Project Agreement
for the Central 70 Project

COLORADO BRIDGE ENTERPRISE,
HIGH PERFORMANCE TRANSPORTATION ENTERPRISE,
and
KIEWIT MERIDIAM PARTNERS LLC

Dated November 21, 2017
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This Project Agreement (this “Agreement”) is made, entered into and effective as of the date it is approved and signed by the Colorado State Controller or its designee below (the “Agreement Date”) among:

(1) Colorado High Performance Transportation Enterprise (“HPTE”), a government-owned business within and a division of the Colorado Department of Transportation (“CDOT”);

(2) Colorado Bridge Enterprise, a government-owned business within CDOT (“BE” and, together with HPTE, each individually an “Enterprise” and, together, the “Enterprises”); and

(3) Kiewit Meridiam Partners LLC, a limited liability company formed under the laws of the State of Delaware (“Developer”).

RECITALS

Whereas:

(A) CDOT has determined that the deteriorating condition and inadequate capacity of the I-70 East corridor requires a comprehensive transportation solution to resolve such challenges and to address other stakeholder and community concerns.

(B) Based on a review process conducted in accordance with the National Environmental Policy Act of 1969 (“NEPA”), CDOT identified a preferred alternative, the Preferred Alternative, to address these challenges and concerns.

(C) HPTE was created to pursue innovative means of more efficiently financing important surface transportation projects to improve the safety, capacity, and accessibility of the surface transportation system in the State, which means include public-private partnerships, user fee-based project financing, and availability payment and design-build contracting.

(D) BE was created for the purpose of financing, repairing, reconstructing, and replacing designated bridges that have been identified by CDOT as being structurally deficient or functionally obsolete.

(E) Pursuant to the State’s Funding Advancements for Surface Transportation and Economic Recovery legislation, C.R.S. §§ 43-4-801, et seq., the Enterprises were created as government-owned businesses within CDOT, each with certain limited statutory powers and duties necessary to accomplish their respective business purposes.

(F) Pursuant to Resolution #TC-15-2-5 approved February 19, 2015 by the State’s Transportation Commission (the “Transportation Commission”), the Transportation Commission delegated to the Enterprises the responsibility for procurement of the design, construction, financing, operation and maintenance of a portion of the I-70 East corridor in Greater Denver (such portion, the “Project”), the scope of which Project is reflected by the scope of the Work required to be performed by Developer pursuant to this Agreement.

(G) The design, construction, financing, operation and maintenance method of procurement for the Project is intended to reduce overall Project cost and maximize the improvements that can be constructed, in part, by requiring private parties to assume and manage certain risks associated with the Project, including risks related to utilities, railroads, environmental conditions and financial and market conditions.

(H) On March 25, 2015, the Enterprises issued a Request for Qualifications for the Project, as subsequently amended on May 29, 2015.

(I) On June 22, 2015, the Enterprises received five responsive statement of qualification submittals from potential project developer groups, and then shortlisted four such groups on July 24, 2015 (each a “Proposer” and, collectively, the “Proposers”) for purposes of proceeding to the next stage in the procurement process for the Project.
(J) Subsequently, the Enterprises issued to the Proposers for their review and comment a draft Request for Proposals (“RFP”), which included the Instructions to Proposers (“ITP”), first issued on September 15, 2015, and a draft of this Agreement, first issued on September 29, 2015. The Enterprises subsequently issued a number of addenda to the draft RFP, pursuant to the procedures set out in the ITP. On March 6, 2017 the Enterprises issued the final RFP, which was subsequently amended by addenda issued on April 25, 2017, May 25, 2017 and July 22, 2017.

(K) On January 15, 2016, the Federal Highway Administration (the “FHWA”) issued the Final Environmental Impact Statement (“FEIS”). On January 19, 2017 the FHWA issued the Record of Decision (the “ROD”) for Phase 1 of the Partial Cover Lowered Alternative, which is also known as the Central 70 Project. The ROD was published in the Federal Register (Vol. 82, No. 27) on February 10, 2017.

(L) On June 1, 2017 and August 1, 2017, the Enterprises received, respectively, the Proposers’ technical and financial proposals in response to the RFP.

(M) On August 24, 2017, the Enterprises issued a notice identifying Kiewit Meridiam Partners as the successful Proposer (the “Preferred Proposer”) to which the Project was awarded, subject to satisfaction of certain conditions precedent under the ITP to execution of this Agreement by Developer.

(N) As of the Agreement Date, the Equity Members of the Preferred Proposer, which as of such date are Meridiam I-70 East CO, LLC (as holder of a 60% direct membership interest) and Kiewit C70 Investors, LLC (as holder of a direct 40% membership interest), have formed Developer for purposes of executing this Agreement with the Enterprises, and have otherwise satisfied the conditions precedent under the ITP to execution of this Agreement.

(O) This Agreement and the further agreements referred to herein set out or, as applicable, will set out the terms and conditions pursuant to which Developer will implement the Project and perform the Work in consideration for the payments to be made by the Enterprises to Developer under this Agreement.

Now, therefore, in consideration of their mutual undertakings and agreements hereunder, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties undertake and agree as follows:
PART A: DEFINITIONS AND ABBREVIATIONS; INTERPRETATION; PROJECT INFORMATION

1. DEFINITIONS AND ABBREVIATIONS

Except as otherwise specified herein or as the context may otherwise require:

a. terms set out in Part A of Annex A (Definitions and Abbreviations) have the respective meanings set out therein for all purposes of this Agreement;

b. terms defined in either the CDOT Standard Specifications or the Standard Special Provisions have the respective meanings set out in the CDOT Standard Specifications and the Standard Special Provisions for purposes of the Construction Standards, provided that, if any term used in any Construction Standard is defined in both:

   i. Part A of Annex A (Definitions and Abbreviations); and

   ii. either the CDOT Standard Specifications or the Standard Special Provisions,

then such term shall have the meaning set out in Part A of Annex A (Definitions and Abbreviations); and

c. abbreviations set out in Part B of Annex A (Definitions and Abbreviations) are provided as references for purposes of the Technical Requirements, Table 6A.1 and Table 6A.2 only.

2. INTERPRETATION OF THIS AGREEMENT

2.1. Interpretation of Certain Terms, Phrases and Language

2.1.1. Headings and other internal references

a. Headings are inserted for convenience only and shall not affect interpretation of this Agreement.

b. Except as the context may otherwise provide, the words “herein”, “hereof” and “hereunder”, and words of similar import, shall be construed to refer to this Agreement in its entirety and not to any particular provision of it.

c. Except as otherwise expressly provided or as the context may otherwise provide, a reference to any Section within this Agreement (including in Part A of Annex A (Definitions and Abbreviations) and the Schedules) is a reference to such Section of this Agreement (excluding the Schedules).

d. Any reference to “Section X of the Project Agreement” (where “X” is a number) in any Schedule is a reference to the corresponding numbered Section in this Agreement (including Annex A (Definitions and Abbreviations), but excluding the Schedules).

2.1.2. Common terms and references

a. The singular includes the plural and vice versa.

b. Words preceding “include”, “includes”, “including” and “included” shall be construed without limitation by the words that follow.

c. The verb “will” has the same meaning and effect as the verb “shall.”

d. The word “promptly” means as soon as reasonably practicable in light of then-prevailing circumstances.
2.1.3. References to agreements, documents, Law, Governmental Approvals and Permits

Except as otherwise expressly provided in this Agreement, and subject to Section 8.6.2 with respect to the Project Standards, a reference:

a. to an agreement or other document shall be construed to be a reference to such agreement or other document (including any schedules, annexes or exhibits thereto) as it may be amended, modified or supplemented from time to time pursuant to its terms; and

b. to any Law, Governmental Approval or Permit shall be construed as a reference to such Law, Governmental Approval or Permit as amended, replaced, consolidated or re-enacted (as applicable) from time to time.

2.1.4. References to Persons

Except as otherwise expressly provided in this Agreement:

a. a reference to a Person includes such Person’s permitted successors, assigns and transferees;

b. the feminine includes the masculine and vice-versa; and

c. the words “they”, “them”, “themselves” and “their” when used to refer to a single Person or a grammatically singular antecedent shall be construed to mean an individual of unknown gender or whose gender is irrelevant.

2.1.5. Professional language and terms of art

Except as otherwise expressly provided in this Agreement:

a. words and phrases not otherwise defined herein:

i. that have well-known technical, insurance or construction industry meanings shall be construed pursuant to such recognized meanings; and

ii. of an accounting or financial nature shall be construed pursuant to GAAP, in each case taking into account the context in which such words and phrases are used;

b. all statements of, or references to, dollar amounts or money, including references to “$” and “dollars”, are to the lawful currency of the United States of America;

c. all references to “digital” or “electronic” media or communications shall include all technology or services having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities that are used to facilitate the storage or dissemination of data and information as of the Setting Date, and all other successor forms of technology that serve the same or equivalent purposes which come into existence or widespread use after the Setting Date; and

d. all references to reimbursement of another Person’s “cost and expense” or “costs and expenses” shall be deemed to be references to reimbursement of all relevant third-party fees, costs and expenses incurred by such Person, including for those of external legal counsel and other external advisors.

2.1.6. Deadlines occurring on Calendar Days

Whenever this Agreement requires either Party (including CDOT acting as the Enterprises’ designee pursuant to Section 18.1.2) to make any payment, or provide or deliver any Acceptance, Approval, consent, approval or like assent, notice, Deliverable, comment or any information or material, or otherwise complete any action or performance, in each case on or no later than a date that is a Calendar Day that is not also a Working Day, then such deadline shall automatically be extended to the next Working Day to occur after such Calendar Day.
2.2. **Terminology for Agreements and Assents**

2.2.1. Agreements and determinations

Where this Agreement provides that a matter shall be "Agreed or Determined", such reference shall mean either that:

a. the Parties have agreed to the matter in writing; or

b. that the matter has been finally determined pursuant to the Dispute Resolution Procedure.

2.2.2. Consents, approvals and like assents

Except as otherwise expressly provided in this Agreement, where this Agreement provides that any consent, approval or like assent:

a. shall not be "unreasonably withheld" by a Person, then it shall not be unreasonably withheld, delayed or made subject to the imposition of unreasonable conditions by such Person, and "unreasonably withhold" shall be similarly construed; and

b. is to be made or given in the "discretion" of a Person, it shall be made or given only in the sole and absolute discretion of such Person (which discretion includes the ability to refrain from giving, or to impose conditions on, such consent, approval or like assent), which discretionary decision regarding any consent, approval or like assent shall be final and binding and not subject to the Dispute Resolution Procedure other than with respect to:

   i. a good faith dispute concerning whether the consent, approval or like assent was discretionary; or

   ii. a breach of the implied covenant of good faith and fair dealing.

2.2.3. Acceptance, Approval and Information

Where this Agreement provides that any matter or information shall be submitted to the Enterprises (or to CDOT acting as their designee pursuant to Section 18.1.2) for their:

a. "Acceptance", then the Enterprises shall give their determination in writing and may not unreasonably withhold their Acceptance, after having a reasonably sufficient opportunity to review and comment on such submission, where the only bases for withholding such Acceptance shall be if the Enterprises determine, acting reasonably, that the subject-matter of such submission:

   i. does not comply with this Agreement;

   ii. does not comply with any Law, Governmental Approval or Permit;

   iii. is not made pursuant to, or otherwise is not compliant with, Good Industry Practice;

   iv. would give rise to a material risk to the health or safety of any person, the Environment or Improvements, the community or property; and/or

   v. would have an adverse impact on:

      A. the performance by Developer of its obligations under this Agreement;

      B. the rights of the Enterprises under this Agreement; and/or

      C. the Project, (where any failure to respond within a time period expressly provided in this Agreement shall be deemed an Acceptance of such submission by the Enterprises);

b. "Approval", then the Enterprises shall give their determination in writing and may reject such submission in their discretion (where any failure to respond within a time period...
expressly provided in this Agreement shall be deemed a rejection of such submission by the Enterprises); and

c. “Information”, then no Acceptance, Approval, or other consent, approval or like assent, is required and the matter or information is being submitted for the Enterprises’ information, review and comment only.

2.2.4. Default standards for consents, approvals and like assents

Where this Agreement requires one Party (including CDOT acting as the Enterprises’ designee pursuant to Section 18.1.2) to provide a consent, approval or like assent to the other Party (excluding any waiver, for which purposes Section 43.3 shall apply, and any matter or submission expressly requiring Acceptance or Approval) and no express standard for such consent, approval or like assent is given, then such consent, approval or like assent shall be in writing and:

a. with respect to Developer, not be unreasonably withheld; and

b. with respect to the Enterprises, be in their discretion.

2.2.5. Limited Developer reliance

a. Developer may rely on Acceptances and Approvals, any other consent, approval or like assent, and any notice, from the Enterprises (including from CDOT acting as their designee pursuant to Section 18.1.2) only for the limited purpose of establishing that the Acceptance or Approval, or any other consent, approval or like assent, occurred, or any notice was given.

b. Except as otherwise expressly provided in this Agreement, no:

i. Acceptance or Approval, other consent, approval or like assent, or notice;

ii. comment, review, certification, concurrence, verification or oversight; or

iii. payment,

or the absence of any of the foregoing, shall in any case:

iv. constitute acceptance of materials, Work or any Element as satisfying the requirements of this Agreement;

v. relieve Developer from, or diminish Developer’s liability for, the performance of its obligations under this Agreement;

vi. prevent the Enterprises from subsequently exercising their rights under this Agreement without being bound by the manner in which they previously exercised (or refrained from exercising) such rights; or

vii. constitute a waiver of any rights under this Agreement of any legal or equitable right of the Enterprises or of any other Person.

2.3. Indexation of Amounts

2.3.1. Contract Year Indexation

Subject to Section 2.3.2 and Section 4.2(d)(i) of Schedule 1 (Financial Close), where in this Agreement an amount is expressed to be “indexed”, such expression means that the relevant amount will be changed on the first Calendar Day of each Contract Year (the “Relevant Contract Year”) by applying the following formula:

\[ V_{\text{new}} = V_{\text{old}} \times \left(1 + \frac{(I_{\text{new}} - I_{\text{old}})}{I_{\text{old}}} \right) \]
Where:

a. \( V_{\text{new}} \) is the new amount for the Relevant Contract Year;

b. \( V_{\text{old}} \) is the amount for the Contract Year immediately preceding the Relevant Contract Year;

c. \( I_{\text{new}} \) is the value for CPI most recently published prior to the first Calendar Day of the Relevant Contract Year; and

d. \( I_{\text{old}} \) is the value for CPI most recently published prior to the first Calendar Day of the Contract Year immediately prior to the Relevant Contract Year, or, in the case of the first occasion on which this calculation is carried out, the value of CPI most recently published prior to July 1, 2017,

provided that, if \( I_{\text{new}} \) is less than or equal to \( I_{\text{old}} \), then no calculation shall be carried out and \( V_{\text{new}} \) shall be deemed to be equal to \( V_{\text{old}} \).

2.3.2. For purposes of:

a. the definitions of Base Benchmarked Insurance Cost and Proposal Insurance Cost in Part A of Annex A (Definitions and Abbreviations); and

b. Section 2.8.b of Schedule 13 (Required Insurances),

references to “Contract Years” in Section 2.3.1 shall be deemed to refer to the corresponding annual period referred to in such definitions or, as applicable, multi-year periods referred to in Section 2.8.b of Schedule 13 (Required Insurances).

2.4. Resolution of Conflicts Among, and Prioritization of, Terms

2.4.1. Integrated and binding agreement

a. Subject to Section 42.3, the Enterprises and Developer agree and expressly intend that this Agreement, which includes its Annex, Schedules and any valid amendments, constitutes a single, non-severable, integrated agreement whose terms are interdependent and non-divisible.

b. Subject to Sections 2.4.2 and 2.4.3 and the express terms of this Agreement, any term, condition, requirement, criteria or specification set out or referenced in any part of this Agreement is a binding contractual obligation.

2.4.2. Standards for resolving conflicts and inconsistencies

a. If there is any conflict, ambiguity or inconsistency between or among any provision(s) of (A) this Agreement (including Annex A (Definitions and Abbreviations), but excluding the Schedules) and/or (B) any provision(s) of the Schedules and/or (C) any provision(s) of the Project Standards, in each case that cannot be reconciled by reading all relevant provisions of this Agreement, the Schedules and/or the Project Standards as mutually explanatory of one another, then the order of precedence shall be as follows:

i. this Agreement (including Annex A (Definitions and Abbreviations), but excluding the Schedules) shall prevail over any of the Schedules and any of the Project Standards;

ii. Schedule 17 (Environmental Requirements) shall prevail over any other Schedule and any of the Project Standards;

iii. subject to Section 2.4.2.a.ii, Schedules 3 (Commencement and Completion Mechanics), 4 (Payments), 5 (Milestone Payments), 6 (Performance Mechanism), 8 (Project Administration), and 9 (Submittals) shall prevail equally over all remaining Schedules;
iv. Part B of Schedule 28 (Proposal Extracts) shall prevail over all other remaining Schedules; and

v. subject to Sections 2.4.2.a.ii, iii, and iv, all Schedules (including the Project Special Provisions) shall prevail equally over any of the Project Standards (excluding the Project Special Provisions);

provided that:

vi. if there is any conflict, ambiguity or inconsistency between or among any provision(s) of the Construction Standards, the order of precedence set out in Section 105.09 of the CDOT Standard Specifications shall apply;

vii. Changes made pursuant to any Change Order or Directive Letter and amendments made pursuant to Section 43.1 shall prevail over such portions of this Agreement that they modify or amend;

viii. in the event of any conflict, ambiguity or inconsistency between or among the provisions of this Agreement (including, for certainty, the Schedules) with an equal order of precedence, the most stringent requirement shall take precedence;

ix. notwithstanding anything to the contrary contained in this Agreement, in the event of any conflict, ambiguity or inconsistency between or among any applicable requirement under Law and any other requirement of this Agreement, the applicable requirement under Law shall take precedence;

x. except where expressly referred to in this Agreement, the Financial Model and its contents shall not be used to interpret this Agreement and shall not otherwise affect the meaning of this Agreement; and

xi. additional or supplemental requirements that Developer is required to comply with pursuant to this Agreement (including such requirements pursuant to any of the Project Standards) with a lower order of precedence relative to other parts of this Agreement (including, for certainty, the Schedules) as determined pursuant to this Section 2.4.2 shall be given effect except to the extent such requirements conflict or are inconsistent with, or otherwise create an ambiguity in relation to, the provisions contained in a part of this Agreement with a higher order of precedence.

b. [Reserved.]

2.4.3. Interpretation and resolution of conflicts

a. Each Party shall notify the other Party promptly after it identifies or becomes aware of any conflict, ambiguity or inconsistency:

i. of a type described in Section 2.4.2;

ii. between or among any Deliverable and the provisions of this Agreement and/or the Project Standards; or

iii. regarding the interpretation of any Deliverable,

and each Party agrees to not take advantage of any such conflict, ambiguity or inconsistency, or of any other error or omission in or to this Agreement. Furthermore, in the event of any such conflict, ambiguity or inconsistency, the Parties agree that the relevant terms of this Agreement shall not be construed against the Person that prepared them and the Parties waive any Law with contrary effect which would otherwise be applicable in connection with the construction and interpretation of this Agreement.

b. To the extent that the Parties disagree on the reconciliation of any conflict, ambiguity or inconsistency of a type described in Section 2.4.3.a.ii to the extent such relates to a
Technical Deliverable, the Enterprises may, in their discretion, notify Developer of their determination regarding such reconciliation, which determination shall be binding, unless such determination is Agreed or Determined to:

i. substantively amount to a unilateral amendment to this Agreement or to a Change not made pursuant to Section 14; or

ii. breach the implied covenant of good faith and fair dealing.

3. PROJECT INFORMATION, RELIANCE AND DILIGENCE

3.1. Limited Reliance on Project Information

Developer acknowledges and agrees that:

a. prior to the Final Project Information Date, the Reference Documents (including, for certainty, the Reference Design) and certain other documents, information, reports and materials (together, the “Project Information”) were made available to the Preferred Proposer for information only as contemplated in Section 2.5.1 of Part C of the ITP;

b. prior to the Agreement Date, the Preferred Proposer, the Core Proposer Team Members and Developer each conducted their own due diligence on the accuracy, completeness, relevance, fitness for purpose and adequacy of the Project Information;

c. the Reference Documents have not been incorporated into this Agreement either as a result of being listed in Schedule 29 (Reference Documents) or as a result of being referenced in any provision of this Agreement that requires Developer to comply with a specific Reference Document (or part thereof); and

d. neither the Enterprises, nor any other Person that produced or provided any Project Information, gives or has given any representation, warranty, undertaking or guarantee as to the accuracy, completeness, relevance, fitness for purpose or adequacy of any Project Information, and as such:

i. Developer is not entitled to rely on any Project Information, except with respect to any Reference Document, to the extent such Reference Document is either expressly or implicitly and necessarily the basis for determining the occurrence of a Supervening Event or whether any risk, information, matter or thing was Known or Knowable; and

ii. subject to Section 3.4, neither the Enterprises, nor any other Person that produced or provided any Project Information, shall have any responsibility or liability to Developer or any other Developer-Related Entity in respect of, and Developer shall not be relieved of any obligation under this Agreement as a result of:

A. any lack of accuracy, utility, completeness, relevance, fitness for purpose or adequacy of any kind whatsoever of any such Project Information;

B. any interpretations of, or conclusions drawn from, any such Project Information;

C. any failure by the Enterprises, or by any other Person that produced or provided any such Project Information, to update such Project Information, the contents of which may reflect information available as of the date that such Project Information was prepared or as of such other date indicated therein;

D. any failure by the Enterprises or any other Person to reference or otherwise make available any materials, documents, drawings, plans or other information relating to the Project; or
E. any causes of action or claims of, or Losses whatsoever suffered by, Developer or any other Developer-Related Entity by reason of any use of, or any action or forbearance in reliance on, such Project Information.

3.2. Responsibility for Independent Diligence

3.2.1. Sufficient diligence

Subject to the terms of this Agreement, Developer is deemed to have satisfied itself as to:

a. the sufficiency and (as applicable) condition of the Right-of-Way, the ROD Construction Limits and the Project License, and of all other property, assets and rights that it is entitled to receive under this Agreement;

b. the nature and extent of the risks assumed by it under this Agreement;

c. the sufficiency of the Preferred Proposer’s and the Developer-Related Entities’ opportunities to conduct due diligence, including in relation to the condition of each ROW Parcel, on or prior to the Setting Date pursuant to Good Industry Practice; and

d. the precautions and times and methods of working necessary to prevent or, if it is not possible to prevent, to mitigate or reduce any nuisance or interference, whether public or private, being caused to any third parties through the performance of the Work.

3.2.2. No reliance on unincorporated statements or representations and warranties

Developer acknowledges and agrees that:

a. it has not entered into this Agreement on the basis of, and has not relied upon, any statement, representation or warranty or other provision (in each case whether oral or written, express or implied) made or agreed to by the Enterprises or by any other Person, or any of their agents or employees, except those expressly set out or repeated in this Agreement; and

b. the only remedies available in respect of any untrue statement, misrepresentation or breach of warranty made to Developer in this Agreement shall be any remedies expressly available under this Agreement.

3.3. Limitations on Site Condition Claims

3.3.1. General prohibition of Claims, subject to limited exceptions

Neither Developer nor any other Developer-Related Entity shall be entitled to make any Claim against any Person in relation to the condition of any ROW Parcel or any Additional ROW Parcel at the time such parcel first became subject to Developer’s Possession or Developer first acquired any interest or right in respect of such parcel, except, with respect to Developer Claims only:

a. with respect to Claims against the Enterprises and CDOT, to the extent expressly provided for in this Agreement; and

b. with respect to Claims against any other Person:

i. to the extent that such Claims are against the relevant contractor pursuant to Colo. Rev. Stat. §§ 13-20-801 et seq. in relation to such contractor’s construction of Structure No. E-17-VD (I-70 over Havana Street) or Structure No. E-17-VE (I-70 over UPRR spur track) (for purposes of this Section 3.3, any such Claim, a “Relevant Claim” and any such contractor, a “Relevant Contractor”), subject only to Developer providing five Working Days’ prior notice to the Enterprises that it intends to make a Relevant Claim (or such longer period of notice as is reasonable in the circumstances in the event that Developer has made a request to the Enterprises pursuant to Section 3.3.2.c);

ii. to the extent that such Claims are with respect to:
A. any Unexpected Hazardous Substances (where, for purposes of this Section 3.3.1.b.ii.A, the exclusions in paragraphs b., c., d., e., f. and g.iii. of the definition thereof in Part A of Annex A (Definitions and Abbreviations) shall not apply); or

B. any Unexpected Groundwater Contamination Conditions;

subject to the prior written consent of the Enterprises (such consent not to be unreasonably withheld); and

iii. otherwise, subject to the prior Approval of the Enterprises.

3.3.2. Assignment of and assistance with certain Claims

In connection with the assertion or potential assertion of a Relevant Claim by Developer:

a. as of the Agreement Date, the Enterprises shall have procured the assignment by CDOT to the Enterprises of any right of CDOT to assert a Relevant Claim against any Relevant Contractor;

b. the Enterprises hereby assign to Developer:

i. the rights of CDOT that were previously assigned to the Enterprises as referenced in Section 3.3.1.b.ii; and

ii. any other right of the Enterprises to assert a Relevant Claim against any Relevant Contractor; and

c. the Enterprises shall, upon the reasonable request of Developer, use (and shall procure that CDOT shall use) Reasonable Efforts to cooperate with Developer in the assertion of any Relevant Claim against a Relevant Contractor, including by making available any relevant documents or materials in the Enterprises’ or CDOT’s possession.

3.4. Residual Enterprise Liability

Nothing in this Section 3 shall exclude any liability which the Enterprises would otherwise have to Developer:

a. in respect of any statements, representations or warranties made fraudulently, recklessly or in bad faith or constituting willful misconduct or gross negligence; or

b. to the extent expressly provided for in this Agreement.
PART B: EFFECTIVENESS AND TERM; REPRESENTATIONS AND WARRANTIES; FINANCIAL CLOSE; GRANT OF RIGHTS

4. EFFECTIVENESS AND TERM

4.1. Effectiveness

This Agreement (including Annex A (Definitions and Abbreviations) and the Schedules) shall come into effect on and from the Agreement Date.

4.2. Term

The “Term” shall commence on the Agreement Date and end on the earliest to occur of:

a. the Expiry Date; and
b. the Termination Date.

5. REPRESENTATIONS AND WARRANTIES

5.1. Representations and Warranties

5.1.1. Developer hereby represents and warrants to the Enterprises that each representation and warranty set out in Part A of Schedule 2 (Representations and Warranties) is true and correct as of the Agreement Date and, as applicable, is true and correct as of the effective date of the relevant Principal Subcontract.

5.1.2. Each Enterprise hereby represents and warrants to Developer that each representation and warranty made by it and set out in Part B of Schedule 2 (Representations and Warranties) is true and correct as of the Agreement Date.

5.2. Mutual Reliance

Developer and each Enterprise acknowledge that, respectively, the Enterprises and Developer enter into this Agreement in reliance on the representations and warranties made pursuant to Section 5.1.

5.3. Notice of Untrue, Incorrect or Misleading Representations and Warranties

Notwithstanding that the representations and warranties made by the Parties pursuant to Section 5.1 are made and, pursuant to Sections 2.2(b) and 2.3(a) of Schedule 1 (Financial Close), repeated, only at particular times:

a. Developer shall promptly inform the Enterprises after it becomes aware that any of its representations and warranties either was false, misleading or inaccurate in any material respect when made (or repeated) or omitted material information when made (or repeated); and

b. each Enterprise shall promptly inform Developer after it becomes aware that any of the representations and warranties made by it either was false, misleading or inaccurate in any material respect when made (or repeated) or omitted material information when made (or repeated).

5.4. Special Remedies for Mutual Breach of Warranty

If any circumstance or event exists or occurs that constitutes or results in concurrent breaches of any of the parallel representations and warranties made pursuant to Section 5.1, or thereafter repeated pursuant to Schedule 1 (Financial Close), by Developer and one or both Enterprises, but which breaches do not also constitute or result in any other breach or default by either Party, including, subject to the passage of time and giving of notice, a Developer Default or an Enterprise Default, then:
a. such breaches shall not result in a Supervening Event or form the basis for a damages claim by either Party against the other; and

b. each Party’s only remedy shall be to:
   i. take action as permitted under this Agreement to rectify or mitigate the effects of such circumstance or event;
   ii. if applicable, exercise its rights to pursue severance and/or substitution of any invalid clause, condition, term, provision, section, subsection or part of this Agreement pursuant to Section 42.3;
   iii. if applicable, pursue a Termination by Court Ruling; and/or
   iv. exercise its rights pursuant to Section 43.3.

5.5. Survival of Representations and Warranties

Pursuant to Section 41, each Party’s liability with respect to its representations and warranties made pursuant to Section 5.1, or thereafter repeated pursuant to this Agreement, shall survive the end of the Term.

6. FINANCIAL CLOSE

6.1. Financial Close Process

The Parties agree to comply with their respective obligations with respect to the achievement of Financial Close pursuant to Schedule 1 (Financial Close).

6.2. Achievement of, or Failure to Achieve, Financial Close

6.2.1. Financial Close shall occur subject to, and in accordance with, Sections 2 and 3 of Schedule 1 (Financial Close).

6.2.2. A failure to achieve Financial Close by the Financial Close Deadline shall have the effects set out in, and may result in termination of this Agreement pursuant to, Section 5 of Schedule 1 (Financial Close).

7. GRANT OF RIGHTS AND PROJECT LICENSE

7.1. Grant of Right to Develop Project

Subject to the terms and conditions of this Agreement:

a. the Enterprises hereby grant to Developer the exclusive right to design, construct, finance, operate and maintain the Project in each case pursuant to this Agreement; and

b. Developer accepts such right and acknowledges its obligations under this Agreement, in each case during the Term.

7.2. Developer’s Project License

7.2.1. Grant of Project License

a. Subject to the terms and conditions of this Agreement:
   i. the Enterprises grant to Developer a license (the “Project License”) over, under, upon and in the Right-of-Way, and any Additional Right-of-Way, for the sole purpose of exercising its rights and performing its obligations under this Agreement pursuant to the terms hereof; and
   ii. Developer acknowledges and accepts such Project License.

b. Without limiting Developer’s conditional, limited rights to obtain early access to and use of (but, for certainty, not Possession of) ROW Parcels pursuant to Section 1.2 of Schedule 18 (Right-of-Way), the Enterprises shall deliver, and Developer shall be entitled to have, Possession of:
i. each ROW Parcel on and from the Possession Date specified in the Notice of Possession with respect to such ROW Parcel until such ROW Parcel’s Project License End Date; and

ii. any Additional ROW Parcel on and from the Possession Date specified in the Notice of Possession with respect to such Additional ROW Parcel until such Additional ROW Parcel’s Project License End Date,

without prejudice to Developer’s rights arising as a result of the occurrence of any Compensation Event as described in paragraph b. of the definition thereof in Part A of Annex A (Definitions and Abbreviations) and, for certainty, subject to such rights and restrictions of access and use of certain third parties that fall within the definition of Possession in Part A of Annex A (Definitions and Abbreviations) from time to time during the Term.

c. The Project License shall automatically be revoked upon the occurrence of the end of the Term.

d. The Enterprises may, in their discretion, by not less than 365 Calendar Days’ notice to Developer, terminate the Project License with respect to the ROW Parcels (or any part thereof) on which the Maintenance Yard is located in the event that the Enterprises or CDOT require the use of such ROW Parcels (or part thereof) in connection with the development of the ultimate planned-for improvements to the I-70 East corridor as described in the FEIS, provided that:

i. any such termination shall not be effective prior to the Final Acceptance Date;

ii. prior to exercising such termination rights, the Enterprises shall consult with Developer to consider the extent to which there may be alternative solutions that:

A. do not require the termination of the Project License with respect to any or all such ROW Parcels (or any part thereof) in connection with such development; and

B. are acceptable to the Enterprises in their discretion.

Following any such termination pursuant to this Section 7.2.1.d, Developer shall, without limiting its other obligations under this Agreement, cooperate and coordinate with the transfer of such ROW Parcels (or any part thereof) to the Enterprises, CDOT or any other Person designated by the Enterprises. Developer shall not be entitled to any compensation, extension of time and/or relief with respect to any exercise by the Enterprises of their rights pursuant to this Section 7.2.1.d.

