
PROJECT AGREEMENT

Execution Version

August 24, 2015

MICHIGAN DEPARTMENT OF TRANSPORTATION

**DELIVERY OF FREEWAY LIGHTING AS A DESIGN-BUILD-FINANCE-OPERATE-
MAINTAIN PROJECT**

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This Agreement is made as of August 24, 2015

BETWEEN:

MICHIGAN MDOT OF TRANSPORTATION

(“MDOT”)

AND

FREEWAY LIGHTING PARTNERS, LLC

(“PROJECT COMPANY”)

RECITALS

1. MDOT desires to receive and the Project Company desires to deliver the Relevant Infrastructure as provided under this Agreement.
2. MDOT is undertaking the Project for the purpose of maximizing government efficiency and improving essential services to the citizens of the State of Michigan and the Detroit Metropolitan Region.
3. MDOT wishes to facilitate private sector investment and participation in the development of the Improved Freeway Lighting System by entering into a contract as contemplated and authorized by 1951 PA 51, MCL 257.651 et seq., and 1925 PA 17, MCL 250.61 et seq. (the “Acts”). These Acts authorize MDOT to construct and maintain the State’s trunk line highway system, including the maintenance of freeway lighting for traffic safety purposes, and to enter into contracts for this work.
4. On or before April 21 2014, MDOT received Statements of Qualification submittals from 9 proposers and subsequently shortlisted 4 eligible Proposers.
5. On September 12, 2014, MDOT issued to the shortlisted Proposers a Request for Proposals to Design, Build, Finance, Operate and Maintain the Freeway Lighting System through a project agreement (as amended, the “RFP”).
6. On March 27, 2014, MDOT received responses to the RFP, including the response of the Project Company (the “Proposal”).
7. After conducting a thorough analysis of all responses to the RFP, MDOT determined that the Project Company’s Proposal best met the selection criteria contained in the RFP and recommended that a project agreement be awarded to the Project Company.
8. This Agreement collectively constitutes a project agreement as contemplated under the Act, and is hereby entered into in accordance with the Act and the provisions of the RFP.

In consideration of the mutual covenants in this Agreement and other good and valuable consideration, the receipt and sufficiency of which are hereby expressly acknowledged, the Parties, intending to be legally bound, covenant and agree as follows:

ARTICLE 1 DEFINITIONS AND INTERPRETATION

Section 1.1 Definitions and Interpretations

- (a) Unless the context otherwise requires, capitalized terms in this Agreement have the meaning given in Schedule 1 – Definitions.
- (b) In this Agreement unless the context otherwise requires:
 - (i) the words “including”, “includes” and “include” will be read as if followed by the words “without limitation”;
 - (ii) the meaning of “or” will be that of the inclusive “or”, that is meaning one, some or all of a number of possibilities;
 - (iii) a reference to any Party or Person includes each of their legal representatives, trustees, executors, administrators, successors, and permitted substitutes and assigns, including any Person taking part by way of novation;
 - (iv) a reference to any Governmental Entity, institute, association or body is:
 - (A) if that Governmental Entity, institute, association or body is reconstituted, renamed or replaced or if the powers or functions of that Government Entity, institute, association or body are transferred to another organization, a reference to the reconstituted, renamed or replaced organization or the organization to which the powers or functions are transferred, as applicable; and
 - (B) if that Governmental Entity, institute, association or body ceases to exist, a reference to the organization which serves substantially the same purposes or objectives as that Governmental Entity, institute, association or body;
 - (v) a reference to this Agreement or to any other deed, agreement, document, or instrument includes a reference to this Agreement or such other deed, agreement, document or instrument as amended, revised, supplemented or otherwise modified from time to time;
 - (vi) a reference to any legislation or to any section or provision of it includes any amendment to or re-enactment of, or any statutory provision substituted for that legislation, section or provision;
 - (vii) words in the singular include the plural (and vice versa) and words denoting any gender include all genders;
 - (viii) headings are for convenience only and do not affect the interpretation of this Agreement;

- (ix) a reference to this Agreement includes all Schedules, Appendices and Exhibits;
- (x) a reference to a Section, Schedule, Appendix or Exhibit is a reference to a Section, Appendix or Exhibit of or to the body of this Agreement;
- (xi) where any word or phrase is given a defined meaning, any other part of speech or other grammatical form of that word or phrase has a corresponding meaning;
- (xii) a reference to “\$” is to currency in the United States;
- (xiii) a reference to time is a reference to Eastern Time Zone in the United States;
- (xiv) no rule of construction applies to the disadvantage of a Party on the basis that the Party put forward or drafted this Agreement or any part; and
- (xv) if this Agreement requires calculation of an amount payable to a Party there must be no double counting in calculating that amount.

Section 1.2 Project Documents; Order of Precedence

- (a) In the event of any conflict, ambiguity or inconsistency between any terms or provisions of this Agreement, the order of precedence, from highest to lowest, except as provided otherwise in this Article 1, will be as follows:
 - (i) Changes to this Agreement in accordance with this Agreement;
 - (ii) Article 1 through Article 48 and Schedule 1 - Definitions;
 - (iii) the Schedules to this Agreement (excluding the Technical Requirements, the Project Management Plan, the Proposal Technical Commitments and Schedule 1 – Definitions);
 - (iv) the Proposal Technical Commitments;
 - (v) the Technical Requirements; and
 - (vi) the Project Management Plan.
- (b) In the event of any conflict, ambiguity or inconsistency between the standards, criteria, requirements, conditions, procedures, specifications or other provisions of the Technical Requirements and the Applicable Standards, the Technical Requirements will prevail except as provided otherwise in this Section 1.2.
- (c) If any portion of the Applicable Standards conflicts with or is less stringent than Applicable Laws, such conflicting or less stringent portions of Applicable Standards will not be deemed “applicable.” If any of the Applicable Standards (other than a Rule and Regulation) conflicts with or is less stringent than a Rule and Regulation, such Rule and Regulation will prevail. If any of the provisions of this Agreement conflicts with or is inconsistent with any Rule and Regulation, such provision of this Agreement will prevail, provided that with respect to any conflict or inconsistency directly bearing on public health, welfare or safety, the applicable Rule and Regulation will prevail.

- (d) In the event of any conflict, ambiguity or inconsistency between or among 2 or more Project Documents, the greater or higher requirement, standard, quality, level of service, quantum or scope prevails.
- (e) Additional or supplemental details or requirements in a lower priority Project Document must be given effect except to the extent they irreconcilably conflict with requirements, provisions and practices contained in the higher priority Project Document.
- (f) Project Company acknowledges and agrees that it had the opportunity and obligation, prior to submission of its Proposal, to review the terms and conditions of this Agreement and to bring to the attention of MDOT any conflicts, ambiguities or inconsistencies of which it is aware contained within this Agreement.

Section 1.3 Order of Precedence of Project Management Plan

- (a) In the event of any conflict, ambiguity or inconsistency between the Project Management Plan and this Agreement, this Agreement will prevail to the extent of any conflict, ambiguity or inconsistency.
- (b) If the Project Management Plan include statements, terms, concepts or designs that can reasonably be interpreted as offering to provide a greater or higher requirement, standard, quality, level of service, quantum or scope than otherwise required by the other Project Documents, then Project Company's obligations under this Agreement will include compliance with that greater or higher requirement, standard, quality, level of service, quantum or scope.

ARTICLE 2 TERM

Section 2.1 Term

This Agreement shall:

- (a) come into effect on the Commercial and Financial Close Date; and
- (b) terminate on the Scheduled Expiry Date unless this Agreement is terminated earlier, in which case, this Agreement will expire on the date of such earlier termination ("Expiry Date").

Section 2.2 Survival

Notwithstanding any other provision of this Agreement, any provisions of this Agreement together with any provisions necessary to give effect to the above provisions which expressly or by implication from their nature are intended to survive termination, completion or expiration of this Agreement will survive such termination, completion or expiration, including the following provisions:

- (a) Article 24 (Handback Requirements);
- (b) Article 26 (Records, Information and Audit);
- (c) Article 34 (Project Company Default);
- (d) Article 35 (MDOT Default);

- (e) Article 36 (Non-Default Termination);
- (f) Article 37 (Effect of Termination);
- (g) Article 38 (Compensation on Termination);
- (h) Article 40 (Confidentiality);
- (i) Article 41 (Insurance Provisions),
- (j) Article 43 (Indemnities)
- (k) Article 44 (Limitation on Special, Consequential, Indirect or Punitive Damages);
- (l) Article 45 (Dispute Resolution Procedure); and
- (m) Schedule 6 (Termination Compensation).

ARTICLE 3 MANDATORY TERMS OF PROJECT DEBT, FINANCING DOCUMENTS AND SECURITY DOCUMENTS

Project Debt, Financing Documents and Security Documents, as amended, must comply with the terms and conditions in Schedule 10 – Financing Document Terms.

ARTICLE 4 FINANCIAL MODEL AND UPDATES

Section 4.1 Financial Model

- (a) Project Company and MDOT agree to the composition of the Financial Model as of the date of this Agreement in the form included in Schedule 14 – Financial Model.
- (b) Project Company will not cause (or permit any other person to cause) the Financial Model to contain any hidden data.
- (c) Except as expressly provided under this Agreement, in no event will the Financial Model or any Financial Model Update be changed, except with the prior approval of both MDOT and Project Company.

Section 4.2 Updates to Financial Model

- (a) The Financial Model will be utilized and varied in accordance with this Section 4.2, on the occurrence of any of the following events (each, a “Model Variation Event”):
 - (i) a Refinancing;
 - (ii) a Relevant Event; and
 - (iii) any other event that Project Company and MDOT (acting reasonably) agree to be a Model Variation Event.
- (b) Any variation to the Financial Model to take account of a Model Variation Event will be made as follows:

- (i) Project Company must propose the variation by Notice to MDOT giving full and complete details of the assumptions and calculations used; and
- (ii) MDOT will review the varied Financial Model in accordance with the Submittal Requirements and within 5 Business Days after receipt provide Notice to Project Company as to whether or not it approves or disapproves the varied Financial Model, including, if it disapproves, reasonable information about the basis of its disapproval.
- (c) Once the variation to the Financial Model is agreed or determined in accordance with Article 45 (any such variation, a “Financial Model Update”), such updated model is deemed to be the Financial Model in effect as of such date.
- (d) Project Company must provide (and must ensure that each Project Company Related Entity provides) MDOT and any nominee of MDOT with full access to electronic copies of the calculations required to vary the Financial Model for a Model Variation Event, including reasonable access to any financial modeller with the ability to access that information, and relevant passwords or other access information.

Section 4.3 Financial Model Disputes

In the event of a Dispute, the Financial Model or the immediately preceding Financial Model Update (as applicable) that is not being disputed (or, if there has been no undisputed Financial Model Update, the Financial Model) will remain in effect until such Dispute is resolved or a new Financial Model Update is issued and not disputed. If a proposed Financial Model or Financial Model Update (as applicable) has not been disputed, or if any such Dispute has been so resolved, the proposed Financial Model or Financial Model Update (as applicable) will serve as the Financial Model or the current Financial Model Update (as applicable).

ARTICLE 5 REFERENCE INFORMATION DOCUMENTS

Section 5.1 Purpose

MDOT has provided and disclosed to Project Company the Reference Information Documents for the purposes of disclosure and, in the case of general industry and general governmental manuals and publications, for guidance regarding Good Industry Practice.

Section 5.2 No Warranty

Neither MDOT nor any MDOT Person:

- (a) gives any warranty or undertaking in respect of the Reference Information Documents; or
- (b) warrants that the Reference Information Documents represent all of the information in its possession or power (either during the conduct of the procurement process for the Project or at the Commercial and Financial Close Date) relevant or material to or in connection with the Project; and
- (c) will be liable to Project Company or any Project Company Related Entity in respect of any failure, whether before, on or after the Commercial and Financial Close Date:

- (i) to disclose or make available to Project Company or any Project Company Related Entity any information, documents or data;
- (ii) to review or update the Reference Information Documents; or
- (iii) to inform Project Company or any Project Company Related Entity of any inaccuracy, error, omission, defect or inadequacy in the Reference Information Documents.

Section 5.3 No Claims

Project Company acknowledges and confirms that:

- (a) it has, before the Commercial and Financial Close Deadline, conducted its own analysis and review of the Reference Information Documents upon which it places reliance;
- (b) MDOT has not made any representation or warranty as to the accuracy, completeness and fitness for purpose of any such Reference Information Documents upon which it places reliance and that any use or reliance on such Reference Information Documents by Project Company shall be solely at its own risk; and
- (c) except as expressly provided in this Agreement, neither it nor any Project Company Related Entity is entitled to make (and Project Company must prohibit any Project Company Related Entity from making) any Claim against MDOT or any MDOT Person for any Liability in connection with the Reference Information Documents including on the grounds:
 - (i) of any misunderstanding or misapprehension in respect of the Reference Information Documents; or
 - (ii) that the Reference Information Documents were incorrect or insufficient,nor will Project Company be relieved from any of its obligations under this Agreement on any such grounds.

ARTICLE 6 REPRESENTATIONS AND WARRANTIES

Section 6.1 Project Company Representations and Warranties

- (a) Project Company represents and warrants to MDOT that, as of the Commercial and Financial Close Date:
 - (i) Project Company is a limited liability company duly organized and validly existing under the laws of the State of Delaware, and is duly qualified and authorized to do business in the State of Michigan and has all the requisite power and authority to own its properties and assets, to carry on its business as it is currently being conducted and to enter into and perform its obligations under this Agreement;
 - (ii) all ownership interests in Project Company and any owners of Project Company and the identity of the ultimate parent corporation of Project Company and any owners of Project Company have been disclosed in writing to MDOT;

- (iii) each Project Company Related Entity has the requisite power, authority and capacity to execute, deliver and perform the Project Documents to which it is a party in its capacity as a Project Company Related Entity, and to do all acts and things, and execute, deliver and perform all applicable agreements, instruments, undertakings and documents as are required by this Agreement;
- (iv) this Agreement has been duly authorized, executed, and delivered on behalf of Project Company and constitutes a legal, valid, and binding obligation of Project Company, enforceable against Project Company in accordance with its terms, subject only to limitations with respect to the enforcement of remedies by bankruptcy, insolvency, moratorium, winding-up, arrangement, reorganization, fraudulent preference and conveyance and other laws of general application affecting the enforcement of creditors' rights generally;
- (v) no Project Company Default has occurred and is continuing;
- (vi) there are no actions, suits, proceedings, or investigations pending or, to the Project Company's knowledge threatened against Project Company or, to Project Company's knowledge at law or in equity that individually or in the aggregate could reasonably be expected to result in any material adverse effect on the business, properties, or assets, or the condition, financial or otherwise, of Project Company or in any impairment of its ability to perform the Project Operations, and Project Company has no knowledge of any violation or default with respect to any order, writ, injunction, or decree of any Governmental Entity or arbitral body that could reasonably be expected to result in any such material adverse effect or impairment;
- (vii) that neither Project Company nor any Project Company Related Entity, nor any principal of the foregoing, are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from entering into this Agreement by any federal agency or by any department, agency or political subdivision of the State. For purposes of this Section 6.1(a)(vii), the term "principal" for purposes of this Agreement means an officer, director, owner, partner, Key Personnel, employee, or other person, in each case with primary management or supervisory responsibilities, or a person who has a critical influence on or substantive control over the operations of such entity;
- (viii) Project Company has carefully reviewed each of the Project Documents, and all other documents made available to Project Company by or on behalf of MDOT, and, to Project Company's knowledge, nothing contained under this Agreement or in those documents inhibits or prevents Project Company from completing the Project in accordance with this Agreement in a good and safe manner so as to achieve and satisfy the requirements of this Agreement;
- (ix) Project Company has evaluated the constraints affecting delivery of the Project, including Right of Way constraints and conditions of the Environmental Approvals and has reasonable grounds for believing and does believe that the Project can be delivered within such constraints;
- (x) Project Company has evaluated the feasibility of performing the Project Operations within the time specified under this Agreement and for the Service

Payments and Milestone Payments, and has reasonable grounds for believing and does believe, subject to the express terms of this Agreement, that such performance is feasible and practicable;

- (xi) Project Company has, prior to the execution of this Agreement, in accordance with Good Industry Practice, reviewed the RIDs, inspected the Premises and undertaken other appropriate activities sufficient to familiarize itself with surface conditions and subsurface conditions discernible from the surface affecting the Project including inspection and examination of the Premises and surrounding locations. Subject to Project Company's express rights under this Agreement, based on its review, inspection, examination and other activities, Project Company is familiar with and accepts the physical requirements of the D&C Work and agrees to accept the Premises conditions on an "as is, where is" basis. Project Company must be responsible for ensuring that the Design and Construction Documents accurately depict all governing and adjoining dimensions and conditions;
- (xii) Project Company familiarized itself with the requirements of all Applicable Laws and the conditions of any required Permits, License and Approvals required in connection with the Project and has no reason to believe that any Permits, License and Approvals required to be obtained by Project Company will not be granted in due course and thereafter remain in effect so as to enable the Project Operations to proceed in accordance with the Project Agreement;
- (xiii) the execution, delivery and performance of this Agreement have been duly authorized by all necessary actions of Project Company, and, if applicable, Project Company Related Entities, and will not result in a Project Company Default under this Agreement or any indenture, loan, credit agreement, or other material agreement or instrument to which any Lender is a party or by which their properties and assets may be bound or affected;
- (xiv) no organizational conflicts of interest exist with respect to Project Company and its Contractors and there have been no organizational changes to Project Company or its Contractors identified in its Proposal, which have not been approved in writing by MDOT. For this purpose, organizational conflict of interest has the meaning set forth in the ITP; and
- (xv) Project Company recognizes that the requirements of the Program Fraud Civil Remedies Act of 1986, as amended, 31 U.S.C. § 3801 *et seq.* and the USDOT regulations, "Program Fraud Civil Remedies," 49 C.F.R. Part 31, apply to its actions under this Agreement. Accordingly, by signing the Project Agreement, Project Company certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, or it may make pertaining to the Project Agreement. In addition to other penalties that may be applicable, Project Company also acknowledges that if it makes a false, fictitious, or fraudulent claim, statement, submission, or certification, the federal government reserves the right to impose the penalties of the Program Fraud Civil Remedies Act of 1986, as amended, on Project Company to the extent the federal government deems appropriate.

- (b) Project Company agrees that MDOT has relied on the representations and warranties of Project Company set out in this Agreement in entering into this Agreement.

Section 6.2 MDOT Representations

- (a) MDOT represents to Project Company that, as of the Commercial and Financial Close Date:
 - (i) MDOT has the requisite power, authority and capacity to perform this Agreement, and to do all acts and things, and execute, deliver and perform all other agreements, instruments, undertakings and documents as are required by this Agreement to be done, executed, delivered or performed;
 - (ii) this Agreement has been duly authorized, executed, and delivered by MDOT and constitutes a legal, valid, and binding obligation of MDOT, enforceable against MDOT in accordance with its terms;
 - (iii) the Project Documents to which MDOT is (or will be) a party have each been duly authorized by MDOT, and each constitutes (or at the time of execution and delivery will constitute) a legal, valid and binding obligation of MDOT enforceable against MDOT in accordance with its terms;
 - (iv) there is no action, suit, proceeding, investigation or litigation pending and served on MDOT which challenges MDOT's authority to execute, deliver or perform, or the validity or enforceability of, the Project Documents to which MDOT is a party or which challenges the authority of the MDOT official executing the Project Documents;
 - (v) MDOT has disclosed to Project Company any pending and un-served or threatened action, suit, proceeding, investigation or litigation with respect to the Project of which MDOT is aware;
 - (vi) neither the execution and delivery by MDOT of the Project Documents to which MDOT is a party, nor the consummation of the transactions contemplated by such documents, is (or at the time of execution will be) in conflict with or has resulted or will result in a default under or a violation of the enabling legislation of MDOT or any agreement, judgment or decree to which MDOT is a party or is bound;
 - (vii) the execution and delivery by MDOT of the Project Documents to which MDOT is a party and the performance by MDOT of its obligations under this Agreement, will not conflict with any Applicable Law that is valid and in effect on the date of execution and delivery. MDOT is not in breach of any Applicable Law that would have a material adverse effect on the performance of any of its obligations under the Project Documents to which MDOT is a party;
 - (viii) MDOT has received all required approvals by the State Transportation Commission and the State Administrative Board of Michigan;
 - (ix) any freeway lighting provided under this Agreement will only be provided on State Trunk Line Highways for traffic safety purposes;

- (x) MDOT awarded the Agreement to Project Company using a competitive procurement process as described in Section 3 of the ITP.
- (b) MDOT agrees that Project Company has relied on the representations of MDOT set out in this Agreement in entering into this Agreement.

Section 6.3 Survival

The representations and warranties of Project Company and representations of MDOT in this Agreement survive 5 years after the expiration or earlier termination of this Agreement.

ARTICLE 7 GENERAL RESPONSIBILITIES OF THE PARTIES

Section 7.1 MDOT Responsibilities

Subject to the terms and conditions of this Agreement, MDOT must, in addition to the other obligations specified in this Agreement, pay the Service Payment and Milestone Payments to Project Company for the performance of the Project Operations.

Section 7.2 Project Company Responsibilities

- (a) Project Company must:
 - (i) perform all Project Operations and the Project:
 - (A) in compliance with Applicable Law;
 - (B) in compliance with all Permits, Licenses and Approvals and so as to preserve the existence and continued effectiveness of any such Permits, Licenses and Approvals;
 - (C) in accordance with the other terms and conditions of this Agreement and the Project Management Plan;
 - (D) so as to satisfy the D&C Requirements, including using reasonable efforts to comply with the Construction Schedule in the case of the D&C Work;
 - (E) so as to satisfy the O&M Requirements in the case of the O&M Work;
 - (F) in accordance with Good Industry Practice;
 - (G) with due regard to the health and safety of persons and property; and
 - (H) subject to the other provisions of this Agreement, in a manner which will not impair the ability of MDOT or any MDOT Persons to comply with Applicable Law.
- (b) Project Company must perform its obligations under, and observe all of the provisions of, each of the Project Documents to which Project Company is a party, so as to ensure that

other parties to such Project Documents will not be entitled to terminate such Project Document.

- (c) Project Company must not engage in any activities which are not authorized under the Project Documents and, as to the Project, may only engage in such activities which are specifically related to or are undertaken specifically in connection with the Project, without the prior consent of MDOT, in its sole discretion.
- (d) Except as otherwise expressly provided in this Agreement, Project Company:
 - (i) accepts all risks in connection with delivering the Project consistent with this Agreement; and
 - (ii) is not entitled to make any Claim against MDOT for any Liability in connection with the Project, the Relevant Infrastructure or this Agreement.

Section 7.3 Safety and Security

Project Company must:

- (a) comply, and cause contractually and be responsible for each Project Company Partner's compliance, with Applicable Law relating to health and safety, including, the Occupational Safety and Health Act and all regulations thereto; and
- (b) with respect to the Project Operations, perform all of the obligations of Project Company and indemnify MDOT and any MDOT Person against any and all of the liabilities of Project Company under the Occupational Safety and Health Act and all regulations thereto.

Section 7.4 Project Management Plan

- (a) Project Company must prepare, update and submit to MDOT the Project Management Plan for review and approval in accordance with Article 3 of the General Technical Requirements and the Submittal Requirements.
- (b) Unless otherwise agreed by MDOT, Project Company must perform the Project Operations and deliver the Project in accordance with the Project Management Plan provided that a failure to comply with the Construction Schedule shall not constitute a Project Company Default, except as expressly provided under Section 34.1 (excluding Section 34.1(n)).
- (c) Project Company must comply at all times with the then current version of the Project Management Plan.

ARTICLE 8 PERSONNEL AND CONTRACTS

Section 8.1 The MDOT Representative

- (a) The MDOT Representative must exercise the functions and powers identified in this Agreement as functions or powers to be performed by the MDOT Representative and such other functions and powers of MDOT under this Agreement as MDOT may notify Project Company from time to time.

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- (b) MDOT may, from time to time, by Notice to Project Company, change the MDOT Representative. Such change will take effect on the later of the date of delivery of such Notice and the date specified in such Notice.
- (c) The MDOT Representative must not, except as otherwise provided in this Agreement, be entitled to modify or waive any provision of this Agreement or to authorize a Change.

