, decisions, certifications or other determinations respecting the Dispute. The Independent Engineer shall, however, give oral or written testimony to explain or clarify its previous written evaluations, opinions, findings, reports, recommendations, objections, decisions, certifications or other determinations at the request of TxDOT, the Developer, or the Disputes Board.

## 2.13 Audits

**2.13.1.** The Independent Engineer shall Audit the Developer, its Contractors and their respective books and records with respect to the Work as set forth in the CDA Documents, and as more particularly described in the approved IE QAP.

**2.13.2.** The Independent Engineer shall conduct process Auditing functions with respect to the Work set forth in Table 1 at the frequency set forth in that table. The Independent Engineer shall prepare and provide reports on such Audits within 14 days of completing the Audit task.

**Table 1 - ENGINEER's Audit Frequency**

Process Audit Role	Frequency of Process Audit
Audit of the Developer's design process (as distinguished from Developer's Design Documents) as necessary to Audit the Developer's conformance with the CDA Documents and the Project Management Plan with regard to the Work.	Up to four times per year
Audit of a reasonable sampling of the Developer's construction operations and testing by Auditing the Developer's Records for conformance with the CDA Documents and the Project Management Plan with regard to the Work.	Up to four times per year Offsite Plants: Up to four times per year Testing Labs: Once every 2 months during the construction season.

Audit of the Developer during Operation and Maintenance for conformance with the CDA Documents and the Project Management Plan with regard to the Work.	Up to two times per year
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**2.13.3.** The rights and obligations of the Independent Engineer to Audit and inspect the Work under this Agreement and the CDA shall include the right to monitor, Audit and investigate Developer’s books and records with respect to performance of the Work and Developer’s systems, practices and procedures concerning Patron Confidential Information. If the Independent Engineer requests access to Patron Confidential Information, Developer shall require the Independent Engineer to execute and deliver an appropriate confidentiality agreement consistent with the provisions of CDA Section 8.8 (relating to User Privacy).

**2.13.4.** The Independent Engineer shall select Auditable Sections, accompany the Developer on physical inspections associated with Developer’s Audit Inspections, conduct its own Audit Inspections, assess and score Developer’s O&M Records, and assess and score the condition of Elements, as provided in Section 22.4 of the Technical Provisions (relating to Performance Monitoring).

**2.13.5.** The Independent Engineer shall Audit the Developer’s performance of the activities set forth in the Developer’s Public Information and Communications Plan.

**2.13.6.** The Independent Engineer shall Audit the books and records of Key Contractors with respect to the Work to confirm compliance with the CDA Documents and applicable Law. The Developer shall arrange with Key Contractors for the Independent Engineer to gain access to such books and records.

**2.14 Review Procedure**

**2.14.1.** Following receipt of a Submittal from the Developer, or a request from TxDOT for a recommendation, in either case commencing the “Review Period,” the Independent Engineer shall, within the applicable time period set forth in Section 2.15 of this Agreement, either acknowledge receipt of the Submittal without comments, review with comments, provide its recommendations, or otherwise take action as required under this Agreement and consistent with the terms of the CDA Documents.

**2.14.2.** In the event that the Independent Engineer does not respond within the applicable time period set forth in Section 2.15, the Independent Engineer shall be deemed for the purpose of the CDA to have acknowledged receipt of a Submittal without comment or recommendation.

**2.14.3.** The Independent Engineer may provide the following comments on a Submittal by Developer under the Review Procedure:

1. Submittal does not meet the requirements of the CDA Documents,

2. Submittal does not comply with safety requirements under the CDA Documents,
3. Submittal is not in accordance with Good Industry Practice,
4. Submittal would, if adopted, result in a conflict with or violation of any Law or Governmental Approval,
5. Submittal is incomplete or not properly signed or not accompanied by reasonable evidence of approval by the appropriate Developer's Key Personnel,
6. Submittal proposes commitments, requirements, actions, terms or conditions that are not usual and customary arrangements that TxDOT offers or accepts for addressing similar circumstances affecting its own projects (applicable if the Submittal to be delivered to another Governmental Entity as a proposed Governmental Approval).

The Independent Engineer shall include with its comments a statement explaining in reasonably sufficient detail the basis for its comments and where appropriate, shall attach copies of any documents or standards in support thereof. The Independent Engineer's comments shall be provided simultaneously to TxDOT and Developer.

**2.14.4.** The Developer shall provide responses to TxDOT's and the Independent Engineer's comments and/or objections with respect to a Developer's Submittal. The Independent Engineer shall provide to TxDOT and the Developer, within the applicable Review Period, as set forth in Section 2.15, a determination as to whether the response or amended Submittal complies with the requirements of the CDA and recommend further action by TxDOT or the Developer as appropriate.

**2.14.5.** If the Developer does not provide a notification or respond to a comment by TxDOT or the Independent Engineer within the time period specified in the CDA, the Independent Engineer shall prepare a written notice on behalf of TxDOT as required by the CDA.

**2.14.6.** The Independent Engineer shall keep a running tally of the number of Submittals that are subject to review and comment or approval by TxDOT or by TxDOT and the Independent Engineer, and shall advise TxDOT and Developer whenever the number of concurrent Submittals exceeds the maximum number stated in the CDA, together with a recommendation regarding the additional review time required.

**2.14.7.** The Independent Engineer will recommend to TxDOT and Developer the extension of any time period within which TxDOT and/or the Independent Engineer is required to act following a Relief Event (as defined in the CDA) affecting TxDOT's and/or the Independent Engineer's ability to act.

## **2.15 Review Periods**

**2.15.1.** The Independent Engineer shall have the following time periods to take action as required under the CDA Documents, whether such action calls for a review and comment on the Submittal, the making of recommendations, or otherwise.

**2.15.1.1** If the CDA Documents require TxDOT, or TxDOT and the Independent Engineer, to review and comment on a Submittal within, or otherwise take action within, 14 Days or less, the Independent Engineer shall review and comment on the Submittal within, or otherwise take action within, the time period set forth in the CDA Documents less four Days.

**2.15.1.2** If the CDA Documents require TxDOT, or TxDOT and the Independent Engineer, to review and comment on a Submittal within, or otherwise take action within, 15 to 20 Days, the Independent Engineer shall review and comment on the Submittal within, or otherwise take action within, the time period set forth in the CDA Documents less five Days.

**2.15.1.3** If the CDA Documents require TxDOT, or TxDOT and the Independent Engineer, to review and comment on a Submittal within, or otherwise take action within, 20 to 30 Days, the Independent Engineer shall review and comment on the Submittal within, or otherwise take action within, the time period set forth in the CDA Documents less ten Days.

**2.15.1.4** If the CDA Documents require TxDOT, or TxDOT and the Independent Engineer, to review and comment on a Submittal within, or otherwise take action within, 31 Days or more, the Independent Engineer shall review and comment on the Submittal within, or otherwise take action within, the time period set forth in the CDA Documents less 15 Days.

**2.15.1.5** If this Agreement or the CDA Documents require only the Independent Engineer to review and comment on a Submittal within, or otherwise take action within, a set time period, the Independent Engineer shall review and comment on the Submittal within, or otherwise take action within, such time period.

**2.15.1.6** If TxDOT determines in accordance with the CDA Documents that a time period for review, comment or other action by TxDOT on a Submittal should be extended or revised, the time period for the Independent Engineer to review and comment on the Submittal, or otherwise take action, with respect to such Submittal shall be increased by the same amount of time.

**2.15.1.7** The Independent Engineer shall endeavor to reasonably accommodate a written request from TxDOT or Developer, with a copy of the request provided to the other Party, for expedited action on a specific Submittal, within the practical limitations on availability of personnel appropriate for acting on the types of Submittal in question.



## **2.16 Document Control**

The Independent Engineer shall implement an electronic document control system and a review and comment logging system that enables web access tracking of every Submittal by the Developer and every review and comment by the Independent Engineer and notifications or responses to comments provided by the Developer. The logging system shall allow read-only open access to TxDOT and the Developer and shall permit review and comment history to be followed. The electronic document control system shall be backed up daily and back up copies shall be stored in a safe location. The safe location must protect the back up copies from fire, water, theft, injury or damage of any kind.

## **2.17 Reports**

**2.17.1.** In addition to the other reporting obligations set out in this Agreement, the Independent Engineer shall report to TxDOT and the Developer on the progress of the design and construction of the Project at monthly intervals (“IE Monthly Report”) until issue of the certificate of Service Commencement. During the design and construction period, the IE Monthly Report shall be issued within 5 days following receipt of the Developer’s Monthly Report pursuant to Section 2.4.3 of the Technical Provisions. The IE Monthly Report shall include the Independent Engineer’s observations on Developer’s Monthly Report, and a copy of the Developer’s Monthly Report shall be appended to the IE Monthly Report.

**2.17.2.** The Independent Engineer shall provide simultaneously to Developer and TxDOT all reports, quality reports, regular Audit reports, reports on Performance Requirements, Targets and Defects, other reports, and findings, opinions, evaluations, comments, objections and recommendations prepared by the Independent Engineer under this Agreement, and as described in the IE QAP. The Independent Engineer acknowledges and agrees that such documents are created on a work-for-hire basis and are the intellectual property of TxDOT and Developer for use by each of them on an unrestricted basis.

## **2.18 Access**

**2.18.1.** TxDOT and the Developer shall provide to the Independent Engineer access to all Project materials, records, systems, facilities and properties as set forth in the CDA Documents.

**2.18.2.** The Developer and TxDOT at all times shall coordinate and cooperate with the Independent Engineer to facilitate the full, efficient, effective and timely performance by the Independent Engineer of monitoring, inspection, sampling, measuring, testing, reporting, Auditing, and other oversight duties under this Agreement and the CDA.

**2.18.3.** The Independent Engineer shall be entitled to safe access to the Project and Developer’s Project offices, operations buildings and data respecting the Project

and the Work, during normal business hours and in accordance with Developer's and the Design-Build Contractor's reasonable policies and procedures regarding safety and security, including access to accurate and complete books, records, data and information regarding the Project and the Work. Provided the Independent Engineer complies with such policies and procedures, the Independent Engineer has the right to attend and witness any tests and verifications to be conducted pursuant to the CDA, including accuracy, availability and performance tests of the toll collection system. The Developer shall provide to the Independent Engineer copies of all test results and reports (which may be provided in electronic format in accordance with the CDA) within one Business Day.

## **2.19 Project Management Plan Review**

The Independent Engineer shall provide independent reports to TxDOT and Developer consistent with the terms of the CDA Documents to recommend acceptance or otherwise of Developer's additions and amendments to the Project Management Plan. The Independent Engineer shall receive proposed amendments or additions to the Project Management Plan from the Developer in accordance with the requirements of the CDA, review submitted parts of the Developer's Project Management Plan and submit comments to TxDOT and the Developer according to the review procedure set forth in the CDA and the IE QAP. The Independent Engineer shall report annually to TxDOT and the Developer regarding the Developer's compliance with the Project Management Plan, including recommendations consistent with the terms of the CDA Documents regarding the adequacy of the Project Management Plan and suggestions for any amendment or update of any part of the Project Management Plan to the extent necessary to comply with Good Industry Practice and the CDA.

## **2.20 Independent Engineer Recommendations**

On TxDOT's written request, the Independent Engineer shall recommend the scope and timing of additional monitoring, Audit or independent inspection and quality control measures to be undertaken by either TxDOT or the Independent Engineer in order to reasonably monitor Developer's compliance with the CDA without delay or disruption to the performance of the Work.

## **2.21 Limitations on Independent Engineer's Authority**

**2.21.1.** The Independent Engineer is authorized to act under this Agreement only where and to the extent that this Agreement expressly provides, and a Work Authorization has been issued authorizing the Independent Engineer to act. The Independent Engineer is required to deliver its reports, opinions and other deliverables within the time periods set forth in the CDA Documents and this Agreement.

**2.21.2.** The Independent Engineer shall have no authority to give instructions to the Developer, deviate from or amend the CDA, relieve the Developer of any duty or obligation under the CDA or otherwise to act on behalf of TxDOT under the CDA, except under Section 9.3.1.2(c) of the CDA.

**2.21.3.** The Independent Engineer has no authority under the CDA or this Agreement to:

1. Arbitrate or render binding decisions or judgments;
2. Approve or disapprove Submittals or Work, unless expressly provided otherwise in the CDA Documents or this Agreement for specific Submittals;
3. Conduct “over-the-shoulder” reviews of Design Documents or other Submittals;
4. Conduct formal prior reviews of Design Documents except to the extent necessary or advisable to comply with FHWA, or unless TxDOT chooses to have the Independent Engineer do so pursuant to Section 9.3.3.4 ;
5. Direct design, construction, operations or maintenance of the Project, or order suspensions of Work, except to give such direction or order or take such action as in its opinion is necessary to remove an immediate and present threat to the safety of life or property;
6. Act as an agent of the TxDOT or the Developer; or,
7. Undertake the Developer’s primary responsibility for quality assurance and quality control.

### **ARTICLE 3. CONTRACT PERIOD**

This Agreement shall become effective and binding on the Parties when executed by all Parties and shall continue thereafter for a term that ends on the earlier of \_\_\_\_\_ or the date of Final Acceptance, unless terminated earlier in accordance with its terms. The Parties recognize that TxDOT does not have the authority to extend this Agreement unless and until the Master Agreement is extended; however the Independent Engineer agrees that if TxDOT has the authority to extend the term of this Agreement, the Independent Engineer will agree to an extension of the term to the date of Final Acceptance.

### **ARTICLE 4. COMPENSATION**

#### **4.1 General**

TxDOT and Developer shall compensate the Independent Engineer for its services under this Agreement as described in this Article 4, using the explanation of the terms Baseline Services, Contingent Services and Additional Services that is found in Exhibit 3.

The Independent Engineer agrees that at all times during the term of this Agreement, the Independent Engineer will perform the services required under this Agreement and the applicable Work Authorizations for compensation in accordance with the terms

specified in the Independent Engineer's Fee Schedule attached hereto as Exhibit 1. Upon request by either Developer or TxDOT, the Independent Engineer will, based on the Independent Engineer's Fee Schedule, prepare and submit within a reasonable time following such request, a written estimate of the total hours and cost of services that the Independent Engineer considers reasonable and appropriate to be rendered in the performance of the specific task(s) required by a proposed Work Authorization, with a breakdown of such hours and cost according to the proposed Work Authorization tasks to be performed by each of the Independent Engineer's personnel who will undertake such performance.

**4.1.1.** TxDOT and the Developer shall each be separately responsible for payment of one-half of the compensation payable to the Independent Engineer for performance of Baseline Services in accordance with this Agreement, such responsibility to be several and not joint.

**4.1.2.** TxDOT and Developer shall compensate the Independent Engineer for all Contingent Services performed by the Independent Engineer that are authorized by Work Authorizations issued under this Agreement. Such compensation shall be in the amounts and on the terms set forth in the applicable Work Authorizations, and shall be in accordance with the Fee Schedule attached hereto as Exhibit 1. TxDOT and the Developer shall each be separately responsible for payment of one-half of the compensation payable to the Independent Engineer for performance of Contingent Services in accordance with this Agreement, such responsibility to be several and not joint.

**4.1.3.** TxDOT and Developer shall compensate the Independent Engineer for all Additional Services performed by the Independent Engineer pursuant to Work Authorizations issued under this Agreement. Such compensation shall be in the amounts and on the terms set forth in the applicable Work Authorizations. Each of TxDOT and the Developer shall be separately responsible for payment of one-half of the compensation payable to the Independent Engineer for Additional Services that are performed in accordance with this Agreement pursuant to jointly issued Work Authorizations, such responsibility to be several and not joint. In the event on the basis of an uncured Persistent Developer Default under the CDA for which TxDOT has given notice to Developer, TxDOT exercises its right under the CDA to require the Independent Engineer to perform additional oversight or verification testing and issues a Work Authorization to the Independent Engineer to perform such additional oversight or verification testing and such Work Authorization contemplates a compensation to the Independent Engineer at pricing in accordance with that set forth in the Independent Engineer's Fee Schedule attached hereto as Exhibit 1 for a unit cost or specified rate basis, the Developer, and not TxDOT, shall be responsible for the compensation payable to the Independent Engineer for such additional oversight or verification testing required under the CDA that is actually performed by the Independent Engineer in accordance with such Work Authorization and this Agreement. Notwithstanding the foregoing, prior to engaging the Independent Engineer for any such additional services, TxDOT shall first undertake reasonable good faith efforts to involve Developer in the

negotiation of the compensation payable to the Independent Engineer pursuant to such Work Authorizations, and if TxDOT fails to do so, Developer shall nevertheless pay the Independent Engineer for the costs associated with such additional services, and Developer shall thereafter have the right to pursue remedies against TxDOT for such failure in accordance with this Agreement and the CDA. If either TxDOT or Developer, with the written consent of the other Party, issues a Work Authorization for Additional Services that are not included in any of the foregoing, (i) the Party issuing such Work Authorization, and no other Party, shall be responsible for the compensation payable to the Independent Engineer pursuant to such Work Authorization and (ii) the Independent Engineer shall perform the applicable Additional Services to the extent the same do not interfere with, or delay the performance of, any other duties of the Independent Engineer hereunder pursuant to Work Authorizations previously issued.

#### **4.2 Cost Compliance**

The Independent Engineer's costs must be eligible for payment in accordance with 48 CFR Part 31, Federal Acquisition Regulation (FAR 31).

#### **4.3 Limitation on Compensation**

The Independent Engineer shall not be entitled to any compensation for work performed (i) prior to the effective date of this Agreement or the applicable Work Authorization, or (ii) after termination of this Agreement, except as specifically provided in this Agreement or (iii) that is not expressly authorized under a Work Authorization.

#### **4.4 TxDOT Issuance of Work Authorization under Master Agreement**

In the event that TxDOT and the Independent Engineer have agreed on the terms of a new Work Authorization for Baseline Services or Contingent Services prior to the expiration of the operative Work Authorization for such services, and the Developer has not agreed to such terms, after ten (10) days prior written notice from TxDOT, TxDOT may issue a Work Authorization under the Master Agreement for the performance of such services at TxDOT's sole cost and expense, but no such Work Authorization shall be inconsistent with the terms of this Agreement or the CDA Documents, until (i) the Parties come to agreement on the terms of a new Work Authorization, or (ii) a replacement Independent Engineer is selected in accordance with CDA Section 24.1.

### **ARTICLE 5. PAYMENT REQUIREMENTS**

#### **5.1 Monthly Billing Statements**

The Independent Engineer shall request payment of its fees and costs incurred by submitting the original and one copy to TxDOT, and two copies to the Developer, of an itemized billing statement in a form substantially similar to that attached as Exhibit 5 hereto. The Independent Engineer shall submit billing statements monthly.

## **5.2 Billing Statement**

The billing statement shall show work performed during the billing period, separately itemized by duty in accordance with Sections 4.1.1, 4.1.2, and 4.1.3 above, with reference to the CDA section or Work Authorization for any billings for Contingent or Additional Services, the total amount earned to the date of submission, and the amount due and payable as of the date of the current billing statement for each Work Authorization. The billing statement shall indicate if the work has been completed or if the billing is for partial completion of the work. The billing statement shall indicate which portions of the work are the responsibility of TxDOT and which are the responsibility of the Developer, as set forth in this Agreement and the CDA. As between TxDOT and the Independent Engineer, the amount paid by TxDOT shall be applied to the maximum amount payable under the Master Agreement; and the amount paid by the Developer shall not be applied to the maximum amount payable under the Master Agreement.

## **5.3 Overhead Rates**

To the extent that the Independent Engineer's compensation includes overhead, the Independent Engineer shall use the provisional overhead rate indicated in the Fee Schedule attached as Exhibit 1. If a periodic escalation of the provisional overhead rate is specified in Exhibit 1, the effective date of the revised provisional overhead rate must be included. For lump sum Work Authorizations, the overhead rate remains unchanged for the entire period covered by the Work Authorization.

## **5.4 Thirty Day Payments**

TxDOT and Developer shall pay undisputed amounts no later than 30 days after receipt of a billing statement that complies with the invoice requirements set forth in this Article.

## **5.5 Withholding Payments by TxDOT**

TxDOT reserves the right to withhold payment of its portion of the Independent Engineer's billing statement in the event of any of the following: (1) If a dispute over the Independent Engineer's services or costs thereof is not resolved within a thirty day period; (2) pending verification of satisfactory services performed; (3) the Independent Engineer becomes a delinquent obligor as set forth in Section 231.006 of the Family Code; (4) required reports are not received from the Independent Engineer; (5) the State Comptroller of Public Accounts will not issue a warrant to the Independent Engineer; or (6) the Independent Engineer has not paid subproviders in accordance with this Agreement. In the event that payment is withheld, TxDOT shall notify the Independent Engineer and Developer and shall identify the reason for withholding the payment.

## **5.6 Withholding Payments by the Developer**

If (1) there is a dispute over the Independent Engineer's services or costs thereof and such dispute is not resolved within a 30-Day period; (2) there is pending verification of

performance of services in accordance with the requirements of this Agreement; (3) required reports are not received from the Independent Engineer; or (4) the Independent Engineer has not paid subproviders in accordance with this Agreement, then Developer, at its election, shall have the right to either (A) withhold payment of its portion or the disputed portion, as applicable, of the Independent Engineer's billing statement, or (B) pay its portion or the disputed portion, as applicable, of the Independent Engineer's billing statement. In the event that payment is withheld, the Developer shall notify the Independent Engineer and TxDOT of the basis for withholding payment. If Developer elects to withhold payment, and it is finally determined in accordance with the dispute procedures set forth in Section 7.23 of this Agreement that Developer wrongfully withheld such payment, upon such final decision, Developer shall pay the Independent Engineer the amount determined to be payable to the Independent Engineer in accordance with such final decision, plus interest on such amount at the LIBOR rate from the date such payment was due and payable until the date such payment is made by Developer. If Developer elects to pay the Independent Engineer, and it is finally determined in accordance with the dispute procedures set forth in Section 7.23 of this Agreement that the Independent Engineer was not entitled to all or any portion of such payment, upon such final decision, the Independent Engineer shall repay the Developer the amount of any overpayment determined to be payable to the Developer in accordance with such final decision, plus interest on such overpayment at the LIBOR rate from the date such overpayment was made until the date such overpayment is repaid by the Independent Engineer.

## **5.7 Required DBE/HUB Reports**

**5.7.1.** As required in Exhibit 6 hereto (Disadvantaged Business Enterprise for Federal-Aid Professional or Technical Services Contracts, the same document that is attached as Attachment H to the Master Agreement) the Independent Engineer shall submit Progress Assessment Reports to report actual payments made to Disadvantaged Business Enterprises or Historically Underutilized Businesses. One copy shall be submitted with each billing statement and one copy shall be submitted to the address included in Exhibit 6 hereto.

**5.7.2.** Prior to contract closeout, the Independent Engineer shall submit a Final Report in the form of Form H-4 attached to Exhibit 6 to the address set forth in Exhibit 6 hereto.

**5.7.3.** The Independent Engineer shall submit a separate report with each billing statement showing the percentage completion of the work accomplished during the billing period and the percentage completion to date, and any additional written report requested by TxDOT to document the progress of the work.

## **5.8 Subproviders and Suppliers List**

Pursuant to requirements of 43 Texas Administrative Code § 9.50 *et seq.*, the Independent Engineer must provide TxDOT a list of all subproviders and suppliers that submitted quotes or proposals for subcontracts in the form of Form H-5 attached to

Exhibit 6. This list shall include subproviders and suppliers names, addresses, telephone numbers, and type of work desired. The Independent Engineer shall also provide a copy of this list to the Developer.

## **5.9 Debt to the State**

If the State Comptroller of Public Accounts is prohibited from issuing a warrant to the Independent Engineer because of a debt owed to the State or TxDOT, TxDOT shall apply to the debt or delinquent tax all payment due the Independent Engineer, until the debt or delinquent tax is paid in full.

## **5.10 Audit**

The State Auditor may conduct an audit or investigation of any entity receiving funds from TxDOT directly under this Agreement or indirectly through a subcontract under this Agreement. Acceptance of funds directly under this Agreement or indirectly through a subcontract under this Agreement acts as acceptance of the authority of the state auditor, under the direction of the legislative audit committee, to conduct an audit or investigation in connection with those funds. An entity that is the subject of an audit or investigation must provide the state auditor with access to any information the state auditor considers relevant to the investigation or audit.

## **5.11 Independent Engineer Payment of Subproviders**

No later than ten (10) days after receiving payment from TxDOT and the Developer, the Independent Engineer shall pay all subproviders undisputed amounts due and payable for work performed under a subcontract authorized hereunder. TxDOT and the Developer may withhold all payments that have or may become due if the Independent Engineer fails to comply with the ten-day payment requirement. If the Independent Engineer is not in compliance with such ten-day requirement, on three days advance notice to the Independent Engineer and Developer, TxDOT may also suspend the work under this Agreement until subproviders are paid undisputed amounts due and payable. This requirement also applies to all lower tier subproviders, and this provision must be incorporated into all subcontracts.

## **ARTICLE 6. SIGNATORY WARRANTY**

The undersigned signatory for the Independent Engineer hereby represents and warrants that he or she is an officer of the organization for which he or she has executed this Agreement and that he or she has full and complete authority to enter into this Agreement on behalf of the firm. These representations and warranties are made for the purpose of inducing TxDOT and Developer to enter into this Agreement.



## ARTICLE 7. GENERAL PROVISIONS

### 7.1 Instructions and Notices to the Independent Engineer

Any Party providing instruction and notices to the Independent Engineer shall provide a copy to the other Party.

### 7.2 Disclaimer

TxDOT and the Developer acknowledge that the Independent Engineer has no duty and obligation to cause the Developer's Work or the Project to satisfy the standards and requirements of the CDA Documents.

### 7.3 Progress

**7.3.1.** The Independent Engineer shall from time to time during the progress of the services performed hereunder, and as described in the IE QAP and applicable Work Authorizations, confer with TxDOT and the Developer. The Independent Engineer shall prepare and present such information as may be pertinent and necessary or as may be requested by TxDOT and the Developer in order to evaluate features of the Independent Engineer's services hereunder.

**7.3.2.** At the request of TxDOT, the Developer, or the Independent Engineer, the representatives of the Parties shall meet at a location in Austin, Texas designated by TxDOT to discuss progress of services provided by the Independent Engineer. These meetings shall also include evaluation of the Independent Engineer's services when requested by the TxDOT or the Developer.

**7.3.3.** If federal funds are used to reimburse costs incurred under this Agreement, the services of the Independent Engineer and all reimbursements will be subject to periodic review by the U.S. Department of Transportation.

### 7.4 Suspension of Work

**7.4.1.** TxDOT and Developer may jointly direct the Independent Engineer to suspend the services under this Agreement by providing written notice of such suspension, setting forth the effective date of such suspension, to the Independent Engineer. Neither TxDOT nor Developer, acting alone, may suspend the Independent Engineer's work pursuant to this Section 7.4.1. Suspension of the work shall suspend, but not terminate, the current Work Authorization.

**7.4.2.** The work of the Independent Engineer under this Agreement that has been previously suspended pursuant to Section 7.4.1, may be reinstated and resumed in full force and effect upon written notice from TxDOT and the Developer, given in accordance with the provisions of this Section 7.4.2, directing the Independent Engineer to resume the work in accordance with the suspended Work Authorization within the period of time specified in this Section 7.4.2. The Independent Engineer shall maintain

adequate personnel necessary to resume the work on 15 days' notice at the sole cost of the Independent Engineer for a period of 2 months following the effective date of any suspension, and if TxDOT and Developer deliver notice to the Independent Engineer to resume the work previously suspended within such 2-month period, the Independent Engineer shall resume such work within 15 days of such notice without additional cost to Developer or TxDOT. If Developer and TxDOT determine or reasonably believe that the suspension period will exceed 2 months, Developer and TxDOT shall send notice to the Independent Engineer no later than 15 days prior to the expiration of such 2-month period electing one of the following: (i) to require that the Independent Engineer continue to maintain adequate personnel necessary to resume the work on 15 days' notice, or (ii) to require the Independent Engineer to be able to resume the work on 45 days' notice. If Developer and TxDOT fail to give such notice, TxDOT and Developer shall be deemed to have elected that the Independent Engineer shall maintain adequate personnel necessary to resume the work on 15 days' notice. Notwithstanding the foregoing, Developer and TxDOT shall have the right at any time after such initial election (or deemed election) to change such initial election by delivering notice to the Independent Engineer of such change. Should Developer and TxDOT elect option (i) (either initially or in a subsequently delivered notice) or should Developer and TxDOT fail to give such notice electing option (i) or (ii), Developer and TxDOT shall each pay one-half of 80% of the costs incurred by the Independent Engineer to maintain adequate personnel necessary to resume the work on 15 days' notice throughout the remaining duration of the suspension, and if TxDOT and Developer deliver notice to the Independent Engineer to resume the work previously suspended, the Independent Engineer shall resume such work within 15 days of such notice. Should Developer and TxDOT elect option (ii) (either initially or in a subsequently delivered notice), Developer and TxDOT shall pay one-half each of the costs incurred by the Independent Engineer during the 30 days' prior to such restart date in order to regain adequate personnel to resume the work on such date, and if TxDOT and Developer deliver notice to the Independent Engineer to resume the work previously suspended, the Independent Engineer shall resume such work within 45 days of such notice.

**7.4.3.** If TxDOT and Developer suspend the services of the Independent Engineer under the Agreement, the term of this Agreement as determined in Article 3 of this Agreement (Contract Period) is not affected and the term of this Agreement will expire on the date specified in Article 3 unless it is amended to authorize additional time.

Neither TxDOT nor the Developer shall have any liability for services performed by the Independent Engineer or costs incurred by the Independent Engineer (a) prior to the effective date of this Agreement, (b) during periods when work by the Independent Engineer is suspended, or (c) after the expiration of the term or earlier termination of this Agreement.

## **7.5 Ownership of Data**

**7.5.1.** All services provided under this Agreement are considered work-for-hire and as such all data, basic sketches, charts, calculations, plans, specifications, and other documents created or collected under the terms of this Agreement are the property of TxDOT and Developer.

**7.5.2.** All documents prepared by the Independent Engineer, and all documents furnished to the Independent Engineer by TxDOT or the Developer, shall be delivered to TxDOT and the Developer upon request by one or both. Subject to the terms of the CDA and any applicable Intellectual Property Escrow Agreement, the Independent Engineer, at its own expense, may retain copies of such documents or any other data which it has furnished TxDOT and/or the Developer under this Agreement, but further use of the data is subject to permission by TxDOT and the Developer.

**7.5.3.** The Independent Engineer (1) will not release any Submittal created or collected under this Agreement except to its subproviders as necessary to perform its work under this Agreement; (2) shall include a provision in all subcontracts which acknowledges TxDOT's and the Developer's ownership of the design plan and prohibits its use for any use other than the Project identified in this Agreement; and (3) is responsible for any improper use of the design plan by its employees, officers, or subproviders, including costs, damages, or other liability resulting from improper use. Neither the Independent Engineer nor any subprovider may charge a fee for the portion of the design plan created by TxDOT or the Developer.

## **7.6 Public Information and Confidentiality**

**7.6.1.** TxDOT will comply with the CDA, Government Code, Chapter 552, the Public Information Act, and 43 Texas Administrative Code §3.10 et seq. in the release of information produced under this Agreement.

**7.6.2.** The Independent Engineer shall not disclose drawings or information obtained from TxDOT or the Developer under this Agreement without the express written consent of both TxDOT and the Developer, and shall require execution of a confidentiality agreement by employees or staff to whom such disclosure is made. However, if the Independent Engineer receives a subpoena or other court order regarding such drawings or information, the Independent Engineer shall immediately provide notice thereof to TxDOT and Developer and will cooperate with any attempts to resist such court order. Thereafter, the Independent Engineer may disclose such information if so required by binding order of a court or other judicial tribunal of competent jurisdiction. Subject to the restrictions in any applicable Intellectual Property Escrow Agreement, the Independent Engineer may make copies of drawings and information provided by TxDOT or the Developer only for the purpose of performing its work under this Agreement. The Independent Engineer may disclose to its subcontractors drawings or information provided by TxDOT or the Developer with the written consent of TxDOT and the Developer, such consent not to be unreasonable withheld.