7.2.2. Sublicensing

Developer shall have the right to issue sub-licenses under the Project License to Subcontractors as necessary to carry out Developer’s obligations under this Agreement.

7.2.3. Limitations and qualifications on the grant of rights and Project License

a. The Project License is personal property, and not an interest in real property, and shall not be recorded in the City of Denver’s Clerk and Recorder’s Office or in any other county.

b. Developer shall not use any part of the Site, or exercise its rights with respect to the Project License, in either case, for any purpose other than carrying out its obligations under this Agreement.

c. Developer’s interest in the Right-of-Way, and any Additional Right-of-Way, is limited by the Project License and the other terms and conditions of this Agreement. Developer is not and shall not be, and shall not be treated as or be deemed to be, the legal or
equitable owner of the Right-of-Way, or any Additional Right-of-Way, in whole or in part, for any purpose.

d. This Agreement does not, and shall in no way be deemed to, constitute a lease (regardless of the characterization of such lease, including as an operating lease or a financing lease) to Developer or, except as expressly provided in Section 7.1, a grant (regardless of the characterization of such grant, including by way of easement, purchase option, conveyance, lien or mortgage), in each case, of any right, title, interest or estate, including any fee simple, leasehold estate, easement or property interest of any kind, in or to the Right-of-Way, any Additional Right-of-Way, the Project or of any Assets incorporated into, or appurtenant to, the Project.

e. Without limiting its rights under this Agreement arising as a result of the occurrence of any Compensation Event as described in paragraph b. of the definition thereof in Part A of Annex A (Definitions and Abbreviations), Developer acknowledges and agrees that its Possession of each ROW Parcel and any Additional ROW Parcel pursuant to Section 7.2.1.b is subject to the rights and restrictions of access and use of certain third parties that fall within the definition of Possession in Part A of Annex A (Definitions and Abbreviations) from time to time during the Term. Developer shall reasonably facilitate access to and through the Site by all Persons with such rights of access and use, and shall not take any action (or refrain from taking any action) in a manner that is calculated or intended to directly or indirectly prejudice or frustrate such rights of access and use.

7.3. Ownership and Liability

7.3.1. Right-of-Way

All of the Right-of-Way, and any Additional Right-of-Way, shall be held or acquired, as applicable, in the name of CDOT (or in such other name(s) as the Enterprises may otherwise determine in their discretion). Subject to the terms of this Agreement, the Enterprises reserve to themselves and their designees, including CDOT, the rights of use, occupancy and, as applicable, ownership over, under, upon and in the Right-of-Way and any Additional Right-of-Way.

7.3.2. Developer’s responsibilities

Following either Developer’s Possession of any ROW Parcel or any Additional ROW Parcel pursuant to Section 7.2.1.b (and for such period of time as Developer is entitled to have Possession thereto pursuant to such Section), or Developer’s acquisition of any interest or right with respect to any Temporary Property or Permit Area (and for such period of time as such interest or right is maintained), Developer shall (as among the Parties):

a. have sole responsibility for such part of the Site (and for all Elements located thereon), including risk of damage and loss; and

b. bear any costs and expenses incurred in relation to such part of the Site (and in relation to all Elements located thereon), including all fees, expenses and taxes associated with such part of the Site,

in each case subject to the express terms of this Agreement.

7.3.3. Transfer of Ownership

a. With respect to any part of any Element that is to be affixed to any ROW Parcel or any Additional ROW Parcel (or any infrastructure already affixed thereto) as part of the Project, ownership of and title to each such part shall automatically vest in CDOT (or, in the Enterprises’ discretion, their designee) free from all Encumbrances, other than Permitted Encumbrances, immediately upon such part being affixed thereto.
b. Any Work Product, including all property interests therein, shall be considered “works made for hire” pursuant to Law and, accordingly, shall be the property of the Enterprises, excluding only:
   i. the Financial Model;
   ii. any Project Records that are exempt from disclosure in compliance with CORA and other Laws applicable to the disclosure of Public Records, but only to the extent identified in the disclosure protocol Accepted by the Enterprises pursuant to Section 20.1.2 as being excluded from the application of this Section 7.3.3.b; and
   iii. any Proprietary Intellectual Property.

c. Notwithstanding Section 7.3.3.a:
   i. the vesting of ownership of and title to any part of any Element pursuant to Section 7.3.3.a and any Work Product pursuant to Section 7.3.2.b shall not imply acceptance of such part of such Work Product by the Enterprises (or by such part’s or such Work Product’s current or future owner) as to the compliance of such part with the requirements set out in this Agreement, nor shall Developer be relieved of its obligation to comply with any of its obligations under this Agreement with respect to such Element or such Work Product, as applicable, the Work or otherwise; and
   ii. subject to the terms of this Agreement, the risk of loss or damage to such part of any Element and any Work Product held by Developer shall remain with Developer pursuant to Section 7.3.2.

d. Developer shall not do any act or thing that will create any Encumbrance (other than with respect to any Element or other real property, a Permitted Encumbrance) against any Element (or part thereof), any Work Product or any part of the Right-of-Way or of any Additional Right-of-Way, and shall promptly remove any such Encumbrance (including such a Permitted Encumbrance that falls within paragraph b. of the definition thereof in Part A of Annex A (Definitions and Abbreviations), but excluding any other Permitted Encumbrances), unless such Encumbrance came into existence as a result of an act of or omission by the Enterprises or CDOT, or a Person claiming through any of them, which in turn was not caused by an act or omission of Developer or any other Developer-Related Entity.
PART C: OBLIGATIONS TO DESIGN, CONSTRUCT, OPERATE, MAINTAIN AND HANDBACK THE PROJECT

8. DEVELOPER’S PROJECT OBLIGATIONS

8.1. General Undertakings

8.1.1. Developer hereby undertakes to perform the Work pursuant to and in compliance with:

a. the terms, conditions and requirements of this Agreement, including each of the Schedules;

b. the Project Standards;

c. Law;

d. all Governmental Approvals and all Permits in effect from time to time; and

e. Good Industry Practice.

8.1.2. Furthermore, Developer hereby undertakes that it shall:

a. not adopt or, once adopted, change its legal form or name of organization without the Enterprises’ prior consent, such consent:

i. in the Enterprises’ discretion, if such change would adversely affect the Enterprises’ rights, obligations or interests under this Agreement or with respect to the Project; and

ii. otherwise, not to be unreasonably withheld;

b. not carry out any business or other activities other than business and activities solely related to the performance of its obligations pursuant to this Agreement in relation to the Project;

c. not permit any other Person to carry out any business activities on the Site or in relation to the Project, except as expressly permitted by this Agreement;

d. not commit or otherwise facilitate, and not permit any other Developer-Related Entity to commit or otherwise facilitate, the commission of any Prohibited Acts;

e. maintain and, as applicable, comply with, and ensure that each Principal Subcontractor maintains and complies with, all licenses, certifications and accreditations and related standards, as well as all other required professional abilities, skills and capacity, in each case required to perform the Work; and

f. subject to any rights of Developer arising as a result of the occurrence of any Developer Change documented in a Change Order or any Supervening Event, bear all risk, including of delay and/or increased cost, resulting from or arising out of the use of the Reference Design or the I-70 Cover Plans or any differences between its design for any portion of the Project and the Reference Design or such plans.

8.1.3. Without limiting its other obligations under this Agreement, Developer shall use Reasonable Efforts to cooperate and coordinate with the Enterprises, CDOT and all other Governmental Authorities with jurisdiction in matters relating to the Work, including their review, inspection and oversight of the Project as contemplated herein, in accordance with any Law granting such jurisdiction or as contemplated by any of the Third Party Agreements.
8.2. Assumption of Risk and Responsibility

8.2.1. Except to the extent otherwise expressly provided for in this Agreement (including as the result of the occurrence of any Developer Change documented in a Change Order or Supervening Event), all risks, costs and expenses in relation to the performance by Developer of the Work are allocated to, and accepted by, Developer as its entire and exclusive responsibility.

8.2.2. As among the Parties, Developer shall be solely responsible for the selection, pricing and performance of all Subcontractors (of every tier) and all other Persons for whom or for which Developer is responsible by contract or pursuant to Law, and for the performance, acts, defaults, omissions, breaches and negligence of the same, as fully as if any such performance, acts, defaults, omissions, breaches or negligence were those of Developer.

8.2.3. In the event that the inclusion in this Agreement of any ATC (as defined in the ITP) that was included in the Preferred Proposer’s Proposal was made subject to any express condition, as such conditions are set out, and defined as ATC Conditions, in Part B of Schedule 28 (Proposal Extracts), Developer shall be solely responsible for satisfying such condition. If any such condition is not satisfied, and without limiting the Enterprises’ other rights hereunder, Developer shall comply with the requirements of this Agreement (unmodified by such ATC) without any resulting entitlement to an extension of time, relief and/or compensation.

8.3. Federal and State Requirements

8.3.1. Compliance with Federal requirements
- a. Developer shall, and shall ensure that in respect of the Project and the Work each of its Subcontractors and each of their respective Subcontractors shall, comply with all Federal Law requirements applicable to transportation projects that receive Federal credit or funds, including the requirements set out in Schedule 15 (Federal and State Requirements).
- b. In the event of any conflict between any applicable Federal Law requirement and the other requirements of this Agreement, Section 2.4.2.a.ix shall apply.

8.3.2. False or fraudulent statements and claims
- b. Accordingly, by signing this Agreement, Developer certifies and affirms the truthfulness and accuracy of any claim, statement, submission or certification it has made pertaining to this Agreement and the Project.
- c. Developer acknowledges that, if it makes a false, fictitious or fraudulent claim, statement, submission or certification, then, in addition to any other penalties that may be applicable, the Federal government reserves the right to impose the penalties of the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. § 3801 et seq., on Developer to the extent the Federal government deems appropriate.

8.3.3. Federal status of Project
- a. Developer acknowledges that:
  i. the FHWA has designated the Project as a “Major Project” under 23 U.S.C. § 106, which designation, as applied to the Project by the FHWA (including pursuant to the FHWA’s “Major Project Financial Plan Guidance” (December 2014)), requires:
    A. submission by the Enterprises to, and approval by, FHWA of a project management plan; and
    B. subject to Section 8.4.3.a, submission by Developer of:
I. promptly following Financial Close, an initial financial plan; and
II. during the Construction Period, annual updates to such financial plan,
   in each case to, and for approval by, FHWA; and

C. submission by the Enterprises to, and approval by, FHWA of a
   supplement to each financial plan submitted by Developer pursuant to
   Section 8.3.3.a.i.B; and

ii. portions of the Project are and will be part of the National Highway System, as
defined in 23 CFR § 470.

b. Accordingly:
   i. to facilitate subsequent submission to, and approval by, FHWA pursuant to
      Section 8.3.3.a.i.B.I, no later than 30 Calendar Days after the Agreement Date
      Developer shall submit to FHWA, for initial FHWA review (but not approval), a
      draft initial financial plan as Approved by the Enterprises; and
   ii. Developer acknowledges and agrees that the Enterprises may submit documents
       based on or including the Proposal and/or Project Records to the FHWA in order
       for the Enterprises to comply with the requirements of 23 U.S.C. § 106(h) as
       applied to the Project by FHWA, including as part of any submission made by the
       Enterprises to the FHWA as described in Sections 8.3.3.a.i.A and 8.3.3.a.i.C, and
       Developer shall also use Reasonable Efforts to cooperate with and assist the
       Enterprises in the Enterprises complying with such requirements as reasonably
       requested by the Enterprises from time to time.

8.3.4. Emergency Repair Work

a. As a condition to receiving payment of any Change in Costs for performing Emergency
   Repair Work as a result of the occurrence of any Compensation Event as described in
   paragraphs c., (with respect to relevant Public Safety Orders), d., e. and k. of the
   definition thereof in Part A of Annex A (Definitions and Abbreviations), Developer shall
   competitively bid and contract for such Emergency Repair Work as FHWA’s or FEMA’s or
   any other equivalent Governmental Authority’s applicable regulations, policies or
   procedures may require in order for the Enterprises or CDOT to obtain reimbursement for
   eligible costs.

b. Developer shall:
   i. ensure that any Emergency Repair Work is performed pursuant to the
      requirements of this Agreement, Law and FHWA’s, FEMA’s and any other
      equivalent Governmental Authority’s applicable regulations, policies or
      procedures, including (as applicable) the FHWA’s “Emergency Relief Manual”;
      and
   ii. maintain estimates, cost records and supporting documentation pursuant to such
       applicable regulations, policies or procedures, and otherwise in form and
       substance as reasonably required by the Enterprises.

c. Without limiting Developer’s obligations under Sections 8.3.4.a and 8.3.4.b, the
   Enterprises may, in their discretion, provide oversight of Emergency Repair Work as may
   be required by FHWA, FEMA or any other equivalent Governmental Authority, or by Law,
   to preserve eligibility for reimbursement of eligible costs.
8.3.5. Restrictions on communications with FHWA and US DOT

Developer shall only communicate with the FHWA and the US DOT in relation to the Project and the Work indirectly through the Enterprises, except for direct communications:

a. with respect to the TIFIA Financing;
b. as required by Law;
c. expressly permitted or required by this Agreement; or
d. made with the Enterprises’ prior Approval,
in each of which cases Developer shall provide the Enterprises with regular and reasonably detailed written updates regarding such communications.

8.4. Governmental Approvals and Permits

8.4.1. Department Provided Approvals

The Department Provided Approvals were obtained prior to the Agreement Date by CDOT and, subject to Section 8.4.3.b, shall be maintained by the Enterprises, acting in coordination with CDOT, at their cost and expense (excluding any cost or expense borne by Developer pursuant to Section 8.4.3.b).

8.4.2. Developer’s responsibility to obtain Governmental Approvals and Permits

a. Subject to Section 8.4.4.a, and without limiting its rights under this Agreement arising as a result of the occurrence of any Developer Change documented in a Change Order or any Supervening Event (including any such rights that relate to obtaining any new or amending any existing Governmental Approval or Permit as a result of any such Change Order or Supervening Event), Developer shall be responsible for obtaining all Governmental Approvals (other than the Department Provided Approvals) and all Permits, and for arranging any necessary amendments to any Governmental Approvals (including, pursuant to Section 8.4.3.b, Department Provided Approvals) and any Permits, in each case as necessary to perform its obligations hereunder at the time and in the manner when they fall due for performance.

b. Without limiting its obligations under Section 19.1, Developer shall deliver to the Enterprises copies of all Governmental Approvals and Permits for which it is responsible pursuant to Section 8.4.2.a (and copies of any modifications, renewals, extensions and waivers to or of any thereof) promptly following receipt by Developer of the same.

c. Developer’s obligations under Section 8.4.2.a shall not be limited by any Law placing responsibility for the same upon either or both of the Enterprises, CDOT or another Person.

8.4.3. Submissions to the FHWA and involving Department Provided Approvals; process for obtaining and modifying Governmental Approvals

a. Prior to submitting an application for any Governmental Approval or Permit (or for any proposed termination, modification, renewal, extension or waiver of a Governmental Approval or Permit) or (with respect to FHWA only) any other Deliverable to:
   i. the FHWA; or
   ii. any Person with respect to all such submissions that involve a Department Provided Approval,

   Developer shall first submit the same, together with any supporting environmental or other studies, analyses and data, to the Enterprises for Approval. Developer shall submit each other application for a Governmental Approval or Permit (or for any proposed termination, modification, renewal, extension or waiver of a Governmental Approval or
Permit) for, except as otherwise provided in this Agreement, Information to the Enterprises in accordance with Section 5(a) of Schedule 9 (Submittals).

b. As between the Enterprises and Developer, Developer shall perform all necessary actions and shall bear all risk of delay and/or all risk of cost and expense, in either case, associated with Governmental Approvals and with Permits, including:

i. without limiting the Enterprises’, CDOT’s and FHWA’s rights to independently evaluate all environmental and other studies and documents and fulfill the other responsibilities assigned to them by 23 CFR Part 771, conducting all necessary environmental or other studies and preparing all necessary environmental or other documents in compliance with Law (provided that the Enterprises may, in their discretion, elect to conduct any such studies or to prepare any such documents at the Enterprises’ cost and expense);

ii. obtaining and complying with all necessary new Governmental Approvals and Permits, or all necessary modifications, renewals and extensions of existing Governmental Approvals and Permits, or of pending applications for Governmental Approvals and Permits; and

iii. all risk and cost of litigation,

where such risk of delay and/or risk of cost and expense:

iv. either:

A. relates to:

   I. a Governmental Approval that is not a Department Provided Approval; or

   II. a Permit; or

B. results from:

   I. Developer’s use of the Reference Design or the I-70 Cover Plans (except to the extent that any such risk of delay and/or cost and expense relates solely to a Department Provided Approval);

   II. any differences between Developer’s design and the Reference Design or the I-70 Cover Plans;

   III. differences between the design, construction, operations and/or maintenance means and methods Developer chooses for any portion of the Project and those set out, referred to or contemplated in any Governmental Approval (including, for certainty, any Department Provided Approval) or Permit, or in the application for any Governmental Approval or Permit;

   IV. the incorporation of any ATC (as defined in the ITP) into this Agreement;

   V. the acquisition of any Additional ROW Parcel, Developer-risk Permit Area or Temporary Property Rights; and/or

   VI. any breach of Law, Governmental Approval, Permit or this Agreement, or fraud, willful misconduct, criminal conduct, recklessness, bad faith or negligence by or of any Developer-Related Entity; and

v. does not otherwise result from the occurrence of any Supervening Event (including where such Supervening Event results in a requirement to obtain any new or amend any existing Governmental Approval or Permit) or to the extent otherwise agreed in any Change Order.
c. If Developer is unable to obtain, modify, renew or extend any Governmental Approval or Permit for which it is responsible pursuant to Section 8.4.2.a, then, without limiting its rights under this Agreement arising as a result of the occurrence of any Developer Change documented in a Change Order or any Supervening Event (including as a result of the Enterprises’ breach of their obligations under Section 8.4.4.a, and including any such rights that relate to obtaining any new or amending any existing Governmental Approval or Permit as a result of any such Change Order or Supervening Event), Developer shall promptly notify the Enterprises and proceed or continue to design, build, operate and maintain the Project according to the requirements of this Agreement and the design, construction, operations and maintenance means and methods set out, referred to or contemplated in the Department Provided Approvals, and any other Governmental Approvals and any Permits that have been or are subsequently obtained.

d. No such inability of Developer to obtain, modify, renew or extend any Governmental Approval or Permit for which it is responsible pursuant to Section 8.4.2.a shall itself constitute a Supervening Event or other legal or contractual basis for any claim or relief hereunder by or for Developer to the extent that the cause of, or reason for, such inability does not otherwise constitute a Supervening Event or such other basis for any claim or relief.

8.4.4. Enterprise assistance in obtaining and modifying Governmental Approvals and Permits

a. The Enterprises shall, as and when expressly provided in this Agreement and otherwise at the reasonable request of Developer, where necessary to obtain, modify, renew or extend any Governmental Approval or Permit for which Developer is otherwise responsible pursuant to Section 8.4.2.a, use Reasonable Efforts to:
   
i. execute (or, as applicable, facilitate execution by CDOT of) such documents as can only be executed by the Enterprises or, as applicable, CDOT;
   
ii. make such applications or recordings (or, as applicable, facilitate such applications or recordings by CDOT), either in its own name or jointly with Developer, as can only be made by the Enterprises or, as applicable, CDOT, or in joint names of Developer and the Enterprises or, as applicable, CDOT; and
   
iii. attend meetings and cooperate with any relevant Governmental Authority, Utility Owner or Railroad as reasonably requested by Developer (or, as applicable, facilitate such attendance and cooperation by CDOT), in each case within a reasonable period of time after being requested to do so by Developer.

b. Subject to any pre-agreed scope of Work and budget and to any rights of Developer that arise as a result of the occurrence of any Developer Change documented in a Change Order or Supervening Event, Developer shall fully reimburse the Enterprises for all reasonable costs and expenses they and, as applicable, CDOT, incur as a result of the Enterprises complying with their obligations pursuant to Section 8.4.4.a, provided that, except to the extent provided pursuant to Section 8.4.3.b, Developer shall not be responsible for the payment of the Enterprises’ and, as applicable, CDOT’s costs and expenses incurred in obtaining, modifying, renewing or extending any Department Provided Approval.

8.5. Third Party Agreements

8.5.1. Compliance with Third Party Agreements and performance of related Work

Developer shall not, and shall ensure that each of its Subcontractors and each of their respective Subcontractors shall not, take any action (or refrain from taking any action) in a manner that is calculated or intended to directly or indirectly prejudice or frustrate the performance by any party to a Third Party Agreement of its obligations thereunder.
8.5.2. Designation of third party agreements

The Enterprises may, in their discretion and at any time, by notice to Developer require Developer to comply with the terms (to the extent specified in such notice) of:

a. an agreement (a copy of which shall be attached to such notice) that is not prior to such notice a Third Party Agreement and to which either or both of the Enterprises and/or CDOT is a party with:
   i. any Governmental Authority, Utility Owner or Railroad; or
   ii. any property owner or other Person:
      A. having jurisdiction over any aspect of the Project or Work; or
      B. having any property interest affected by the Project or the Work; and

b. any amendment or modification of an existing Third Party Agreement (a copy of which amendment or modification shall be attached to such notice),

and, following delivery of any such notice, such agreement, amendment or modification shall become a Third Party Agreement or amend or modify the existing Third Party Agreement, as the case may be, for purposes of this Agreement.

8.5.3. Restrictions on new third party agreements

Unless expressly Approved by the Enterprises, Developer shall not enter into, and shall ensure that no other Developer-Related Entity enters into, any agreement with any Person referred to in Section 8.5.2.a.i or 8.5.2.a.ii, that in any way purports to, or reasonably could be interpreted to, obligate the Enterprises, CDOT or the State. For certainty, this Section 8.5.3 shall not apply to any Sprint Reimbursement Agreement, to which Section 4.6.1.b of Schedule 10 (Design and Construction Requirements) shall apply.

8.5.4. Sharing of Recovery

Subject to Section 15.7.3, if either Party shall, by exercising any right under any URA, any Utility Work Order, any RRA or the Cover Maintenance Agreement, or by asserting any Claim against any Utility Owner, Railroad or Cover Top Maintainer in connection with the same, obtains payment in respect of Losses incurred by the other Party which (in aggregate together with other amounts obtained) are in excess of its own Losses (which, for such purposes, shall be deemed to include any reasonable costs and expenses incurred by it in obtaining such payment), then the recovering Party shall promptly release such excess payment to the other Party up to an amount equal to such other Party’s Losses, provided that (without prejudice to Section 15.7.3.a) this Section 8.5.4 shall not be interpreted as meaning that any Party shall be obliged to exercise any such right or assert any such Claim.

8.5.5. Enforcement of RRAs

The Enterprises shall, upon the reasonable request of Developer, use Reasonable Efforts to enforce their rights under each RRA against the Railroad that is party to such agreement.

8.6. Compliance with Project Standards

8.6.1. Monitoring of Project Standards

a. Developer shall, and shall ensure that each of its Subcontractors and each of their respective Subcontractors shall, monitor and familiarize themselves with changes or additions to, or replacements of, the Project Standards (in the case of Subcontractors, to the extent applicable to their portion of the Work).

b. Developer shall notify the Enterprises of any change or addition to, or replacement of, any Project Standard promptly after it becomes aware of such change, addition or replacement.
8.6.2. Changes, additions or replacements to or of Project Standards

a. Subject to Section 8.6.2.b, Developer shall not be required to comply with any change or addition to, or replacement of, a Project Standard, except pursuant to an Enterprise Change documented in a Change Order or a Directive Letter.

b. If and to the extent that compliance by Developer with any change or addition to, or replacement of, a Project Standard is required for Developer’s continued compliance with Law (the burden of establishing which shall be on Developer), but without limiting Developer’s obligation to at all times comply with Law, the Enterprises shall be required to issue an Enterprise Change Notice to require compliance by Developer with such change or addition to, or replacement of, a Project Standard.

c. Notwithstanding any Enterprise Change documented in a Change Order or a Directive Letter in relation to any change or addition to, or replacement of, an O&M Standard, Developer shall only be entitled to compensation for Change in Costs resulting from any such Enterprise Change if and to the extent such Enterprise Change:

i. is initiated to conform the O&M Standards with a Discriminatory Change in Law or a Qualifying Change in Law;

ii. requires Developer to incur any expenditure that would be treated as a capital expenditure in accordance with GAAP (in which event, for certainty, Developer shall be entitled to compensation for any resulting Change in Costs and not only any resulting capital expenditure); or

iii. is materially more onerous as applied to the Project, Developer or any Principal Subcontractor than the application thereof to (A) Similar Projects of either Enterprise or CDOT or (B) the principal contractors responsible for such projects, provided that, in each case, such Enterprise Change does not arise as a result of or is not made in response to any breach of Law, Governmental Approval, Permit or this Agreement, or fraud, willful misconduct, criminal conduct, recklessness, bad faith or negligence by or of any Developer-Related Entity.

9. DEVELOPER’S CONSTRUCTION PERIOD OBLIGATIONS

9.1. Obligation to Perform Construction Work; Restrictions on Construction Work

a. Developer shall perform:

i. the NTP1 Work on and from (but (other than, for certainty, those preparatory activities referenced in paragraphs b. and c. of the definition of NTP1 Work in Part A of Annex A (Definitions and Abbreviations)) not prior to) the date of issuance of NTP1;

ii. subject to Section 9.1.a.i, all the Construction Work and all the O&M Work During Construction (other than the performance of Snow and Ice Control Services) on and from (but not prior to) the date of issuance of NTP2; and

iii. Snow and Ice Control Services, on and from the Snow and Ice Control Commencement Date (subject to any obligation of Developer to perform such services prior to such date pursuant to Section 2.2.2.b of Schedule 11 (Operations and Maintenance Requirements)), pursuant to and in compliance with the terms, conditions and requirements of this Agreement.

b. Unless expressly Approved by the Enterprises, Developer shall not perform any Construction Work (other than Utility Work) consisting of activities that disturb, alter or otherwise physically impact any part of the Right-of-Way (or of any Additional Right-of-Way) that is outside the ROD Construction Limits.
9.2. Schedule Management, Completion and Commissioning

9.2.1. Milestone Completion, Substantial Completion and Final Acceptance

a. Subject to Section 9.2.2, Developer shall achieve:
   i. Substantial Completion by the Baseline Substantial Completion Date (and, by doing so, achieve Milestone Completion of each Payment Milestone); and
   ii. Final Acceptance by the Final Acceptance Deadline Date.

b. The Baseline Substantial Completion Date and the Final Acceptance Deadline Date shall only be extended pursuant to this Agreement as Agreed or Determined either pursuant to a Change or following the occurrence of a Relief Event or a Compensation Event.

9.2.2. Project Schedule

Notwithstanding anything to the contrary in this Agreement, including Section 9.2.1.a, and without prejudice to the rights of the Enterprises:

a. that arise as a result of the Noncompliance Event specified in item 2.32 in Table 6A.2; or
b. that arise as a result of the occurrence of Developer Default number (5) in Section 32.1.1, Developer’s failure to comply with the Project Schedule (including its failure to comply with Sections 9.2.1.a.i or 9.2.1.a.ii) in carrying out the Construction Work shall not constitute a breach of this Agreement or a Developer Default.

9.2.3. Float

a. Float shall be considered as a jointly owned, expiring resource available to the Project for the benefit of all Parties (and not for the exclusive benefit of either the Enterprises or Developer), available to each of them as needed to absorb delays caused by Supervening Events or other events to achieve interim completion dates and deadlines set out in the Project Schedule and, ultimately, to achieve Milestone Completion of each Payment Milestone by the relevant Milestone Completion Target Date, Substantial Completion by the Baseline Substantial Completion Date and Final Acceptance by the Final Acceptance Deadline Date.

b. Notwithstanding Section 9.2.3.a, Float shall not be available to the Enterprises to absorb delays caused by the occurrence of a Compensation Event as described in paragraphs a.i. (but only with respect to a material breach of this Agreement by the Enterprises), a.ii., g., i.i., l., m. or o. of the definition thereof in Part A of Annex A (Definitions and Abbreviations).

9.3. Payment and Performance Security

9.3.1. Obligation to obtain and maintain Contractor Bonds

a. Developer shall deliver to the Enterprises Contractor Bonds with respect to:
   i. collectively (or, to the extent Accepted pursuant to Section 9.3.3, separately), the Construction Work and the O&M Work During Construction; and
   ii. the O&M Work After Construction,
   in each case as and when required pursuant to Schedule 3 (Commencement and Completion Mechanics).

b. Thereafter, Developer shall ensure that each such Contractor Bond shall remain in full force and effect, and in full compliance with the definition of Contractor Bond set out in Part A of Annex A (Definitions and Abbreviations), provided that, subject to Sections 9.3.1.c and 9.3.1.d, the terms of the Principal Subcontractor Direct Agreements and the Enterprises’ rights to draw on any Contractor Bond in accordance with its terms
and the terms of this Agreement, promptly following the earlier of the Termination Date and:

i. the Final Acceptance Date, the Enterprises shall release or return to Developer each Contractor Bond delivered pursuant to Section 9.3.1.a.i; and

ii. the Expiry Date, the Enterprises shall release or return to Developer each Contractor Bond delivered pursuant to Section 9.3.1.a.ii.

c. Notwithstanding Section 9.3.1.a, Developer acknowledges and agrees that, to the extent required by Law in connection with Work to be performed during the Term, or as otherwise required in connection with a Change Order or Directive Letter, Developer shall obtain and maintain additional payment and/or performance security in such amounts, for such periods of time and in such form (if any) as required by Law or in connection with a Change. For purposes of this Agreement, references to a Contractor Bond shall be deemed to include any such additional security and any such additional security shall, subject to compliance with Law or the terms of any Change Order or Directive Letter, be provided by and maintained with an Eligible Surety or otherwise pursuant to Section 9.3.3. The Enterprises shall release or return to Developer any such additional security obtained and maintained pursuant to this Section 9.3.1.c at the end of the relevant period during which Developer is obligated to obtain and maintain the same.

d. Developer shall be entitled to replace any Contractor Bond delivered pursuant to Section 9.3.1.a or otherwise obtained and maintained pursuant to Section 9.3.1.c. Promptly following such replacement, and subject to Developer’s continued compliance with Section 9.3.1.a or Section 9.3.1.c, as applicable, the Enterprises shall release or return to Developer such replaced Contractor Bond.

9.3.2. Methods of providing Contractor Bonds

Subject to Section 9.3.3, Developer may, in its discretion (but subject always to compliance with any Law referred to in Section 9.3.1.c), satisfy its obligations to provide Contractor Bonds under Sections 9.3.1.a and 9.3.1.c by:

a. procuring Contractor Bonds from an Eligible Surety which provide security for:

i. Developer’s performance obligations to the Enterprises under this Agreement; and

ii. Developer’s payment obligations to Subcontractors and laborers,
in which case the Enterprises shall be the primary obligees, and the Lenders or their Collateral Agent may be additional obligees, under such Contractor Bonds; or

b. procuring such Contractor Bonds from its Principal Subcontractors so that such bonds as provided by an Eligible Surety are security for:

i. such Principal Subcontractor’s performance obligations to Developer under its Subcontract; and

ii. such Principal Subcontractor’s payment obligations to lower tier Subcontractors and to laborers,
in which case Developer shall be the primary obligee under such Contractor Bonds and the Enterprises shall be, and the Lenders or their Collateral Agent may be, additional obligees.

9.3.3. Alternative Forms of Security

Developer may satisfy its obligations under Section 9.3.1.a in a manner that provides security at least equivalent (including with respect to the amount thereof) to the security required to be provided pursuant to either Section 9.3.2.a or Section 9.3.2.b by delivering to the Enterprises for their Acceptance:
a. alternative form(s) of payment and/or performance surety bond(s) that are not in substantially the form set out in Schedule 20 (Forms of Contractor Bonds);

b. one or more irrevocable on demand letters of credit from Eligible Financial Institutions which, with respect to satisfaction of Developer's obligations under Section 9.3.1.a.i, may only be in relation to the O&M Work During Construction (and not, for certainty, the Construction Work); and

c. one or more parent company guarantees with respect to satisfaction of Developer's obligations under Section 9.3.1.a.ii only (but not, for certainty, Section 9.3.1.a.i),

provided that in each case Developer shall deliver any such proposed alternative form(s) of security to the Enterprises for their Acceptance at least 30 Calendar Days prior to the date on which Developer is required, or otherwise proposes, to have such security in full force and effect for purposes of compliance with its obligations under this Agreement.