Section 8.2 The Project Company Representative

- (a) The Project Company Representative must have full authority to exercise the functions and powers identified in this Agreement as powers to be performed by Project Company.
- (b) Project Company may change the Project Company Representative with the prior consent of MDOT, in its reasonable discretion.
- (c) The Project Company Representative must not, except as otherwise provided in this Agreement, be entitled to modify or waive any provision of this Agreement or to authorize a Change.

Section 8.3 Key Contracts, Key Contractors and Key Personnel

- (a) Key Contract and Key Personnel Approvals, Amendments and Termination; Use of and Change in Key Contractors.

Project Company must:

- (i) retain, employ and utilize the firms, organizations and individuals specifically listed in Schedule 9 - Key Contractors and Personnel Requirements to fill the corresponding Key Contractor and Key Personnel positions. For Key Contractors or Key Personnel not known as of the Commercial and Financial Close Date, MDOT may review the qualifications of each proposed Key Contractor and Key Personnel and the character of each proposed Key Personnel position (including personnel employed by Contractors to fill any such position) and approve or disapprove use of such individual or Contractor in such position prior to the commencement of any Project Operations, in its good faith discretion;
- (ii) cause each individual filling a Key Personnel position to dedicate the full amount of time necessary, in MDOT's good faith discretion, for the proper prosecution and performance of the Project Operations including as a minimum the commitments identified in Schedule 9 - Key Contracts and Personnel Requirements, such that each such person must have no other conflicting assignments when and where they are needed during performance of their duties on the Project;
- (iii) in the case of Key Personnel, not change or substitute any such individuals without MDOT's prior approval, in its good faith discretion;
- (iv) provide MDOT with office and cell phone numbers and email addresses for each Key Personnel. MDOT must have the ability to contact any Key Personnel 24 hours per day, 7 days per week; and

- (v) subject to Section 8.3(a)(vi), not amend any Key Contract without MDOT's prior approval, in its good faith discretion, in a manner inconsistent with the Project Documents or the Project Operations, including any modification with respect to the provisions required under Section 4 of Schedule 9 – Key Contractor and Personnel Requirements);
 - (vi) not terminate any Key Contract, permit termination of a Key Contract, permit or suffer any substitution or replacement (by way of assignment of the Key Contract, or transfer to another of any material portion of the scope of work, or otherwise) of any Key Contractor, except:
 - (A) in the case of material uncured default by the Key Contractor;
 - (B) in the case of termination of this Agreement and MDOT's election not to assume the Key Contract;
 - (C) if there occurs any suspension, debarment, disqualification or removal (distinguished from ineligibility due to lack of financial qualifications) of the Key Contractor, or there goes into effect an agreement for voluntary exclusion of the Key Contractor, from bidding, proposing or contracting with any federal, State or local department or agency; or
 - (D) with MDOT's prior approval, in its good faith discretion.
- (b) Key Contract Provisions

Each Key Contract must include the provisions and comply with the requirements set out in Section 4 of Schedule 9 – Key Contractor and Personnel Requirements.

Section 8.4 Prequalification, Contract Covers

- (a) Project Company must only issue Contracts to Contractors that are prequalified by MDOT to perform the classification of work proposed. MDOT's prequalification of the Contractor is for the benefit of MDOT and is not for the benefit of Project Company or any other person. MDOT confirms that, subject to such Contractors continuing to comply with the requirements of this Agreement, the Contractors listed in Section 2 of Schedule 9 to perform the D&C Works are all prequalified by MDOT as of the date of this Agreement. MDOT's prequalification is not a guarantee or warranty of the Contractor's ability to perform or complete the Contract work.
- (b) Before Final Acceptance, Project Company must certify that the Contractor has met the subcontracting requirements using Form 1386 Post Certification of Subcontract Compliance. Project Company must itemize the name of each Contractor, the amount of each Contract, and the amount paid for each Contract.
- (c) Project Company must submit the Contract cover page and the statement of work for each Contract to the MDOT Representative, before the start of the Project Operations associated with the Contract.
- (d) Project Company shall supervise and be fully responsible for the actions, omissions, negligence, willful misconduct, fraud, bad faith or breach of applicable Law or contract

by any Project Company Related Entity or by any member or employee of Project Company or any Project Company Related Entity, as though Project Company directly employed all such individuals.

ARTICLE 9 PERMITS, LICENSES AND APPROVALS

Section 9.1 MDOT Permits, Licenses and Approvals

- (a) MDOT has received the NEPA Document as of the Commercial and Financial Close Deadline.
- (b) MDOT must, at Project Company's cost, provide or cause to be provided such information, documentation, and administrative assistance as Project Company may request and as MDOT may reasonably be able to provide, and must execute such applications as are required to be in its name, to enable Project Company to obtain, maintain or renew any Permits, Licenses and Approvals or to demonstrate compliance with any Permits, Licenses and Approvals, provided that, except as expressly provided in Article 28, Article 29 or Article 30, MDOT is not responsible for obtaining or for any delay in obtaining or for the failure of Project Company to obtain any Permits, Licenses and Approvals, unless such delay or failure is caused by any MDOT Fault.
- (c) Without limiting Section 9.1(b), MDOT must not be obligated to:
 - (i) exercise its legal rights in order to avoid or eliminate the requirement to obtain any Permits, Licenses and Approvals; and
 - (ii) automatically grant Permits, Licenses and Approvals for which it is the authorizing entity and will apply its usual procedures and criteria in considering applications from Project Company for such Permits, Licenses and Approvals.

Section 9.2 Project Company Permits, Licenses and Approvals

- (a) Project Company must:
 - (i) obtain, modify, maintain, and, as applicable, renew all Permits, Licenses and Approvals which may be required for the performance of the Project Operations (excluding the NEPA Document); and
 - (ii) comply with all Permits, Licenses and Approvals in accordance with their terms.
- (b) Project Company must provide or cause to be provided such information, documentation, and administrative assistance as MDOT may request and as Project Company may reasonably be able to provide, and must execute such applications as are required to be in its name, to enable MDOT to obtain, maintain or renew the NEPA Document or any other Permits, Licenses and Approvals required expressly to be obtained by MDOT in accordance with this Agreement.

ARTICLE 10 ENVIRONMENTAL REQUIREMENTS

Section 10.1 Project Company Obligations

Project Company must comply with all applicable Environmental Laws and any issued Permits, Licenses and Approvals, including Environmental Approvals, relating to this Project, whether obtained by MDOT or Project Company and to ensure the protection of the public health, safety, welfare, and environment.

Section 10.2 Mitigation Requirements

Project Company must perform all environmental mitigation measures (which term must be deemed to include all requirements of the Environmental Approvals and similar Permits, License and Approvals, regardless of whether such requirements would be considered to fall within a strict definition of the term) for the Project.

Section 10.3 Existing Environmental Approvals

MDOT confirms that there are no existing Environmental Approvals for this Project other than the NEPA Documents.

Section 10.4 New Environmental Approvals

(a) Approvals to Be Obtained by MDOT

- (i) MDOT is responsible for obtaining any new or modified Environmental Approvals necessitated by a MDOT Change, a Delay Event or a Relief Event.
- (ii) Project Company must provide support services to MDOT with respect to obtaining any such Environmental Approval as MDOT may reasonably request. Project Company will be entitled to be reimbursed its Direct Costs or Delay Costs (as applicable) associated with any new or modified Environmental Approvals necessitated by a MDOT Change, a Delay Event or Relief Event including for any changes in the Project Operations (including performance of additional mitigation measures and performance of such support services) resulting from such new Environmental Approvals calculated in accordance with Schedule 15 – Costs Schedule.

(b) Approvals Required by Project Company

If a new or modified Environmental Approval becomes necessary for any reason other than those expressly specified in Section 10.4(a)(i), Project Company must be fully responsible for:

- (i) all risk, cost and schedule impacts of obtaining such Environmental Approval and any related approvals; and
- (ii) any litigation or other challenge that might arise in connection with such Environmental Approval.

Section 10.5 Responsibility for Contamination

(a) If MDOT or Project Company:

- (i) receives Notice from a Governmental Entity or any third party that Contamination in over, under or emanating from the Premises requires a response action or other action in order to comply with Applicable Law; or

- (ii) discovers or becomes aware of any Contamination in, over, under or emanating from the Premises (whether or not Project Company has caused or contributed to that Contamination),

Project Company or MDOT, as applicable, must provide Notice to the other Party as soon as possible but nevertheless within 5 Business Days after the earlier of receipt of the Notice or discovery of such Contamination (as applicable).

- (b) Upon receipt of Project Company's Notice under Section 10.5(a):
 - (i) MDOT will be responsible for notifying the necessary regulatory agencies and other necessary parties;
 - (ii) Project Company must be prepared to stop work, at the direction of MDOT or any authorized Governmental Entity, at the contaminated area after discovering the Contamination; and
 - (iii) the MDOT Representative may direct Project Company to remediate any Contamination in, over, under or emanating from the Premises.
- (c) In performing the Project Operations, Project Company must:
 - (i) not exacerbate any Pre-Existing Contamination or any other Contamination which becomes known by Project Company through physical observation (including any such observation made during excavations) or through Notice by MDOT or any other Person;
 - (ii) not excavate Contamination without the approval of MDOT, nor shall any Contamination be excavated unless MDOT is present;
 - (iii) minimize the excavation of Contamination to the greatest extent possible and shall take measures to ensure Contamination are not mixed with non-contaminated materials;
 - (iv) ensure that the Project Operations (including Utility Work) does not cause a change in the groundwater flow in the area of the Project. In any Utility or excavated trench where groundwater contamination is present, backfill materials shall not be more conducive to the transfer or flow of groundwater; and
 - (v) install bentonite plugs meeting the requirements of the MDOT Special Provision for Bentonite Plugs.
- (d) Without contradiction of any assertion by MDOT of third party liability Project Company is not required to execute any hazardous waste manifests as a "generator".
- (e) Where the handling, remediation, transporting or disposing of Contamination under Section 10.5(b)(iii) constitutes a Contamination Relief Event, then, subject to the express terms of this Agreement, Project Company may submit a claim under Article 29 or Article 30 (as applicable). Project Company shall otherwise not be entitled to make any Claim against MDOT for any Liability in connection with the remediation of Contamination under Section 10.5.

ARTICLE 11 UTILITIES

Project Company must:

- (a) make all enquiries as to the location of existing Utility Infrastructure and liaise with all Utility Companies as to the need for any potential relocation, protection (including protection in place) or decommissioning of Utility Infrastructure;
- (b) make all arrangements and undertake all coordination necessary to secure the availability of all Utilities required to deliver the Project, deliver and operate the Relevant Infrastructure and otherwise perform the Project Operations in accordance with this Agreement;
- (c) pay for all Utilities consumed or used in undertaking the D&C Works in accordance with any agreements Project Company enters into with Utility Companies;
- (d) undertake, coordinate and ensure that one or more Utility Companies undertakes all necessary Utility Work;
- (e) provide access to Utility Companies during Project Operations in order for such Utility Companies to provide, repair, service and install all Utilities required or necessary for Project Operations; and
- (f) otherwise comply with its obligations in Article 5 of the General Technical Requirements with respect to Utilities.

ARTICLE 12 FEDERAL AND STATE REQUIREMENTS

Section 12.1 Compliance with Federal Requirements

Project Company must comply and require its Contractors to comply with all Federal Requirements applicable to transportation projects that receive federal credit or funds, including those set forth in Schedule 12 - Federal and State Requirements.

Section 12.2 Role of and Cooperation with FHWA

- (a) Project Company acknowledges that the FHWA may have certain approval and oversight rights relating to this Agreement and the Project Management Plan.
- (b) Project Company must cooperate with FHWA in the reasonable exercise of FHWA's duties and responsibilities in connection with the Project.

Section 12.3 Conflicting Provisions

In the event of any conflict between any applicable Federal Requirements and the other requirements of this Agreement, the Federal Requirements will prevail.

Section 12.4 Suspension and Debarment

Project Company must deliver to MDOT, not later than January 31 of each year through Final Acceptance, and upon Final Acceptance, signed certifications regarding suspension, debarment, ineligibility, voluntary exclusion, convictions and civil judgments from Project Company and require

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delivery of such certificates, from each affiliate of Project Company (as “affiliate” is defined in 29 C.F.R. § 16.105 or successor regulation of similar import), and from each Contractor whose Contract amount equals or exceeds \$25,000.

Section 12.5 Labor Compliance

- (a) Project Company must comply and must require by contract that all Contractors:
- (i) comply with all labor compliance requirements in this Agreement as well as with the current MDOT procedure for prevailing wage oversight;
 - (ii) include or ensure that this Section 12.5 is included in each Contract;
 - (iii) advise all Contractors of the requirement to pay the prevailing wage rates prior to commencement of Project operations and that all employees must cooperate during wage rate interviews;
 - (iv) ensure labor compliance posters and the project specific prevailing wage rates are posted on the Premises, in a conspicuous place, prior to the commencement of Project Operations;
 - (v) resolve all labor compliance issues within 40 Business Days of receiving MDOT’s first documented Notice. The 40 Business Day requirement may be extended based on documented mutual agreement between MDOT and Project Company. A violation of state and/or federal prevailing wage rates or laws may result in the debarment of Project Company from being awarded a contract for a period of up to 8 years;
 - (vi) maintain payrolls and basic records relating to labor compliance (i.e. W2, canceled checks, bank statements, payroll software etc.) by all Contractors during the course of the Project Operations and preserved for a period of 3 years thereafter for all employees working on the site of work as outlined in 29 Code of Federal Regulations part 5.5 (29 CFR 5.5) and make these records available for inspection, copying, or transcription by MDOT or its representative;
 - (vii) submit their certified payrolls to the prime Contractor. The submitted payrolls must set out accurately and completely all of the information required on MDOT Form CP-347, Certified Payroll. The required weekly payroll information must be submitted using the most current process identified by MDOT or as directed by the MDOT Representative; and
 - (viii) review all Contractor certified payrolls prior to submission to the MDOT Representative. The review must ensure the certified payroll complies with the submittal requirements as set forth in the current MDOT procedure for prevailing wage oversight. Complete Form 1955, Contractor’s Certified Payroll Report, and submit, using the most current procedure, to the MDOT Representative along with the certified payrolls on a weekly basis. Forms 1955 and CP-347 are available on MDOT forms webpage.
- (b) Federal Prevail Wage Rates: The Davis-Bacon Related Acts apply to all Contractors performing work on federally funded or assisted construction contracts in excess of

\$2,000. Project Company must comply and must require by contract that all Contractors comply with 29 Code of Federal Regulations Parts 1, 3, and 5. The applicable rates are set forth in Appendix E to Schedule 12 – Federal and State Requirements. Project Company must ensure that employees receive at least the minimum compensation applicable.

- (c) State Prevailing Wage Projects. 1965 PA 166 applies to all Contractors performing work on contracts which are sponsored or financed in whole by the State of Michigan. On contracts involving two or more job numbers where the type of funding is mixed, and where one source of funding is federal, the rates set forth in Appendix E to Schedule 12 – Federal and State Requirements will apply.
- (d) Section 12.5(b) and Section 12.5(c) do not limit Project Company's obligation to fully comply with Applicable Laws, including labor laws and regulation applicable to labor classification and prevailing wages.
- (e) Other actions, including the reconciliation of records and restitution for employees, included in state and federal laws, may be required of Project Company and all Contractors.
- (f) Project Company is responsible for ensuring all Contractor labor compliance.

Section 12.6 DBE Program and Small Business Compliance

- (a) Project Company must comply and must require by contract its Contractors to comply with the requirements of 49 C.F.R. Part 26 relating to Disadvantaged Business Enterprise (DBE) programs.
- (b) Project Company must include provisions to implement the DBE Program in every Contract to which it is a party. Further, Project Company must require that such provisions be included in all Contracts at lower tiers, so that such provisions will be binding upon each Contractor. The foregoing does not apply to Contracts at any tier with MDOT or Governmental Entities (excepting this Project Agreement).
- (c) Without limiting this Section 12.6, Project Company must comply with Equal Opportunity provisions in Appendix C of Schedule 12 – Federal and State Requirements and require contractually its Contractors to comply.
- (d) Upon request, Project Company must provide all DBE records to MDOT for review in accordance with the Submittal Requirements. All such records are required to be maintained for a period of five years following acceptance of final payment and have them available for inspection by MDOT and the FHWA.

Section 12.7 Discrimination

- (a) Project Company must and must contractually require its Contractors, both prospective and otherwise, doing business with the City of Detroit to take affirmative action to achieve reasonable representation of minority groups and women, on their work force. Such affirmative action must include the following; employment, promotion, demotion or transfer, recruiting or recruitment, advertising, layoff or termination, and rates of pay or other forms of compensation, and selection for training or education, including

apprenticeships. Breach of the covenant must be regarded as a material breach of the contract.

- (b) Project Company must require by contract that all Contracts include a covenant:
- (i) obligating the Contractor to take affirmative action as outlined above to achieve reasonable representation of minority groups and women on their work force. Contractors must be required to include a covenant obligating the Contractor to take affirmative action as outlined in Section 12.7(a) to achieve reasonable representation of minority groups and women on their work force similar provision in all Contracts including in the form of Appendix D to Schedule 12 – Federal and State Requirements; and
 - (ii) for the Contractor not to discriminate against any employee or applicant for employment, training, education, or apprenticeship connected directly or indirectly with the performance of the contract, with respect to his or her hire, promotion, job assignment, tenure, terms, conditions or privileges of employment because of race, color, religious beliefs, national origin, age, marital status, disability, sex, sexual orientation or gender identity or expression. Breach of this covenant will be deemed a material breach of the Contract. This Section 12.7(b)(ii) does not apply where it is determined by the human rights department that such requirements are bona fide occupational qualifications reasonably necessary to performance of the duties required for employment. The burden of proof that the occupational qualifications are bona fide is upon the employer.

ARTICLE 13 ACCESS TO PREMISES

Section 13.1 Project Company Access

- (a) On or after the Commercial and Financial Close Date, Project Company and its authorized Project Company Partners have the right and license to enter onto the Premises, and other lands, owned by or in the possession and control of MDOT or subject to a right of entry or access in favor of MDOT for the purpose of carrying out Project Company's rights and obligations under this Agreement (the "Project Right of Entry").
- (b) The Project Right of Entry automatically terminates at the end of the Term; provided, however, that Project Company and its authorized Project Company Partners shall be entitled to limited access after the Termination Date during the period required to perform Project Company's obligations under any Transition Plan.

Section 13.2 Access and Cooperation with MDOT

- (a) Project Company must cause its representatives to be available at all reasonable times for consultation with the MDOT Representative, MDOT and its nominee(s).
- (b) Subject to Section 13.2(d), Project Company acknowledges that MDOT, its nominees, the MDOT Representative and their respective Contractors ("Interface Parties") have the right to, and Project Company must afford each of them, safe and unrestricted access to the Relevant Infrastructure at all reasonable times to carry out work, services, activities and functions on, adjacent to or in the vicinity of the Relevant Infrastructure.

- (c) Without limiting the requirements of the Technical Requirements, Project Company must, at all times,
 - (i) permit the Interface Parties to undertake their work, services, activities and functions;
 - (ii) fully co-operate with the Interface Parties;
 - (iii) co-ordinate and interface the Project Operations with the work, services, activities and functions carried out or to be carried out by the Interface Parties;
 - (iv) carry out the Project Operations so as to avoid interfering with, disrupting or delaying the work, services, activities and functions of the Interface Parties, including scheduling, resequencing, redeploying and reallocating Project Operations and Project Company personnel to allow and facilitate such work, services, activities and functions of the Interface Parties; and
 - (v) notify MDOT of any problems which the undertaking or intended undertaking of any works, services, activities or functions of the Interface Parties may have on the carrying out of the Project Operations as soon as possible after becoming aware of such problems.
- (d) While MDOT, its nominees, the MDOT Representative and their respective Contractors are present on the Project, they must abide by the D&C Contractor's or O&M Contractor's reasonable, non-discriminatory safety policies and practices.
- (e) Except as expressly provided in Article 28, Article 29 or Article 30, Project Company:
 - (i) bears all risk in respect of the Interface Parties; and
 - (ii) has no Claim against MDOT or any MDOT Partner for any Liability in connection with:
 - (A) MDOT and its Contractors performing work on or around the Premises, including any Claim in connection with interference caused to the Project Operations; or
 - (B) any plan, schedule or implementation of identified or known activities impacting upon the Project Operations provided by MDOT.

ARTICLE 14 D&C OBLIGATIONS

Project Company must design, construct, commission and complete the Improved Freeway Lighting System:

- (a) in accordance with this Agreement, including Section 2.2 of the General Technical Requirements; and
- (b) so as to provide MDOT a complete and operational Improved Freeway Lighting System that will allow Project Company to perform the O&M Work, in accordance with and subject to the terms of this Agreement.

ARTICLE 15 CONSTRUCTION SCHEDULE AND CONSTRUCTION REPORT**Section 15.1 The Construction Schedule**

Project Company must prepare and submit to MDOT for review and approval in accordance with the Submittal Requirements a detailed Construction Schedule that meets the requirements of Section 3.5(d) of the General Technical Requirements.

Section 15.2 Failure to Maintain Schedule

- (a) Without limiting any other provision of this Agreement, if, at any time:
 - (i) the actual progress of the D&C Work has, in MDOT's good faith discretion, significantly fallen behind the Construction Schedule; or
 - (ii) MDOT, in its good faith discretion, is of the opinion that:
 - (A) key activities of the D&C Work have significantly fallen behind the Construction Schedule; or
 - (B) Project Company will not achieve Substantial Completion by the Substantial Completion Deadline,
- then Project Company must be required:
- (iii) within 10 Business Days of receipt of Notice from MDOT, to produce and deliver to each of the MDOT Representative:
 - (A) a report identifying the reasons for the delay; and
 - (B) a plan showing the steps that are to be taken by Project Company to eliminate or reduce the delay to achieve Substantial Completion by the Substantial Completion Deadline.
- (b) Project Company must comply with the plan provided under Section 15.2(a)(iii)(B) as reviewed and approved by MDOT in accordance with the Submittal Requirements.
 - (c) Project Company must notify the MDOT Representative if, at any time, the actual progress of the Improved Freeway Lighting System is significantly ahead of the Construction Schedule.

Section 15.3 Construction Status Report

Project Company must continuously monitor the progress of the D&C Works in relation to the Construction Schedule and, within 10 Business Days following the end of each month until Substantial Completion, Project Company must provide to the MDOT Representative a report ("Construction Status Report") for review and comment in accordance with the Submittal Requirements, which will include:

- (a) an executive summary describing the general status of the D&C Works and progress made over the relevant quarter; and

- (b) an updated Construction Schedule, in both summary and detailed formats which reflects the actual progress of the D&C Works being undertaken in order to achieve Substantial Completion by the Substantial Completion Deadline.

ARTICLE 16 SUBSTANTIAL COMPLETION

Section 16.1 Notice of Substantial Completion

- (a) Project Company must give the MDOT Representative separate Notices:
 - (i) 90 Business Days; and
 - (ii) 20 Business Days,prior to the date upon which it reasonably expects to achieve Substantial Completion.
- (b) When Project Company considers that it has achieved Substantial Completion, Project Company must:
 - (i) notify the MDOT Representative of its opinion;
 - (ii) request the MDOT Representative to issue a Certificate of Substantial Completion; and
 - (iii) provide the MDOT Representative with a reasonably detailed list of the Minor Deficiencies remaining to be performed in its opinion to achieve Final Acceptance and the cost of performing such Minor Deficiencies.