## **7.7 Personnel, Equipment and Material**

**7.7.1.** The Independent Engineer shall provide competent personnel and equipment in sufficient numbers to perform the services required under the Agreement. The Independent Engineer represents and warrants that it either currently has an adequate number of competent and properly licensed personnel in its employment for performance of the services required under this Agreement, or it will, in advance of needing them, be able to obtain such personnel from sources other than TxDOT or the Developer in sufficient numbers to supply the services contemplated hereunder.

**7.7.2.** All employees and subproviders of the Independent Engineer assigned to this Agreement shall have such knowledge and experience as will enable them to competently perform the duties assigned to them, the resolution of any questions or disagreements concerning the Work, and the avoidance of delay or disruption to the Work, including any design, construction, operation and maintenance of the Project. Either TxDOT or Developer may require removal of the Independent Engineer's employees or subproviders from performing all or part of the services or other responsibilities assigned to them under this Agreement for reasonable cause or for material breach of this Agreement.

**7.7.3.** The Independent Engineer must notify TxDOT and the Developer in writing as soon as possible, but no later than three business days after a project manager or other key person ceases employment with the Independent Engineer, giving the reason for removal.

**7.7.4.** The initial project manager and key personnel for the Independent Engineer are identified in Exhibit 7 hereto. The Independent Engineer may not replace the project manager or other key personnel without prior consent of TxDOT and the Developer. TxDOT and the Developer must be satisfied that the new project manager or other key personnel is qualified to provide the authorized services. If TxDOT and the Developer determine that the new project manager or key personnel is not acceptable, the Independent Engineer may not use that person in that capacity and shall replace him or her with one satisfactory to TxDOT and the Developer within forty-five (45) days.

**7.7.5.** Unless a specific provision of this Agreement or Work Authorization states to the contrary, TxDOT shall own all intellectual property purchased or developed by the Independent Engineer under this Agreement and all equipment purchased by the Independent Engineer or its subcontractors under this Agreement for which reimbursement is provided under this Agreement. All such intellectual property and equipment shall be delivered to TxDOT when this Agreement terminates, or when it is no longer needed for work performed under this Agreement, whichever occurs first.

## **7.8 Subcontracting**

**7.8.1.** The Independent Engineer shall not assign, subcontract or transfer any portion of professional services related to the work under this Agreement without prior written approval from TxDOT and the Developer.

**7.8.2.** The Independent Engineer's subcontracting program shall comply with the requirements set forth in Exhibit 6 hereto (Disadvantaged Business Enterprise for Federal-Aid Professional or Technical Services Contracts).

**7.8.3.** All subcontracts for professional services shall include the provisions included in this Agreement, and any provisions required by law. The Independent Engineer is authorized to pay subproviders in accordance with the terms of the subcontract, and TxDOT and the Developer acknowledge that the basis for payments to be made to subproviders may differ from the basis for payments by TxDOT and the Developer hereunder.

**7.8.4.** Subcontracts for professional services in excess of \$25,000 shall be delivered to TxDOT and the Developer prior to performance of work thereunder for review and approval.

**7.8.5.** No subcontract relieves the Independent Engineer of any responsibilities under this Agreement.

## **7.9 Inspection of Work**

**7.9.1.** TxDOT, the Developer, FHWA (if federal funds are involved), and any of their respective authorized representatives shall have the right at all reasonable times to review or otherwise evaluate the work performed hereunder and to inspect the premises in which it is being performed.

**7.9.2.** If any review or evaluation is made on the premises of the Independent Engineer or a subprovider, the Independent Engineer shall provide and require its subproviders to provide all reasonable facilities and assistance for the safety and convenience of the state or federal representatives or Developer in the performance of their duties.

**7.9.3.** The Independent Engineer's Auditing/monitoring results shall be accessible throughout the term of the CDA and for twenty-four (24) months thereafter to TxDOT and the Developer in a Project document control system operated by the Independent Engineer and separate from any system operated by Developer.

**7.9.4.** The Independent Engineer shall implement an electronic records management and quality management system that enables full compliance with all of the Independent Engineer's duties as described in the scope and which enables read-only web access by TxDOT and the Developer to reports, opinions and deliverables produced by the Independent Engineer and the records on which they are based. See Section 2.17 for additional requirements relating to these systems.

**7.9.5.** TxDOT and Developer reserve the right to monitor and verify the Independent Engineer's proper performance of its responsibilities and obligations hereunder, including compliance with Good Industry Practice.

## **7.10 Violation of Contract Terms**

**7.10.1.** Violation of any terms hereof, breach of contract, or default by the Independent Engineer shall be grounds for termination of the Agreement as specified in Section 7.11, and any increased or additional cost incurred by TxDOT or the Developer arising from the Independent Engineer's default, breach of contract or violation of contract terms shall be paid by the Independent Engineer.

**7.10.2.** This provision shall not be considered as specifying the exclusive remedy for any default, but all remedies existing at law and in equity may be invoked by any party and shall be cumulative.

## **7.11 Termination**

**7.11.1.** This Agreement may be terminated before the end of the term specified herein upon occurrence of any of the following conditions.

1. By mutual agreement and consent, in writing from all Parties.
2. By TxDOT and the Developer, acting jointly by notice in writing to the Independent Engineer, as a consequence of failure by the Independent Engineer to perform the services set forth herein in a satisfactory manner.
3. By the Independent Engineer, upon the material breach by either TxDOT or the Developer of their respective obligations as set forth herein, following written notice that sets forth with particularity the alleged condition(s) of default and the expiration of a 45-day cure period during which time either Party shall have the opportunity to cure the default; provided that upon request of TxDOT or Developer, the Independent Engineer shall continue to perform the services provided for in this Agreement and the applicable Work Authorizations for a period of up to 90 days after expiration of the cure period.
4. By TxDOT and the Developer acting jointly for reasons of their own, not subject to the consent of the Independent Engineer, by giving 30 Business Days notice of termination in writing to the Independent Engineer.
5. By TxDOT, if the Independent Engineer violates the provisions of Section 7.18 (Gratuities), or Exhibit 6.

TxDOT and Developer agree as between themselves that no termination of the Independent Engineer shall become effective until a replacement is selected and engaged in accordance with the CDA.

**7.11.2.** Should TxDOT or TxDOT and the Developer terminate this Agreement as provided in Section 7.11.1, no compensation other than fees due and payable at the time of termination shall thereafter be paid to the Independent Engineer, except as provided in Section 7.11.8 below. In determining the value of the work performed by the

Independent Engineer prior to termination, TxDOT and the Developer shall be the sole arbiters. Nothing in this Section shall be construed as a waiver of the other legal or equitable remedies set forth in this Agreement. Compensation for work performed prior to termination under a lump sum Work Authorization will be based on a percentage of the work completed at that time. Should TxDOT and the Developer terminate this Agreement pursuant to Section 7.11.1(4) above, the Independent Engineer shall not be entitled to compensation for work performed during the 30-day notice period in excess of the amount incurred during the preceding thirty days.

**7.11.3.** If the Independent Engineer defaults in the performance of this Agreement or if TxDOT and the Developer terminate this Agreement for fault on the part of the Independent Engineer, TxDOT and the Developer will give consideration to the following when calculating the value of the completed services: (1) the actual costs incurred (not to exceed the rates set forth in the then-current Fee Schedule) by the Independent Engineer in performing the services to the date of default; (2) the amount of services required which was satisfactorily completed to date of default; (3) the value of the services which is usable to TxDOT or the Developer; (4) the cost to TxDOT and the Developer of procuring and employing another firm to complete the required services; (5) the time required to procure and employ another firm to complete the services; and (6) other factors which affect the value to TxDOT and the Developer of the services performed.

**7.11.4.** TxDOT and the Developer shall use the then-current Fee Schedule under the applicable Work Authorization(s) in determining the value of the services performed up to the time of termination. In the case of partially completed engineering services, eligible costs will be calculated as set forth in the Fee Schedule. The sum of the provisional overhead percentage rate for payroll additives and for general and administrative overhead costs during the years in which work was performed shall be used to calculate partial payments. Any portion of the fixed fee not previously paid in the partial payments shall not be included in the final payment.

**7.11.5.** Except with respect to defaults of subproviders, the Independent Engineer shall not be in default by reason of any failure in performance of this Agreement in accordance with its terms (including any failure to progress in the performance of the work) if such failure arises out of causes beyond the control and without the default or negligence of the Independent Engineer. Such causes may include, but are not restricted to, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather. The Independent Engineer shall provide TxDOT and Developer prompt notice of any such impact hereunder and shall use diligent and reasonable efforts to minimize any such impact on the performance of the Independent Engineer's services.

**7.11.6.** The termination of this Agreement and payment of an amount in settlement as prescribed above shall extinguish the rights, duties, and obligations of TxDOT, the Developer, and the Independent Engineer under this Agreement, except for

those provisions that establish responsibilities that extend beyond the term of this Agreement.

**7.11.7.** If termination of this Agreement is due to the failure of the Independent Engineer to fulfill its obligations hereunder, the Independent Engineer shall be liable to TxDOT and the Developer for any additional cost to TxDOT and the Developer, including costs of replacement of the Independent Engineer.

**7.11.8.** TxDOT and the Developer, may, in their sole discretion, elect to extend the services of the Independent Engineer under this Agreement for a period or periods after termination pursuant to Section 7.11.1 hereof, not to exceed 180 days from the end of the applicable cure period, during the time in which they are seeking a replacement for the Independent Engineer. Any such extension shall be in writing, signed by both TxDOT and the Developer, and shall state the length of the extension. The Independent Engineer shall accept any such extensions. The Independent Engineer shall be compensated for its work under any such extensions using the then-current Fee Schedule, or as otherwise agreed by the parties.

## **7.12 Compliance With Laws**

The Independent Engineer shall comply with all applicable federal, state and local laws, statutes, codes, ordinances, rules and regulations, and the orders and decrees of any court, or administrative bodies or tribunals in any manner affecting the performance of this Agreement, including, without limitation, worker's compensation laws, minimum and maximum salary and wage statutes and regulations, nondiscrimination, and licensing laws and regulations. When required, the Independent Engineer shall furnish TxDOT and the Developer with satisfactory proof of its compliance therewith.

## **7.13 Changes and Supplemental Agreements**

**7.13.1.** The Parties may make changes to and supplement this Agreement only through Work Authorizations, change orders or supplemental agreements executed and delivered by all of the Parties.

**7.13.2.** In the event TxDOT and the Developer determine that this Agreement for any reason is inconsistent with the provisions of the CDA Documents on the scope of work, roles, responsibilities or compensation of the Independent Engineer, or fails to include any such scope of work, role, responsibility or compensation terms, TxDOT, the Developer, and the Independent Engineer shall use diligent efforts to amend this Agreement to correct the inconsistency or failure.

## **7.14 Indemnification**

**7.14.1.** The Independent Engineer shall indemnify, defend, protect and hold harmless TxDOT, the Developer, and their respective officers and employees from all costs, claims and liability due to activities of the Independent Engineer, its agents, or employees, performed under this Agreement and which are caused by or result from



negligent error or omission, or negligent act of the Independent Engineer or of any person employed by the Independent Engineer.

**7.14.2.** The Independent Engineer shall also indemnify, defend, protect and hold harmless TxDOT and the Developer from any and all expense, including, but not limited to, attorney fees which may be incurred by TxDOT or the Developer in litigation or otherwise resisting said claim or liabilities which may be imposed on TxDOT or the Developer as a result of such negligent acts, errors or omissions by the Independent Engineer, its agents, or employees.

**7.14.3.** To the fullest extent permitted by law, and notwithstanding any other provision of this Agreement, the total liability in any calendar year for negligent acts, errors or omissions occurring in such calendar year (regardless of when any claim therefor is made), in the aggregate, of Independent Engineer and Independent Engineer's officers, directors, partners, employees, agents, and Independent Engineer's consultants, and any of them, to Developer and anyone claiming by, through, or under Developer for any and all claims, losses, costs, or damages whatsoever arising out of, resulting from or in any way related to the Project or the Agreement from any cause or causes, including but not limited to professional negligent acts, errors or omissions, or breach of contract or warranty express or implied of Independent Engineer or Independent Engineer's officers, directors, partners, employees, agents, or Independent Engineer's consultants, or any of them, shall not exceed the total compensation payable to the Independent Engineer under this Agreement during such calendar year when the negligent acts, errors or omissions occurred; provided, however, that the foregoing limitation on liability does not apply to (i) the Independent Engineer's indemnity obligations under Sections 7.14.1 and 7.14.2 for third party claims for property damage or personal injury due to the negligent acts, errors or omissions of the Independent Engineer, or (ii) claims arising out of Independent Engineer's gross negligence or intentional misconduct. Should the total amount of all such claims, losses, costs, or damages for any such calendar year exceed the cap set forth in this paragraph for such calendar year, TxDOT and Developer shall, upon the request of either of them made to the other, jointly terminate this Agreement on 30-Days' notice to the Independent Engineer.

**7.14.4.** The Developer shall indemnify the Independent Engineer in the same manner as Developer indemnifies the Indemnified Parties as set forth in Section 16.5 of the CDA (relating to Indemnity), a copy of which is attached hereto as Exhibit 8.

**7.14.5. IN NO EVENT SHALL ANY PARTY BE LIABLE TO ANOTHER PARTY UNDER ANY PROVISION OF THIS AGREEMENT OR OTHERWISE FOR LOST PROFITS, INCLUDING LOST OR PROSPECTIVE PROFITS, OR FOR ANY OTHER SPECIAL, INDIRECT, INCIDENTAL, CONSEQUENTIAL, EXEMPLARY OR PUNITIVE DAMAGES, IN CONTRACT, TORT OR OTHERWISE, WHETHER OR NOT CAUSED BY OR RESULTING FROM SUCH PARTY'S OWN, SOLE OR CONCURRENT NEGLIGENCE OR THE NEGLIGENCE OF ANY OF ITS AFFILIATES OR RELATED PARTIES; PROVIDED, HOWEVER, THAT THE FOREGOING LIMITATION OF**

**LIABILITY SHALL NOT APPLY TO (i) CLAIMS OF ANY PARTY ARISING OUT OF THIRD PARTY CLAIMS FOR PROPERTY DAMAGE OR PERSONAL INJURY DUE TO THE NEGLIGENT ACTS, ERRORS OR OMISSIONS OF A PARTY, (ii) CLAIMS OF ANY PARTY ARISING OUT OF THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF A PARTY, OR (iii) AS BETWEEN TxDOT AND DEVELOPER ONLY, THE RIGHTS AND OBLIGATIONS OF TxDOT AND DEVELOPER UNDER THE CDA DOCUMENTS, WHICH SHALL BE GOVERNED BY THE CDA DOCUMENTS.**

### **7.15 Independent Engineer's Responsibility**

The Independent Engineer shall be responsible for the accuracy of its work and shall promptly, at no cost to TxDOT or the Developer, make necessary revisions or corrections resulting from its errors, omissions, or negligent acts.

### **7.16 Noncollusion**

**7.16.1.** The Independent Engineer warrants to TxDOT and Developer that it has not employed or retained any company or person, other than a bona fide employee working solely for the Independent Engineer, to solicit or secure this Agreement and that it has not paid or agreed to pay any company or engineer any fee, commission, percentage, brokerage fee, gifts, or any other consideration, contingent upon or resulting from the award or making of this Agreement.

**7.16.2.** Subject to Section 7.11.1 of this Agreement, for breach or violation of this warranty, TxDOT or Developer shall have the right to annul this Agreement without liability or, in its discretion, to deduct from the contract price or compensation, or otherwise recover from the Independent Engineer, the full amount of such fee, commission, percentage, brokerage fee, gift or contingent fee.

### **7.17 Insurance**

The Independent Engineer certifies that it has insurance on file with the Contract Services Section of the Office of General Counsel of the Texas Department of Transportation in the amount specified on Texas Department of Transportation Form 20.102-CSS or Form 1560-CSS Certificate of Insurance, as required by TxDOT. No other proof of insurance is acceptable to TxDOT and the Developer. In addition, the Independent Engineer shall have such policies endorsed to name the Developer as an additional insured and deliver to the Developer copies of the insurance on file and described above. Notwithstanding the foregoing, the Independent Engineer shall not be required to have its professional errors and omissions policy endorsed to name Developer as an additional insured. The Independent Engineer certifies that it will keep current insurance on file with that office for the duration of the contract period. If insurance lapses during the contract period, the Independent Engineer must stop work until a new certificate of insurance is provided.

## **7.18 Gratuities**

**7.18.1.** Texas Transportation Commission policy mandates that employees of the Texas Department of Transportation shall not accept any benefit, gift or favor from any person doing business with or who reasonably speaking may do business with the State under this Agreement. The only exceptions allowed are ordinary business lunches and items that have received the advance written approval of the Executive Director of the Texas Department of Transportation or his designee.

**7.18.2.** Any person doing business with or who reasonably speaking may do business with TxDOT under this Agreement may not make any offer of benefits, gifts or favors to department employees, except as mentioned above. Failure on the part of the Independent Engineer to adhere to this policy may result in the termination of this Agreement in accordance with Section 7.11 hereof.

## **7.19 Disadvantaged Business Enterprise or Historically Underutilized Business Requirements**

The Independent Engineer agrees to comply with the requirements set forth in Exhibit 6 with an assigned goal or without an assigned goal, as determined by TxDOT.

## **7.20 Maintenance, Retention and Audit of Records**

**7.20.1.** The Independent Engineer shall maintain all books, documents, papers, accounting records and other evidence pertaining to the costs Independent Engineer incurred and the services that the Independent Engineer provided hereunder (hereinafter "Records"). The Independent Engineer shall make the Records available at its office or another safe and convenient location reasonably acceptable to Developer and TxDOT during the term of this Agreement and thereafter for four years from the date of final payment under this Agreement, until completion of all audits, or until pending litigation has been completely and fully resolved, whichever occurs last.

**7.20.2.** TxDOT, the Developer, any of their duly authorized representatives, the Federal Highway Administration, the United States Department of Transportation, Office of Inspector General, and the Comptroller General shall have access to the Independent Engineer's Records which are directly pertinent to this Agreement for the purpose of making audits, examinations, excerpts and transcriptions.

**7.20.3.** The Records maintained by the Independent Engineer hereunder shall, upon termination of this Agreement, be transferred by the Independent Engineer to the designated successor independent engineer identified in writing by TxDOT, and the Independent Engineer shall have no further right or title to any such Records. The Independent Engineer may retain copies of Records necessary to maintain its own compliance with tax laws and other applicable laws of local, state or federal government.

## **7.21 Civil Rights Compliance**

**7.21.1.** The Independent Engineer shall comply with the regulations of the Department of Transportation, Title 49, Code of Federal Regulations, Parts 21, 24, 26 and 60 as they relate to nondiscrimination; and with Executive Order 11246 titled Equal Employment Opportunity as amended by Executive Order 11375 (collectively, the “Regulations”).

**7.21.2.** The Independent Engineer, with regard to the work performed by it during the contract, shall not discriminate on the grounds of race, color, sex, or national origin in the selection and retention of subcontractors, including procurement of materials and leases of equipment.

**7.21.3.** In all solicitations either by competitive bidding or negotiation made by the Independent Engineer for work to be performed under a subcontract, including procurement of materials or leases of equipment, each potential subcontractor or supplier shall be notified by the Independent Engineer of the Independent Engineer’s obligations under this Agreement and the Regulations relative to nondiscrimination on the grounds of race, color, sex, or national origin.

**7.21.4.** The Independent Engineer shall provide all information and reports required by the Regulations, or directives issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information, and facilities as may be determined by TxDOT or FHWA to be pertinent to ascertain compliance with such Regulations or directives. Where any information required of the Independent Engineer is in the exclusive possession of another who fails or refuses to furnish this information, the Independent Engineer shall so certify to TxDOT or FHWA, as appropriate, and shall set forth what efforts it has made to obtain the information.

**7.21.5.** In the event of the Independent Engineer's noncompliance with the nondiscrimination provisions of this Agreement, TxDOT shall impose such contract sanctions as it or FHWA may determine to be appropriate, including, but not limited to:

1. withholding of payments to the Independent Engineer under the Agreement until the Independent Engineer complies and/or
2. cancellation, termination, or suspension of the Agreement, in whole or in part, but any termination shall be in accordance with Section 7.11.

**7.21.6.** The Independent Engineer shall include the provisions of Sections 7.21.1 through 7.21.5 in every subcontract, including procurement of materials and leases of equipment, unless exempt by the Regulations or directives issued pursuant thereto. The Independent Engineer shall take such action with respect to any subcontract or procurement as TxDOT or FHWA may direct as a means of enforcing such provisions including sanctions for noncompliance provided, however, that in the event an Independent Engineer becomes involved in, or is threatened with, litigation with a subcontractor or supplier as a result of such direction, the Independent Engineer

may request TxDOT to enter into such litigation to protect the interests of TxDOT; and, in addition, the Independent Engineer may request the United States to enter into such litigation to protect the interests of the United States.

## **7.22 Child Support Statement**

The Independent Engineer certifies that it has a child support statement on file with the Contract Services Section of the Office of General Counsel of the Texas Department of Transportation. The Independent Engineer is responsible for keeping the child support statement current and on file with that office for the duration of the contract period. The Independent Engineer further certifies that the child support statement on file contains the child support information for the individuals or business entities named in this contract. Under Section 231.006, Family Code, the Independent Engineer certifies that the individual or business entity named in this Agreement, bid, or application is not ineligible to receive the specified grant, loan, or payment and acknowledges that this Agreement may be terminated and payment may be withheld if this certification is inaccurate, but any termination shall be in accordance with Section 7.11.

## **7.23 Disputes**

**7.23.1.** The Independent Engineer shall be responsible for the settlement of all contractual and administrative issues arising out of any procurement made by the Independent Engineer in support of the services authorized herein.

**7.23.2.** Any dispute between TxDOT and the Independent Engineer concerning the work hereunder or additional costs, or any non-procurement issues shall be settled in accordance with 43 Texas Administrative Code §9.2, provided, however, that any dispute between TxDOT and the Developer relating to this Agreement or their respective obligations hereunder shall be settled pursuant to the dispute resolution provisions of the CDA.

**7.23.3.** Any dispute between the Developer and Independent Engineer shall be resolved pursuant to the following provisions:

**7.23.3.1** As a condition to either Developer or Independent Engineer pursuing a claim or dispute against the other Party through arbitration, the claiming Party shall first initiate informal resolution procedures by serving a written notice on the other Party's authorized representative. The notice shall contain (i) a concise statement describing the claim or matter in dispute, including a description of its nature, circumstances and cause, (ii) an explanation of the basis and justification for the claim, including reference to any pertinent provision(s) of this Agreement, (iii) if applicable, the estimated dollar amount of the claim and how that estimate was determined, (iv) the claiming Party's desired resolution, and (v) any other information the claiming Party deems relevant. Commencing within ten days after the notice is served and concluding ten business days thereafter, the authorized representatives of the Parties shall meet and confer, in good faith, to seek to resolve the claim or dispute raised in the claiming Party's notice. If they succeed in resolving the claim or dispute, Developer and

Independent Engineer shall memorialize the resolution in writing. If the claim or dispute is not timely resolved under the foregoing procedures, then the claiming Party may initiate arbitration to resolve the claim or dispute pursuant to Section 7.23.3.2.

**7.23.3.2** Any unresolved controversy between the Developer and Independent Engineer arising under this Agreement shall be subject to final and binding arbitration. Such arbitration shall be governed by the provisions of the Texas General Arbitration Act (Texas Civil Practice and Remedies Code Section 171.001 et seq.). Arbitration shall be conducted in accordance with the Construction Arbitration Rules of the American Arbitration Association, subject to the provisions contained in Exhibit 9.

## **7.24 Successors and Assigns**

The Independent Engineer, TxDOT and the Developer do each hereby bind themselves, their successors, executors, administrators and assigns to each other party of this Agreement and to the successors, executors, administrators and assigns of such other parties in respect to all covenants of this Agreement. The Independent Engineer shall not assign, subcontract or transfer its interest in this Agreement without the prior written consent of TxDOT and the Developer.

## **7.25 Severability**

In the event any one or more of the provisions contained in this Agreement shall, for any reason, be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision thereof and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained herein.

## **7.26 Prior Contracts Superseded**

This Agreement constitutes the sole agreement of the parties hereto for the services authorized herein and supersedes any prior understandings or written or oral contracts between the parties respecting the subject matter defined herein; provided, however that as between TxDOT and the Independent Engineer, the terms of the Master Agreement shall remain effective as a separate agreement between TxDOT and the Independent Engineer.

## **7.27 Conflict of Interest**

The Independent Engineer represents that its firm has no conflict of interest that would in any way interfere with its or its employees' performance of services for TxDOT and the Developer or which in any way conflicts with the interests of TxDOT or the Developer. The firm shall exercise reasonable care and diligence to prevent any actions or conditions that could result in a conflict with interests of TxDOT or the Developer.

**7.28 Notices and Communications**

**7.28.1.** All notices, correspondence, and other communications under this Agreement, including but not limited to reports, notices, comments, and recommendations, shall be in writing and: (a) delivered personally; (b) sent by certified mail, return receipt requested; (c) sent by a recognized overnight mail or courier service, with delivery receipt requested, or (d) sent by facsimile or email communication followed by a hard copy and with receipt confirmed by telephone, to the following addresses (or to such other address as may from time to time be specified in writing by such Person):

**7.28.2.** All notices, correspondence and other communications to Developer shall be delivered to the following address or as otherwise directed by Developer's Authorized Representative:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attention: \_\_\_\_\_  
Telephone: \_\_\_\_\_  
Facsimile: \_\_\_\_\_  
E-mail: \_\_\_\_\_

with a copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attention: \_\_\_\_\_  
Telephone: \_\_\_\_\_  
Facsimile: \_\_\_\_\_  
E-mail: \_\_\_\_\_

**7.28.3.** All notices, correspondence and other communications to TxDOT shall be marked as regarding the IH 635 Managed Lanes Project and shall be delivered to the following address or as otherwise directed by TxDOT's Authorized Representative:

Texas Department of Transportation  
4777 E. Highway 80  
Mesquite, Texas 75150-6643  
Attn: John Hudspeth, P.E.  
Telephone: (214) 320-4490  
Facsimile: (214) 320-6117  
E-mail: [jhudsp1@dot.state.tx.us](mailto:jhudsp1@dot.state.tx.us)

In addition, copies of all notices regarding Disputes, and termination and default notices shall be delivered to the following person:

Texas Department of Transportation  
Attn: Office of General Counsel  
125 East 11<sup>th</sup> Street  
Austin, Texas 78701  
Telephone: (512) 463-8630  
Facsimile: (512) 475-3070

**7.28.4.** All notices, correspondence and other communications to the Independent Engineer shall be delivered to the following address or as otherwise directed by the Independent Engineer:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attention: \_\_\_\_\_  
Telephone: \_\_\_\_\_  
Facsimile: \_\_\_\_\_  
E-mail: \_\_\_\_\_

**7.28.5.** Notices, correspondence, and communications shall be deemed received when actually received in the office of the addressee (or by the addressee if personally delivered) or when delivery is refused, as shown on the receipt of the U. S. Postal Service, private carrier or other Person making the delivery. Notwithstanding the foregoing, notices sent by facsimile after 4:00 p.m. Central Standard or Daylight Time (as applicable) and all other notices, correspondence or communications (including e-mail) received after 5:00 p.m. shall be deemed received on the first business day following delivery (that is, in order for a fax to be deemed received on the same day, at least the first page of the fax must have been received before 4:00 p.m.).

## **7.29 Survival**

The indemnifications, limitations and releases contained in this Agreement, the express obligations of the Parties following termination, the dispute resolution provisions, and all other provisions which by their inherent character should survive expiration or earlier termination of this Agreement and/or completion of the work under this Agreement, shall survive the expiration or earlier termination of this Agreement and/or the completion of the work under this Agreement.

## **7.30 Governing Law**

This Agreement shall be governed by and construed in accordance with the laws of the State of Texas. Venue shall be in Travis County.

## **7.31 Counterparts**

This instrument may be executed multiple counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.



### **7.32 No Third Party Beneficiaries**

Nothing in this paragraph or this Agreement shall be construed as creating a third party beneficiary relationship with any party not specifically identified as a party to this Agreement, and all such third party beneficiary relationships are specifically disclaimed.

IN WITNESS WHEREOF, the parties, intending to be legally bound, have executed this Agreement as of the date first written above.

**INDEPENDENT ENGINEER**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**TxDOT**

**TEXAS DEPARTMENT OF  
TRANSPORTATION**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**DEVELOPER**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title:

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**EXHIBIT 1**  
**FEE SCHEDULE**

**[TO BE THE SAME AS UNDER THE MASTER AGREEMENT]**

## EXHIBIT 2

### Description of Scope of Services for Preparation of IE QAP

The initial Work Authorization will not authorize performance of any of the below listed activities, only the development of the IE QAP. Subject to the terms of the Independent Engineer Agreement, the Independent Engineer function is to Audit, monitor, review and comment on the processes and procedures implemented by the Developer to accomplish the Work; to assess quality; and report dually and independently to both the Developer and TxDOT. Therefore, the IE QAP must be based on and work in concert with, the FMP/QMP written by the Developer and approved by TxDOT. This IE QAP will be written to a similar level of detail as the FMP/QMP. Further procedures will be developed as specific QC and QA procedures are written and submitted by the Developer and its team (Designer, Design-Build Contractor and etc.).

Within 60 Days of issuance of the Work Authorization for the same, the Independent Engineer shall, develop an Independent Engineer Quality Assurance Plan (IE QAP) for TxDOT, Developer and FHWA approval that describes detailed systems, procedures and processes for the implementation of the activities associated to its rights and responsibilities as stated in the Independent Engineer Agreement and in the CDA, including those stated in Section 9.3.1.2 of the CDA. The below listed activities is a summary of the duties performed by the Independent Engineer.

The frequency of the Independent Engineer's performance of the services listed below will be in accordance with the approved IE QAP.