9.3.4. No Release

Any demand made by an obligee under any Contractor Bond shall not serve to waive, or release Developer from, any of Developer's obligations under this Agreement.

9.4. Warranties and Liability for Defects

9.4.1. Warranties

Developer warrants that each Warranted Element:

a. shall be designed, constructed and completed in a manner that:
   i. complies with Good Industry Practice; and
   ii. meets or exceeds all other applicable requirements of this Agreement;

b. shall, except as otherwise expressly permitted under this Agreement, be comprised of new materials; and

c. shall be of good quality and free from faults and Defects,

(a, b and c, together with the Additional Warranties, the “Warranties”). For certainty, all provisions of this Section 9.4 shall apply to the Additional Warranties, except to the extent expressly specified otherwise.

9.4.2. Warranty Beneficiaries

a. The Warranties (including, for certainty, the Additional Warranties) are for the express benefit of the Enterprises, CDOT and, with respect to those Warrantied Elements to be maintained by each of them, the City of Denver and Denver Public Schools (all such beneficiaries, together, the “Warranty Beneficiaries”). Developer acknowledges and agrees that the Enterprises shall have the right, on behalf of any Warranty Beneficiary, to enforce the Warranties relating to such Warranty Beneficiary’s Warrantied Elements and Developer’s obligations under Sections 9.4.1 to 9.4.5 as such obligations apply to such Warrantied Elements. The Enterprises shall coordinate the exercise of such right of enforcement with each Warranty Beneficiary, with a view to the Enterprises being the primary party with which Developer is required to interface in connection with any such enforcement.

b. The rights and remedies of the Enterprises or any Warranty Beneficiary arising with respect to any breach of the Warranties shall not limit Developer’s liability or responsibility, or the Enterprises’ rights and remedies, under this Agreement or Law with respect to the Work, including with respect to any Defect, Nonconforming Work, Noncompliance Event, Non-Permitted Closure, breach, fraud, willful misconduct, criminal conduct, recklessness, bad faith or negligence.
9.4.3. Warranty Period

a. Subject to Section 9.4.3.b:
   
i. the Warranties (other than the Additional Warranties) shall remain in effect until:
   
   A. with respect to Warranties for the benefit of:
      
      I. CDOT or the Enterprises (and no other Person); or
      
      II. the City of Denver (excluding Warranties with respect to that portion of the Cover that is within the scope of the Cover Top O&M Work),

      the first anniversary of the Final Acceptance Date; and

   B. with respect to Warranties for the benefit of:
      
      I. Denver Public Schools; or
      
      II. the City of Denver with respect to that portion of the Cover that is within the scope of the Cover Top O&M Work,

      the second anniversary of the Final Acceptance Date; and

   ii. the Additional Warranties shall each remain in effect until the expiry date of the applicable warranty period specified in Schedule 10 (Design and Construction Requirements),

   in the case of each Warranty, the "Warranty Period".

b. Following Approval pursuant to Section 9.4.4.a by the Enterprises of any work performed to remedy a Defect or any other breach of the Warranties in relation to a Warranted Element, the Warranties as to each affected part of a Warranted Element shall automatically extend beyond the original Warranty Period to the extent less than one year remains of such original period, such that each affected part of such Warranted Element shall have a one-year extended Warranty Period ending on the first anniversary of the completion of such remedial work. For certainty, the extended Warranty Period in relation to any part of the Warranted Elements cannot exceed the first anniversary of the end of the original Warranty Period.

9.4.4. Developer obligation to remedy Warrantied Elements

a. Developer shall (at its own risk, cost and expense, including the risk, cost and expense of associated design work) promptly (and, to the extent applicable, no later than any required date of completion specified in any Warranty Defects List) investigate, repair, replace or otherwise correct and fully remedy any Defect in the Warranted Elements or any other breach of the Warranties notified to it by the Enterprises prior to the expiry of the applicable Warranty Period (including, for certainty, as such period may be extended pursuant to Section 9.4.3). The Enterprises shall Approve the completion of all work with respect to any such Defect in the Warranted Elements or any other such breach of the Warranties on the basis that the relevant Construction Work completed as a result of the correction and remedy of such Defect or breach is in full compliance with the applicable requirements of this Agreement. The Enterprises shall be entitled to take action to investigate, repair, replace or otherwise correct and fully remedy any Defect in the Warranted Elements and any other breach of the Warranties pursuant to Section 23.4.1.c if Developer fails to comply with its obligations pursuant to this Section 9.4.4.a.

b. Developer acknowledges and agrees that the Enterprises, CDOT and each Warranty Beneficiary may perform work on any Warranted Element during the Warranty Period, to the extent they or it otherwise have or has rights to do so, without voiding any Warranty, provided that Developer:
i. shall not be liable for any Defect or any other breach of the Warranties caused, or to the extent exacerbated by, such work; and
ii. does not hereby waive any defenses, rights, claims or remedies to which it may otherwise be entitled as a result of the performance of such work.

9.4.5. Warranty Defects List

a. At any time prior to the expiry of the applicable Warranty Period (including, for certainty, as extended pursuant to Section 9.4.3) the Enterprises and, with respect to any Warrantied Element maintained by it, each Warranty Beneficiary shall, in their discretion, have the right to access and conduct an inspection of each Warrantied Element. Following such inspection, the Enterprises, in consultation with any relevant Warranty Beneficiary, shall have the right, but not the obligation, to identify Defects and breaches of the Warranties in relation to the relevant Warrantied Element and to prepare and deliver to Developer a list of such Defects and breaches (the “Warranty Defects List”) and a required date of completion of the required Warranty work, provided that any such list shall be delivered to Developer prior to the expiry of the applicable Warranty Period.

b. Developer shall notify the Enterprises within 10 Working Days of receipt of any Warranty Defects List whether it agrees with or disputes the contents of such Warranty Defects List. If Developer fails to provide such notice within such period, then Developer shall be deemed to agree with the contents and requirements of such Warranty Defects List.

c. Developer shall reimburse the Enterprises (and, at the Enterprises’ direction, any applicable Warranty Beneficiary) for all reasonable costs and expenses incurred in conducting an inspection pursuant to Section 9.4.4.a, this Section 9.4.5, or otherwise pursuant to this Agreement, that identifies a Defect in the Warrantied Elements or any other breach of the Warranties.

9.4.6. Standard Warranties

In addition to the Warranties, Developer shall in accordance with Good Industry Practice use Reasonable Efforts to procure for itself customary supplier, manufacturer and other third party warranties, which warranties shall, to the extent commercially available, be fully transferrable and assignable to the Enterprises (and, to the extent that any such warranty is in respect of a Warrantied Element, the relevant Warranty Beneficiary) upon the Expiry Date or, if earlier, the Termination Date (or, in the case of any such warranty in respect of a Warrantied Element, if earlier, upon expiry of the applicable Warranty Period).

9.5. Assignment of Certain Causes of Action

Developer agrees to assign to the Enterprises all rights, title, and interest in and to all causes of action Developer may have under Section 4 of the Clayton Act (15 U.S.C. § 15) or under comparable State Law, arising from purchases of goods, services or materials pursuant to this Agreement. This assignment shall be made and become effective automatically upon payment of the Substantial Completion Payment, without further acknowledgment by the Parties.

10. DEVELOPER’S OPERATING PERIOD OBLIGATIONS

Developer shall perform the O&M Work After Construction from and after the Substantial Completion Date pursuant to and in compliance with the terms, conditions and requirements of this Agreement.
11. **PAYMENTS IN CONSIDERATION OF WORK PERFORMED AND PAYMENT ASSURANCES**

11.1. **Payments in Consideration of Work Performed**

11.1.1. **Milestone Payments**

The Enterprises shall pay the Milestone Payments to Developer in accordance with Part 1 of Schedule 4 (Payments) and Schedule 5 (Milestone Payments).

11.1.2. **Performance Payments**

The Enterprises shall pay the Performance Payments to Developer in accordance with Part 2 of Schedule 4 (Payments) and Schedule 6 (Performance Mechanism).

11.2. **Enterprise Credit Related Covenants**

11.2.1. **Maintenance of Bridge Surcharges**

BE agrees that it shall not reduce any Bridge Surcharges charged during the Term below the maximum rates authorized by C.R.S. § 43-4-805, as in effect as of the Setting Date.

11.2.2. **Maintenance of Enterprise status**

Neither Enterprise shall take any action that would cause it to fail (or refrain from taking any action that would prevent it from failing) to qualify as a government-owned business within CDOT or an enterprise under Article X, Section 20 of the State Constitution unless such failure will not adversely affect the interests of Developer or any Lender.

11.2.3. **IAA enforcement, amendments and waivers**

a. The Enterprises agree that they shall not, without Developer’s prior written consent (such consent not to be unreasonably withheld), amend or waive any of the following provisions of the IAA:

i. Section III., subsections 2, 4-7, 9, and 11-12;

ii. Section IV., subsections 2-5, 6 (excluding d-f) and 8;

iii. Section V., subsections 5-8;

iv. Section VI.;

v. Section VII.;

vi. Section VIII., subsections 1-4;

vii. Section IX., subsections 1-3, 7, 12, and 14; and

viii. Exhibits A and B,

except that such consent shall not be required in respect of any such amendment or waiver that will not adversely affect the interests of Developer or any Lender (a copy of which amendment or waiver the Enterprises shall in each case deliver to Developer promptly following execution thereof).

b. The Enterprises shall at all times enforce their rights under the provisions of the IAA specified in Section 11.2.3.a as necessary to ensure CDOT’s compliance with the terms of such provisions, unless any failure of the Enterprises to do so will not adversely affect the interests of Developer or any Lender.
12. **COOPERATION AND COORDINATION WITH RELATED TRANSPORTATION FACILITIES, ON LIMITED O&M WORK SEGMENTS AND WITH OTHER DEPARTMENT PROJECTS**

12.1. **Duty to Cooperate and Coordinate**

Without limiting its other obligations under this Agreement, Developer shall:

a. cooperate and coordinate with the Enterprises, CDOT and any relevant third party (including the City of Denver in relation to the Denver Planned Projects) as reasonably requested by the Enterprises, with regard to the design, construction, operation and/or maintenance of, respectively, the Project (including with regard to the Limited O&M Work Segments) and the Related Transportation Facilities; and

b. otherwise use Reasonable Efforts in order to minimize any adverse impact:
   
   i. on the Work or the operation of the Project as a result of the design, construction, operation and/or maintenance of any Related Transportation Facility and the Limited O&M Work Segments; and
   
   ii. on (A) any Related Transportation Facility, (B) the Limited O&M Work Segments and (C) any Other Department Project, as a result of the Work.

12.2. **Compatibility and Integration with Related Transportation Facilities**

Developer shall:

a. as part of the Construction Work, locate, configure, design and construct the endpoints, interfaces, interchanges, ramps, intersections, crossings, entrances and exits of the Project so that the Project will be compatible and integrated with the location, configuration, design, operation and maintenance of, and provide a smooth, safe and orderly transition of traffic to and from, each Related Transportation Facility that:
   
   i. exists on the Setting Date; or
   
   ii. is a CCD Identified Future Improvement,

   in each case in accordance with Good Industry Practice and to the extent possible in light of the Known or Knowable configuration, design and use of such facilities;

b. as part of the O&M Work, and without prejudice to Developer’s right arising as a result of the occurrence of any Compensation Event as described in paragraph n. of the definition thereof in Part A of Annex A (Definitions and Abbreviations), provide for, facilitate and accommodate such compatibility, integration and transition with, to and from Related Transportation Facilities in accordance with Good Industry Practice; and

c. not take any action (or refrain from taking any action) in a manner that is calculated or intended to directly or indirectly prejudice or frustrate the construction, operation and maintenance of any Related Transportation Facility.

12.3. **Procurement of Other Department Projects**

12.3.1. In response to the Enterprises’ written request, Developer shall inform the Enterprises within 20 Working Days of receipt of such request of all material facts or circumstances of which it is aware that might reasonably be expected to affect the procurement, design, construction, operation or maintenance of any Other Department Project, or any other Related Transportation Facility, in the light of the details concerning such project or facility that the Enterprises have provided to Developer or that are otherwise known by Developer.

12.3.2. If the Enterprises are preparing to issue or have issued any Other Department Project Procurement Materials or are otherwise seeking offers from any Person or negotiating with any Person in respect of any proposed Other Department Project, then Developer shall use Reasonable Efforts as the Enterprises may reasonably request to assist such procurement, including providing access to the Enterprises, CDOT and each of their respective designees to:
a. each part of the Site for the purpose of surveying, inspecting or investigating the relevant parts thereof (provided that the Enterprises shall, and shall require that other parties requiring access at the Enterprises’ request shall, at all times comply with all relevant site rules and safety regulations in relation to the Site); and

b. Project Records, but only to the extent that the Enterprises may otherwise require Developer to deliver or to procure the delivery of such records under the terms of this Agreement,

in each case solely and to the extent necessary to procure and award the relevant Other Department Project.

12.3.3. If the Enterprises or CDOT award or otherwise undertake any Other Department Project other than with Developer, then Developer shall:

a. use Reasonable Efforts to cooperate and coordinate with the Enterprises, CDOT and each of their respective designees engaged in such Other Department Project as required pursuant to Section 12.1;

b. not take any action (or refrain from taking any action) in a manner that is calculated or intended to directly or indirectly prejudice or frustrate such Other Department Project; and

c. at reasonable times and upon reasonable notice, allow access to the Enterprises, CDOT and each of their respective designees to each part of the Site as is reasonably necessary to facilitate the carrying out of and interface with the Other Department Project (provided that the Enterprises shall, and shall require that CDOT and all other parties requiring access shall, at all times comply with all relevant site rules and safety regulations in relation to the Site),

provided that Developer shall not be required to take (or refrain from taking) any action (including allowing access pursuant to Section 12.3.3.c) that would reasonably be anticipated to adversely affect the Work or the carrying out of Developer’s other obligations under this Agreement.

12.4. Enterprises’ Assistance

The Enterprises shall:

a. at reasonable times and upon reasonable notice, and subject to CORA, provide to Developer reasonable access to plans, surveys, drawings, specifications, reports and other documents and information in the possession of, or otherwise accessible by, the Enterprises pertaining to Related Transportation Facilities and Other Department Projects, including the use of Reasonable Efforts to provide Developer with copies of the same; and

b. at Developer’s request, use Reasonable Efforts to provide assistance to Developer in fulfilling its obligations under Sections 12.1 through 12.3, provided that in no event shall the Enterprises be required to bring any legal action or proceeding against any third party.

12.5. Traffic Management

12.5.1. Developer acknowledges that the Enterprises, CDOT, the City of Denver, Emergency Services and other Governmental Authorities with traffic management authority under Law, shall have, without obligation or liability to Developer, the right to conduct traffic management activities pursuant to standard practices and procedures in effect from time to time:

a. on the Right-of-Way, any Additional Right-of-Way and any other part of the Site that is open for use by the traveling public;

b. in connection with the conduct of operations and maintenance activities by CDOT in relation to the Limited O&M Work Segments;

c. in connection with any Other Department Project; and
d. on any Related Transportation Facility,

which activities shall not, for certainty, themselves constitute a Supervening Event.

12.5.2. Except in the case of an Emergency, the Enterprises shall use Reasonable Efforts to notify Developer in advance of any Person conducting any traffic management activities as permitted by Section 12.5.1 to the extent that the Enterprises are aware of such activities, provided that no such notice shall be required as to activities of which Developer is known by the Enterprises to be aware (whether due to prior notice, the terms of this Agreement or otherwise). To the extent that any such traffic management activities prevent Developer from accessing locations for the purpose of curing any Category 1 Defect or Category 2 Defect, the Defect Remedy Period applicable to the relevant Category 1 Defect or Category 2 Defect shall be extended by the period of time that such access is prevented.

13. **HANDBACK**

Developer shall prepare to hand back the Project, and at the Expiry Date hand back the Project, in accordance with its obligations under Schedule 12 (Handback Requirements).
PART D: CHANGES AND SUPERVENING EVENTS

14. CHANGE PROCEDURE

14.1. Right to Initiate Changes

Subject to the limitations set out in Schedule 24 (Change Procedure), either Party may (and, with respect to the Enterprises, pursuant to Section 8.6.2.b shall) propose a Change by submitting a notice to the other Party. Such a notice:

a. submitted by the Enterprises to Developer (an “Enterprise Change Notice”) shall be processed pursuant to Sections 1 and 3 of Schedule 24 (Change Procedure); and

b. submitted by Developer to the Enterprises (a “Developer Change Notice”) shall be processed pursuant to Sections 2 and 3 of Schedule 24 (Change Procedure).

14.2. Directive Letters

Pursuant to Section 1.4 of Schedule 24 (Change Procedure), the Enterprises may deliver a Directive Letter to Developer at any time after the Enterprises’ submission of a related Enterprise Change Notice to Developer.

15. SUPERVENING EVENTS

15.1. Submission of Supervening Event Notices and Submissions

15.1.1. Developer shall (and shall ensure that each of its Principal Subcontractors shall) develop and maintain procedures pursuant to Good Industry Practice to anticipate, identify and notify the Enterprises (or, in the case of the Principal Subcontracts, Developer) of the occurrence of Supervening Events, provided that:

a. such obligation, and Developer’s obligations under Sections 15.1.2 through 15.1.5, shall not apply to any Enterprise Change initiated pursuant to a Change Order; and

b. Section 15.1.2.a shall not apply to any Enterprise Change initiated pursuant to a Directive Letter.

15.1.2. If Developer becomes aware or determines that a Supervening Event has occurred (regardless of whether such event has concluded or is continuing, and without limiting any other obligation Developer may have to notify the Enterprises or any other Person of, or in relation to, such event pursuant to this Agreement, Law, any Permit or Governmental Approval or otherwise) or, with respect to Section 15.1.2.a only, is likely to occur, then, subject to Section 15.1.4, it shall:

a. promptly, and in any event no later than 10 Working Days, after becoming aware of such occurrence or making a determination that such event is likely to occur submit to the Enterprises a notice in the form provided in Part A of Schedule 21 (Forms of Supervening Event Notifications and Submissions) (a “Supervening Event Notice”); and

b. thereafter, and to the extent a Supervening Event has occurred:

i. promptly, and in any event no later than 20 Working Days, after becoming aware of such occurrence submit to the Enterprises a submission in the form provided in Part B of Schedule 21 (Forms of Supervening Event Notifications and Submissions) (a “Preliminary Supervening Event Submission”); and

ii. promptly after becoming aware of such occurrence, and in any event no later than the later of (A) 80 Working Days after becoming aware thereof and (B) 40 Working Days after the conclusion of such Supervening Event, submit to the Enterprises a submission in the form provided in Part B of Schedule 21 (Forms of Supervening Event Notifications and Submissions) (a “Detailed Supervening Event Submission”),

provided that, for purposes of determining when Developer is required to submit any notice or submission under this Section 15.1.2, Developer shall be deemed to be aware of any
Supervening Event on the date of its occurrence to the extent Developer failed to comply with its obligations under Section 15.1.1.

15.1.3. The Enterprises shall respond promptly to any Supervening Event Submission submitted by Developer pursuant to Section 15.1.2.b and, as applicable, to any notice or submission in relation thereto subsequently submitted by Developer pursuant to Section 15.1.5, in each case for the purpose of attempting, together with Developer, to reach an agreement pursuant to Section 15.3.2.

15.1.4. Developer may satisfy its obligation under Section 15.1.2.b.i by instead submitting a Detailed Supervening Event Submission promptly and in any event no later than the expiry of the applicable period that would have otherwise applied under Section 15.1.2.b.i.

15.1.5. After Developer submits any notice or submission to the Enterprises pursuant to Section 15.1.2 or 15.1.4, Developer shall, with respect to any Supervening Event that has occurred, promptly:

a. notify the Enterprises if at any time it becomes aware of any further material information relating to the Supervening Event, to the extent that such information is new or renders information previously submitted materially inaccurate or misleading; and

b. following the Enterprises' reasonable request, or as required pursuant to the terms of any written agreement previously made pursuant to Section 15.3.2 (including with respect to a continuing Supervening Event), submit to the Enterprises additional information related to the relevant Supervening Event.

15.2. Limitations on Supervening Event Submissions

15.2.1. Failure to provide timely notice

If, following the occurrence of a Supervening Event, Developer fails to comply with its obligations under any of Sections 15.1.2.a, 15.1.2.b and 15.1.5 within the applicable time period (in each case measured from the date on which Developer first became aware (or, in accordance with the proviso to Section 15.1.2, is deemed to have become aware) or determined that a Supervening Event had occurred) specified in such Sections, then Developer shall be deemed to have irrevocably and forever waived and released:

a. the portion of any claim or right with respect to such event (including the right to take into account for calculation purposes, pursuant to (i) Section 15.7 or (ii) the definition of Appendix B Parcel Costs in Part A of Annex A (Definitions and Abbreviations), the amount of certain Losses whether or not the Enterprises would owe Developer compensation in respect of any such Loss as a result of such calculation) that would relate to adverse effects accruing, persisting or increasing after the expiry of the applicable period or otherwise due to such failure and until Developer complies with the relevant obligation; and

b. any and all claim or right with respect to such event (including the right to take into account for calculation purposes, pursuant to (i) Section 15.7 or (ii) the definition of Appendix B Parcel Costs in Part A of Annex A (Definitions and Abbreviations), the amount of certain Losses whether or not the Enterprises would owe Developer compensation in respect of any such Loss as a result of such calculation) if Developer has failed to:

i. submit a Supervening Event Notice on or before the 30th Working Day after Developer became aware (or, in accordance with the proviso to Section 15.1.2, is deemed to have become aware) of the occurrence of a Supervening Event;

ii. submit a Preliminary Supervening Event Submission on or before the 80th Working Day after Developer became aware (or, in accordance with the proviso to Section 15.1.2, is deemed to have become aware) of the occurrence of a Supervening Event; or
iii. submit a Detailed Supervening Event Submission on or before the later of (A) the 140th Working Day after becoming aware (or, in accordance with the proviso to Section 15.1.2, is deemed to have become aware) of the occurrence of a Supervening Event and (B) the 100th Working Day after the conclusion of such Supervening Event.

15.2.2. Duty to mitigate
a. Without modifying its other obligations under this Agreement, Developer shall use Reasonable Efforts to mitigate the effects of any Supervening Event, including by re-sequencing, reallocating or redeploying its forces to other parts of the Work.

b. Developer shall not be entitled to any extension of time, compensation or other relief pursuant to this Section 15 to the extent such extension of time, compensation or other relief would have been avoided by its compliance with Section 15.2.2.a.

15.2.3. Events affecting Financial Close
Without prejudice to Developer’s rights and the Enterprises’ obligations under Schedule 1 (Financial Close), Developer shall not be entitled to claim or receive:

a. an extension of the Financial Close Deadline; and/or

b. any relief from and/or compensation in connection with Developer’s performance of its obligations with respect to Financial Close pursuant to Sections 27.1 and 27.2 and Schedule 1 (Financial Close), pursuant to this Section 15.

15.3. Resolution
15.3.1. If Developer has complied with its obligations under Section 15.1 and, through the submission of a Detailed Supervening Event Submission, has demonstrated that the Supervening Event occurred (regardless of whether such event has concluded or is continuing) then, subject to Section 15.2:

a. in the case of any Relief Event or Compensation Event, Developer shall be relieved from the performance of its obligations under this Agreement to the extent, and only to the extent, that Developer’s inability to perform such obligations is due directly to, and limited to the duration of the direct effects of, such Relief Event or Compensation Event, provided that Developer shall not be excused from timely compliance with any obligation to make a payment pursuant to this Agreement due to the occurrence of any Relief Event or Compensation Event;

b. in the case of any Relief Event or Compensation Event:

i. to the extent that any Noncompliance Event is directly attributable to the occurrence of such Relief Event or Compensation Event, subject to Section 15.3.1.a, no Noncompliance Points shall accrue in respect of such Noncompliance Event; and

ii. to the extent that any Closure is directly attributable to the occurrence of such Relief Event or Compensation Event, subject to Section 15.3.1.a, such Closure shall be an Excused Closure, but only to the extent that paragraphs g. and h. of the definition thereof in Part A of Annex A (Definitions and Abbreviations) are satisfied;

c. in the case of any Relief Event or Compensation Event occurring prior to the Final Acceptance Date that:

i. affects or will affect the Critical Path, after taking into account any available Float pursuant to Section 9.2.3.a (but subject always to Section 9.2.3.b) and excluding any previous or concurrent unrelated delay for which Developer is responsible
(the resulting period of delay, measured in Calendar Days, being the “Schedule Delay Period”); and/or

ii. delays or will delay completion of the Construction Work (after taking into account any available Float pursuant to Section 9.2.3.a (but subject always to Section 9.2.3.b) and excluding any previous or concurrent unrelated delay for which Developer is responsible) required to achieve:

A. Milestone Completion of any Payment Milestone by the Milestone Completion Target Date; and/or

B. Substantial Completion by the Baseline Substantial Completion Target Date,

and, as a result, Milestone Completion of such Payment Milestone or Substantial Completion occurs or will occur, as applicable, after the relevant Milestone Completion Target Date or the Baseline Substantial Completion Target Date (the resulting period of delay with respect to such Payment Milestone or Substantial Completion, measured in Calendar Days, being a “Milestone Delay Period” and, together with any Schedule Delay Period, each a “Delay Period”);

then:

iii. with respect to any such Relief Event or Compensation Event that affects or will affect the Critical Path:

A. if such Relief Event or Compensation Event occurred prior to the Baseline Substantial Completion Date, then the Baseline Substantial Completion Date shall be extended by the number of Calendar Days equal to the Schedule Delay Period;

B. if such Relief Event or Compensation Event occurred after the Baseline Substantial Completion Date but prior to the Substantial Completion Date, then the Longstop Date shall be extended by the number of Calendar Days equal to the Schedule Delay Period; or

C. if such Relief Event or Compensation Event occurred after the Baseline Substantial Completion Date but prior to the Final Acceptance Date, then the Final Acceptance Deadline Date shall be extended by the number of Calendar Days equal to the Schedule Delay Period;

d. in the case of any Relevant Event, the Enterprises shall compensate Developer pursuant to Sections 15.4 and 15.6 (without double-counting), as applicable, for Compensable Costs, in each case subject to Section 15.7; and

e. in the case of any Relief Event or Compensation Event that occurs or is continuing during the Operating Period, the Enterprises shall be entitled to deduct from any Performance Payment otherwise payable pursuant to Schedule 6 (Performance Mechanism) (and after taking into account any adjustment otherwise to be made to such payments pursuant to Sections 15.4 and/or 15.6, as applicable, as a result of any compensation payable pursuant to Section 15.3.1.d):

i. Developer’s actual avoided costs of Work not being performed as a direct result of the occurrence or, as the case may be, continuation of such Relief Event or Compensation Event during the Operating Period; and

ii. the amount that Developer is (or, pursuant to Section 35.5.a, should be) entitled to recover under any “business interruption” coverage under the Available Insurance as a direct result of the occurrence or, as the case may be, continuation of such Relief Event or Compensation Event during the Operating Period.
15.3.2. Upon agreement between the Parties, such agreement not to be unreasonably withheld, as to:
   
a. the extension of time, relief and/or compensation (including the payment terms of, and
documentation required for, any such compensation) to which Developer is then entitled
   (including, as necessary, on a retroactive basis) in respect of any Relief Event or
   Compensation Event as determined pursuant to Section 15.3.1; and/or
   
b. the amount of any Loss that Developer is then entitled to take into account for calculation
   purposes pursuant to (i) Section 15.7 or (ii) the definition of Appendix B Parcel Costs in
   Part A of Annex A (Definitions and Abbreviations), whether or not the Enterprises owe
   Developer compensation in respect of any such Loss as a result of such calculation,
   
the Parties shall execute a written memorandum (or, with respect to any Supervening Event that
was continuing when a prior such memorandum was executed, a written addendum to such prior
memorandum) in a form to be prepared by the Enterprises setting out the details of such
agreement.

15.3.3. If the Parties do not reach agreement as contemplated in Section 15.3.2 and any dispute in
relation to the relevant matters is resolved pursuant to the Dispute Resolution Procedure, to the
extent that the Dispute Resolution Procedure does not result in a written record of such resolution
equivalent to such a memorandum, the Parties shall execute such a memorandum to document
such resolution.

15.3.4. Pursuant to Section 1.3.b.ii of Schedule 24 (Change Procedure), a Change Order implementing
an Enterprise Change shall constitute an agreed memorandum for purposes of Section 15.3.2.

15.4. Payment of Change in Costs
   
a. Subject to this Section 15 (including, for certainty, Section 15.7), the Enterprises shall pay
to Developer all Change in Costs (as documented pursuant to Section 15.4.c and, as
applicable, subject to any limitations in accordance with the definition of Change in Costs
in Part A of Annex A (Definitions and Abbreviations)) actually incurred by it as a direct
result of a Compensation Event, through one, or any combination of more than one, of
the following methods as determined in the Enterprises’ discretion (subject to
Section 15.5):
   
i. as a lump sum payment for work already performed (or, in the Enterprises' discretion, as a series of progress payments for payment of work as it is performed) within 45 Calendar Days of Developer’s written demand for such payment;
   
ii. as deferred installment payments over the Term for work performed within
   45 Calendar Days of Developer’s written demand for any such installment payment (provided that, at any time after electing such payment method, the Enterprises may choose to accelerate compensation for work already performed
   through a (or a series of) lump sum payment(s) equal to the present value as of the
date of payment of the remaining compensation), which deferred installment payments will leave Developer in a No Better and No Worse position; and/or
   
iii. as an adjustment to the “Base CPP” and/or “Base OMRP” set out in Section 2(f)
of Part 2 of Schedule 6 (Performance Mechanism), which adjustment will leave
   Developer in a No Better and No Worse position.
   
b. Developer shall maintain (and shall ensure that each of its Subcontractors and each of
their respective Subcontractors shall maintain) cost records, supporting documentation
and such other Project Records as necessary to calculate and document any Change in
Costs payable pursuant to Section 15.4.a.

c. Any Developer written demand for payment pursuant to Section 15.4.a shall be made in
form, and accompanied by such documentation, as necessary to comply with the terms
of any written memorandum executed pursuant to Section 15.3.2 (including, pursuant to
Section 15.3.4, any Change Order implementing an Enterprise Change), as applicable, and otherwise as reasonably required by the Enterprises.

15.5. Financing

15.5.1. If, pursuant to Section 15.4 or Section 15.6.3.b, the Enterprises elect to compensate Developer through Deferred Compensation, Developer shall use Reasonable Efforts to obtain:

a. funding from the Lenders, or other lenders if permitted by the Financing Documents; and/or
b. equity support from existing Equity Members of Developer,
in either case:

c. if, and only if, and to the extent necessary; and
d. on terms Acceptable to the Enterprises (and, for certainty, acceptable to Developer (acting reasonably)),
in advance of receiving the Deferred Compensation payments from the Enterprises.

15.5.2. If, despite such efforts and any compensation that is or would be paid pursuant to Section 15.4, Developer is unable to obtain such funding and/or equity support (or the Enterprises do not Accept the terms under which Developer is able to obtain additional financing), then, notwithstanding its prior election, the Enterprises shall pay the required compensation pursuant to Section 15.4.a.i or Section 15.6.3.a, as applicable.

15.6. Delay Financing Costs and Milestone Payment Delay Costs

15.6.1. To the extent that, pursuant to Section 15.3.1.d and subject to this Section 15 (including, for certainty, Section 15.7), the Enterprises are obligated to compensate Developer in respect of:

a. any Milestone Payment Delay Costs in respect of any relevant Milestone Delay Period as determined pursuant to Section 15.3.1.c.ii; or
b. any Delay Financing Costs in respect of any relevant Schedule Delay Period as determined pursuant to Section 15.3.1.c.i,
as the case may be, the Enterprises shall pay to Developer an amount equal to such Milestone Payment Delay Costs or Delay Financing Costs, as applicable, less any amount Developer is (or, pursuant to Section 35.5.a, should be) entitled to recover under any “delay in startup” coverage under the Available Insurance as a direct result of the occurrence of the Relevant Event promptly, and in any event no later than the later of:

c. 45 Calendar Days after such net amount (or any part thereof) has been Agreed or Determined; and
d. five Working Days prior to the date that such Milestone Payment Delay Costs or Delay Financing Costs become due for payment or repayment by Developer pursuant to the Financing Documents.