Section 16.2 Determination Regarding Substantial Completion

- (a) Notwithstanding that Project Company may not have issued a Notice under Section 16.1(b), when Project Company has achieved Substantial Completion, the MDOT Representative may issue a Certificate of Substantial Completion.
- (b) As soon as reasonably practicable and, in any event, no later than 15 Business Days after receipt of Project Company's Notice under Section 16.1(b), the MDOT Representative is required to inspect, in conjunction with Project Company, the D&C Works and the MDOT Representative must either:
 - (i) If the MDOT Representative agrees that Substantial Completion has been achieved, issue a Substantial Completion Certificate to Project Company:
 - (A) certifying that Substantial Completion has taken place;
 - (B) stating the Substantial Completion Date;
 - (C) listing any Minor Deficiencies of the kind referred to in paragraph (a) of the definition of Substantial Completion which, in its opinion, remains to be performed together with the estimated cost to perform such Minor Deficiencies; and

- (D) setting out reasonable details of the work remaining to be performed to achieve Final Acceptance; or
- (ii) if Substantial Completion has, in MDOT's opinion, not been achieved, issue a Notice to Project Company:
 - (A) listing the work which, in its opinion, remains to be performed to achieve Substantial Completion; or
 - (B) stating, in its opinion, that Substantial Completion is so far from being achieved that it is not practicable to provide a list of the type referred to in Section 16.2(b)(i)(C).
- (c) Without limiting Project Company's other obligations under this Agreement, immediately upon achievement of Substantial Completion, Project Company must expeditiously and diligently correct all of the Minor Deficiencies specified in the Substantial Completion Certificate and will complete such work by the Final Acceptance Deadline.
- (d) Project Company must give Notice to the MDOT Representative when Project Company considers that the work listed in a Notice issued by the MDOT Representative under Section 16.2(b)(ii) has been completed.
- (e) Section 16.1(b) through Section 16.2(c) will apply in respect of any new Project Company Notice under Section 16.2(d) in the same way as if it were the original Notice given under Section 16.1(b).
- (f) The MDOT Representative's opinion as to whether Substantial Completion has been achieved, will not be restricted by any Notice, list or opinion which it previously provided to Project Company under Section 16.2(b).
- (g) The MDOT Representative will be entitled to raise any other items of work (other than the Minor Deficiencies of the kind referred to in clause (a) of the definition of Substantial Completion) that is not in accordance with this Agreement as grounds for determining that Substantial Completion has not been achieved.
- (h) In the event that the Project Company and MDOT disagree as to whether or not Substantial Completion has been achieved, the date of Substantial Completion, the list of work remaining to be performed or the list of or estimated cost to perform Minor Deficiencies, MDOT and Project Company will meet to resolve such dispute, failing which such dispute shall be resolved in accordance with Schedule 4 – Dispute Resolution Procedures.

Section 16.3 Effect of Substantial Completion on Service Payment and Milestone Payment

- (a) Notwithstanding any other provision of this Agreement, MDOT may certify Substantial Completion prior to the Substantial Completion Deadline but will not commence payment to Project Company of the Service Payment prior to the Substantial Completion Deadline regardless of whether Substantial Completion has been achieved or certified prior to the Substantial Completion Deadline.

- (b) Subject to complying with the other provisions of this Agreement, Project Company will be entitled to receive Milestone Payment 2 upon achieving Substantial Completion in accordance with Article 22.

ARTICLE 17 FINAL ACCEPTANCE

Section 17.1 Conduct of Remaining D&C Works

Project Company must expeditiously and diligently progress the performance of the balance of the D&C Works required to achieve Final Acceptance, including completion of Minor Deficiencies and will complete such work by the Final Acceptance Deadline.

Section 17.2 Notice of Final Acceptance

When Project Company considers that Final Acceptance has been achieved, Project Company must:

- (a) notify the MDOT Representative of its opinion; and
- (b) request the MDOT Representative to issue a Final Acceptance Certificate.

Section 17.3 Determination of Final Acceptance

- (a) Within 10 Business Days after the receipt of Project Company's Notice under Section 17.2, the MDOT Representative is required to inspect, in conjunction with Project Company, the D&C Works and must either:
 - (i) if the MDOT Representative agrees that Final Acceptance has been achieved, issue to Project Company a Final Acceptance Certificate certifying that Final Acceptance has taken place and the Final Acceptance Date; or
 - (ii) if, in the MDOT Representative's opinion, Final Acceptance has not been achieved, issue a Notice to Project Company listing the work it believes remains to be performed to achieve Final Acceptance.
- (b) Without limiting Project Company's other obligations under this Project Agreement, immediately upon receipt of a Notice under Section 17.3(a)(ii), Project Company must expeditiously and diligently progress performance of the work specified in the Notice.
- (c) Project Company must give Notice to the MDOT Representative when Project Company considers that the work listed in the MDOT Representative's Notice under Section 17.3(a)(ii) has been completed.
- (d) Section 17.3(a) through Section 17.3(c) will apply in respect of any new Project Company Notice under Section 17.3(c) in the same way as if it were the original Notice under Section 17.3(a).
- (e) The MDOT Representative's opinion as to whether Final Acceptance has been achieved will not be restricted by any:
 - (A) Substantial Completion Certificate, Notice, list or opinion already provided under this Project Agreement; or

- (B) warranty provided by Project Company or any of its contractors.
- (f) The MDOT Representative will be entitled to raise any items of work not in accordance with this Agreement as grounds for determining that Final Acceptance has not been achieved.
- (g) In the event that the Project Company and MDOT disagree as to whether or not Final Acceptance has been achieved or the date of Final Acceptance, MDOT and Project Company will meet to resolve such dispute failing which such dispute shall be resolved in accordance with Schedule 4 – Dispute Resolution Procedures.

Section 17.4 Late Final Acceptance

- (a) If Final Acceptance does not occur by the Final Acceptance Deadline, MDOT may retain from any moneys due to Project Company (including any Service Payments):
 - (i) 120% of the cost estimated by MDOT to complete and resolve any Minor Deficiencies; or
 - (ii) such lesser amount as MDOT, in its sole discretion, may determine, until Final Acceptance is achieved (“Retention Amount”).
- (b) Within 20 Business Days of the Final Acceptance Date, MDOT will pay Project Company the Retention Amount less:
 - (i) the amount of any Deduction to the extent applicable to the Retention Amount;
 - (ii) any amount reimbursed to MDOT under Section 17.4(c)(iv)(B); and
 - (iii) any other amount MDOT may deduct under Section 22.3(a).
- (c) MDOT:
 - (i) is not obliged to pay Project Company interest on the Retention Amount;
 - (ii) does not hold the Retention Amount in trust;
 - (iii) if Final Acceptance is not achieved before this Agreement is terminated, will be absolutely and irrevocably entitled to retain and use the Retention Amount for its own account, in its sole discretion; and
 - (iv) may, at any time after the Final Acceptance Deadline, subject to giving Project Company prior written Notice of its intention to do so and the rights of the Lenders’ under the Lenders’ Direct Agreement:
 - (A) perform any work remaining to be performed to achieve Final Acceptance itself or engage others to do so; and
 - (B) use the Retention Amount to reimburse it for the costs (including any liability) incurred in performing the work referred to in Section 17.4(c)(iv)(A).

ARTICLE 18 O&M REQUIREMENTS

Project Company must commence:

- (a) the D&C Term O&M Work 90 days following Commercial and Financial Close and Project Company must perform the D&C Term O&M Work until the Substantial Completion Date in accordance with this Agreement; and
- (b) the O&M Term O&M Work from the Services Commencement Date and Project Company must perform the O&M Term O&M Work until the Expiry Date in accordance with this Agreement.

Section 18.2 Equipment for O&M Work

Project Company will procure, deliver, install, commission, maintain, repair, decommission, upgrade and replace any goods, equipment and materials required by Project Company to perform the O&M Work in accordance with this Agreement.

ARTICLE 19 RISK OF LOSS AND DAMAGE TO RELEVANT INFRASTRUCTURE**Section 19.1 Risk of Loss and Damage**

Subject to this Article 19, Project Company bears the risk of loss, damage or destruction of or to:

- (a) the D&C Works, the D&C Term O&M Works and the Freeway Lighting System, during the D&C Term;
- (b) the Improved Freeway Lighting System and the O&M Term O&M Works, during the O&M Term; and
- (c) the Premises, during the Term.

Section 19.2 MDOT Election to Repair or Rebuild Loss or Damage

- (a) The Parties agree that this Section 19.2 does not apply to damage of a minor nature that can be remedied without incurring significant cost or delay and which does not materially adversely affect Project Company's ability to perform the O&M Work.
- (b) Without limiting Project Company's obligations under Schedule 3 – Payment Mechanism or otherwise under this Agreement, Project Company must promptly and within 3 Business Days, provide Notice to MDOT of any loss or damage to the Relevant Infrastructure.
- (c) Within 30 Business Days after receipt of Project Company's Notice of any loss or damage to the Relevant Infrastructure under Section 19.2(a) (or such longer period as MDOT reasonably requires in order to assess the situation and decide how to proceed, but in no event later than 45 Business Days), MDOT must provide Notice to Project Company confirming whether it requires Project Company:
 - (i) to repair or rebuild the Relevant Infrastructure; or
 - (ii) not to repair or rebuild the Relevant Infrastructure,

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for which Project Company retains the risk of loss or damage in accordance with Section 19.1

- (d) If MDOT notifies Project Company that it requires Project Company to repair or rebuild the Relevant Infrastructure in accordance with Section 19.2(c)(i), Project Company must:
- (i) take immediate steps to minimize the risk to the health and safety of Users, document the damage, clear any debris and begin initial repair work;
 - (ii) promptly consult with MDOT and carry out such steps as are necessary to ensure the prompt repair and rebuilding of the loss or damage (including as a result of Vandalism or Vehicle Damage provided that Project Company must not be responsible for repairing graffiti on the Freeway Lighting System or Improved Freeway Lighting System) so that, subject to Section 19.2(d)(iii), once repaired or rebuilt:
 - (A) the Relevant Infrastructure complies with the requirements of this Agreement;
 - (B) Project Company is able to comply with its obligations in accordance with this Agreement; and
 - (C) MDOT is fully informed of the progress of the repair and rebuilding activities;
 - (iii) subject to Section 19.2(c), Section 19.2(e) and Section 19.3 through Section 19.7, bear the cost of repairing or rebuilding the Relevant Infrastructure (as applicable); and
 - (iv) unless directed by MDOT to repair or rebuild the Relevant Infrastructure to a different specification, repair or rebuild the Relevant Infrastructure in accordance with the Technical Requirements.
- (e) Where MDOT exercises its rights under Section 19.2(d), subject to Section 19.3, Section 19.4 and Section 19.5:
- (i) Project Company must pay for the cost of repairing or rebuilding the Relevant Infrastructure, as a result of the damage or destruction from the proceeds of any Insurance Policy, covering the physical loss, destruction or damage; and
 - (ii) any cost of repairing or rebuilding the Relevant Infrastructure not covered by such Insurances or indemnity will, subject to Section 19.2(f), be funded by Project Company.
- (f) If:
- (i) MDOT determines under Section 19.2(d)(iv) that the Relevant Infrastructure is to be rebuilt or repaired on the basis of different specifications than those set forth in the Technical Requirements (as amended for any prior Change);

- (ii) the Direct Cost of repairing or rebuilding according to such specifications exceeds the total cost of repairing or rebuilding the Relevant Infrastructure according to the Technical Requirements (as amended for any Change), and
- (iii) the Insurance Proceeds are insufficient for this purpose,

MDOT will bear the amount (if any) of the excess either agreed to by the Parties, or if not agreed, determined in accordance with Article 45, as determined in accordance with Schedule 15 - Costs Schedule.

- (g) Where the repairing or rebuilding of the Relevant Infrastructure must be to different specifications than those set forth in the Technical Requirements (as amended for any prior Change) and such different specifications will increase or decrease the cost of providing the O&M Works over the remainder of the Term, MDOT will:
 - (i) pay the reasonable, substantiated and unavoidable increased Direct Costs of Project Company calculated in accordance with Schedule 15 - Costs Schedule; and
 - (ii) be entitled to the benefit of decreased costs if there is a decrease in the Direct Cost of Project Company, calculated in accordance with Schedule 15 - Costs Schedule.

Section 19.3 Force Majeure

- (a) If:
 - (i) the Relevant Infrastructure is wholly or substantially destroyed or damaged;
 - (ii) the event which gave rise to the loss or damage is a Force Majeure Event which is not insured against and is not required to be insured against in accordance with this Agreement; and
 - (iii) MDOT requires Project Company to repair or reinstate the Relevant Infrastructure,

the Parties will use reasonable efforts to agree on how the Relevant Infrastructure will be reinstated and the Direct Cost of doing so in accordance with Schedule 15 - Costs Schedule.

- (b) If the Parties are unable to agree on how the Relevant Infrastructure will be repaired or reinstated, MDOT must notify Project Company that:
 - (i) the Relevant Infrastructure will be repaired or rebuilt as a result of a Force Majeure Event under Section 19.2(g), in which case the Notice will be deemed to be a Change and MDOT must issue a Change Order; or
 - (ii) it no longer requires Project Company to repair or rebuild the Relevant Infrastructure and the provisions of Section 19.7(b)(iii) will apply.

Section 19.4 Compensable Delay Event, Compensable Relief Event or Vehicle Damage

Subject to Project Company complying with its obligations under Section 19.6(a) in the case of Vehicle Damage, if the loss or damage to the Relevant Infrastructure is caused by a Compensable Delay Event, a Compensable Relief Event or Vehicle Damage and MDOT requires Project Company to repair or rebuild the Relevant Infrastructure, then subject to the express terms of this Agreement, Project Company may submit a claim under Article 29 or Article 30 (as applicable).

Section 19.5 Uninsurable Risk

If the event which gave rise to the loss or damage to the Relevant Infrastructure is an Uninsurable Risk to which Section 41.3 applies, MDOT will cover the costs and liabilities of Project Company in accordance with that Section.

Section 19.6 Vehicle Damage

- (a) No later than 10 Business Days after completing any Remedy or otherwise repairing loss or damage from any third party vehicle accident which results in Vehicle Damage or upon request by MDOT, Project Company must provide MDOT with the following information, to the extent applicable in a form and substance satisfactory to MDOT:
 - (i) details of the accident and Vehicle Damage recorded by reference to an incident number;
 - (ii) police report;
 - (iii) an invoice identifying the breakdown of the Direct Costs involved in repairing the Vehicle Damage in accordance with this Agreement calculated in accordance with Schedule 15 – Costs Schedule;
 - (iv) a completed Report of Property Damage with respect to the incident; and
 - (v) any other information reasonably requested by MDOT.
- (b) Upon request from MDOT, Project Company must provide all necessary supporting documentation reasonably required by MDOT in support of Project Company's Request for Change Proposal including labor, equipment and materials (time cards, equipment rental rates, material cost receipts etc as related to the incident number (or specific location).
- (c) If Project Company fails to comply with its obligations under Section 19.6(a) or Section 19.6(b), Project Company will not be entitled to reimbursement under Section 19.4 and will not otherwise be entitled to make any Claim for any Liability in connection with the relevant Vehicle Damage.

Section 19.7 Consequences of Not Repairing or Rebuilding

If MDOT notifies Project Company not to repair or rebuild the Relevant Infrastructure in accordance with Section 19.2(c)(ii) MDOT may:

- (a) omit the relevant part of the Relevant Infrastructure from the Project, in which case, the Notice of MDOT in accordance with Section 19.2(c)(ii) will be deemed to be a Change and MDOT must issue a Change Order; or
 - (b) if the loss of or damage was caused by:
 - (i) Project Company Default, terminate this Agreement for Project Company Default in accordance with Section 34.7;
 - (ii) MDOT Fault and the Relevant Infrastructure is wholly or substantially destroyed, terminate this Agreement for convenience in accordance with Article 36; or
 - (iii) a Force Majeure Event, a Compensable Delay Event, a Compensable Relief Event or Uninsurable Risk and the Relevant Infrastructure is wholly or substantially destroyed, immediately terminate this Agreement by Notice to Project Company;
- and, in the case of any of clauses (i)-(iii) above:
- (A) this Agreement will terminate on the date stated in MDOT's Notice; and:
 - (B) MDOT will pay to Project Company the Termination Compensation under Section 38.3.

ARTICLE 20 MONITORING

Section 20.1 Monitoring of Performance

- (a) Project Company must:
 - (i) monitor the performance of the Project Operations in the manner and at the frequencies set out in the O&M Plan and the Quality Management Plan; and
 - (ii) as reasonably requested by MDOT, but in no event less frequently than monthly, provide the MDOT Representative with relevant particulars of any aspects of Project Company's performance which fail to meet the requirements of this Agreement.
- (b) MDOT or the MDOT Representative may, at any and all reasonable times, observe, inspect, monitor, audit and take any steps reasonably necessary to satisfy itself as to the adequacy of the monitoring (including the Performance Monitoring Program), including performing sample checks, material testing, record reviews and general inspections of the Project Operations.

ARTICLE 21 MDOT'S STEP-IN AND SUSPENSION RIGHTS

Section 21.1 Exercise of Step-in Rights

- (a) If:
 - (i) an Emergency occurs;

- (ii) MDOT is required by Applicable Law to discharge a statutory power or duty; or
 - (iii) a Project Company Default occurs and the applicable cure period in Section 35.2 expires, without full and complete cure by Project Company,
- (each a “Step-In Event”),

MDOT or its nominee may:

- (iv) temporarily assume total or partial management and control of the whole or any part of the Relevant Infrastructure;
 - (v) access the Premises;
 - (vi) perform the Project Operations; and
 - (vii) take such other steps as are necessary in the reasonable opinion of MDOT to perform the Project and minimize the effect of the Step-in Event.
- (b) MDOT must provide Notice to Project Company as soon as practicable upon exercise of its Step-In Rights and the Lenders if Notice is not already provided for under the Lenders’ Direct Agreement.

Section 21.2 Suspension of Project Company’s Obligations

If MDOT has exercised its Step-In Rights in accordance with Section 21.1, Project Company’s obligations in accordance with this Agreement will be suspended (and a failure by Project Company to perform the suspended obligations will not constitute a breach of this Agreement by Project Company or a Project Company Default) for the affected period but only to the extent necessary to enable MDOT to exercise those Step-In Rights.

Section 21.3 Costs and Expenses

- (a) If the Step-in Event was a result of a Project Company Default or was caused by Project Company Fault then:
- (i) all Liabilities incurred by MDOT in exercising its Step-In Rights will be a debt due and payable from Project Company to MDOT on demand;
 - (ii) during the Term:
 - (A) the Service Payment and any Milestone Payment will be subject to Deductions in accordance with Schedule 3 – Payment Mechanism as a result of the Step-In Event including to the extent that Project Company is not providing the O&M Work in accordance with the O&M Requirements;
 - (B) Project Company’s Liability under Section 21.3(a)(i) will be reduced by any Deductions to the Service Payment or Milestone Payment under Section 21.3(a)(i) and all such amounts will be deducted from future Service Payments or Milestone Payments until all such amounts are recovered, unless all future Service Payments or Milestone Payments are,

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in MDOT's determination, insufficient, in which case, such amounts will be a debt due and payable by Project Company to MDOT on demand.

- (b) If the Step-in Event was not the result of a Project Company Default and was not caused by Project Company Fault:
 - (i) the Service Payment or Milestone Payment will not be subject to Deductions notwithstanding that the O&M Work affected by the Step-in Event are suspended or are being provided by MDOT, however MDOT may deduct the amount of avoided costs which are not in fact incurred by Project Company during the period, because the O&M Work is suspended or are being provided by MDOT under this Article 21; and
 - (ii) MDOT's Step-In Rights will be limited to the extent and for such period as is necessary, in MDOT's sole discretion, to cure or resolve the Step-In Event;
- (c) Project Company must provide MDOT with all necessary assistance in a timely manner to enable it to exercise its Step-In Rights effectively and expeditiously.

Section 21.4 Cessation of Step-in Rights

- (A) MDOT may, at any time, cease to exercise its Step-In Rights on 5 Business Days' Notice to Project Company provided that where the Step-in Event was not the result of a Project Company Default or was not caused by Project Company Fault, MDOT may not exercise its Step-In Rights for longer than, in MDOT's good faith discretion, is necessary to cure or resolve the Step-In Event.
- (B) MDOT will cease to exercise its Step-In Rights on 5 Business Days' Notice to Project Company where MDOT has exercised its rights in accordance with:
 - (i) Section 21.1(a)(i) if the Emergency ceases;
 - (ii) Section 21.1(a)(ii) if MDOT is no longer required by Applicable Law to discharge the statutory power or duty; or
 - (iii) Section 21.1(a)(iii) if the Project Company Default has been remedied or ceases.
- (c) If MDOT has ceased to exercise its Step-In Rights, MDOT will provide Notice to Project Company after which Project Company will immediately recommence performing any obligations suspended due to the exercise of such step-in rights.

Section 21.5 Priority of Step-In Rights

- (a) Subject to Section 21.5(b), MDOT's Step-In Rights are subject to:
 - (i) the right of any surety under any Performance Security to assume performance and completion of all bonded work; and
 - (ii) the Lenders' rights to cure any Project Company Default under the Lenders' Direct Agreement.

- (b) MDOT may continue exercise of its Step-in Rights with respect to any Project Company Default:
 - (i) until the Lender obtains possession and control of the Premises and notifies MDOT that it stands ready to commence good faith, diligent curative action; and
 - (ii) provided that the Lender continues good faith, diligent exercise of curative action until the Project Company Default is fully and completely cured.

Section 21.6 Suspension of Project Operations

- (a) MDOT may, by Notice to Project Company suspend, in whole or in part, the Project Operations due to any of the following, regardless of whether a Project Company Default has been declared or any cure period (other than the cure period provided below) has not yet lapsed:
 - (i) failure to perform the Project Operations in compliance with, or other breach of, this Agreement where such failure is not substantially cured within 10 Business Days after MDOT delivers Notice of the breach to Project Company, except Noncompliance Events where no Persistent Project Company Default exists;
 - (ii) failure to comply with any Applicable Law or Permit, License and Approval including any failure to handle, preserve and protect archeological, paleontological, cultural or historic resources, or failure to handle Hazardous Substances, in accordance with Applicable Laws and Permits, Licenses and Approvals);
 - (iii) Project Company has failed to pay in full when due sums owing any Contractor for services, materials or equipment, except only for retainage provided in the relevant Contract and amounts in dispute where such failure is not substantially cured within 10 Business Days after MDOT delivers Notice of such failure to Project Company;
 - (iv) failure to provide proof of required Insurance Policy coverage;
 - (v) failure to deliver or maintain any Performance Security in accordance with this Agreement;
 - (vi) the existence of conditions unsafe for workers, other Project personnel or the general public, including failures to comply with safety standards or traffic management procedures or perform safety compliance in accordance with the Technical Provisions; and
 - (vii) failure to carry out and comply with Directive Letters or where the failure is not substantially cured within 10 Business Days after MDOT delivers Notice of such failure to Project Company,

provided, however, that Project Company shall retain its ability to cure or mitigate the effects of the events contemplated in Section 21.6(a)(i) through Section 21.6(a)(vii) notwithstanding any such suspension.

- (b) Project Company must promptly comply with any such suspension order, even if Project Company disputes the grounds for suspension provided, that, in the event that it is determined pursuant to Schedule 4 – Dispute Resolution Procedures, that MDOT did not have grounds for such suspension, such suspension will be deemed to be a Compensable Relief Event or Compensable Delay (as applicable).
- (c) Project Company must promptly recommence the Project Operations upon receipt of Notice from MDOT directing Project Company to resume work. MDOT will lift the suspension order promptly after Project Company fully cures and corrects the applicable breach or failure to perform or any other reason for the suspension order ceases to apply.

Section 21.7 No Claim Against MDOT

Except as otherwise expressly provided under this Agreement, MDOT will have no Liability and Project Company is not entitled to make any Claim against MDOT or any MDOT Person for any Liability in connection with MDOT exercising its Step-in Rights or suspension rights under Section 21.6.

ARTICLE 22 PAYMENTS TO PROJECT COMPANY

Section 22.1 Milestone Payments

MDOT will pay Milestone Payments to Project Company in accordance with Article 1 of Schedule 3 – Payment Mechanism.

Section 22.2 Service Payment

- (a) The Service Payment has been calculated assuming the provision of all O&M Work in accordance with this Agreement for the Term.
- (b) MDOT will pay Service Payments to Project Company in arrears during the O&M Term in accordance with Schedule 3 – Payment Mechanism.

Section 22.3 Deductions

- (a) Project Company acknowledges and agrees that:
 - (i) the amount of each Milestone Payment and Service Payment may be subject to Deductions in accordance with Schedule 3 – Payment Mechanism;
 - (ii) MDOT may deduct from any monies due and payable to Project Company in accordance with this Agreement (including Service Payments and Milestone Payments) or make a demand of Project Company for:
 - (A) any amount due and payable by Project Company to MDOT (whether in accordance with or relating to this Agreement or any other Project Document); or
 - (B) any other Claim or Liability by MDOT against Project Company; and
 - (iii) such adjustments are integral to the provisions of this Agreement.