No.	Duty	Reference
	Describe procedures to implement and maintain document control system for all Independent Engineer records, CDA defined TxDOT submittals and TxDOT's responses.	Section 2.16 (IE Agreement)
	Describe procedures used for compliance Audits, review and comment in accordance with the CDA for the following: <ul style="list-style-type: none"><li>• submission by Developers of design plans and process</li><li>• implementation of Developers design plans and process, with particular regard to design safety plans and procedures and use of qualified personnel</li></ul>	CDA 9.3.1.2 (d)  CDA 6.3 and 9.3.1.2 (a)  CDA 9.3.1.2 (a)

No.	Duty	Reference
	<ul style="list-style-type: none"> <li>• implementation of design plans and process</li> <li>• submission by Developers of management plans and processes (not specific to design or permanent construction)</li> </ul>	<p>CDA 9.3.1.2 (a)</p> <p>CDA 6.3 and 9.3.1.2 (a)</p>
	<ul style="list-style-type: none"> <li>• implementation of Developers management plans and processes (not specific to design or permanent construction)</li> </ul>	<p>CDA 9.3.1.2 (a)</p>
	<ul style="list-style-type: none"> <li>• implementation of Project Schedule</li> <li>• temporary and permanent environmental measures</li> <li>• implementation of construction safety control plan</li> <li>• submissions by Developer of construction plans and processes</li> <li>• implementation of Developer's construction plans and processes</li> <li>• interim, revised, and Final Design Documents</li> <li>• Safety Compliance and the performance of Safety Compliance Orders</li> </ul>	<p>CDA Book 2, Section 2.3.3</p> <p>CDA 9.3.1.2 (a)</p> <p>CDA 9.3.1.2 (a)</p> <p>CDA 6.3 and 9.3.1.2 (a)</p> <p>CDA 9.3.1.2 (a)</p> <p>CDA 9.3.1.2 (a)</p> <p>CDA 9.3.1.2 (j) and 12.4</p>
	<p>Describe procedures to perform annual design and construction safety Audits, with particular regard to whether:</p> <ul style="list-style-type: none"> <li>• Qualified personnel are being used</li> <li>• safety control processes are in place</li> <li>• safety control plans are in place</li> <li>• Record keeping is adequate to document control processes and compliance with TxDOT standards and Developer's safety plan</li> </ul>	<p>CDA 9.3.1.2 (j) and 12.4</p>

No.	Duty	Reference
	Describe procedures to perform compliance Audits on implementation of contract requirements, including insurance, contracting and labor practices, etc.	CDA 9.3.1.2 (a)
	Describe procedures to perform compliance Audits on books and records of key contractors	CDA 9.3.1.2 (i)
	Describe procedures to update the initial submittal list, attached in Table 2 of Attachment C to the Master Agreement	CDA 6.3 and 9.3.1.2 (e)
	Describe procedures to review and comment on items flagged with an "R" in Table 2 of Attachment C to the Master Agreement	CDA 6.3 and 9.3.1.2 (e)
	Describe procedures to report systemic problems	CDA 9.3.1.2 (d)
	Describe procedures to notify TxDOT of breaches or failures, applicable Cure Period and recommendation and rationale regarding assessment of Noncompliance Points	CDA 9.3.1.2 (n) and 18.2
	Describe procedures for recommendation and rationale regarding assessment of Noncompliance Points	CDA 9.3.1.2 (n) and 18.2
	Describe procedures to verify and certify completion of Developer cure, including description of cure and modifications to the Project Management Plan to prevent recurrence	CDA 9.3.1.2 (n) and 18.2

### EXHIBIT 3

#### Independent Engineer Services and TxDOT/Developer Payment Responsibility

Duty	Description	Payment Responsibility
Baseline Services	Duties to be performed regardless of the occurrence of any contractual event, for example the duty to Audit Developer during the performance of the design at a specified baseline frequency and to report the results.	Shared equally (see Section 4.1.1)
Contingent Services	Duties that are contingent on specific events described in the FCA Documents such as the duty to prepare a report in the event of a change order or a relief event. These duties are to be performed on joint instruction by TxDOT and Developer pursuant to a Work Authorization.	Shared equally (see Section 4.1.2)
Additional Services	<p>These may consist of:</p> <p>(a) Baseline Services for which the Independent Engineer is instructed by Work Authorization to increase the frequency of performance over and above the frequency described in the IE QAP</p> <p>(b) Additional reporting duties, for example review and comment on documents that are not within the scope of the Baseline Services</p>	See Section 4.1.3

**EXHIBIT 4**  
**CDA Submittals**

<b>Developer Submittal to TxDOT and the Independent Engineer</b>	<b>Duty</b>	<b>Review Period</b>	<b>Reference</b>
<b>Tolls</b>			
Permission for non-paid use of Project	X		
Developer's toll rate schedule	X		
Written notice of intention to change toll rates or User Classification	X		
<b>Financing</b>			
Initial Funding Agreements and Initial Security Documents to Intellectual property Escrow	X		
Re-financing	X		
Provision of draft and final Funding Agreements	X		
Conditioning of approval of refinancing	X		
<b>Facility Planning and Approvals</b>			
Submittal of an application to a Government Entity	A		
<b>Design, Acquisition and Construction</b>			
Deviation from Technical Provisions or TxDOT Standards	A		
<b>Operations and Maintenance</b>			
Deviations from Technical Provisions or TxDOT Standards	A		
Renewal Works Schedule	R		
Arrangements for Renewal Works Reserve	R		
<b>Management Systems and Oversight</b>			
Relevant part of plan before commencement of Work	R		
Changes or additions to plan	R		
Referenced materials within plan	R		
<b>Contracting and Labor Practices</b>			
Termination or change of a Key Contractor	A		
Change in Key Personnel	R		
<b>Technical Provisions</b>			
Final Design documents signed and sealed by PE	R		
<b>Facility Management Plan</b>			



<b>Developer Submittal to TxDOT and the Independent Engineer</b>	<b>Duty</b>	<b>Review Period</b>	<b>Reference</b>
Initial Submittal (except pre-execution deliverables)	R		
Management Plan (MP) Amendment	R		
Internal Audits by Developer under MP	R		
Non-Conformance and corrective action reports	R		
<b>Facility Schedule</b>			
Baseline Schedule First Issue	X		
Baseline Schedule Amendment	R		
Status Schedule Update (Monthly)	R		
Recovery Schedule	R		
Work Breakdown Structure	X		
<b>Reporting Requirements</b>			
Developer Monthly Report	R		
Developer Quarterly Report	R		
Developer Annual Report	R		
Developer Financial Reports	A		
<b>Publicity</b>			
Minutes of Public Relations meetings	A		
Correspondence to/from public	A		
Proposals for Public Meetings	A		
Information provided to TxDOT in Emergency	A		
Information provided to TxDOT in respect of Lane Closures	R		
Updated database of Customer Groups	A		
<b>Environmental Compliance</b>			
Environmental Approvals	A		
Section 404, CWA, permit	A		
Water Quality Certification (concurrently with the USACE Nationwide Permit)	A		
Authorization from the SHPO in accordance with the ACT for previously unknown cultural resource sites	A		
Application revisions, supplements, as necessary to secure or amend previously issued Environmental Approvals which become invalid or need amending due to design changes.	A		
Applications to Regulatory Agencies	A		
Submittal to the appropriate regulatory agencies	A		

<b>Developer Submittal to TxDOT and the Independent Engineer</b>	<b>Duty</b>	<b>Review Period</b>	<b>Reference</b>
Hazardous Materials Management Plan	R		
Corrective action proposed to remediate a hazardous material	A		
Hazardous materials reports	A		
Antiquities Permit Application	A		
<b>Right of Way</b>			
Appraisals, legal descriptions, acquisition documentation, purchase price, requests to acquire Final ROW, condemnation-related activities and funding/closing procedures.	X		
Condemnation action through the "Declaration of Taking" procedure	X		
All specific reports and supporting documentation for review and approval during the acquisition process	X		
Form and substance of title policies	X		
Initial property owner contact letters	X		
ROW acquisition packages	X		
Consent to lease a property from a property owner	X		
Option to extend a tenant's lease	X		
Transfer of title of improvements within acquired Facility ROW	X		
Approval for delegation of STATE's approval processes for ROW	X		
Determination of whether land plan services shall be used by Developer	X		
<b>Utilities</b>			
Exceptions to the UAR	X		
MUAA Documents	A		
Waiver of relinquishment of Existing Utility Property	X		
Waiver of need for a Quitclaim Deed for each Existing Utility Property	X		
Exceptions to Quitclaim Deed standard	X		
Deviation from standard form of Utility Joint Use	X		
Waiver of requirement for PE to sign and seal a Utility Adjustment Plan	X		
Waiver of TxDOT's approval requirement for an applicable Utility Assembly	X		

<b>Developer Submittal to TxDOT and the Independent Engineer</b>	<b>Duty</b>	<b>Review Period</b>	<b>Reference</b>
Commencement by Developer of a Utility Adjustment until all the conditions are met	A		

- R. The Independent Engineer is required to review and comment on the submittal within the period stated in accordance with the Review Procedure.
- A The Independent Engineer is required to receive a copy of the submittal but is required to review and comment only on instruction by TxDOT or the Developer. On receipt of the relevant instruction this is an Additional Duty.
- X The Independent Engineer receives only a copy of the transmittal and is not required to review and comment, but is required to track the number of submittals and TxDOT’s responses and report thereon.

**EXHIBIT 5**  
**Form of Billing Statement**

## EXHIBIT 6

### **Disadvantaged Business Enterprise (DBE) for Federal-Aid Professional or Technical Services Contracts**

- 1) **PURPOSE.** The purpose of this attachment is to carry out the U.S. Department of Transportation's (DOT) policy of ensuring nondiscrimination in the award and administration of DOT assisted contracts and creating a level playing field on which firms owned and controlled by minority or socially and economically disadvantaged individuals can compete fairly for DOT assisted contracts.
  
- 2) **POLICY.** It is the policy of the DOT and the Texas Department of Transportation (henceforth the "Department") that Disadvantaged Business Enterprises (DBEs) as defined in 49 CFR Part 26, Subpart A and the Department's Disadvantaged Business Enterprise Program, shall have the opportunity to participate in the performance of contracts financed in whole or in part with Federal funds. Consequently, the Disadvantaged Business Enterprise requirements of 49 CFR Part 26, and the Department's Disadvantaged Business Enterprise Program, apply to this contract as follows.
  - a. The Provider will offer Disadvantaged Business Enterprises, as defined in 49 CFR Part 26, Subpart A and the Department's Disadvantaged Business Enterprise Program, the opportunity to compete fairly for contracts and subcontracts financed in whole or in part with Federal funds. In this regard, the Provider shall make a good faith effort to meet the Disadvantaged Business Enterprise goal for this contract.
  - b. The Provider and any subprovider(s) shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The Provider shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT assisted contracts. The requirements of this Special Provision shall be physically included in any subcontract.
  - c. When submitting the contract for execution by the Department, the Provider must complete and furnish Form H-1 which lists the commitments made to certified DBE subprovider(s) that are to meet the contract goal and Form H-2 which is a commitment agreement(s) containing the original signatures of the Provider and the proposed DBE(s). For Work Authorization Contracts, Form H-1 is required at the time of submitting the contract for execution by the Department. Form H-2 will be required to be completed and attached with each work authorization number that is submitted for execution, if the DBE will be performing work. Any substitutions or changes to the DBE subcontract amount shall be subject to approval by the Department.
  - d. Failure to carry out the requirements set forth above shall constitute a material breach of this contract and may result; in termination of the contract by the

Department; in a deduction of the amount of DBE goal not accomplished by DBEs from the money due or to become due to the Provider, not as a penalty but as liquidated damages to the Department; or such other remedy or remedies as the Department deems appropriate.

3) **DEFINITIONS.**

- a. "Department" means the Texas Department of Transportation (TxDOT).
- b. "Federal-Aid Contract" is any contract between the Texas Department of Transportation and a Provider which is paid for in whole or in part with U. S. Department of Transportation (DOT) financial assistance.
- c. "Provider" is any individual or company that provides professional or technical services.
- d. "DBE Joint Venture" means an association a DBE firm and one or more other firm(s) to carry out a single business enterprise for profit for which purpose they combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks and profits of the joint venture are commensurate with its ownership interest.
- e. "Disadvantaged Business Enterprise (DBE)" means a firm certified as such by the Department in accordance with 49 CFR Part 26.
- f. "Good Faith Effort" means efforts to achieve a DBE goal or other requirement of this Special Provision which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.
- g. "Race neutral DBE Participation" means any participation by a DBE through customary competitive procurement procedures.

4) **PERCENTAGE GOAL.** The goal for Disadvantaged Business Enterprise (DBE) participation in the work to be performed under this contract is \_\_% of the contract amount.

5) **PROVIDER'S RESPONSIBILITIES.** A DBE prime may receive credit toward the DBE goal for work performed by his-her own forces and work subcontracted to DBEs. A DBE prime must make a good faith effort to meet the goals. In the event a DBE prime subcontracts to a non-DBE, that information must be reported to the Department.

- a. A Provider who cannot meet the contract goal, in whole or in part, shall document the "Good Faith Efforts" taken to obtain DBE participation. The following is a list of the types of actions that may be considered as good faith efforts. It is not intended to be a mandatory checklist, nor is it intended to be

exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

- (1) Soliciting through all reasonable and available means the interest of all certified DBEs who have the capability to perform the work of the contract. The solicitation must be done within sufficient time to allow the DBEs to respond to it. Appropriate steps must be taken to follow up initial solicitations to determine, with certainty, if the DBEs are interested.
- (2) Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the Provider might otherwise prefer to perform the work items with its own forces.
- (3) Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.
- (4) Negotiating in good faith with interested DBEs by making a portion of the work available to DBE subproviders and suppliers and selecting those portions of the work or material needs consistent with the available DBE subproviders and suppliers.
- (5) The ability or desire of the Provider to perform the work of a contract with its own organization does not relieve the Provider's responsibility to make a good faith effort. Additional costs involved in finding and using DBEs is not in itself sufficient reason for a Provider's failure to meet the contract DBE goal, as long as such costs are reasonable. Providers are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.
- (6) Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities.
- (7) Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or Provider.
- (8) Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials or related assistance or services.
- (9) Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, state, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

- (10) If the Director of the Business Opportunity Programs Section of the Department's Construction Division determines that the Provider has failed to meet the good faith effort requirements, the Provider will be given an opportunity for reconsideration by the Director of the appropriate Division.

NOTE: The Provider must not cause or allow subproviders to bid their services.

- b. The preceding information shall be submitted directly to the Chair of the Consultant Selection Team responsible for the project.
- c. The Provider shall make all reasonable efforts to honor commitments to DBE subproviders named in the commitment submitted under Section 2.c. of this attachment. Where the Provider terminates or removes a DBE subprovider named in the initial commitment, the Provider must demonstrate on a case-by-case basis to the satisfaction of the department that the originally designated DBE was not able or willing to perform.
- d. The Provider shall make a good faith effort to replace a DBE subprovider that is unable or unwilling to perform successfully with another DBE, to the extent needed to meet the contract goal. The Provider shall submit a completed Form H-5 for the substitute firm(s). Any substitution of DBEs shall be subject to approval by the Department. The Department may request a statement from the firm being replaced concerning its replacement prior to approving the substitution.
- e. The Provider shall designate a DBE liaison officer who will administer the DBE program and who will be responsible for maintenance of records of efforts and contacts made to subcontract with DBEs.
- f. Providers are encouraged to investigate the services offered by banks owned and controlled by disadvantaged individuals and to make use of these banks where feasible.

6) **ELIGIBILITY OF DBEs.**

- a. The Department certifies the eligibility of DBEs, DBE joint ventures and DBE truck-owner operators to perform DBE subcontract work on DOT financially assisted contracts.
- b. This certification will be accomplished through the use of the appropriate certification schedule contained in this Department's DBE program.
- c. The Department publishes annually a Directory of Disadvantaged Business Enterprises containing the names of firms that have been certified to be eligible to participate as DBEs on DOT financially assisted contracts. The directory is available from the Department's Construction Division, Business Opportunity Programs Section. A monthly update of the Directory can be found on the Internet at [www.dot.state.tx.us/insdot/orgchart/cmd/cserve/dbelst/](http://www.dot.state.tx.us/insdot/orgchart/cmd/cserve/dbelst/).



- d. Only DBE firms certified at the time the contract is signed or at the time the commitments are submitted are eligible to be used in the information furnished by the Provider as required under Section 2.c. and 5.d. above. For purposes of the DBE goal on this contract, DBEs will only be allowed to perform work in the categories of work for which they were certified.

7) **DETERMINATION OF DBE PARTICIPATION.**

A firm must be an eligible DBE and perform a professional or technical function relating to the project. Once a firm is determined to be an eligible DBE, the total amount paid to the DBE for work performed with his/her own forces is counted toward the DBE goal. When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the subprovider is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.

A DBE subprovider may subcontract no more than 70% of a federal aid contract. The DBE subprovider shall perform not less than 30% of the value of the contract work with assistance of employees employed and paid directly by the DBE; and equipment owned or rented directly by the DBE. DBE subproviders must perform a commercially useful function required in the contract in order for payments to be credited toward meeting the contract goal. A DBE performs a commercially useful function when it is responsible for executing the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. When a DBE is presumed not to be performing a commercially useful function, the DBE may present evidence to rebut this presumption.

A Provider may count toward its DBE goal a portion of the total value of the contract amount paid to a DBE joint venture equal to the distinct, clearly defined portion of the work of the contract performed by the DBE.

Proof of payment, such as copies of canceled checks, properly identifying the Department's contract number or project number may be required to substantiate the payment, as deemed necessary by the Department.

8) **RECORDS AND REPORTS.**

- a. After submission of the initial commitment reported (Form H-1), required by Section 2.c. of this attachment, the Provider shall submit Monthly Progress Assessment Reports (Form H-3), after contract work begins, on DBE involvement to meet the goal and for race-neutral participation. One copy of each report is to be sent to the Construction Division, Business Opportunity Programs Section, and one copy is to be submitted with the Provider's invoice. Only actual payments made to subproviders are to be reported. These reports will be required until all DBE subprovider activity is completed. The Department may verify the amounts being reported as paid to DBEs by requesting copies of canceled checks paid to DBEs on a random basis.
- b. DBE subproviders should be identified on the report by name, type of work being performed, the amount of actual payment made to each during the billing period, cumulative payment amount and percentage of the total contract amount. These reports will be due within fifteen days after the end of a calendar month. Reports are required even when no DBE activity has occurred in a billing period.
- c. All such records must be retained for a period of four years following final payment or until any investigation, audit, examination, or other review undertaken during the four years is completed, and shall be available at reasonable times and places for inspection by authorized representatives of the Department or the U.S. Department of Transportation.
- d. Prior to receiving final payment, the Provider shall submit a Final Report (Form H-4), detailing the DBE payments. The Final Report is to be sent to the Construction Division, Business Opportunity Programs Section and one copy to be submitted with the Provider's final invoice. If the DBE goal requirement is not met documentation of the good faith efforts made to meet the goal must be submitted with the Final Report.

- 9) **COMPLIANCE OF PROVIDER.** To ensure that DBE requirements of this U.S. DOT-assisted contract are complied with, the Department will monitor the Provider's efforts to involve DBEs during the performance of this contract. This will be accomplished by a review of Monthly Progress Assessment Reports (Form H-3), submitted to the Construction Division, Business Opportunity Programs Section by the Provider indicating his progress in achieving the DBE contract goal, and by compliance reviews conducted by the Department.

The Provider shall receive credit toward the DBE goal based on actual payments to the DBE subproviders with the following exceptions and only if the arrangement is consistent with standard industry practice. The Provider shall contact the Department if he/she withholds or reduces payment to any DBE subprovider.

- (1) A DBE firm is paid but does not assume contractual responsibility for performing the service;

- (2) A DBE firm does not perform a commercially useful function;
- (3) Payment is made to a DBE that cannot be linked by an invoice or canceled check to the contract under which credit is claimed;
- (4) Payment is made to a broker or a firm with a brokering-type operation;
- (5) Partial credit is allowed, in the amount of the fee or commission provided the fee or commission does not exceed that customarily allowed for similar services, for a bona fide service, such as professional, technical, consultant, or managerial services, and assistance in the procurement of essential personnel, facilities, equipment, materials, or supplies required for performance of the contract.

A Provider's failure to comply with the requirements of this Special Provision shall constitute a material breach of this contract. In such a case, the Department reserves the right to terminate the contract; to deduct the amount of DBE goal not accomplished by DBEs from the money due or to become due the Provider, not as a penalty but as liquidated damages to the Department; or such other remedy or remedies as the Department deems appropriate.



**FORM H-1**

Form Exhibit H-1  
(8/2006)  
(GSD-EPC)

**Texas Department of Transportation  
Subprovider Monitoring System  
Commitment Worksheet**

Contract No.:	Assigned Goal:	% Federally Funded <input type="checkbox"/>	State Funded <input type="checkbox"/>
---------------	----------------	---------------------------------------------	---------------------------------------

Prime Provider:	Total Contract Amount:
-----------------	------------------------

Prime Provider Info: DBE  HUB  Both

Vendor ID No.:	Expiration Date:
----------------	------------------

(First 11 Digits Only)

*If no subproviders are used on this contract, please indicate by placing "N/A" on the 1<sup>st</sup> line under Subproviders.*

Subprovider(s) (List All)	Type of Work	Vendor ID No. (First 11 Digits Only)	D=DBE H=HUB	Expiration Date	\$ Amount or % of Work *
<b>Subprovider(s) Contract or % of Work* Totals</b>					

For Work Authorization Contracts, indicate the % of work to be performed by each subprovider.

Total DBE or HUB Commitment Dollars \$	
Total DBE or HUB Commitment Percentages of Contract	%

(Commitment Dollars and Percentages are for Subproviders only)



## FORM H-2 Texas Department of Transportation

### Subprovider Monitoring System Commitment Agreement

This commitment agreement is subject to the award and receipt of a signed contract from the Texas Department of Transportation (TxDOT). **NOTE: Exhibit H-2 is required to be attached to each contract that does not include work authorizations. Exhibit H-2 is required to be attached with each work authorization. Exhibit H-2 is also required to be attached to each supplemental work authorization. If DBE/HUB Subproviders are used, the form must be completed and signed. If no DBE/HUB Subproviders are used, indicate with "N/A" on this line: \_\_\_\_\_ and attach with the work authorization or supplemental work authorization.**

Contract #:		Assigned Goal:		% Prime Provider:	
-------------	--	----------------	--	-------------------	--

Work Authorization (WA) #:		Work Authorization Amount:		Date:	
Supplemental Work Authorization (SWA) #:		to WA #:		SWA Amount:	
<b>Revised WA Amount:</b>					

Description of Work <i>(List by category of work or task description. Attach additional pages, if necessary.)</i>	Dollar Amount <i>(For each category of work or task description shown.)</i>
	\$
	\$
	\$
	\$
	\$
<b>Total Commitment Amount</b> <i>(Including all additional pages.)</i>	\$ 0.00

**IMPORTANT:** The signatures of the prime and the DBE/HUB and Second Tier Subprovider, if any (both DBE and Non-DBE) and the total commitment amount must always be on the same page.

<b>Provider Name:</b> <b>Address:</b> <b>Phone # &amp; Fax #:</b> <b>E-mail:</b>	<b>Name:</b> _____ <i>(Please Print)</i> <b>Title:</b> _____  <div style="display: flex; justify-content: space-between;"> <span>_____</span> <span>_____</span> </div> <div style="display: flex; justify-content: space-between;"> <span><b>Signature</b></span> <span><b>Date</b></span> </div>
<b>DBE/HUB Sub Provider</b> <b>Subprovider Name:</b> <b>VID #:</b> <b>Address:</b> <b>Phone # &amp; Fax #:</b> <b>E-mail:</b>	<b>Name:</b> _____ <i>(Please Print)</i> <b>Title:</b> _____  <div style="display: flex; justify-content: space-between;"> <span>_____</span> <span>_____</span> </div> <div style="display: flex; justify-content: space-between;"> <span><b>Signature</b></span> <span><b>Date</b></span> </div>
<b>Second Tier Sub Provider</b> <b>Subprovider Name:</b> <b>VID #:</b> <b>Address:</b>	<b>Name:</b> _____ <i>(Please Print)</i> <b>Title:</b> _____  <div style="display: flex; justify-content: space-between;"> <span>_____</span> <span>_____</span> </div>

**Phone # & Fax #:**

**Signature**

**Date**

**E-mail:**

**VID # is the Vendor Identification Number issued by the Comptroller. If a firm does not have a VID #, please enter the owner's Social Security or their Federal Employee Identification Number (if incorporated).**



**FORM H-3**  
**Texas Department of Transportation Subprovider Monitoring System**

Form Exhibit H-3  
 (8/2006)  
 (GSD-EPC)

	<b>PROGRESS ASSESSMENT REPORT FOR MONTH OF (MO./YR.)</b>		/		
--	----------------------------------------------------------	--	---	--	--

Contract #:		•	Original Contract Amount:	
Date of Execution:		•	Approved Supplemental Agreements:	
Prime Provider:		•	Total Contract Amount:	
Work Authorization No.:		•	Work Authorization Amount:	

*If no subproviders are used on this contract, please indicate by placing "N/A" on the 1<sup>st</sup> line under Subprovider.*

DBE	All Subproviders	Category of Work	Total Subprovider Amount	% Total Contract Amount	Amount Paid This Period	Amount Paid To Date	Subcontract Balance Remaining
<input type="checkbox"/>			\$		\$	\$	\$
<input type="checkbox"/>			\$		\$	\$	\$
<input type="checkbox"/>			\$		\$	\$	\$
<input type="checkbox"/>			\$		\$	\$	\$
<input type="checkbox"/>			\$		\$	\$	\$
<input type="checkbox"/>			\$		\$	\$	\$
<input type="checkbox"/>			\$		\$	\$	\$
<input type="checkbox"/>			\$		\$	\$	\$
<input type="checkbox"/>			\$		\$	\$	\$
<input type="checkbox"/>			\$		\$	\$	\$

Fill out Progress Assessment Report with each estimate submitted, *for all subcontracts*, and forward as follows:

**1 Copy with Invoice - Contract Manager/Managing Office**

**1 Copy – TxDOT, BOP Office, 125 E. 11th, Austin, TX 78701, 512-486-5500, toll free 866-480-2518, or Fax to 512-486-5519**

I hereby certify that the above is a true and correct statement of the amounts paid to the firms listed above.

Print Name - Company Official /DBE/HUB Liaison Officer

Signature

Date

E-mail

Phone

Fax





**FORM H-4**  
**Texas Department of Transportation**  
**Subprovider Monitoring System**

Form Exhibit H-4  
 (8/2006)  
 (GSD-EPC)

**Final Report**

The Final Report Form should be filled out by the Prime Provider and submitted to the Contract Manager and the Business Opportunity Programs Office for review upon completion of the contract. The report should reflect **all subcontract activity** on the project. The report will aid in expediting the final estimate for payment. If the HUB or DBE goal requirements were not met, documentation supporting good faith efforts must be submitted.

DBE Goal:		%	<b>OR</b>		HUB Goal:		%
Total Contract Amount: \$				Total Contract Amount: \$			

Vendor ID Number	Subprovider	Total Amount Paid (Final)
		\$
		\$
		\$
		\$
		\$
		\$
		\$
		\$
		\$
		\$
		\$
		\$
<b>TOTAL</b>		\$ 0.00

This is to certify that		% of the work was completed by the HUB or DBE subproviders as stated above.
-------------------------	--	-----------------------------------------------------------------------------

	By: Prime Provider
	Per: Signature

Subscribed and sworn to before me, this		day of		, 20	
-----------------------------------------	--	--------	--	------	--

	Notary Public		County
--	---------------	--	--------

My Commission expires:	
------------------------	--



**EXHIBIT 7**

**Identification of Project Manager and Key Personnel**

**Project Manager**

**Key Personnel**

## EXHIBIT 8

### 16.5 Indemnity by Developer

**16.5.1** Subject to Section 16.5.3, Developer shall release, defend, indemnify, protect and hold harmless the Indemnified Parties from and against any and all claims, causes of action, suits, judgments, investigations, legal or administrative proceedings, demands and Losses, in each case if asserted or incurred by or awarded to any third party, arising out of, relating to or resulting from:

**16.5.1.1** The breach or alleged breach of this Agreement by any Developer-Related Entity;

**16.5.1.2** The failure or alleged failure by any Developer-Related Entity to comply with the Governmental Approvals, any applicable Environmental Laws or other Laws (including Laws regarding Hazardous Materials Management) in accordance with the requirements of this Agreement;

**16.5.1.3** Any alleged patent or copyright infringement or other allegedly improper appropriation or use by any Developer-Related Entity of trade secrets, patents, proprietary information, know-how, copyright rights or inventions in performance of the Work, or arising out of any use in connection with the Project of methods, processes, designs, information, or other items furnished or communicated to TxDOT or another Indemnified Party pursuant to the CDA Documents; provided that this indemnity shall not apply to any infringement resulting from TxDOT's failure to comply with specific written instructions regarding use provided to TxDOT by Developer;

**16.5.1.4** The actual or alleged act, error or misconduct of any Developer-Related Entity acting within the scope of its authority and duties associated with performance of the Work;

**16.5.1.5** Any and all claims by any governmental or taxing authority claiming taxes based on gross receipts, purchases or sales, the use of any property, or income of any Developer-Related Entity with respect to any payment for the Work made to or earned by any Developer-Related Entity;

**16.5.1.6** Any and all liens filed in connection with the Work, including all expenses and attorneys', accountants' and expert witness fees and costs incurred in discharging any lien, and any other liability to Contractors for failure to pay sums due for their work or services, provided that TxDOT is not in default in payments owing (if any) to Developer with respect to such Work;

**16.5.1.7** Any actual or threatened Developer Release of Hazardous Materials;

**16.5.1.8** The claim or assertion by any other developer or contractor of inconvenience, disruption, delay or loss caused by interference by any Developer-

Related Entity acting within the scope of its authority and duties hindering the progress or completion of work being performed by the other contractor or developer, or failure of any Developer-Related Entity to cooperate reasonably with other developers and contractors in accordance therewith;

**16.5.1.9** Any dispute between Developer and a Utility Owner, or any Developer-Related Entity's performance of, or failure to perform, acting within the scope of its authority and duties, the obligations under any Master Utility Agreement;

16.5.1.10 (a) Any Developer-Related Entity's breach of or failure to perform an obligation that TxDOT owes to a third Person, including Governmental Entities, under Law or under any agreement between TxDOT and a third Person, where TxDOT has delegated performance of the obligation to Developer pursuant to the terms of the CDA Documents or (b) the acts or omissions of any Developer-Related Entity which render TxDOT unable to perform or abide by an obligation that TxDOT owes to a third Person, including Governmental Entities, under any agreement between TxDOT and a third Person, where the agreement is previously disclosed or known to Developer;

**16.5.1.11** The fraud, bad faith, arbitrary or capricious acts, willful misconduct, negligence or violation of Law or contract by any Developer-Related Entity in connection with Developer's performance of real property acquisition services under the CDA Documents; or

**16.5.1.12** Inverse condemnation, trespass, nuisance or similar taking of or harm to real property by reason of (a) the failure of any Developer-Related Entity to comply with Good Industry Practice, requirements of the CDA Documents, Project Management Plan or Governmental Approvals respecting control and mitigation of construction activities and construction impacts, (b) the intentional misconduct or negligence of any Developer-Related Entity, or (c) the actual physical entry onto or encroachment upon another's property by any Developer-Related Entity.

**16.5.2** Subject to Section 16.5.3, Developer shall release, protect, defend, indemnify and hold harmless the Indemnified Parties from and against any and all third party claims, causes of action, suits, judgments, investigations, legal or administrative proceedings, demands and losses arising out of, relating to or resulting from errors, inconsistencies or other defects in the design or construction of the Project and/or of Utility Adjustments included in the Design Work or Construction Work.

**16.5.3** Subject to the releases and disclaimers herein, including all the provisions set forth in Section 6.3.8, Developer's indemnity obligation shall not extend to any Loss to the extent caused or contributed to by:

**16.5.3.1** The negligence, recklessness, willful misconduct, bad faith or fraud of any Indemnified Party,

**16.5.3.2** TxDOT's material breach of any of its obligations under the CDA Documents

**16.5.3.3** Any Compensation Event;

**16.5.3.4** Any Indemnified Party's violation of any Laws or Governmental Approvals; or

**16.5.3.5** Any Relief Event or Extended Relief Event to the extent caused by any Indemnified Party.

**16.5.4** In claims by an employee of Developer, a Contractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Section 16.5 shall not be limited by a limitation on the amount or type of damages, compensation or benefits payable by or for Developer or a Contractor under workers' compensation, disability benefit or other employee benefits laws.

**16.5.5** For purposes of this Section 16.5, "third party" means any person or entity other than an Indemnified Party and Developer, except that a "third party" includes any Indemnified Party's employee, agent or contractor who asserts a claim against an Indemnified Party which is within the scope of the indemnities and which is not covered by the Indemnified Party's worker's compensation program.