15.6.2. No later than 45 Calendar Days after the Substantial Completion Date, the Parties shall determine pursuant to Section 28.2 (such determination being referred to in this Section 15 as the “Reconciliation”), the extent to which Developer was left in a position that was No Better and No Worse as a direct result of the Delay Periods caused by any one or more Relevant Events taking into account (without double-counting):

a. payments made by the Enterprises to Developer pursuant to Section 15.6.1;
b. Milestone Payment Delay Costs and Delay Financing Costs incurred by Developer as a direct result of the occurrence of all such Relevant Events but which were not previously taken into account in any payments made by the Enterprises to Developer pursuant to Section 15.6.1;
c. Developer’s actual avoided costs of Work not being performed as a direct result of the occurrence of all such Relevant Events; and

d. the amount Developer is (or, pursuant to Section 35.5.a, should be) entitled to recover under any “delay in startup” coverage under the Available Insurance as a direct result of the occurrence of all such Relevant Events.

15.6.3. To the extent that the Reconciliation demonstrates that Developer was left in a worse position as determined pursuant to Section 28.2 notwithstanding the payments made to Developer by the Enterprises pursuant to Section 15.6.1, the Enterprises shall, through one, or any combination, of the following methods as determined in the Enterprises’ discretion (subject to Section 15.5):  

a. make a lump sum payment to Developer within 45 Calendar Days after completion of the Reconciliation; or

b. notify Developer of an adjustment to the “Base CPP” set out in Section 2(f) of Part 2 of Schedule 6 (Performance Mechanism), which adjustment shall take effect from the date specified in such notice,

in either case in a manner that would result in Developer being left in a No Better and No Worse position after taking into account the Reconciliation.

15.6.4. To the extent that the Reconciliation demonstrates that Developer was left in a better position as determined pursuant to Section 28.2 as a result of the payments made to Developer by the Enterprises pursuant to Section 15.6.1, Developer and the Enterprises shall, as applicable, through one, or any combination, of the following methods as determined in the Enterprises’ discretion:

a. with respect to Developer, make a lump sum payment to the Enterprises within 30 Calendar Days after completion of the Reconciliation; or

b. with respect to the Enterprises, notify Developer of an adjustment to the “Base CPP” set out in Section 2(f) of Part 2 of Schedule 6 (Performance Mechanism), which adjustment shall take effect from the date specified in such notice,

c. with respect to the Enterprises, by way of set-off pursuant to Section 5 of Part 3 of Schedule 4 (Payments) against amounts otherwise payable by the Enterprises to Developer,

in each case in a manner that would result in Developer being left in a No Better and No Worse position after taking into account the Reconciliation.

15.7. Compensation Exclusions and Limitations

15.7.1. With respect to any Compensable Costs incurred by Developer in respect of any Relevant Event (other than any No-deductible Event, to which this Section 15.7.1 shall not apply) that occurs during the Construction Period, if the aggregate amount of such Compensable Costs directly resulting from the occurrence of such event is greater than $20,000 (any such event, a “Compensable Construction Period Event”), then, subject to Section 15.7.3, the Enterprises shall compensate Developer (as applicable):

a. with respect to the occurrence of all Compensable Construction Period Events (other than such events that are subject to Sections 15.7.1.b, 15.7.1.c or 15.7.1.d), for the amount by which the aggregate amount of Compensable Costs directly resulting from the occurrence of all such events is greater than $500,000;

b. with respect to all Unexpected Utility Condition Events that are Compensable Construction Period Events, for the aggregate amount of Compensable Costs directly resulting from the occurrence of all such events as follows:

i. 50% of the first $5,000,000 of such aggregate amount of Compensable Costs (while, for certainty, Developer shall bear the remaining 50% of such costs); and
ii. 100% of any and all such aggregate amount of Compensable Costs in excess of such first $5,000,000 of such aggregate amount; and

c. with respect to all Non-Appendix B Parcel Unexpected Hazardous Substances Events that are Compensable Construction Period Events, for the aggregate amount of Compensable Costs directly resulting from the occurrence of all such events as follows:

i. 50% of the first $6,000,000 of such aggregate amount of Compensable Costs (while, for certainty, Developer shall bear the remaining 50% of such costs); and

ii. 100% of any and all such aggregate amount of Compensable Costs in excess of such first $6,000,000 of such aggregate amount; and

d. with respect to all Appendix B Parcel Unexpected Hazardous Substances Events that are (or, as the case may be, to the extent they are) Compensable Construction Period Events, for the aggregate amount of Compensable Costs directly resulting from the occurrence of all such events as follows:

i. none of the first $25,000,000 of all Appendix B Parcel Costs; and

ii. 100% of any and all such aggregate amount of Compensable Costs that are:

A. incurred as a direct result of the occurrence of all Appendix B Parcel Unexpected Hazardous Substances Events that are (or, as the case may be, to the extent that they are) Compensable Construction Period Events; and

B. in excess of the dollar amount specified in Section 15.7.1.d, where, for purposes of this Section 15.7.1.d, Change in Costs as a component of such aggregate amount of Compensable Costs shall be determined in accordance with paragraph a. of the definition thereof in Part A of Annex A (Definitions and Abbreviations) (and not paragraph b. of such definition)).

15.7.2. With respect to any otherwise Compensable Costs incurred by Developer in respect of any Relevant Event (other than any No-deductible Event, to which this Section 15.7.2 shall not apply) that occurs during the Operating Period, if the aggregate amount of such Compensable Costs directly resulting from the occurrence of such event is greater than $10,000 (indexed), then, subject to Section 15.7.3, the Enterprises shall compensate Developer, with respect to the occurrence of all such events, for the amount by which the aggregate amount of such Compensable Costs directly resulting from the occurrence of all such events in any given Contract Year is greater than $100,000 (indexed).

15.7.3. With respect to any Change in Costs (excluding any such costs as described in paragraph a.viii. of the definition thereof in Part A of Annex A (Definitions and Abbreviations)) incurred by Developer as a result of the occurrence of a Compensation Event as described in paragraph f.vi. of the definition thereof in Part A of Annex A (Definitions and Abbreviations):

a. the Enterprises shall, following consultation with Developer, use Reasonable Efforts to assert a Claim against the relevant Utility Owner in respect of the Losses incurred by Developer as a result of the occurrence of any such Compensation Event which Losses constitute Change in Costs to which this Section 15.7.3 applies;

b. Developer’s rights under Sections 15.3.1.d, 15.4, 15.7.1 and 15.7.2 to be compensated with respect to any and all Change in Costs to which this Section 15.7.3 applies shall (subject to Section 15.7.3.c) be limited to the amount of such Change in Costs (if any) that the Enterprises recover from the relevant Utility Owner;

c. the Enterprises shall be entitled to be reimbursed by Developer for the reasonable cost and expense of pursuing any Claim against a Utility Owner pursuant to Section 15.7.3.a (whether or not the Enterprises make any recovery from the relevant Utility Owner as a result of making such Claim), including by deducting the amount thereof from any amount
otherwise payable to the Developer under this Agreement including as contemplated by
Section 15.7.3.b; and

d. provided that the Enterprises have complied with their obligations under Section 15.7.3.a,
Developer:

i. agrees to be bound by the outcome of the Enterprises’ use of Reasonable Efforts
to assert a Claim pursuant to Section 15.7.3.a in connection with the occurrence
of any such Compensation Event; and

ii. hereby waives any right that it may have to recover from the Enterprises any
Change in Costs to which this Section 15.7.3 applies to the extent that any such
Change in Costs that it has incurred as a result of the occurrence of any such
Compensation Event exceed the amount recovered by it pursuant to
Sections 15.7.3.b and 15.7.3.c,

provided that, for certainty, this Section 15.7.3:

e. shall not apply to any:

i. Change in Costs as described in paragraph a.viii. of the definition thereof in
Part A of Annex A (Definitions and Abbreviations);

ii. Milestone Payment Delay Costs; or

iii. Delay Financing Costs,

in any such case arising as a result of any such Compensation Event; and

f. is without prejudice to Developer’s rights under any other provision of this Section 15 to
be compensated for costs referenced in Sections 15.7.3.e.i, 15.7.3.e.ii and 15.7.3.e.iii.

15.8. Special Provisions for Force Majeure Events

15.8.1. Following the occurrence of a Force Majeure Event:

a. Developer, if an Affected Party with respect to such Force Majeure Event, shall promptly
notify the Enterprises of the Force Majeure Event pursuant to Sections 15.1 and 15.2.2.a; and

b. the Enterprises, if Affected Parties with respect to such Force Majeure Event, shall
promptly notify Developer of the Force Majeure Event, including the date of its
commencement, evidence of its effect on the obligations of the Affected Party and any
action proposed to mitigate its effect.

15.8.2. Whether or not any notice has been given pursuant to Section 15.8.1:

a. Developer, if an Affected Party, shall comply with Sections 15.1 and 15.2.2.a with respect
to the treatment of the relevant Force Majeure Event as a Relief Event pursuant to
Section 15.3; and

b. the Enterprises, if an Affected Party, may require Developer to consult with them in good
faith, and to use all Reasonable Efforts, to agree on appropriate terms to mitigate the
effects of the relevant Force Majeure Event and facilitate the continued performance of
this Agreement.

15.8.3. To the extent either of the Enterprises is an Affected Party, the Enterprises shall be relieved from
the performance of their affected obligations under this Agreement (and shall not incur liability to
Developer for Losses in connection with a Force Majeure Event), provided that, notwithstanding
the foregoing, the Enterprises shall not be excused from timely payment of any monetary
obligations under this Agreement due to the occurrence of any Force Majeure Event.
PART E: KEY PERSONNEL, SUBCONTRACTORS AND WORKFORCE

16. PERSONNEL

16.1. Developer's Key Personnel Obligations

Subject to Section 16.2, Developer shall ensure that all Key Personnel are at all relevant times (as determined by reference to the periods set out in Schedule 27 (Key Personnel)):

a. seconded to or employed by such Person; and
b. occupying the role and performing the function of their position,

in each case as required by or set out in such Schedule and any other relevant provisions of this Agreement.

16.2. Removal or Replacement of Key Personnel

16.2.1. Developer shall not remove and/or replace any of the Key Personnel without the Enterprises' prior Approval, provided that Developer may, as required by Law or pursuant to Good Industry Practice, terminate, suspend or limit the duties of any Key Personnel individual (and, promptly thereafter, notify the Enterprises of such action).

16.2.2. If for any reason Developer wishes to remove and/or replace any Key Personnel and such removal and/or replacement requires the Enterprises’ Approval under Section 16.2.1, Developer shall promptly deliver a notice to the Enterprises for Approval, setting out the reason for such removal and/or replacement, together with:

a. the identity, expertise and experience of the proposed replacement; and
b. any such support information or evidence as the Enterprises may reasonably require in relation to such matters.

16.3. Developer's Personnel Qualifications

Developer shall ensure that all Work shall be performed and, as applicable, supervised by personnel:

a. who are careful, skilled, experienced and competent in their respective trades or professions;

b. who are professionally qualified to, and who hold all necessary registrations, permits, approvals and licenses to, perform or supervise the relevant part Work pursuant to this Agreement; and

c. who shall assume professional responsibility for the accuracy and completeness of the relevant part Work performed or supervised by them.

17. SUBCONTRACTING REQUIREMENTS

17.1. Subcontracting Terms and Requirements

17.1.1. Each Subcontract, and any amendments or supplements thereto, shall comply with, and, as applicable, incorporate the terms set out in, Part A of Schedule 16 (Mandatory Terms).

17.1.2. Without prejudice to Section 17.1.3, the Parties acknowledge and agree that:

a. Developer has entered into a Construction Contract dated as of the Agreement Date with Kiewit Infrastructure Co. and an O&M Contract dated as of the Agreement Date with Roy Jorgensen Associates, Inc., and the Enterprises hereby confirm that they Accept the terms of such contracts pursuant to Section 17.1.3.b.i;

b. as of and with effect from the Agreement Date:
i. Kiewit Infrastructure Co. is the Construction Contractor;

ii. Roy Jorgensen Associates, Inc. is, subject to Section 17.1.2.c and Section 17.1.2.e, the O&M Contractor;

iii. Kiewit Infrastructure Group Inc. is the Guarantor with respect to the Construction Contract and there is no Guarantor with respect to the O&M Contract; and

iv. neither Roy Jorgensen Associates, Inc. nor Kiewit Infrastructure Group Inc. is a joint venture of which there are separate members;

c. for purposes of the definitions of O&M Contract and of O&M Contractor set out in Part A of Annex A (Definitions and Abbreviations), and subject to Section 17.1.2.e, as of and with effect from the Agreement Date, Developer shall be considered to be self-performing:

i. all Handback Work; and

ii. such part of the Renewal Work that is not allocated to Roy Jorgensen Associates, Inc. as O&M Contractor in accordance with the "Scope of Services" as defined in the O&M Contract in effect on the Agreement Date,

and the Enterprises hereby confirm that they Accept Developer’s self-performance of such elements of the Work pursuant to Section 17.1.3.b.iii;

d. Developer may only enter into replacements to the Accepted Principal Subcontracts referred to in Section 17.1.2.a, or any new Principal Subcontract, pursuant to this Section 17; and

e. after the expiration (but not early termination for breach or default) of the O&M Contract previously Accepted pursuant to Section 17.1.2.a, for purposes of the definitions of O&M Contract and of O&M Contractor set out in Part A of Annex A (Definitions and Abbreviations), as of and with effect from the expiration date of such O&M Contract (the "Initial O&M Contract Expiration Date"), Developer shall be considered to be self-performing such portion of the O&M Work:

i. that was previously performed by Roy Jorgensen Associates, Inc. as the O&M Contractor under the terms of such O&M Contract; and

ii. which is not otherwise to be performed under a separate third-party Principal Subcontract,

without the requirement for an Acceptance by the Enterprises pursuant to Section 17.1.3.b.iii, provided that as a condition to the foregoing:

iii. 18 months prior to the Initial O&M Contract Expiration Date and every 6 months thereafter until such date, and otherwise at such other times within such 18 month period as the Enterprises may reasonably require, Developer shall meet with the Enterprises to discuss the transition to self-performance of such portion of the O&M Work by the Developer and consequential updates to the MMP and OMP to be made and Accepted in accordance with Section 5.1.3 of Schedule 11 (Operations and Maintenance Requirements) and Section 9.1.2 of Schedule 11 (Operations and Maintenance Requirements) prior to the Initial O&M Contract Expiration Date;

iv. prior to the initial meeting referred to in Section 17.1.2.e.iii, and otherwise upon the reasonable request of the Enterprises, Developer shall deliver the following (or, as applicable, updates thereto) to the Enterprises:

A. a draft organizational chart and staffing plan that shows the personnel including the O&M Manager required for all maintenance activities required in Schedule 11 (Operations and Maintenance Requirements);
B. details of the technical and financial resources available to Developer to fulfill its obligations in self-performing such portion of the O&M Work, including the names, qualifications, experience and/or technical or other professional competence of its proposed Subcontractors and any personnel referenced in the staffing plan referenced in Section 17.1.2.e.iv.A;

C. the location and layout of maintenance and storage facilities, vehicles and equipment, tools, computers, software and other major assets/items to be used by Developer in connection with the performance of the O&M Work;

D. drafts of Contractor Bonds required to be provided by the Developer in accordance with Sections 9.3 and 17.1.2.e.v.A;

E. a schedule of the insurance to be provided by the Developer in accordance with Sections 17.1.2.e.v.B and 25.1; and

F. a draft transition plan with respect to the MMIS required by Section 7 of Schedule 11 (Operations and Maintenance Requirements); and

v. as of the Initial O&M Contract Expiration Date:

A. Developer shall have delivered to the Enterprises the Contractor Bonds as then required pursuant to Section 9.3.1.a.ii;

B. with respect to all Insurance Policies that are required pursuant to Section 25 and Schedule 13 (Required Insurance) to be in effect on and from such date:

   I. such policies have been obtained from Eligible Insurers on terms that comply with Section 25 and Schedule 13 (Required Insurance) and are in full force and effect; and

   II. the Enterprises shall have received binding verifications of coverage from the relevant insurers (or Developer’s insurance brokers) of such Insurance Policies, in compliance with Section 25.3.1 as Accepted by the Enterprises;

C. Developer shall have submitted and received prior to such date Acceptance, Approval or other consent, approval or like assent, as applicable, of or to each other Deliverable which is required by the terms of this Agreement to be submitted in advance of such date and of such transition to self-performance;

D. no Developer Default has occurred and is continuing, the Increased Oversight Threshold has not been met or exceeded and no Initial Warning Notice has been served and remains in effect; and

E. Developer has certified to the Enterprises that it has no reason to believe that either (I) it shall be unable to self-perform such O&M Work as of and with effect from the Initial O&M Contract Expiration Date in accordance with this Agreement or (II) such self-performance will have an adverse impact on the continuing performance by Developer of its obligations under this Agreement or on the Project.
17.1.3. Without prejudice to Section 33.3, Developer shall not:

a. subject to Section 17.1.3.c, without prior notice to the Enterprises, Amend, or waive any provision of, any Principal Subcontract, other than to the extent necessary to reflect a corresponding amendment to, or Change under, this Agreement;

b. without the prior Acceptance of the Enterprises, subject to Section 17.1.3.c.i:
   i. enter into any Principal Subcontract unless previously Accepted pursuant to this provision or confirmed as Accepted in Section 17.1.2.a;
   ii. enter into any agreement replacing all or part of any Principal Subcontract, excluding, for certainty, an extension of the O&M Contract previously Accepted pursuant to Section 17.1.2.a in the same or substantially similar form and substance for a period following the Initial O&M Contract Expiration Date; or
   iii. self-perform any part of the Work, including in replacement of all or part of any Principal Subcontract unless such self-performance has been previously Accepted pursuant to this provision or confirmed as Accepted in Section 17.1.2.c or otherwise does not require Acceptance pursuant to Section 17.1.2.e, provided that, if applicable and required by the Enterprises as a condition of such Acceptance, Developer simultaneously executes and delivers (and ensures that the relevant Principal Subcontractor executes and delivers) to the Enterprises for counter-signature a Principal Subcontractor Direct Agreement; or

c. without the prior Approval of the Enterprises:
   i. enter into any agreement, amendment or waiver materially and adversely affecting the performance of any Principal Subcontract, other than to the extent necessary to reflect a corresponding amendment to, or Change under, this Agreement;
   ii. terminate, or permit or suffer any termination of, any Principal Subcontract (in whole or in material part), other than in conjunction with the Enterprises' Acceptance of either a replacement of such Principal Subcontract or Developer's self-performance of any relevant part of the Work, in either case in accordance with Section 17.1.3.b; or
   iii. assign or transfer any of its, or permit or suffer any assignment or transfer by a Principal Subcontractor of any of such Principal Subcontractor's, rights and/or obligations under any Principal Subcontract (in whole or in material part), other than pursuant to any related Lenders' Subcontract Direct Agreement (as such term is defined in the relevant Principal Subcontractor Direct Agreement); or
   iv. in any material respect, fail to perform, depart from its obligations, fail to enforce or waive or allow to lapse any rights it may have (or procure that others in any material respect either fail to perform, depart from their obligations, fail to enforce or waive or allow to lapse any rights they may have) under any Principal Subcontract, except to the extent that any such action or failure to act by Developer shall have no material adverse impact on:
      A. the performance by Developer of its obligations under this Agreement; or
      B. the rights of the Enterprises under this Agreement or under any Principal Subcontractor Direct Agreement.

17.1.4. Developer shall deliver to the Enterprises a copy of:

a. any amendment or replacement of any Principal Subcontract promptly following execution of the same; and
b. each Subcontract other than a Principal Subcontract (and any amendment to any such Subcontract) promptly and in any event no later than 30 Calendar Days after execution of such Subcontract (or amendment).

17.2. **Self-Performance**

a. Developer shall ensure that the Construction Contractor self-performs at least 30% of the value of the Construction Work as measured by the amounts payable under the terms of the Construction Contract with respect to such Construction Work (excluding, for certainty, any amounts payable with respect to the O&M Work During Construction).

b. For purposes of Section 17.2.a, the Construction Contractor shall be considered to be a “design-builder” as described in 23 CFR § 635.116(d)(2).

17.3. **Subcontracting with Affiliates**

a. Without limiting its obligations under Sections 17.1 and 17.2, Developer shall have the right to have Work directly or indirectly performed by Affiliates of itself or any of its Equity Members (including any Affiliate that may be a Principal Subcontractor or other Subcontractor as identified in the Preferred Proposer’s Proposal) only if the following conditions are satisfied:

i. the Affiliate shall be qualified, experienced and capable in the performance of such part of the Work assigned;

ii. Developer shall execute, or have a Subcontractor execute, a written Subcontract with the Affiliate;

iii. such Subcontract shall be subject to the Enterprises’ Acceptance, and:

   A. be on terms consistent with this Agreement and Good Industry Practice;

   B. be on terms no less favorable to Developer (or, as applicable, its Subcontractor) than those that Developer (or such Subcontractor) could reasonably obtain in an arms’ length, competitive transaction with an unaffiliated Subcontractor;

   C. be in form and substance similar to Subcontracts then being used by Developer or its Subcontractors, as applicable, for similar work or services with unaffiliated Subcontractors; and

   D. set out the scope of work and services thereunder and all the pricing, terms and conditions in relation to such scope of work and services.

b. Developer shall make no payments to Affiliates for work or services in advance of provision of such work or services under the terms of a Subcontract that complies with Section 17.3.a, except for reasonable mobilization payments or other payments consistent with arm’s length, competitive transactions of similar scope.

17.4. **Relationship with Subcontractors**

a. Pursuant to Section 8.2, the retention of any Subcontractor (of any tier) by Developer in accordance with this Agreement shall not:

i. relieve Developer of its obligations and liabilities, or deprive Developer of any rights, in each case under this Agreement; and

ii. relieve the Enterprises of or increase their obligations and liabilities, or deprive the Enterprises of any rights, in each case under this Agreement.

b. The Enterprises acknowledge and agree that:

i. the Principal Subcontracts may provide that the Principal Subcontractors may claim relief from Developer only if and to the extent that such claim or relief is granted to Developer under this Agreement; and
ii. Developer will not be precluded from advancing any claim or seeking any relief under this Agreement solely by reason that Developer is not liable to a Principal Subcontractor under a Principal Subcontract until and/or only to the extent that such claim or relief is granted by the Enterprises to Developer under this Agreement, provided that all such claims shall be made and administered by Developer, and nothing in this Section creates any contract or obligation directly between or among the Enterprises and any Principal Subcontractor or gives any Principal Subcontractor any rights against the Enterprises.

17.5. Prompt Payment of Subcontractors

17.5.1. Developer shall, and shall ensure that each of its Subcontractors and each of their respective Subcontractors shall, pay each of its and their respective Subcontractors (excluding only any Principal Subcontractor as payee) an amount equal to:

a. 100% of the calculated value of the completed work or the services provided under the relevant Subcontract through and including the last day of the most recently concluded month; less

b. any amounts previously paid in respect of such completed work or provided services; less

c. any amount that is subject to retainage as permitted by Section 17.5.4; less

d. any amount that is subject to a good faith dispute presented in accordance with the terms of the relevant Subcontract, promptly, which for purposes of this Section 17.5.1 means no later than:

e. with respect to:

i. Developer as payor of any Subcontractor that is not a Principal Subcontractor; or

ii. any Principal Subcontractor as payor,

30 Calendar Days following the relevant payee Subcontractor’s delivery of an invoice to the relevant payor in compliance with Section 2.(c) of Part A of Schedule 16 (Mandatory Terms) in respect of such amount as determined pursuant to Sections 17.5.1.a through 17.5.1.d and in accordance with the terms of the relevant Subcontract; and

f. with respect to any Subcontractor (that is not a Principal Subcontractor) as payor, seven Calendar Days following such payor Subcontractor’s receipt of a corresponding payment in respect of the relevant work or services, as applicable.

17.5.2. Developer may request Approval for any payee Subcontractor that is not a Principal Subcontractor to be exempt from being paid promptly as provided for in Section 17.5.1. Following the Approval of any such exemption, Section 17.5.1.e (and not Section 17.5.1.f) shall apply to the exempted Subcontractor as a payor Subcontractor as if such exempted Subcontractor was a Principal Subcontractor (except to the extent that any of such exempted Subcontractor’s payee Subcontractors are also subject to such an Approved exemption under this Section 17.5.2).

17.5.3. Notwithstanding the provisions of Section 17.5.1 and 17.5.2, Developer shall pay each of its direct Subcontractors (including any Principal Subcontractor as payee) in accordance with 49 CFR § 26.29 no later than 30 Calendar Days following payment from the Enterprises to the Developer of any Milestone Payment, Performance Payment or other payment under this Agreement to the extent that part of such payment is required under the terms of the relevant Subcontract to be used to pay such Subcontractor the relevant amount.
17.5.4. Developer shall, and shall ensure that each of its direct Subcontractors and each of their respective Subcontractors shall, be permitted (but not, for certainty, required) to withhold retainage from payments otherwise due to a payee Subcontractor, provided that:

a. excluding with respect to payments to be made to (i) any Principal Subcontractor or (ii) any other Subcontractor (subject to the Enterprises’ prior Approval), such retainage shall not exceed 5% of the calculated value of the completed work or services provided from time to time; and

b. all such retainage shall be paid in full no later than 30 Calendar Days after the work or services performed under the relevant Subcontract is or are satisfactorily completed.
PART F: PROJECT MANAGEMENT

18. DELEGATION OF AUTHORITY

18.1. Delegations Among Enterprises and to CDOT

18.1.1. While, for ease of reference, HPTE and BE are collectively referred to herein as the Enterprises, either one of them may in their discretion act or perform for both of them in their capacity as Enterprises under this Agreement, and Developer shall accept such action or performance as discharging the relevant obligation(s) of both Enterprises, except where this Agreement expressly refers to BE acting as PABs Issuer, and not to an Enterprise or the Enterprises.

18.1.2. Subject to compliance with Law, and without relieving the Enterprises of any obligation hereunder, either Enterprise may also in its discretion delegate the exercise of any right or the performance of any obligation under this Agreement to CDOT.

18.2. Use of Representatives

18.2.1. Appointment of Representatives

a. Pursuant to this Section 18.2.1, Developer and the Enterprises shall each identify and maintain a person as its and their official representative (respectively, the “Developer’s Representative” and the “Enterprise Representative” and, together, the “Representatives” and each a “Representative”) with the functions and powers as set out in Section 18.2.2.

b. The Developer’s Representative shall at all times be its “Project Manager”, initially as identified in Schedule 27 (Key Personnel), subject to replacement pursuant to Section 16.2. The Enterprise Representative shall initially be their “Project Director” as notified to Developer on or prior to the Agreement Date, subject to replacement pursuant to this Section 18.2.1.

c. From time to time:

i. the Enterprises may replace their Representative; and

ii. Developer and the Enterprises may each delegate all or part its or their Representative’s responsibilities under this Agreement,

in either case by notice to the other Party containing:

iii. the name, title, mailing address, principal phone numbers, email address (or digital equivalent) and fax number (if any) of the replacement Representative or delegatee;

iv. in the case of partial delegations of authority, a schedule setting out the extent to which authority for managing any aspect of this Agreement has been delegated and to whom; and

v. in the case of time-limited replacements or delegations, the start and end date for such time-limited replacement or delegation.

18.2.2. Power and authority of Developer Representatives

a. Except as previously notified by Developer to the Enterprises before any relevant act or instruction occurs or is given:

i. the Enterprises shall be entitled to assume that Developer’s Representative has, and Developer shall (subject to reasonable exceptions and limitations to be notified to the Enterprises) ensure that Developer’s Representative shall have, full authority to act on behalf of Developer for all purposes of this Agreement; and

ii. subject to any exceptions or limitations previously notified to them, the Enterprises and the Enterprise Representative shall be entitled to treat any act of Developer’s Representative in connection with this Agreement as being
expressly authorized by Developer and the Enterprises and the Enterprise Representative shall not be required to determine whether any express authority has in fact been given.

b. Any relevant instruction to be given by either party shall be given in accordance with Section 49.1.1.

18.2.3. Power and authority of Enterprise Representative

Except as previously notified by the Enterprises to Developer before any relevant act or instruction occurs or is given:

a. Developer shall only be entitled to assume that the Enterprise Representative has the functions and powers of the Enterprises (collectively, and pursuant to this Agreement where necessary or permissible, individually) in relation to the Project that are identified in this Agreement as functions or powers to be carried out by the Enterprise Representative; and

b. Developer and Developer’s Representative:

i. shall be entitled to treat any written action or instruction by the Enterprise Representative that is authorized by this Agreement as being expressly authorized by the Enterprises (collectively, and pursuant to this Agreement where necessary or permissible, individually) and Developer and Developer’s Representative shall not be required to determine whether any express authority has in fact been given; and

ii. shall not be entitled to treat any other act or instruction by any other officer, employee or other Person engaged by the Enterprises or CDOT, unless otherwise expressly authorized pursuant to this Agreement, as being authorized by the Enterprises, and upon receiving any such presumptively unauthorized act or instruction from any Person, Developer shall:

A. promptly submit a written request to the Enterprises requesting clarification whether and to what extent authority has in fact been given to the relevant Person; and

B. pending the Enterprises’ response, refrain from taking any related action to the extent reasonable under the circumstances.
PART G: PUBLIC OVERSIGHT

19. RECORD KEEPING AND OVERSIGHT

19.1. Project Records

19.1.1. General obligation to maintain Project Records

Developer shall (and shall require that each of its Subcontractors and each of their respective Subcontractors shall) at all times create and maintain full and complete records, books, documents, papers, databases, files and other documentation of information relating to the Project and, as applicable, Developer’s performance of its obligations under this Agreement and the Principal Subcontracts and each Subcontractor’s performance under the Subcontracts to which it is a party, including:

a. as required by Law, including CORA to the extent it is applicable to Project Records in the custody of Developer-Related Entities as a matter of Law;
b. pursuant to Good Industry Practice;
c. pursuant to GAAP, as applicable;
d. as otherwise required by the provisions of this Agreement other than this Section 19.1.1, including pursuant to Section 13 of Schedule 8 (Project Administration); and
e. maintenance of copies of:
   i. all Principal Subcontracts (and all amendments and waivers thereto) and, with respect to each Subcontractor’s records, of each Subcontract to which it is a party (and all amendments and waivers thereto); and
   ii. all notices, correspondence, submissions, change, purchase or work orders, or other documents and materials expressly referenced as work product in this Agreement, any Principal Subcontract and, with respect to each Subcontractor’s records, each Subcontract to which it is a party,

   together, the “Project Records”.

19.1.2. Standards for maintenance of Project Records

Developer shall (and shall ensure that each of its Subcontractors and each of their respective Subcontractors shall):

a. create and maintain Project Records in the format or formats (hardcopy, analog, digital or otherwise) determined from time to time by reference to the requirements and standards set out in Sections 19.1.1.a through 19.1.1.e;
b. maintain originals or copies of all Project Records that are otherwise required to be maintained in a physical format at a location in the State; and
c. develop and maintain procedures to backup and secure all Project Records that, at a minimum, comply with Law and Good Industry Practice.

19.1.3. Inspection of Project Records

Developer shall, without charge:

a. make all its Project Records available for inspection by the Enterprises, CDOT or any of their representatives or designees (each, an “Inspecting Party”) pursuant to this Section 19.1.3;
b. make its Project Records available for inspection by the Inspecting Parties at its principal offices in the State, or at such other facilities as the Enterprises may reasonably require on behalf of themselves or any other Inspecting Party to the extent records are maintained at such other facilities:
i. during normal business hours (and, upon reasonable request, at times outside normal business hours); and

ii. upon reasonable notice, unless the Enterprises have a good faith suspicion of fraud in which case no prior notice shall be required;

c. allow any Inspecting Party to make extracts and take notes during any inspection and, upon request, furnish copies of Project Records to any Inspecting Party; and

d. subject to its obligations to comply with Section 19.1.2.c, and without limiting its obligations pursuant to Schedule 8 (Project Administration), prior to issuance of NTP2 Developer shall submit to the Enterprises for Acceptance, and have received Acceptance of, a written protocol with respect to making all Project Records maintained in digital formats available for real-time, “24/7” secure remote access by the Inspecting Parties to the extent reasonably practicable. Developer shall thereafter comply with such protocol.