- (b) Subject to Section 22.3(c) and any other rights of MDOT otherwise provided in this Agreement, Deductions to the Service Payment will be MDOT's sole right to monetary compensation from Project Company, under this Agreement for Noncompliance Events which result in Deductions.
- (c) Section 22.3(b) does not preclude MDOT from:
- (i) making a Claim against Project Company (including exercising offset rights, rights to Deductions and rights for monetary compensation or damages) with respect to Noncompliance Events which result in Deductions for:
 - (A) losses or damages to the extent (i) covered by the proceeds of insurance required to be carried in accordance with this Agreement, or (ii) covered by the proceeds of insurance actually carried by or insuring Project Company under policies solely with respect to the Project and the Relevant Infrastructure, regardless of whether required to be carried under this Agreement;
 - (B) losses or damages arising out of fraud, criminal conduct, intentional misconduct, recklessness, bad faith, gross negligence or negligence on the part of any Project Company Related Entity;
 - (C) losses or damages arising out of Project Company Hazardous Substances;
 - (D) MDOT's right under, including the right to enforce, Project Company's indemnities under this Agreement, including those set forth in Section 7.3, Section 22.6, Section 39.5 and Article 43 (excluding Section 43(a) where the alleged breach is also Noncompliance Event);
 - (E) losses or damages arising as a result of MDOT exercising its default and termination rights under this Agreement;
 - (F) losses or damages arising as a result of MDOT exercising its Step-in Rights including under Article 21 or Section 34.2; or
 - (G) damage to property for which Project Company bears the risk of loss or damage under Article 19; and
 - (ii) exercising any of its other rights, remedies or obligations under this Agreement, at law or in equity, including MDOT's Step-In Rights, termination rights and rights in connection with Persistent Project Company Default, even if the exercise of such rights results in an obligation or liability on behalf of Project Company to pay damages or monetary compensation to MDOT or any other party.

Section 22.4 Invoicing and Payment Arrangements

- (a) Within 10 Business Days following:

- (i) satisfying the conditions in Schedule 3 – Payment Mechanism for Milestone Payment 1 and Milestone Payment 2; and
- (ii) the end of each Quarter in the case of each Service Payment,

or as otherwise provided under this Agreement, Project Company must issue to MDOT an invoice for the amount of the Milestone Payment or Service Payment owed by MDOT to Project Company for such Quarter, with such adjustments as provided in the Monthly Report issued in the previous Quarter.

- (b) Each invoice must comply with all requirements of Schedule 3 – Payment Mechanism, be in a form agreed by the Parties, acting reasonably, and must include:
 - (i) for an invoice issued with respect to:
 - (A) any Milestone Payment, the Milestone Payment payable in accordance with Article 1 of Schedule 3 – Payment Mechanism and in accordance with Section 22.4(a)(i);
 - (B) any Service Payment, the Service Payment payable in accordance with Article 2 of Schedule 3 – Payment Mechanism in respect of the applicable Quarter;
 - (ii) any adjustments set out in the Monthly Report issued in the previous Quarter that have been approved by MDOT;
 - (iii) any other adjustments to reflect overpayments and underpayments, as agreed between the Parties, of any amount owing to MDOT under this Agreement;
 - (iv) any amount owing to Project Company under this Agreement including in respect of any MDOT Change, Compensable Delay Event, Compensable Relief Event, Force Majeure Event or Vehicle Damage;
 - (v) such supporting documentation as MDOT may reasonably require in connection with the invoice; and
 - (vi) the net amount owing by MDOT to Project Company, or by Project Company to MDOT, as applicable.
- (c) Upon agreement of the Parties, the form of invoice may be changed from time to time.
- (d) Within the later of 10 Business Days after receipt by MDOT of the invoice or the Monthly Report:
 - (i) MDOT will determine and advise Project Company that the Monthly Report is approved by MDOT, in which case the adjustments in the Monthly Report will be reflected by Project Company in the invoice to be issued by Project Company; and
 - (ii) if MDOT disputes Project Company's entitlement to any part of the amounts set out therein, provide to Project Company a statement ("Payment Statement")

stating the amount payable and that part of the amounts (insofar as, at the time of such Notice, MDOT is reasonably able to quantify it) MDOT disputes and the reason for such dispute. In such event, MDOT will pay the undisputed portion and such disputes shall be resolved pursuant to Schedule 4 – Dispute Resolution Procedures.

- (e) Unless otherwise determined pursuant to Schedule 4 – Dispute Resolution Procedures or as otherwise expressly provided under this Agreement, MDOT will pay the amount stated in:
 - (i) Project Company's invoice, where Section 22.4(d)(i) applies;
 - (ii) the Payment Statement, where Section 22.4(d)(ii) applies,

on the first Thursday following the expiration of 25 Business Days after MDOT's receipt of Project Company's invoice or Payment Statement (as applicable).

- (f) MDOT may withhold payment of any disputed amount pending agreement or determination of Project Company's entitlement to the disputed amount in accordance with Section 22.6.
- (g) MDOT is not obligated to make any payment to Project Company unless all conditions precedent applicable to such payment under this Agreement have been satisfied by Project Company.
- (h) Within 10 Business Days following the end of each Quarter during the Term, Project Company must also submit to MDOT the Monthly Report in accordance with Section 4.2 of the General Technical Requirements.

Section 22.5 Electronic Invoicing

- (a) Project Company must cooperate with the reasonable requirements of MDOT, and must submit its invoices and all other documentation relating to this Agreement in a form and with the structure and content as is reasonably required to be compatible with MDOT's information systems.
- (b) Project Company acknowledges that State of Michigan has developed a fully integrated financial management system to be used statewide by all State departments and agencies.
- (c) As a condition precedent to receiving payments, Project Company must register at and ensure it is included in the State's master Consultant/Payee file including:
 - (i) if not previously registered for the system, provide proof of registration and a copy of their Request for Taxpayer Identification Number and Certification Form (W-9); and
 - (ii) if previously registered with the system, submitting a W-9.
- (d) To complete the registration process under Section 22.5(c), Project Company must identify the applicable National Institute of Government Purchasing (NIGP)

commodity/service code(s) for the service classification(s) for which it is applying from the Department of Management, Technology and Budget website.

Section 22.6 Disputes

The Parties will use reasonable efforts to resolve any Dispute under Section 22.4(d) or otherwise relating to the payment adjustments in the Monthly Report and/or the Service Payments or Milestone Payment payable within 10 Business Days of the aforesaid Notice of the Dispute. If they fail to resolve the Dispute within such period, the Dispute may be referred for resolution in accordance with Schedule 4 - Dispute Resolution Procedure. Following resolution of the Dispute, any amount which has been paid by MDOT that is determined not to have been payable must be paid forthwith by Project Company to MDOT together with interest at the Libor 1 Year Rate from the date due to the date of payment, and (ii) any amount which has not been paid by MDOT that it is determined to have been payable shall be paid by MDOT to Project Company.

Section 22.7 Payments

Unless specific timeframes are stipulated for payment of any amounts owing or payable by one Party to the other Party under this Agreement, such amounts will be due within 30 Business Days of receipt or deemed receipt of an applicable invoice.

Section 22.8 Manner of Payment

- (a) All payments under this Agreement must be made in U.S. dollars and must be electronically transferred, quoting the invoice number or description against which payment is made, in immediately available funds on the due date to a single bank account as may be designated by the recipient from time to time by Notice to the other Party.
- (b) If the due date is not a Business Day, then the electronic transfer must be made on the Business Day immediately succeeding such day, pursuant to the terms of this Agreement.

Section 22.9 Effect of Payment

No payment under this Agreement will be construed as an acceptance or approval of incomplete, defective or improper performance by Project Company of any of its obligations under this Agreement, nor will it operate to relieve Project Company from the performance of any of its obligations under this Agreement which have not been performed.

Section 22.10 All MDOT Payment Obligations Subject to Appropriations

- (a) The Parties acknowledge that the funds for payment of the Milestone Payments, Service Payments and other amounts due to Project Company under this Agreement (together the “**MDOT Payments**”) are subject to appropriation by the State legislature and the availability of the amounts necessary to fund such appropriations.
- (b) The MDOT Payments are limited obligations of MDOT, payable solely from funds payable by MDOT as appropriated by the State legislature to MDOT for the purpose of this Agreement. The obligation of MDOT to make MDOT Payments does not constitute an indebtedness of the State or any political subdivision thereof within the meaning or application of any constitutional provision or limitation.

- (c) The obligation of MDOT to make any MDOT Payment does not constitute a pledge of the faith, credit or taxing power of the State or any political subdivision thereof within the meaning or application of any constitutional provision or limitation. MDOT has no taxing power. Project Company has no right to have taxes levied or to compel appropriations by the State legislature for any payment of the MDOT Payments.
- (d) MDOT will include the Project in its five year capital plan.
- (e) MDOT shall prepare, prior to the year end of each fiscal year, its annual budget request submission to the State legislature.
- (f) MDOT will include in the budget request prepared under Section 22.10(e) a request for an appropriation sufficient for the MDOT Payments for the relevant fiscal year.
- (g) Nothing in this Agreement shall be construed to limit the future issuance of bonds or securing of other indebtedness (whether on parity or junior to the existing pledge on bonds), for which the debt service of current and future issuances will be prioritized ahead of any MDOT Payment.
- (h) If MDOT becomes aware of any Non-Appropriation Event, MDOT will promptly provide Notice to the Project Company and will consult with the Project Company to discuss the situation and the possible solutions it being understood that such discussions shall be without prejudice to Project Company's right to termination or right to suspension for unexcused and undisputed non-payment by MDOT of the MDOT Payments, as set forth in Section 35.3 or Section 35.4, respectively.

Section 22.11 Payments to Contractors

- (a) Project Company agrees to pay each Contractor for the Satisfactory Completion of Project Operations under any Contract no later than 30 days:
 - (i) after receiving any Milestone Payment directly attributable to the D&C Works or any corresponding Service Payment in the case of the O&M Works;
 - (ii) from the Satisfactory Completion of the relevant aspect of the Project Operations by the Contractor; or
 - (iii) from the end of the month in which the relevant Project Operations was actually performed satisfactorily by the Contractor,whichever results in the earliest payment to the relevant Contractor. Any delay or postponement of payment from this time frame may occur only upon receipt of written approval from MDOT. This requirement is applicable to all Contractors and shall be included in all Contracts.
- (b) This prompt payment provision is a requirement of 49 CFR 26.29 and does not confer third-party beneficiary right or other direct right to a Contractor against MDOT. This provision applies to both DBE and non-DBE subcontractors.

Section 22.12 Non-Payment Claims.

- (a) Project Company must ensure that notifications of any failure to meet prompt payment provisions are referred by all Contractors to Project Company or to the MDOT Representative where Project Company is the offending party in writing within 20 Business Days of the date the payment was to be received.
- (b) Project Company must provide the MDOT Representative with copies of any notifications provided under Section 22.12(a).
- (c) Project Company must, where it is the offending party and must ensure any Contractor offending party to respond in writing to the claimant within 10 days of receipt of the notification of failure to meet prompt payment requirements. Project Company must or must ensure that copies of such response are provided to the MDOT Representative, Project Company (only where Project Company is not the offending party) and the MDOT Engineer of Construction Field Services.
- (d) Project Company must and must ensure that its Contractors also provide the required sworn statements and waivers of lien from the affected Contractor to the MDOT Representative within 10 days of receipt of the notification. MDOT will consider the failure of the alleged offending party to respond to the notification from the claimant as an admission of the prompt pay violation which may result in sanctions.
- (e) Project Company must ensure that each Contract includes Notice to Contractors of their right to prompt payment, and MDOT's prohibiting the Project Company from holding retainage from Contractors under 49 CFR 26.29.

Section 22.13 Prompt Payment Disputes

- (a) The Parties to a prompt payment dispute may initiate whatever dispute resolution procedure is specified in the applicable Contract or is available under Michigan law. If dispute resolution or litigation is selected, the actions by both parties must proceed in a timely manner. Project Company must or must ensure that the outcome of the dispute resolution proceeding or litigation is provided to the MDOT Representative promptly upon the conclusion of the proceeding. MDOT may be entitled to deduct any disputed payment under Section 22.3(a) or otherwise in accordance with this Agreement to reflect the outcome of the proceedings
- (b) When the MDOT Representative verifies a prompt payment violation, Project Company, within 5 days, must propose one or a combination of any of the following actions items for review and approval by the MDOT Representative:
 - (i) issue payment to the affected Contractor (including any lower tier subcontractor or supplier of a Contractor);
 - (ii) issue payments to the affected Contractor in the form of joint checks to the Contractor and the Contractor's lower-tier subcontractors and/or suppliers; or
 - (iii) request a negative estimate to withdraw the amount confirmed in the prompt payment violation.

- (c) If Project Company fails to submit a timely remedy request or obtain an approved course of action within the 5 day time period, the MDOT Representative will direct a course of action or issue a negative estimate to deduct the amount confirmed in the prompt payment violation under Section 22.3(a) or otherwise in accordance with this Agreement. If Project Company fails to fulfill the approved or directed course of action the MDOT Representative will impose sanctions until such time as the approved or directed course of action is completed.
- (d) Any payments to a Contractor's lower tier subcontractor or supplier will be issued in the amounts reflected upon the Contractor's sworn statements or in amounts independently verified by the MDOT Representative as being due to the Contractor's lower-tier subcontractors and suppliers for work completed. Payments to a lower-tier subcontractor or supplier will be considered payment to the subcontractor directly so that payment for the same work cannot be claimed. Any other use of joint checks must follow current Department procedures
- (e) Failure to comply with any of the prompt payment requirements by Project Company or any Contractor may result in sanctions against the offending party. These sanctions may include:
 - (i) withholding of estimates on projects where prompt payment violations are confirmed;
 - (ii) reduction or removal of prequalification;
 - (iii) MDOT exercising its rights under Section 22.3(a), Article 42 or otherwise exercising its rights in accordance with this Agreement; or
 - (iv) suspension of bidding privileges on future MDOT projects.

ARTICLE 23 NONCOMPLIANCE POINTS

Project Company will be subject to Noncompliance Points with respect to Noncompliance Events in accordance with Schedule 3 – Payment Mechanism.

ARTICLE 24 HANDBACK REQUIREMENTS

Section 24.1 Condition of the Relevant Infrastructure on Handback

For the purpose of this Agreement, the “**Handback Requirements**” mean the required condition of the Relevant Infrastructure which:

- (a) if Handback occurs during the D&C Term, is the condition that the Relevant Infrastructure would be in if Project Company had complied with all of its obligations in connection with the Relevant Infrastructure in accordance with this Agreement up to the time of termination and taking into account the circumstances of the termination;
- (b) if Handback occurs during the O&M Term and prior to or on the date which is 2 years before the Scheduled Expiry Date, is the condition that the Relevant Infrastructure would be in if Project Company had complied with all of its obligations in connection with this

Agreement up to the time of termination and taking into account the circumstances of the termination; or

- (c) if Handback occurs on or after 2 years prior to the Scheduled Expiry Date, is consistent with:
 - (i) the Relevant Infrastructure and each of the elements of the Improved Freeway Lighting System having been designed and built in accordance with the applicable residual life requirements specified in Article 6 of the O&M Requirements;
 - (ii) Project Company having performed the O&M Work in accordance with the Technical Requirements;
 - (iii) the remaining residual life standards established in Article 6 of the O&M Requirements, compliance with which must be determined using the methodology and criteria specified therein; and
 - (iv) Project Company having complied with the requirements of this subsection and Article 6 of the O&M Requirements.

Section 24.2 System Inspections

- (a) The Parties will perform a joint inspection of the Relevant Infrastructure and Project Company must produce and deliver to MDOT a report (a “Preliminary System Condition Report”) for review and approval in accordance with the Submittal Requirements not less than 30 months prior to the Scheduled Expiry Date or such shorter period before the Expiry Date as is required by MDOT, that:
 - (i) identifies the condition and each element of the Relevant Infrastructure in relation to the Handback Requirements;
 - (ii) assesses Project Company’s plan related to capital replacement (which, for greater certainty, will include consideration of energy consumption), and Project Company’s proposed strategy and the consistency of Project Company’s proposed strategy with the Project Management Plan;
 - (iii) identifies any works required to ensure all the elements of the Relevant Infrastructure will meet the Handback Requirements on the Expiry Date (the “Handback Works”), and specifying the year in which each of those Handback Works would be required;
 - (iv) specifies an estimate of the costs that would be required to perform the Handback Works (the “Handback Works Costs”); and
 - (v) details how the Handback Works Costs were calculated.
- (b) The Parties will perform another inspection of the Relevant Infrastructure and Project Company must produce and deliver to MDOT an updated System Condition Report (a “Prefinal System Condition Report”) on the first anniversary of the date of the original Preliminary System Condition Report or such shorter period before the Expiry Date as is

required by MDOT for review and approval in accordance with the Submittal Requirements.

- (c) The Project Management Plan must be amended and updated, as applicable, to include all Handback Works identified in either the Preliminary System Condition Report or the Prefinal System Condition Report (as reviewed and amended in accordance with the Submittal Requirements) not already included in the then current Project Management Plan.
- (d) Project Company must carry out the Handback Works at its own cost notwithstanding that the actual cost of the Handback Works may be higher than the Handback Works Costs.
- (e) Either Party may dispute the Preliminary System Condition Report or the Prefinal System Condition Report, including the Handback Works and the Handback Works Costs, in accordance with Schedule 4 - Dispute Resolution Procedure. In the event that a final determination in accordance with Schedule 4 - Dispute Resolution Procedures specifies Handback Works or Handback Works Costs which are different than those set out in either the Preliminary System Condition Report or the Prefinal System Condition Report, then either the Preliminary System Condition Report or the Prefinal System Condition Report, as applicable, will be deemed to be amended accordingly, as amended pursuant to Section 24.2(c) and all deductions and payments permitted or required by Section 24.3 must be adjusted accordingly.

Section 24.3 Payments To and From Handback Account

- (a) Within 20 Business Days of the date for delivery of the Prefinal System Condition Report, Project Company must provide to MDOT an amount equal to the Handback Works Costs for deposit with the State Treasurer in a separate account held for the purpose of making payment to the Project Company (the “Handback Account”).
- (b) MDOT will pay from the Handback Account the amounts necessary to reimburse the Project Company upon submittal of certified requisitions with full supporting receipts or other evidence of payment for work actually expended in the performance of the Handback Works.
- (c) If the funds in the Handback Account exceed the value (based on the Handback Works Costs) of all or any part of the Handback Works (as amended) yet to be performed, then MDOT will pay the excess to Project Company from the Handback Account within 20 Business Days thereafter. Project Company must include with its request all information reasonably required by MDOT to evaluate such request.

Section 24.4 Handback Letter of Credit

In lieu of the establishment or funding of the Handback Account, Project Company may deliver to MDOT one or more Acceptable Letters of Credit to cover all or any portion of the amounts required to be on deposit in the Handback Account, whereupon (to the extent that the Handback Account has already been established) MDOT will release from the Handback Account to Project Company such amount.

Section 24.5 Project Company Not Relieved Obligations

- (a) Notwithstanding:
- (i) any agreement of MDOT to any Handback Works and Handback Works Costs;
 - (ii) any participation of MDOT in any inspection under this Article 24; or
 - (iii) the complete or partial carrying out of the Handback Works,

Project Company must not be relieved or absolved from any obligation to conduct any other inspection or to perform any other works to the extent otherwise required by this Agreement, including the O&M Requirements.

Section 24.6 Final System Condition Report

- (a) The Parties will perform a joint inspection of the Relevant Infrastructure and Project Company must produce and deliver to MDOT a final System Condition Report within 30 Business Days after the Expiry Date (the “Final System Condition Report”) that documents whether the Relevant Infrastructure met the Handback Requirements on the Expiry Date and if not any Handback Works remaining to be performed and the associated Handback Works Costs.
- (b) If the Final System Condition Report identifies any Handback Works, MDOT may withdraw from the Handback Account or draw on the Acceptable Letter of Credit provided under Section 24.4 an amount equivalent to the applicable Handback Works Costs, and MDOT will pay any remaining funds in the Handback Account or return the unused portion of the Acceptable Letter of Credit provided under Section 24.4.
- (c) Provided that the funds in the Handback Account are adequate to meet Project Company’s obligations in respect of the Handback Works identified in the Final System Condition Report, following any withdrawal from the Handback Account or draw on the letter of credit in accordance with Section 24.6(b), Project Company will have no further liability with respect to such Handback Works.
- (d) If no Handback Works are identified in the Final System Condition Report, MDOT will, within 20 Business Days of receipt by MDOT of the Final System Condition Report, pay the funds in the Handback Account (including any interest accrued) or return the letter of credit to Project Company, unless MDOT disputes the Final System Condition Report, in which case the Handback Account must be dealt with as determined in accordance with Schedule 4 - Dispute Resolution Procedure.

Section 24.7 Assistance in Securing Continuity

Project Company must, before the Expiry Date, do all things reasonably required by MDOT to ensure the smooth and orderly transfer of responsibility for the Project to MDOT or its nominee including:

- (a) meeting with MDOT and such other persons notified by MDOT to discuss the Project;
- (b) providing access to its operations for the purpose of familiarization;

- (c) providing sufficient information to MDOT and its nominee to determine the status and condition of the Project and any Construction Programs in place at the time; and
- (d) complying with Section 37.4.

ARTICLE 25 REFINANCING GAIN SHARE

Section 25.1 Requirement for MDOT Consent

- (a) Subject to complying with this Article 25, Project Company from time to time may consummate Refinancings on terms and conditions acceptable to it.
- (b) Subject to Section 25.1(c), MDOT will have no obligations or liabilities in connection with any Refinancing except for the rights, benefits and protections set forth in the Lenders' Direct Agreements and as set out in this Article 25. If the Refinancing is with a new Lender, the new Lender may be added to an existing Lenders' Direct Agreement or MDOT must enter into a new Lenders' Direct Agreement with the new Lender in the form of Lenders' Direct Agreement previously executed by MDOT, if Lender so elects.
- (c) At any time and from time to time, within 20 Business Days after written request of any Lender or proposed Lender entitled to the rights, benefits and protections under this Agreement, without charge, shall certify to its actual knowledge by written instrument duly executed and acknowledged, to any Lender or proposed Lender as follows:
 - (i) as to whether this Agreement has been supplemented or amended, and if so, the substance and manner of such supplement or amendment, attaching a copy thereof to such certificate;
 - (ii) as to the validity and force and effect of this Agreement, in accordance with its terms;
 - (iii) as to the existence of any Project Company Default;
 - (iv) as to the existence of events which, by the passage of time or Notice or both, would constitute a Project Company Default;
 - (v) as to the then accumulated amount of Noncompliance Points;
 - (vi) as to the existence of any claims by MDOT regarding this Agreement;
 - (vii) as to the commencement and expiration dates of the Term;
 - (viii) as to whether a specified acceptance, approval or consent of MDOT called for under this Agreement has been granted;
 - (ix) whether the Lender and its Financing Documents, or the proposed Lender and its proposed Financing Documents, meet the conditions and limitations set forth in Schedule 10 – Financing Document Terms; and
 - (x) as to any other matters of fact within MDOT's knowledge about this Agreement, Project Company, the Project or the Project Operations as may be reasonably requested.

- (d) MDOT shall deliver the same certified, written instrument to a Substituted Entity or proposed Substituted Entity within 10 Business Days after receiving its written request, provided that the request is delivered to MDOT either before the Substituted Entity or proposed Substituted Entity succeeds to the Project Company's Interest or within 40 Business Days after the Substituted Entity has succeeded to the Project Company's Interest.
- (e) Any such certificate may be relied upon by, and only by, the Lender, proposed Lender, Substituted Entity or proposed Substituted Entity to whom the same may be delivered, and the contents of such certificate shall be binding on MDOT.
- (f) Project Company must provide at least 10 Business Days advance Notice to MDOT of any intended Refinancing, including facts and documents of such Refinancing which must include, at a minimum, the documents described in Section 25.3 and whether Project Company considers it to be an Exempt Refinancing.
- (g) Within 10 Business Days after receipt of the materials required under Section 25.1(f), MDOT will review and provide Notice to Project Company as to whether, in its opinion, the proposed Refinancing is an Exempt Refinancing.