**16.5.6** The following procedures shall apply to any indemnification under Section 16.5.1 or Section 16.5.2 above:

**16.5.6.1** Any Indemnified Party seeking indemnification under Section 16.5.1 or Section 16.5.2 shall notify Developer in writing thereof promptly upon, and not later than 15 days after, (a) discovering any matter for which it may be entitled to Developer's indemnification under Section 16.5.1 or Section 16.5.2 above (each such matter being referred to herein as a "Covered Liability"), or of any facts which may reasonably be expected to give rise to a claim for a Covered Liability, or (b) the date of receipt of notice of any action, lawsuit, proceeding, investigation, or other claim against such Indemnified Party which may be or give rise to a claim of a Covered Liability. Such notice shall assert the Indemnified Party's claim for indemnity hereunder and describe the Covered Liability and any claim or potential claim for such Covered Liability for which indemnity is sought, the amount thereof (if known and quantifiable), and the basis thereof (a "Notice of Claim"). Failure by an Indemnified Party to give timely notice as provided herein shall not relieve Developer of its obligations under Section 16.5.1 or Section 16.5.2 to the extent that Developer is not materially prejudiced or damaged in its ability to defend against such matter and to make a timely response thereto, including, without limitation, any responsive motion or answer to a complaint, petition, notice or other legal, equitable, or administrative process relating to the liability, action or claim.

**16.5.6.2** With respect to any third party action, lawsuit, proceeding, investigation or other claim which is the subject of a Notice of Claim, Developer shall, within 15 days after receipt of the Indemnified Party's Notice of Claim,

assume the defense of such action, lawsuit, proceeding, investigation or other claim at Developer's expense.

(a) Developer's obligation to defend such action expressly includes, in addition to any other defenses available to Developer, the right to assert on behalf of the Indemnified Party any and all defenses that the Indemnified Party could assert if defending itself, including defenses of sovereign or official immunity from liability and suit to the extent such defenses are available to the Indemnified Party.

(b) The Indemnified Party shall be entitled, subject to Section 16.5.6.3, (i) to participate in the defense of such claim and to employ counsel of its choice for such purpose (the fees and expenses of such separate counsel to be borne by Indemnified Party) and (ii) if participating in the defense of such claim, to assert against any third party any and all cross claims and counterclaims the Indemnified Party may have.

(c) Developer may settle a claim of Covered Liability either (i) by written settlement agreement providing for Developer's payment of a stipulated monetary settlement in exchange for the claimant's irrevocable, unconditional release of the Indemnified Party from any and all liability, together with dismissal with prejudice of any petition filed in court by the claimant, with prior written notice of such written settlement agreement being furnished by Developer to the Indemnified Party, or (ii) as agreed in writing by the claimant and Developer, with the Indemnified Party's joinder therein or its prior written consent thereto (which consent shall not be unreasonably withheld, conditioned or delayed).

(d) If within 15 days after Developer receives a Notice of Claim it reasonably appears to the Indemnified Party that Developer has not taken affirmative action to assume the defense of the Covered Liability described in the Notice of Claim, the Indemnified Party may undertake the defense of such claim with counsel selected by it and may make any compromise or settlement thereof or otherwise protect against the same and be entitled to all amounts paid as a result of such third party claim, demand, suit or action or any compromise or settlement thereof, provided, however, that the Indemnified Party first provides written notice to Developer of its intent to undertake such defense and Developer fails to take affirmative action reasonably evidencing its assumption of the Indemnified Party's defense within 15 days after receipt of the Indemnified Party's notice under this Section 16.4.6.2(d).

**16.5.6.3** The obligations of Developer shall not extend to any Losses, damage, costs or expense of whatever kind and nature (including all related costs and expenses) to the extent the same results from the taking by the Indemnified Party of any action (unless required by Law) after the assertion of any claim which gave rise to Covered Liability which prejudices the successful defense of the action or claim, without, in any such case, the prior written consent of Developer (such consent not to be required in a case where Developer has failed to assume the defense of the Indemnified Party after notice and opportunity to cure under Section 16.5.6.2(d)). The Indemnified Party agrees to afford Developer and its counsel the opportunity to be



present at, and to participate in, conferences with all Persons, including Governmental Entities, asserting any Covered Liability and conferences with representatives of or counsel for such Person.

**16.5.6.4** So long as Developer is defending in good faith Covered Liability, the Indemnified Party shall at all times cooperate in all reasonable ways with, make relevant files and records available for inspection by, and make its employees available or otherwise render reasonable assistance to, Developer (with all reasonable out-of-pocket costs to be borne by Developer).

## **EXHIBIT 9**

### **Arbitration**

Any arbitration brought under the terms of this Agreement shall be conducted in the following manner:

1. Developer and the Independent Engineer may agree on one arbitrator, but in the event that they cannot so agree, there shall be three arbitrators, one named in writing by each of Developer and the Independent Engineer within 15 days after demand for arbitration is made by either Developer or the Independent Engineer, and a third to be chosen by the two so named within ten days after they are named. Should either Developer or the Independent Engineer fail to timely join in the appointment of the arbitrator(s), the arbitrator(s) shall be appointed in accordance with the provisions of Texas Civil Practice and Remedies Code Section 171.041.
2. Developer and the Independent Engineer shall be entitled to conduct reasonable discovery in preparation for arbitration hearings. On application of either Developer or the Independent Engineer, the arbitrator(s) may issue orders and set time limits concerning the conduct of discovery and responses to discovery requests. Developer and the Independent Engineer express their mutual interest in full and fair discovery consistent with obtaining timely final resolution of disputes. The arbitrator(s) shall issue orders and set time limits regarding discovery so as to carry out such mutual interest.
3. Arbitration hearings conducted under the terms of this Agreement shall be at the time and place within Travis County, Texas selected by the arbitrator(s). Notice of hearing shall be given and the hearing conducted in accordance with the provisions of Section 171.044 et seq. of the Texas Civil Practice and Remedies Code.
4. At the hearing, any relevant evidence may be presented by either Developer or the Independent Engineer, and the formal rules of evidence applicable to judicial proceedings shall not govern. Evidence may be admitted or excluded in the sole discretion of the arbitrator(s), who shall balance Developer's and the Independent Engineer's mutual interest in receiving a full and fair hearing with Developer's and the Independent Engineer's interest in obtaining timely final resolution of disputes.
5. The arbitrator(s) shall hear and determine the matter expeditiously. The arbitrator(s) shall execute, acknowledge and deliver to Developer and the Independent Engineer a written decision and, if applicable, award, not later than 30 days after closing of the hearing. Delivery shall be made by registered or certified mail.
6. In deciding on the dispute in arbitration, the arbitrator(s) shall apply the applicable Laws, including judicial precedent, and the terms of this Agreement. The arbitrator shall have authority to grant legal and equitable relief, including interlocutory orders.

7. The costs and expenses of arbitration, including the fees of the arbitrator(s), shall be borne by the losing party or in such proportions as the arbitrator(s) shall determine. The prevailing party shall be entitled to recover its attorneys' and expert witness fees and costs from the losing party, in such amount as the arbitrator(s) determine is reasonable.

If there is only one arbitrator, his or her decision shall be binding and conclusive on Developer and the Independent Engineer. If there are three arbitrators, the decision of any two shall be binding and conclusive. The submission of a dispute to the arbitrator(s) and the rendering of their decision shall be a condition precedent to any right of legal action on the dispute. A judgment confirming the award or other relief granted by the arbitrator(s) may be entered by any court having jurisdiction; or the court may vacate, modify, or correct the award in accordance with the provisions of the Texas General Arbitration Act (Texas Civil Practice and Remedies Code Section 171.087 et seq.).

## **Exhibit H-2**

### **PRE-QUALIFIED INDEPENDENT ENGINEERS**

The following entities are pre-qualified to provide Independent Engineer services on the Project. They are listed in order of assignment by TxDOT.

- (1) CH2M HILL, Inc.;
- (2) URS Corporation;
- (3) HNTB Corporation;
- (4) Raba-Kistner Consultants, Inc.; and
- (5) The PBS&J Corporation

## Exhibit I

### RIGHT OF ENTRY PROCESS

Proposers must comply with the following steps in order to obtain a right of entry from TxDOT to IH 635 and IH 35E Right of Way at various locations prior to execution of the CDA.

1. Proposer shall complete the Agreement for Engineering Investigations on State Highway Right of Way and forward a signed original agreement and Exhibit B, TxDOT Form 1560, Certificate of Insurance, to John Hudspeth, P.E., with a copy to Sylvia Eder in the District Tollway Office.
2. Exhibit A, CDA Site Investigation on Highway Right of Way in the Dallas District, shall be completed by Proposer for each request for right of entry upon State highway Right of Way. One Exhibit A can cover a request for multiple days of access. Exhibit A may be turned in with the signed original Agreement for Engineering Investigations on State Highway Right of Way and Exhibit B, or may be turned in subsequent to Proposer's receipt of the fully executed copy of the agreement.
3. Dependant upon the location of the Right of Way for which Proposer seeks entry, Proposer shall submit Exhibit A to each of the following persons:

Access on IH 635 from Luna Road to East side of Greenville Avenue  
Responsible Area Office: Northwest Dallas Area Office (NWAO)  
Submit Exhibit A to:

- a) John Hudspeth, P.E.; and
- b) All listed contacts on the attached Contact List for the NWAO

Access on IH 635 from East side of Greenville Avenue to South side of LaPrada  
Responsible Area Office: Northeast Dallas Area Office (NEAO)  
Submit Exhibit A to:

- a) John Hudspeth, P.E.; and
- b) All listed contacts on the attached Contact List for the NEAO

Access on IH 635 from South Side of LaPrada to IH 30  
Responsible Area Office: Southeast Dallas Area Office (SEAO)  
Submit Exhibit A to:

- a) John Hudspeth, P.E.; and
- b) All listed contacts on the attached Contact List for the SEAO

Access on IH 35E from south of LP 12 to north of IH 635  
Responsible Area Office: Northwest Area Office (NWAO)  
Submit Exhibit A to:

- a) John Hudspeth, P.E.; and

b) All listed contacts on the attached Contacts list for the NWA0

4. Prior to a Proposer's entry onto State highway Right of Way, Proposer must receive Approval from the appropriate area office.
5. Proposer may perform investigations in areas only as requested in each Exhibit A.

\*\*\*Note: Exhibit A may be faxed, e-mailed or submitted in hard copy. Approval of Exhibit A shall occur in written format which may include e-mail.

\*\*\* Exhibit A preparation:

In addition to location and general description of investigations to be performed, if the investigations require closure of a lane(s) of traffic for any reason, Proposer shall submit a traffic control plan for TxDOT review and approval with the appropriate Exhibit A.

**Contact List:**

<p><b>Dallas District Tollway Office:</b></p>	<p><b>Dallas District Tollway Office:</b></p>	<p><b>Northwest Dallas Area Office (NWAO)</b></p>
<p>John Hudspeth TxDOT-Dallas District Tollway Office PO Box 133067 Dallas, Texas 75313-3067 214-320-4489 John Hudspeth jhudsp1@dot.state.tx.us</p>	<p>Sylvia Eder TxDOT – Dallas District Tollway Office PO Box 133067 Dallas, Texas 75313 214-320-4464 <a href="mailto:seeder@dot.state.tx.us">seeder@dot.state.tx.us</a></p>	<p>Gary Bailey TxDOT- NWAO 12000 Greenville Ave. Dallas, Texas 74253 972-479-9747 <a href="mailto:gbailey@dot.state.tx.us">gbailey@dot.state.tx.us</a></p>
<p><b>Northwest Dallas Area Office (NWAO)</b></p>	<p><b>Northwest Dallas Area Office (NWAO)</b></p>	<p><b>Northwest Dallas Area Office (NWAO)</b></p>
<p>Maurice Pittman TxDOT- NWAO 12000 Greenville Ave. Dallas, Texas 74253 972-479-9747 <a href="mailto:mpittma@dot.state.tx.us">mpittma@dot.state.tx.us</a></p>	<p>Tommy McKinnon TxDOT- NWAO 12000 Greenville Ave. Dallas, Texas 74253 972-479-9747 <a href="mailto:jmckinn@dot.state.tx.us">jmckinn@dot.state.tx.us</a></p>	<p>Brad Braden TxDOT- NWAO 12000 Greenville Ave. Dallas, Texas 74253 972-479-9747 <a href="mailto:hbraden@dot.state.tx.us">hbraden@dot.state.tx.us</a></p>
<p><b>Northeast Area Office (NEAO)</b></p>	<p><b>Northeast Area Office (NEAO)</b></p>	<p><b>Southeast Area Office (SEAO)</b></p>
<p>Paul Williams TxDOT-NEAO 4777 E. Hwy 80 Mesquite, Texas 75150 (214) 320-6240 <a href="mailto:pwilli1@dot.state.tx.us">pwilli1@dot.state.tx.us</a></p>	<p>William Fuller TxDOT-NEAO 4777 E. Hwy 80 Mesquite, Texas 75150 (214) 320-6240 <a href="mailto:wfulle1@dot.state.tx.us">wfulle1@dot.state.tx.us</a></p>	<p>Gary Moonshower TxDOT-SEAO 505 IH 45 South Hutchins, Texas 75141 972-225-2387 <a href="mailto:gmoonsh@dot.state.tx.us">gmoonsh@dot.state.tx.us</a></p>
<p><b>Southeast Area Office (SEAO)</b></p>	<p><b>Southeast Area Office (SEAO)</b></p>	<p><b>Southeast Area Office (SEAO)</b></p>
<p>Ray Schmidt TxDOT-SEAO 505 IH 45 South Hutchins, Texas 75141 972-225-2387 <a href="mailto:rschmid@dot.state.tx.us">rschmid@dot.state.tx.us</a></p>	<p>Elliot Stovall TxDOT-SEAO 505 IH 45 South Hutchins, Texas 75141 972-225-2387 <a href="mailto:estoval@dot.state.tx.us">estoval@dot.state.tx.us</a></p>	<p>Melvin McNeal TxDOT-SEAO 505 IH 45 South Hutchins, Texas 75141 972-225-2387 <a href="mailto:mmcneal@dot.state.tx.us">mmcneal@dot.state.tx.us</a></p>



**AGREEMENT FOR  
ENGINEERING INVESTIGATIONS  
ON STATE HIGHWAY RIGHT OF WAY**

STATE OF TEXAS           §

COUNTY OF TRAVIS       §

THIS AGREEMENT made this \_\_\_\_\_ day of \_\_\_\_\_ by the State of Texas, acting by and through the Texas Department of Transportation, referred to as “TxDOT,” party of the first part, and \_\_\_\_\_, hereinafter referred to as the “Requestor,” party of the second part.

**WITNESSETH**

WHEREAS, TxDOT owns and operates a system of highways for public use and benefit, including IH 635 and IH 35E, in Dallas County; and

WHEREAS, the Requestor has requested permission from TxDOT to use IH 635 and IH 35E Right of Way at various locations to be determined based on submittal of Exhibit A for each instance of access requested. Exhibit A is attached hereto and made a part of this Agreement, for the purpose of asset assessment, engineering studies and site investigations; and

WHEREAS, in accordance with Tex. Adm. Code, § 27, TxDOT seeks to enter into a Comprehensive Development Agreement with a private sector partner and desires the private



sector partner have access to the proposed Project limits for performance of due diligence work in preparation of its Proposal; and

WHEREAS, this Agreement is intended to encourage and facilitate access to TxDOT highway facilities and their adjacent Right of Way for the promotion of that goal while protecting the safety of the traveling public and the integrity of state highway facilities and Right of Way.

## **AGREEMENT**

1. The Requestor's description of the activities, including the placement of people and equipment on TxDOT highway Right of Way, will be submitted in writing as outlined in Exhibit A and shall be made part of this Agreement upon approval of TxDOT.
2. It is expressly understood that TxDOT does not purport hereby to grant any right, claim, title, or easement in or upon its Right of Way. Furthermore, approval of this Agreement by TxDOT does not constitute approval by any other Texas State agency.
3. The Requestor agrees to accept full responsibility for coordinating and making arrangements with the local law enforcement personnel to provide adequate and safe traffic control during the above referenced activity. If, during the activity, the local law enforcement personnel determine that the above referenced use of the Right of Way is creating a traffic hazard, the Right of Way will be opened to traffic and the activity will be rescheduled to a time agreeable to TxDOT, the Requestor, and the local law enforcement personnel.
4. The Requestor shall provide necessary safeguards to protect the public during the above referenced activity, including adequate insurance for payment of any damages which might result from activities during occupation of the Right of Way, and shall save

TxDOT and the State of Texas harmless from damages, to the extent of said insurance coverage and insofar as it can legally do so.

5. The Requestor agrees to indemnify and save harmless TxDOT and the State of Texas and its officers, agents, contractors, and employees from all suits, actions, or claims and from all liability and damages for any and all injuries or damages sustained by any person or property as a consequence of any neglect in the performance of the above referenced activity and any related activity by the Requestor and from any claims or amounts arising or recovered under the “Workers’ Compensation Laws”; V.T.C.S., Civil Practice & Remedies Code 101.021, 101.051; or any other laws.
6. The Requestor shall further indemnify TxDOT and the State of Texas and accept responsibility for all damages or injury to property of any character occurring during the prosecution of the activity resulting from any act, omission, neglect or misconduct on the part of the Requestor in the manner or method of executing the activity. The Requestor assumes all costs associated with the inspections, investigations and assessments.
7. TxDOT, having the legal right to occupy TxDOT highway Right of Way, will not be responsible or liable for damages to the Requestor’s property or operations. The Requestor’s attention is directed to the fact that utility installations owned by others exist in the Right of Way. The Requestor shall save harmless TxDOT and the State of Texas from any and all suits or claims resulting from damage to any utility installation due to the above referenced activity.
8. The Requestor shall restore the Right of Way to its original condition, free of any damage to the roadway and drainage structures, signs, and pavement and, to the

extent practicable, restore the natural environment, including landscape features. The Requestor will avoid or minimize damage outside the Right of Way and will, at its own expense, restore or repair damage outside the Right of Way. The Requestor's performance shall be in compliance with all federal, State and local laws, ordinances, and regulations including:

- the Endangered Species Act of 1973, 16 USC § 1531 et seq. and the regulations there under as amended;
- TxDOT's erosion and sedimentation control standards and TxDOT's Vegetation Management Standards, which may in any way regulate or control the activity;
- all State and federal environmental laws and any conditions required by TxDOT to protect the environment.
- Any costs incurred by TxDOT for repairs to highway facilities, for the removal of debris, or for any other necessary restoration work performed by TxDOT as a result of the activity will be billed to the Requestor at cost. The Requestor shall make full and complete payment to TxDOT within thirty (30) days from receipt of TxDOT's written notification.

9. Any action by the Requestor that indicates a commencing of the activity in the Right of Way will signify that the Requestor agrees to abide by the above requirements.
10. Any changes in the time frame, character, or responsibilities of the parties as outlined on the appropriate previously approved Exhibit A shall be enacted by a written approval by TxDOT.
11. It is mutually agreed and understood that if the above referenced section of paved Right of Way is to be partially or totally temporarily closed, it will be closed in

accordance with a “Traffic Control Plan” provided as part of the appropriate Exhibit A and subject to approval by TxDOT. The Requestor hereby agrees to immediately reopen any partially or totally closed section of Right of Way to emergency vehicles, law enforcement personnel, or others in case of emergency. The traffic control shall be provided by the Requester through cooperation with the appropriate law enforcement personnel at no cost to TxDOT. Each Traffic Control Plan shall be provided by the Requestor, at no cost to TxDOT, and approved by TxDOT, and shall be in accordance with the Texas Manual on Uniform Traffic Control Devices, latest edition. The Requestor hereby agrees to accept full responsibility for the complete planning, design and implementation of each Traffic Control Plan. Each Traffic Control Plan shall include a traffic enforcement plan, including a letter by mail or facsimile from the law enforcement agency that will be providing the traffic control for the event or a contact name and telephone number of the responsible law enforcement agency. Law enforcement will be present at all times during a closure unless stated otherwise in the Traffic Control Plan.

12. The Requestor has provided TxDOT with Exhibit B, covering the below listed insurance limits for the duration of the activity. Exhibit B is attached hereto and made a part of this Agreement.
  - A. Worker’s Compensation Insurance Amount – Statutory Endorsed with a Waiver of Subrogation in favor of TxDOT and the State of Texas.

B. Comprehensive General Liability Insurance

Amounts –

Bodily Injury \$500,000 each occurrence

Property Damage \$100,000 each occurrence

OR

Commercial General Liability Insurance

Amount - \$600,000 combined single limit each occurrence and in the aggregate which includes Contractual Coverage; and, endorsed with a Waiver of Subrogation in favor of those parties named in paragraph A above, and endorsed with TxDOT and the State of Texas as an additional insured.

C. Comprehensive Automobile Liability

Amounts –

Bodily Injury \$250,000 each person

\$500,000 each occurrence

Property Damage \$100,000 each occurrence

Endorsed with a Waiver of Subrogation in favor of those parties named in paragraph A above, and endorsed with TxDOT and the State of Texas as an additional insured.

13. This Agreement shall terminate execution of a Comprehensive Development Agreement, unless terminated by:

- Mutual agreement and written consent of both parties,

- TxDOT upon written notice to the Requestor as consequence of the Requestor's failure to perform the responsibilities set forth herein (TxDOT may grant allowances for circumstances beyond the control of the Requestor),
- TxDOT for reasons of its own and not subject to mutual consent of the Requestor upon not less than 15 days written notice to the Requestor, or
- By satisfactory completion of the Requestor's temporary use of the highway Right of Way.

The termination of this agreement and payment of any amount in settlement as prescribed herein shall extinguish all rights, duties, and obligations of TxDOT and the Requestor. Upon termination of this Agreement, the Requestor shall vacate the highway Right of Way and restore it to the original condition in a manner described herein within two days from the termination date of this Agreement.

14. Should disputes arise between the parties regarding the obligations and responsibilities established herein, TxDOT's decision shall be final and binding.
15. In case one or more of the provisions contained in this Agreement shall for any reason be held invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provisions hereof and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained herein.
16. This Agreement constitutes the sole and only agreement between the parties hereto and supersedes any prior understandings and/or written or oral agreements between TxDOT and the Requestor respecting the within subject matter.

17. The undersigned for the Requestor represents and warrants that he or she is an officer of the Requestor for which he or she has executed this Agreement and that he or she has the full and complete authority to enter into this Agreement on behalf of the Requestor.

IN TESTIMONY WHEREOF, the parties hereto have caused these presents to be executed on the dates shown below stated.

**LIST OF ATTACHED EXHIBITS**

Exhibit	Description
A	CDA Site Investigation on Highway Right of Way in the Dallas District
B	TxDOT Form 1560, Certificate of Insurance



## Exhibit A

### CDA SITE INVESTIGATION ON HIGHWAY RIGHT OF WAY IN THE DALLAS DISTRICT

\_\_\_\_\_ is giving written notice of proposed Work to take place within the right of way of IH 635 and IH 35E in Dallas County, TX as follows:

(Give general written description of location and work to take place- Do not write "See Attached")

The Work listed above **is not to include** the following: The destructive testing of any in place pavement or structure, or other work that may be considered harmful to assets already in place. This Work is limited to Site investigations and Engineering Studies for the purposes of preparing a Proposal for the IH 635 Managed Lanes CDA. This may include reviewing in place Work along the Project Right of Way, gathering pavement condition score information, subsurface soils investigations and other investigations as required in preparation of a Proposal in response to the TxDOT issued RFP.

At no time shall any Work activity that involves digging take place any closer than three feet from the edge of pavement or back of curb.

The Requestor will use best management practices to minimize erosion and sedimentation resulting from the proposed Work, and will revegetate the Work area as indicated under "Revegetation Special Provisions."

The Requestor will ensure that traffic control measures complying with applicable portions of the *Texas Manual of Uniform Traffic Control Devices* will be installed and maintained for the duration of this Work. (Approval of traffic control plans is required by area/maintenance office.)

Refer to attached location map and drawing for a more specific location and a description of the Work activity. The undersigned agrees to comply with the terms and conditions set forth in this notice.

The proposed Work will begin on the \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_ .



Requestor Party \_\_\_\_\_  
By (Print) \_\_\_\_\_  
Signature \_\_\_\_\_  
Address \_\_\_\_\_  
\_\_\_\_\_  
Phone \_\_\_\_\_

Texas Department of Transportation  
\_\_\_\_\_  
Area Engineer or Maintenance Supervisor  
Signature: \_\_\_\_\_  
\_\_\_\_\_  
Date

**COPY OF THIS DOCUMENT MUST BE KEPT ON JOBSITE**  
**If Approved via e-mail, retain printed copy of e-mail approval on jobsite as well.**



## Texas Department of Transportation

### NOTES TO AGENTS:

Agents must provide all requested information then either fax or mail this form directly to the address listed below.

Pre-printed limits are the minimum required, if higher limits are provided by the policy, enter the higher limit amount and strike-through or cross-out the pre-printed limit.

**To avoid work suspension**, an updated insurance form must reach the address listed below **one business day prior** to the expiration date. **Insurance must be in force in order to perform any work.**

**Binder numbers are not acceptable for policy numbers.**

The certificate of insurance, once on file with the department, is adequate for subsequent department contracts provided adequate coverage is still in effect. Do not refer to specific projects/contracts on this form.

The TxDOT certificate of insurance form is the only acceptable proof of insurance for department contracts.

List the contractor's legal company name, including the DBA (doing business as) name as the insured or list both the contractor and staff leasing service as insured when a staff leasing service is providing insurance.

Over-stamping and/or over-typing entries on the certificate of insurance are not acceptable if such entries change the provisions of the certificate in any manner.

This form may be reproduced.

The **SIGNATURE** of the agent is required. Stamped/typed/printed signatures are not acceptable.

### CERTIFICATE OF INSURANCE REQUIREMENTS:

#### WORKERS' COMPENSATION INSURANCE:

The contractor is required to have Workers' Compensation Insurance if the contractor has any employees including relatives.

The word STATUTORY, under limits of liability, means that the insurer would pay benefits allowed under the Texas Workers' Compensation Law.

GROUP HEALTH or ACCIDENT INSURANCE is not an acceptable substitute for Workers' Compensation.

#### COMPREHENSIVE GENERAL LIABILITY INSURANCE or COMMERCIAL GENERAL LIABILITY INSURANCE:

If coverages are specified separately, they must be at least these amounts:

Bodily Injury	\$500,000 each occurrence
Property Damage	\$100,000 each occurrence
	\$100,000 for aggregate

MANUFACTURERS' or CONTRACTOR LIABILITY INSURANCE is not an acceptable substitute for Comprehensive General Liability Insurance or Commercial General Liability Insurance.

#### COMPREHENSIVE AUTOMOBILE LIABILITY INSURANCE or TEXAS BUSINESS AUTOMOBILE POLICY:

The coverage amount for a Texas Business Automobile Policy or Comprehensive Automobile Liability may be shown as a minimum of \$600,000 Combined Single Limit by a typed or printed entry and deletion of the specific amounts listed for Bodily Injury and Property Damage.

BASIC AUTOMOBILE LIABILITY INSURANCE is not an acceptable substitute for Comprehensive Automobile Liability Insurance or Texas Business Automobile Policy.

#### MAIL ALL CERTIFICATES TO :

Texas Department of Transportation  
CST – Contract Processing Unit (RA/200 – 1st Fl.)  
125 E. 11th Street  
Austin TX 78701-2483  
512/416-2429 (V), 512/416-2536 (F)

**Exhibit J**  
**MINUTE ORDER**  
(see attached)

Minute Order 110725  
Passed October 26, 2006

--XXXXXXXXXX--

I, Roger Polson, executive assistant to the deputy executive director, certify that the attached is a true and correct copy of Minute Order 110725, dated October 26, 2006, which was passed at a regular meeting of the Texas Transportation Commission of the State of Texas, and as appears in the records of official minutes of the Texas Transportation Commission, and that I am an official custodian.

Witness my hand and Official Seal this 2nd day of November 2006.



Roger Polson  
Executive Assistant, Deputy Executive Director  
Texas Department of Transportation

TEXAS TRANSPORTATION COMMISSION

DALLAS County

MINUTE ORDER

Page 1 of 2

DALLAS District

Transportation Code, Chapter 223, Subchapter E, prescribes the process by which the Texas Department of Transportation (department) may enter into a comprehensive development agreement (CDA) with a private entity that provides for the design, construction, financing, maintenance, or operation of a toll project on the state highway system.

Transportation Code, §223.203, prescribes requirements for a solicited proposal and requires the department to publish a request for qualifications in the *Texas Register* that includes the criteria that will be used to evaluate any received qualifications statements, the relative weight given to the criteria, and a deadline by which qualifications statements must be received.

On April 28, 2005, by Minute Order 110052, the Texas Transportation Commission (commission) authorized and directed the department to issue a request for qualifications (RFQ) for the development of the INTERSTATE 635 (I-635) managed lanes project. The department issued the RFQ on May 23, 2005 and subsequently determined that all four teams submitting qualifications statements in response to the RFQ were qualified to be on the short list of teams that will be requested to submit detailed proposals for the project.

Transportation Code, §223.203 and 43 TAC §27.4 provide that, if authorized by the commission, the department will issue a request for proposals (RFP) from all private entities qualified for the short list. The department intends to issue an RFP for the I-635 project and request detailed proposals from the four short-listed teams.

Transportation Code, §223.203(m) and 43 TAC §27.4(f) require the department to pay an unsuccessful private entity who submits a detailed proposal that is responsive to the requirements of the RFP a stipulated amount in exchange for the work product contained in that proposal. The stipulated amount must be stated in the RFP and may not exceed the value of any work product contained in the proposal that can, as determined by the department, be used by the department in the performance of its functions. Payment for this work product would allow the department to use the work product for the benefit of the I-635 project or other department projects without further payment to the unsuccessful proposer.

IT IS THEREFORE ORDERED that the department is authorized and directed to issue an RFP for the development of the I-635 managed lanes project along I-635 from east of Luna Road to north of I-30 and on I-35E from south of the Loop 12/I-35E split to south of Valwood Parkway in Dallas County, and other facilities to the extent necessary for connectivity, mobility, safety, and financing.

TEXAS TRANSPORTATION COMMISSION

DALLAS County

MINUTE ORDER


Page 2 of 2

DALLAS District

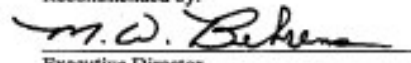
IT IS FURTHER ORDERED that the department is authorized to pay to each proposer who submits a responsive, but unsuccessful, proposal for the I-635 project an amount based upon the value of the work product provided in the proposal that can, as determined by the department, be used by the department in the performance of its functions, up to a maximum amount per proposer of \$1 million.

IT IS FURTHER ORDERED that payment for work product may only be paid to the extent that the work product submitted meets the minimum criteria and other conditions to payment identified by the department in the I-635 procurement documents.

Submitted and reviewed by:

  
Director, Texas Turnpike Authority Division

Recommended by:

  
Executive Director

**110725 OCT 26 06**

Minute Number	Date Passed
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**Exhibit K**

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PROJECT TRUST AGREEMENT

by and between  
[TRUSTEE], as Trustee  
and  
[DEVELOPER], as Developer

RELATING TO THE  
IH 635 MANAGED LANES PROJECT

Dated as of \_\_\_\_\_, 2008

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## **PROJECT TRUST AGREEMENT**

This PROJECT TRUST AGREEMENT, dated as of \_\_\_\_\_, 2008, by and between [TRUSTEE], a national banking association, duly organized and existing under and by virtue of the laws of the United States (the "Trustee"), and \_\_\_\_\_, a \_\_\_\_\_ (the "Developer"), with reference to the following facts:

### **RECITALS**

A. The Texas Department of Transportation ("TxDOT") and Developer have entered into that certain Comprehensive Development Agreement, IH 635 Managed Lanes Project dated as of \_\_\_\_\_, 2008 (as it may be amended from time to time in accordance with its terms, the "CDA") regarding the design, construction, financing, operation and maintenance and the collection of toll charges from users of the Project described therein; and

B. This Project Trust Agreement is being executed by the parties hereto in order to provide for (i) the establishment of a Project Trust Fund and various trust accounts within the Project Trust Fund, (ii) the deposit into the Project Trust Fund of funds that may be remitted to the Trustee in respect of the use of the Project as described herein, and (iii) the Trustee to hold, administer and distribute the Project Trust Fund as provided herein.