19.1.4. Subcontractor Project Records

a. Developer shall ensure that each of its Subcontractors and each of their respective Subcontractors shall, either directly or through Developer and in either case without charge, make its Project Records available to the Inspecting Parties for inspection on terms equivalent to those set out in Section 19.1.3.a to 19.1.3.c.

b. To the extent any Project Records are in the exclusive possession of a Subcontractor that fails to make such records available pursuant to Section 19.1.4.a, Developer shall notify the Enterprises of such occurrence, identify the Project Records that are unavailable, and describe what efforts Developer has made to secure compliance or otherwise obtain such Project Records.

19.1.5. Limitations on disclosure

Notwithstanding anything to the contrary contained in this Agreement:

a. Developer shall not be required to disclose, or to ensure the disclosure by any of its Subcontractors and/or of their respective Subcontractors of, any Project Records protected by attorney-client or other legal privilege or protection under Law based upon an opinion of counsel (such counsel to be Acceptable to the Enterprises) unless such disclosure is otherwise compelled by Law; and

b. to the extent permitted by Law, the Parties agree that the Financial Model and any Project Intellectual Property that is subject to an Intellectual Property Escrow shall at all times be treated by the Parties as proprietary and confidential commercial non-public information which may only be reviewed by and accessed by the Enterprises pursuant to this Agreement and, as applicable, the Financial Model Escrow Agreement or the relevant Intellectual Property Escrow.

19.1.6. Retention of Project Records

a. Each individual Project Record shall be retained for a period of at least seven years after such Project Record is first generated, or for such longer period as may be required pursuant to Sections 19.1.1.a through 19.1.1.e or Section 19.1.6.b.

b. Notwithstanding Section 19.1.6.a, Developer shall (and shall ensure that each of its Subcontractors and each of their respective Subcontractors shall) retain and make available pursuant to this Section 19.1 all Project Records:

i. that relate to a Claim or Dispute until any later date that such matters are Agreed or Determined; and

ii. in existence on the last Calendar Day of the Term (or the equivalent under any Subcontract) until the later of the seventh anniversary of such day and any date as may be required pursuant to Sections 19.1.1.a through 19.1.1.e.
19.1.7. Survival of obligations

Developer’s obligations under this Section 19.1 shall survive until the later of:

a. the seventh anniversary of the Expiry Date (or, if applicable, the Termination Date); and
b. with respect to the retention of any Project Record, such date as determined pursuant to Section 19.1.6.

19.2. Financial Statements

In addition to all Developer’s other obligations to prepare and deliver reports and other materials under this Agreement, Developer shall provide the Enterprises with copies of the following:

a. its unaudited quarterly and annual accounts within 20 Working Days after such accounts have been finalized; and
b. its audited annual accounts within 20 Working Days after publication (or, if not published, after such accounts have been finalized),

each of which may be subject to redactions made in compliance with Section 20 and may be subsequently made available to the public pursuant to CORA.

19.3. Enterprise Board Meeting Attendance

Developer shall appear before and make a separate presentation to each Enterprise’s board and the Transportation Commission as and when required by the Enterprises (subject to reasonable prior notice), and, in the case of the boards of the Enterprises, no less frequently than:

a. during the Construction Period, once in each month with respect to each Enterprise board; and
b. during the Operating Period, once in each month with respect to the HPTE board only,

for the purpose of informing such bodies about the Project and the Work in connection with their public oversight of the same.

20. COLORADO OPEN RECORDS ACT

20.1.1. Notwithstanding anything to the contrary contained in this Agreement, Developer acknowledges and agrees that this Agreement, except as provided for in Section 19.1.5, shall not be treated as CORA Exempt Materials and may be disclosed by the Enterprises without restriction.

20.1.2. Prior to issuance of NTP1, Developer shall submit to the Enterprises for, and have received, Acceptance of a written protocol for the disclosure and, as applicable, exemption from disclosure of Project Records in compliance with CORA and other Laws applicable to the disclosure of such Project Records. Such protocol shall include provisions to address disclosure and sharing of Project Records among Developer-Related Entities and with any of their Lenders, regulators or rating agencies, in each case in the ordinary course of business and in connection with the Project. Developer shall (and shall ensure that each Developer-Related Entity shall) comply with any such Accepted protocol.

20.1.3. Neither the Enterprises nor CDOT shall be responsible or liable to Developer or any other Person for the disclosure of any Project Records if the disclosure:

a. is required by Law;
b. subject to Section 19.1.5 (and excluding, for certainty, any disclosure of CORA Exempt Materials) is permitted by Law;
c. is required by court order;
d. occurs through inadvertence or mistake;
e. is made to the FHWA or the US DOT; or
f. is compliant with the protocol Accepted pursuant to Section 20.1.2.

20.1.4. In the event the Enterprises or CDOT receives a CORA request for Project Records that are in the custody and control of Developer-Related Entities, Developer shall cooperate with the Enterprises, CDOT and, as applicable, the State’s Attorney General’s office, and shall cause all Subcontractors and each of their respective Subcontractors to cooperate, in responding to such request in a timely manner under CORA or otherwise in accordance with the protocol Accepted pursuant to Section 20.1.2.

20.1.5. Developer shall be responsible for all costs associated with defending any request for disclosure of any Project Records claimed by Developer to be exempt from disclosure under CORA, whether such records are in the custody of Developer (or any other Developer-Related Entity), the Enterprises or CDOT. In connection with this obligation, Developer shall:

a. use Reasonable Efforts to assist the Enterprises (and to secure the assistance of the Enterprises by each of Developer’s Subcontractors and of each of their Subcontractors) in such defense;

b. pursuant to Section 24.2, indemnify the Enterprises for any Losses incurred or suffered by them in such defense; and

c. at the request of the Enterprises or the State Attorney General’s office, intervene in any such defense at its own cost and with its own counsel.

20.1.6. Developer shall not (and shall ensure that each of its Subcontractors and each of their respective Subcontractors shall not) disclose any Project Records to any Person, other than:

a. as expressly permitted by this Agreement;

b. as required by Law or a court order;

c. in compliance with the protocol Accepted pursuant to Section 20.1.2 or, prior to Acceptance of such protocol, among Developer-Related Entities, their Lenders, regulators and rating agencies, in the ordinary course of business in connection with the Project and subject to customary safeguards regarding the confidential treatment of such records; or

d. with the Enterprises’ prior Approval,

and, in each case, where such information relates to a member of the public, Developer shall not disclose or make use of any such information otherwise than for the purpose for which it was provided and then only in compliance with Law, unless Developer has obtained the prior written consent of such Person and of the Enterprises.

21. INSPECTIONS AND AUDITS

21.1. Site Inspections and Annual Survey and Audit Rights

21.1.1. Inspections of the Site

a. Subject to Section 21.1.1.b, the Enterprises, CDOT, the FHWA and their respective authorized agents shall have an unrestricted right to enter the Site from time to time in order to:

i. inspect the state and progress of the Work and to monitor compliance by Developer with its obligations under this Agreement, including by conducting inspections, surveys, sampling, measurements, observations, testing and other reasonably necessary oversight activities;

ii. conduct routine, in-depth or any other type of inspection or other oversight activity in accordance with their standard practices; and/or

iii. any other inspection or oversight activity expressly contemplated by this Agreement,
provided that any such activities are conducted pursuant to Section 21.1.3.

b. In exercising their rights under this Section 21.1.1, the Enterprises shall at all times comply with all relevant site rules and safety regulations in relation to the Site.

21.1.2. Annual Survey and Audit Rights

a. Once in every Calendar Year, and at additional times if the Enterprises reasonably believe that Developer is in breach of its obligations under this Agreement, the Enterprises may carry out or cause the carrying out of:

i. a survey of the Project and the Work (or part of the Project and the Work) by a suitably qualified independent expert (not being an employee or consultant of either Enterprise or CDOT that has otherwise been materially involved in the Project (except for purposes of conducting a prior survey)); and

ii. an audit of Project Records and Developer’s compliance with its obligations under this Agreement.

b. The Enterprises shall notify Developer in writing a minimum of 10 Working Days in advance of the date they wish to carry out a survey or audit described in Section 21.1.2.a, provided that no such prior notice shall be required if the Enterprises reasonably believe that Developer is in breach of its obligations under this Agreement. Unless a Developer Default has occurred and is continuing, the Enterprises shall consider in good faith any reasonable request by Developer for the survey or audit to be carried out on a different date if such request is made at least five Working Days prior to the notified date and Developer (acting reasonably) is able to demonstrate that carrying out the survey on the notified date would materially prejudice Developer’s ability to perform its obligations or exercise its rights under this Agreement. The survey and audit described in Section 21.1.2.a may be conducted separately during any relevant Calendar Year.

21.1.3. Rules governing conduct of inspections, surveys and audits

a. When carrying out any inspection, survey or audit pursuant to Section 21.1.1 or Section 21.1.2, the Enterprises shall use Reasonable Efforts to minimize any unnecessary disruption to the Work and Developer’s performance of its obligations under this Agreement.

b. Subject to Sections 21.1.3.c and 21.1.4.a.iii, as between the Enterprises and Developer, the cost of the inspection, survey or audit conducted pursuant to Section 21.1.1 or Section 21.1.2 shall be borne by the Enterprises.

c. Developer shall, at its own cost and expense, use Reasonable Efforts to provide assistance to the Enterprises as required from time to time during the carrying out of any inspection, survey or audit conducted pursuant to this Section 21.

21.1.4. Findings of breach

a. If an inspection, survey or an audit conducted pursuant to Section 21.1.1 or Section 21.1.2 is conducted in response to or identifies any Developer breach or Developer Default, the Enterprises may, as applicable and in their discretion:

i. notify Developer of the condition which the Project and the Work (or any part of the Project and the Work) should be in to comply with Developer’s obligations under this Agreement or, without altering Developer’s obligations hereunder, of other steps the Enterprises believe should be taken with respect to Developer’s obligations under this Agreement;

ii. without altering Developer’s obligations hereunder, specify a reasonable period within which Developer must carry out any rectification and/or maintenance work, or where rectification or maintenance work cannot rectify the non-compliance, to
take reasonable steps to prevent the recurrence of such a non-compliance; and/or

iii. be entitled to be reimbursed by Developer for the reasonable cost and expense of the inspection, survey or audit and any costs and expenses incurred by the Enterprises in relation to such inspection, survey or audit (or, in the case of a breach that is not a Developer Default, such parts of the inspection, survey or audit that the Enterprises reasonably determine were necessary to identify such breach).

b. Notwithstanding any action by the Enterprises pursuant to Section 23.4, Developer shall promptly (or within such other period of time as is required or expressly permitted by Law and the provisions of this Agreement) rectify any non-compliance identified by any survey or audit conducted pursuant to this Section 21.1.

21.2. Right to Conduct Physically Intrusive Inspections

21.2.1. Without prejudice to the Enterprises’ other rights under this Agreement, the Enterprises shall have the right, at any time prior to the Final Acceptance Date or prior to completion of any Renewal Work and, in either case, upon reasonable notice, to require Developer to permit physically intrusive inspections by the Enterprises of any part or parts of the Construction Work or Renewal Work, as applicable, including by opening up covered or sealed portions of the Work, when the Enterprises reasonably believe that such part or parts of the Construction Work or Renewal Work, as applicable, do not comply with the requirements of this Agreement. In carrying out any such inspection the Enterprises shall use Reasonable Efforts to minimize unnecessary disruption to the Work and Developer’s performance of its obligations under this Agreement.

21.2.2. If, following the exercise by the Enterprises of their right pursuant to Section 21.2.1, an inspection shows that the relevant part or parts of the Construction Work or Renewal Work:

a. does not or do not comply with the requirements of this Agreement, then:
   i. Developer shall rectify such noncompliance at its own cost and expense; and
   ii. the Enterprises shall be entitled to be reimbursed by Developer for the reasonable cost and expense incurred by the Enterprises in relation to such inspection conducted pursuant to Section 21.2.1 (or, in the case of a noncompliance that is not a Developer Default, such parts of the inspection that the Enterprises reasonably determine were necessary to identify such noncompliance); and

b. complies or comply with the requirements of this Agreement, such inspection shall be treated as a Compensation Event, except to the extent that such inspection was carried out in response to Developer breaching its obligation to maintain Project Records pursuant to Section 19.1, which Project Records, if maintained in accordance with this Agreement, would have demonstrated that the relevant part or parts of the Construction Work or Renewal Work complied with the requirements of this Agreement.

21.2.3. Without prejudice to the rights of the Enterprises pursuant to this Section 21.2, the Parties acknowledge that the exercise of such rights pursuant to this Section 21.2 shall not in any way affect the obligations of Developer under this Agreement except as expressly set out in this Section 21.2 or elsewhere in this Agreement.

21.3. Increased Oversight

21.3.1. The Enterprises may, in their discretion, at any time when:

a. there are material Defects in the Work; or

b. Developer has materially failed to comply with the Technical Requirements (other than with respect to any breach that constitutes a Noncompliance Event) which failure remains uncured; and/or
c. the Increased Oversight Threshold has been met or exceeded, without prejudice to any other right or remedy available to them, and without limiting Developer’s other obligations under this Agreement (including obligations to remedy Defects and to otherwise perform in accordance with the requirements set out in this Agreement), by notice to Developer:

d. require Developer to promptly prepare and submit for Approval a remedial plan to, as applicable:
   i. remedy such Defects or failure and prevent its recurrence; or
   ii. improve performance so as to address the causes of the Increased Oversight Threshold being met or exceeded,

   and, following Approval of such plan, Developer shall be required to comply with such plan; and/or

e. increase the level of their monitoring of Developer relative to the prior standard of practice under this Agreement prior to such Defect or failure, or to the Increased Oversight Threshold being met or exceeded, until such time as Developer shall have demonstrated to the reasonable satisfaction of the Enterprises that it is capable of performing and shall perform all its obligations under this Agreement.

21.3.2. If the Enterprises, in their discretion, issue a notice pursuant to Section 21.3.1, Developer shall bear its own costs and expenses and pay to the Enterprises on demand all reasonable costs and expenses incurred by or on behalf of the Enterprises in relation to any increased level of monitoring.
PART H: PERFORMANCE MANAGEMENT

22. PERFORMANCE-BASED PAYMENT DEDUCTIONS AND PERSISTENT BREACH

22.1. Performance-based Payment Deductions

22.1.1. Pursuant to Section 3(b) of Schedule 5 (Milestone Payments) and Part 1 of Schedule 6 (Performance Mechanism), certain Construction Period performance related deductions may be made from the Substantial Completion Milestone Payment.

22.1.2. Pursuant to Parts 2 and 3 of Schedule 6 (Performance Mechanism), certain Operating Period performance related deductions may be made from each Performance Payment.

22.2. Persistent Breach by Developer

22.2.1. If a breach of this Agreement by Developer (other than any breach that constitutes a Noncompliance Event or results in the accrual of a Construction Closure Deduction or an Operating Period Closure Deduction or that arises due to a Supervening Event) has:

a. continued for more than 30 consecutive Calendar Days; or

b. occurred three or more times in any six consecutive month period,

then the Enterprises may serve a notice (an “Initial Warning Notice”) on Developer:

c. specifying that it is an Initial Warning Notice;

d. giving reasonable details of the breach; and

e. stating that the relevant breach is a breach which, if it continues for the period of time specified in Section 22.2.2.a or recurs as specified in Section 22.2.2.b, may result in a Developer Default for Persistent Breach,

provided that an Initial Warning Notice may not be served in respect of any incident of breach which has previously been the subject of a separate Initial Warning Notice or a Final Warning Notice.

22.2.2. If the breach specified in an Initial Warning Notice:

a. continues beyond 30 consecutive Calendar Days after the date of service of the Initial Warning Notice; or

b. recurs three or more times within the six consecutive month period after the date of service of the Initial Warning Notice,

then the Enterprises may serve another notice (a “Final Warning Notice”) on Developer:

c. specifying that it is a Final Warning Notice;

d. stating that the breach specified has been the subject of an Initial Warning Notice; and

e. stating that:

i. the continuation of such breach for more than 30 consecutive Calendar Days after the date of service of the Final Warning Notice; or

ii. the recurrence of such breach two or more times within the six consecutive month period after the date of service of the Final Warning Notice,

shall constitute a “Persistent Breach”, which itself shall constitute a Developer Default pursuant to Section 32.1.1.
23. SAFETY COMPLIANCE, SUSPENSION OF THE WORK AND PUBLIC SECTOR RIGHTS TO INTERVENE

23.1. Safety Compliance

23.1.1. Subject to their obligations under Section 23.1.2, the Enterprises may, in their discretion, issue Safety Compliance Orders to Developer from time to time.

23.1.2. Except in the case of an Emergency, the Enterprises shall use Reasonable Efforts:
   a. to promptly inform Developer of any circumstance or information relating to the Project which, in the Enterprises’ reasonable judgment, is likely to result in the issuance of a Safety Compliance Order; and
   b. consult with Developer prior to issuing a Safety Compliance Order.

23.1.3. Developer shall promptly implement each Safety Compliance Order that the Enterprises issue pursuant to Section 23.1.1, including through the use of Reasonable Efforts by Developer to overcome any inability to comply with any Safety Compliance Order caused by a Supervening Event. The Enterprises shall be entitled to take action pursuant to Section 23.4.1.d if Developer fails to comply with its obligations pursuant to this Section 23.1.3.

23.2. Refusal of Access

The Enterprises reserve the right to refuse (or, alternatively, authorize the Department to refuse) access to the Right-of-Way by any Person:

a. if the Enterprises reasonably believe that:
   i. the presence or activities of such Person on the Right-of-Way or any Additional Right-of-Way represents a material risk to the health or safety of any person, the Environment or Improvements, the community or property;
   ii. such Person is under the influence of alcohol or drugs; or
   iii. such Person is acting or threatening to act in a violent, harassing, discriminatory or illegal manner, or such Person previously acted in such a manner; or

b. who previously committed any of the conduct described in Section 23.2.a while accessing any part of the Site.

23.3. Suspension of Work

23.3.1. The Enterprises shall at all times have the right and authority to suspend, in whole or in part, the Work by written order to Developer. Any such order shall state the Enterprises’ reasons for the required suspension of the Work.

23.3.2. Except where any suspension of the Work by the Enterprises pursuant to Section 23.3.1 is made (and continues):

a. in response to:
   i. any uncured failure by Developer to comply with any Law, Governmental Approval or Permit; and/or
   ii. the existence of conditions unsafe for workers, other Project personnel or the general public, including failures to comply with Project Standards related to safety or to comply with any Safety Compliance Order; or

b. pursuant to Section 25.3.3.b,

the issuance of any such suspension order (or the continuation of any such suspension order) shall constitute a Compensation Event.
23.4. **Self-Help**

23.4.1. **Self-help rights**

Without limiting any other rights of the Enterprises under this Agreement, if the Enterprises reasonably believe that they need to take action in connection with the Project or the Work as a result of:

a. an Emergency having occurred and being continuing;

b. any Developer Default having occurred and not having been cured within any relevant Developer Default Cure Period;

c. Developer having failed to comply with its obligations pursuant to Section 9.4.4.a with respect to any Defect in the Warrantied Elements or any other breach of the Warranties;

d. Developer having failed to comply with its obligations pursuant to Section 23.1.3 with respect to any Safety Compliance Order; and/or

e. being necessary to discharge a constitutional or statutory duty or a duty imposed on the Enterprises, CDOT or the State by any Law, or to facilitate any such discharge by the Enterprises, CDOT or the State,

then, subject to Lenders’ rights pursuant to the Lenders Direct Agreement, the Enterprises shall be entitled to take action pursuant to Sections 23.4.2 and 23.4.3.

23.4.2. **Notice of election to exercise self-help rights**

Except in the case of an Emergency or a Developer Default, in which case the Enterprises shall only be obliged to use Reasonable Efforts to comply with their obligations under this Section 23.4.2, if the Enterprises wish to take action pursuant to Section 23.4.1 they shall notify Developer a reasonable time prior to taking such action, which notice shall include the following:

a. a description of any action that the Enterprises reasonably believe is necessary for them to take;

b. the reason for such action;

c. the date the Enterprises intend to commence such action;

d. the time period Developer has (if any) to take action before the Enterprises will commence such action;

e. the time period which the Enterprises believe will be necessary for such action; and

f. to the extent practicable, the effect on Developer and its obligation to perform the Work during the period such action is being undertaken.

23.4.3. **Required actions**

a. Following service of a notice by the Enterprises pursuant to Section 23.4.2 and expiration of any time within which Developer is permitted to take action pursuant to Section 23.4.2.d before the Enterprises will take action pursuant to Section 23.4.1, the Enterprises shall take such action as notified under Section 23.4.2 (or, in the case of an Emergency, as they may otherwise determine in their discretion) and any consequential additional action as they reasonably believe is necessary (together, the “Required Action”), and Developer shall use Reasonable Efforts to give all necessary assistance to the Enterprises while they are taking the Required Action.

b. Except in the case of an Emergency or a Developer Default, in which case the Enterprises shall only be obliged to use Reasonable Efforts to comply with their obligations under this Section 23.4.3.b, the Enterprises shall provide Developer with prompt notice of completion of the Required Action.
23.4.4. Reimbursement of Enterprises’ costs and expenses

If the Enterprises take any Required Action in response to or because of any Developer breach of its obligations under this Agreement or any Developer Default, any costs and expenses of the Enterprises incurred in taking, or as a result of taking, such action shall be payable on demand by Developer to the Enterprises.
PART I: INDEMNIFICATION AND INSURANCE

24. INDEMNIFICATION AND NOTICE AND DEFENSE OF CLAIMS

24.1. No Obligation to Indemnify Developer

Neither the Enterprises, nor CDOT, have any obligation to indemnify Developer.

24.2. Developer Indemnity

Subject to Section 24.3 and Sections 35.2 through 35.6, Developer shall, to the fullest extent permitted by Law, release, protect, defend, indemnify and hold harmless each Enterprise, CDOT and the State (the “Principal Indemnified Parties”) and each of their respective officers, directors, agents and employees (each of the Principal Indemnified Parties and each such Person, an “Indemnified Party” and, collectively, the “Indemnified Parties”) from and against any and all Claims against an Indemnified Party and/or Losses suffered by an Indemnified Party arising from, or as a consequence of, performance or non-performance of any of Developer’s obligations under this Agreement or breach by Developer of this Agreement, including any such Claims and/or Losses that are in respect of:

a. death or personal injury;

b. loss of or damage to any Indemnified Party’s property (whether personal or real), equipment or facilities, regardless of whether such property, equipment or facilities are owned, leased or otherwise held by such Indemnified Party, including loss of use thereof;

c. any Claim against the Enterprises or CDOT by any third party in connection with the Enterprises or CDOT’s use of any Project Intellectual Property in compliance with the terms of this Agreement;

d. any violation of Law, including any Federal or state securities Law or similar, or any Environmental Law, by any Developer-Related Entity;

e. the authorization, issuance, sale, trading, redemption or servicing of the PABs or any other bonds issued to finance the Project;

f. Developer’s failure to comply with any requirement necessary to preserve the tax exempt status of interest paid on the PABs or other tax exempt bond; or

g. to the extent not otherwise a Claim or Loss that is in respect of any of the matters specified in Sections 24.2.a through 24.2.f, Claims asserted and/or Losses suffered by any third party (including (i) any counterparty to a Third Party Agreement and (ii) any officer, director, agent or employee who is an Indemnified Party), which such third party asserts against and/or claims from one or more of the Principal Indemnified Parties provided that such Claim and/or Loss shall only fall within the scope of this Section 24.2.g if and to the extent that any such Claim and/or Loss arose as a result of either:

i. Developer’s or any other Developer-Related Entity’s breach or failure to perform any obligation that any Principal Indemnified Party owed to such third party (any such obligation, a “Relevant Obligation”); or

ii. any act or omission of Developer or any other Developer-Related Entity that renders any Principal Indemnified Party unable to perform any Relevant Obligation or otherwise results in any Principal Indemnified Party having liability for such Claim and/or Loss;

iii. the Relevant Obligation or any Principal Indemnified Party’s potential liability for such Claim and/or Loss exists or arises under Law or any Governmental Approval, Permit or agreement (including a Third Party Agreement); and
iv. either:
   A. if Section 24.2.g.i applies, the Enterprises have delegated performance of the Relevant Obligation to Developer pursuant to this Agreement; or
   B. if Section 24.2.g.ii applies, the existence of the Relevant Obligation or the Principal Indemnified Party’s potential liability for such Claim and/or Loss under any Law, Governmental Approval, Permit or agreement was known (or, with respect to any Relevant Obligation, should have been known) to Developer or such other Developer-Related Entity prior to the occurrence of the relevant breach, failure to perform, act or omission, provided that nothing in this Section 24.2 shall limit or preclude Developer’s right to claim any affirmative defense permitted by Law.

24.3. Exclusions from Developer Indemnity

Developer’s indemnification and hold harmless obligations under Section 24.2 shall not extend to any Loss or Claim of an Indemnified Party to the extent that such Loss or Claim:

a. was, with respect to a Loss only, already the subject of an indemnity claim under Section 24.2 from another Indemnified Party; or
b. was directly caused by:
   i. a Supervening Event;
   ii. the fault, fraud, willful misconduct, criminal conduct, recklessness, bad faith or negligence of such Indemnified Party (including, for certainty, any such conduct by BE acting in its capacity as PABs Issuer);
   iii. performance or non-performance by the Enterprises of any of their obligations under this Agreement;
   iv. such Indemnified Party’s violation of any Law (including, for certainty, any such violation by BE acting in its capacity as PABs Issuer); or
   v. any event described in Section 27.4.4.a through 27.4.4.c; or

c. is comprised of a Claim asserted and/or Loss suffered by any third party (including (i) any counterparty to a Third Party Agreement and (ii) any officer, director, agent or employee who is an Indemnified Party) which third party asserts a Claim that is:
   i. against one or more of the Principal Indemnified Parties;
   ii. otherwise within the scope of the indemnity set out in Section 24.2; and
   iii. covered by the worker compensation program of the Principal Indemnified Party against which the Claim is asserted; or

d. is not of a type specifically referenced in Sections 24.2.a through 24.2.f and such Loss or Claim:
   i. arose from, or as a consequence of, Developer’s performance (and not of any non-performance or breach) of its obligations under this Agreement; and
   ii. could not have been avoided by Developer.

24.4. Claims by Employees

Developer’s indemnification obligation under Section 24.2 in relation to Losses and/or Claims against an Indemnified Party by an employee of Developer, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, shall not be limited by any limitation on the amount or type of damages, compensation or benefits payable by or for
Developer or a Subcontractor under workers’ compensation, disability benefit or other employee benefits laws.

24.5. Notice of Claims and Tender of Defense

If any of the Indemnified Parties receives notice of a Claim or otherwise has actual knowledge of a Claim that it believes is within the scope of the indemnity under Section 24.2, the Enterprises shall, without limiting their obligations under Section 25.4.2:

a. provide Developer with notice of any such Claim of which they are aware (together with a copy of all written materials that the Indemnified Parties receive asserting such Claim), provided, however, that any failure to give such notice will not constitute a waiver of any rights of the Enterprises except to the extent that the rights of Developer are actually prejudiced by such failure; and

b. subject to Section 24.6.2:

i. tender to any applicable insurers or Developer, as applicable, the Enterprises’ defense of any Claim resulting from the same; and

ii. use Reasonable Efforts to cause CDOT and each other Indemnified Party to tender to the insurers or Developer, as applicable, CDOT’s or such Indemnified Party’s defense of any Claim resulting from the same.

24.6. Defense of Claims

24.6.1. Tender of defense

a. Subject to Section 24.6.2, if and to the extent defense of any Claim that is subject to Developer’s indemnity under Section 24.2 is tendered to Developer, then within 30 Calendar Days after the receipt of such tender, Developer shall notify the Indemnified Party whether it has tendered the matter to an insurer (if applicable).

b. Subject to Section 24.6.2, if the insurer under any Insurance Policy accepts any tender of defense with respect to any Claim that is subject to Developer’s indemnity under Section 24.2 or that is otherwise subject to such policy within the applicable time period required by Law:

i. the Parties shall use Reasonable Efforts to cooperate in the defense proffered by such insurer, including (with respect to Developer) communication and coordination of Developer’s and its insurer’s defense strategy with the Enterprises and the Colorado Attorney General’s Office; and

ii. for purposes of this Agreement, each applicable Indemnified Party shall be deemed to be an insured party under the relevant Insurance Policy.

c. If any such Claim is not tendered to an insurer, or if an insurer has rejected the tender, Developer shall promptly notify the Indemnified Party whether Developer:

i. accepts tender of defense and confirms the Claim is subject to full indemnification under Section 24.2 without any reservation of rights to deny or disclaim full indemnification;

ii. accepts tender of defense with a reservation of rights, in whole or in part;

iii. is incapable of accepting such tender of defense due to an Indemnified Party’s exercise of rights pursuant to Section 24.6.2, or otherwise has not been tendered defense of any relevant Claim by CDOT or any other Indemnified Party pursuant to Section 24.5.b.ii, or; or

iv. rejects the tender of defense, in which circumstance the Indemnified Party shall be entitled to select its own counsel and control the defense of such Claim, including the right to settle the Claim without Developer’s consent:
A. following consultation by the Enterprises (to the extent they are the relevant Indemnified Parties) with Developer; and

B. without prejudice to such Indemnified Party's right to be indemnified by Developer.

d. If Developer accepts tender of defense pursuant to Section 24.6.1.c.i or Section 24.6.1.c.ii, then, subject to Section 24.6.2, Developer shall have the right to select legal counsel for the Indemnified Party with the prior written consent of such Indemnified Party, provided that Developer shall be responsible for all costs and expenses related to such defense and each such counsel.

e. Notwithstanding any Developer acceptance of tender of defense pursuant to Section 24.6.1.c.i or Section 24.6.1.c.ii, Developer acknowledges and agrees that each Indemnified Party retains all rights with regard to settlement of any Claim that is subject to Developer's indemnity under Section 24.2, and Developer (or counsel appointed by Developer or its insurer) shall seek the consent of such Indemnified Party (with respect to the Enterprises as Indemnified Parties, such consent not to be unreasonably withheld) and of the Colorado Attorney General's Office to any settlement terms and conditions.

f. Developer shall not be liable for any settlement by an affected Indemnified Party of a Claim that is subject to Developer's indemnity under Section 24.2 except:

i. where Developer (or its insurer) has given its prior written consent to such settlement, which consent shall not be unreasonably withheld;

ii. with respect to any settlement made pursuant to Section 24.6.1.c.iv; or

iii. where the settlement is approved by a court of competent jurisdiction and such court approval has become final and binding.

24.6.2. Reservation of rights

Developer acknowledges and agrees that:

a. the Colorado Attorney General's Office:

i. is required by Law to represent and defend the Enterprises and CDOT; and

ii. may appoint counsel of its selection to act as Special Assistant Attorney General in respect of any particular Claim;

b. certain other Indemnified Parties may have similar statutory representation obligations and rights; and

c. consequently, the Enterprises and such other Indemnified Parties have the right in their discretion to:

i. elect at any time to conduct their own defense with respect to a Claim that is within the scope of the indemnity under Section 24.2; or

ii. agree to allow such defense to be conducted in whole, in part or in conjunction with counsel appointed by Developer or its insurer, subject (with respect to the Enterprises, CDOT and the State) to Approval of such counsel by the Colorado Attorney General's Office.

25. INSURANCE

25.1. Obligation to Obtain and Maintain Insurance

25.1.1. Developer shall, at a minimum, obtain and maintain, or cause to be obtained and maintained, all insurance policies specified in Schedule 13 (Required Insurances) (the “Insurance Policies”) pursuant to the requirements of this Section 25 and Schedule 13 (Required Insurances). Developer may satisfy such requirements by:
a. placing any of the Insurance Policies on a Project-specific basis; and/or
b. relying on corporate policies of Developer-Related Entities (or their Affiliates),

provided that all other applicable requirements of this Section 25 and Schedule 13 (Required Insurances) are satisfied.