Section 25.2 Share of Gain

MDOT is entitled to receive a 50% share of any Refinancing Gain arising from a Qualifying Refinancing. MDOT is not entitled to receive any portion of Refinancing Gain arising from Exempt Refinancing.

Section 25.3 Project Company Details

Project Company must promptly provide MDOT with full details of any proposed Qualifying Refinancing, including:

- (a) a copy of the proposed Financial Model Update relating to it (if any);
- (b) the basis for the assumptions used in the Financial Model Update (including term sheets and other relevant information outlining the new terms);
- (c) details of the actual timing and amounts of committed investments or Distributions to Equity Members up to the Refinancing date;
- (d) details of any adjustment required to raise the Pre-Refinancing Equity IRR to the Base Case Equity IRR;
- (e) MDOT's estimated share of the Refinancing Gain, expressed in terms elected by MDOT under Section 25.4; and
- (f) all proposed revisions to the Financing Documents , including track changed versions of the original documents.

MDOT must (before, during and at any time after any Refinancing) have unrestricted rights of audit over any Financial Model and documentation (including any aspect of the calculation of the Refinancing Gain) used in connection with that Refinancing whether the Refinancing is a Qualifying Refinancing or not.

Section 25.4 Receipt of Gain

MDOT will have the right to elect to receive the MDOT share of any Refinancing Gain as either:

- (a) a single payment in an amount less than or equal to any Distribution made on or about the date of the Refinancing;
- (b) a reduction in the Service Payment over the remainder or a portion of the Term; or
- (c) a combination of the choices in Section 25.4(a) and Section 25.4(b).

Section 25.5 Method of Calculation

Following Project Company's delivery of the details regarding a proposed Qualifying Refinancing pursuant to Section 25.3, MDOT and Project Company will negotiate in good faith to agree on the amount of the Refinancing Gain resulting from such Qualifying Refinancing and the basis of payment of MDOT's share of the Refinancing Gain (taking into account how MDOT has elected to receive its share of the Refinancing Gain under Section 25.4).

Section 25.6 Costs

The Refinancing Gain will be calculated after taking into account the reasonable and proper professional costs that each Party directly incurs in relation to the Qualifying Refinancing and on the basis that all reasonable and proper professional costs incurred by MDOT will be paid to MDOT by Project Company within 20 Business Days of any Qualifying Refinancing.

ARTICLE 26 RECORDS, INFORMATION AND AUDIT**Section 26.1 Maintenance and Inspection of Records**

- (a) Project Company must:
 - (i) keep and maintain in Detroit, Michigan, or in another location MDOT approves in its reasonable discretion, accurate and complete Books and Records relating to the Project, the Relevant Infrastructure and the Premises (including copies of all original documents delivered to MDOT) in accordance with this Agreement, the Project Management Plan and Good Industry Practice;
 - (ii) make all Books and Records available for inspection by MDOT and its nominees at all times during normal business hours, or at other reasonable times upon reasonable Notice throughout the Term. MDOT's right of inspection includes the right to make extracts, scans, copies and take notes;
 - (iii) furnish copies or scans of all Books and Records to MDOT or its nominee at no cost to MDOT, if requested.
 - (iv) retain all Books and Records for a minimum of 3 years after the Expiry Date provided that:
 - (A) if this Agreement specifies any different time period for retention of particular records (including pursuant to Section 26.1(b)), such time period will control;

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- (B) if Applicable Law specifies any longer period, such time period will control; and
 - (C) all Books and Records which relate to Claims and Disputes being processed or actions brought under Schedule 4 - Dispute Resolution Procedures must be retained and made available until any later date that such Claims, Disputes and actions are finally resolved.
- (b) Refer to Schedule 12 - Federal and State Requirements regarding applicable Federal and State Requirements in respect of maintenance and inspection of Books and Records, with which Project Company must comply.
 - (c) Project Company has the right to designate conspicuously any documents that it believes contain trade secret or other information that would be exempted from disclosure in response to a public records request under the Public Records Act by placing "CONFIDENTIAL" in the header or footer of such page or record affected. Any such designation of trade secret or other basis for exemption must be accompanied by a concise statement of reasons supporting the claim including the specific law that authorizes the exemption from disclosure under the Public Records Act.
 - (d) If a request is made for disclosure of Books and Records that have been designated by Project Company as "CONFIDENTIAL", MDOT will make filings of its own concerning possible disclosure and is under no obligation to support the positions of or Notify Project Company of any request. By entering this Agreement, Project Company consents to, and expressly waives any right to contest, the provision by MDOT to MDOT's general counsel of all, or representative samples of, the Books and Records in accordance with the Public Records Act. MDOT will have no responsibility or obligation for a failure of Project Company to respond or to respond timely to any request for disclosure of the Books and Records in accordance with the Public Records Act, and MDOT will not be required to wait therefor if it is required to disclose or otherwise take action under the Public Records Act or other applicable Law. MDOT will not be responsible or liable to Project Company or any other party as a result of disclosing any such materials, including materials marked "CONFIDENTIAL," whether the disclosure is deemed required by law or by an order of court or MDOT's general counsel or occurs through inadvertence, mistake or negligence on the part of MDOT or its officers, employees, contractors or consultants.
 - (e) MDOT will not advise a submitting party or Project Company as to the nature or content of documents entitled to protection from disclosure under the Public Records Act or other Applicable Laws, as to the interpretation of such laws, or as to definition of trade secret. Project Company must be solely responsible for all determinations made by it under Applicable Laws and for clearly and prominently marking each and every page or sheet of materials with "CONFIDENTIAL" as it determines to be appropriate. Project Company is advised to contact its own legal counsel concerning the effect of Applicable Laws to Project Company's Books and Records.
 - (f) In the event of any proceeding or litigation concerning the disclosure of any Books and Records to third parties, Project Company must be responsible for otherwise prosecuting or defending any action concerning the materials at its sole expense and risk; provided, however, that MDOT reserves the right, in its sole discretion, to intervene or participate in the litigation in such manner as it deems necessary or desirable. All costs and fees

(including attorneys' fees and costs) incurred by MDOT in connection with any litigation, proceeding or request for disclosure of Books and Records must be reimbursed and paid by Project Company.

Section 26.2 Audits

- (a) Project Company agrees that MDOT and its nominee must have, during regular business hours and at other reasonable times and, where reasonably practicable, upon reasonable Notice, unrestricted rights of audit and review of any Books and Record or the Project Operations including for purposes of verifying compliance with this Agreement and Applicable Law, Claims and payments made to Project Company.
- (b) Without limiting Section 26.2(a):
 - (i) MDOT must have the right to inspect Project Operations to verify the accuracy and adequacy of the Books and Records including the Project Management Plan and its component parts, plans and other documentation;
 - (ii) the audits may be performed by the Michigan Auditor of State;
 - (iii) Project Company must make available to the Michigan Auditor of State, for inspecting, scanning and/or copying any Books and Records, and any other records, reports, information, documents, data relating to performance and payments.
 - (iv) Project Company, Contractors or their agents must provide adequate facilities, acceptable to the Michigan Auditor of State, for the audits;
 - (v) Project Company must cause each Contract to include a similar right of MDOT to audit records and interview staff of the Contractor, and a similar covenant to cooperate with the Michigan Auditor of State;
 - (vi) Project Company must seek MDOT's prior approval (which will not be unreasonably withheld) to the terms of, and any amendment to, any Contract for professional services which exceeds \$100,000; and
 - (vii) full compliance by Project Company with the provisions of Article 26 is a contractual condition precedent to Project Company's right to seek relief on a Claim.
- (c) Any rights of the federal government and any agency thereof, including FHWA, to review and audit Project Company, its Contractors and their respective Books and Records are set forth in Schedule 12 - Federal and State Requirements and Applicable Law. Nothing in this Agreement will in any way limit the constitutional and statutory powers, duties and rights of elected State officials, including the independent rights of the Michigan Auditor of State, in carrying out his or her legal authority.
- (d) Subject to Section 26.2(e), Project Company understands and acknowledges that:

- (i) the Michigan Auditor of State may conduct an audit or investigation of any entity receiving funds from the State directly under this Agreement or indirectly through a Contract;
 - (ii) acceptance of funds directly under this Agreement or indirectly through a Contract acts as acceptance of the authority of the Michigan Auditor of State, under the direction of the legislative audit committee, to conduct an audit or investigation in connection with those funds; and
 - (iii) an entity that is the subject of an audit or investigation must provide the Michigan Auditor of State with access to any information the Michigan Auditor of State considers relevant to the investigation or audit.
- (e) Subject to extension due to Project Company Fault, any audit by the Michigan Auditor of State with respect to the D&C Works must be initiated on or before the date 3 years after the Substantial Completion Date.
- (f) MDOT must notify Project Company, their designees or FHWA of the results of the audit, and if MDOT's auditor discovers any inaccuracy, incorrectness or incompleteness, then, subject to Section 26.3:
- (i) Project Company must:
 - (A) remedy any such inaccuracy, incorrectness or incompleteness and issue a revision to the applicable Books and Records; and
 - (B) where the inaccuracy, incompleteness or incorrectness has resulted in any material overpayment by MDOT, Project Company must, within 20 Business Days reimburse MDOT for all costs relating to the Michigan Auditor of State and audit to a maximum amount that is the lesser of:
 - (1) the actual costs relating to the Michigan Auditor of State and audit; or
 - (2) an amount equal to the amount of any overpayment;
 - (C) where the inaccuracy, incompleteness or incorrectness has resulted in any overpayment, whether or not material, by MDOT, Project Company must reimburse MDOT for the amount of such overpayment; and
 - (D) where the inaccuracy, incompleteness or incorrectness has resulted in any underpayment by MDOT, whether or not material, MDOT must pay Project Company the amount of such underpayment.

Section 26.3**Disputes as to Audit**

- (a) In the event that an audit performed by the Michigan Auditor of State indicates an adjustment to the costs reported under this Agreement or questions the allowability of an item of expense, MDOT will promptly submit to Project Company a Notice of audit results and a copy of the audit report, which may supplement or modify any tentative findings verbally communicated to Project Company at the completion of an audit.

- (b) Within 60 Business Days after the date of the Notice of audit results, Project Company must (a) respond in writing to the responsible Bureau of MDOT indicating whether or not it concurs with the audit report, (b) clearly explain the nature and basis for any disagreement as to a disallowed item of expense, and (c) submit to MDOT a written explanation as to any questioned or no opinion expressed item of expense (“Response”). The Response will be clearly stated and will provide any supporting documentation necessary to resolve any disagreement or questioned or no opinion expressed item of expense. Where the documentation is voluminous, Project Company may supply appropriate excerpts and make alternate arrangements to conveniently and reasonably make that documentation available for review by MDOT. The Response will refer to and apply the language of the Agreement. Project Company agrees that failure to submit a Response within 60 Business Day constitutes agreement with any disallowance of an item of expense and authorizes MDOT to finally disallow any items of questioned or no opinion expressed cost.
- (c) MDOT will make its decision with regard to any Notice of audit results and Response within 120 Business Days after the date of the Notice of audit results and any amount owing will be a debt due and payable from Project Company to MDOT on demand including interest at the Libor 1 Year Rate and charges payable from the date of the demand until payment is made. Should any decision of MDOT with regard to a Notice of audit result in an amount owing from MDOT to Project Company, such amount will be a debt due and payable from MDOT to Project Company on demand.

ARTICLE 27 ASSIGNMENT AND CHANGE IN CONTROL

Section 27.1 Assignment by Project Company

Subject to Section 27.2, Project Company must not assign, mortgage, novate, charge or transfer any of its rights or obligations under this Agreement without the prior consent of MDOT and on such terms and conditions as are determined by MDOT.

Section 27.2 Security

The provisions of Section 27.1 do not apply to the grant of any security for any financing extended to Project Company (directly or indirectly) under the Financing Documents or to the enforcement of the same.

Section 27.3 Assignment by MDOT

MDOT may assign all or any portion of its rights, title and interests in and to the Project, the Relevant Infrastructure, appropriations, Project Documents, Performance Security, guarantees, letters of credit and other security for payment or performance:

- (a) without Project Company’s consent, to any other State governmental entity of Michigan that:
- (i) succeeds to the governmental powers and authority of MDOT, including the power and authority to request appropriations from the State legislature; and

- (ii) has the legal authority to perform its obligations under this Agreement and sources of funding for the Milestone Payments and Service Payments that are at least as adequate and secure as MDOT's at the time of the assignment; and
- (b) to others with the prior consent of Project Company.

Section 27.4 Change of Organization or Name

- (a) Project Company must not change the legal form of its organization without providing prior Notice to MDOT.
- (b) If either Party changes its name, such Party agrees to promptly furnish the other Party with Notice of change of name and appropriate supporting documentation.

Section 27.5 Change in Control

No Change in Control of Project Company, or of any person with any form of direct, indirect, beneficial or other ownership interest in Project Company, is permitted:

- (a) prior to two years after Substantial Completion, without the prior consent of MDOT, in its sole discretion; or
- (b) after two years after Substantial Completion, without the prior consent of MDOT not to be unreasonably withheld or delayed based on the financial resources, qualifications and experience necessary to perform the Project Operations and potential conflicts of interest pursuant to Section 27.6(c).

Section 27.6 Notice of Change in Control

- (a) Whether or not Project Company is required to obtain MDOT's consent pursuant to this Article 27, Project Company must provide Notice to MDOT of any proposed Change in Control of Project Company, or of any person with any form of direct, indirect, beneficial or other ownership interest in Project Company, as applicable, on or before at least 15 Business Days prior to effecting such Change in Control for review and approval in accordance with the Submittal Requirements.
- (b) Project Company's Notice under Section 27.6(a) must include:
 - (i) a statement identifying, in respect of the relevant owners in the ownership interests of Project Company, or of any person with an ownership interest in Project Company, as applicable;
 - (ii) the holdings prior to and proposed holdings following the Change in Change in Control; and
 - (iii) all other information reasonably necessary for MDOT to determine whether to consent to the Change in Control.
- (c) For transactions pursuant to Section 27.5(b), MDOT will evaluate the identity, financial resources, qualifications, experience and potential conflicts of interest using the same applicable 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

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evaluation of Persons responding to MDOT requests for qualifications for concession or similar agreements for comparable projects and facilities, including the requests for qualifications for this Project to the extent relevant.

ARTICLE 28 GENERAL PROVISIONS APPLYING TO DELAY EVENTS AND RELIEF EVENTS

Section 28.1 Mitigation

- (a) If a Delay Event, Relief Event, Force Majeure Event or any other event occurs as a result of which Project Company considers that it is entitled to claim an extension of time, compensation or relief from performance of its obligations under this Agreement (together "Relevant Events"), Project Company must and must require all Project Company Partners to use and continue to use commercially reasonable efforts to:
- (i) eliminate or mitigate the losses, damages, schedule impact and other consequences of such event upon the performance of its obligations under this Agreement, including by re-sequencing, reallocating or redeploying Project Company forces to other work, as appropriate;
 - (ii) continue to perform and remain liable and responsible for its obligations under this Agreement to the extent commercially reasonable notwithstanding the Relevant Event; and
 - (iii) resume performance of its obligations under this Agreement affected by the Relevant Event as soon as practicable.
- (b) To the extent that Project Company does not comply with its obligations under this Section 28.1, then Project Company's entitlement to claim an extension of time, compensation or relief from performance of its obligations under this Agreement with respect to the Relevant Event will be reduced to the extent of such failure.

Section 28.2 Deductions for Relevant Events

The compensation payable to Project Company with respect to any Relevant Event will be reduced by:

- (a) any amount which Project Company or a Project Company Related Entity recovers under any Insurance Policy, or would have recovered if it had complied with the requirements of this Agreement in respect of any Insurance Policy required under this Agreement, which amount, for greater certainty, will not include any excess or deductibles or any amount over the maximum amount insured under any such insurance policy; and
- (b) the amount of any costs (including applicable Direct Costs, Delay Costs, Financing Delay Costs and margins calculated in accordance with Schedule 15 – Costs Schedule) avoided or otherwise reduced as a result of the Relevant Event, except that in relation to a Relevant Change in Law, it means a saving of the capital costs and operating costs which would otherwise be required to be incurred or payable by Project Company which are or are likely to be decreased from the relevant amounts (if any) assumed in the then current Financial Model.

Section 28.3 Acts of Project Company or Project Company Related Entity

Project Company's entitlement to claim an extension of time, compensation or relief from performance of its obligations under this Agreement with respect to any Relevant Event will be reduced to the extent the Relevant Event arises out of, relates to or was caused or contributed to by any Project Company Fault.

Section 28.4 Notification; Delay in Notification

- (a) Project Company must provide notifications regarding Relevant Events as set forth in:
 - (i) Section 29.2(a) and Section 29.2(c) with respect to Delay Events;
 - (ii) Section 30.2(a) and Section 30.2(c) with respect to Relief Events; and
 - (iii) Section 33.1(a) with respect to any Force Majeure Events.
- (b) Subject to Section 28.4(c), if any Relevant Event Notice or any required information is submitted by Project Company after the dates required under this Agreement, then Project Company will be entitled to relief provided due to the occurrence of the Relevant Event except to the extent that the ability to mitigate was adversely affected as a result of the delay in providing such Notice or information or MDOT was prejudiced by such delay.
- (c) If any Relevant Event Notice or any required information is submitted by Project Company to MDOT later than 20 Business Days after Project Company has knowledge that the Relevant Event has caused or is likely to cause an entitlement under this Agreement (or should have discovered such Relevant Event in the exercise of reasonable prudence), Project Company has no right to make any Claim for any Liability in connection with the Relevant Event.

Section 28.5 Multiple and Overlapping Claims

Project Company may make multiple but not duplicative claims with respect to a Relevant Event.

Section 28.6 Burden of Proof and Mitigation

Project Company bears the burden of proof in establishing the occurrence of a Relevant Event and the entitlement to, and amount of, relief for such Relevant Event, including demonstrating that Project Company complied with its mitigation obligations under Section 28.1.

Section 28.7 Sole Entitlement

Project Company hereby acknowledges and agrees that:

- (a) subject to the express terms of this Agreement, the Service Payment and the Milestone Payments constitutes full compensation for performance of all of the Project Operations .
- (b) Project Company's sole right to claim an extension of time, compensation or relief from performance of its obligations under this Agreement or otherwise make any Claim for any Liability in connection with a Delay Event, Relief Event or Force Majeure Event is as set out in this Article 28 through Article 33.

ARTICLE 29 RELIEF DURING THE D&C TERM**Section 29.1 Overview**

This Article 29 sets out Project Company's entitlement to an extension of time, Direct Costs, Delay Costs and Service Payment (as applicable) as a result of Delay Events occurring during the D&C Term.

Section 29.2 Claim for Delay Event

- (a) Project Company must provide Notice to the MDOT Representative within 10 Business Days of becoming aware of the occurrence of Delay Event (or, if earlier, on such date that Project Company should have discovered such Delay Event in the exercise of reasonable prudence).
- (b) Project Company must, within 40 Business Days after such notification, provide further details to the MDOT Representative which must include:
 - (i) a statement of which Delay Event the claim is based upon and the provisions of this Agreement that entitle Project Company to relief. If Project Company seeks relief for MDOT's alleged breach of this Agreement, then Project Company must identify the provisions of this Agreement which allegedly have been breached and the actions or failures to act constituting such breach;
 - (ii) details of the circumstances from which the Delay Event arises including its nature, the date of its occurrence, its duration (to the extent that the Delay Event and the effects thereof have ceased or estimated duration to the extent that the Delay Event and the effects thereof have not ceased), the portions of the Relevant Infrastructure affected;
 - (iii) details of the contemporary records which Project Company must maintain to substantiate its claim for extra time and the substance of any oral communications, if any, relating to the Delay Event and the name of the person or persons making such material oral communications;
 - (iv) analysis of consequences (whether direct or indirect, financial or non-financial) which such Delay Event may have upon achieving each Milestone or the Substantial Completion Deadline, or both, as applicable including an impacted delay analysis indicating all activities represented or affected by the change, with activity numbers, durations, predecessor and successor activities, resources and cost, and with a narrative report, in form satisfactory to MDOT, which compares the proposed new schedule to the Construction Schedule, as appropriate. Project Company may reschedule activities not otherwise affected by the event, in order to take advantage of additional float available as the result of the time extension. Any such rescheduling must be reflected in the Construction Schedule;
 - (v) where the Delay Event is also a Compensable Delay Event, an itemized estimate of all amounts claimed under Section 29.5. Direct Costs and Delay Costs must be broken down in accordance with Schedule 15 - Costs Schedule;
 - (vi) the type and amount of insurance that may be applicable and amounts that have been or are anticipated to be collected under such insurance; and

- (vii) details of any measures which Project Company has taken to date and proposes to adopt to mitigate the consequences of such Delay Event in accordance with Section 28.1.
- (c) As soon as possible, but in any event, within 3 Business Days of Project Company receiving, or becoming aware of, any supplemental information which may further substantiate or support Project Company's claim, Project Company must submit further particulars based on such information to the MDOT Representative.
- (d) The MDOT Representative must, after receipt of details under Section 29.2(a), or of further particulars under Section 29.2(c), be entitled by Notice to require Project Company to provide such further supporting particulars as the MDOT Representative may reasonably consider necessary. Project Company must afford the MDOT Representative reasonable facilities for investigating the validity of Project Company's claim, including, on-site inspection.

Section 29.3 Consequences of Delay Event

Subject to Article 28 and this Article 29, upon the occurrence of a Delay Event:

- (a) Project Company shall be entitled to an extension of the Substantial Completion Deadline equal to the delay caused by the Delay Event so as to cause a delay in achieving Substantial Completion by the relevant Substantial Completion Deadline and must fix a revised Substantial Completion Deadline, as soon as reasonably practicable and in any event within 10 Business Days of the later of:
 - (i) the date of receipt by the MDOT Representative of Project Company's Notice given in accordance with Section 29.2(a) and the date of receipt of any further particulars (if such are required under Section 29.2(d), whichever is later; and
 - (ii) the date of receipt by the MDOT Representative of any supplemental information supplied by Project Company in accordance with Section 29.2(c) and the date of receipt of any further particulars (if such are required under Section 29.2(d), whichever is later;
- (b) to the extent directly arising out of such Delay Event, any failure by Project Company to perform, and any poor performance of, any affected D&C Term O&M Work will not constitute a breach of this Agreement by Project Company, no Noncompliance Points will accrue in respect of such failure and Project Company must be relieved of its obligations to perform such D&C Term O&M for the duration and to the extent directly prevented by such Delay Event (provided that Project Company will remain fully responsible and liable for performance, in accordance with the requirements of this Agreement, of such elements of the D&C Term O&M Work not directly impacted or affected by such Delay Event);
- (c) no Project Company Default or right of termination or other claim by MDOT, other than either Party's right to terminate this Agreement pursuant to Section 33.2 will arise under this Agreement by reason of any failure by a Party to perform any of its obligations under this Agreement, to the extent that such failure is as a direct result of the Delay Event;

- (d) no Deductions will be applied in accordance with Schedule 3 - Payment Mechanism to the extent of the direct impact of such Delay Event, subject to Section 33.1(b); and
- (e) any interference arising directly out of such Delay Event will be taken into account in operating the Payment Mechanism, which must be operated as though any Noncompliance Event resulting from such direct interference by such Delay Event had not occurred, so that Project Company will be entitled to payment under this Agreement as if there had been no such direct interference by such Delay Event with the D&C Term O&M Work, provided, however, that Project Company will not be entitled to any additional compensation, except Termination Compensation, if this Agreement is terminated in accordance with this Agreement.

Section 29.4 Concurrent Delays

If Project Company has made a claim for an extension of time in accordance with this Article 29, Project Company is not entitled to an extension of time to the Substantial Completion Deadline where a delay to Substantial Completion would have occurred due to an event other than the Delay Event, for the period of the delay to the extent that the delay would have occurred as a result of such other event.