### **AGREEMENT**

Now therefore, in consideration of the foregoing premises and of the mutual agreements and covenants contained herein and for other valuable consideration, the receipt and adequacy of which are hereby acknowledged, the parties hereto do hereby agree as follows:

### **ARTICLE I.**

### **DEFINITIONS**

#### **Section 1.01 Definitions.**

Unless the context otherwise requires, the terms defined in this Section 1.01 shall for all purposes hereof and of any amendment hereof or supplement hereto and of any certificate, opinion, request or other document mentioned herein or therein have the meanings defined herein, the following definitions to be equally applicable to both the singular and plural forms of any of the terms defined herein. All capitalized terms used herein and not defined herein shall have the respective meanings ascribed thereto in the CDA.

"Business Day" means any day other than a Saturday, Sunday or legal holiday or a day on which banks are authorized to be closed for business in Texas or any city in any other state in which the corporate trust office of the Trustee is located.

"Certificate of Developer" means an instrument in writing signed by an officer of Developer duly authorized by the Board of Directors of Developer for that purpose.

"Certificate of Toll Operator" means an instrument in writing signed by an officer of Toll Operator duly authorized by the Board of Directors of Toll Operator for that purpose.

“Certificate of TxDOT” means an instrument in writing signed by an officer of TxDOT duly authorized by the Texas Transportation Commission or State law for that purpose.

“Collateral Agent” means the Person identified by Developer to the Trustee and to TxDOT as the Collateral Agent (as such term is defined in the CDA) for purposes of holding all liens and security interests securing the Project Debt for the benefit of holders of the Project Debt.

“Daily Disbursement Date” means any Business Day that there are funds on deposit in the Toll Revenue Account as of the opening of business of the Trustee on such day.

“Daily Revenue Payment Amount” means a daily amount that shall be calculated in the same manner as calculations of the TxDOT Revenue Payment Amount are made pursuant to Exhibit 7 of the CDA,

“Developer Claims Account” has the meaning set forth in Section 2.02(d).

“Developer Claim Certificate” has the meaning set forth in Section 2.02(d).

“Developer Claim Final Decision Amount” has the meaning set forth in the definition of Developer Claim Final Decision Certificate.

“Developer Claim Final Decision Certificate” means a Certificate of Developer or a Certificate of TxDOT delivered to the Trustee pursuant to Section 2.03(d) in which either Developer or TxDOT, as applicable, (a) certifies to the Trustee that a Final Decision has been entered with respect to a disputed Claim of Developer described in a Developer Claim Certificate previously received by the Trustee, along with a copy of such Final Decision, certified as true and correct, and (b) certifies to the Trustee the amount, if any, payable to Developer pursuant to any such Final Decision (the “Developer Claim Final Decision Amount”).

“Developer/Toll Operator Dispute Final Decision Amount” has the meaning set forth in the definition of Developer/Toll Operator Dispute Final Decision Certificate.

“Developer/Toll Operator Dispute Final Decision Certificate” means a Certificate of Developer or a Certificate of Toll Operator delivered to the Trustee pursuant to Section 2.03(c)(i) in which either Developer or the Toll Operator, as applicable, (i) certifies to the Trustee that a court or arbitrator has delivered a written decision and award, and/or a judgment has been entered by a court confirming or modifying an arbitrator’s award and that such award, decision or judgment is final and not subject to appeal, and (ii) certifies to the Trustee the amount, if any, payable to the Toll Operator or Developer, as the case may be, pursuant to any such award or judgment (the “Developer/Toll Operator Dispute Final Decision Amount”).

“Early Deposit Date” means January 1 of the Fiscal Year immediately preceding the Fiscal Year in which the original stated expiration of the Term of the CDA will occur, as such Early Deposit Date is specified in a notice thereof from Developer and TxDOT to Trustee.

“Event of Default” has the meaning set forth in Section 4.01.

“Final Decision” means either that (a) to the extent the Claim or Dispute is eligible for resolution pursuant to the Dispute Resolution Procedures, as provided in Section 17.8.1.1(b) of the CDA, the TxDOT Executive Director or his designee has issued or been deemed to issue a

final order implementing a decision or award of the Disputes Board with respect to a Claim or Dispute or (b) a final judgment has been entered on a Claim or Dispute by a court having proper jurisdiction over the Claim or Dispute and such order or judgment in each case is not subject to appeal.

“Final Decision Certificate” means a Certificate of Developer or Certificate of TxDOT delivered to the Trustee in which Developer or TxDOT, as applicable, (a) certifies to the Trustee that a Final Decision has been entered with respect to the final amounts payable to each of Developer and TxDOT under the CDA following the Termination Date, along with a copy of such Final Decision, certified as true and correct, and (b) certifies to the Trustee the amount, if any, payable to Developer or TxDOT pursuant to any such Final Decision (the “Final Decision Amounts”).

“Final Termination Certificate” means a Certificate of Developer or Certificate of TxDOT delivered to the Trustee in which Developer or TxDOT, as applicable, (a) certifies to the Trustee that the “Termination Date” (as defined in the CDA) occurred under the CDA, and (b) certifies to the Trustee the actual Termination Date under the CDA.

“Financing Documents” means the agreements and documents evidencing or securing any Project Debt, including any Funding Agreements or Security Documents described in the CDA.

“Joint Instructions” means written instructions to the Trustee which are executed (i) by both Developer and TxDOT, provided that such instructions are also approved by the Collateral Agent during any Project Debt Default Period solely to the extent such approval is required pursuant to the Funding Agreements or Security Documents, or (ii) by both TxDOT and either the Collateral Agent or its Substituted Entity, in the event the Collateral Agent has exercised its step-in rights under the CDA and it or its Substituted Entity has succeeded to the Developer’s Interest.

“Monthly Disbursement Date” means the last Business Day of each calendar month.

“NTTA” means the North Texas Tollway Authority, a regional tollway authority authorized and operating under Chapter 366 of the Texas Transportation Code, and its successors and assigns.

“Post-Termination Revenue Account” has the meaning set forth in Section 2.02(f).

“Post-Termination Developer Claims Account” has the meaning set forth in Section 2.02(i).

“Post-Termination Developer Claim Certificate” has the meaning set forth in Section 2.02(i).

“Post-Termination Developer Claim Final Decision Amount” has the meaning specified in the definition of Post-Termination Developer Claim Final Decision Certificate.

“Post-Termination Developer Claim Final Decision Certificate” means a Certificate of Developer or a Certificate of TxDOT delivered to the Trustee pursuant to Section 2.03(g) in which either Developer or TxDOT, as applicable, (a) certifies to the Trustee that a Final Decision has been entered with respect to a disputed Claim of Developer described in a Post-

Termination Developer Claim Certificate, along with a copy of such Final Decision, certified as true and correct, and (b) certifies to the Trustee the amount, if any, payable to Developer pursuant to any such Final Decision (the "Post-Termination Developer Claim Final Decision Amount").

"Post-Termination Work Account" has the meaning set forth in Section 2.02(g).

"Project Debt Default Notice" means a written notice delivered by the Collateral Agent to the Trustee, Developer and TxDOT stating that (a) a default has occurred and is continuing with respect to the Project Debt and (b) pursuant to the terms of the Financing Documents, the Collateral Agent is entitled to be paid any funds that would otherwise be payable by the Trustee to Developer from any Project Trust Account on any date hereunder, and to give any related payment instructions to the Trustee in connection therewith.

"Project Debt Default Period" means the period commencing on the date a Project Debt Default Notice is received by the Trustee and ending on the date the relevant default in respect of the Project Debt shall have been cured or otherwise waived.

"Project Trust Accounts" has the same meaning set forth in Section 2.02.

"Project Trust Agreement" means this Project Trust Agreement by and between the Trustee and Developer, dated as of \_\_\_\_\_, 2008, as it may from time to time be amended or supplemented in accordance herewith.

"Project Trust Fund" means the fund by the name "IH 635 Managed Lanes Project Trust Fund" established in Section 2.01 hereof, including all of the Project Trust Accounts described herein that are established to hold funds received by the Trustee for deposits into the Project Trust Fund.

"Termination Date" means, for all purposes of this Project Trust Agreement, the earlier of the date the Trustee receives Joint Instructions or the date the Trustee receives a Final Termination Certificate, in either case, to the effect that the "Termination Date" (as defined in the CDA) has occurred.

"Texas UCC" means the Uniform Commercial Code in effect from time to time in the State of Texas.

"Toll Operator" means the NTTA or, in case permitted by law, any other person or entity providing services under a Tolling Services Agreement identified in a Certificate of Developer delivered to Trustee.

"Toll Operator Dispute Account" has the meaning set forth in Section 2.02(c).

"Toll Revenue Account" has the meaning set forth in Section 2.02(b).

"Tolling Services Agreement" means (a) that certain Tolling Services Agreement dated as of \_\_\_\_\_, 2008, by and between NTTA and Developer, and (b) any other agreement between Developer and another person or entity for providing back office customer services and toll collection and enforcement services for the Project, provided such agreement creates rights and obligations of Developer and such person or entity regarding the Toll Operator Dispute Account.

“Trustee” means [TRUSTEE], a national banking association, duly organized and existing under and by virtue of the laws of the United States, or its successor or any other bank or trust company which may at any time be substituted in its place as provided in Section 5.01.

“TxDOT Claim Certificate” has the meaning set forth in Section 2.02(e).

“TxDOT Claim Final Decision Amount” has the meaning set forth in the definition of TxDOT Claim Final Decision Certificate.

“TxDOT Claim Final Decision Certificate” means a Certificate of Developer or a Certificate of TxDOT delivered to the Trustee pursuant to Section 2.03(e) in which either Developer or TxDOT, as applicable, (a) certifies to the Trustee that a Final Decision has been entered with respect to a disputed Claim of TxDOT described in a TxDOT Claim Certificate previously received by the Trustee, along with a copy of such Final Decision, certified as true and correct, and (b) certifies to the Trustee the amount, if any, payable to TxDOT pursuant to any such Final Decision (the “TxDOT Claim Final Decision Amount”).

“TxDOT Claims Account” has the meaning set forth in Section 2.02(e).

“TxDOT Revenue Payment Account” has the meaning set forth in Section 2.02(h).

“TxDOT Revenue Payment Amount” means the TxDOT Revenue Payment Amount payable pursuant to Part C of Exhibit 7 of the CDA.

## ARTICLE II.

### PROJECT TRUST FUND AND ACCOUNTS

#### Section 2.01 Establishment of Project Trust Fund.

The Trustee hereby establishes a fund to be known as the “IH 635 Managed Lanes Project Trust Fund”. The Trustee covenants and agrees that all funds, when and as received by Trustee and designated or otherwise directed for deposit into the IH 635 Managed Lanes Project Trust Fund, whether pursuant to a transfer from TxDOT, Developer or any other Person, will be received and held by the Trustee in trust hereunder and will be deposited by the Trustee in the Project Trust Fund and will be accounted for through and held in trust in the Project Trust Fund. All funds delivered to the Trustee for deposit into the Project Trust Fund shall be (a) held by the Trustee in trust for the benefit of Developer and, to the extent provided herein, TxDOT and/or the Toll Operator in accordance with the terms of this Project Trust Agreement, (b) disbursed, allocated and applied by Trustee solely to the uses and purposes hereinafter in this Article II set forth, and (c) accounted for separately and apart from all other money, funds, accounts or other resources of the Trustee. Trustee does not have any interest in the Project Trust Fund but is serving as trust holder of the same for the benefit of Developer and, to the extent provided herein, TxDOT as a designated third party beneficiary with direct rights of enforcement. In addition, Trustee is serving as trust holder for the benefit of the Toll Operator as a designated third party beneficiary with direct rights of enforcement, to the extent of the provisions of this Project Trust Agreement pertaining to the Toll Operator Dispute Account, but not otherwise.

**Section 2.02** Establishment and Maintenance of Accounts.

The following trust accounts (each, a “Project Trust Account”) shall be established by the Trustee within the Project Trust Fund and all funds received by the Trustee for deposit into the Project Trust Fund shall be allocated to such Project Trust Accounts as set forth herein:

(a) [Reserved]

(b) Toll Revenue Account.

(i) There is hereby established within the Project Trust Fund a trust account designated the “Toll Revenue Account.” Except as otherwise set forth in Section 2.02(f), until the Termination Date the Trustee shall deposit the following into the Toll Revenue Account:

(A) all funds received by the Trustee for deposit into the Project Trust Fund and designated or otherwise identified as “Toll Revenues from Transponder Transactions or Video Transactions” (from whomever received); and

(B) any other funds received by the Trustee from the Toll Operator, TxDOT or Developer which the Trustee is directed or otherwise instructed to deposit to the Toll Revenue Account by the Person delivering such funds to Trustee.

(ii) If after the Termination Date the Trustee continues to receive funds in respect of revenues from the operation of the Project for deposit into the Project Trust Fund but has not received a Certificate of Developer or Certificate of TxDOT pursuant to which the Post-Termination Revenue Account is to be established under Section 2.02(f), then the Trustee shall deposit such funds received after the Termination Date into the Toll Revenue Account to be held for distribution pursuant to Section 2.03(b)(ii).

(c) Toll Operator Dispute Account.

(i) Upon Trustee’s receipt of a written request from Developer, together with (A) a copy, certified by Developer to be true and complete, of a notice from Developer to the Toll Operator stating that Developer disputes an amount included in a Toll Operator invoice in respect of fees and charges for services rendered, and (B) a Certificate of Developer that the Toll Operator disagrees with Developer as to the amount in dispute in whole or in part and setting forth specifically the amount in dispute (with respect to each such disputed amount, a “Developer Dispute Certificate”), the Trustee shall establish within the Project Trust Fund a trust account designated the “Toll Operator Dispute Account.” The Trustee shall make a deposit to the Toll Operator Dispute Account in an amount equal to 105% of the amount in dispute either from (I) amounts received from Developer, or (II) if Developer has not made the required deposit in the amount specified in the Developer Dispute Certificate and the Toll Operator delivers a Certificate of Toll Operator to the Trustee stating that Toll Operator is permitted under the Tolling Services Agreement to direct the Trustee to make such deposit from the Toll Revenue Account to the Toll Operator Dispute Account until the amount on deposit therein (without regard to deposits for other disputed amounts) equals the disputed amount specified in Developer Dispute Certificate.



(ii) Upon Trustee's receipt of a written request from the Toll Operator, together with (a) a copy, certified by the Toll Operator to be true and complete, of a notice from the Toll Operator to Developer stating that the Toll Operator disputes an amount Developer claims is due in respect of tolls collected or to be collected by the Toll Operator pursuant to the Tolling Services Agreement, and (b) a Certificate of Toll Operator stating that Developer disagrees with the Toll Operator as to the amount in dispute in whole or in part and setting forth specifically the amount in dispute and stating that the Toll Operator is permitted under the Tolling Services Agreement to direct the Trustee to make such deposit (with respect to each such disputed amount, a "Toll Operator Dispute Certificate"), the Trustee shall establish within the Project Trust Fund a trust account designated the "Toll Operator Dispute Account." The Trustee shall make a deposit to the Toll Operator Dispute Account in an amount equal to the amount in dispute either from amounts received from Developer or the Toll Operator so long as the Person delivering such funds delivers to the Trustee a Certificate of Developer or a Certificate of Toll Operator stating that the funds for deposit into the Toll Operator Dispute Account are not Toll Revenues.

(d) Developer Claims Account. Upon Trustee's receipt of a written request from Developer, together with (a) a copy, certified by Developer to be true and complete, of a notice from Developer to TxDOT stating that Developer has asserted a Claim against TxDOT and (b) a Certificate of Developer that TxDOT disputes the Claim in whole or in part and setting forth specifically the amount of the Claim in dispute (with respect to each such disputed Claim, a "Developer Claim Certificate"), the Trustee shall establish within the Project Trust Fund a trust account designated the "Developer Claims Account" and thereafter the Trustee shall make deposits from the Toll Revenue Account to the Developer Claims Account as provided in Section 2.03(b)(i) hereof or, if applicable, from the TxDOT Revenue Payment Account to Developer Claims Account as provided in Section 2.03(i) hereof. For all funds on deposit in Developer Claims Account, Developer shall be entitled to a credit in such amount against the amounts payable to TxDOT as the TxDOT Revenue Payment Amount while such funds are on deposit in Developer Claims Account.

(e) TxDOT Claims Account. Upon Trustee's receipt of a written request from TxDOT together with (a) a copy, certified by TxDOT to be true and complete, of a notice from TxDOT to Developer stating that TxDOT has asserted a Claim against Developer and (b) a Certificate of TxDOT that Developer disputes the Claim in whole or in part and setting forth specifically the amount of the Claim in dispute (with respect to each such disputed Claim, a "TxDOT Claim Certificate"), the Trustee shall establish within the Project Trust Fund a trust account designated the "TxDOT Claims Account," and thereafter the Trustee shall make deposits (i) from the Toll Revenue Account to the TxDOT Claims Account as provided in Section 2.03(b)(i) hereof, (ii) if applicable, from the TxDOT Revenue Payment Account to the TxDOT Claims Account as provided in Section 2.03(i)(iii) or (iii) to the TxDOT Claims Account of amounts TxDOT delivers to the Trustee for deposit therein pursuant to Part F.2 of Exhibit 23 of the CDA.

(f) Post-Termination Revenue Account. If the Termination Date has occurred and the Trustee receives a Certificate of Developer or Certificate of TxDOT that there is an outstanding unpaid amount owing from TxDOT to Developer (other than that set forth in Section 2.02(g) hereof), or an outstanding unsatisfied Claim for sums owing from TxDOT to Developer (other than that set forth in Section 2.02(i) hereof), then the Trustee shall establish within the Project Trust Fund a trust account designated as the "Post-Termination Revenue Account". In such event, the Trustee shall also establish, at TxDOT's request, sub-accounts

of the Post-Termination Revenue Account for allocation of reasonable reserves for costs of reconstruction, rehabilitation, renewal and replacement of the Project as set forth in a Certificate of TxDOT delivered to Trustee and Developer. After the Termination Date and receipt of such Certificate of Developer or Certificate of TxDOT, the Trustee shall deposit in the Post-Termination Revenue Account all funds received by the Trustee in respect of revenues from the operation of the Project, until such account is terminated pursuant to Section 2.03(j) hereof. Notwithstanding the foregoing, if the Trustee receives (i) Joint Instructions stating that funds received after the Termination Date are on account of Transactions occurring prior to the Termination Date, and stating the amount of such funds, or (ii) a Certificate of Developer or Certificate of TxDOT stating that a Final Decision has been rendered that funds received after the Termination Date are on account of Transactions occurring prior to the Termination Date, and stating the amount of such funds as set forth in the Final Decision, then the Trustee shall deposit such funds into the Toll Revenue Account (or, if such funds were previously received and deposited into the Post-Termination Revenue Account, transfer such funds from the Post-Termination Revenue Account to the Toll Revenue Account) for disbursement pursuant to Section 2.03(b)(i).

(g) Post-Termination Work Account. On the Termination Date, the Trustee shall establish within the Project Trust Fund a trust account designated the “Post-Termination Work Account,” and thereafter the Trustee shall deposit all funds delivered to the Trustee by TxDOT for deposit into the Post-Termination Work Account. Pursuant to Section G of Exhibit 23 of the CDA, TxDOT is required to deposit in the Post-Termination Work Account an amount equal to TxDOT’s reasonable estimate of the costs Developer will incur to perform and complete its post-termination obligations under Section 19.5 of the CDA.

(h) TxDOT Revenue Payment Account. Commencing on the Early Deposit Date, the Trustee shall establish within the Project Trust Fund a trust account designated the “TxDOT Revenue Payment Account,” and thereafter the Trustee shall deposit in the TxDOT Revenue Payment Account all transfers of the calculated daily accrued TxDOT Revenue Payment Amount from the Toll Revenue Account on each Daily Disbursement Date pursuant to Section 2.05 hereof.

(i) Post-Termination Developer Claims Account. Upon the Trustee’s receipt of a written request from Developer, together with (a) a copy, certified by Developer to be true and complete, of a notice from Developer to TxDOT stating that Developer has asserted a Claim against TxDOT payable out of the Post-Termination Revenue Account and (b) a Certificate of Developer that TxDOT disputes the Claim in whole or in part and setting forth specifically the amount of the Claim in dispute (with respect to each such disputed Claim, a “Post-Termination Developer Claim Certificate”), the Trustee shall establish within the Project Trust Fund a trust account designated the “Post-Termination Developer Claims Account,” and thereafter the Trustee shall make deposits from the Post-Termination Revenue Account to the Post-Termination Developer Claims Account as provided in Section 2.03(f)(v) hereof.

**Section 2.03 Withdrawal of Funds from the Accounts.**

(a) ***Reserved.***

(b) Withdrawal of Funds in the Toll Revenue Account.

(i) On each Daily Disbursement Date until the Termination Date, the Trustee shall withdraw all funds on deposit in the Toll Revenue Account and make the following payments in the following order of priority:

(A) if on or before such date the Trustee has received the documentation required under Section 2.02(d) from Developer with respect to any disputed Claim by Developer against TxDOT, for transfer to Developer Claims Account an amount not to exceed TxDOT's Daily Revenue Payment Amount certified to the Trustee in a Certificate of Developer and calculated as set forth in Section 2.05 hereof, until the amount so accumulated in Developer Claims Account equals the amount of the disputed portion of Developer Claim specified in Developer Claim Certificate. The Trustee acknowledges, however, that TxDOT may apply, through the Dispute Resolution Procedures, for limitations on the cumulative amount to be transferred pursuant to this clause (A) into Developer Claims Account, and the Trustee agrees to adhere to any order or decision of the Disputes Board (even if not a Final Decision) regarding any such limit following receipt of a Certificate of TxDOT that such an order by the Disputes Board has been entered, together with a copy of such order or decision;

(B) if on or before such date the Trustee has received the documentation required under Section 2.02(e) from TxDOT with respect to any disputed Claim by TxDOT against Developer, for transfer to the TxDOT Claims Account an amount not to exceed TxDOT's Daily Revenue Payment Amount certified to the Trustee in a Certificate of Developer and calculated as set forth in Section 2.05 hereof; until the amount so accumulated in the TxDOT Claims Account equals the amount of the disputed portion of the TxDOT Claim, or any lesser amount, specified in the TxDOT Claims Certificate. The Trustee acknowledges, however, that Developer may apply, through the Dispute Resolution Procedures, for limitations on the cumulative amount to be transferred pursuant to this clause (B) into the TxDOT Claims Account, and the Trustee shall adhere to any order or decision of the Disputes Board (even if not a Final Decision) regarding any such limit following receipt of a Certificate of Developer that such an order by the Disputes Board has been entered, together with a copy of such order or decision; and provided, further that Developer acknowledges that no such transfer of funds to the TxDOT Claims Account from the Toll Revenue Account shall affect or reduce Developer's continuing obligation to pay TxDOT its TxDOT Revenue Payment Amount under Exhibit 7 of the CDA. If Developer for any reason fails to deliver a Certificate of Developer as and when required under this clause (B), TxDOT shall have the right to deliver, and the Trustee shall rely upon, a TxDOT Certificate;

(C) if the Trustee has received the Certificate of Toll Operator as provided in Section 2.02(c)(i), for transfer to the Toll Operator Dispute Account an amount equal to the disputed portion of Developer's claim as set forth in Developer Dispute Certificate;

(D) if such Daily Disbursement Date is a Business Day on or after the Early Deposit Date, for transfer to the TxDOT Revenue Payment Account an amount

equal to TxDOT's Daily Revenue Payment Amount certified in a Certificate of Developer and calculated as set forth in Section 2.05 hereof. If Developer for any reason fails to deliver a Certificate of Developer as and when required under this clause (D), TxDOT shall have the right to deliver, and the Trustee shall rely upon, a TxDOT Certificate; and

(E) for payment to Developer (to such account as Developer designates in writing to the Trustee) or as otherwise required by the Collateral Agent during a Project Debt Default Period.

(ii) If after the Termination Date the Trustee continues to receive funds in respect of revenues from the operation of the Project for deposit into the Project Trust Fund but has not received a Certificate of Developer or Certificate of TxDOT pursuant to which the Post-Termination Revenue Account is to be established under Section 2.02(f), then the Trustee shall not thereafter make any payment under Section 2.03(b)(i) from funds received into the Toll Revenue Account after such "Termination Date". Instead, the Trustee shall transfer or disburse such funds only in accordance with (A) Joint Instructions stating that funds received after the Termination Date are on account of Transactions occurring prior to the Termination Date, and stating the amount of such funds, or a Certificate of Developer or Certificate of TxDOT stating that a Final Decision has been rendered that funds received after the Termination Date are on account of Transactions occurring prior to the Termination Date, and stating the amount of such funds as set forth in the Final Decision (and in either case the Trustee shall disburse such funds pursuant to Section 2.03(b)(i)), (B) Joint Instructions or (C) a Final Decision Certificate. If the Trustee thereafter establishes the Post-Termination Revenue Account pursuant to Section 2.02(f), the Trustee shall transfer such funds, other than those previously transferred or disbursed pursuant to the previous sentence, to the Post-Termination Revenue Account.

(iii) If Joint Instructions setting forth the Termination Date or the Final Termination Certificate is delivered to the Trustee on a date that is later than the Termination Date indicated in the Joint Instructions or Final Termination Certificate, then the Joint Instructions or Final Termination Certificate, as applicable, also shall instruct the Trustee on the amount in the Toll Revenue Account to withdraw and transfer either to TxDOT or to the Post-Termination Revenue Account.

(iv) With respect to funds subject to Section 2.03(b)(i), on the first Daily Disbursement Date after the Termination Date, the Trustee shall make a final disbursement of such funds from the Toll Revenue Account pursuant to Sections 2.03(b)(i) (subject to any subsequent disbursements pursuant to Section 2.03(b)(i) as provided in Sections 2.02(f) and 2.03(b)(ii)). With respect to funds subject to Section 2.03(b)(ii), the Trustee shall make a final disbursement of such funds from the Toll Revenue Account pursuant to Joint Instructions or a Final Decision Certificate. Thereupon, the Trustee shall close the Toll Revenue Account.

(c) Use and Withdrawal of Funds in the Toll Operator Dispute Account.

(i) Upon the Trustee's receipt of a Developer/Toll Operator Dispute Final Decision Certificate setting forth amounts owed to the Toll Operator, if any, with respect to a Claim described in a Developer Dispute Certificate delivered pursuant to Section 2.02(c)(i), the Trustee shall (A) first, withdraw funds in the Toll Operator Dispute Account in an amount up to the lesser of (I) Developer/Toll Operator Dispute Final Decision

Amount, including any late charges and interest, and (II) the amounts deposited into the Toll Operator Dispute Account with respect to such Claim plus any interest earnings thereon, and pay such funds to the Toll Operator, and (B) second, pay any amount deposited to the Toll Operator Dispute Account relating to such Claim in excess of Developer/Toll Operator Dispute Final Decision Amount to Developer, together with any interest earnings in the Toll Operator Dispute Account attributable to the excess funds so released to Developer.

(ii) Upon the Trustee's receipt of a Developer/Toll Operator Dispute Final Decision Certificate setting forth amounts owed to Developer, if any, with respect to a Claim described in a Toll Operator Dispute Certificate, the Trustee shall (A) first, withdraw funds in Developer/Toll Operator Dispute Account in an amount up to the lesser of (I) Developer/Toll Operator Dispute Final Decision Amount, including any late charges and interest, and (II) the amounts deposited into the Toll Operator Dispute Account with respect to such Claim plus any interest earnings thereon, and pay such funds to Developer, and (B) second, pay any amount deposited to the Toll Operator Dispute Account relating to such Claim in excess of Developer/Toll Operator Dispute Final Decision Amount to the Toll Operator, together with any interest earnings in the Toll Operator Dispute Account attributable to the excess funds so released to the Toll Operator.

(d) Use and Withdrawal of Amounts in Developer Claims Account. Upon the Trustee's receipt of a Developer Claim Final Decision Certificate, the Trustee shall (i) first, withdraw funds in Developer Claims Account in an amount up to Developer Claim Final Decision Amount, plus all earnings received on such amount prior to such date, and pay such funds to Developer (or as otherwise required by the Collateral Agent during a Project Debt Default Period), and (ii) second, provided at such time there remains no other disputed Claim of Developer for which funds have been deposited into Developer Claims Account, withdraw the balance of funds remaining in Developer Claims Account and pay such funds to TxDOT for credit toward the TxDOT Revenue Payment Amount, unless at such time the Trustee is in receipt of a Certificate of TxDOT or Certificate of Developer stating that no Revenue Payment Amount is then due and payable to TxDOT, in which case the Trustee shall transfer such funds to the Toll Revenue Account. Upon the Trustee's receipt of Joint Instructions regarding final settlement of a disputed Claim of Developer for which funds have been deposited in Developer Claims Account, the Trustee shall (i) first, withdraw funds in Developer Claims Account in an amount up to the settlement amount payable to Developer specified in such Joint Instructions, plus all earnings received on such amount prior to such date, and pay such funds to Developer (or as otherwise required by the Collateral Agent during a Project Debt Default Period), and (ii) second, provided at such time there remains no other disputed Claim of Developer for which funds have been deposited into Developer Claims Account, withdraw the balance of funds remaining in Developer Claims Account and pay such funds to TxDOT for credit toward the TxDOT Revenue Payment Amount, unless at such time the Trustee is in receipt of a Certificate of TxDOT or Certificate of Developer stating that no Revenue Payment Amount is then due and payable to TxDOT, in which case the Trustee shall transfer such funds to the Toll Revenue Account. All funds so paid to Developer (or as otherwise required by the Collateral Agent during a Project Debt Default Period) or to TxDOT in accordance with the preceding two sentences shall be a credit toward any amounts payable by Developer to TxDOT under the CDA as the TxDOT Revenue Payment Amount. To the extent any funds are on deposit in Developer Claims Account, Developer waives any other right of offset it may have with respect to the Claim for which such funds were transferred into Developer Claims Account; provided however, that the foregoing does not limit or reduce any credits that

Developer is entitled to against amounts payable by Developer to TxDOT as the TxDOT Revenue Payment Amount as provided in Section 2.02(d) or this Section 2.03(d). In lieu of any transfer of funds from the Toll Revenue Account to Developer Claims Account as contemplated by Section 2.03(b)(i), or at any time thereafter while funds remain in Developer Claims Account, Developer may elect at any time after it asserts its Claim, by written notice to TxDOT and the Trustee, to waive any right to offset such Claim with TxDOT Revenue Payment Amounts accruing in favor of TxDOT. In such event, the Trustee shall transfer to Developer (or as otherwise required by the Collateral Agent during a Project Debt Default Period) any funds accumulated in Developer Claims Account by reason of such Claim in accordance with Developer's (or if applicable the Collateral Agent's) written instructions, but in such event Developer shall no longer be entitled to offset TxDOT Revenue Payment Amounts by such Claim. The Trustee shall give written notice to TxDOT, Developer and the Collateral Agent once the amount deposited in Developer Claims Account equals the disputed portion of the Claim.

(e) Use and Withdrawal of Amounts in TxDOT Claims Account. Upon the Trustee's receipt of a TxDOT Claim Final Decision Certificate, the Trustee shall (i) first, withdraw funds in the TxDOT Claims Account in an amount up to the TxDOT Claim Final Decision Amount, plus all earnings received on such amount prior to such date, and pay such funds to TxDOT, and (ii) second, provided at such time there remains no other disputed Claim of TxDOT for which funds have been deposited into the TxDOT Claims Account, withdraw the balance of funds remaining in the TxDOT Claims Account and transfer such funds to the Toll Revenue Account. Upon the Trustee's receipt of Joint Instructions regarding final settlement of a disputed Claim of TxDOT for which funds have been deposited in the TxDOT Claims Account, the Trustee shall (i) first, withdraw funds in the TxDOT Claims Account in an amount up to the settlement amount payable to TxDOT specified in such Joint Instructions, plus all earnings received on such amount prior to such date, and pay such funds to TxDOT, and (ii) second, provided at such time there remains no other disputed Claim of TxDOT for which funds have been deposited into the TxDOT Claims Account, withdraw the balance of funds remaining in the TxDOT Claims Account and pay such funds to the Toll Revenue Account.