25.1.2. Notwithstanding Section 25.1.1, Developer acknowledges and agrees that:

a. the Enterprises make no representation or warranty as to the adequacy or sufficiency of the minimum Insurance Policy requirements specified in this Agreement, including as to whether such Insurance Policies shall be adequate to protect Developer against:
   i. the performance or non-performance of its obligations under this Agreement;
   ii. the risks it is assuming under this Agreement; and
   iii. its liabilities to any third party;

b. except as otherwise expressly provided in this Agreement, no limit of liability specified for any Insurance Policy, or approved variances therefrom, shall preclude the Enterprises from exercising any right otherwise available to them under this Agreement or at Law; and

c. to the extent required by Law in connection with Work to be performed during the Term, Developer shall obtain and maintain, or cause to be obtained and maintained, in addition to the Insurance Policies, such other insurance policies for such amounts, for such periods of time and subject to such terms, as required by Law.

25.1.3. For certainty, the insurance coverage Developer is required to obtain and maintain, or cause to be obtained and maintained, pursuant to Sections 25.1.1 and 25.1.2.c may support but shall not limit Developer’s indemnification and defense obligations under this Agreement.

25.2. General Insurance Requirements

25.2.1. Placement of insurance with Eligible Insurers

a. All Insurance Policies shall be obtained from, and maintained with, Eligible Insurers.

b. If an insurer providing any Insurance Policy ceases to be an Eligible Insurer, then Developer shall promptly, and in any event within 21 Calendar Days of such event occurring, secure alternate coverage with an Eligible Insurer unless the Enterprises otherwise Approve the continued maintenance of such Insurance Policy with the existing insurer.

25.2.2. Language; governing law

All Insurance Policies shall be issued in the English language and governed by the laws of the State of Colorado or the State of New York.

25.2.3. Developer liability and deductibles

Except to the extent included in any Termination Amount or in any compensation paid with respect to a Supervening Event or Change, as between Developer and the Enterprises, Developer shall be liable for all insurance deductibles, premiums, and liabilities in excess of the coverage provided under any Insurance Policy, and the Enterprises shall have no liability for the same.

25.2.4. Primary coverage

a. Each Insurance Policy shall provide that the coverage thereof is primary and non-contributory with respect to all named insureds, additional insureds (including the Enterprises, CDOT and the Specified Additional Insureds) and loss payees, as their interests may appear.
b. Any insurance or self-insurance that is maintained by an insured or any additional insured (including the Enterprises, CDOT and any Specified Additional Insured) in addition to any Insurance Policy shall be in excess of such Insurance Policy and not contribute with it.

25.2.5. Endorsements

Each Insurance Policy (excluding those required pursuant to Section 1.3, Section 1.4, Section 1.6, Section 1.8, Section 1.10, Section 2.3, Section 2.5, and Section 2.6 of Schedule 13 (Required Insurances)) shall be written or endorsed such that:

a. any:
   i. failure on the part of a named or any additional insured (including any Specified Additional Insured) to comply with reporting provisions or other conditions of such Insurance Policy;
   ii. breach of representation or warranty by, breach of any provision in such policy by, or other action or inaction of, a named insured, any additional insured (including any Specified Additional Insured) or others; or
   iii. change in ownership of all or any portion of the Project or Developer's interest in the same,

shall not affect or vitiate the coverage provided under such Insurance Policy to the other named insureds or any additional insureds (including any Specified Additional Insured) (or to any such named insured’s or additional insured’s respective members, directors, officers, employees and agents);

b. such Insurance Policy shall apply separately to each named insured and additional insured (including any Specified Additional Insured) against whom a claim is made or suit is brought, except with respect to the limits of the insurer’s liability;

c. endorsements adding additional insureds (including Specified Additional Insureds) to required policies shall contain no limitations, conditions, restrictions or exceptions to coverage beyond those that apply under the Insurance Policy generally, including, for certainty, any limitation, condition, restriction or exception to coverage due to the absence of a direct contractual relationship between the additional insured and the named insured or, if different, the Person that obtained the insurance; and

d. Specified Additional Insureds may be added as additional insureds from time to time as anticipated by the definition thereof,
in the case of each of paragraphs a to d., to the extent not prohibited by Law.

25.2.6. Prior notice of cancellation, suspension, modification etc.

Each Insurance Policy shall be written or endorsed such that coverage under, and limits with respect to, such Insurance Policy cannot be canceled, voided, suspended, lapsed, modified or reduced except following 30 Calendar Days’ (or for non-payment of premium, 10 Calendar Days’) prior notice to the Enterprises, where the insurer shall not have any limitation of liability for failure to provide such notice.

25.2.7. Waivers of subrogation

a. The Enterprises waive all rights against each Developer-Related Entity, and Developer waives all rights against the Enterprises, CDOT and each Specified Additional Insured, in each case for any claims to the extent covered and paid by the Insurance Policies, or by any other insurance obtained and maintained pursuant to Section 25.1.2.c, except such rights as they may have to the proceeds of such insurance.

b. Developer shall require each Principal Subcontractor and all Subcontractors, to the extent applicable, to provide written waivers (equivalent to Developer’s waivers set out in
Section 25.2.7.a) in favor of the Enterprises, CDOT and each Specified Additional Insured.

c. The Enterprises may, at their discretion (provided that such discretion is exercised and notice of the same is given to Developer at least 15 Calendar Days prior to any associated loss), require Developer to provide written waivers equivalent to the waivers set out in Sections 25.2.7.a and 25.2.7.b in favor of the City of Denver (other than in its capacity as Cover Top Maintainer) and Denver Public Schools.

25.2.8. Defense costs

No defense costs shall be included within or erode the limits of coverage under any Insurance Policy, except that defense costs may be included within the limits of coverage under each Insurance Policy required pursuant to Sections 1.2, 1.4, 1.5, 1.6, 2.2, 2.4, 2.5 and 2.6 of Schedule 13 (Required Insurances).

25.2.9. Exhaustion of limits

With respect to each Insurance Policy (excluding those that are specific to this Project) required pursuant to Sections 1.2 and 2.2 of Schedule 13 (Required Insurances), whenever the aggregate limit is exhausted by at least 25% of the required aggregate limit by claims paid or reserved by insurer(s) (such that, for certainty, 75% or less of such required aggregate limit then remains available), Developer shall promptly:

a. notify the Enterprises of such exhaustion; and

b. and in any event within five Working Days, deliver evidence to the Enterprises (such evidence reasonable satisfactory to the Enterprises) that Developer has obtained, or caused to be obtained, additional insurance to reinstate the aggregate limit to the minimum amount required by Section 1.2 or Section 2.2 of Schedule 13 (Required Insurances), as the case may be.

25.3. Verification of coverage

25.3.1. Developer shall, not less than five Working Days prior to the effective (or renewal) date of each Insurance Policy, deliver to the Enterprises:

a. a written certificate of insurance that:
   i. is on the most recent ACORD form consistent with the required coverage and in standard form;
   ii. states the identity of all insurers, named insureds and additional insureds;
   iii. states the type and limits of coverage;
   iv. includes as attachments all additional insured endorsements; and
   v. is signed by an authorized representative of the insurer shown on the binder; and

b. a letter from the Insurance Broker placing the Insurance Policy addressed to the Enterprises certifying that:
   i. such Insurance Broker has reviewed this Section 25 and Schedule 13 (Required Insurances);
   ii. the Insurance Policy so certified has been issued in accordance with this Section 25 and Schedule 13 (Required Insurances);
   iii. all premiums in respect of such Insurance Policy have been paid, or arrangements have been made to pay such premiums in a timely manner; and
   iv. in the absence of material non-disclosure, misrepresentation or fraud by the named insured, the Enterprises may rely on such letter.
25.3.2. Developer shall promptly, and in any event no later than 90 Calendar Days after the effective (or renewal) date of each Insurance Policy, deliver to the Enterprises a true and complete certified copy of each such Insurance Policy, including all endorsements thereto, provided that if any Insurance Policy insures subject matter other than the Work or the Project (or any part of either thereof) any reference to such other subject matter (including any confidential information as determined in compliance with the disclosure protocol Accepted by the Enterprises pursuant to Section 20.1.2) may be removed or redacted from such certified copies so long as such certified copies are accompanied by a letter from the Insurance Broker confirming that such removal or redaction has no effect on the conclusions in the letter that it previously provided pursuant to Section 25.3.1.b in respect of such Insurance Policy.

25.3.3. If Developer fails to comply with its obligations under Sections 25.2.1.b, 25.3.1 or 25.3.2, the Enterprises shall, without limiting any of their other rights under this Agreement, have the right, but not the obligation, without notice to Developer, to:

a. obtain any insurance that is the subject of such failure at Developer's cost and expense; or

b. for so long as such failure continues, exercise their right to suspend, in whole or in part, the Work pursuant to Section 23.3.1.

25.4. Reporting and Handling of Claims

25.4.1. Developer's obligations to report and process claims

a. Unless notified otherwise by the Enterprises pursuant to Section 25.4.2.a with respect to the Enterprises’ (or CDOT’s) insurance claims (and potential claims), as between the Enterprises and Developer, Developer shall:

i. promptly report and process all potential claims under the Insurance Policies;

ii. promptly and diligently pursue claims pursuant to the claims procedures specified in such Insurance Policies, whether for defense or indemnity or both; and

iii. enforce all legal rights against insurers under the Insurance Policies and under Law in order to collect on all claims, including pursuing necessary litigation and enforcement of judgments, provided that Developer shall be deemed to have satisfied this obligation if a judgment is not collectible through the exercise of lawful and diligent means,

in each case, to the extent applicable, following (x) notice to and regular consultation with the Enterprises pursuant to Section 25.4.1.b and (y) the use by Developer of Reasonable Efforts to reflect Enterprises’ resulting input.

b. Developer shall:

i. promptly notify the Enterprises of any incident, potential claim, claim or other matter of which Developer becomes aware that:

   A. involves or could conceivably involve an Indemnified Party as a defendant;

   B. involves a claim or potential claim by Developer or any other Person under an Insurance Policy, or any other insurance obtained and maintained pursuant to Section 25.1.2.c, with, in any such case, a potential value of $25,000 (indexed) or more;

   C. involves a claim which is being denied by an insurer; or

   D. involves a fatality, and

   ii. regularly consult with the Enterprises (as and when reasonably requested by the Enterprises) regarding, and thereafter keep the Enterprises fully informed of, any incident, claim or matter of the type referenced in Sections 25.4.1.b.i.A through
25.4.1.b.i.D (including, for certainty, any such incident, claim or matter of which Developer becomes aware by notice from the Enterprises).

25.4.2. Enterprise involvement in reporting and processing claims

a. Notwithstanding Section 25.4.1, the Enterprises (and CDOT, to the extent it is a Specified Additional Insured with respect to any relevant Insurance Policy) shall have the right, but not the obligation, to report directly to insurers and, subject to prior notice to Developer, process the Enterprises’ (or, as applicable, CDOT’s) claims under the Insurance Policies.

b. The Enterprises agree to promptly:

i. notify Developer of any Enterprise and/or CDOT incident, or any Claim or potential Claim against the Enterprises and/or CDOT, and/or any other matters that are reasonably expected to give rise to an insurance claim, in each case of which the Enterprises become aware; and

ii. subject to Sections 24.6.1 and 24.6.2, to:

A. tender to any applicable insurers the Enterprises’ defense of any Claim against the Enterprises; and

B. use Reasonable Efforts to procure that CDOT tenders to the insurers its defense of any Claim against it.

c. The Enterprises shall use Reasonable Efforts to cooperate with Developer as necessary for Developer to satisfy its obligations under Sections 25.4.1 and 24.6.1, including providing Developer a copy of all written materials that the Enterprises receive asserting a Claim against the Enterprises and/or CDOT that is subject to defense by an insurer under an Insurance Policy.

25.4.3. Insurance meetings

Without limiting Developer’s obligations under this Section 25.4, Developer and Developer’s insurers and control claims adjuster shall provide the Enterprises with claim updates from designated insurance representatives at such intervals as the Enterprises may reasonably request, but no less than twice in each Calendar Year, to review all incidents, potential claims and claim files together with such other matters related to the Insurance Policies as the Enterprises may reasonably request.

25.5. Reinstatement

25.5.1. Use of Physical Damage Proceeds and conduct of Reinstatement Work

a. All insurance proceeds received under the Insurance Policies in respect of physical property damage to the Work or the Project (excluding any delay in startup or business interruption insurance maintained as part of such policies, “Physical Damage Proceeds”) shall be applied by Developer to perform work (“Reinstatement Work”) necessary to repair, reconstruct, reinstate and replace each part of the Work and the Project in respect of which such proceeds were received.

b. Prior to carrying out Reinstatement Work for which Physical Damage Proceeds have been received or are payable in an amount in excess of $1,000,000 (indexed) in respect of a single event (or a series of related events), Developer shall:

i. prepare, and submit to the Enterprises for Acceptance, a plan (a “Reinstatement Plan”) for performing and completing such Reinstatement Work in accordance with this Agreement (for which purposes the requirements of Schedule 10 (Design and Construction Requirements) shall be deemed to apply to the Reinstatement Work); and

ii. following the Enterprises’ Acceptance of any such Reinstatement Plan, promptly perform the Reinstatement Work in accordance with such plan, while regularly
keeping the Enterprises informed in relation to the progress of such Reinstatement Work,

provided that, pending submission or Acceptance of any Reinstatement Plan, Developer shall promptly begin performing any Reinstatement Work to the extent necessary to comply with Law or to address a material risk to the health or safety of any person or the Environment or any Improvements.

c. Completion of any Reinstatement Work shall be subject to Acceptance by the Enterprises.

d. If the Expiry Date or Termination Date occurs prior to the completion of all Reinstatement Work, Developer shall pay, or arrange for payment of, all remaining Physical Damage Proceeds (excluding those held by the Enterprises in the Physical Damage Proceeds Reserve) to the Enterprises. For certainty, the Enterprises may include any such proceeds that are owed but not yet paid to them as part of the Termination Deduction Amount for purposes of calculating any Termination Amount pursuant to Schedule 7 (Compensation on Termination).

25.5.2. Physical Damage Proceeds Reserve

a. Developer shall ensure that, if the Physical Damage Proceeds received in respect of a single event (or a series of related events) are, in aggregate, in excess of $1,000,000 (indexed), all such proceeds shall be paid to the Enterprises to be held as a reserve (the "Physical Damage Proceeds Reserve"). The Enterprises shall hold the Physical Damage Proceeds Reserve as a sub-account within its general accounts for purposes of Sections 25.5.2.b and 25.5.2.c and shall only withdraw monies therefrom in accordance with Sections 25.5.2.b and 25.5.2.c. For certainty, Developer shall have no interest in the Physical Damage Proceeds Reserve other than its contractual right to reimbursement pursuant to Section 25.5.2.b.

b. The Enterprises shall promptly reimburse Developer for reasonable and documented third-party costs and expenses incurred by Developer to effect the Reinstatement Work to the extent that:

i. such work complies with the Accepted Reinstatement Plan;

ii. funds are available in the Physical Damage Proceeds Reserve; and

iii. such funds were paid into such reserve in connection with the event (or series of related events) to which such costs and expenses relate.

c. Following completion of any Reinstatement Work in respect of which Physical Damage Proceeds are held by the Enterprises as a Physical Damage Proceeds Reserve, the Enterprises shall promptly return any amounts remaining in such Physical Damage Proceeds Reserve to Developer.

d. If the Termination Date or the Expiry Date occurs prior to the completion of any Reinstatement Work, the Enterprises shall be entitled to retain any amounts then standing to the credit of the Physical Damage Proceeds Reserve, subject to Developer’s continuing right to:

i. reimbursement pursuant to Section 25.5.2.b after the Expiry Date occurs for such Reinstatement Work performed prior to the Expiry Date; and

ii. except in the case of a termination for Developer Default, receive any amounts due under Section 25.5.2.c but not returned prior to the Termination Date or the Expiry Date, as applicable (but without double-counting with respect to the calculation of any Termination Amount).
25.6. Unavailability of Insurance

25.6.1. Unavailability due to an Uninsurable risk

a. If a risk otherwise covered by any Insurance Policy becomes, or is likely to become, Uninsurable then:
   i. Developer shall notify the Enterprises promptly, and in any event within five Working Days, after becoming aware of that any such risk has become, or is likely to become, Uninsurable;
   ii. Developer shall thereafter provide the Enterprises with such information as the Enterprises reasonably request regarding the Uninsurable risk; and
   iii. the Parties shall promptly meet to discuss the means by which the risk should be managed or shared under the circumstances.

b. If it is Agreed or Determined that any risk has become Uninsurable, then:
   i. Developer shall be relieved of its obligations pursuant to Section 25.1.1 to the extent, and only to the extent, that Developer's inability to comply with such obligations is due directly to, and limited to the duration of, such risk having become Uninsurable; and
   ii. the Enterprises shall (at their discretion):
      A. terminate this Agreement pursuant to Section 33.1.7 and pay to Developer an amount equal to the amount calculated pursuant to Section 2 of Schedule 7 (Compensation on Termination);
      B. elect to continue this Agreement, in which case, but only for so long as such risk remains Uninsurable:
         (I) the Enterprises agree that, following the occurrence of such risk, they shall pay Developer an amount equal to the insurance proceeds that would have been payable to Developer under the Insurance Policies had such risk not become Uninsurable, subject to the limitations, conditions and exclusions set out in the certificates and policies of insurance relating to the relevant Insurance Policies most recently provided by Developer to the Enterprises (or, if no such certificates or policies of insurance have previously been provided, such limitations, conditions and exclusions as the Enterprises may reasonably determine would have applied), provided that Developer shall remain responsible for any deductibles; and
         (II) in respect of each month during any part of which the relevant insurance relating to such risk is not maintained, Developer shall pay to the Enterprises, or (at the Enterprises' discretion during the Operating Period) the Enterprises shall set-off against the Performance Payments pursuant to Section 5 of Part 3 of Schedule 4 (Payments), an amount equal to the premium paid by Developer in respect of the relevant risk in respect of the month prior to such risk becoming Uninsurable (using a reasonable estimate of such amount where a precise figure is not available and pro-rating any annual or other premium previously payable where appropriate); or
   C. issue an Enterprise Change, as a result of which:
      I. Developer shall be left in a No Better and No Worse position (relative to the position that it would have been in had the
Enterprises elected to proceed under Section 25.6.1.b.ii.B) with respect to such Uninsurable risk; and

II. the ability of Developer to comply with this Agreement shall not be adversely affected as a consequence,

and, for certainty, this Agreement shall continue.

c. For so long as any risk remains Uninsurable and this Agreement remains in effect, Developer shall approach the insurance market at least once every three months to establish whether the risk continues to be Uninsurable. Promptly upon Developer becoming aware that the risk is no longer Uninsurable, Developer shall, as soon as is reasonably practicable, take out and maintain, or cause to be taken out and maintained, the insurance required to be maintained for such risk pursuant to this Agreement, and on such insurance becoming effective the provisions of Section 25.6.1.b shall cease to apply in respect of such risk.

25.6.2. Unavailable Terms

a. If any Insurance Term that would otherwise be included in an Insurance Policy becomes, or is likely to become, an Unavailable Term then:

i. Developer shall notify the Enterprises promptly, and in any event within five Working Days, after becoming aware of the existence of an Unavailable Term or the likelihood of an Insurance Term becoming an Unavailable Term;

ii. Developer shall thereafter provide the Enterprises with such information as the Enterprises reasonably request regarding the Unavailable Term; and

iii. the Parties shall promptly meet to discuss the means by which the existence of such Unavailable Term should be managed or its consequences shared under the circumstances.

b. If it is Agreed or Determined that an Insurance Term has become an Unavailable Term, then:

i. Developer shall be relieved of its obligations pursuant to Section 25.1.1 to include the relevant Insurance Term in the relevant Insurance Policies to the extent, and only to the extent, that Developer’s inability to comply with such obligations is due directly to, and limited to the duration of, such term having become an Unavailable Term; and

ii. in respect of each month during any part of which the relevant Insurance Term is an Unavailable Term, Developer shall pay to the Enterprises, or (at the Enterprises’ discretion during the Operating Period) the Enterprises shall set-off against the Performance Payments pursuant to Section 5 of Part 3 of Schedule 4 (Payments), an amount of premium equal to the amount paid by Developer in respect of the Unavailable Term in respect of the month prior to such term becoming an Unavailable Term (using a reasonable estimate of such amount where a precise figure is not available and pro-rating any annual or other premium previously payable where appropriate) net of any annual amount paid or payable by Developer with respect to such month to maintain, or cause to be maintained, any (whether full or partial) alternative or replacement term and/or condition in respect of such Insurance Term pursuant to Section 25.6.2.d.

c. For so long as an Insurance Term is an Unavailable Term, Developer shall approach the insurance market at least once every three months to establish that the relevant term remains an Unavailable Term. Promptly upon Developer becoming aware that the term is no longer an Unavailable Term, Developer shall, as soon as is reasonably practicable, take out and maintain, or cause to be taken out and maintained, the relevant insurance including such previously Unavailable Term pursuant to this Agreement, and on such
insurance becoming effective the provisions of Section 25.6.2.b shall cease to apply in respect of such Insurance Term.

d. Notwithstanding Section 25.6.2.b, to the extent that it is Agreed or Determined that an alternative to or replacement of the Unavailable Term is available to Developer in the worldwide insurance market with Eligible Insurers, which if included in the relevant Insurance Policy would fully or partially address Developer’s inability to fully comply with its obligations pursuant to Section 25.1.1, at a cost which contractors in relation to transportation-related infrastructure projects in the United States are (at such time) generally prepared to pay, Developer shall obtain and maintain, or cause to be obtained and maintained, insurance including such alternative or replacement Insurance Term.

25.7. Benchmarking of Insurance Costs

25.7.1. The procedure set out in this Section 25.7 shall be used to determine how the Parties shall share any increase, or benefit from any decrease, in the cost of Benchmarked Insurances.

25.7.2. Developer shall cause the Insurance Broker to prepare (at Developer’s cost and expense) and deliver to the Enterprises (no later than 10 Working Days after the end of the most recent Insurance Review Period a report in respect of such Insurance Review Period (the “Joint Insurance Cost Report”). Each Joint Insurance Cost Report shall be addressed to both Developer and the Enterprises on a reliance basis.

25.7.3. Each Joint Insurance Cost Report shall, at a minimum, contain the following information in respect of the relevant Insurance Review Period:

   a. a full breakdown of the Actual Benchmarked Insurance Cost;
   b. a full breakdown of the Base Benchmarked Insurance Cost;
   c. the Proposal Insurance Cost;
   d. a spreadsheet detailing separately:
      i. the sum(s) insured/limit(s) of indemnity (i.e. rateable factor) for each of the Benchmarked Insurances;
      ii. the premium rate for each of the Benchmarked Insurances;
      iii. the net premium paid (or to be paid) for each of the Benchmarked Insurances (i.e. excluding both insurance premium tax and broker’s costs and expenses);
      iv. the actual deductible(s) applicable to the calculations made in the Joint Insurance Cost Report; and
      v. details of all claims paid or reserved (including incident date and type and amount of claim);
   e. an assessment, quantification and breakdown of each increase or decrease in insurance costs that, in aggregate, determine the amount of any Project Insurance Change together with an explanation of the reasons therefor;
   f. the calculation of any Insurance Cost Increase or any Insurance Cost Decrease and of any resulting Exceptional Cost or Exceptional Saving arising from this calculation;
   g. the opinion of the Insurance Broker as to the reasons why the Actual Benchmarked Insurance Cost has varied from the Proposal Benchmarked Insurance Cost, specifying the impact of each explanatory factor and quantifying the amount attributable to each such factor; and
   h. such other evidence as reasonably requested by the Enterprises of any changes to circumstances generally prevailing in the Relevant Insurance Markets that the Insurance Broker indicates to account for the Insurance Cost Increase or the Insurance Cost Decrease.
25.7.4. The Enterprises, at their discretion and at their cost and expense, may independently assess the accuracy of the information in the Joint Insurance Cost Report and otherwise conduct their own independent insurance review, which review may include retaining advisors and/or performing their own assessment as to, among other things, the impact of the claims history on renewal costs. Developer shall cooperate with respect to any reasonable requests from the Enterprises for additional information in relation to such independent assessment (including, if applicable, by ensuring that the Insurance Broker provides any reasonably requested additional information).

25.7.5. No later than 60 Calendar Days’ after Developer’s submission of any Joint Insurance Cost Report, the Enterprises shall (acting reasonably) determine in respect of the Insurance Review Period to which such report relates, and with reference to such report, whether:

   a. there is an Exceptional Cost, in which case the Enterprises shall within 45 Calendar Days of such determination make a one-off lump-sum payment to Developer equal to 80% of the Exceptional Cost;

   b. there is an Exceptional Saving, in which case Developer shall within 30 Calendar Days of such determination make a one-off lump-sum payment to the Enterprises equal to 80% of the Exceptional Saving; and

   c. there is neither an Exceptional Cost nor an Exceptional Saving, in which case any Insurance Cost Increase or any Insurance Cost Decrease shall be borne by or be for benefit of Developer.
PART J: EQUITY AND PROJECT DEBT

26. EQUITY REQUIREMENTS

26.1. Equity Contribution Requirements

26.1.1. Subject to Section 26.1.2, on and from the Financial Close Date through and including the Substantial Completion Date, Developer shall, at all times, have and maintain Committed Investments equal to or greater than 10% of the amount equal to the aggregate of:

a. the then Committed Investment; plus
b. the total principal amount of the then outstanding Long Term Project Debt.

26.1.2. The minimum amount of Committed Investments required under Section 26.1.1 is subject to reduction only:

a. with the Approval of the Enterprises; or
b. with the Acceptance of the Enterprises in the event that the amount of Committed Investments is required to be reduced below such percentage:
   i. as part of a workout of a breach or default under the Financing Documents that were entered into in connection with Financial Close; or
   ii. as a result of Developer incurring additional Project Debt pursuant to a Rescue Refinancing.

26.2. Equity Transfer and Change of Control Restrictions

26.2.1. A Developer Default shall occur if an Equity Transfer in relation to Developer is effected:

a. during the Restricted Transfer Period, unless such Equity Transfer:
   i. is a Permitted Equity Transfer; or
   ii. received the prior Approval of the Enterprises;

b. after the Restricted Transfer Period, if such Equity Transfer results in a Change of Control that has not been consented to by the Enterprises pursuant to Section 26.2.2; and

c. at any time (other than as a Permitted Equity Transfer under paragraph a. of the definition thereof in Part A of Annex A (Definitions and Abbreviations)), to a Person that at the time of the proposed transfer is disqualified, suspended or debarred, or subject to a proceeding to suspend or debar such Person, from bidding, proposing or contracting with any Governmental Authority.

26.2.2. After the Restricted Transfer Period, any Equity Transfer that results in a Change of Control shall require the consent of the Enterprises, provided that such consent may be (i) withheld or (ii) made subject to the condition of the provision of reasonable additional security or other reasonable arrangements, in either case (i) and (ii) if (and only if) the Enterprises determine, acting reasonably, that:

a. the proposed transaction or transactions is or are prohibited by Law; or

b. after the occurrence of such Change of Control Developer’s ability to perform its obligations under this Agreement would be materially diminished, which determination may be based upon, or take into account in addition to other factors that the Enterprises may reasonably determine are relevant, the financial strength, integrity, past performance and relevant experience of the proposed transferee(s) relative to the proposed transferor(s) and the then current performance requirements under this Agreement.

26.2.3. The Enterprises may reasonably request, and following receipt of any such request Developer shall promptly provide to the Enterprises, any or all of the following information regarding a
proposed transferee in connection with any Equity Transfer that would result in a Change of Control in order to enable the Enterprises to determine whether or not to provide their consent to such Equity Transfer pursuant to Section 26.2.2:

a. the name and address of the proposed transferee;

b. unless such proposed transferee is a publicly traded entity, the names of the proposed transferee’s shareholders or members together with the share capital or partnership or membership interests, as the case may be, held by each of them;

c. the manner in which the proposed transferee shall be financed and the extent to which such financing is committed (to the extent relevant);

d. copies of the proposed transferee’s financial statements (audited, if available) for its three most recent financial years (or such shorter period as such entity has been in existence) or, in the case of a special purpose company, its opening balance sheet;

e. a copy of the proposed transferee’s organizational documents; and

f. details of the resources available to the proposed transferee and the proposed transferee’s qualifications, experience and/or technical competence to fulfill the obligations of the transferor, as applicable, including the names, qualifications, experience and/or technical or other professional competence of the proposed transferee’s directors and any key personnel who shall have responsibility for the day-to-day management of its participation in the Project as transferee.

26.2.4. Developer shall use Reasonable Efforts to provide the Enterprises with at least 30 Calendar Days’ prior notice of any Equity Transfer in relation to Developer excluding any Permitted Equity Transfer as described in paragraph a. of the definition thereof in Part A of Annex A (Definitions and Abbreviations).

26.2.5. Any Equity Transfer made or purportedly made in violation of the restrictions set out in Sections 26.2.1 or 26.2.2 shall be null and void.

26.2.6. Developer agrees to reimburse the Enterprises for all reasonable costs and expenses incurred by the Enterprises in connection with its review of any Equity Transfer.

27. DEBT FINANCING

27.1. Developer Responsibilities for Financing

27.1.1. Developer is solely responsible for obtaining and repaying all financing necessary for the Work and the Project, without recourse to the Enterprises except as expressly permitted or specified in this Agreement. Subject to Schedule 1 (Financial Close), Developer exclusively bears the risk of any changes in the interest rate, credit spreads, payment provisions, collateral requirements, financing charges, breakage charges or other terms of any of its financing commitments.

27.1.2. If Developer seeks to utilize PABs or a TIFIA Loan to finance the Work and the Project, then Developer is responsible for obtaining necessary approvals, complying with all applicable Federal, State and local requirements and achieving Financial Close, in each case subject to, and without prejudice to the Enterprises’ (including the PABs Issuer’s) obligations under, Section 27.4 and Schedule 1 (Financial Close).

27.2. Mandatory Terms of Financing Documents

Each Financing Document, including any amendments or supplements thereto, shall comply with, and, as required, incorporate the terms set out in, Part B of Schedule 16 (Mandatory Terms).
27.3. Limited Permission to Grant Security

27.3.1. Developer may grant security interests in, or assign its interest in, any and all of its rights, title and interests in, to, under or derived from:

a. this Agreement (including any such rights, title and interests in, to or derived from payments made by the Enterprises to Developer hereunder);

b. the Subcontracts;

c. each Contractor Bond;

d. the Insurance Policies (provided that any such security interest or assignment does not result in a violation of Section 25.5);

e. the Supplemental Indenture; and

f. the Central 70 Note,

(excluding any rights or interests to or in the Handback Reserve Account or the Physical Damage Proceeds Reserve) to Lenders exclusively for purposes of securing the Project Debt, subject to the terms and conditions contained in this Agreement.

27.3.2. Developer is strictly prohibited from mortgaging, pledging or encumbering, or creating a lien, charge or security interest on or against, its interest in, and its rights and obligations under, this Agreement, the Subcontracts, any Contractor Bonds, the Insurance Policies, the Supplemental Indenture and the Central 70 Note, or any portion thereof, to secure any indebtedness of any Person other than:

a. itself;

b. any special purpose entity that owns Developer but has no other assets and has purposes and powers limited to the Project and the Work;

c. a special purpose entity subsidiary owned by either Developer or by an entity described in Section 27.3.2.b; or

d. the PABs Issuer,

and no Security Document or other instrument purporting to do the same shall extend to or affect the right, title and interest of the Enterprises in the Project or the Enterprises’ rights or interests under this Agreement.

27.3.3. Notwithstanding the foreclosure or other enforcement of any security interest created by, or assignment made pursuant to, a Security Document, Developer shall remain liable to Enterprises for the payment of all sums owing to the Enterprises under this Agreement and the performance and observance of all of Developer’s obligations under this Agreement.

27.4. Limitations on Enterprise Involvement in and Liability for any Financing

27.4.1. The Enterprises shall use Reasonable Efforts in order to assist Developer’s efforts to achieve Financial Close with a TIFIA Loan and/or PABs (including, with respect to any TIFIA Loan, by providing such information to the Build America Bureau as the Build America Bureau or Developer may reasonably request from time to time), provided that, subject to Schedule 1 (Financial Close), the Enterprises shall not bear any risk for the failure to obtain funding from either of these potential sources (for certainty, except to the extent expressly provided in Schedule 1 (Financial Close), including following the occurrence of a Key Financial Event), and any such failure shall not diminish Developer’s obligations under this Agreement.