Section 29.5 Compensable Delay Events

- (a) Subject to Article 28, this Article 29 and Schedule 15 – Costs Schedule, if a Delay Event occurs, MDOT must reimburse Project Company:
 - (i) Subject to Section 29.5(c), Direct Costs calculated in accordance with Schedule 15 – Costs Schedule attributable to the Delay Event as determined by MDOT;
 - (ii) Delay Costs calculated in accordance with Schedule 15 – Costs Schedule attributable to the Delay Event as determined by MDOT but only if the Delay Event is one for which an extension of time was granted under Section 29.3 and is also an event falling within clause (a), (b) or (e) of the definition of Compensable Delay Event; and
 - (iii) any Service Payment forecast in Project Company’s Financial Model which, but for the Compensable Delay Event, would have been paid by MDOT to Project Company during the period in which Project Company is entitled to relief under this Agreement, but only if the Delay Event is a Compensable Delay Event for which an extension of time was granted under Section 29.3 and provided Project Company achieves Substantial Completion after the Original Substantial Completion Deadline.
- (b) The Service Payment payable under Section 29.5(a)(iii) will not be subject to O&M Deductions, however MDOT may deduct the amount of avoided costs which are not in fact incurred by Project Company during the period for which an extension of time was granted for the Delay Event.
- (c) If the Compensable Delay Event is Vandalism, the Direct Costs payable to Project Company will be subject to the following thresholds and deductibles.

Total Direct Costs for loss or damage to Project in any Contract Year.	MDOT Compensation to Project Company for net Direct Costs calculated in accordance with <u>Schedule 15</u> – Costs Schedule in the relevant Contract Year.
Up to and including \$150,000	0% of net Direct Costs
Greater than \$150,000, up to and including \$250,000	50% of net Direct Costs
Greater than \$250,000	100% of net Direct Costs

- (d) Direct Costs and other costs not included in the table set forth in Section 29.5 shall be the sole responsibility of Project Company.
- (e) The threshold and deductible amounts set out in the table set forth in clause (c) above shall be Indexed each year on the anniversary of the Commercial and Financial Close Date.

ARTICLE 30 RELIEF DURING THE O&M TERM

Section 30.1 Overview

This Article 30 sets out Project Company’s entitlement to Direct Costs and relief from performance as a result of Relief Events occurring during the O&M Term.

Section 30.2 Claim for a Relief Event

- (a) Project Company must provide Notice to the MDOT Representative within 10 Business Days of becoming aware of the occurrence of Relief Event (or, if earlier, on such date that Project Company should have discovered such Relief Event in the exercise of reasonable prudence).
- (b) Project Company must, within 40 Business Days after its Notice under Section 30.2(a), provide a further Notice the MDOT Representative which must include:
 - (i) a statement of which Relief Event the claim is based upon and the provisions of this Agreement that entitle Project Company to relief. If Project Company seeks relief for MDOT’s alleged breach of this Agreement, then Project Company must identify the provisions of this Agreement which allegedly have been breached and the actions constituting such breach;
 - (ii) details of the circumstances from which the Relief Event arises including its nature, the date of its occurrence, its duration (to the extent that the Relief Event and the effects thereof have ceased or estimated duration to the extent that the Relief Event and the effects thereof have not ceased) and any portions of the Relevant Infrastructure. Impacts to the O&M Works, if any, must be stated by Contract Year;

- (iii) details of the contemporary records which Project Company must maintain to substantiate its claim for relief or compensation and the substance of any oral communications, if any, relating to the Relief Event and the name of the person or persons making such material oral communications;
 - (iv) where the Relief Event is also a Compensable Relief Event, an itemized estimate of all amounts claimed under Section 30.2 broken down into Direct Costs identified in Schedule 15 - Costs Schedule. The estimate must include, to the extent applicable, Direct Costs for additional work for future O&M Work, stated by fiscal year and by net present value using the then-applicable yield on two-year U.S. Treasury bonds as the discount rate;
 - (v) the type and amount of insurance that may be applicable and amounts that have been or are anticipated to be collected under such insurance; and
 - (vi) details of any measures which Project Company has taken to date and proposes to adopt to mitigate the consequences of such Relief Event in accordance with Section 28.1.
- (c) As soon as possible but in any event within 3 Business Days of Project Company receiving, or becoming aware of, any supplemental information which may further substantiate or support Project Company's claim, Project Company must submit further particulars based on such information to the MDOT Representative.
- (d) The MDOT Representative must, after receipt of details under Section 30.2(a), or of further particulars under Section 30.2(c), be entitled by Notice to require Project Company to provide such further supporting particulars as the MDOT Representative may reasonably consider necessary. Project Company must afford the MDOT Representative reasonable facilities for investigating the validity of Project Company's claim, including, on-site inspection.

Section 30.3 Consequences of Relief Event

- (a) Subject to Article 28 and this Article 30, upon the occurrence of a Relief Event:
- (i) to the extent directly arising out of such Relief Event, any failure by Project Company to perform, and any poor performance of, any affected O&M Term O&M Work will not constitute a breach of this Agreement by Project Company, no Noncompliance Points will accrue in respect of such failure and Project Company must be relieved of its obligations to perform such O&M Term O&M Work for the duration and to the extent directly prevented by such Relief Event (provided that Project Company will remain fully responsible and liable for performance, in accordance with the requirements of this Agreement, of such elements of the O&M Term O&M Work not directly impacted or affected by such Relief Event);
 - (ii) no Project Company Default or right of termination or other claim by MDOT, other than either Party's right to terminate this Agreement pursuant to Section 33.2 will arise under this Agreement by reason of any failure by a Party to perform any of its obligations under this Agreement to the extent that such failure is a direct result of the Relief Event;

- (iii) no Deductions will be applied in accordance with Schedule 3 - Payment Mechanism to the extent of the direct impact of such Relief Event, subject to Section 33.1(b); and
- (iv) any interference arising directly out of such Delay Event will be taken into account in operating the Payment Mechanism, which must be operated as though any Noncompliance Event resulting from such direct interference by such Relief Event had not occurred, so that Project Company will be entitled to payment under this Agreement as if there had been no such direct interference by such Relief Event with the O&M Term O&M Work, provided however that Project Company will not be entitled to any additional compensation, except Termination Compensation, if this Agreement is terminated in accordance with this Agreement.

Section 30.4 Compensable Relief Events

- (a) Subject to Article 28, this Article 30 and Schedule 15 – Costs Schedule, upon the occurrence of a Compensable Relief Event, MDOT will reimburse Project Company for all Direct Costs incurred by Project Company in connection with the Compensable Relief Event including costs in connection with any commercially reasonable steps taken to cure or mitigate against such events, together with any applicable margin for overhead and profit on such Direct Costs as determined by MDOT in accordance with Schedule 15 - Costs Schedule.
- (b) If the Compensable Relief Event is Vandalism, the Direct Costs payable to Project Company will be subject to the following thresholds.

Total Project Operations costs in any Contract Year.	MDOT Compensation to Project Company for net Direct Costs calculated in accordance with <u>Schedule 15</u> – Costs Schedule for relevant Contract Year.
Up to and including \$150,000	0% of net Direct Costs
Greater than \$150,000, up to and including \$250,000	50% of net Direct Costs
Greater than \$250,000	100% of net Direct Costs

- (c) Direct Costs and other costs not included in the table set forth in Section 30.4 above shall be the sole responsibility of Project Company.
- (d) The threshold amounts set out in the table set forth in clause (c) above shall be Indexed each year on the anniversary of the Commercial and Financial Close Date.

ARTICLE 31 CHANGE PROCEDURE

Schedule 2 – Change Procedure sets out the process with respect to (i) Directive Letters unilaterally issued by MDOT (ii) Change Orders issued by MDOT following a Request for Change Proposal by MDOT; and (iii) Change Orders issued by MDOT following a Change Request by Project Company.

ARTICLE 32 CHANGE IN LAW AND CHANGE IN STANDARDS**Section 32.1 Change in Law**

Following any Change in Law, Project Company must perform the Project Operations in accordance with the terms of this Agreement, including in compliance with Applicable Law.

Section 32.2 Change in Standards Applicable to the Project Operations

Where this Agreement requires Project Company to comply with a technical standard in respect of the Project Operations not in place at the Setting Date, Project Company must give Notice to MDOT of such change. If, after such Notice, MDOT requires compliance with the changed standard (rather than the standard applicable at the Setting Date), then, to the extent such change directly and materially impacts the Project Operations and would not have otherwise been taken into account by compliance with Good Industry Practice, such changed standard must, subject to and in accordance with Schedule 2 - Change Procedure, result in a Change. If MDOT does not require compliance with the changed standard, then Project Company must continue to comply with the standard applicable at the Setting Date. This Section 32.2 must not apply where a change in a technical standard is also a Change in Law.

ARTICLE 33 FORCE MAJEURE**Section 33.1 Consequences of Force Majeure**

- (a) If a Delay Event for which an extension of time was granted under Section 29.3 is:
- (i) a Force Majeure Event; and
 - (ii) the Force Majeure Event is not insured against and is not required to be insured against in accordance with this Agreement,

Project Company will be entitled to Financing Delay Costs (if any).

- (b) If a Force Majeure Event occurs during the O&M Term which is not insured and is not required to be insured in accordance with this Agreement, MDOT is entitled to make Deductions in accordance with Schedule 3 - Payment Mechanism notwithstanding the cancellation of Noncompliance Points pursuant to Section 30.3(a)(i) provided that such Deduction shall not exceed, in the aggregate, the amount that would be necessary to reduce payments to Project Company to an amount below the sum of the Senior Debt Service Amount and 50% of Fixed O&M Costs.

Section 33.2 Extended Force Majeure

- (a) Subject to Section 38.3 and Section 33.2(c), if a Force Majeure event is continuing and prevents or is likely to continue to prevent Project Company from undertaking all or substantially all of its obligations in accordance with this Agreement for a continuous period exceeding 6 months, either Party may terminate this Agreement by giving Notice to the other Party (“Force Majeure Termination Event”).
- (b) The termination of this Agreement for a Force Majeure Termination Event will take effect upon the date stated in the Notice given in accordance with Section 33.2(a).

- (c) Project Company may not terminate under Section 33.2(a) for the period Project Company is able to recover under any Insurance Policy that it is required to procure in accordance with this Agreement for any Liability suffered as a consequence of the relevant Force Majeure Termination Event or would have been able to recover had it effected and maintained such insurances in accordance with this Agreement.

ARTICLE 34 PROJECT COMPANY DEFAULT

Section 34.1 Project Company Default

The occurrence of any one or more of the following events or conditions constitute a “Project Company Default” where such event is not solely and directly attributable to a Delay Event, Relief Event, or Force Majeure Event”:

- (a) Project Company fails to begin the D&C Work within 20 Business Days following the Commercial and Financial Close Date;
- (b) Project Company fails to begin the D&C Term O&M Work within 90 days following the Commercial and Financial Close Date;
- (c) Project Company (a) fails to make any payment due to MDOT under this Agreement when due, (b) fails to deposit funds to any custodial account, trust account or other reserve or account in the amount and within the time period required by this Agreement or deliver the handback letter of credit in accordance with Article 24 (if applicable) in an amount and within the period required in this Agreement;
- (d) Project Company ceases performing a substantial portion of its business, or a substantial portion of such business is suspended or is not being performed, whether voluntarily or involuntarily, that has or will have a material adverse effect on Project Company’s ability to perform its obligations under this Agreement;
- (e) Project Company abandons the Project or discontinues the performance of all or materially all of the Project Operations for a period of 20 or more Business Days;
- (f) Project Company fails to obtain, provide and maintain the Insurance Policies in accordance with this Agreement;
- (g) Project Company breaches Section 27.5 with respect to a Change in Control;
- (h) any representation or warranty made by Project Company in this Agreement or any documents delivered to MDOT pursuant to the requirements of this Agreement is false in any material respect or materially misleading or inaccurate in any material respect when made or omits material information when made;
- (i) a Bankruptcy Event arises with respect to:
- (i) Project Company except where such Bankruptcy Event is solely and directly as a result of a failure by MDOT to pay Project Company as required under this Agreement, and/or

- (ii) any D&C Contractor or D&C Guarantor (in each case only during the Construction Period) or O&M Contractor, unless Project Company either:
 - (A) enters into a replacement D&C Contract, guarantee or O&M Contract (as relevant) with a reputable counterparty reasonably acceptable to MDOT within 40 Business Days of the relevant Bankruptcy Event; or
 - (B) in the absence of entering into a replacement O&M Contract, Project Company otherwise demonstrates to the satisfaction of MDOT that Project Company possesses the technical and financial capacity to perform all remaining O&M Work in accordance with this Agreement; or
- (j) any D&C Contract or O&M Contract is terminated (other than non-default termination on its scheduled termination date) and Project Company has not either:
 - (i) entered into a replacement D&C Contract or O&M Contract (as relevant) with a reputable counterparty reasonably acceptable to MDOT within 40 Business Days of the termination of the relevant D&C Contract or O&M Contract (as relevant); or
 - (ii) in the absence of entering into a replacement O&M Contract, Project Company otherwise demonstrates to the satisfaction of MDOT that Project Company possesses the technical and financial capacity to perform all remaining O&M Work in accordance with this Agreement;
- (k) Project Company fails to achieve Substantial Completion by the Longstop Date;
- (l) a Persistent Project Company Default occurs, MDOT delivers to Project Company a Default Notice, and either (a) Project Company fails to deliver to MDOT, within 30 Business Days after such Notice is delivered, a cure plan meeting the requirements for approval set forth in Section 34.6 or (b) Project Company fails to fully comply with the schedule or specific elements of, or actions required under, the approved cure plan;
- (m) Project Company fails to comply with MDOT's suspension of Project Operations issued in accordance with Section 21.6 within the time reasonably allowed in such order;
- (n) without limitation to Section 34.1(a) through Section 34.1(m), Project Company fails, within 10 Business Days of receipt of Notice from MDOT that Project Company has failed to timely observe or perform or cause to be observed or performed any other covenant, agreement, obligation, term or condition required to be observed or performed by Project Company under the Project Documents, including failure to pay for or perform the D&C Work, O&M Work or any portion thereof in accordance with the Project Documents, to cure any such failure identified in such MDOT Notice but excluding any Noncompliance Event unless the number of points accumulated with respect to such Noncompliance Event constitutes a Project Company Default under Section 34.1(l); and
- (o) there occurs any other Project Company Default for which MDOT issues a Warning Notice and such Project Company Default is not fully and completely cured within the applicable cure period, if any, set forth in Section 34.3 or any Lenders' Direct Agreement.

Section 34.2 MDOT Remedies Relating to Project Company Default

- (a) Subject to the terms of the Lenders' Direct Agreement, upon occurrence of a Project Company Default that has not been cured within the applicable cure period, if any, MDOT will be entitled to
- (i) exercise its Step-In Rights;
 - (ii) terminate this Agreement as set out in Section 34.7;
 - (iii) recover any and all damages available at law on account of the occurrence of a Project Company Default. Project Company must owe any such damages that accrue after the occurrence of the Project Company Default regardless of when the Default Notice is given or whether the Project Company Default is subsequently cured;
 - (iv) where such Project Company Default is not cured within the applicable cure period specified in Section 34.3, make demand upon and enforce any Performance Security, and make demand upon, draw on and enforce and collect any letter of credit, guaranty or other payment or performance security (including the Handback Account) available to MDOT under this Agreement with respect to the Project Company Default in question in any order in MDOT's sole discretion without Notice to Project Company. MDOT will apply the proceeds of any such action to the satisfaction of Project Company's obligations under this Agreement, including payment of amounts due to MDOT;
 - (v) suspend the Project Operations in whole or part in accordance with Section 21.6; or
 - (vi) exercise any other remedies available under this Agreement or at law or in equity.
- (b) Each right and remedy of MDOT with respect to Termination is cumulative as set out in Section 48.8.

Section 34.3 Default Notice and Cure Periods

- (a) Project Company must promptly:
- (i) notify MDOT upon the occurrence of a Project Company Default; and
 - (ii) take steps to commence the cure of and mitigate the effects of the Project Company Default.
- (b) If Project Company notifies MDOT of a Project Company Default in accordance with Section 34.3(a) or MDOT considers a Project Company Default has occurred, MDOT may give Project Company a Notice ("Default Notice") which contains:
- (i) details of the Project Company Default;
 - (ii) the cure period (if any) by which Project Company must cure the Project Company Default in accordance with Section 34.3(c)(i); and

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- (iii) if the Project Company Default is not capable of being cured, a date by which Project Company must comply with any requirements of MDOT in connection with that Project Company Default.
- (c) Project Company shall have the following cure periods under any Default Notice:
 - (i) for a Project Company Default under Section 34.1(a), a period of 5 Business Days after delivery by MDOT to Project Company of Notice of such Project Company Default;
 - (ii) for any Project Company Default under Section 34.1(l)(a), Section 34.1(c), Section 34.1(f) and Section 34.1(h) a period of 10 Business Days after delivery by MDOT to Project Company of Notice of such Project Company Default;
 - (iii) for any Project Company Default under Section 34.1(d), Section 34.1(b), Section 34.1(e) and Section 34.1(n) a period of 20 Business Days after delivery by MDOT to Project Company of Notice of such Project Company Default; provided, however, if the Project Company Default is of such a nature that the cure cannot with diligence be completed within such time period and Project Company has commenced meaningful steps to cure promptly after receiving the Default Notice, Project Company must have such additional period of time, up to a maximum cure period of 40 Business Days after delivery by MDOT to Project Company of Notice of such Project Company Default; and
 - (iv) for any other Project Company Default, there is no cure period.

Section 34.4 Warning Notices

- (a) Without prejudice to any other right or remedy available to MDOT, MDOT may deliver a Notice (a “**Warning Notice**”) to Project Company, with a copy to the Collateral Agent, stating explicitly that it is a “Warning Notice” of a material Project Company Default and stating in reasonable detail the matter or matters giving rise to the Notice and, if applicable, amounts due from Project Company, and reminding Project Company of the implications of such Notice, whenever there occurs a Project Company Default.
- (b) If MDOT issues a Warning Notice for any Project Company Default after it issues a Notice of such Project Company Default, then the remaining cure period available to Project Company, if any, for such Project Company Default before MDOT may terminate this Agreement on account of such Project Company Default will be extended by the time period between the date the Notice of such Project Company Default was issued and the date the Warning Notice is issued. However, this must not affect the time when MDOT may exercise any other remedy respecting such Project Company Default.

Section 34.5 Project Company to Comply with Default Notice and Provide Cure Plan

If MDOT gives a Default Notice to Project Company, then:

- (a) Project Company must comply with the Default Notice;
- (b) except for a Project Company Default under Section 34.1(e), Section 34.1(g), Section 34.1(i), Section 34.1(j), Section 34.1(k) or Section 34.1(l), Project Company must as soon

as possible give MDOT a program for review and approval in accordance with the Submittal Requirements to either cure the Project Company Default and comply with any requirements of MDOT in accordance with the terms of MDOT's Default Notice which will also specify steps to address the underlying cause of the Project Company Default and to avoid similar Events of Default occurring in the future;

- (i) the Parties must consult to develop and agree to the cure program; and
- (ii) following agreement or determination of the cure program, Project Company must implement and comply with the cure program and any failure to do so will result in an additional Project Company Default which must not be subject to any cure period.

Section 34.6 Cure Plan for Persistent Project Company Default

- (a) In the case of a Persistent Project Company Default:
 - (i) Project Company must within 30 Business Days give MDOT a cure plan for review and approval in accordance with the Submittal Requirements including a program and specific actions to be taken by Project Company to improve its performance and reduce:
 - (A) Project Company's cumulative number of Noncompliance Points assessed in accordance with Schedule 3 – Payment Mechanism and cumulative number of breaches and failures to perform to the point that such Persistent Project Company Default will not continue; and
 - (B) the cumulative number of Noncompliance Points outstanding with respect to the Project Company Default by at least 50%;
 - (ii) MDOT may require that Project Company's actions under Section 34.6(a) include improving Project Company's quality management practices, plans and procedures, revising and restating Management Plans, changing organizational and management structure, increasing monitoring and inspections, changing Key Personnel and other important personnel, replacement of Contractors;
 - (iii) the Parties must consult to develop and agree to the cure program; and
 - (iv) following agreement or determination of the cure program, Project Company must implement and comply with the cure program and any failure to do so must result in an additional Project Company Default which must not be subject to any cure period.
- (b) If:
 - (i) Project Company complies in all material respects with the approved cure plan and achieves the requirements set forth in Section 34.6(a)(i)(A) and Section 34.6(a)(i)(B); and
 - (ii) as of the date it achieves such requirements there exist no other uncured Project Company Defaults for which a Notice was given,

then MDOT will reduce the number of cured Noncompliance Points that would otherwise then be counted toward Persistent Project Company Default by 25%. Such reduction will be taken from the earliest assessed Noncompliance Points that would otherwise then be counted toward Persistent Project Company Default.

Section 34.7 Right to Termination

- (a) Subject to the terms of the Lenders' Direct Agreement, in the event that:
- (i) a Project Company Default occurs and it has not been cured within any relevant cure period set out in the Default Notice or (if relevant) in accordance with any cure plan accepted by MDOT pursuant to Section 34.5; or
 - (ii) a Project Company Default occurs for which there is no cure period under Section 34.3;
- MDOT may terminate this Agreement immediately by Notice to Project Company.
- (b) Termination of this Agreement for a Project Company Default in accordance with Section 34.7(a) will take effect on the date stated in the Notice given by MDOT to Project Company under Section 34.7(a).

ARTICLE 35 MDOT DEFAULT

Section 35.1 MDOT Default

The occurrence of any one or more of the following events or conditions constitute a “**MDOT Default**”:

- (a) MDOT fails to make any payment due to Project Company under this Agreement when due where such payment is not subject to a good faith Dispute;
- (b) any representation made by MDOT under Section 6.2 is false or materially misleading or inaccurate when made in each case in any material respect or omits material information when made; or
- (c) MDOT commits a material breach of its obligations under the Project Agreement (other than as a consequence of any act, omission, negligence, recklessness, willful misconduct, fault, breach of contract, or breach by any Project Company-Related Entity of the requirements of this Agreement, or violation of Law or a Permit, License or Approval of or by any Project Company-Related Entity), which breach materially adversely affects the ability of Project Company to perform its obligations under this Agreement for a continuous period of not less than 40 Business Days after Notice is received from Project Company.

Section 35.2 Notice and Cure Periods

Project Company must provide Notice to MDOT of the occurrence of a MDOT Default. Upon receipt of Project Company's Notice, MDOT has 40 Business Days to cure the MDOT Default; provided, however, that, if the MDOT Default is for a matter other than non-payment and such MDOT Default is of such a nature that the cure cannot with diligence be completed within such time period and MDOT has

commenced meaningful steps to cure immediately after receiving the default Notice, MDOT must have such additional period of time, up to a maximum cure period of 110 Business Days.

Section 35.3 Right of Termination

- (a) If a MDOT Default occurs that has not been cured within any relevant cure period set out in Section 35.2 Project Company may terminate this Agreement on no less than 20 Business Days' Notice to MDOT.
- (b) Termination of this Agreement for a MDOT Default in accordance with Section 35.3(a) will take effect on the date stated in the Notice given by Project Company to MDOT under Section 35.3(a).

Section 35.4 Right of Suspension

For so long as a MDOT Default set out in Section 35.3(a) has occurred and remains uncured after the expiration of any applicable cure period, Project Company may suspend performance of the Project Operations.

ARTICLE 36 NON-DEFAULT TERMINATION

Section 36.1 Termination for Convenience

- (a) MDOT may, in its sole discretion and for any reason whatsoever, be entitled to terminate this Agreement at any time on no less than 60 Business Days' written Notice to Project Company.
- (b) Termination of this Agreement for convenience in accordance with Section 36.1(a) will take effect on the date stated in the Notice given by MDOT to Project Company under Section 36.1(a).
- (c) In the event of Notice being given by MDOT in accordance with this Section 36.1, MDOT will, at any time before the expiration of such Notice, be entitled to direct Project Company to refrain from commencing, or allowing any third party to commence, all or any part of the Project Operations, where such Project Operations have not yet been commenced.

ARTICLE 37 EFFECT OF TERMINATION

Section 37.1 Termination

- (a) Notwithstanding any provision of this Agreement, upon the service of a Notice of termination or expiration on the Scheduled Expiry Date, this Article 37 will apply in respect of such termination.
- (b) Subject to Article 44, MDOT is entitled to recover any Liability on account of the occurrence of a Project Company Default regardless of whether such Liability accrues after the occurrence of the Project Company Default including all Liabilities incurred by MDOT in exercising its Step-In Rights, Notice is given or the Project Company Default is subsequently cured; exercise any other rights and remedies available under this Agreement, or available at law or in equity.