(f) Use and Withdrawal of Amounts in the Post-Termination Revenue Account. Not more frequently than once each calendar week, TxDOT may deliver to the Trustee a Certificate of TxDOT setting forth the amount of TxDOT's reasonable and documented operating and maintenance costs and expenses incurred respecting the Project since the last Certificate of TxDOT delivered under this Section 2.03(f). Within one Business Day after receipt of each such Certificate of TxDOT, the Trustee shall withdraw funds from the Post-Termination Revenue Account and make payment to TxDOT of the amount set forth in such Certificate of TxDOT. In addition, on each Monthly Disbursement Date, the Trustee shall withdraw funds from the Post-Termination Revenue Account and make the following payments in the following order of priority:

(i) to TxDOT an amount equal to TxDOT's reasonable and documented operating and maintenance costs and expenses respecting the Project for such month, as set forth in a Certificate of TxDOT delivered to the Trustee and Developer not less than one Business Day prior to such date, to the extent not previously paid from the Post-Termination Revenue Account;

(ii) for deposit in the sub-accounts of the Post-Termination Revenue Account established under Section 2.02(f) hereof until the reasonable reserves established for costs of reconstruction, rehabilitation, renewal and replacement of the Project have been

funded in the amounts set forth in a Certificate of TxDOT delivered to the Trustee and Developer requesting the establishment of such reserves;

(iii) to TxDOT, if amounts have previously been reserved in sub-accounts of such Post-Termination Revenue Account for such purpose, the amounts in such sub-accounts necessary to pay the reasonable documented costs of reconstruction, rehabilitation, renewal and replacement of the Project actually incurred by TxDOT, as set forth in a Certificate of TxDOT delivered to the Trustee and Developer;

(iv) to Developer (or as otherwise required by the Collateral Agent during a Project Debt Default Period) an amount equal to the undisputed amounts due to Developer under the terms of the CDA, as set forth in a Certificate of TxDOT delivered to the Trustee and Developer not less than one Business Day prior to such date, until such undisputed amounts have been paid in full to Developer (or as otherwise required by the Collateral Agent during a Project Debt Default Period); and

(v) if on or before such date the Trustee has received the documentation required under Section 2.02(i) from Developer with respect to any disputed Claim by Developer against TxDOT, for transfer to the Post-Termination Developer Claims Account the amounts remaining in the Post-Termination Revenue Account, to the extent (A) necessary to cause the aggregate amounts on deposit in the Post-Termination Developer Claims Account to equal the aggregate amount of disputed Claims described in any previously delivered Post-Termination Developer Claim Certificate and (B) such Claims have not previously been paid as contemplated by Section 2.03(g) hereof. The Trustee acknowledges, however, that TxDOT may apply, through application to a court of competent jurisdiction or, to the extent permitted under the CDA, the Disputes Board, for limitations on the cumulative amount to be transferred pursuant to this clause (v) into the Post-Termination Developer Claims Account, and the Trustee agrees to adhere to any order or decision of the court or Disputes Board (even if not a Final Decision) upon receipt of a TxDOT Certificate with respect to such order or decision together with a copy of such order or decision.

(g) Use and Withdrawal of Amounts in Post-Termination Developer Claims Account. Upon the Trustee's receipt of a Post-Termination Developer Claim Final Decision Certificate, the Trustee shall (i) first, withdraw funds in the Post-Termination Developer Claims Account in an amount up to the Post-Termination Developer Claim Final Decision Amount, plus all earnings received on such amount prior to such date, and pay such funds to Developer (or as otherwise required by the Collateral Agent during a Project Debt Default Period), and (ii) second, provided at such time there remains no other disputed Claim of Developer for which funds have been deposited into the Post-Termination Developer Claims Account, withdraw the balance of such funds in the Post-Termination Developer Claims Account and transfer such funds to TxDOT. Upon the Trustee's receipt of Joint Instructions concerning any disputed Claim of Developer for which funds have been deposited into the Post-Termination Developer Claims Account, the Trustee shall (A) first, withdraw funds in the Post-Termination Developer Claims Account in an amount up to the settlement amount payable to Developer specified in such Joint Instructions, plus all earnings received on such amount prior to such date, and pay such funds to Developer (or as otherwise required by the Collateral Agent during a Project Debt Default Period), and (B) second, provided at such time there remains no other disputed Claim of Developer for which funds have been deposited into the Post-Termination Developer Claims Account, withdraw the balance of such funds in the Post-Termination Developer Claims Account and transfer such funds to TxDOT. The Trustee

shall give written notice to TxDOT and Developer and the Collateral Agent once the amount deposited in the Post-Termination Developer Claims Account equals the disputed portion of the Claim.

(h) Use and Withdrawal of Amounts in the Post-Termination Work Account. Upon the Trustee's receipt of written notice from TxDOT that Developer has completed all its post-termination obligations under Section 19.5 of the CDA, the Trustee shall withdraw all funds on deposit in the Post-Termination Work Account and pay such funds to Developer (or as otherwise required by the Collateral Agent during a Project Debt Default Period).

(i) Use and Withdrawal of Amounts in the TxDOT Revenue Payment Account.

(i) Within 15 days after the end of the calendar year in which the Early Deposit Date occurs, Developer shall deliver to the Trustee a Certificate of Developer setting forth Developer's preliminary calculation of the TxDOT Revenue Payment Amount for the prior calendar year. Within 15 days after the scheduled expiration of the Term, Developer shall deliver to the Trustee a Certificate of Developer setting forth Developer's preliminary calculation of the TxDOT Revenue Payment Amount for the period from the immediately preceding January 1 to the scheduled expiration date. Within one Business Day after receipt of each such Certificate of Developer, the Trustee shall withdraw from the TxDOT Revenue Payment Account and pay to TxDOT the amount shown in the Certificate of Developer together with any interest earnings thereon.

(ii) Within 90 days after the end of the calendar year in which the Early Deposit Date occurs, Developer shall deliver to the Trustee a Certificate of Developer setting forth Developer's final calculation of the TxDOT Revenue Payment Amount for the prior calendar year and the additional TxDOT Revenue Payment Amount to be paid, if any. Within 90 days after the end of the scheduled expiration of the Term, Developer shall deliver to the Trustee a Certificate of Developer setting forth Developer's final calculation of the TxDOT Revenue Payment Amount for the period from the immediately preceding January 1 to the scheduled expiration date, and the additional Revenue Payment Amount to be paid, if any. Within one Business Day after receipt of each such Certificate of Developer, the Trustee shall withdraw from the TxDOT Revenue Payment Account and pay to TxDOT the amount, if any, shown in the Certificate of Developer together with any interest earnings thereon.

(iii) If at any time after either 90-day period set forth in clause (ii) above the Trustee receives a TxDOT Claim Certificate setting forth a Claim that Developer has not paid the full amount due for the TxDOT Revenue Payment Amount and the amount of the Claim, then the Trustee shall transfer from the TxDOT Revenue Payment Account into the TxDOT Claims Account available funds up to the amount of the Claim. If at any time prior to withdrawal of funds as set forth in clause (i) or (ii) above the Trustee receives a Developer Claim Certificate setting forth a Claim and the amount of the Claim, then the Trustee shall transfer from the TxDOT Revenue Payment Account into Developer Claims Account available funds in the TxDOT Revenue Payment Account up to the amount of the Claim.

(iv) Upon the Trustee's receipt of a Final Decision Certificate or Joint Instructions setting forth the final calculation of the TxDOT Revenue Payment Amount, the Trustee shall withdraw all funds on deposit in the TxDOT Revenue Payment



Account, including any interest earnings thereon, and make the following payments in the following order of priority:

(A) \_\_\_\_\_ to TxDOT, an amount equal to the TxDOT Revenue Payment Amount set forth in such Final Decision Certificate or Joint Instructions; and

(B) \_\_\_\_\_ to Developer (or as otherwise required by the Collateral Agent during a Project Debt Default Period), the remaining balance in the TxDOT Revenue Payment Account.

(v) All payments to TxDOT of the Revenue Payment Amount from the TxDOT Revenue Payment Account as provided in this Section 2.03(i) shall be a credit against Developer's obligation to pay the Revenue Payment Amount as required under the CDA.

(j) Use and Withdrawal of Remaining Funds in Project Trust Accounts. Upon the Trustee's receipt of a Certificate of Developer (which must be approved in writing by the Collateral Agent unless the Project Debt has been repaid in full and the Trustee has received prior notice of such repayment from the Collateral Agent) stating that all amounts payable to Developer and TxDOT under the CDA following the Termination Date have been paid in full to Developer and TxDOT, respectively, or a Certificate of TxDOT stating that all amounts payable to Developer and TxDOT under the CDA following the Termination Date have been paid in full to Developer and TxDOT, respectively, then in such event (i) the Trustee shall deliver a copy of any such Certificate of Developer to TxDOT, and a copy of any such Certificate of TxDOT to Developer, and (ii) except as provided below, on the date which is 30 days after the date on which the Trustee has delivered any such copy of such Certificate to Developer or TxDOT, as applicable, (the "Scheduled Final Distribution Date"), the Trustee shall withdraw all remaining funds on deposit in the Project Trust Accounts and shall pay such funds to TxDOT, whereupon any interests of Developer or the Collateral Agent in such funds shall terminate. If, however, the Trustee receives a Certificate of Developer or a Certificate of TxDOT prior to the Scheduled Final Distribution Date stating that all amounts payable to Developer or TxDOT, as the case may be, under the CDA following the Termination Date have not been paid in full to Developer or TxDOT, as the case may be, then in such event funds shall remain on deposit in the Project Trust Accounts, subject to all of the terms of this Project Trust Agreement, until such time as the Trustee receives a Final Decision Certificate or Joint Instructions, in either case regarding final settlement of the amounts payable to Developer and to TxDOT, respectively. Upon receipt thereof, the Trustee shall withdraw all remaining funds on deposit in the Project Trust Accounts and (A) first pay the amounts payable to Developer and TxDOT respectively, in accordance with the terms of such Final Decision Certificate or Joint Instructions, and (B) second remit the balance of such funds to TxDOT, whereupon any interests of Developer or the Collateral Agent in such funds shall terminate.

## **Section 2.04 Security Interests.**

(a) Security Interest of Collateral Agent. The Trustee acknowledges that pursuant to the terms of the Financing Documents, Developer will grant to the Collateral Agent for the benefit of holders of the Project Debt a first priority security interest in any right, title and interest of Developer under the CDA and all funds held in the Project Trust Accounts within the Project Trust Fund as provided in this Project Trust Agreement, but in each case always subject to the terms and conditions of this Project Trust Agreement and the rights of TxDOT

and the Toll Operator as beneficiaries hereof, including the rights described herein of TxDOT to deliver Certificates of TxDOT and the rights of the Toll Operator to deliver a Certificate of Toll Operator. The Trustee agrees that for purposes of perfecting any such security interest of the Collateral Agent as it relates to the Project Trust Accounts and funds or investments held therein, the Trustee has confirmed the matters set forth in Section 2.04(d) below. The Trustee further agrees that it shall execute such other documents as may reasonably be requested by the Collateral Agent in order to give the Collateral Agent control over any rights of Developer hereunder and in connection with the Project Trust Accounts under the Texas UCC, subject only to the express rights of TxDOT and the Toll Operator as beneficiaries hereof, including the rights described herein of TxDOT to deliver Certificates of TxDOT and the rights of the Toll Operator to deliver Certificates of Toll Operator; provided, however, that each of Developer and the Trustee expressly agrees and understands that no rights of control shall be given to the Collateral Agent that would provide to the Collateral Agent any greater rights than Developer itself would have to direct any disposition of funds held by the Trustee hereunder or that would otherwise conflict with the express terms and conditions of deposits into, and disbursements from, the Project Trust Accounts or otherwise in connection with the Project Trust Fund. TxDOT shall be entitled to receive a copy of any such other document.

(b) Security Interests of Developer. The Trustee acknowledges that pursuant to the terms of the Project Trust and Security Instruments, TxDOT has granted or will grant to Developer, in order to secure certain obligations of TxDOT described in the CDA, a security interest in any right, title and interest of TxDOT in the Post-Termination Revenue Account and all funds deposited therein, together with any earnings thereon (hereinafter called the "Developer Account Collateral"), excluding, however, the right, title and interest of TxDOT in funds in the Post-Termination Revenue Account used or needed or to be used or needed for payment of the amounts set forth in this Sections 2.03(f)(i), (ii) and (iii). The Trustee agrees that for purposes of perfecting any such security interest of Developer in Developer Account Collateral under the Texas UCC, the Trustee has confirmed the matters set forth in Section 2.04(d) below.

(c) No Other Security Interests. The Trustee hereby confirms that it has no knowledge that either Developer or TxDOT has created or suffered to exist any pledge or assignment of, lien on, or security interest in funds held by the Trustee at any time under this Project Trust Agreement (other than the security interests contemplated by Sections 2.04(a) and (b) in favor of the Collateral Agent or Developer) and that if the Trustee at any time receives any notice from any Person regarding any claim to the funds held by the Trustee under this Project Trust Agreement, the Trustee will promptly notify Developer and TxDOT and the Collateral Agent of such claim.

(d) Perfection of Security Interests by Control. The Trustee hereby represents and warrants and covenants the following in respect of the Project Trust Accounts, and each of Developer and TxDOT consents thereto:

(i) Role as Securities Intermediary. The Trustee is acting as securities intermediary (as defined in Section 8.102 of the Texas UCC) in connection with the Project Trust Accounts.

(ii) Establishment and Maintenance of Securities Accounts. Each Project Trust Account has been, or will be when required, established in the manner contemplated by this Project Trust Agreement and will be a "securities account" as defined in Section 8.501 of the Texas UCC.

(iii) Financial Assets. Each item of property (whether investment property, financial asset, security, instrument, cash or other property) credited to any Project Trust Account shall be treated as a “financial asset” within the meaning of Sections 8.102(a)(9) and 8.103 of the Texas UCC, and all such financial assets (except cash) credited to any Project Trust Account will be registered in the name of the Trustee, indorsed to the Trustee or in blank or credited to another securities account maintained in the name of the Trustee and in no case will any financial asset credited to any Project Trust Account be registered in the name of Developer or TxDOT, payable to the order of Developer or TxDOT, or specially indorsed to Developer or TxDOT unless such financial asset has been further indorsed to the Trustee or in blank.

(iv) Jurisdiction of Trustee as Securities Intermediary. For purposes of Section 8.110(e) of the Texas UCC, the jurisdiction of the Trustee, in its capacity as securities intermediary in respect of the Project Trust Accounts, is the State of Texas.

(v) Entitlement Holders. The sole entitlement holder for each Project Trust Account shall be Developer, provided that in exercising any rights as entitlement holder, Developer (and the Collateral Agent, at any time during a Project Debt Default Period) shall be limited by the rights specifically granted to TxDOT and the Toll Operator as beneficiaries hereof, including the rights described herein of TxDOT to deliver Certificates of TxDOT and the rights of the Toll Operator to deliver Certificates of Toll Operator.

(vi) Entitlement Orders Generally. The Trustee shall promptly make the deposits, withdrawals, and payments contemplated to be made into or from the Project Trust Accounts. For purposes of this Project Trust Agreement, the Trustee shall treat each Certificate of Developer and Certificate of TxDOT contemplated hereby as an entitlement order relative to the Project Trust Accounts so long as such Certificate of Developer and Certificate of TxDOT is expressly contemplated by this Project Trust Agreement, and shall be entitled to rely on such entitlement orders in order to effect the payments to be made respectively, to TxDOT and Developer (or the Collateral Agent while any Project Debt Default Period is in effect).

(vii) Collateral Agent Instructions. Prior to the Trustee's receipt of a Project Debt Default Notice from the Collateral Agent, the Trustee shall be entitled to make any payments contemplated to be made to Developer in accordance with the instructions received by the Trustee from Developer. At any time after the Trustee's receipt of a Project Debt Default Notice and during a Project Debt Default Period, the Trustee shall (A) make any payments otherwise to be made to Developer as instructed by the Collateral Agent, and (B) any Certificate of Developer contemplated hereby shall be approved in writing by the Collateral Agent prior to its delivery to the Trustee, or may be delivered by the Collateral Agent to the Trustee on behalf of Developer. During any Project Debt Default Period, the Trustee agrees to comply with any “entitlement order” (as defined in Section 8-102 of the UCC) originated hereunder by the Collateral Agent in respect of any Project Trust Account to the extent Developer would otherwise be entitled to give such entitlement order in the manner specified above or any financial asset credited thereto without further consent by Developer, TxDOT or any other person or entity.

**Section 2.05** Calculation of Daily Revenue Payment Amount.

(a) For purposes of the certifications Developer is to deliver to the Trustee pursuant to Sections 2.03(b)(i)(A) and (D) hereof, Developer agrees that it shall calculate TxDOT's "Daily Revenue Payment Amount" in the same manner as calculations of the TxDOT Revenue Payment Amount are made pursuant to Exhibit 7 of the CDA, except that such compensation shall be calculated for each applicable day on the basis of the balance in the Toll Revenue Account as of the opening of business on the Business Day of such calculation based on the Trustee's confirmation thereof on such day, less (i) the aggregate amount of funds, if any, transferred from Developer Claims Account and the TxDOT Claims Account and deposited into the Toll Revenue Account on or after the immediately preceding Daily Distribution Date, and (ii) any credits provided for under Section 2.02(d) hereof

(b) For purposes of the certifications Developer is to deliver to the Trustee pursuant to Section 2.03(b)(i)(B) hereof, Developer agrees that it shall calculate TxDOT's "Daily Revenue Payment Amount" as follows:

(i) During any period that there is no outstanding TxDOT Certificate delivered to Developer and the Trustee as described in subsection (b)(ii) below, Developer shall calculate TxDOT's Daily Revenue Payment Amount as set forth in subsection (a) above; and

(ii) During any period that TxDOT has delivered to Developer and the Trustee a TxDOT Certificate stating that Developer has failed to deliver a letter of credit on the terms and within the time required under Section 17.3.5.3(b) of the CDA, Developer shall calculate TxDOT's Daily Revenue Payment Amount so that it equals 5% of the gross Toll Revenues deposited to the Toll Revenue Account during the immediately preceding day based on the Trustee's confirmation thereof.

**ARTICLE III.**

**COVENANTS**

**Section 3.01 Accounting Records and Statements.**

The Trustee will keep proper accounting records in which complete and correct entries shall be made of all transactions made by it relating to the receipt, deposit and disbursement of funds into the Project Trust Fund, and any other funds received by Trustee hereunder and such accounting records shall be available for inspection by TxDOT, Developer or the Collateral Agent or their respective agents duly authorized in writing on any Business Day upon reasonable notice at reasonable hours and under reasonable conditions prescribed by the Trustee. Not later than the fifteenth day of each month commencing [ ] 15, 2008, the Trustee will furnish to TxDOT, Developer and the Collateral Agent a statement covering all receipts of the Trustee for deposit into the Project Trust Fund and all transfers from and into the Project Trust Accounts and disbursements from the Project Trust Accounts for the preceding month.

## **ARTICLE IV.**

### **DEFAULT AND LIMITATIONS OF LIABILITY**

#### **Section 4.01 Events of Default.**

Each of the following events by Developer, TxDOT or the Toll Operator shall constitute Events of Default by such party for purposed of this Project Trust Agreement:

- (a) Such party delivers a false or incorrect notice or certificate to the Trustee; or
- (b) Such party defaults in the performance of any of the other agreements or covenants contained in this Project Trust Agreement required to be performed by it, and such default shall have continued for a period of 30 days after such party shall have been given notice in writing of such default by TxDOT, Developer, the Trustee or the Collateral Agent.

#### **Section 4.02 Remedies.**

Upon the occurrence of an Event of Default, the Trustee may (following notice given in writing to TxDOT, Developer, the Collateral Agent and, if applicable, the Toll Operator), and TxDOT may (following notice given in writing to the Trustee, Developer, the Collateral Agent and, if applicable, the Toll Operator), and Developer may (following notice given in writing to the Trustee, TxDOT, the Collateral Agent and, if applicable, the Toll Operator), and the Collateral Agent may (following notice given in writing to the Trustee, TxDOT, Developer and, if applicable, the Toll Operator) and with respect only to the provisions hereof relating to the Toll Operator Dispute Account, the Toll Operator may (following notice given in writing to the Trustee, TxDOT, Developer and the Collateral Agent) by mandamus or other action or proceeding or suit at law or in equity enforce its rights under this Project Trust Agreement. Notwithstanding the foregoing, each of TxDOT's and Developer's legal remedies hereunder are subject to the applicable Dispute Resolution Procedures specified in Section 17.8.1 of the CDA, except as provided otherwise in Section 17.8.1.1(b) of the CDA.

#### **Section 4.03 Non-Waiver.**

A waiver of any default or breach of duty or contract by the Trustee or TxDOT or Developer shall not affect any subsequent default or breach of duty or contract or impair any rights or remedies on any such subsequent default or breach of duty or contract. No delay or omission by the Trustee or TxDOT or Developer or the Toll Operator to exercise any right or remedy accruing upon any default or breach of duty or contract shall impair any such right or shall be construed to be a waiver of any such default or breach of duty or contract or an acquiescence therein, and every right or remedy conferred upon the Trustee or TxDOT or Developer or the Toll Operator by law or by this article may be enforced and exercised from time to time and as often as shall be deemed expedient by the Trustee or TxDOT or Developer or the Toll Operator. If any action, proceeding or suit to enforce any right or to exercise any remedy is abandoned or determined adversely to the Trustee or TxDOT or Developer or the Toll Operator, then the Trustee, the Collateral Agent, TxDOT, Developer and the Toll Operator shall be restored to their former positions, rights and remedies as if such action, proceeding or suit had not been brought or taken.

#### **Section 4.04 Remedies Not Exclusive.**

No remedy herein conferred upon or reserved to the Trustee, TxDOT, Developer or the Toll Operator hereunder is intended to be exclusive of any other remedy, and each such remedy shall be cumulative and shall be in addition to every other remedy given hereunder or now or hereafter existing in law or in equity or by statute or otherwise and may be exercised without exhausting and without regard to any other remedy conferred by any law.

#### **Section 4.05 No Liability by the Trustee.**

The Trustee will have no obligation or liability to any Person with respect to the performance by Developer or TxDOT of any agreements and covenants required to be performed by Developer or TxDOT contained in the CDA or herein or by Developer or the Toll Operator of any agreements and covenants required to be performed by Developer or the Tolling Operator under a Tolling Services Agreement.

### **ARTICLE V.**

#### **THE TRUSTEE**

#### **Section 5.01 Trustee; Duties, Removal and Resignation.**

(a) By executing and delivering this Project Trust Agreement, the Trustee accepts the duties and obligations of the Trustee provided in this Project Trust Agreement, but only upon the terms and conditions set forth in this Project Trust Agreement.

(b) Developer (except during the continuance of an Event of Default by Developer) or, during any Project Debt Default Period, the Collateral Agent, may, by 30 days prior written request and subject to giving notice thereof to TxDOT and receiving the consent of TxDOT (which shall not be unreasonably withheld), remove the Trustee initially a party hereto, and any successor thereto, and in such event, or in the event the Trustee resigns, Developer shall appoint a successor Trustee approved by TxDOT, such approval not to be unreasonably withheld, delayed or conditioned, but any such successor shall be a bank or trust company in good standing doing business and having an office in Austin, Texas, having a combined capital (exclusive of borrowed capital) and surplus of at least Seventy-five Million Dollars (\$75,000,000) and subject to supervision or examination by federal or state authority. If such bank or trust company publishes a report of condition at least annually, pursuant to law or to the requirements of any supervising or examining authority above referred to, then for the purposes of this Section the combined capital and surplus of such bank or trust company shall be deemed to be its combined capital and surplus as set forth in its most recent report of conditions so published.

(c) The Trustee may at any time resign by giving written notice to TxDOT, Developer and the Collateral Agent not less than 30 days prior to the date of resignation. Upon receiving any such notice of resignation Developer shall promptly appoint a successor Trustee by an instrument in writing; provided, however, that in the event that Developer does not appoint a successor Trustee within 30 days following receipt of such notice of resignation, the resigning Trustee may petition an appropriate court having jurisdiction to appoint a successor Trustee. Any resignation or removal of the Trustee shall not become effective until written acceptance of appointment by the successor Trustee under this Project Trust

Agreement and written consent thereof given by TxDOT, such consent not to be unreasonably withheld.

(d) Any Trustee which shall resign or be removed pursuant to this Section shall be entitled to compensation due and payable in accordance with Section 5.02 and to reimbursement for all reasonable and proper expenses and advances incurred and not previously reimbursed for its activities in connection with this Project Trust Agreement and for any indemnification due pursuant to this Project Trust Agreement and not previously paid. Any Trustee which resigns or is removed, upon payment of its unpaid compensation and expenses hereunder, shall fully discharge all the right, title and interest of the retiring Trustee and the accounts and funds hereunder shall vest in said successor Trustee, and such retiring Trustee shall promptly pay over, assign and deliver to the successor Trustee any money or other property constituting part of the Project Trust Fund and any other funds and accounts then held by such Trustee, and deliver any and all records, or copies thereof, in respect of the funds and accounts held hereunder which it may have.

### **Section 5.02 Compensation of the Trustee.**

(a) In accordance with the terms of a separate agreement between Developer and Trustee, Developer shall pay from time to time, upon receipt of a statement, to the Trustee reasonable compensation for the Trustee's services and shall reimburse the Trustee for all its reasonable advances and expenditures, including but not limited to advances to and fees and expenses of independent accountants and attorneys-at-law or other experts employed by it in the exercise and performance of its powers and duties under this Project Trust Agreement, all as set forth in such separate agreement. Developer shall promptly pay such compensation and reimbursement in accordance with the terms of the separate agreement between Developer and the Trustee.

(b) Developer shall indemnify, defend, protect and hold harmless the Trustee for all costs, claims, expenses and liabilities incurred by or asserted against the Trustee in the performance of its duties under this Project Trust Agreement or any related document, including any such reasonable costs, claims, expenses and liabilities incurred in the course of defending itself against any claims or actions or enforcing any remedies under this Project Trust Agreement or any related document. Any such indemnity shall not extend to any costs, claims, expenses or liabilities adjudicated to have been caused by the negligence or willful misconduct of the Trustee or the breach of the terms of this Project Trust Agreement by Trustee. The indemnification of the Trustee under this Project Trust Agreement shall extend to its directors, officers, employees and agents. The obligations of Developer under this Section shall survive the discharge of this Project Trust Agreement and the removal or resignation of the Trustee.

### **Section 5.03 Protection to the Trustee.**

(a) Developer shall indemnify, defend, protect and hold harmless the Trustee and the Trustee shall incur no liability for acting upon any notice, resolution, consent, order, certificate, report or other paper or document contemplated hereunder and reasonably believed by it to be genuine and to have been signed or presented by the proper party or parties. The Trustee, in its discretion, may consult with counsel, who may be counsel to Developer, and the opinion or advice of such counsel, shall be full and complete authorization and protection in respect of any action taken or suffered by it under this Project Trust Agreement in good faith in accordance therewith.

(b) The Trustee, either as principal or agent, may also engage in or be interested in any financial or other transaction with TxDOT or Developer or the Collateral Agent, and may act as depository, trustee, or agent for any committee or body of TxDOT or Developer or the Collateral Agent or with respect to other obligations of TxDOT or Developer as freely as if it were not the Trustee under this Project Trust Agreement.

(c) The recitals at the beginning of this Project Trust Agreement shall be taken and construed as made by and on the part of Developer, and not by the Trustee, and the Trustee does not assume, and shall not have, any responsibility or obligation for the correctness of such recitals. The Trustee shall not be deemed to make any representations with respect to the security afforded by this Project Trust Agreement.

(d) The Trustee may execute any of the trusts or powers hereof and perform the duties required of it under this Project Trust Agreement by or through attorneys, agents, or receivers, and shall be entitled to advice of counsel concerning all matters of trust and its duty under this Project Trust Agreement.

(e) The Trustee, undertakes to perform only such duties as are specifically set forth in this Project Trust Agreement.

(f) Every provision of this Project Trust Agreement relating to the conduct or liability of the Trustee shall be subject to the provisions of this Project Trust Agreement, including without limitation, this Article.

(g) Whenever in the administration of the duties of the Trustee under this Project Trust Agreement the Trustee shall deem it necessary or desirable that a matter be proved or established prior to taking or not taking any action, the Trustee may request a signed Certificate of TxDOT or Certificate of Developer as to such matter, and such Certificate shall be full protection to the Trustee for any action taken or not taken in good faith reliance thereon.

#### **Section 5.04 Merger or Consolidation.**

Any company into which the Trustee may be merged or converted or with which it may be consolidated or any company resulting from any merger, conversion or consolidation to which it shall be a party or any company to which the Trustee may sell or transfer all or substantially all of its corporate trust business, provided that such company shall be eligible under Section 5.01 hereof, shall be the successor to the Trustee without the execution or filing of any paper or further act, anything herein to the contrary notwithstanding.

#### **Section 5.05 Waiver of Trustee Lien; Waiver of Trustee Set-off.**

The Trustee waives any security interest, lien or right to make deductions or setoffs that it may now have or hereafter acquire in or with respect to the Project Trust Accounts, any financial asset credited thereto or any security entitlement in respect thereof (except as expressly set forth in the parenthetical phrase in the immediately succeeding sentence). Neither the financial assets credited to the Project Trust Accounts nor the security entitlements in respect thereof will be subject to deduction, set-off, banker's lien, or any other right in favor of any person (except that the Trustee may set-off funds in any Project Trust Account other than a TxDOT Account, the TxDOT Claims Account and the TxDOT Revenue Payment Account to pay (a) amounts due to the Trustee pursuant to the terms of a separate agreement between the



Trustee and Developer, and (b) the face amount of any checks or ACH transactions that have been credited to any of the Project Trust Accounts but are subsequently returned unpaid or reversed because of uncollected or insufficient funds).

## **ARTICLE VI.**

### **AMENDMENT OF OR SUPPLEMENT TO PROJECT TRUST AGREEMENT**

#### **Section 6.01 Amendment or Supplement by Consent.**

No amendment of this Project Trust Agreement shall be valid or effective unless in writing signed by Developer, TxDOT and the Collateral Agent. No amendment of this Project Trust Agreement affecting provisions relating to the Toll Operator Dispute Account shall be valid or effective unless in writing and also signed by the Toll Operator. Notwithstanding the foregoing, this Project Trust Agreement and the rights and obligations provided thereby may also be modified or amended at any time without the consent of the Collateral Agent, but only (1) for the purpose of curing any ambiguity, or of curing, correcting or supplementing any defective provision contained in this Project Trust Agreement, or (2) in regard to questions arising under this Project Trust Agreement which the Trustee or Developer may deem necessary or desirable and not inconsistent with this Project Trust Agreement and which shall not materially adversely affect the interests of the Collateral Agent. Developer shall provide TxDOT with a written copy of any proposed amendment 30 days prior to its proposed effective date.

## **ARTICLE VII.**

### **TXDOT'S AND TOLL OPERATOR'S RIGHTS UNDER PROJECT TRUST AGREEMENT**

#### **Section 7.01 Rights of TxDOT and Toll Operator**

(a) Developer or the Trustee, as appropriate, shall concurrently furnish to TxDOT a copy of any notice to be given to Developer, the Trustee, the Collateral Agent or the Toll Operator, and to the Toll Operator a copy of any notice to be given to Developer, TxDOT, the Trustee or the Collateral Agent if the notice relates to the rights of the Toll Operator under this Project Trust Agreement.

(b) The Trustee, to the extent of its actual knowledge, shall notify TxDOT of any failure of Developer to provide relevant notices, certificates, or filings, and shall notify the Toll Operator of any failure of Developer to provide relevant notices, certificates or filings that relate to any rights of the Toll Operator under this Project Trust Agreement.