27.4.2. None of the Enterprises, CDOT or any other Governmental Authority, other than the PABs Issuer to the extent of its obligations in relation to the PABs issued by it and BE in connection with its obligations in respect of the Central 70 Note, shall:

a. without prejudice to, and without altering, the Enterprises’ obligations pursuant to Sections 15 and 33 and Schedule 7, and subject to the terms of the Lenders Direct
Agreement, have any liability whatsoever for payment of any Project Debt, or of any other indebtedness issued or incurred by any Person in connection with this Agreement or the Project, or any interest accrued thereon or any other sum secured by or accruing under any Financing Document; or

b. join in, execute or guarantee any note or other evidence of indebtedness incurred in connection with this Agreement, the Project or under any Financing Document.

27.4.3. Any review or comment by the Enterprises of any Financing Document is not:

a. a guarantee or endorsement of the Project Debt or any other obligations issued or incurred by any Person in connection with this Agreement or the Project; or

b. a representation, warranty or other assurance as to the ability of any Person to perform its obligations with respect to the Project Debt or with respect to any other obligations of such Person in connection with this Agreement or the Project.

27.4.4. Except in the case of:

a. default by the PABs Issuer of its express obligations set out in a Financing Document to which it is a party;

b. a breach by the Enterprises of their express obligations to Lenders set out in the Lenders Direct Agreement;

c. a default by the Enterprises (including the PABs Issuer) of their express obligations set out in any continuing disclosure agreement related to the PABs to which either or both of them is or are a party; and

d. any Lender succeeding to the rights and interests of Developer hereunder pursuant to the Lenders Direct Agreement,

the Enterprises shall not have any obligation to any Lender and no Lender is entitled to seek any damages or other amounts from the Enterprises (and, in the case of an event specified in Section 27.4.4.a, then only from BE in its capacity as PABs Issuer), whether for Project Debt or any other amount. For certainty, the foregoing does not affect Enterprises’ liability to Developer under Section 33 and Schedule 7 (Compensation on Termination) for the payment of any Termination Amount.

28. FINANCIAL MODEL

28.1. General

28.1.1. Whenever a Relevant Event occurs (except as otherwise provided in this Agreement or where the Parties mutually agree otherwise), the financial consequences of such event shall be determined pursuant to this Section 28.

28.1.2. Where, for the purposes of this Section 28, the Financial Model is to be used to make calculations related to, and/or to be adjusted by reference to, a Relevant Event, this shall be carried out by Developer, in consultation with the Enterprises, to reflect the impact of the Relevant Event in respect of which such calculations and/or adjustment is being undertaken.

28.1.3. In calculating any Change in Costs, Delay Financing Costs or Milestone Payment Delay Costs and in assessing other adjustments to be made to the Financial Model arising from a Relevant Event, Developer shall not be entitled to take into account the financial impact up to or after the date of the Relevant Event of those risks which Developer bears under the terms of this Agreement, including (to the extent so borne by Developer under this Agreement) changes in taxation rates, inflation and the impact of any deductions made by the Enterprises pursuant to Schedules 4 (Payments), 5 (Milestone Payments) and 6 (Performance Mechanism).

28.2. No Better and No Worse

Any reference in this Agreement to “No Better and No Worse” or to leaving Developer in a “No Better and No Worse position” shall be construed by reference to Developer’s:
a. rights, duties and liabilities under or arising pursuant to the performance of this Agreement, the Financing Documents and the Principal Subcontracts; and

b. ability to perform its obligations and exercise its rights under this Agreement, the Financing Documents and the Principal Subcontracts,

so as to ensure that:

c. Developer is left in a position (ascertained in accordance with Section 28.2.d) which is financially no better and no worse in relation to the Key Ratios and the Equity IRR; and

d. such position shall be ascertained by determining through an adjustment to the Financial Model made pursuant to Sections 28.3 and 28.4 the adjustment or credit to the payments between the Parties hereunder required to maintain Developer in the financial position it would have been in under the version of the Financial Model applicable immediately prior to the relevant adjustment,

provided that, for the purposes of determining whether Developer was left in a No Better and No Worse position pursuant to any Section of this Agreement, any such adjustment or credit shall be reduced to take into account any Loss, suffered or incurred by Developer as a result of the occurrence of the relevant Supervening Event, in respect of which the Enterprises are not required to compensate Developer pursuant to this Agreement and/or any unrelated set-off by the Enterprises pursuant to Section 44.1.1.

28.3. Amendments to Logic and/or Formulae

28.3.1. Where it is necessary to amend the logic or formulae incorporated in the Financial Model to permit calculations and/or adjustments to be made as required by this Section 28, such amendments shall be made to the extent necessary.

28.3.2. If any amendment is to be made to the logic or formulae incorporated in the Financial Model pursuant to Section 28.3.1, the Financial Model shall first be run immediately prior to the making of any such amendment to ensure that the Key Ratios from the Financial Model are maintained at levels that are neither lower nor higher than the Key Ratios existing immediately after making such amendment, and the difference in the Equity IRR after and immediately prior to making such amendment does not differ by more than one basis point (being 0.01%).

28.4. Financial Model Audits and/or Accuracy

28.4.1. In connection with any adjustments made to the Financial Model, including amendments to the logic or formulae incorporated in the Financial Model as contemplated by Section 28.3, and as a condition to any Approval pursuant to Section 28.6, Developer shall deliver to the Enterprises (on a reliance basis) an audit of such amended version of the Financial Model from an independent audit firm that is unaffiliated with Developer, is otherwise free of any conflict of interest and has a nationally recognized reputation.

28.4.2. Developer shall bear the entire risk of any errors in or omissions from the Financial Model and shall not be entitled to any compensation or other relief from the Enterprises in relation to any Loss or damage that it suffers as a result of any such error or omission.

28.5. Copies of the Revised Financial Model

Following any adjustment or other revision to the Financial Model under the provisions of this Section 28 or pursuant to Section 29, Developer shall promptly deliver a copy of the revised Financial Model to the Escrow Agent pursuant to the Financial Model Escrow Agreement in the same form as the version delivered pursuant to Schedule 1 (Financial Close) prior to Financial Close.
28.6. Replacement of Financial Model

Any Financial Model produced following adjustments pursuant to this Section 28 shall, when it is Approved by the Enterprises, become the Financial Model for the purposes of this Agreement until any further amendment pursuant to this Section 28 or 29.

28.7. Financial Model License

a. Developer grants to the Enterprises a license to use the Financial Model commencing from its delivery pursuant to this Agreement to end of the Term or, if later, the date of full settlement of all mutual claims arising out of this Agreement that the Parties may have against each other if such a date occurs after the end of the Term, for any purpose in connection with this Agreement and/or the Project.

b. The license granted pursuant to Section 28.7.a shall not be transferable or assignable by the Enterprises except to CDOT or to any Person to whom this Agreement may be transferred in accordance with Section 39.2 and then only for purposes in connection with this Agreement and/or the Project.

29. REFINANCINGS

29.1. Enterprises’ Approval, and Sharing in the Gains of Qualifying Refinancings

29.1.1. Developer shall not implement any Qualifying Refinancing without the prior Acceptance of the Enterprises.

29.1.2. Following the completion by Developer of any Enterprise Accepted Qualifying Refinancing, the Enterprises shall be entitled to collectively receive a 50% share of any Refinancing Gain arising therefrom, provided that the Enterprises shall not withhold or delay their Acceptance to a Qualifying Refinancing in order to obtain greater than such a 50% share of the Refinancing Gain.

29.2. Refinancing Details

29.2.1. Developer shall notify Enterprises of any Qualifying Refinancing at least 30 Working Days (or 15 Working Days, in case of a Rescue Refinancing) in advance of the date that is proposed that such Qualifying Refinancing or Rescue Refinancing, as applicable, becomes effective.

29.2.2. The notice to be provided by Developer referred to in Section 29.2.1 shall include details of any changes to Developer’s obligations to the Lenders, details of the anticipated Refinancing Gain and details of changes or replacements to the Financing Documents, and shall include a copy of the proposed revised Financial Model relating to the proposed Refinancing (if any) and the basis for the assumptions used in the proposed Financial Model.

29.2.3. No later than 10 Working Days (or five Working Days, in the case of a Rescue Refinancing) after delivery of the notice by Developer to the Enterprises pursuant to Section 29.2.1, the Enterprises (following consultation with Developer and good faith consideration of Developer’s reasonable recommendations regarding the sharing of any Refinancing Gain) shall notify Developer as to how Enterprises shall elect to receive its share of the Refinancing Gain pursuant to Section 29.3. No later than 10 Working Days (or five Working Days, in the case of a Rescue Refinancing) after delivery of such notice to Developer, Developer shall deliver to the Enterprises a detailed update to its original notice referred to in Section 29.2.1 reflecting any adjustments to the proposed revised Financial Model necessary to take account of the Enterprises’ election. With the Enterprises’ Approval, such revised Financial Model shall become the Financial Model for purposes of this Agreement until any further amendment pursuant to Section 28 or this Section 29.

29.2.4. The Enterprises shall (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 or not the Refinancing is a Qualifying Refinancing, provided that:
a. Developer shall reimburse the Enterprises for all reasonable costs and expenses incurred in conducting any such audit in respect of a Qualifying Refinancing, and such costs and expenses shall be taken into account when calculating the Refinancing Gain; and

b. the Enterprises shall reimburse Developer for all reasonable costs and expenses incurred in conducting any such audit in respect of a Refinancing that is not and, prior to such audit, was known by the Enterprises to not be a Qualifying Refinancing.

29.3. Receipt of Enterprises' Share

The Enterprises shall have the right to elect to receive their share of any Refinancing Gain described in Section 29.1.2 as either:

a. to the extent Developer receives a lump sum payment as a result of the Qualifying Refinancing, a lump sum payment, to be paid promptly and in any event no later than five Working Days following the relevant Distribution;

b. a reduction in the Performance Payments over the remainder of the Term in a manner to be determined by the Enterprises provided that Developer is left in a No Better and No Worse position (after taking into account Developer's share of the relevant Refinancing Gain); or

c. a combination of paragraphs a. and b.

29.4. Costs

The Refinancing Gain shall 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 the Enterprises shall be paid to the Enterprises by Developer no later than 20 Working Days after any Qualifying Refinancing.

29.5. Notifiable Refinancings

Without prejudice to the other provisions of this Section 29, Developer shall notify the Enterprises of all Notifiable Refinancings on becoming aware of the same and again when they are entered into and provide full details of the same within 30 Calendar Days of the date the relevant agreements for the Notifiable Refinancing are entered into.

29.6. Delivery of Changed Financing Documents

At any time an amendment is made to any Financing Document or Developer enters into a new Financing Document (or any agreement which affects the interpretation or application of any Financing Document), Developer shall deliver to the Enterprises a conformed copy of each such amendment or agreement within 10 Working Days of the date of its execution or creation (as applicable) certified as a true copy by an officer of Developer.

30. TAXES

30.1. Developer shall pay, prior to delinquency, all Taxes, including, for certainty, all Ad Valorem and Possessory Interest Taxes and all State Sales Taxes, in each case in respect of Developer's performance of the Work, Developer's obligations under this Agreement, Developer's interests in and rights to the Site and the Project License and any other Developer-Related Entity interest in this Agreement and the Project. Subject to Section 30.1.6 and Developer's rights arising as a result of the occurrence of any Compensation Event as described in paragraph c.i. of the definition thereof in Part A of Annex A (Definitions and Abbreviations), the Enterprises shall not be responsible for any Taxes levied on Developer or on any other Developer-Related Entities.

30.1.2. Subject to Section 30.1.6, Developer accepts sole responsibility for, and agrees that it shall have no right to claim a Supervening Event or to any other Claim for relief due to, its misinterpretation of Laws in relation to Taxes or incorrect assumptions regarding applicability of Taxes.
30.1.3. Developer shall promptly notify the Enterprises after it becomes aware that it (or any other Developer-Related Entity) may be legally obligated to pay:

a. any:
   i. ad valorem property tax imposed by a Governmental Authority under the laws of the State; or
   ii. possessory interest property tax pursuant to Articles 1-14 of Title 39, C.R.S. (including, for certainty, C.R.S. § 39-1-103 (17)),
      (each an “Ad Valorem and Possessory Interest Tax”); or
b. any sales and use tax (“State Sales Tax”) imposed by the State under the laws of the State (excluding, for certainty, any sales and use tax imposed by the City of Denver or any other Governmental Authority that is not the State),

in each case in connection with the Work and the Project.

30.1.4. Developer shall:

a. cooperate and coordinate with the Enterprises in their efforts to reduce or eliminate Developer’s liability for any Ad Valorem and Possessory Interest Tax and State Sales Tax for which the Enterprises otherwise would be obligated to reimburse Developer pursuant to Section 30.1.6; and

b. use (and ensure that each other relevant Developer-Related Entity uses) Reasonable Efforts to mitigate the imposition and amount of the relevant Tax,

provided that Developer shall not be required to disclose any Project Records to the applicable Governmental Authority when complying with its obligations under this Section 30.1.4 to the extent such records are identified as exempt from disclosure under such circumstances in the disclosure protocol Accepted by the Enterprises pursuant to Section 20.1.2.

30.1.5. Following Developer’s decision not to disclose any Project Record pursuant to Section 30.1.4, Developer shall assume the Enterprises’ efforts to reduce or eliminate Developer’s liability for any State Sales Tax and the Enterprises shall be relieved of their obligation to reimburse Developer pursuant to Section 30.1.6 with respect to such State Sales Tax.

30.1.6. Subject to Section 30.1.5, the Enterprises shall reimburse Developer for the actual amount of any Ad Valorem and Possessory Interest Tax and State Sales Tax paid by Developer or any other Developer-Related Entity in connection with the Work and the Project, excluding any such Tax imposed or owing as a result of any breach of Law, Governmental Approval, Permit or this Agreement, fraud, willful misconduct, criminal conduct, recklessness, bad faith or negligence by or of any Developer-Related Entity no later than the date that is 45 Calendar Days after the Enterprises’ receipt of a demand for such reimbursement (or, provided that such 45 Calendar Day period has expired, no later than 10 Working Days prior to the final date by which Developer is legally obligated to pay such Tax), which demand shall include:

a. all supporting evidence necessary to substantiate such demand, including, in the case of any State Sales Tax, evidence that Developer or any relevant Developer-Related Entity submitted the requisite State Sales Tax exemption certificate for the transaction in question; and

b. evidence of Reasonable Efforts by Developer and any other relevant Developer-Related Entities to mitigate the imposition and amount of the relevant Tax,

and satisfaction of both paragraphs a. and b. shall be conditions precedent to the Enterprises’ reimbursement payment to Developer.
31. **RESTRICTIONS ON REVENUE GENERATING ACTIVITIES**

31.1. **Restrictions on Tolling**

31.1.1. The Enterprises (and CDOT) have exclusive rights to impose tolls or any other user fees (in any form) in relation to the Project, including the right to deposit and allocate any resulting revenues as they determine in their discretion.

31.1.2. Developer hereby acknowledges and agrees that:
   a. it has no right to:
      i. impose tolls or any other user fees (in any form) in relation to the Project; or
      ii. directly or indirectly engage in any revenue generating business on any part of the Site in connection with the Project, other than the conduct of its business pursuant to Section 8.1.2.b and the revenues it receives from the Enterprises pursuant to this Agreement;
   b. it will not have any lien over or security interest in any toll revenues, user fees or other revenues generated by the Enterprises, CDOT or other Persons on any part of the Site or in connection with the Project.

31.2. **Restrictions on Advertising**

31.2.1. The Enterprises retain all rights relating to approving, planning and/or selling advertising on the Right-of-Way, any Additional Right-of-Way and any other Assets, and otherwise in connection with the Project.

31.2.2. Developer shall:
   a. use Reasonable Efforts to cooperate with; and
   b. without prejudice to Developer’s rights arising as a result of the occurrence of any Compensation Event as described in paragraphs b.iv. and g.iii. of the definition thereof in Part A of Annex A (Definitions and Abbreviations), grant all necessary access to, the Enterprises and any Person authorized by the Enterprises in connection with the exercise of the Enterprises’ retained rights under Section 31.2.1.
PART K: DEFAULTS, REMEDIES AND TERMINATION

32.  DEFAULTS AND REMEDIES

32.1.  Developer Defaults and Cure Periods

32.1.1. The occurrence of any one of the events set out in the column titled “Developer Default” in the table below shall constitute a “Developer Default”. For purposes of this Agreement, “Developer Default Cure Period” means, in respect of a Developer Default, the cure period (if any) specified in the column titled “Cure Period” in the table below in the same row as such Developer Default, subject to extension in accordance with Section 32.1.2.

<table>
<thead>
<tr>
<th>Developer Default</th>
<th>Cure Period</th>
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</thead>
<tbody>
<tr>
<td>(1) An Insolvency Event occurs in respect of Developer.</td>
<td>None.</td>
</tr>
<tr>
<td>(2) An Insolvency Event occurs in respect of a Required Guarantor unless, within 90 Calendar Days after the occurrence of such Insolvency Event:</td>
<td></td>
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<tr>
<td>(a) Developer has:</td>
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<td>(i) replaced such Insolvent Required Guarantor with a guarantor that is Accepted by the Enterprises; or</td>
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<tr>
<td>(ii) provided security for such Insolvent Required Guarantor’s guaranty in the form of a cash deposit, other payment or letter of credit in each case in an amount equal to the specified sum or specified maximum liability (or, absent such specified sum or maximum liability, the reasonably estimated maximum liability) under its guaranty; or</td>
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<td>(b) such Insolvent Guarantor has ceased to be a Required Guarantor.</td>
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<tr>
<td>(3) An Insolvency Event occurs in respect of a Principal Subcontractor (or any Required Principal Subcontractor Member thereof) whose Work is not completed at the time of such occurrence, unless within 90 Calendar Days after the occurrence of such Insolvency Event:</td>
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<tr>
<td>(a) Developer has replaced such Insolvent Principal Subcontractor (or such Insolvent Required Principal Subcontractor Member) with a party Accepted by the Enterprises; or</td>
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<tr>
<td>(b) any such Insolvent Required Principal Subcontractor Member has ceased to be a Required Principal Subcontractor Member.</td>
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<tr>
<td>(4) With respect to any Principal Subcontract pursuant to which Work remains to be performed, Developer fails to enter into:</td>
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<tr>
<td>(a) a replacement Principal Subcontract Accepted by the Enterprises pursuant to Section 17.1.3.b and related guaranty (if any) with a counterparty and a Required Guarantor (if any) Accepted by the Enterprises within 90 Calendar Days after termination of such Principal Subcontractor</td>
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<tr>
<td>Developer Default</td>
<td>Cure Period</td>
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<tr>
<td>(b) a replacement guaranty Acceptable to the Enterprises within 90 Calendar Days</td>
<td>(a) Developer; or</td>
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<td>from a Required Guarantor related to a Principal Subcontract that has not also been terminated.</td>
<td>(b) any other Developer-Related Entity:</td>
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<td></td>
<td>(i) acting in concert with Developer; or</td>
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<td></td>
<td>(ii) acting independently of Developer, but with Developer’s prior knowledge,</td>
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<td>unless Developer promptly notifies the Enterprises and, as required by Law,</td>
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<td></td>
<td>any other relevant Governmental Authorities of such Prohibited Act</td>
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<td></td>
<td>(in which case Developer Default number (22) in this Section 32.1.1 shall</td>
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<td></td>
<td>apply with respect to such Prohibited Act).</td>
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<tr>
<td>(5) The Substantial Completion Date does not occur on or prior to the Longstop</td>
<td>(a) Developer;</td>
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<tr>
<td>Date.</td>
<td>(b) any Equity Member that remains an Equity Member 60 Calendar Days after</td>
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<td></td>
<td>the date of the relevant Exclusion;</td>
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<tr>
<td>(6) A Noncompliance Default Event occurs.</td>
<td>(c) any Principal Subcontractor whose work is not completed at the date of</td>
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<td>the relevant Exclusion that is not replaced with a contractor Accepted by</td>
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<td>(7) A Closure Default Event occurs.</td>
<td>the Enterprises within 90 Calendar Days after the date of the relevant</td>
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<tr>
<td>(8) A Persistent Breach occurs.</td>
<td>Exclusion;</td>
</tr>
<tr>
<td>(9) Any Developer-Related Entity commits a Prohibited Act and such entity is:</td>
<td>(d) any Guarantor or any member of any Principal Subcontractor whose work</td>
</tr>
<tr>
<td>(a) Developer; or</td>
<td>is not completed at the date of the relevant Exclusion that is not:</td>
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<td>(b) any other Developer-Related Entity:</td>
<td>(i) replaced with a Guarantor or member Accepted by the Enterprises; or</td>
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<td>(ii) removed without replacement on the basis that at the relevant time such</td>
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<td></td>
<td>Guarantor or member was</td>
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<td>(10) After exhaustion of all rights of appeal, there occurs any disqualification,</td>
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<tr>
<td>suspension or debarment from bidding, proposing or contracting with any state-</td>
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<td>level, interstate or Federal Governmental Authority (distinguished from ineligibility due to lack of financial qualifications) (any such event, an “Exclusion”) of:</td>
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<td>(a) Developer;</td>
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<td>(b) any Equity Member that remains an Equity Member 60 Calendar Days after the</td>
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<td>date of the relevant Exclusion;</td>
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<td>(c) any Principal Subcontractor whose work is not completed at the date of the</td>
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<td>relevant Exclusion that is not replaced with a contractor Accepted by the</td>
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<tr>
<td>Enterprises within 90 Calendar Days after the date of the relevant Exclusion;</td>
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<tr>
<td>(d) any Guarantor or any member of any Principal Subcontractor whose work is not</td>
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<td>completed at the date of the relevant Exclusion that is not:</td>
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<tr>
<td>(i) replaced with a Guarantor or member Accepted by the Enterprises; or</td>
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<tr>
<td>(ii) removed without replacement on the basis that at the relevant time such</td>
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<td>Guarantor or member was</td>
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<tr>
<td>Developer Default</td>
<td>Cure Period</td>
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<tr>
<td>not a Required Guarantor or Required Principal Subcontractor Member, in either case within 90 Calendar Days after the date of the relevant Exclusion; or (e) any other Developer-Related Entity whose work is not completed at the date of the relevant Exclusion and that remains a Developer-Related Entity 90 Calendar Days after the date of the relevant Exclusion.</td>
<td>15 Calendar Days after the date on which the Enterprises deliver notice to Developer of the occurrence of the relevant Developer Default.</td>
</tr>
<tr>
<td>(11) A Developer Default occurs pursuant to Section 26.2.1. (12) Developer makes or permits a transfer or assignment in breach of Section 39.1. (13) Developer fails to procure or maintain any Contractor Bond required to be procured and maintained pursuant to Sections 9.3.1 and 9.3.2 (other than due to the provider of any such bond ceasing to qualify as an Eligible Surety or an Eligible Financial Institution). (14) Developer fails to obtain and maintain, or cause to be obtained and maintained, any Insurance Policy in full compliance with, and as and when required under, this Agreement (other than any non-material deviation from the requirements of this Agreement pertaining to the amounts or terms of such Insurance Policy) and such failure continues for 15 Calendar Days. (15) Developer fails to comply with any Safety Compliance Order pursuant to Section 23.1.3 and such failure directly results in a material and ongoing risk to: (a) the health or safety of any person; (b) the Environment; (c) Improvements; (d) the community; or (e) property. (16) If Developer has elected pursuant to Section 4.5 of Schedule 12 (Handback Requirements) to provide a Handback Letter of Credit, Developer fails to maintain such Handback Letter of Credit in full compliance with the requirements of that Section 4.5: (a) due to the provider of any such Handback Letter of Credit ceasing to qualify as an Eligible Financial Institution, and Developer fails to procure a replacement Handback Letter of Credit within 15 Calendar Days after the provider ceases to so qualify; or (b) for any reason, other than that specified in Developer Default number (16)(a) in this Section 32.1.1, provided that no such failure shall constitute a Developer Default if such failure occurs and is continuing during the Handback Reserve Standstill Period.</td>
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<tr>
<td>Developer Default</td>
<td>Cure Period</td>
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<tr>
<td>(17) Unless Developer has delivered a Handback Letter of Credit that complies</td>
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<td>with the requirements of Section 4.5 of Schedule 12 (Handback Requirements), the</td>
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<td>amount standing to the credit of the Handback Reserve Account at any time after</td>
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<td>the commencement of the Handback Period is less than the Handback Reserve Amount,</td>
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<td>provided that no such failure shall constitute a Developer Default if such failure</td>
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<tr>
<td>occurs and is continuing during the Handback Reserve Standstill Period.</td>
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<tr>
<td>(18) Developer fails to procure a replacement Contractor Bond pursuant to</td>
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<tr>
<td>Sections 9.3.1 and 9.3.2 within 15 Calendar Days after the provider of any such</td>
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<tr>
<td>Contractor Bond ceases to qualify as an Eligible Surety or an Eligible Financial</td>
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<td>Institution.</td>
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<td>(19) A breach of Federal Law or any requirement that in either case, pursuant</td>
<td>30 Calendar</td>
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<td>to the express terms of Schedule 15 (Federal and State Requirements), gives</td>
<td>Days after</td>
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<td>rise to a default (excluding, for certainty, a default pursuant to Section 5.4</td>
<td>the date on</td>
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<td>of Schedule 15 (Federal and State Requirements)) that may subsequently result</td>
<td>which the</td>
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<td>in termination of this Agreement by the Enterprises.</td>
<td>Enterprises</td>
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<tr>
<td>(20) Developer fails to make any payment to the Enterprises pursuant to or in</td>
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<td>relation to this Agreement when due (unless such payment is the subject of a good</td>
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<td>faith Dispute).</td>
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<tr>
<td>(21) An Abandonment occurs.</td>
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<td>(22) Any Developer-Related Entity (other than Developer):</td>
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<tr>
<td>(a) not acting in concert with Developer; or</td>
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<tr>
<td>(b) acting independently of Developer to the extent that Developer Default</td>
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<tr>
<td>number (9) in this Section 32.1.1 does not apply;</td>
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<tr>
<td>commits a Prohibited Act and:</td>
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<tr>
<td>(i) any Equity Member or any Indirect Equity Member that remains an Equity</td>
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<tr>
<td>Member or any Indirect Equity Member, as applicable, 60 Calendar Days after</td>
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<td>the occurrence of the relevant Prohibited Act;</td>
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<tr>
<td>(ii) with respect to any Principal Subcontractor whose work is not completed</td>
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<tr>
<td>when the relevant Prohibited Act occurs, such Principal Subcontractor is not</td>
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<tr>
<td>replaced with a contractor Accepted by the Enterprises within 90 Calendar Days</td>
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<td>after the occurrence of the relevant Prohibited Act;</td>
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<tr>
<td>(iii) Guarantor or any member of any Principal Subcontractor whose work is</td>
<td></td>
</tr>
<tr>
<td>not completed at the date of the relevant Prohibited Act:</td>
<td></td>
</tr>
<tr>
<td>(A) is not replaced with a Guarantor or member Accepted by the Enterprises; or</td>
<td></td>
</tr>
<tr>
<td>(B) removed without replacement on the basis that at the relevant time such</td>
<td></td>
</tr>
</tbody>
</table>
| Guarantor or
<table>
<thead>
<tr>
<th>Developer Default</th>
<th>Cure Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>member was not a Required Guarantor or Required Principal Subcontractor Member, in either case within 90 Calendar Days after the date of the Prohibited Act; or (iv) with respect to any other Developer-Related Entity, remains a Developer-Related Entity 30 Calendar Days after the occurrence of the relevant Prohibited Act.</td>
<td>30 Calendar Days (subject to extension in accordance with Section 32.1.2.a) after the date on which the Enterprises deliver notice to Developer of the occurrence of the relevant Developer Default.</td>
</tr>
<tr>
<td>(23) An Organizational Conflict of Interest was known, or should have been known, and was not disclosed to the Enterprises pursuant to the ITP before the Agreement Date.</td>
<td>30 Calendar Days (subject to extension in accordance with Section 32.1.2.a) after the date on which the Enterprises deliver notice to Developer of the occurrence of the relevant Developer Default.</td>
</tr>
<tr>
<td>(24) Developer fails to comply with any Governmental Approval, Permit or Law, or any Environmental Requirement, in any such case in any material respect.</td>
<td>30 Calendar Days (subject to extension in accordance with Section 32.1.2.a) after the date on which the Enterprises deliver notice to Developer of the occurrence of the relevant Developer Default.</td>
</tr>
<tr>
<td>(25) Developer fails to comply with any requirement of this Agreement pertaining to the amounts, terms, coverage documentation or evidencing of any Insurance Policy, other than: (a) with respect to any failure to submit documents verifying insurance coverage and payment of insurance premiums and renewals that constitutes a Noncompliance Event; or (b) with respect to any failure that results in a Developer Default number (14) in this Section 32.1.1.</td>
<td>45 Calendar Days (subject to extension in accordance with Section 32.1.2.a) after the date on which the Enterprises deliver notice to Developer of the occurrence of the relevant Developer Default.</td>
</tr>
<tr>
<td>(26) During the Restricted Transfer Period, an Insolvency Event occurs in respect of any Equity Member and continues for 45 Calendar Days, unless such Equity Member has fully met all financial obligations owing to Developer by providing a Committed Investment and payments or transfers of money or property previously made to or for the benefit of Developer are not subject to any Law respecting the avoidance or recovery of preferences for fraudulent transfers.</td>
<td>45 Calendar Days (subject to extension in accordance with Section 32.1.2.a) after the date on which the Enterprises deliver notice to Developer of the occurrence of the relevant Developer Default.</td>
</tr>
<tr>
<td>(27) Subject to Section 5.4, any representation or warranty in this Agreement made by Developer pursuant to this Agreement, or in any certificate, schedule, report, instrument, agreement or other document delivered by or on behalf of Developer to the Enterprises pursuant to this Agreement, is false, misleading or inaccurate in any material respect when made or omits material information when made.</td>
<td>45 Calendar Days (subject to extension in accordance with Section 32.1.2.a) after the date on which the Enterprises deliver notice to Developer of the occurrence of the relevant Developer Default.</td>
</tr>
<tr>
<td>(28) A violation by Developer of Section 53.5.</td>
<td>45 Calendar Days (subject to extension in accordance with Section 32.1.2.a) after the date on which the Enterprises deliver notice to Developer of the occurrence of the relevant Developer Default.</td>
</tr>
<tr>
<td>(29) A breach by Developer of any of its material obligations under this Agreement, including any written repudiation of this Agreement, other than any breach that: (a) constitutes a Developer Default under any other paragraph of this Section 32.1.1; (b) constitutes a Noncompliance Event; (c) results in the accrual of a Construction Closure</td>
<td>45 Calendar Days (subject to extension in accordance with Section 32.1.2.a) after the date on which the Enterprises deliver notice to Developer of the occurrence of the relevant Developer Default.</td>
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</tbody>
</table>
Central 70 Project: Project Agreement

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Developer Default | Cure Period
---|---
Deduction or an Operating Period Closure Deduction; or (d) arises due to a Relief Event or Compensation Event.

32.1.2. For purposes of determining when any applicable Developer Default Cure Period has expired or when a cure of any relevant Developer Default has been effected the following provisions of this Section 32.1.2 shall apply:

a. with respect to any Developer Default number (23), (24), (25), (26), (27), (28) or (29) in Section 32.1.1 that requires a longer period to cure than the applicable Developer Default Cure Period, if Developer has within 10 Calendar Days of the start of the relevant Developer Default Cure Period submitted a rectification plan to the Enterprises for Acceptance, then such Developer Default Cure Period shall be extended so that it expires on the earliest of:
   i. the later of the date on which the Enterprises reject such plan and the end of the Developer Default Cure Period absent any extension;
   ii. the latest date reasonably necessary to effect the cure thereof as set out in the Accepted plan;
   iii. if there is an Accepted plan, 120 Calendar Days after the date of the start of the applicable Developer Default Cure Period; or
   iv. the date on which Developer ceases its good faith efforts to cure such Developer Default in accordance with the Accepted plan;

b. without prejudice to Section 32.1.2.a, with respect to the Developer Default number (27) in Section 32.1.1, the cure will be complete when all necessary disclosures have been made and all adverse effects (if any) caused by the incorrect disclosure have been cured;

c. with respect to any Developer Default number (9), (10), (22) or (23) in Section 32.1.1, the cure must be Accepted by the Enterprises;

d. with respect to Developer Default number (14), (18) or (25) in Section 32.1.1, the Enterprises shall have the right, but not the obligation, to effect a cure, at Developer’s expense, if such a Developer Default continues after the end of the applicable Developer Default Cure Period; and

e. any requirement of prior notice of Developer Default from the Enterprises to Developer to initiate the applicable Developer Default Cure Period shall be automatically waived if:
   i. Developer knew that the relevant Developer Default had occurred;
   ii. Developer failed to notify the Enterprises of the relevant Developer Default;
   iii. Developer knew (or reasonably should have anticipated) that as a result of such failure the Enterprises would not know of such Developer Default; and
   iv. at the relevant time, the Enterprises did not know of the relevant Developer Default,

in which case the applicable Developer Default Cure Period shall start on the date that Developer first knew that the relevant Developer Default had occurred.