Section 37.2 Ownership of Information

Subject to Article 39, all information obtained by Project Company, including the As-Built Drawings and other technical drawings and data, supplier agreements and contracts, utilities consumption information, environmental and technical reports, lease, license and subletting data and contracts, asset condition data, standard operating procedures, processes and manuals and all other information directly related to the Project Operations accumulated over the course of the Term will be the property of MDOT and upon termination of this Agreement must be provided or returned to MDOT, as applicable, in paper and electronic format acceptable to MDOT, acting reasonably, where it exists in electronic format, and in its original format, when not in electronic format.

Section 37.3 Transition Plan

- (a) Not later than 60 Business Days prior to the Scheduled Expiry Date, or, if applicable, within 3 Business Days after Project Company receives or delivers a Notice of termination, Project Company must meet and confer with MDOT for the purpose of developing a Transition Plan for the orderly transition of Project Operations, demobilization and transfer of Project management, maintenance, operation and control to MDOT.
- (b) The Parties must use diligent efforts to complete preparation of the transition plan not later than 20 Business Days prior to the Scheduled Expiry Date or, if applicable, within 10 Business Days after the date Project Company receives or delivers the Notice of termination.
- (c) The Transition Plan must, at a minimum:
 - (i) include a plan to promptly deliver to MDOT or its designee possession of all the property, data and documents described in Section 37.4;
 - (ii) include an estimate of costs and expenses to be incurred by both Parties in connection with implementation of the Transition Plan. Neither Party will be liable for the other Party's transition costs and expenses, regardless of the reason for termination; and
 - (iii) be in form and substance acceptable to MDOT in its good faith discretion and consistent with the requirements of this Article 37.

Section 37.4 Requirements at Termination

- (a) Without limiting Section 24.1, upon the Expiry Date or as otherwise provided in the Transition Plan, Project Company must:
 - (i) handover the Relevant Infrastructure (including all control, rights, title and interest in them) to MDOT or its nominee free from any encumbrances and in a state and condition which complies with the Handback Requirements;
 - (ii) transfer or license (on a perpetual, fully paid-up, nonexclusive, royalty-free basis) to MDOT or its nominee all rights, title and interest in plans, plant, fixtures, software, furnishing and equipment required to allow MDOT or its nominee to

- operate, maintain and repair the Relevant Infrastructure to the standards required in accordance with this Agreement free from any encumbrances;
- (iii) deliver to MDOT all Books and Records, reports, test reports, studies and other documents of a similar nature relating to the Relevant Infrastructure;
 - (iv) deliver to MDOT or its nominee all manuals, records, plans, boring information, samples, drawings, specifications, designs and other information under the control of Project Company which are relevant to the design, construction, operation, maintenance or repair of the Relevant Infrastructure;
 - (v) provide training for MDOT employees in connection with the Project Operations;
 - (vi) procure, upon the request of MDOT, the novation or failing this, the assignment to MDOT or its nominee of:
 - (A) such contracts for Project Operations to which it, the D&C Contractor or the O&M Contractor is a party provided that MDOT assumes liability for those remaining obligations of Project Company, the D&C Contractor or O&M Contractor accruing after the date of assumption, such assignment to include the benefit to MDOT of all Key Contractor warranties, indemnities, guarantees, insurance and professional responsibility and cures all existing payment defaults; and
 - (B) any leases, subleases and licences agreed to by MDOT;
 - (vii) terminate and demobilize such contracts for Project Operations to which it, the D&C Contractor or the O&M Contractor is a party and which are not nominated by MDOT under Section 37.4(a)(vi)(A);
 - (viii) grant or procure through a license (on a perpetual, fully paid-up, nonexclusive, royalty-free basis) the grant to MDOT or its nominee of such Intellectual Property Rights as will enable MDOT or its nominee to be in a position to perform the Project Operations at the performance standards stated in this Agreement;
 - (ix) pay to MDOT or its nominee any insurance proceeds from any Insurance Policies for the reinstatement or replacement of the Relevant Infrastructure (as applicable) to the extent not already reinstated or replaced, and assign to MDOT any rights available to Project Company under the Insurance Policies;
 - (x) do all acts and things necessary to enable MDOT (or its nominee) to have obtained all Permits, Licenses and Approvals necessary for the Relevant Infrastructure; and
 - (xi) do all other acts and things to enable MDOT (or its nominee) to be in a position to deliver the Project at the standards stated in this Agreement, with minimum disruption.
- (b) On the Expiry Date, or as otherwise provided in the Transition Plan, MDOT grants to Project Company and its authorized Project Company Partners a right to access the

Premises for the limited purpose of carrying out Project Company's obligations contemplated by this Article 37, including, execution of the Transition Plan. Project Company's right of access automatically expires upon Project Company's fulfillment of such obligations.

Section 37.5 Contracts and Agreements

Regardless of MDOT's prior actual or constructive knowledge of such Contracts or agreements, no Contract or agreement, to which Project Company is a party as of the Expiry Date will bind MDOT, unless MDOT elects to assume such Contract or agreement in writing. Except in the case of MDOT's express written assumption, no such Contract or agreement will entitle the contracting party to continue performance of work or services respecting the Project following Project Company's relinquishment to MDOT of Project management, custody and control, or to any Claim for any Liability against MDOT.

Section 37.6 Performance of Work Pending Early Termination Date

Where Notice of termination precedes the effective Termination Date, Project Company and MDOT must continue performing the Project Operations in accordance with the requirements of this Agreement.

ARTICLE 38 COMPENSATION ON TERMINATION

Section 38.1 Compensation on Termination for Convenience and MDOT Default

On termination of this Agreement pursuant to Section 35.3 or Section 36.1, MDOT will pay to Project Company the "MDOT Termination Amount" in accordance with Schedule 6 – Termination Compensation.

Section 38.2 Compensation on Termination for Project Company Default

On termination of this Agreement pursuant to Section 34.4 MDOT will pay to Project Company the "Project Company Default Termination Amount" in accordance with Schedule 6 – Termination Compensation.

Section 38.3 Compensation on Termination for Extended Force Majeure or Uninsurable Risk

On termination of this Agreement pursuant to Section 33.2 or Section 41.3, MDOT will pay to Project Company the "Extended Force Majeure Termination Amount" in accordance with Schedule 6 – Termination Compensation.

Section 38.4 Miscellaneous Compensation Provisions

- (a) Timing of payment of Termination Amount:
 - (i) Any Termination Amount will be due and payable by MDOT 90 Business Days after such amount is finally agreed or determined.
 - (ii) To the extent any Termination Amount is less than zero, then the amount equal to the Project Company Default Termination Amount will be due and payable by Project Company to MDOT 40 Business Days after such amount is finally agreed or determined.

(b) Handback Requirements:

As a condition precedent to the payment of any Termination Amount Project Company must have complied with Section 37.4.

(c) Exclusivity of remedy

(i) Any Termination Amount irrevocably paid by MDOT to Project Company is in full and final settlement Project Company's rights and Claims for any Liability against MDOT for breaches and/or termination of this Agreement or any other Project Documents but without prejudice to:

(A) any liability of either Party to the other that arose prior to the Expiry Date (but not from the termination itself) to the extent such liability has not already been taken into account in the calculation of the Termination Amount; and

(B) any liabilities in connection with any breach by either Party after the Expiry Date of any obligation under this Agreement that survives the Expiry Date, to the extent not taken into account in the calculation of any Termination Amount.

(d) Lenders' Direct Agreement

This Article 37, together with the express provisions on termination set forth in Section 33.2, Article 34 and Article 36 are subject to the terms of the Lenders' Direct Agreement.

ARTICLE 39 INTELLECTUAL PROPERTY

Section 39.1 Representation and Warranty

Project Company represents, warrants and covenants to MDOT and agrees that:

- (a) Project Company is the sole and exclusive owner of the Project Data and the Intellectual Property Rights or has the right to provide the licenses granted to MDOT in accordance with this Agreement;
- (b) Project Company has and must have the right to execute, and must require that the Project Company Partners have the right to execute, all assignments of Intellectual Property and Project Data contemplated under this Article 39; and
- (c) the Project Data and the Intellectual Property Rights do not and must not infringe, and are not and must not be misappropriation of, any third party Intellectual Property Rights and, as of the Commercial and Financial Close Date, Project Company has not received any alleged infringement or misappropriation Notices from third parties regarding the Project Data or the Intellectual Property Rights.

Section 39.2 Delivery of Project Data and Intellectual Property Rights

Project Company must make all Project Data and Intellectual Property Rights available to, and upon request must deliver to, MDOT free of charge, all Project Data, and must obtain all necessary licenses, permissions and consents to ensure that Project Company must make the Project Data and Intellectual

Execution Version

Property Rights available to and deliver the Project Data to MDOT in accordance with this Agreement for any and all of the Approved Purposes. Nothing in this Section 39.2 shall be construed as transferring full and sole ownership of the Project Data and Intellectual Property to MDOT.

Section 39.3 License of Project Data and Intellectual Property Rights

- (a) Project Company:
- (i) hereby grants to MDOT an irrevocable, worldwide, royalty free, perpetual, non-exclusive and transferable license, including the right to grant sub-licenses, to use the Project Data and the Intellectual Property Rights for any and all of the Approved Purposes;
 - (ii) must, where any Intellectual Property Rights are or become vested in the D&C Contractor or, if applicable, any O&M Contractor, obtain the grant of an equivalent license to that referred to in Section 39.3(a)(i), provided that such license may, in respect of the D&C Contractor's and any applicable O&M Contractor's Intellectual Property Rights that are proprietary and subject to trademark or copyright, be limited to the term of the relevant Contract; and
 - (iii) must, where any Intellectual Property Rights are or become vested in a third party (other than the Construction Contractor or, if applicable, any O&M Contractor), obtain the grant of an equivalent license to that referred to in the contract with such entity, provided that Project Company is able to obtain such license from such third party on reasonable commercial terms and conditions.
- (b) In this Section 39.3 and Section 39.4(a), "use" includes any and all acts of copying, modifying, adapting, translating, incorporating with other materials, creating derivative works and otherwise using the Project Data and Intellectual Property Rights.

Section 39.4 Maintenance of Data

- (a) To the extent that any of the data, materials and documents referred to in Article 39 are generated by, or maintained on, a computer or similar system, Project Company must procure for the benefit of MDOT, either at no charge or at the lowest reasonable fee, the grant of a license or sub-license for any relevant software to enable MDOT or its nominee to access and otherwise use (as such term is defined in Section 39.3(b), subject to the payment by MDOT of any relevant fee) such data, materials and documents for the Approved Purposes.
- (b) Without limiting the obligations of Project Company under Section 39.4(a), Project Company must ensure the backup and storage in safe custody of the data, materials and documents referred to in Article 39 in accordance with Good Industry Practice. Project Company must submit to the MDOT Representative Project Company's proposals for the backup and storage in safe custody of such data, materials and documents and MDOT will be entitled to object if the same is not in accordance with Good Industry Practice. Project Company must comply, and must cause all Project Company Partners to comply, with all procedures to which the MDOT Representative has not objected. Project Company may vary its procedures for such backup and storage subject to submitting its proposals for change to the MDOT Representative, who will be entitled to object on the basis set out above.

Section 39.5 Claims

Where a Claim is made or brought against MDOT or any MDOT Person which arises out of the alleged infringement or misappropriation of any rights in or to any Project Data or Intellectual Property Rights or the use thereof by MDOT or any MDOT Person or because the use of any materials, plant, machinery or equipment in connection with the Project Operations infringes any rights in or to any Intellectual Property of a third party then, unless such infringement has arisen out of the use of any Project Data or Intellectual Property Rights by MDOT or any MDOT Person otherwise than in accordance with the terms of this Agreement, Project Company must indemnify, defend and hold harmless MDOT and such MDOT Person from and against all such Claims.

Section 39.6 Confidential Information

It is expressly acknowledged and agreed that nothing in Article 39 must be deemed to create or convey to a Party any right, title, or interest in and/or to the Confidential Information of the other Party.

Section 39.7 Government Use of Documents

- (a) Project Company hereby disclaims any right, title or interest of any nature whatsoever it may have in or to this Agreement that might prohibit or otherwise interfere with MDOT's ability to use this Agreement in any manner desired by MDOT.
- (b) Project Company hereby consents to the use by MDOT of this Agreement, and any portion thereof, subject to compliance with the FOIA and to the removal by MDOT (in consultation with Project Company) of any information supplied in confidence to MDOT by Project Company in circumstances where disclosure may be refused under FOIA.

Section 39.8 Restrictions

- (a) The Parties hereby agree that either Party may use the Project Know-How for any purpose, provided, however, that neither Project Company nor any Project Company Partner must use the Project Know-How to the extent that such Project Know-How incorporates, references or is otherwise based on the Project Data, the Intellectual Property Rights, the Intellectual Property of MDOT or the Confidential Information of MDOT, including the Technical Requirements unless such use is otherwise permitted pursuant to this Agreement in order to enable Project Company to meet Project Company's obligations under this Agreement.
- (b) Project Company hereby covenants and agrees that it will not make any commercial use, including use in any other request for proposal or similar procurement process, of the Project Data, the Intellectual Property Rights, the Intellectual Property of MDOT or the Confidential Information of MDOT, including the Technical Requirements, or any other drawings, reports, documents, plans, formulae, calculations, manuals, or other data that was created specifically for the Project or was based upon the Project Data, the Intellectual Property Rights, the Intellectual Property of MDOT or the Confidential Information of MDOT, including the Technical Requirements.

ARTICLE 40 CONFIDENTIALITY**Section 40.1 Freedom of Information Act (FOIA)**

The Parties acknowledge that Michigan's Freedom of Information Act, MCL 15.231 et seq., (FOIA) applies to MDOT and that MDOT is required to fully comply with FOIA.

Section 40.2 Use and Disclosure of Confidential Information

- (a) Except as authorized under this Agreement, as described in Section 40.2(c) or as required by law or court order, each Party must hold in confidence, not disclose and not permit any person any manner of access to, whether directly or indirectly, any Confidential Information of the other Party.
- (b) Project Company acknowledges that MDOT may use the Confidential Information of Project Company for purposes not specific to the Project, but for other general governmental purposes including development of MDOT's alternate procurement and financing policies and framework (including the Approved Purposes). MDOT will advise Project Company prior to using any Confidential Information of Project Company for non-Project purposes.
- (c) Project Company is not obliged to keep confidential any information:
 - (i) which is lawfully in the public domain through Project Company or which, after disclosure to Project Company, becomes part of the public domain other than by any Project Company Fault;
 - (ii) information which was in Project Company's possession prior to its disclosure to Project Company by MDOT, and provided that it was not acquired by Project Company under an obligation of confidence; or
 - (iii) information which was lawfully obtained by the Proposer from a third party without restriction of disclosure, provided such third party was at the time of disclosure under no obligation of secrecy with respect to such information.
 - (iv) the disclosure of which is required by a relevant law or consented to by MDOT.

ARTICLE 41 INSURANCE PROVISIONS**Section 41.1 General Requirements**

Project Company and MDOT must comply with the provisions of Schedule 7 - Insurance Requirements.

Section 41.2 No Relief from Liabilities and Obligations

Neither compliance nor failure to comply with the insurance provisions of this Agreement will relieve Project Company or MDOT of their respective liabilities and obligations under this Agreement.

Section 41.3 Uninsurable Risk

- (a) If a risk is an Uninsurable Risk then:

- (i) Project Company must notify MDOT within 5 Business Days of becoming aware that the risk has become an Uninsurable Risk; and
 - (ii) MDOT must meet with Project Company within 5 Business Days after receipt of Project Company's Notice to discuss the risk, including whether the risk is in fact an Uninsurable Risk.
- (b) If Project Company demonstrates to MDOT's reasonable satisfaction that it has used diligent efforts in the global insurance and reinsurance markets to procure the required Insurance Policy coverages for the Uninsurable Risk, and if despite such diligent efforts and, through no fault of Project Company or any Project Company Partner, any Uninsurable Risk exists or occurs the Parties must meet further to discuss how the risk should be managed.
- (c) If the Parties cannot agree on how to manage the Uninsurable Risk, then MDOT, in its sole discretion, shall do one of the following:
- (i) compensate Project Company for the costs of any Claim or Liability incurred in connection with the Uninsurable Risk, up to an amount equal to the insurance proceeds that would have been payable had the relevant Insurance Policy continued to be available on the previous terms of that Insurance Policy and deduct from the Service Payment or Milestone Payment owing to Project Company 100% of the greater of (a) the amount of insurance premiums Project Company would have been obligated to pay under this Agreement (up to the Commercially Reasonable Insurance Rates) and (B) the premiums assumed in the Financial Model;
 - (ii) if the required Insurance Policies are available from Reputable Insurers but not at Commercially Reasonable Insurance Rates, provide Notice to Project Company, to not approve modification of insurance requirements and for MDOT to be responsible for 100% of the premiums that exceed the Commercially Reasonable Insurance Rates. Any exercise of MDOT's discretion under this Section 41.3 is final and not subject to Schedule 4 - Dispute Resolution Procedures; or
 - (iii) terminate this Agreement by Notice to Project Company in which case this Agreement will terminate on the date stated in MDOT's Notice and MDOT will pay to Project Company the termination amount in accordance with Section 38.3.

Section 41.4 Review of Uninsurable Risk

- (a) Project Company must review the global insurance and reinsurance markets at least Quarterly (prior to the O&M Term) and at least annually thereafter to track whether an Uninsurable Risk has become insurable at Commercially Reasonable Insurance Rates.
- (b) Project Company must keep MDOT currently informed of insurance market conditions and deliver to MDOT the information obtained from such annual reviews. If upon such review it is found that the relevant Uninsurable Risk is insurable at Commercially Reasonable Insurance Rates, then Project Company will promptly procure the insurance in connection with that risk in accordance with this Article 41.

ARTICLE 42 PERFORMANCE SECURITY**Section 42.1 Equity Letter of Credit**

The Financing Documents will require each Equity Member to provide an Equity Letter of Credit, the aggregate amount of which must be at least equal to the unfunded equity committed to the Project during the D&C Term.

Section 42.2 D&C Performance Security

- (a) Project Company must or must cause the D&C Contractor to furnish the D&C Performance Security in accordance with Article 9 of the ITP.
- (b) The D&C Performance Security must remain in full force and effect until the Service Commencement Date.
- (c) Subject to Section 42.5, MDOT will release the Payment Bond upon Substantial Completion.
- (d) Subject to Section 42.5, MDOT will release the Performance Bond one year after Substantial Completion.

Section 42.3 O&M Performance Security

- (a) Project Company will or will require the O&M Contractor to furnish each O&M Performance Security by no later than 10 Business Days prior to the Substantial Completion Date.
- (b) Project Company must ensure that the O&M Performance Security remains in place throughout the O&M Term and may, subject to Section 42.3(e) and Section 42.3(f), satisfy this requirement through the use of multiple O&M Performance Securities replaced on a continual basis throughout the O&M Term (provided the requirements of this Section 42.3 remain satisfied).
- (c) Subject to Section 42.3(d) and Section 42.5, MDOT will release each remaining O&M Performance Security within 20 Business Days of the Expiry Date and satisfaction of all of Project Company's obligations under this Agreement.
- (d) Throughout the O&M Term, on or before 20 Business Days prior to the earlier of the expiry date (if applicable) of any O&M Performance Security, Project Company must or must require the O&M Contractor to procure a replacement O&M Performance Security.
- (e) If Project Company has failed to procure a replacement O&M Performance Security by the date required (if applicable), MDOT will be entitled to immediately draw down the full remaining value of the O&M Performance Security, and hold the cash as security for performance of Project Company's obligations under this Agreement.
- (f) Upon receipt by MDOT of a replacement O&M Performance Security which satisfies the requirements of this provision, MDOT will immediately surrender the O&M Performance Security that has been replaced to the issuing financial institution.

Section 42.4 Performance Security Requirements

- (a) Each Performance Security:
 - (i) must be issued by a surety or an insurance company that is authorized to issue bonds in the State and is rated in the top 2 categories by 2 of the 3 Rating Agencies or at least A-: VIII or better according to A.M. Best's Financial Strength Rating and Financial Size Category; and
 - (ii) will name MDOT a permitted assignee or transferee beneficiary (as applicable), with rights to draw upon or exercise other remedies thereunder if MDOT succeeds to the position of Project Company.
- (b) Project Company agrees that it may not seek an injunction to restrain MDOT from calling upon any Performance Security.
- (c) Unless otherwise specified in this Agreement, a draw on the Performance Security or exercise of any rights thereunder will not be conditioned on prior resort to any other security of, or provided for the benefit of, Project Company.
- (d) If MDOT receives proceeds of a draw on the Performance Security in excess of the relevant obligation, MDOT will promptly refund the excess to Project Company (or to its designee) after all relevant obligations are satisfied in full.
- (e) Project Company will obtain and furnish, or cause to be obtained and furnished, all Performance Security (including replacements) at no additional cost to MDOT aside from any cost included in the Financial Model, and will pay all charges imposed in connection with MDOT's presentment of sight drafts and drawing against any Performance Security or replacements thereof.

Section 42.5 Release of Performance Security

MDOT is only required to release the Performance Security upon Substantial Completion or the Expiry Date (as applicable) if all of the following conditions have been met:

- (a) no Project Company Default has occurred or is continuing and no event has occurred which, with the passage of time or the giving of Notice, would constitute a Project Company Default;
- (b) receipt by MDOT of:
 - (i) evidence satisfactory to MDOT that all Persons eligible to file a claim against the Performance Security have been fully paid;
 - (ii) unconditional releases of liens and stop payment Notices from all Contractors who filed preliminary Notice of a claim against the Performance Security; and
 - (iii) the statutory period for Contractors to file a claim against the Performance Security has expired and no Claims have been filed.

ARTICLE 43 INDEMNITIES

- (a) Project Company must indemnify and hold harmless, and defend MDOT and any MDOT Persons and each of their respective directors, officers, employees, agents and representatives from and against any Claim or Liability which may be suffered, sustained, incurred or brought against them in connection with any one or more of the following:
- (i) the actual or alleged breach by Project Company or any Project Company Related Entity of any of its obligations under the Project Documents;
 - (ii) the actual or alleged fraud, bad faith, willful misconduct, negligent acts or omissions, breach of Applicable Law or contract, or other culpable act of Project Company or any Project Company Related Entity in or associated with performance of the Project Operations;
 - (iii) the failure or alleged failure by Project Company or any Project Company Related Entity to comply with the Permits, Licenses and Approvals, any applicable Environmental Laws or other Applicable Laws (including Applicable Laws regarding Hazardous Substances) relating to the Project Operations;
 - (iv) any alleged patent or copyright infringement or other allegedly improper appropriation or use by any Project Company Related Entity of trade secrets, patents, proprietary information, know-how, copyright rights or inventions in performance of the Project Operations, or in connection with the Project of methods, processes, designs, information, or other items furnished or communicated to MDOT or another MDOT Person pursuant to the Project Documents; provided that this indemnity does not apply to any infringement resulting from MDOT's failure to comply with specific written instructions regarding use provided to MDOT by Project Company;
 - (v) any actual or threatened release of Project Company Hazardous Substances relating to Project Company's performance of the Project Operations;
 - (vi) a failure by Project Company to achieve a Substantial Completion by the Longstop Date;
 - (vii) 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 Project Company Related Entity with respect to any payment for the Project Operations made to or earned by any Project Company Related Entity;
 - (viii) the Claim or assertion by any other developer or contractor that any Project Company Related Entity interfered with or hindered the progress or completion of work being performed by the other contractor or developer, or failed to cooperate reasonably with the other developer or contractor, so as to cause inconvenience, disruption, delay or loss, except where the Project Company Related Entity was not in any manner engaged in performance of the Project Operations;
 - (ix) inverse condemnation, trespass, nuisance or similar taking of or harm to real property by reason of (a) the failure of any Project Company Related Entity to

comply with Good Industry Practice, requirements of the Project Documents, Project Management Plan or Permits, Licenses and Approvals respecting control and mitigation of construction activities and construction impacts in connection with the performance of the Project Operations (b) the intentional misconduct or negligence of any Project Company Related Entity in connection with the performance of the Project Operations, or (c) the actual physical entry onto or encroachment upon another's property by any Project Company Related Entity in connection with the performance of the Work;

- (x) on account of any violation of any representation, warranty, or other covenant, obligation or agreement under the Project Documents or any Applicable Law to be complied with by Project Company hereunder or thereunder; or
 - (xi) any act, omission, negligence, recklessness, willful misconduct, fault, breach of contract, or breach by any of the Project Company Related Entity of the requirements of the Project Documents, or violation of Law or a Permit, License or Approval of or by any of the Project Company Related Entity that results in or causes the death or personal injury of any person, any physical loss of or damage to property or assets of any third party, or any other loss or damage of any third party,
- (b) Project Company's indemnity obligation does not extend to any Liability to the extent directly caused by:
- (i) the sole negligent acts, sole negligent omissions, recklessness or willful misconduct, bad faith or fraud of the Indemnified Party;
 - (ii) MDOT's breach of any of its material obligations under this Agreement; or
 - (iii) MDOT's violation of any Applicable Laws.