(c) Developer agrees, upon the direction of TxDOT, to exercise Developer's rights hereunder to remove the Trustee for any breach of trust contained in this Project Trust Agreement. Developer shall also give prior written notice to TxDOT of any removal, resignation or termination of the Trustee, and no removal, resignation or termination shall become effective until a successor Trustee is appointed in accordance with the terms hereof and accepts the trusts created under this Project Trust Agreement.

(d) Without TxDOT's prior written approval in its sole discretion, Developer shall not (i) terminate or permit a termination of this Project Trust Agreement, (ii) agree to any amendment of any provisions of this Project Trust Agreement, (iii) in any material respect

waive, or fail to enforce, any provision of this Project Trust Agreement, or (iv) oppose or interfere with TxDOT's exercise of its third party beneficiary rights under this Project Trust Agreement in accordance with this Project Trust Agreement and the CDA.

(e) At any time a Toll Services Agreement is in effect with the Toll Operator, without the Toll Operator's prior written approval in its sole discretion, Developer shall not (i) terminate or permit a termination of this Project Trust Agreement, (ii) agree to any amendment of any provisions of this Project Trust Agreement that would materially adversely affect the rights of the Toll Operator under this Project Trust Agreement., (iii) in any material respect waive, or fail to enforce, any provision of this Project Trust Agreement relating to the rights of the Toll Operator under this Project Trust Agreement, or (iv) oppose or interfere with the Toll Operator's exercise of its third party beneficiary rights under this Project Trust Agreement in accordance with this Project Trust Agreement and the Tolling Services Agreement.

### **Section 7.02 TxDOT and Toll Operator as Third-Party Beneficiaries.**

To the extent this Project Trust Agreement confers upon or gives or grants to TxDOT or the Toll Operator any right, remedy or claim under or by reason of this Project Trust Agreement, each of TxDOT and the Toll Operator is hereby explicitly recognized as being an intended, direct third-party beneficiary hereunder and may enforce any such right, remedy or claim conferred, given or granted hereunder.

### **Section 7.03 No Intended TxDOT Procurement.**

Notwithstanding the benefits afforded to TxDOT hereunder, each of Developer, the Trustee and TxDOT agree and confirm that the services of the Trustee hereunder are procured exclusively by, and for the account of, Developer and neither TxDOT nor the Toll Operator has any responsibility to pay any fees or expenses of the Trustee in connection with this Project Trust Agreement.

## **ARTICLE VIII.**

### **MISCELLANEOUS**

#### **Section 8.01 Benefits of Project Trust Agreement.**

Nothing in this Project Trust Agreement expressed or implied is intended or shall be construed to confer upon, or to give or grant to, any person or entity, other than Developer, TxDOT, the Trustee, the Toll Operator and the Collateral Agent, any right, remedy or claim under or by reason of this Project Trust Agreement or any covenant, condition or stipulation hereof, and all covenants, stipulations, promises and agreements in this Project Trust Agreement contained by and on behalf of Developer shall be for the sole and exclusive benefit of TxDOT, Developer, the Trustee, the Toll Operator and the Collateral Agent. Developer, the Trustee, the Toll Operator and TxDOT expressly recognize the Collateral Agent as a third party beneficiary of this Project Trust Agreement.

#### **Section 8.02 Successor Deemed Included in all References to Predecessor.**

Whenever Developer, TxDOT, the Trustee, the Toll Operator or any officer thereof is named or referred to herein, such reference shall be deemed to include the successor to the powers, duties and functions that are presently vested in Developer, TxDOT, the Trustee, the

Toll Operator or such officer, and all agreements, conditions, covenants and terms required hereby to be observed or performed by or on behalf of Developer, TxDOT, the Trustee, the Toll Operator or any officer thereof shall bind and inure to the benefit of the respective successors thereof whether so expressed or not.

### **Section 8.03 Content of Certificates.**

(a) Every Certificate of Developer, Certificate of TxDOT or Certificate of Toll Operator with respect to compliance with any agreement, condition, covenant or term contained herein shall include (i) a statement that the person or persons making or giving such Certificate have the authority to do so and have read such agreement, condition, covenant or term and the definitions herein relating thereto; (ii) a statement that, in the opinion of the signers they have made or caused to be made such examination or investigation as is necessary to enable them to express an informed opinion as to whether or not such agreement, condition, covenant or term has been complied with; and (iii) a statement as to whether, in the opinion of the signers, such agreement, condition, covenant or term has been complied with.

(b) Any Certificate of Developer, Certificate of TxDOT or Certificate of Toll Operator may be based, insofar as it relates to legal matters, upon an opinion of counsel unless the person making or giving such certificate knows that the opinion of counsel with respect to the matters upon which such certificate may be based, as aforesaid, is erroneous, or in the exercise of reasonable care should have known that the same was erroneous. Any opinion of counsel may be based, insofar as it relates to factual matters or information in the possession of Developer, TxDOT or the Toll Operator, upon a representation by an officer or officers of Developer, TxDOT or the Toll Operator unless the counsel executing such opinion of counsel knows that the representation with respect to the matters or upon which his opinion may be based, as aforesaid, is erroneous, or in the exercise of reasonable care should have known that the same was erroneous.

### **Section 8.04 Notices.**

All notices, demands, requests, consents, approvals and other communications required or permitted hereunder shall be in writing and mailed via registered mail (return receipt requested), telecopied (and promptly confirmed by mail or delivery) or delivered (via courier service), if to Developer at its address at \_\_\_\_\_, facsimile number \_\_\_\_\_; if to TxDOT at its address at 125 E 11<sup>th</sup> Street, Austin Texas, 78701-2483 Attention: Finance Division; if to NTTA at its address at P.O. Box 260729, Plano, TX 75026 Attention: Susan A Buse, if to any other Toll Operator, at the address it states in a written notice delivered to the Trustee, Developer and TxDOT and if to the Trustee, at its address at \_\_\_\_\_, facsimile number \_\_\_\_\_ or; as to each party, at such other address as shall be designated by such party in a written notice to the other parties.

### **Section 8.05 Tax Reporting.**

All items of income, gain, expense and loss recognized in the Project Trust Accounts (other than the TxDOT Accounts) or in respect of any financial assets credited thereto shall be reported to the Internal Revenue Service and all state and local taxing authorities under the name and taxpayer identification number of Developer. All items of income, gain, expense and loss recognized in the TxDOT Accounts or in respect of any financial assets credited thereto

shall be reported to the Internal Revenue Service and all state and local taxing authorities under the name and taxpayer identification number of TxDOT.

#### **Section 8.06 Investments.**

(a) Amounts on deposit in each Project Trust Account pursuant to this Project Trust Agreement shall be invested in Eligible Investments that will, as nearly as practicable, mature on or before the dates when such money is anticipated to be needed for disbursement hereunder. Such Eligible Investments shall be made in accordance with written directions that TxDOT gives from time to time with respect to the TxDOT Accounts, and in accordance with written directions that Developer gives from time to time with respect to all other Project Trust Accounts. The Trustee may act as principal or agent in the acquisition or disposition of any such investment. The Trustee shall not be liable or responsible for any loss suffered in connection with any such investment made by it under the terms of and in accordance with this Section 8.06. The Trustee may sell or present for prepayment any obligations so purchased whenever it shall be necessary in order to provide moneys to meet any payment of the funds so invested, and the Trustee shall not be liable or responsible for any losses resulting from any such investment sold or presented for prepayment. Interest or profit received on such investments shall be retained in the account that generated the interest or profit.

(b) The Trustee may exclusively rely that any investment directed by TxDOT or Developer, as the case may be, is an Eligible Investment as required by this Project Trust Agreement. The Trustee may act as depository, manager, advisor or sponsor with regard to any Eligible Investment.

(c) If Developer or TxDOT receive brokerage confirmations of security transactions as they occur, Developer or TxDOT, as the case may be, will forward such confirmations to the Trustee. The Trustee will furnish Developer and TxDOT monthly cash transaction statements as provided herein which include detail for all investment transactions made by the Trustee hereunder.

(d) In computing the amount in any fund or account, Eligible Investments shall be valued at market value, exclusive of accrued interest. The Trustee shall perform such valuation no more frequently than monthly.

(e) If at any time after investment therein an Eligible Investment ceases to meet the criteria set forth in the definition of Eligible Investments and such obligation, aggregated with other non-conforming investments, exceeds ten percent (10%) of invested funds, such Eligible Investment shall be sold or liquidated.

(f) Investment earnings on amounts held in the Project Trust Accounts shall be credited and applied as follows:

(i) Toll Revenue Account shall be for the benefit of Developer and may be withdrawn at any frequency Developer decides.

(ii) Investment earnings on amounts held in the Toll Operator Dispute Account shall be for the benefit of Developer or the Toll Operator as provided in Section 2.03(c) and may be withdrawn only through distributions as described in Section 2.03(c).

(iii) Investment earnings on amounts in Developer Claims Account and TxDOT Claims Account shall be retained therein and credited toward the balances required to be deposited therein, and shall be withdrawn and distributed only as provided in Section 2.03(d) and 2.03(e), respectively.

(iv) Investment earnings on amounts in the Post-Termination Revenue Account shall be retained therein and applied in accordance with Section 2.03(f).

(v) Investment earnings on amounts in the Post-Termination Developer Claims Account shall be retained therein and credited toward the balances required to be deposited therein and shall be withdrawn and distributed only as provided in Section 2.03(g) hereof.

(vi) Investment earnings on amounts in the Post-Termination Work Account shall be retained therein and applied in accordance with Section 2.03(h).

(vii) Investment earnings on amounts in the TxDOT Revenue Payment Account described in Section 2.03(i) shall be for the benefit of Developer and may not be withdrawn until annual payment of the TxDOT Revenue Payment Amount as provided in Part C, Section 3.1 of Exhibit 7 of the CDA.

(g) To the extent relevant to any Project Trust Account other than the TxDOT Accounts, Developer shall be entitled to direct the Trustee with respect to the voting of any financial assets credited to such Project Trust Accounts, unless during a Project Debt Default Period in which case the Collateral Agent shall be entitled to direct the Trustee with respect to the voting of any financial assets credited to such Project Trust Accounts. To the extent relevant to any financial assets credited to the TxDOT Accounts, TxDOT shall be entitled to direct the Trustee with respect to the voting of any financial assets credited to such Project Trust Accounts.

#### **Section 8.07 Article and Section Headings, Gender and References.**

The headings or titles of the several articles and sections hereof and the table of contents appended hereto shall be solely for convenience of reference and shall not affect the meaning, construction or effect hereof, and words of any gender shall be deemed and construed to include all genders. All references herein to “Articles,” “Sections” and other subdivisions or clauses are to the corresponding articles, sections, subdivisions or clauses hereof; and the words “hereby,” “herein,” “hereof,” “hereto,” “herewith,” “hereunder” and other words of similar import refer to this Project Trust Agreement as a whole and not to any particular article, section, subdivision or clause hereof.

#### **Section 8.08 Partial Invalidity.**

If any one or more of the agreements, conditions, covenants or terms contained herein required to be observed or performed by or on the part of TxDOT, Developer, NTTA or the Trustee shall be contrary to law, then such agreement or agreements, such condition or conditions such covenant or covenants or such term or terms shall be null and void and shall be deemed separable from the remaining agreements, conditions, covenants and terms hereof.

**Section 8.09 Texas Law.**

This Project Trust Agreement shall be construed and governed in accordance with the laws of the State of Texas.

**Section 8.10 Effective Date.**

This Project Trust Agreement shall become effective upon its execution and delivery.

**Section 8.11 Execution in Counterparts.**

This Project Trust Agreement may be executed in several counterparts, each of which shall be deemed an original, and all of which shall constitute but one and the same instrument.

[Signature Page Immediately Follows]

IN WITNESS WHEREOF, the parties hereto have executed this Project Trust Agreement by their officers thereunto duly authorized as of the day and year first written above.

**[TRUSTEE]**, as Trustee

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**[DEVELOPER]**, as Developer

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**JOINDER AGREEMENT**

This JOINDER AGREEMENT (this “Joinder Agreement”) is made and entered into effective as of the date and year first above written by the Texas Department of Transportation, a public agency of the State of Texas (“TXDOT”), for the benefit of Developer, the Trustee and the Collateral Agent. Capitalized terms not otherwise defined in this Joinder Agreement shall have the same meaning assigned to such terms in the Project Trust Agreement to which this Joinder Agreement is attached.

**NOW, THEREFORE**, for good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, TxDOT agrees as follows:

1. Consent. TxDOT hereby consents to the terms of the Project Trust Agreement and agrees that the same is a Project Trust and Security Instrument under the CDA.
2. TxDOT Covenants. TxDOT hereby covenants and agrees as follows:
  - (a) TxDOT will comply with the terms of the Project Trust Agreement and perform the obligations of TxDOT specified in the Project Trust Agreement;
  - (b) Upon the occurrence of the Termination Date pursuant to the CDA and not before, TxDOT will deliver a Certificate of TxDOT to Developer and the Trustee specifying the date that is the Termination Date pursuant to the terms of the CDA;
  - (c) TxDOT shall have no greater right or interest in and to the Project Trust Fund than is provided in the CDA and the Project Trust Agreement; and
  - (d) TxDOT shall deliver to Developer and the Collateral Agent a copy of all notices, certificates and instructions delivered by or on behalf of TxDOT to the Trustee as and when delivered to the Trustee.

**TEXAS DEPARTMENT OF TRANSPORTATION**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_



## Exhibit L

### LENDER'S DIRECT AGREEMENT

**THIS AGREEMENT** ("Agreement") is made by and between the State of Texas acting by and through the Texas Department of Transportation, ("TxDOT") and \_\_\_\_\_, ("Lender") for the purpose of facilitating the Lender's financing of the IH 635 Managed Lanes Project.

#### **RECITALS**

**WHEREAS**, TxDOT and \_\_\_\_\_ ("Developer") have entered into a Comprehensive Development Agreement ("CDA") for the IH 635 Managed Lanes Project (the "Project"), which CDA contemplates the Developer obtaining financing from third parties; and

**WHEREAS**, TxDOT desires to facilitate the Lender's provision of financing to the Developer; and

**WHEREAS**, in order to induce the Lender to provide the financing necessary for the Project, the Lender requires certain assurances from TxDOT regarding the Lender's rights in the event of a default by the Developer; and

**WHEREAS**, TxDOT and the Developer have previously set forth such assurances in the CDA for the benefit of the Lender as an express third party beneficiary; and

**WHEREAS**, TxDOT and the Lender have agreed to separately contract for such assurances, provided that such contract shall be consistent in all respects with, and not provide the Lender with any rights beyond those set forth in, Article 20 of the CDA; and

**WHEREAS**, the Lender acknowledges that any rights under this Agreement and the CDA are solely derivative of the rights of the Developer; and

**WHEREAS**, the Lender is ***[use applicable language]*** [making a direct, secured loan to the Developer to finance the Project without participating Lenders] [acting as the Collateral Agent for and on behalf of participating Lenders providing a secured loan to the Developer to finance the Project (in which case "Collateral Agent" as used in this Agreement refers to the Lender)]; and

**NOW, THEREFORE**, TxDOT and the Lender, in consideration of the mutual covenants and agreements herein contained, including within these recitals, do hereby mutually agree as follows.

## **AGREEMENT**

### **ARTICLE 1. DEFINITIONS, CONTRACT DOCUMENTS AND ORDER OF PRECEDENCE**

#### **1.1 Definitions**

Capitalized terms used but not otherwise defined in this Agreement have the respective meanings set forth in Exhibit 1 to the CDA.

#### **1.2 Recitals Incorporated**

The Recitals in this Agreement are part of the terms of this Agreement.

#### **1.3 Contract Documents and Order of Precedence**

The following documents comprise the contract documents for this Agreement. In the event of any conflict, ambiguity or inconsistency among the contract documents, the order of precedence shall be as follows:

**1.3.1** Supplemental agreements, change orders, and addenda to this Agreement;

**1.3.2** This Agreement, including Recitals; and

**1.3.3** Those provisions of the CDA that are explicitly referenced in this Agreement.

#### **1.4 No Duplication; No Effect on CDA**

**1.4.1** The sole purpose of this Agreement is to provide the Lender privity of contract with TxDOT regarding the matters set forth in Article 20 of the CDA. The rights of Lender under Article 2 of this Agreement and Article 20 of the CDA are one and the same. Nothing in Article 2 of this Agreement confers on the Lender any rights beyond or in duplication of the rights the Lender has under Article 20 of the CDA.

**1.4.2** Nothing in this Agreement amends or modifies any of the Developer's obligations to TxDOT under the CDA.

## **ARTICLE 2. TERMS**

#### **2.1 Conditions and Limitations Respecting Lenders' Rights**

**2.1.1** No Security Document (including those respecting a Refinancing) shall be valid or effective, and the Lender shall not be entitled to the rights, benefits and protections of this Agreement and Article 20 of the CDA, unless the Security Document, other related Security Documents and related Funding Agreements strictly comply with Section 4.3 of the CDA.

**2.1.2** No Security Document relating to any Refinancing (except Exempt Refinancings) shall be valid or effective, and the Lender shall not be entitled to the rights, benefits and protections of this Agreement and Article 20 of the CDA, unless the Refinancing is in compliance with Section 4.4 of the CDA.

**2.1.3** No Funding Agreement or Security Document shall be binding upon TxDOT in the enforcement of its rights and remedies as provided herein and by Law, and the Lender shall not be entitled to the rights, benefits and protections of this Agreement or Article 20 of the CDA, unless and until (i) a copy (certified as true and correct by the Collateral Agent) of the original thereof bearing, if applicable, the date and instrument number or book and page of recordation or filing thereof, including a copy of a specimen bond, note or other obligation (certified as true and correct by the Collateral Agent) secured by such Security Document, has been deposited into an Intellectual Property Escrow and (ii) TxDOT has received written notice of the address of the Collateral Agent to which notices may be sent. In the event of an assignment of any such Funding Agreement or Security Document, such assignment shall not be binding upon TxDOT unless and until TxDOT has received a certified copy thereof, which copy shall, if required to be recorded, bear the date and instrument number or book and page of recordation thereof, has been deposited into an Intellectual Property Escrow and TxDOT has received written notice of the assignee thereof to which notices may be sent. In the event of any change in the identity of the Collateral Agent, such change shall not be binding upon TxDOT unless and until TxDOT has received a written notice thereof signed by the replaced and substitute Collateral Agent and setting forth the address of the substitute Collateral Agent to which notices may be sent.

**2.1.4** The Lender shall not be entitled to the rights, benefits and protections of this Agreement or Article 20 of the CDA unless the Funding Agreements in favor of the Lender are secured by senior or first tier subordinate Security Documents. For avoidance of doubt, if the Lender holds Project Debt secured by a Subordinated Security Document it shall not have any rights, benefits or protections under this Agreement or Article 20 of the CDA.

**2.1.5** The Lender shall not, by virtue of its Funding Agreement or Security Document, acquire any greater rights to or interest in the Project, the Lease or Toll Revenues than Developer has at any applicable time under the CDA, other than the provisions in this Agreement and in Article 20 of the CDA for the specific protection of the Lender.

**2.1.6** All rights acquired by the Lender under any Funding Agreement or Security Document shall be subject to the provisions of the CDA and the Lease and to the rights of TxDOT hereunder and thereunder.

**2.1.7** The following provisions of this Agreement shall apply only to Security Documents, and the Lender thereunder, that comply with Sections 2.1.1, 2.1.2, 2.1.3 and 2.1.4 of this Agreement and Sections 20.1.1, 20.1.2, 20.1.3, and 20.1.4 of the CDA. None of the following provisions of this Agreement shall be construed inconsistently with the provisions of this Section 2.1 or Section 20.1 of the CDA. The provisions of this

Agreement that are binding on TxDOT shall inure only to the benefit of the Lender, and create no rights in favor of Developer.

## **2.2 Effect of Amendments**

While any Security Document is in effect, no agreement between TxDOT and Developer for the modification or amendment of the CDA or the Lease shall be binding without the Collateral Agent's consent, except to the extent expressly provided otherwise in this Agreement .

## **2.3 Notices to Collateral Agent**

As long as any Security Document shall remain unsatisfied of record, TxDOT shall promptly provide the Collateral Agent with a copy of any notice it sends to Developer concerning an actual or potential breach of the CDA or the Lease or an actual or potential Developer Default, including any Warning Notice, and any notice it sends to Developer, the Design-Build Contractor or any O&M Contractor of default by the Design-Build Contractor or any O&M Contractor under the Design-Build Contract or O&M Contract.

## **2.4 Opportunity to Cure and Step-In**

As long as any Security Document shall remain unsatisfied of record, the following provisions shall apply with respect to any such Security Document and the related Lender and Funding Agreements.

**2.4.1** Should any Developer Default occur which would either immediately or, following the applicable grace period or the giving of notice or both, constitute a Default Termination Event enabling TxDOT to terminate or suspend its obligations under this Agreement, TxDOT shall not terminate the CDA or the Lease until it first delivers to the Collateral Agent a copy of the Warning Notice given to Developer and provides the Collateral Agent a reasonable opportunity to cure such Developer Default, as provided below, provided that no opportunity to cure beyond that afforded Developer shall be required for failure of Developer to timely deliver or perform any remedial plan required under Section 17.3.6 of the CDA, and neither a Warning Notice nor opportunity to cure shall be required for a Developer Default under Section 17.1.1.14 or 17.1.1.15 of the CDA. Commencing on the date the applicable cure period available to Developer expires, the Lender shall have the right (but not the obligation) to remedy such Developer Default or cause the same to be remedied by its Substituted Entity; and from and after such date TxDOT shall accept such performance by or at the instigation of the Lender or Substituted Entity as if Developer had done the same. TxDOT shall have no obligation to accept any Lender's tender of a cure prior to such date.

**2.4.2** If such Developer Default consists of Developer's failure to pay a monetary obligation, the Collateral Agent may cure such Developer Default by paying all amounts due within 60 days after TxDOT delivers a copy of the Warning Notice to the Collateral Agent. If cure is not effected within such 60-day period, TxDOT may proceed

to terminate the CDA and the Lease without further notice to, or opportunity to cure by, the Lender.

**2.4.3** If the Developer Default consists of Developer's failure to achieve Service Commencement for all Toll Segments by the Service Commencement Deadline, as the same may be extended pursuant to the CDA, then the Collateral Agent shall have until the latter of (a) the end of the 90-day Warning Notice period set forth in Section 17.2.1.2 of the CDA and (b) the Long Stop Date, as the same may be extended pursuant to the CDA (including extension pursuant to Section 20.4.9 of the CDA), to achieve or cause Developer to achieve Service Commencement for all Toll Segments. If Service Commencement for all Toll Segments is not achieved by such date, then it shall constitute a material Developer Default and TxDOT may proceed to terminate the CDA and the Lease without further notice to, or opportunity to cure by, the Lender.

**2.4.4** As to each such Developer Default, other than (a) the failure to pay a monetary obligation, (b) the failure to achieve Service Commencement for all Toll Segments by the deadline set forth in Section 20.4.3 to the CDA and (c) Developer Defaults governed by Section 2.4.7 of this Agreement and Section 20.4.7 of the CDA, the Collateral Agent shall have a cure period ending 30 days after the later of (a) the date Developer's cure period expires and (b) the date of delivery of a copy of the Warning Notice to the Collateral Agent. If no cure period is available to Developer, then the Collateral Agent's cure period shall be 60 days, commencing with the date of delivery of a copy of the Warning Notice to the Collateral Agent. However, such period to cure shall be extended if the default is capable of being corrected without having possession of the Project (e.g. cure of Developer Defaults under Sections 17.1.1.9 and 17.1.1.16 of the CDA) but cannot reasonably be corrected within such cure period and the Collateral Agent or the Substituted Entity begins meaningful steps to correct such matter within 60 days after TxDOT delivers a copy of the Warning Notice and thereafter prosecutes the cure to completion with good faith, diligence and continuity, in any event not to exceed a cure period ending 180 days after the date Developer's cure period expires, unless extended pursuant to Section 2.4.10 of this Agreement or Section 20.4.10 of the CDA.

**2.4.5** The Collateral Agent shall have the right to postpone and extend the time to cure any Developer Default governed by Section 2.4.4 of this Agreement and Section 20.4.4 of the CDA capable of being cured only through possession of the Project if the Collateral Agent shall:

**2.4.5.1** Within the cure period available therefor under Section 2.4.2 of this Agreement and Section 20.4.2 of the CDA, cure all Developer Defaults which may be cured by the payment of a sum of money, and within the cure period available therefor under Section 2.4.4 of this Agreement and Section 20.4.4 of the CDA, undertake to cure any other Developer Default governed by Section 2.4.4 of this Agreement and Section 20.4.4 of the CDA then existing or thereafter occurring and capable of being cured without possession;

**2.4.5.2** Continue to pay or cause to be paid when due all fees, rent and other amounts due from Developer under the CDA or the Lease;

**2.4.5.3** Within the later of (a) five days after expiration of the Developer's cure period, if any, and (b) 30 days after receiving a copy of the Warning Notice, initiate and thereafter pursue with good faith, diligence and continuity lawful processes and steps to obtain possession, custody and control of the Project; and

**2.4.5.4** Promptly execute all documents reasonably requested by TxDOT affecting the transactions contemplated by this Agreement and the CDA.

**2.4.6** The Collateral Agent shall exercise the right provided in Section 2.4.5 of this Agreement and 20.4.5 of the CDA by giving TxDOT written notice of the exercise of the same within the later of (a) five days after expiration of the Developer's cure period, if any, and (b) 30 days after TxDOT delivers to the Collateral Agent a copy of the Warning Notice. If the Collateral Agent or its Substituted Entity shall have succeeded to the Developer's Interest and obtained possession diligently and with continuity, and in any event within 210 days after TxDOT delivers to the Collateral Agent a copy of the Warning Notice, shall have delivered to TxDOT within 15 days after obtaining possession and ownership an assumption in writing of all duties, obligations and liabilities of Developer under the CDA and the Lease, and shall have thereafter diligently and with continuity cured all Developer Defaults which are capable of being cured through possession, then the Developer Default shall be removed, and the CDA and the Lease shall not be terminated, and the Lender or the Substituted Entity shall succeed to the Developer's Interest. In connection with any Developer Default or any condition imposed upon Developer to exercise any rights contained in the CDA which cannot be cured or performed until the Collateral Agent or its Substituted Entity obtains possession, the Collateral Agent or its Substituted Entity shall have a time after it obtains possession as may be necessary with exercise of good faith, diligence and continuity to cure such Developer Default or perform such condition, in any event not to exceed 180 days after the date it obtains possession, unless extended pursuant to Section 2.4.10 of this Agreement and Section 20.4.10 of the CDA.

**2.4.7** If the Developer Default is peculiar to Developer and is not curable by the Collateral Agent regardless of whether it obtains possession or control of the Project, such as a Developer Default under Section 17.1.1.14 or 17.1.1.15 of the CDA, or if the Developer Default is a failure to timely deliver and perform a remedial plan required under Section 17.3.6 of the CDA, then TxDOT may terminate the CDA and the Lease without providing a cure period to any Lender.

**2.4.8** If TxDOT terminates the CDA and the Lease under Section 20.4.6 of the CDA for inability of the Collateral Agent, despite diligent, continuous efforts, to obtain possession within 210 days after TxDOT delivers to the Collateral Agent a copy of the Warning Notice, or under Section 20.4.7 of the CDA, then TxDOT shall promptly deliver to the Collateral Agent pursuant to the notice provisions of the CDA written notice of the termination and a statement of any and all sums which would at that time be due under the CDA and the Lease then known to TxDOT. Thereafter the Collateral Agent or its

Substituted Entity, to the extent then permitted by Law, shall have the option to obtain agreements to replace this Agreement, the Lease, the CDA Documents, the Project Trust Agreement and, to the extent necessary new ancillary agreements (e.g. lease escrow agreement, Intellectual Property escrow agreements) (together the “New Agreements”) in accordance with and upon the following terms and conditions:

**2.4.8.1** In order to exercise such option, the Collateral Agent must deliver to TxDOT, within 360 days after TxDOT delivers its written notice of termination, (a) a request for New Agreements, (b) a written commitment that the Collateral Agent (or its Substituted Entity) will enter into the New Agreements and pay all the amounts described in Section 2.4.8.4 of this Agreement and Section 20.4.8.4 of the CDA, and (c) originals of such New Agreements, duly executed and acknowledged by the Collateral Agent (or its Substituted Entity). If any of the foregoing is not delivered within such 360-day period, the option in favor of the Collateral Agent (and all related Lenders) shall automatically expire;

**2.4.8.2** Within 30 days after timely receipt of the written notice, written commitment and New Agreements duly executed, TxDOT shall enter into the New Agreements to which TxDOT is a party with the Collateral Agent or its Substituted Entity, subject to any extension of such 30-day period as TxDOT deems necessary to clear any claims of Developer to continued rights and possession;

**2.4.8.3** Upon the execution by all parties and as conditions to the effectiveness of the New Agreements, the Collateral Agent or its Substituted Entity shall perform all of the following:

(a) Pay to TxDOT any and all sums which would, at the time of the execution of the New Agreements, be due under the CDA or the Lease but for such termination;

(b) Otherwise fully remedy any existing Developer Defaults under the CDA or the Lease , except any uncured material Developer Default that was known to TxDOT at the time it delivers any estoppel certificate to the Lender but fails to disclose in such estoppel certificate (provided, however, that with respect to any Developer Default which cannot be cured until the Collateral Agent or its Substituted Entity obtains possession, it shall have such time, after it obtains possession, as is necessary with the exercise of good faith, diligence and continuity to cure such default, in any event not to exceed 180 days after the date it obtains possession, unless extended pursuant to Section 2.4.10 of this Agreement and 20.4.10 of the CDA); and

(c) Without duplication of amounts previously paid by Developer, pay to TxDOT all reasonable costs and expenses, including TxDOT’s Recoverable Costs, incurred by TxDOT in connection with (i) such default and termination, (ii) the assertion of rights, interests and defenses in any bankruptcy proceeding, (iii) the recovery of possession of the Project, (iv) all TxDOT activities during its period of possession of, and respecting, the Project, including permitting, design, acquisition, construction, equipping, maintenance, operation and management

activities, and (v) the preparation, execution, and delivery of such New Agreements. Upon request of the Collateral Agent or Substituted Entity, TxDOT will provide a written, documented statement of such costs and expenses.

**2.4.8.4** Upon execution of the New Agreements and payment of all sums due TxDOT, TxDOT shall (a) assign and deliver to the Collateral Agent or its Substituted Entity, without warranty or representation, all the property, contracts, documents and information that Developer may have assigned and delivered to TxDOT upon termination of the CDA pursuant to Section 19.5 of the CDA, and (b) if applicable, transfer into a new Handback Requirements Reserve established by the Collateral Agent or Substituted Entity in accordance with the CDA, all funds TxDOT received from the Handback Requirements Reserve pursuant to Section 8.11.4.1 of the CDA (or from draw on a Handback Requirements Letter of Credit) less so much thereof that TxDOT spent or is entitled to as reimbursement for costs of Renewal Work TxDOT performed prior to the effectiveness of the New Agreements.

**2.4.8.5** The New Agreements shall **be effective as of the date of termination of this Agreement and the Lease and shall** run for the remainder of the term of the CDA and the Lease. The New Agreements shall otherwise contain the same covenants, terms and conditions and limitations as the CDA, the Lease and other corresponding CDA Documents and ancillary agreements and documents that were binding on TxDOT and Developer (except for any requirements which have been fulfilled by Developer prior to termination and except that Section 15.1 of the CDA (and any equivalent provisions of the Lease) shall be revised to be particular to the Collateral Agent or its Substituted Entity).

**2.4.8.6** If the holders of more than one Security Document make written requests upon TxDOT for New Agreements in accordance with this Section 2.4.8 or Section 20.4.8 of the CDA, TxDOT shall grant the New Agreements to, as applicable, the holder whose leasehold mortgage has the most senior priority of record. Priority shall be established as follows.

(a) TxDOT shall submit a written request to the Collateral Agent to designate the leasehold mortgage having the most senior priority of record. TxDOT shall have the right to conclusively rely on the Collateral Agent's written designation, without duty of further inquiry by TxDOT and without liability to Lender; and thereupon the written requests of each holder of any other leasehold mortgage shall be deemed to be void.

(b) If TxDOT does not receive the Collateral Agent's written designation within ten days after delivering written request, then TxDOT may conclusively rely, without further inquiry and without liability to Lender, on the seniority indicated by a then-current title report that TxDOT obtains from one of the four largest title insurance companies doing business in Texas (unless otherwise agreed in writing by the most senior holder so indicated); and thereupon the written requests of each holder of any other leasehold mortgage shall be deemed to be void.



(c) In the event the holders of more than one leasehold mortgage share *pari passu* senior lien priority as indicated pursuant to clause (a) or (b) above and make written requests upon TxDOT for New Agreements in accordance with this Section 2.4.8 and Section 20.4.8 of the CDA, TxDOT shall grant the New Agreements to such holders jointly (unless otherwise agreed in writing by such holders); and thereupon the written requests of each holder of any other leasehold mortgage shall be deemed to be void.

**2.4.8.7** The provisions of this Section 2.4.8 and Section 20.4.8 of the CDA shall survive the termination of the CDA and shall continue in full force and effect thereafter.

**2.4.9** The Collateral Agent shall have the option to extend a Long Stop Date by two additional 90-day periods, provided all the following terms and conditions have been satisfied by not later than 15 days before the Long Stop Date to be extended:

**2.4.9.1** The Collateral Agent has delivered to TxDOT (a) written notice identifying the Long Stop Date that is the subject of the notice and stating the election to exercise the option to extend and (b) concurrently with such written notice a payment in good funds in the applicable amount set forth in Exhibit A to this Agreement and Exhibit 24 to the CDA. Such payment is due for each 90-day extension of each Long Stop Date. Such payment shall be fully earned and non-refundable when paid, as consideration for the option to extend;

**2.4.9.2** The Collateral Agent or its Substituted Entity has obtained ownership of the Developer's Interest and full possession and control of the Project to the exclusion of Developer; and

**2.4.9.3** If any other Warning Notices are then outstanding, the Collateral Agent has demonstrated to TxDOT that it or its Substituted Entity has undertaken and continues and will continue to undertake meaningful steps to prosecute cure to completion with good faith, diligence and continuity.

**2.4.10** The Collateral Agent shall have the option to extend the 180-day deadline set forth in Section 2.4.4 of this Agreement and Section 20.4.4 of the CDA or, if applicable, the 180-day deadline after obtaining possession set forth in Section 2.4.6 of this Agreement or Section 20.4.6 of the CDA or the 180-day deadline set forth in Section 2.4.8.4(b) of this Agreement and Section 20.4.8.4(b) of the CDA, by up to but not exceeding an additional 180 days, provided that all the following conditions precedent have been satisfied by not later than 15 days before the deadline to be extended:

**2.4.10.1** The Collateral Agent has delivered to TxDOT written notice requesting extension and setting forth a reasonable time period needed to effect cure, in any event not exceeding such 180 days;

**2.4.10.2** The Collateral Agent has met all the requirements set forth in (a) Section 2.4.4 of this Agreement and Section 20.4.4 of the CDA, (b) Sections 2.4.5

and 2.4.6 of this Agreement and Sections 20.4.5 and 20.4.6 of the CDA or (c) Section 2.4.8.4 of this Agreement and Section 20.4.8.4 of the CDA, as applicable;

**2.4.10.3** The Collateral Agent has delivered evidence to TxDOT demonstrating, and TxDOT is reasonably satisfied, that full and complete cure by the Collateral Agent is highly likely within the period of extension; and

**2.4.10.4** The Collateral Agent has prepared and submitted to TxDOT, and TxDOT has approved, a remedial plan for effecting full and complete cure. The remedial plan shall set forth a schedule and specific actions to be taken by the Collateral Agent to fully and completely cure, with the schedule to be consistent with the period of extension. TxDOT may require that such actions include new and improved quality management practices, plans and procedures, revised and restated Management Plans, changes in organizational and management structure, increased monitoring and inspections, changes in Key Personnel and other important personnel, replacement of Contractors, and delivery of security to TxDOT.

Time is of the essence in the exercise of such option. If for any reason any of the foregoing conditions is not satisfied by 15 days before the deadline that is eligible to be extended, the option shall automatically expire and cease to have effect with respect to such deadline.

**2.4.11** Notwithstanding any contrary provisions of the CDA Documents, in the event the Lender or its Substituted Entity obtains ownership of the Developer's Interest and full possession and control of the Project to the exclusion of Developer, all Noncompliance Points accumulated prior to the date the Lender or Substituted Entity obtains ownership and possession shall be reduced to zero. The foregoing shall not, however, excuse the Lender or its Substituted Entity from any obligation to cure prior uncured breaches or failures to perform under the CDA Documents, and except for determination of Persistent Developer Default shall not affect any rights and remedies available to TxDOT respecting uncured breaches or failures to perform.

**2.4.12** Any curing of any Default Termination Event by the Collateral Agent shall not be construed as an assumption by the Collateral Agent of any obligations, covenants or agreements of Developer under the CDA Documents or any Principal Project Documents, except with respect to the work, services or actions taken or performed by or on behalf of the Collateral Agent.

**2.4.13** Nothing in this Section 2.4 or Section 20.4 of the CDA shall preclude or delay TxDOT from exercising any remedies other than termination of the CDA and the Lease due to Developer Default, including, subject to TxDOT's express covenants to forbear, TxDOT's rights to cure the Developer Default at Developer's expense and to remove and replace Developer.

## **2.5 Forbearance**

To the extent TxDOT has rights to enforce the Design-Build Contract or any O&M Contract, whether as assignee of Developer's rights or otherwise, so long as the CDA

remains in effect TxDOT shall forbear from exercising remedies against the Design-Build Contractor or any O&M Contractor if (a) Developer or the Collateral Agent commences the good faith, diligent exercise of remedies available to Developer under the Design-Build Contract or O&M Contract within 15 days after TxDOT delivers written notice to Developer and the Collateral Agent of default by the Design-Build Contractor or any O&M Contractor, and (b) thereafter continues such good faith, diligent exercise of remedies until the default is cured.

## **2.6 Substituted Entities**

**2.6.1** Any payment to be made or action to be taken by the Collateral Agent as a prerequisite to keeping the CDA in effect shall be deemed properly to have been made or taken by the Collateral Agent if a Substituted Entity proposed by the Collateral Agent and approved by TxDOT makes such payment or takes such action. TxDOT shall have no obligation to recognize any claim to the Developer's Interest by any person or entity that has acquired the Developer's Interest by, through, or under any Security Document or whose acquisition shall have been derived immediately from any holder thereof, unless such person or entity is a Substituted Entity.

**2.6.2** Notwithstanding the foregoing, any entity that is wholly owned by the Lender or group of Lenders shall be deemed a Substituted Entity, without necessity for TxDOT approval, upon delivery to TxDOT of documentation proving that the entity is duly formed, validly existing and wholly owned by such Lender or group of Lenders, including a certificate signed by a duly authorized officer of each such Lender in favor of TxDOT certifying, representing and warranting such ownership.

**2.6.3** TxDOT shall have no obligation to approve a person or entity as a Substituted Entity unless the Lender demonstrates that (a) the proposed Substituted Entity and its contractors collectively have the financial resources, qualifications and experience to timely perform Developer's obligations under the CDA Documents and Principal Project Documents and (b) the proposed Substituted Entity and its contractors are in compliance with TxDOT's rules, regulations and adopted written policies regarding organizational conflicts of interest. TxDOT will approve or disapprove a proposed Substituted Entity within 30 days after it receives from the Lender a request for approval together with (i) such information, evidence and supporting documentation concerning the identity, financial resources, qualifications, experience and potential conflicts of interest of the proposed Substituted Entity and its contractors as TxDOT may request, and (ii) such evidence of organization, authority, incumbency certificates, certificates regarding debarment or suspension, child support statements, and other certificates, representations and warranties as TxDOT may reasonably request. TxDOT will request information on, and evaluate, the financial resources, qualifications, experience and potential conflicts of interest of the proposed Substituted Entity and its contractors using the same standards and criteria that it is then currently applying, or if there is no current application, then the same standards and criteria it most recently applied, to the evaluation of Persons responding to TxDOT requests for qualifications for concession or similar agreements for comparable projects and facilities. If for any

reason TxDOT does not act within such 30-day period, or any extension thereof by mutual agreement of TxDOT and the Lender, TxDOT shall be deemed to disapprove.

**2.6.4** Lender may request approval of more than one Substituted Entity. The Lender may request approval at any time or times. Any approval by TxDOT of a Substituted Entity shall expire one year after the approval is issued, unless TxDOT approves an extension in its sole discretion or unless within such one-year period (or any approved extension thereof) the Substituted Entity has succeeded to the Developer's Interest. TxDOT may revoke an approval if at any time prior to succeeding to the Developer's Interest (a) the Substituted Entity ceases to be in compliance with TxDOT's rules and regulations regarding organizational conflicts of interest or (b) there occurs, after exhaustion of all rights of appeal, any suspension or debarment of the Substituted Entity or any managing member, general partner or controlling investor of the Substituted Entity from bidding, proposing or contracting with any federal or State department or agency.

## **2.7 Receivers**

**2.7.1** The appointment of a receiver at the behest of Developer shall be subject to TxDOT's prior written approval in its sole discretion. The appointment of a receiver at the behest of the Lender if the Lender is not in compliance with Sections 2.1.1, 2.1.2, 2.1.3 and 2.1.4 of this Agreement or Sections 20.1.1, 20.1.2, 20.1.3, and 20.1.4 of the CDA shall be void and may be challenged by TxDOT in any proceeding. The appointment of a receiver at the behest of the Lender if the Lender is in compliance with Sections 2.1.1, 2.1.2, 2.1.3 and 2.1.4 of this Agreement or Sections 20.1.1, 20.1.2, 20.1.3, and 20.1.4 of the CDA shall be subject to the following terms and conditions:

**2.7.1.1** TxDOT's prior approval shall not be required for the appointment of the receiver or the selection of the person or entity to serve as receiver;

**2.7.1.2** Whenever the Lender commences any proceeding for the appointment of a receiver, it shall serve on TxDOT not less than five days' prior written notice of the hearing for appointment and of the Lender's pleadings and briefs in the proceeding;

**2.7.1.3** TxDOT may appear in any such proceeding to challenge the selection of the person or entity to serve as receiver, but waives any other right to oppose the appointment of the receiver; and

**2.7.1.4** TxDOT may at any time seek an order for replacement of the receiver by a different receiver.

**2.7.2** No receiver appointed at the behest of Developer or the Lender shall have any power or authority to replace the Design-Build Contractor or any O&M Contractor except by reason of default or unless the replacement is a Substituted Entity approved by TxDOT.

## **2.8 Other Lender Rights**

**2.8.1** In addition to all other rights herein granted, the Lender shall have the right to be subrogated to any and all rights of Developer under the CDA and the Lease with respect to curing any Developer Default. TxDOT shall permit the Collateral Agent and its Substituted Entity the same access to the Project and Project Right of Way as is permitted to Developer hereunder. TxDOT hereby consents to Developer constituting and appointing any Collateral Agent as Developer's authorized agent and attorney-in-fact with full power, in Developer's name, place and stead, and at Developer's sole cost and expense, to enter upon the Project and Project Right of Way and to perform all acts required to be performed herein, in the Lease, and in any Principal Project Document, but only in the event of a Developer Default or a default under the Lender's Funding Agreement or Security Document. TxDOT shall accept any such performance by the Collateral Agent as though the same had been done or performed by Developer.

**2.8.2** The creating or granting of a Security Document shall not be deemed to constitute an assignment or transfer of the CDA, the leasehold estate under the Lease or the Developer's Interest, nor shall the Lender, as such, be deemed to be an assignee or transferee of the CDA, the leasehold estate under the Lease or the Developer's Interest so as to require the Lender, as such, to assume the performance of any of the terms, covenants or conditions on the part of Developer to be performed hereunder or thereunder. Neither the Lender, nor any owner of the leasehold estate under the Lease or the Developer's Interest whose ownership shall have been acquired by, through, or under any Security Document or whose ownership shall have been derived immediately from any holder thereof, shall become personally liable under the provisions of the CDA or the Lease unless and until such time as the Lender or such owner becomes the owner of the Developer's Interest. Upon any permitted assignment of the CDA, the Lease and the Developer's Interest by a Lender or any owner of the Developer's Interest whose ownership shall have been acquired by, through, or under any Security Document or whose ownership shall have been derived immediately from any holder thereof, the assignor shall be relieved of any further liability which may accrue hereunder or thereunder from and after the date of such assignment, provided that the assignee is a Substituted Entity and executes and delivers to TxDOT a recordable instrument of assumption as required under Section 21.5 of the CDA.

**2.8.3** The Lender or the Collateral Agent may exercise its rights and remedies under its Security Document with respect to all, but not less than all, of the Developer's Interest.

**2.8.4** The exercise by the Lender of its rights with respect to the Developer's Interest under its Security Documents, this Agreement, Article 20 of the CDA, or otherwise, whether by judicial proceedings or by virtue of any power contained in the Security Documents, or by any conveyance from Developer to the Lender in lieu of foreclosure thereunder, or any subsequent transfer from the Lender to a Substituted Entity, shall not require the consent of TxDOT or constitute a breach of any provision of or a default under the CDA Documents. The foregoing does not affect the obligation to

obtain approval of persons or entities as Substituted Entities pursuant to Section 2.6 of this Agreement and Section 20.6 of the CDA (and the definition of Substituted Entity).

**2.8.5** Whenever TxDOT obtains knowledge of any condemnation proceedings by a third party affecting the Project or Project Right of Way, it shall promptly give notice thereof to the Lender. The Lender shall have the right to intervene and be made a party to any such condemnation proceedings, and TxDOT hereby consents that the Lender may be made such a party or an intervener.

## **2.9 Consents and Estoppel Certificates**

**2.9.1** At any time and from time to time, within 15 days after written request of the Lender, TxDOT, without charge, shall (a) consent to (i) the exercise by the Lender of its rights under and in accordance with this Agreement and Article 20 of the CDA in the event of a Developer Default and (ii) a pledge or hypothecation by Developer of the Developer's Interest in its rights under the CDA to the Lender and (b) certify to its best knowledge by written instrument duly executed and acknowledged, to the Lender as follows:

**2.9.1.1** As to whether the CDA has been supplemented or amended, and if so, the substance and manner of such supplement or amendment, attaching a copy thereof to such certificate;

**2.9.1.2** As to the validity and force and effect of the CDA, in accordance with its terms;

**2.9.1.3** As to the existence of any Developer Default;

**2.9.1.4** As to the existence of events which, by the passage of time or notice or both, would constitute a Developer Default;

**2.9.1.5** As to the then accumulated amount of Noncompliance Points;

**2.9.1.6** As to the existence of any claims by TxDOT regarding the CDA;

**2.9.1.7** As to the Effective Date and the commencement and expiration dates of the Term;

**2.9.1.8** As to whether a specified acceptance, approval or consent of TxDOT called for under the CDA has been granted;

**2.9.1.9** Whether the Lender and its Funding Agreements and Security Documents meet the conditions and limitations set forth in Sections 4.3 and 20.1 of the CDA and Section 2.1 of this Agreement; and

**2.9.1.10** As to any other matters of fact within TxDOT's knowledge about the CDA Documents, the Principal Project Documents, Developer, the Project or the Work as may be reasonably requested.

**2.9.2** TxDOT shall deliver the same certified, written instrument to a Substituted Entity or proposed Substituted Entity within 15 days after receiving its written request, provided that the request is delivered to TxDOT either before the Substituted Entity or proposed Substituted Entity succeeds to the Developer's Interest or within 60 days after the Substituted Entity has succeeded to the Developer's Interest.

**2.9.3** Any such certificate may be relied upon by, and only by, the Lender, Substituted Entity or proposed Substituted Entity to whom the same may be delivered, and the contents of such certificate shall be binding on TxDOT.

## **2.10 No Surrender**

No mutual agreement to cancel or surrender the CDA or the Lease shall be effective unless consented to in writing by the Collateral Agent, which consent Developer shall be solely responsible to obtain.

## **ARTICLE 3. CONTRACT PERIOD**

This Agreement shall become effective when executed by all parties. The Agreement shall terminate upon the occurrence of any of the following:

(a) If the CDA is terminated and the Lender does not have a right to a New Agreement, upon termination of the CDA;

(b) If the CDA is terminated and the Lender does have a right to a New Agreement, upon lapse without proper exercise of the right to obtain a New Agreement;

(c) Upon the Lender or a Substituted Entity that is affiliated with the Lender (or any other participating Lenders) succeeding to the Developer's Interest;

(d) Upon release and reconveyance by the Lender of all or any portion of its security interest in the Developer's Interest;

(e) Upon any change in circumstances rendering the Lender ineligible under the terms of this Agreement (i.e., those corresponding to Section 2.1 of this Agreement and Section 20.1 of the CDA) for the rights and protections set forth in this Agreement; or

(f) Upon the natural expiration of the Term of the CDA.

## **ARTICLE 4. SIGNATORY WARRANTY**

**4.1** The undersigned signatory for the Lender hereby represents and warrants that he or she is an officer of the Lender organization for which he or she has executed this

Agreement and that he has full and complete authority to enter into this Agreement on behalf of the Lender organization. These representations and warranties are made for the purpose of inducing TxDOT to enter into this Agreement.

**4.2** The undersigned signatory for TxDOT hereby represents and warrants that he or she is an officer of TxDOT and has full and complete authority to enter into this Agreement on behalf of TxDOT. These representations and warranties are made for the purpose of inducing the Lender to enter into this Agreement.

## **ARTICLE 5. GENERAL PROVISIONS**

### **5.1 Public Information and Confidentiality**

TxDOT will comply with Government Code, Chapter 552, the Public Information Act, and 43 Texas Administrative Code §3.10 et seq. in the release of information related to this Agreement.

### **5.2 Amendments and Waivers**

**5.2.1** No amendment of this Agreement, and no waiver of any term, covenant or condition of this Agreement, shall be effective unless in writing and signed by the parties to this Agreement.

**5.2.2** The exercise by a Party of any right or remedy provided under this Agreement or applicable law shall not waive or preclude any other or further exercise thereof or the exercise of any other right or remedy. No waiver by either party of any right or remedy under this Agreement or applicable law shall be deemed to be a waiver of any other or subsequent right or remedy under this Agreement or applicable law. The consent by one party to any act by the other party requiring such consent shall not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

### **5.3 Noncollusion**

**5.3.1** The Lender warrants that it has not employed or retained any company or person, other than a bona fide employee working solely for the Lender, to solicit or secure this Agreement and that it has not paid or agreed to pay any company or person any fee, commission, percentage, brokerage fee, gifts, or any other consideration, contingent upon or resulting from making of this Agreement.

**5.3.2** For breach or violation of this warranty, TxDOT shall have the right to terminate this Agreement without liability. No such termination shall affect the Lender's rights under Article 20 of the CDA.



## **5.4 Gratuities**

**5.4.1** Texas Transportation Commission policy mandates that employees of the Texas Department of Transportation shall not accept any benefit, gift or favor from any person doing business with or who reasonably speaking may do business with the State under this Agreement. The only exceptions allowed are ordinary business lunches and items that have received the advance written approval of the Executive Director of the Texas Department of Transportation.

**5.4.2** Any person doing business with or who reasonably speaking may do business with TxDOT under this Agreement may not make any offer of benefits, gifts or favors to department employees, except as stated above. Failure on the part of the Lender to adhere to this policy may result in the termination of this Agreement. No such termination shall affect the Lender's rights under Article 20 of the CDA.

## **5.5 Disputes**

**5.5.1** In the event of any dispute between TxDOT and the Lender under this Agreement, the parties shall resolve the dispute according to the Dispute Resolution Procedures, with the Lender having the same rights and obligations of Developer under the Disputes Resolution Procedures and having the obligation to enter into an identical Disputes Board Agreement (other than substitution of the Lender for Developer). If, however, any such dispute arises out of the same set of facts and circumstances that gives rise to a Dispute or Claim by Developer, then TxDOT shall have the right, without consent from members of any Disputes Board, to consolidate the disputes, claims and proceedings into one proceeding under the Disputes Board Agreement between Developer and TxDOT.

**5.5.2** Nothing in Section 5.5.1 of this Agreement affects Lender rights and remedies against Developer and the Developer's Interest under the Lender's Funding Agreements and Security Documents or the procedures available to the Lender under applicable Law to exercise its security interests thereunder. Nothing in Section 5.5.1 of this Agreement changes or affects the Lender's rights of joinder of TxDOT as a necessary party to the extent provided in Section 4.3.10 of the CDA.

## **5.6 Successors and Assigns**

This Agreement shall bind and inure to the benefit of TxDOT and the Lender and their respective successors and assigns. The Lender shall not assign, subcontract or transfer its interest in this Agreement separately from its interests in the Funding Agreements and Security Documents relating to the loan it has made available to Developer for the Project; and any attempt at such assignment, subcontracting or transfer shall be null and void.

## **5.7 Severability**

In the event any one or more of the provisions contained in this Agreement shall, for any reason, be held to be invalid, illegal, or unenforceable in any respect, such

invalidity, illegality, or unenforceability shall not affect any other provision thereof and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained herein.

**5.8 Prior Contracts Superseded**

Except for the Lender’s third party beneficiary rights under the CDA, this Agreement constitutes the sole agreement of the parties hereto with respect to the subject matter set forth herein and supersedes any prior understandings or written or oral contracts between the parties respecting such subject matter.

**5.9 Notices and Communications**

**5.9.1** All notices, correspondence, and other communications under this Agreement shall be in writing and: (a) delivered personally; (b) sent by certified mail, return receipt requested; (c) sent by a recognized overnight mail or courier service, with delivery receipt requested, or (d) sent by facsimile or email communication followed by a hard copy and with receipt confirmed by telephone, to the following addresses (or to such other address as may from time to time be specified in writing by such Person):

**5.9.2** All notices, correspondence and other communications to Lender shall be delivered to the following address:

[Lender address]

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Telephone: \_\_\_\_\_  
Facsimile: \_\_\_\_\_  
E-mail: \_\_\_\_\_

**5.9.3** All notices, correspondence and other communications to TxDOT shall be marked as regarding the IH 635 Managed Lanes Project and shall be delivered to the following address:

Texas Department of Transportation  
125 E. 11th Street, Fifth Floor  
Austin, TX 78701  
Attn: Mr. John Hudspeth, P.E.  
Telephone: (512) 936-0980  
Facsimile: (512) 936-0970  
E-mail: [jhudsp1@dot.state.tx.us](mailto:jhudsp1@dot.state.tx.us)

In addition, copies of all notices regarding disputes shall be delivered to the following person:

Texas Department of Transportation  
Attn: Office of General Counsel  
125 East 11<sup>th</sup> Street  
Austin, Texas 78701

Telephone: (512) 463-8630  
Facsimile: (512) 475-3070

**5.9.4** Notices, correspondence, and communications shall be deemed received when actually received in the office of the addressee (or by the addressee if personally delivered) or when delivery is refused, as shown on the receipt of the U. S. Postal Service, private carrier or other Person making the delivery. Notwithstanding the foregoing, notices sent by facsimile after 4:00 p.m. Central Standard or Daylight Time (as applicable) and all other notices received after 5:00 p.m. shall be deemed received on the first business day following delivery (that is, in order for a fax to be deemed received on the same day, at least the first page of the fax must have been received before 4:00 p.m.).

#### **5.10 Governing Law**

This Agreement shall be governed by the laws of the State of Texas.

#### **5.11 Counterparts**

This instrument may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties, intending to be legally bound, have executed this Agreement as of the date first written above.

**Lender**

**TxDOT**

**TEXAS DEPARTMENT OF  
TRANSPORTATION**

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Name: Amadeo Saenz Jr., P.E. \_\_\_\_\_

Title: \_\_\_\_\_

Title: Executive Director

## **Exhibit M**

### **SANCTIONS**

Texas Administrative Code  
TITLE 43 TRANSPORTATION  
PART 1 TEXAS DEPARTMENT OF TRANSPORTATION  
CHAPTER 27 TOLL PROJECTS  
SUBCHAPTER A COMPREHENSIVE DEVELOPMENT AGREEMENTS

#### RULE §27.9 Sanctions

(a) Procedure.

(1) Notification of rules. A copy of this section will be included in each request for qualifications, request for proposals, and request for competing proposals and qualifications issued under this subchapter. Failure to comply with this subsection does not affect the applicability of this section.

(2) Referral to executive director. In determining whether to refer a private entity to the executive director for possible sanctions, the department will consider the criteria set forth in subsection (c)(3) of this section.

(3) Notice of sanctions. The department will notify the private entity of a sanction by certified mail within five days after the executive director's decision to impose the sanction. The notice will summarize the facts and circumstances underlying the sanction, identify the effective date and period of the sanction, and state that the private entity may petition for a hearing within 10 days after receiving notice of the sanction. Except as provided in subsection (b) of this section, a sanction is effective on the date specified in the notice.

(4) Agreed modification of procedure. The procedure for considering a sanction may be modified by agreement of the executive director and the private entity.

(5) Contractual obligations unaffected. The imposition of sanctions does not affect a private entity's obligations under a comprehensive development agreement or any other agreement with the department or limit the commission's contractual remedies thereunder.

(6) Affiliated entities included. References to the term "private entity" also include an affiliate of the private entity, provided that the affiliate is an entity:

(A) which directly or indirectly through one or more intermediaries controls, is controlled by, or is under common control with, the private entity or any of its members, partners, or shareholders holding a 10% or greater interest in the private entity; or

(B) for which 10% or more of the equity interest in such entity is held directly or indirectly by the private entity, any of the private entity's members, partners or 10% or greater shareholders or any affiliate of the private entity under subparagraph (A) of this paragraph.

(7) Responsibility for acts of others. The conduct of an individual or other entity acting on behalf of the private entity may be imputed to the private entity.

(b) Opportunity for hearing.

(1) Availability of hearing. The private entity will be given the opportunity for a hearing after receiving notice of a sanction and may petition for a hearing as provided in §1.21 et seq. of this title (relating to Procedures in Contested Cases). The petition must be filed within 10 days after the private entity receives notice of the sanction.

(2) Stay of sanctions pending hearing. A sanction, except a suspension, is automatically stayed from the date a petition for hearing is filed until a final order is entered by the commission. On entry of a final order imposing the sanction or dismissing the hearing, the full term of the sanction will be reinstated as if it were first imposed on the date of the final order unless the commission specifically orders that a lesser sanction be imposed.

(3) Commission discretion. In the public interest, the commission may reduce, eliminate, or modify sanctions imposed under this section at any time.

(4) Exception. The opportunity for a hearing described in subsection (b)(1) of this section does not apply to a private entity that has been sanctioned through the use of a reprimand. In such cases, the private entity may submit written documentation disputing the reprimand to the executive director for further consideration.

(c) Application of sanctions.

(1) Determination of offense. The executive director will determine whether a private entity has committed an act or omission listed under subsection (e)(1) of this section.

(2) Consideration of all circumstances. The existence of grounds for imposing a sanction does not mandate that a private entity be sanctioned. The seriousness of the acts or omissions (including the existence of and elapsed time since previous acts or omissions) and any mitigating circumstances will be considered before sanctions are imposed.

(3) Mitigating circumstances. The executive director will consider mitigating circumstances (or lack thereof) in deciding whether to impose sanctions. Mitigating circumstances may include:

(A) the private entity's culpability;

(B) the level of impact the sanction will have on a particular comprehensive development agreement project;

(C) whether, in light of all facts and circumstances, a severe sanction is necessary to protect the interest of the state and the integrity of the comprehensive development agreement program;

(D) restitution paid by the private entity or a third party for damages suffered by a governmental entity as a result of the private entity's actions;

(E) cooperation by the private entity with a governmental entity in the investigation of bidding crimes, including the provision of a full and complete account of the private entity's involvement; and

(F) the private entity's disassociation from individuals and firms that have been involved in a bidding crime.

(4) Determination of sanction level. The executive director, after consideration of all circumstances (including any mitigating circumstances) will determine a sanction level described in subsection (e)(2) of this section to be imposed on the private entity.

(5) Progressive sanctions. If the private entity has previously been sanctioned, the executive director may use increasingly more severe sanctions in order to achieve the private entity's compliance with department policies and procedures. Every effort will be made to resolve the situation with the imposition of the least severe sanction that is appropriate for the circumstances under consideration. However, in cases where the act or omission is of such a nature that progressive sanction action is not in the best interest of the state or the comprehensive development agreement program, a more severe sanction may be imposed even if such act or omission is the first act or omission by the private entity which warrants sanction action.

(6) Consecutive sanctions. In the case of multiple violations by the same private entity arising out of separate occurrences, the executive director may impose multiple sanctions consecutively and in any order.

(7) Imposition of lesser sanctions. A lesser sanction may be imposed instead of the maximum sanction permitted.

(8) Executive director discretion. In the best interest of the state or the comprehensive development agreement program, the executive director may reduce, eliminate, or modify sanctions at any time.

(d) Suspension.

(1) Grounds. The executive director may immediately suspend a private entity without a prior hearing if the private entity is notified of debarment under subsection (e) of this section.

(2) Duration. A suspension will terminate when a final order is entered after a hearing or when ordered by the executive director.

(e) Sanctions.

(1) Grounds. The executive director may sanction a private entity for the following reasons:

(A) conviction of a bidding crime as defined in §9.101 of this title (relating to Contractor Sanctions), a plea of guilty or nolo contendere to a charge of a bidding crime, or a public admission to a bidding crime, whether made by the private entity or by an individual or other entity that acted on behalf of the private entity;

(B) conviction of the private entity for an offense indicating a lack of moral or ethical integrity, such as bribery or payment of kickbacks or secret rebates to agents of a governmental entity, if the offense reflects on the business practices of the private entity;

(C) commission of acts indicating a lack of moral or ethical integrity and reflecting on the business practices of the private entity, if the executive director has probable cause to believe that the acts have been committed;

(D) disqualification of the private entity by a state or by an agency of the federal government for any of the reasons listed in this section;

(E) failure of the private entity to notify the department promptly of a conviction of a bidding crime or debarment for any reason by a state or by an agency of the federal government;

(F) the private entity is declared in default on a comprehensive development agreement in accordance with the terms of that agreement;

(G) violation of the conflict of interest provisions applicable to private entities participating in the department's comprehensive development agreement program as set forth in §27.8 of this subchapter (relating to Conflict of Interest and Ethics Policies);

(H) violation of the provision relating to offering, conferring, or agreeing to confer gifts and benefits to department employees as set forth in §27.8 of this subchapter; or

(I) any other grounds described in §9.106(a) of this title (relating to Contractor Sanctions) exist.

(2) Sanction levels. The executive director will determine the level of sanction appropriate for the circumstances under consideration.

(A) Level 1. Reprimand. After four reprimands in one calendar year, any subsequent act or omission committed by the private entity will result in the imposition of a more severe sanction.

(B) Level 2. Prohibition against the private entity's participation in a particular procurement.

(C) Level 3. Debarment of the private entity for a period of no more than 36 months.

(D) Level 4. Permanent debarment of the private entity.

(3) Exception. Debarment under paragraph (2)(D) of this subsection may not be for more than the period of debarment established by the state or federal agency on whose actions the debarment is based.

(4) Use of sanction information. Information pertaining to any sanction(s) imposed against a private entity may be considered by the department during the evaluation of qualification submittals and other proposals submitted by the private entity during a procurement process. Use of this information is limited to sanction action(s) which occurred within 10 years of the date the qualification submittal or other proposal is received by the department.

Source Note: The provisions of this §27.9 adopted to be effective May 17, 2007, 32 TexReg 2670