ARTICLE 44 LIMITATION ON SPECIAL, CONSEQUENTIAL, INDIRECT OR PUNITIVE DAMAGES

Section 44.1 General Limitation on Special, Consequential, Indirect or Punitive Damages

In no event will either Party be liable for any Claim or Liability from the other Party for any:

- (a) special, incidental, punitive or similar losses or damages;
- (b) consequential or indirect losses or damages including loss of bonding capacity, loss of bidding opportunities, insolvency, and the effects of force account work on other projects, or business interruption on other projects;
- (c) loss of anticipated profit, loss of use or loss of revenue; or
- (d) unabsorbed or extended field or home office overhead or any damages using an Eichleay or similar equation, except as otherwise provided in Schedule 15 – Costs Schedule,

in connection with the performance or non-performance of its obligations or otherwise under this Agreement.

Section 44.2 MDOT Carve Outs from Special, Consequential or Punitive Damages

Section 44.1 does not limit MDOT's recovery of any such losses or damages:

- (a) to the extent (i) covered by the proceeds of Insurance Policies required to be carried in accordance with this Agreement, or (ii) covered by the proceeds of insurance actually carried by or insuring Project Company under policies solely with respect to the Project and the Project Operations, regardless of whether required to be carried pursuant to this Agreement;
- (b) under Article 43 in respect of Claims by third parties (excluding Claims made by any Project Company Related Entity):
- (c) in connection with fraud, criminal conduct, intentional misconduct, recklessness, bad faith or gross negligence on the part of Project Company or any Project Company Related Entity;
- (d) in connection with any Project Company Hazardous Substances
- (e) Project Company may owe or be obligated to reimburse MDOT under the express provisions of this Agreement (including interest at the Libor Year 1 Rate and charges); or
- (f) any credits, deductions or offsets that this Agreement expressly provide to MDOT against amounts owing by Project Company including any Deductions to the Service Payment or Milestone Payment.

Section 44.3 Project Company Carve Outs from Special, Consequential or Punitive Damages

Section 44.1 does not limit Project Company's recovery of any such losses or damages:

- (a) MDOT may owe or be obligated to reimburse Project Company under the express provisions of this Agreement including Service Payments, Milestone Payments, Compensable Delay Events, Compensable Relief Events, Termination Payments, interest and charges; or
- (b) any credits, deductions or offsets that this Agreement expressly provided to Project Company against amounts owing to MDOT.

ARTICLE 45 DISPUTE RESOLUTION PROCEDURE

- (a) Subject to Article 45(b), all Disputes must be resolved in accordance with, and the Parties must comply with, Schedule 4 - Dispute Resolution Procedures.
- (b) Schedule 4 - Dispute Resolution Procedures does not apply to the following:
 - (i) any matters that this Agreement expressly state are final, binding or not subject to dispute resolution;

- (ii) any Claim or dispute that does not arise under this Agreement;
- (iii) Disputes regarding compliance with Rules and Regulations, termination of this Agreement, liability or indemnification;
- (iv) any Claim for injunctive relief;
- (v) any Claim against an insurance company, including any Contractor Dispute that is covered by insurance;
- (vi) disputes regarding safety issues and/or matters under the jurisdiction of Michigan-OSHA;
- (vii) issues regarding DBE participation;
- (viii) any Claim or dispute that is the subject of litigation in a lawsuit filed in court to which the procedures established under Schedule 4 - Dispute Resolution Procedure do not apply, including any effort to interplead a Party into such a lawsuit in order to make the procedures established in Schedule 4 - Dispute Resolution Procedure applicable;
- (ix) issues related to Contractor substitutions governed by Public Contract Code sections 4100 et seq.;
- (x) any Claim for, or dispute based on, remedies expressly created by statute;
- (xi) any Dispute that is actionable only against a surety;
- (xii) any dispute as to audit to be dealt with under Section 26.3; and
- (xiii) any Claim in connection with the Project Operations where a third party is a necessary party.

ARTICLE 46 SUBMITTAL REQUIREMENTS

Section 46.1 Overview

This Article 46 governs all Submittals to MDOT under this Agreement (the “Submittal Requirements”). Unless the context otherwise requires, in the event of any irreconcilable conflict, ambiguity or inconsistency between the provisions of this Article 46 and any other provisions of this Agreement concerning submission, review and approval procedures, this Article 46 will prevail.

Section 46.2 Review by MDOT

- (a) Except as otherwise provided in this Section 46.2(a), where MDOT is entitled to review, comment on or approve a Submittal, MDOT will have:
 - (i) the time period expressly specified with respect to that Submittal in this Agreement; or
 - (ii) where no time period is specified, 15 Business Days, to respond with respect to that Submittal after the date it receives an accurate and complete Submittal in

Execution Version

accordance with this Agreement, together with a completed transmittal form in form to be mutually agreed and all necessary or requested information and documentation concerning the subject matter.

- (b) If, at any given time, MDOT is in receipt of more than 10 Submittals that are subject to MDOT's review, comment or approval where the review time periods available to MDOT under this Section 46.2 entirely or partially overlap, then MDOT may extend the applicable period for review, comment or approval under Section 46.2 (as applicable) by to:
 - (i) that period in which MDOT can reasonably accommodate the Submittals under the circumstances provided such period may not exceed 5 Business Days for each Submittal in excess of 10 received. By way of example, if 13 Submittals are received by MDOT, MDOT would be entitled to an additional 15 Business Days to respond; or
 - (ii) such other period of extension set forth in any other provision of this Agreement.
- (c) No extension under Section 46.2(b) will constitute MDOT Fault or a Change, Relief Event, Delay Event or other basis for any Claim.
- (d) Whenever MDOT is in receipt of excess concurrent Submittals:
 - (i) MDOT must provide Notice to Project Company within 3 Business Days;
 - (ii) Project Company may establish by Notice to MDOT an order of priority for processing such Submittals; and
 - (iii) MDOT must comply with such order of priority.
- (e) All time periods for MDOT to act will be extended by the period of any delay caused by any Delay Event for which Project Company is granted an extension of time and which also delays MDOT's actions, or all time periods caused by any Project Company Fault.
- (f) Except during any time described in Section 46.2(e), MDOT will endeavor to reasonably accommodate a request from Project Company for expedited action on a specific Submittal, within the practical limitations on availability of MDOT personnel appropriate for acting on the types of Submittal in question; provided Project Company sets forth in its request specific, abnormal circumstances, not caused by a Project Company Partner, demonstrating the need for expedited action.

Section 46.3 MDOT Discretionary Approvals.

If the Submittal is one where this Agreement indicate approval, consent, determination, acceptance, decision or other action is required from MDOT in its sole discretion or good faith discretion, then MDOT's lack of approval, consent, determination, acceptance, decision or other action within the applicable time period under Section 46.2(a) will be deemed disapproval. If the approval, consent, determination, acceptance, decision or other action is subject to the sole discretion of MDOT, then its approval, consent, determination, decision or other action (including a failure to act which constitutes a disapproval) will be final, binding and not subject to Schedule 4 - Dispute Resolution Procedures, and such approval, consent, determination, acceptance, decision or other action will not constitute MDOT

Fault or a Change, Relief Event, Delay Event or other basis for any Claim. If the approval, consent, determination, acceptance, decision or other action (including a failure to act which constitutes a disapproval) is subject to the good faith discretion of MDOT, then its approval, consent, determination, acceptance, decision or other action will be binding, unless it is finally determined pursuant to Article 45 by clear and convincing evidence that such approval, consent, determination, acceptance, decision or other action (including a failure to act which constitutes a disapproval) or matter was arbitrary or capricious, and if determined to be arbitrary and capricious through such dispute resolution process and causes delay, it will constitute and be treated as MDOT Fault.

Section 46.4 Other MDOT Approvals

- (a) Whenever this Agreement indicates that a Submittal or other matter is subject to MDOT's approval or consent but the approval or consent is one not governed by Section 46.3 concerning discretionary approvals or the Submittal or other matter is subject to MDOT's reasonable discretion, then the standard must be reasonableness.
- (b) If the reasonableness standard applies and MDOT delivers no approval, consent, determination, decision or other action within the applicable time period under Section 46.2(a), then Project Company may deliver to MDOT a Notice stating the date within which MDOT was to have decided or acted and that if MDOT does not decide or act within 5 Business Days after receipt of the Notice, delay from and after lapse of the applicable time period under Section 46.2(a) will constitute MDOT Fault.

Section 46.5 MDOT Review and Comment

Whenever this Agreement indicates that a Submittal or other matter is subject to MDOT's review, comment, review and comment, disapproval or similar action not entailing a prior approval and MDOT delivers no comments, exceptions, objections, rejections or disapprovals within the applicable time period under Section 46.2(a), then Project Company may proceed thereafter at its election and risk, without prejudice to MDOT's rights to later object or disapprove on any of the grounds set forth in Section 46.7(a). No such failure or delay by MDOT in delivering comments, exceptions, objections, rejections or disapprovals within the applicable time period under Section 46.2(a) will constitute MDOT Fault, MDOT Change, Relief Event, Delay Event or other basis for any Claim. When used in this Agreement, the phrase "completion of the review and comment process" or similar terminology means either (a) MDOT has reviewed, provided comments, exceptions, objections, rejections or disapprovals, and all the same have been resolved, or (b) the applicable time period has passed without MDOT providing any comments, exceptions, objections, rejections or disapprovals.

Section 46.6 Submittals Not Subject to Prior Review, Comment or Approval

Whenever this Agreement indicates that Project Company is to deliver a Submittal to MDOT but express no requirement for MDOT review, comment, disapproval, prior approval or other MDOT action, then Project Company is under no obligation to provide MDOT any period of time to review the Submittal or obtain approval of it before proceeding with further Project Operations, and MDOT may at any time review, comment on, take exception to, object to, reject or disapprove the Submittal in accordance with Section 46.7(a). No failure or delay by MDOT in delivering comments, exceptions, objections, rejections or disapprovals with respect to any such Submittal shall constitute MDOT Fault, MDOT Change, Relief Event, Delay Event or other basis for any Claim.

Section 46.7 Resolution of MDOT Comments and Objections

- (a) If the Submittal or other approval, consent, determination, acceptance, decision or other action or matter is one not governed by Section 46.6, MDOT's exception, objection, rejection or disapproval will be deemed reasonable, valid and binding if based on any of the following grounds or other grounds expressly applicable to such Submittal as set forth in this Agreement; provided that (a) the reasons for MDOT's exception, objection, rejection or disapproval will be described in sufficient detail, as determined by MDOT in its good faith discretion, for Project Company to address MDOT's concerns, and (b) MDOT's exception, objection, rejection or disapproval does not preclude Project Company from revising and resubmitting a Submittal:
- (i) the Submittal or subject provision thereof fails to comply, or is inconsistent, with any applicable covenant, condition, requirement, standard (including safety standards), term or provision of this Agreement;
 - (ii) the Submittal or subject provision thereof is not to a standard equal to or better than Good Industry Practice;
 - (iii) Project Company has not provided all content or information required or reasonably requested in respect of the Submittal or subject provisions thereof, provided that (a) MDOT assumes no duty, obligation or liability regarding completeness or correctness of any Submittal, including a Submittal that is to be delivered to a Governmental Entity as a proposed Permit, License or Approval, or in order to obtain, modify, amend, supplement, renew, extend, waive or carry out a Permit, License or Approval, and (b) Project Company must have the subsequent opportunity to resubmit the Submittal with the required content or information;
 - (iv) adoption of the Submittal or subject provision thereof, or of any proposed course of action thereunder, would result in a conflict with or violation of any Applicable Law or Permit, License or Approval; or
 - (v) in the case of a Submittal that is to be delivered to a Governmental Entity as a proposed Permit, License or Approval, or in order to obtain, modify, amend, supplement, renew, extend, waive or carry out a Permit, License or Approval, it proposes commitments, requirements, actions, terms or conditions that are (a) inconsistent with this Agreement, Applicable Law or the requirements of Good Industry Practice, or (b) not usual and customary arrangements that MDOT offers or accepts for addressing similar circumstances affecting its own projects (except for usual and customary arrangements that are incompatible with the Project's public-private contracting methodology).
- (b) Project Company must respond to all of MDOT's comments, exceptions, disapprovals and objections to a Submittal and, except as provided below, make modifications to the Submittal as necessary to fully reflect and resolve all such comments, exceptions, disapprovals and objections, in accordance with the review processes set forth in this Article 46. Project Company acknowledges that MDOT may provide comments, exceptions, disapprovals and objections which reflect concerns regarding interpretation or preferences of the commenter or which otherwise do not directly relate to grounds set forth in Section 46.7(a). Project Company agrees to undertake reasonable efforts to

accommodate or otherwise resolve any such comments, exceptions, disapprovals or objections through the review processes described in this Article 46. However, if the Submittal is not governed by Section 46.3, the foregoing does not obligate Project Company to incorporate any comments or resolve exceptions, disapprovals or objections that (a) are not on any of the grounds set forth in Section 46.7(a) (and not on any other grounds set forth elsewhere in this Agreement), (b) are otherwise not reasonable with respect to subject matter or length, and (c) would result in a delay to a critical path matter in the Construction Schedule, or in costs associated with additional work or delay, except pursuant to a Change. If, however, Project Company does not accommodate or otherwise resolve any comment, exception, disapproval or objection, Project Company must deliver to MDOT within a reasonable time period, not to exceed 20 Business Days after receipt of MDOT's comments, exceptions, disapprovals or objections, an explanation why modifications based on such comment, exception, disapproval or objection are not required. The explanation must include the facts, analyses and reasons that support the conclusion.

- (c) The foregoing does not obligate Project Company to incorporate any comments or resolve exceptions, disapprovals and objections that would render the Submittal erroneous, defective or less than Good Industry Practice, except pursuant to a Change.
- (d) If Project Company fails to notify MDOT within such time period, MDOT may deliver to Project Company a Notice stating the date by which Project Company was to have addressed MDOT's comments and that if Project Company does not address those comments within 5 Business Days after receipt of this Notice, then that failure will constitute Project Company's agreement to make all changes necessary to accommodate and resolve the comment or objection and full acceptance of all responsibility for such changes without right to a MDOT Change, Relief Event, Delay Event or other basis for any Claim, including any Claim that MDOT assumes design or other liability.
- (e) After MDOT receives Project Company's explanation as to why the modifications are not required as provided in Section 46.7(b), Section 46.7(c) and Section 46.7(d), if MDOT is not satisfied with Project Company's explanation the parties must attempt in good faith to resolve the dispute. If they are unable to resolve the dispute the dispute must be resolved according to the Schedule 4 – Dispute Resolution Procedures; provided that if MDOT elects to issue a Directive Letter pursuant to Section 2.1 of Schedule 2 – Change Procedure with respect to the matter in dispute, Project Company will proceed in accordance with MDOT's Directive Letter while retaining any Claim as to the matter in dispute.

Section 46.8

Limitations on Project Company's Right to Rely

- (a) No review, comment, objection, rejection, approval, disapproval, acceptance, concurrence, certification (including a Substantial Completion Certificate), including review and approval of the Project Management Plan or any Sub-plan, and no lack thereof by MDOT, will constitute acceptance by MDOT of materials or waiver of any legal or equitable right under this Agreement, under Applicable Law, or in equity. MDOT is entitled to remedies for unapproved deviations, Project Operations that are not in compliance with the requirements of this Agreement, and Project Company Faults and to identify additional work that must be done to bring the Relevant Infrastructure into compliance with requirements of this Agreement, regardless of whether previous review, comment, objection, rejection, approval, disapproval, acceptance, concurrence,

certification was conducted or given by MDOT. Regardless of any such activity or failure to conduct any such activity by MDOT, Project Company at all times must have an independent duty and obligation to fulfill the requirements of this Agreement. Project Company agrees and acknowledges that any such activity or failure to conduct any such activity by MDOT:

- (i) is solely for the benefit and protection of MDOT;
 - (ii) does not relieve Project Company of its responsibility for the selection and the competent performance of all Project Company Partners;
 - (iii) does not create or impose upon MDOT any duty or obligation toward Project Company to cause it to fulfill the requirements of this Agreement;
 - (iv) is deemed or construed as any kind of warranty, express or implied, by MDOT;
 - (v) may not be relied upon by Project Company or used as evidence in determining whether Project Company has fulfilled the requirements of this Agreement;
 - (vi) is not deemed or construed as any assumption of risk by MDOT as to design, construction, operations, maintenance, performance or quality of the Project Operations or materials; and
 - (vii) may not be asserted by Project Company against MDOT as a defense, legal or equitable, to, or as a waiver of or relief from, Project Company's obligation to fulfill the requirements of this Agreement.
- (b) Project Company is not relieved or entitled to reduction of its obligations to perform the Project Operations in accordance with this Agreement, or any of its other liabilities and obligations, including its indemnity obligations, as the result of any activity identified in Section 46.8(a) or failure to conduct any such activity by MDOT. Such activity by MDOT will not relieve Project Company from liability for, and responsibility to cure and correct, any unapproved deviations, Project Operations that are not in compliance with the requirements of this Agreement or Project Company Faults.
- (c) To the maximum extent permitted by Applicable Law, Project Company hereby releases and discharges MDOT from any and all duty and obligation to cause the Relevant Infrastructure to satisfy the standards and requirements of this Agreement.
- (d) Notwithstanding the provisions of Section 46.8(a) through Section 46.8(c):
- (i) Project Company shall be entitled to rely on approvals and acceptances from MDOT (i) for the limited purpose of establishing that the approval or acceptance occurred or (ii) that are within its sole or absolute discretion, but only to the extent that Project Company is prejudiced by a subsequent decision of MDOT to rescind such approval or acceptance;
 - (ii) MDOT is not relieved from any liability arising out of a knowing and intentional material misrepresentation under any statement MDOT delivers to Project Company; and

- (iii) MDOT is not relieved from performance of its express responsibilities under this Agreement in accordance with all standards applicable thereto.

ARTICLE 47 NOTICES

Section 47.1 Notices to Parties

All notices, requests, demands, instructions, certificates, consents, explanations, agreements, approvals and other communications (each being a “Notice”) required or permitted under this Agreement must be in writing (whether or not “written notice” or “notice in writing” is specifically required by the applicable provision of this Agreement) and served by sending the same by registered mail, facsimile or by hand, as follows:

If to Project Company: Freeway Lighting Partners, LLC
c/o Star America Fund GP LLC
165 Roslyn Rd
Roslyn Heights 11577 NY
Attention: Mark Melson
Email: mmelson@starinfrapartners.com
Telephone: (516) 882-4097]

If to MDOT: Attention: Charlie Stein
Michigan Department of Transportation
Van Wagoner Building, Mailcode: B220,
425 West Ottawa Street, P.O. Box 30050,
Lansing, MI 48909

With a copy to: Attention: Mia Silver
Michigan Department of Transportation –
Metro Region Office
18101 West Nine Mile Road
Southfield, MI 48075

ARTICLE 48 GENERAL

Section 48.1 Amendments

- (a) This Agreement may not be varied, amended or supplemented except by an agreement in writing signed by duly authorized representatives of the Parties and stating on its face that it is intended to be an amendment, restatement or other modification, as applicable, to this Agreement.
- (b) Subject to Section 48.1(c), Project Company may not at any time after the date of this Agreement:

- (i) make or permit any amendment to, replacement of or waiver of a provision of the Project Documents;
 - (ii) terminate, surrender, rescind or accept repudiation of the Project Documents;
 - (iii) permit the novation, assignment or substitution of any counterparty's rights, obligation or interest in the Project Documents; or
 - (iv) enter into any agreement or arrangement which affects the operation or interpretation of this Agreement,

without MDOT's prior consent, in its sole discretion.
- (c) This Section 48.1 does not apply to:
- (i) any Refinancing which is to be dealt with in accordance with Article 25; or
 - (ii) a Change in Control which is to be dealt with in accordance with Article 27.

Section 48.2 Waiver

- (a) No waiver made or given by a Party in connection with this Agreement will be binding or effective unless the waiver is in writing, signed by an authorized representative of the Party giving such waiver, and delivered by such Party to the other Party. No waiver made with respect to any right, power or remedy in one instance will be deemed to be a waiver with respect to any other instance involving the exercise of such right, power, or remedy or with respect to any other right, power, or remedy.
- (b) Failure by either Party to exercise any of its rights, powers or remedies under this Agreement or its delay to do so will not constitute a waiver of those rights, powers or remedies. The single or partial exercise of a right, power or remedy will not prevent its subsequent exercise or the exercise of any other right, power or remedy.

Section 48.3 Entire Agreement

Except where provided otherwise in this Agreement, this Agreement constitutes the entire agreement between the Parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings, whether oral, written, express or implied, concerning the subject matter of this Agreement.

Section 48.4 Severability

Each provision of this Agreement is valid and enforceable to the fullest extent permitted by law. If any provision of this Agreement is declared invalid, unenforceable or illegal by the courts of a competent jurisdiction, such provision may be severed and such invalidity, unenforceability or illegality will not prejudice or affect the validity, enforceability and legality of the remaining provisions of this Agreement. If any such provision of this Agreement is invalid, unenforceable or illegal, the Parties will, acting in good faith, promptly negotiate new provisions to eliminate such invalidity, unenforceability or illegality and to restore this Agreement as near as possible to its original intent and effect.

Section 48.5 Governing Law and Jurisdiction

- (a) This Agreement, and each of the documents contemplated by or delivered under or in connection with this Agreement, is governed by and construed in accordance with the laws of the State of Michigan and the laws of the United States applicable therein and must be treated in all respects as a MDOT contract, without regard to conflict of laws principles.
- (b) Subject to Schedule 4 - Dispute Resolution Procedure, both Parties hereby irrevocably attorn to the exclusive jurisdiction of the courts of the State of Michigan and all courts competent to hear appeals therefrom.

Section 48.6 Costs

- (a) Each Party is responsible for paying its own costs and expenses incurred in connection with the negotiation, preparation and execution and delivery of this Agreement.
- (b) Except as otherwise provided in this Agreement, each Party perform its obligations in accordance with this Agreement at its own cost and risk.

Section 48.7 Counterparts

This instrument may be executed in two or more counterparts, each of which must be deemed an original, but all of which together must constitute one and the same instrument.

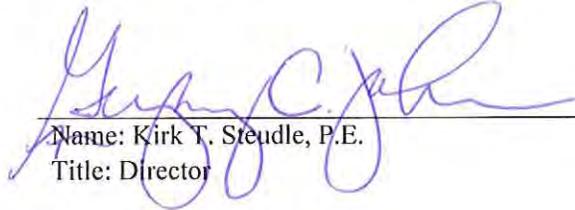
Section 48.8 MDOT Rights Cumulative

Each right and remedy of MDOT under this Agreement is cumulative and in addition to every other right or remedy provided under this Agreement or at law or in equity or by statute or otherwise, and the exercise by MDOT of any part of such rights or remedies does not preclude the simultaneous or later exercise by MDOT of any or all other such rights or remedies.

WITNESS WHEREOF the Parties have executed this Agreement as of the date first above written.

Michigan Department of Transportation (MDOT)

Per:



 Name: Kirk T. Steudle, P.E.
 Title: Director

Title:

I have authority to bind MDOT

PROJECT COMPANY

Per:

 Name: Mark Melson
 Title: Chief Operating Officer

I have authority to bind Freeway Lighting Partners, LLC



WITNESS WHEREOF the Parties have executed this Agreement as of the date first above written.

Michigan Department of Transportation (MDOT)

Per:

Name: Kirk T. Steudle, P.E.

Title: Director

Title:

I have authority to bind MDOT

PROJECT COMPANY

Per:



Name: Mark Melson

Title: Chief Operating Officer

I have authority to bind Freeway Lighting Partners, LLC