32.2. Enterprises Remedies for Developer Default

32.2.1. If any Developer Default occurs and has not been cured by the expiry of the applicable Developer Default Cure Period, the Enterprises may in their discretion, subject to the Lenders’ rights pursuant to the Lenders Direct Agreement, exercise any rights and remedies available to them
(under this Agreement, at Law or otherwise) for so long as such Developer Default continues uncured, including:

a. terminating this Agreement pursuant to Section 33.1.3;

b. exercising their rights of self-help pursuant to Sections 23.4.2 to 23.4.4 as provided in Section 23.4.1.b;

c. by notice to Developer, granting Developer an extended Developer Default Cure Period (in addition to any other extension pursuant to Section 32.1.2.a) which grant may be made subject to such conditions as the Enterprises may require in their discretion;

d. making a demand upon and enforcing any Contractor Bond in accordance with its terms, with the proceeds of any such action to be applied to the satisfaction of Developer’s obligations under this Agreement, including payment of amounts due to the Enterprises; and/or

e. waiving such default in accordance with Section 43.3.

32.2.2. The Enterprises’ rights and remedies with respect to the occurrence of any Developer Default are without limitation to its rights and remedies with respect to the occurrence of any other Developer Default.

32.3. Enterprise Defaults and Cure Periods

32.3.1. The occurrence of any one of the events set out in the column titled “Enterprise Default” in the table below shall constitute an “Enterprise Default”. For purposes of this Agreement, “Enterprise Default Cure Period” means, in respect of an Enterprise Default, the cure period specified in the column titled “Cure Period” in the table below in the same row as such Enterprise Default, subject to extension in accordance with Section 32.3.2.

<table>
<thead>
<tr>
<th>Enterprise Default</th>
<th>Cure Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Either Enterprise fails to comply with its obligation under Section 11.2.2 and, as a result of such failure, such Enterprise fails to qualify as a government-owned business within CDOT or an enterprise under Article X, Section 20 of the State Constitution with respect to the current Contract Year and such failure is subsequently determined to have continued with respect to the following Contract Year.</td>
<td>None.</td>
</tr>
<tr>
<td>(2) The Enterprises fail to make any payment to Developer under this Agreement when due (unless such payment is the subject of a good faith Dispute).</td>
<td>15 Calendar Days with respect to Milestone Payments, and 30 Calendar Days with respect to all other payments, in each case after the date on which Developer delivers notice to the Enterprises of the occurrence of the relevant Enterprise Default.</td>
</tr>
<tr>
<td>(3) Either of the Enterprises, CDOT, the State or any other Governmental Authority confiscates, sequesters, condemns or appropriates all or a material part of:</td>
<td>30 Calendar Days after the date on which Developer delivers notice to the</td>
</tr>
<tr>
<td>Enterprise Default</td>
<td>Cure Period</td>
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<tr>
<td>(a) the Project;</td>
<td>Enterprises of the occurrence of the relevant Enterprise Default.</td>
</tr>
<tr>
<td>(b) the Assets;</td>
<td></td>
</tr>
<tr>
<td>(c) ownership interests in Developer;</td>
<td></td>
</tr>
<tr>
<td>(d) Developer’s interests in this Agreement, excluding the exercise of any right of termination pursuant to this Agreement.</td>
<td></td>
</tr>
<tr>
<td>(4) BE fails to comply with its obligation under Section 11.2.1.</td>
<td></td>
</tr>
<tr>
<td>(5) The Enterprises fail to comply with their obligations under Section 11.2.3.a.</td>
<td></td>
</tr>
<tr>
<td>(6) The Enterprises fail to comply with their obligations under Section 11.2.3.b.</td>
<td>45 Calendar Days after the date on which Developer delivers notice to the Enterprises of the occurrence of the relevant Enterprise Default.</td>
</tr>
<tr>
<td>(7) Either Enterprise makes an assignment or transfer in breach of Section 39.2.</td>
<td></td>
</tr>
<tr>
<td>(8) A breach or breaches by either Enterprise of any of its or their obligations under this Agreement (other than any breach or breaches that constitute an Enterprise Default under any other paragraph of this Section 32.3.1) that (in the case of more than one breach, when taken together) substantially frustrates or renders it impossible for Developer to perform all or a substantial part of its obligations or to exercise all or a substantial part of its rights under this Agreement in each case for a continuous period of 60 Calendar Days.</td>
<td></td>
</tr>
<tr>
<td>(9) Subject to Section 5.4, any representation or warranty made by either Enterprise pursuant to Section 5.1.2 is false, misleading or inaccurate in any material respect when made or omits material information when made.</td>
<td>60 Calendar Days after the date on which Developer delivers notice to the Enterprises of the occurrence of the relevant Enterprise Default.</td>
</tr>
</tbody>
</table>

32.3.2. For purposes of determining when any applicable Enterprise Default Cure Period has expired or when a cure of any relevant Enterprise Default has been effected, the following provisions of this Section 32.3.2 shall apply:

a. with respect to any Enterprise Default number (6) or (9) in Section 32.3.1 that, in the Enterprises’ reasonable determination, requires a longer period to cure than the applicable Enterprise Default Cure Period, if the Enterprises have within the relevant Enterprise Default Cure Period notified Developer of such determination, then, provided that (I) the Enterprises have taken meaningful steps to cure such Enterprise Default before triggering such extension and (II) the Enterprises proceed diligently to cure such Enterprise Default after such extension is made, such Enterprise Default Cure Period shall be extended to the earliest of:

i. the latest date reasonably necessary to effect the cure; or

ii. with respect to:

A. any Enterprise Default number (6) in Section 32.3.1, 45 Calendar Days after the date of the end of the applicable Enterprise Default Cure Period; and
32.4. Developer Remedies for Enterprise Default

32.4.1. If any Enterprise Default occurs and has not been cured within the applicable Enterprise Default Cure Period, Developer may in its discretion:

a. terminate this Agreement pursuant to Section 33.1.4;

b. by notice to the Enterprises, grant the Enterprises an extended Enterprise Default Cure Period (in addition to any other extension pursuant to Section 32.3.2); and/or

c. waive such default in accordance with Section 43.3.

32.4.2. Developer’s rights and remedies with respect to the occurrence of any Enterprise Default are without limitation to its rights and remedies with respect to the occurrence of any other Enterprise Default.

33. TERMINATION

33.1. Termination Events

33.1.1. Exclusive Rights to Terminate

a. Prior to Financial Close, the Parties’ sole right to terminate this Agreement shall be pursuant to Schedule 1 (Financial Close). On and from the Financial Close, this Agreement is subject to termination pursuant to Sections 33.1.2 through 33.1.7.

b. This Section 33, together with the other provisions of this Agreement expressly referred to in this Section 33 and the provisions of the Lenders Direct Agreement, contain the entire and exclusive provisions and rights of the Enterprises and Developer regarding termination of this Agreement, and any and all other rights to terminate at Law or in equity are hereby waived to the maximum extent permitted by Law, provided that termination of this Agreement shall not relieve Developer, or any Guarantor, insurer or any surety or other financial institution that provides a Contractor Bond, of its obligation for any Claims arising prior to termination.

33.1.2. Termination for Convenience

a. The Enterprises may, in their discretion (subject to prior notice in accordance with Section 33.1.2.b and to Section 33.1.2.d), terminate this Agreement at any time on or before the Expiry Date by delivering to Developer a Termination Notice to such effect (a “Termination for Convenience”).

b. Any such Termination for Convenience shall be effective 30 Calendar Days from the date of the Termination Notice, or on such later date as the Enterprises may specify in such notice.

c. As a consequence of a Termination for Convenience, the Enterprises shall pay the Termination Amount to Developer as determined pursuant to Section 1 of Schedule 7 (Compensation on Termination).

d. The Enterprises shall only be entitled to exercise their discretion to terminate this Agreement pursuant to Section 33.1.2.a if at such time they have a reasonable expectation that they will be able to pay such Termination Amount in full no later than the date determined pursuant to Section 4.2 of Schedule 7 (Compensation on Termination).

e. On or about the date of a Termination Notice delivered pursuant to Section 33.1.2.a (and, in any event, prior to the Termination Date), the Enterprises shall deliver to Developer a
written summary of the basis for their reasonable expectation referenced in Section 33.1.2.d.

33.1.3. Termination for Developer Default
   
a. If a Developer Default occurs and has not been cured within the applicable Developer Default Cure Period, the Enterprises may, in their discretion and subject to prior notice in accordance with Section 33.1.3.b and the Lenders’ rights pursuant to the Lenders Direct Agreement, terminate this Agreement at any time that such default is continuing by delivering to Developer a Termination Notice to such effect.

b. Subject to the Lenders Direct Agreement, any such termination for Developer Default shall be effective 30 Calendar Days from the date of the Termination Notice, or on such later date as the Enterprises may specify in such notice.

c. As a consequence of any termination for Developer Default, the Enterprises shall pay the Termination Amount to Developer as determined pursuant to Section 3 of Schedule 7 (Compensation on Termination).

33.1.4. Termination for Enterprise Default
   
a. If an Enterprise Default occurs and has not been cured within the applicable Enterprise Default Cure Period, Developer may, in its discretion and subject to prior notice in accordance with Section 33.1.4.b, terminate this Agreement at any time that such default is continuing by delivering to the Enterprises a Termination Notice to such effect.

b. Any such termination for Enterprise Default shall be effective 30 Calendar Days from the date of the Termination Notice.

c. As a consequence of any termination for Enterprise Default, the Enterprises shall be obligated to pay the Termination Amount to Developer as determined pursuant to Section 1 of Schedule 7 (Compensation on Termination).

33.1.5. Termination by Court Ruling
   
a. Any Termination by Court Ruling shall become effective and automatically terminate Agreement upon issuance of the final, non-appealable court order by a court of competent jurisdiction.

b. As a consequence of any Termination by Court Ruling, excluding any such event that arises by reason of a Developer Default or an Enterprise Default, the Enterprises shall pay the Termination Amount to Developer as determined pursuant to Section 2 of Schedule 7 (Compensation on Termination).

   c. As a consequence of any Termination by Court Ruling that arises by reason of a Developer Default or an Enterprise Default, the Enterprises shall pay the Termination Amount to Developer pursuant to Section 33.1.3.c or Section 33.1.4.c, as applicable.

33.1.6. Termination for Extended Events
   
a. If any of the following conditions is satisfied:

   i. any single:

      A. Force Majeure Event; or

      B. Relief Event as described in paragraphs c., f., h. or l. of the definition thereof in Part A of Annex A (Definitions and Abbreviations),

   causes one or both Parties to be unable to comply with its or their material obligations with respect to all or a material portion of the Project or the Work and such event and inability continues for a continuous period of at least 180 Calendar Days;
ii. any single Relevant Event results in a Milestone Delay Period of more than 365 Calendar Days, where for purposes of this Section 33.1.6.a.ii only:

A. all Compensation Events as described in paragraphs f.i. and f.ii.A. of the definition thereof in Part A of Annex A (Definitions and Abbreviations) shall collectively be deemed to be a single Compensation Event; and

B. all Compensation Events as described in paragraph f.iii. of the definition thereof in Part A of Annex A (Definitions and Abbreviations) shall collectively be deemed to be a single Compensation Event; or

iii. all:

A. Force Majeure Events;

B. Relief Events as described in paragraphs c., f., h. or l. of the definition thereof in Part A of Annex A (Definitions and Abbreviations); and

C. Relevant Events,

collectively result in a Milestone Delay Period of more than 730 Calendar Days, then either Party may in its discretion, subject to Sections 33.1.6.b, 33.1.6.c and 33.1.6.d, terminate this Agreement at any time thereafter:

iv. during the continuation of the relevant event referred to in Section 33.1.6.a.i or Section 33.1.6.a.ii; or

v. during the continuation of the Milestone Delay Period,

(any such event referred to in iv. and any such continuation referred to in v., an “Extended Event”) by delivering to the other Party a Termination Notice to such effect (a “Termination for Extended Events”).

b. Notwithstanding Section 33.1.6.a, the Enterprises shall not be entitled to initiate a Termination for Extended Events in connection with any Extended Event that arises as a result of a Compensation Event as described in paragraphs a., b., g., i.i., i., k., l., m. or o. of the definition thereof in Part A of Annex A (Definitions and Abbreviations).

c. Any Termination for Extended Events shall be effective 30 Calendar Days from the date of the Termination Notice, provided that the Enterprises may, in their discretion (and without prejudice to the Enterprises' right to subsequently issue a Termination Notice pursuant to Section 33.1.6.a at any time thereafter with respect to such Extended Event to the extent then continuing), reject any Termination Notice delivered by Developer within 10 Working Days of receipt, in which case:

i. if such Termination Notice was delivered by Developer during the Construction Period and:

A. such Termination Notice was delivered as a result of satisfaction of any condition described in Section 33.1.6.a.i or Section 33.1.6.a.ii and the relevant Extended Event was a Force Majeure Event or a Relief Event (and not a Compensation Event), then such Extended Event shall constitute a Compensation Event from the date of the Termination Notice;

B. such Termination Notice was delivered as a result of satisfaction of the condition described in Section 33.1.6.a.ii and the relevant Extended Event was caused by the occurrence of either:

I. one or more Compensation Events referred to in Section 33.1.6.a.ii.A; or
II. one or more Compensation Events referred to in Section 33.1.6.a.ii.B.,

then, with respect to any then continuing individual such Compensation Event, any resulting Change in Costs shall be determined in accordance with paragraph a. of the definition thereof in Part A of Annex A (Definitions and Abbreviations) (and not, respectively, paragraphs b. or c. of such definition) from the date of the Termination Notice; and

C. such Termination Notice was delivered as a result of satisfaction of the condition described in Section 33.1.6.a.iii:

I. any Milestone Payment Delay Costs otherwise payable with respect to any continuing Compensation Event or Delay Relief Event shall include principal in addition to interest from the date of the Termination Notice; and

II. to the extent that the satisfaction of such condition resulted from the continuation of a Force Majeure Event and/or a Relief Event (which is not also a Delay Relief Event), the relevant ongoing event(s) and any subsequent such event(s) shall constitute Delay Relief Event(s) from the date of the Termination Notice (and, in such event, any Milestone Payment Delay Costs payable with respect thereto shall include principal in addition to interest pursuant to Section 33.1.6.c.i.C.I); and

ii. if such Termination Notice was delivered by Developer during the Operating Period, the Enterprises shall pay to Developer in respect of the period from the date of the Termination Notice:

A. monthly Performance Payments as if the Work was being fully performed during such period pursuant to the requirements of this Agreement (net of (I) the actual avoidable costs of Work not being performed as a result of the occurrence of such Extended Event, (II) the amount that Developer is (or, pursuant to Section 35.5.a, should be) entitled to recover under any “business interruption” coverage under the Available Insurance and (III) any Monthly Performance Deductions that the Enterprises are otherwise entitled to make pursuant to Schedule 6 (Performance Mechanism); plus

B. all other Losses incurred during such period (to the extent not covered by insurance proceeds) as a result of any damage or delay (including demobilization and remobilization costs) resulting from such Extended Event; and

iii. Developer shall remain responsible for the continuation of the Work to the extent not relieved of its obligations pursuant to Section 15.3.1.a as a result of the occurrence of such Extended Event.

d. As a consequence of any Termination for Extended Events, the Enterprises shall pay the Termination Amount to Developer as determined pursuant to Section 2 of Schedule 7 (Compensation on Termination).
33.1.7. Termination for Uninsurable Risk

a. The Enterprises may, in their discretion and subject to prior notice in accordance with Section 33.1.7.b, terminate this Agreement at any time that they have the right to do so pursuant to Section 25.6.1.b.ii.A by delivering to Developer a Termination Notice to such effect.

b. Subject to Section 33.1.7.c, any such termination shall be effective 30 Calendar Days from the date of the Termination Notice. As a consequence of any termination pursuant to this Section 33.1.7, the Enterprises shall be obligated to pay the Termination Amount to Developer as determined pursuant to Section 2 of Schedule 7 (Compensation on Termination).

c. Notwithstanding the Enterprises’ delivery of a Termination Notice pursuant to Section 33.1.7.a, Developer may choose to continue this Agreement by delivering a notice to the Enterprises within the 30 Calendar Day period specified in Section 33.1.7.b, following which:

i. Developer shall, as a condition to effectiveness of its notice (unless such condition is waived on the basis that Developer will self-insure the relevant risk with the Enterprises’ Approval), deliver to the Enterprises a cash deposit or an irrevocable on demand letter of credit from an Eligible Financial Institution in either case equal to the Enterprises’ reasonable estimate of the aggregate of:

A. the maximum amount that the Enterprises could be obligated to pay Developer under Section 25.6.1.b.ii.B as a result of the relevant risk being Uninsurable (such amount to be held and disbursed in place of insurance proceeds by the Enterprises upon the occurrence of the relevant risk); plus

B. the maximum amount of Enterprise and CDOT Losses that would have been compensable by insurance proceeds payable under the relevant Insurance Policy had the relevant risk not become Uninsurable (such amount to be held and retained by the Enterprises),

subject to the Enterprises’ obligation to return such deposit or letter of credit (less amounts used or drawn) to Developer promptly after the relevant risk ceases to be Uninsurable and becomes insured under an Insurance Policy; and

ii. the Enterprises’ Termination Notice shall have no further effect.

33.2. Consequences of Termination

On the Termination Date as determined pursuant to Sections 33.1.2 through 33.1.7, this Agreement shall automatically terminate.

33.3. No Increased Termination Liabilities

a. Notwithstanding any other provision of this Agreement, but subject to Section 33.3.b:

i. no otherwise effective amendment or waiver of any provision of, or exercise of any right under:

A. any Principal Subcontract;

B. any other Subcontract to which Developer is a party; or

C. any Financing Document; and

ii. no otherwise effective Refinancing,

shall, as between the Enterprises and Developer, have the effect of increasing the amount of the Enterprises’ termination liabilities as of the Termination Date as reflected in any Termination Amount.
b. **Section 33.3.a** shall not apply with respect to any such amendment, waiver, exercise of any right or any Refinancing:

i. to the extent such constitutes:

A. an amendment or waiver of any provision of any Principal Subcontract, or any other Subcontract to which Developer is a party, to the extent necessary to reflect a corresponding amendment to, or Change under, this Agreement;

B. an Exempt Refinancing described in paragraphs a., b. (provided that, for purposes of this **Section 33.3** paragraph b.ii. shall be deemed not to apply), d., e. or f. of the definition thereof in **Part A of Annex A (Definitions and Abbreviations)**; and

C. for certainty, any incurrence of Project Debt through a drawing or disbursement:

I. that constitutes an Exempt Refinancing as described in **Section 33.3.b.i.B**; or

II. pursuant to the terms of any Financing Agreement referenced in paragraph a. of the definition thereof in **Part A of Annex A (Definitions and Abbreviations)** as in effect on the Financial Close Date or that was subsequently amended or entered into with the Enterprises’ consent pursuant to **Section 33.3.b**.

ii. if, after giving effect to the implementation thereof, such amendment, waiver, exercise of any right or any Refinancing would not increase the projected (in the case of amounts that may be determined in accordance with the Financial Model) or reasonably estimated maximum amount of the Enterprises’ liabilities to Developer as of the Termination Date relative to the projected or reasonably estimated, as applicable, maximum amount of such liabilities without giving effect to the implementation thereof; or

iii. if Developer has obtained the Enterprises’ prior written consent to the same resulting in a potential increase in the Enterprises’ liabilities to Developer of the kind referenced in **Section 33.3.b.ii**. which consent shall:

A. reference this **Section 33.3.b.iii**; and

B. be subject to the Enterprises’ Acceptance, Approval, consent, approval or like assent as otherwise provided for in this Agreement with respect to the relevant amendment, waiver, exercise of any right or any Refinancing, or otherwise (if not so provided) subject to the Enterprises’ Approval.

33.4. **Exclusivity of Remedy**

Any Termination Amount irrevocably paid by the Enterprises to Developer shall be in full and final settlement of Developer’s or any Developer-Related Entity’s rights and claims against the Enterprises, CDOT and the State for, or in connection with, breaches and/or termination of this Agreement whether under contract, tort, restitution or otherwise, but without prejudice to:

a. any antecedent liability of the Enterprises to Developer that arose prior to the Termination Date (but not from the termination itself) to the extent such liability has not already been taken into account in the determination of the Termination Amount (which amount, for certainty, shall in all cases be deemed to take into account any otherwise earned or payable Milestone Payment or Performance Payment that remains unpaid on the Termination Date); and
b. any liabilities arising in respect of any breach by the Enterprises after the Termination Date of any obligation under this Agreement that survives the Termination Date, to the extent such liability has not already been taken into account in the determination of any Termination Amount.

34. HANDOVER PREPARATIONS AND ACTIVITIES

34.1. Preparations for Handover

34.1.1. During:

a. the final 24 months prior to the Expiry Date; or

b. the period after the service of any Termination Notice or the occurrence of any Termination by Court Ruling,

as applicable, and in either case for a period of time thereafter as reasonably required by the Enterprises, Developer shall, without limiting its other obligations under this Agreement, use Reasonable Efforts to cooperate and coordinate with the transfer with effect from the Expiry Date or Termination Date, as applicable, of responsibility for the Work to the Enterprises and/or any Person designated by the Enterprises.

34.1.2. For purposes of Section 34.1.1, Developer’s obligations to cooperate and coordinate shall include:

a. cooperating with the Enterprises and/or any Person designated by them, and providing reasonable assistance and advice concerning the Work and its transfer to the Enterprises and/or to such Person;

b. promptly providing to the Enterprises and/or their designee with:
   i. Site access pursuant to Section 21.1.1; and
   ii. pursuant to Section 19.1, access to and, on request pursuant to Section 19.1.3.c, copies of, all Project Records including all:
      A. information on the identity, terms and conditions of employment of all employees of Developer or any Principal Subcontractor employed in the provision of the Work at such time or, with respect to any early termination of this Agreement, immediately prior to the service of any Termination Notice or the occurrence of any Termination by Court Ruling;
      B. manuals;
      C. equipment logs;
      D. drawings;
      E. files; and
      F. specifications,

   as reasonably required for the efficient transfer of responsibility of performance of the Project, and Developer shall warrant that, to the best of its knowledge and belief, the information contained in such Project Records is accurate in all material respects;

c. using Reasonable Efforts to complete all reasonably necessary preliminary acts (including entering into any contracts) to ensure its ability to comply with its obligations under Section 34.2.1 on and from the Expiry Date or the Termination Date, as applicable; and

d. complying with Section 12.1 where, for such purposes, an Other Department Project shall be deemed to prospectively include the Project following the future occurrence of the Expiry Date or Termination Date, as applicable.
34.1.3. In addition to Developer’s obligations under Sections 34.1.1 and 34.1.2, on or before a date falling no earlier than 30 months prior to the Expiry Date, and otherwise in connection with a Termination for Convenience, the Enterprises may, in their discretion, notify Developer whether they wish to retender the provision of the Work (in whole or in part), in which case from the date of such notice, Section 12.3 shall apply where, for such purposes, an Other Department Project shall be deemed to prospectively include this Project following the future occurrence of the Expiry Date or Termination Date, as applicable.

34.2. Assignments and Transfers

34.2.1. Without limiting its other obligations under this Agreement, on the Expiry Date (or, if earlier, on the Termination Date), and subject to the Lenders Direct Agreement and the Principal Subcontractor Direct Agreements, Developer shall, unless the Enterprises elect in writing to the contrary, assign and transfer to the Enterprises, and/or any Person designated by the Enterprises, for no additional payment:

a. the benefit of any and all Principal Subcontracts, and/or other direct contractual arrangements (as may be reasonably required by the Enterprises) that Developer may have with any third parties in relation to the Project, provided that any such assignment or transfer shall be made subject to such terms and conditions as required by State Law to obtain the consent of the Colorado State Controller;

b. to the extent not effected pursuant to any assignment and transfer made pursuant to Section 34.2.1.a, all Governmental Approvals and Permits; and

c. to the extent not effected pursuant to any assignment and transfer made pursuant to Section 34.2.1.a, its rights, title and interest in and to:

i. the Transferrable Assets;

ii. warranties associated with the Transferrable Assets and any Warrantied Elements (including those referenced in Section 9.4.6); and

iii. all Project Intellectual Property (excluding any Proprietary Intellectual Property, which shall remain subject to the license granted pursuant to Section 52.1);

in the case of software (which, for certainty, shall remain subject to the license granted pursuant to Section 52.1.1) together with (to the extent not otherwise provided for under the terms of any then existing Intellectual Property Escrow):

iv. administrator access to each proprietary system software package and workstation, so that the Enterprises can maintain the software system and create users as required for the use of each software package; and

v. an agreement for the use and maintenance of any proprietary software product that is not commercial off-the-shelf software for a period of five years from the Expiry Date (or, if earlier, the Termination Date);

provided that if, for any reason, Developer cannot assign and transfer its interest in any of the foregoing, it shall declare a trust of all its beneficial interest in the same for the benefit of the Enterprises and/or their designee, or use Reasonable Efforts to make equivalent arrangements (including with respect to Transferrable Assets not owned by Developer through a license to use the same as necessary in connection with the Project) to provide the Enterprises with equivalent rights and protections. Developer hereby irrevocably and unconditionally appoints the Enterprises as Developer’s lawful attorney (and to the complete exclusion of any rights that Developer may have in such regard) for the purpose of generally executing or approving such deeds or documents and doing any such acts or things necessary to give effect to the provisions of this Section 34.2.1 as the Enterprises may in their discretion think fit.
34.2.2. Developer shall promptly after, and in any event no later than 20 Working Days after, as applicable, the Expiry Date or the Termination Date hand over to the Enterprises all Project Records and other Work Product owned by the Enterprises pursuant to Section 7.3.3.b (or complete and accurate copies to the extent originals are not required by the Enterprises) by whatever means the Enterprises reasonably require that are in the possession, custody or power of Developer or Principal Subcontractors and other Developer-Related Entities.

34.3. **No Contrary Activities**

Developer shall not take any action (or refrain from taking any action) in a manner that is calculated or intended to directly or indirectly prejudice or frustrate any of the activities contemplated under Section 34.1 or any transfer or assignment contemplated under Section 34.2.
PART L: LIMITATIONS ON LIABILITY

35. REMEDIES AND LIABILITY

35.1. Developer’s Sole Remedies

Subject to Section 35.2, Developer’s sole remedy in relation to matters for which an express right or remedy is stated in this Agreement, including as the result of the occurrence of any Supervening Event, shall be that right or remedy and Developer shall have no additional right or remedy however arising.

35.2. No Double Recovery

Notwithstanding any other provision of this Agreement, no Party shall be entitled to recover compensation under this Agreement or any other agreement in relation to the Project in respect of any Loss that it has incurred to the extent that it has already been compensated in respect of that Loss pursuant to this Agreement or otherwise.

35.3. Enterprises’ Sole Remedy for Certain Developer Failures to Perform Work

Without prejudice to:

a. any other express right of the Enterprises pursuant to this Agreement (other than the right of a Principal Indemnified Party to be indemnified pursuant to Section 24.2 from and against Claims asserted against it and/or Losses suffered by it, except for its right to be indemnified in respect of Claims and/or Losses referred to in Sections 35.3.c and 35.3.d); and

b. the Enterprises’ right to claim, on or after termination of this Agreement, the amount of its reasonable Losses suffered as a result of, or incurred by it as a result of rectifying or mitigating the effects of, any breach of this Agreement by Developer or the occurrence of any Developer Default, save to the extent that the same has already been recovered by the Enterprises pursuant to this Agreement or has been taken into account in the calculation of any Termination Amount,

the sole remedy of the Enterprises in respect of any Noncompliance Event, Non-Permitted Closure or any failure by Developer specified in any of Sections 1.3.1.a, 1.3.1.b, 1.3.2.a, 1.3.2.b or 1.3.2.c of Schedule 15 (Federal and State Requirements) shall be the operation of Schedule 6 (Performance Mechanism), provided that such limitation shall not apply in respect of:

c. Claims asserted against a Principal Indemnified Party by any other Person (including, for certainty, an Indemnified Party who is not a Principal Indemnified Party) and/or Losses suffered by a Principal Indemnified Party as a result of any such Claim; or

d. Losses suffered by a Principal Indemnified Party as a result of any of the events or circumstances referred to in Sections 24.2.b, 24.2.d, 24.2.e or 24.2.g (other than, in the case of any Non-Permitted Closure, loss of use of any travel lane, ramp, cross street, shoulder, sidewalk or driveway).

35.4. Non-financial Remedies

Without prejudice to the other rights and remedies under the express terms of this Agreement, nothing in Sections 35.2 and 35.3 shall prevent or restrict the right of the Enterprises or Developer to seek any non-financial remedies from the court pursuant to the Dispute Resolution Procedure.

35.5. Available Insurance

Developer shall not be entitled to any payment or credit (or any portion of either thereof) which would have been due, or from which it would have otherwise received a benefit, under this Agreement to the extent that it is (or, with respect to Section 35.5.a only, should be) able to
recover the amount or receive the benefit of such payment or credit (or such portion) under, without duplication:

a. any Insurance Policy (whether or not such insurance has in fact been effected or, if effected, has been vitiated, cancelled or declared void as a result of any act or omission of Developer (or any other Developer-Related Entity), including due to non-disclosure or under-insurance), but excluding any insurance coverage that is unavailable in respect of any Uninsurable risk or any Unavailable Term or as the result of any breach of this Agreement by the Enterprises or violation of Law by the Enterprises;

b. any other policy of insurance that Developer has taken out and maintains (excluding, for certainty, any credit enhancement policy related to the Project Debt); or

c. any other policy of insurance that Developer is entitled to claim under as an additional insured,

paragraphs a., b. and c. together, the “Available Insurance”.

35.6. Waiver of Consequential Damages

a. Subject to Section 35.6.b, neither Party shall be liable to the other for any punitive, indirect, incidental or consequential damages of any nature (including, for certainty, lost toll revenue), whether arising out of a breach of this Agreement, tort (including negligence) or other legal theory of liability.

b. The limitation set out in Section 35.6.a shall not apply to:

i. any amounts expressly payable pursuant to this Agreement or any amounts entitled to be offset pursuant to Section 53.7;

ii. any Monthly Performance Deduction and/or Monthly Construction Closure Deduction the Enterprises are entitled to make pursuant to Schedule 6 (Performance Mechanism);

iii. Developer’s liability for:

A. Claims and/or Losses (including defense costs) to the extent that they are required to have been covered by Available Insurance;

B. fines and/or penalties issued by a Governmental Authority arising out of or relating to any Developer Release of Hazardous Substances; and

C. amounts payable by Developer under an indemnity pursuant to this Agreement (but only to the extent such indemnity relates to a Claim asserted and/or Losses suffered by any Person other than a Principal Indemnified Party); and

iv. any Party’s liability for Losses arising out of fraud, willful misconduct, criminal conduct, recklessness, bad faith or gross negligence on the part of the relevant Party (including, with respect to Developer, that of any other Developer-Related Entity).
PART M: CHOICE OF LAW, JURISDICTION AND DISPUTE RESOLUTION

36. CHOICE OF LAW

This Agreement shall be governed by and construed in accordance with the laws of the State of Colorado, other than any provision thereof that permits or requires the application of the laws of another jurisdiction, and regardless of any other jurisdiction’s choice of law rules. Any provision incorporated herein by reference which purports to negate this or any other Special Provision, in whole or in part, shall not be valid or enforceable or available in any action at law, whether by way of complaint, defense, or otherwise. Any provision rendered null and void by the operation of this provision shall not invalidate the remainder of this Agreement, to the extent capable of execution.

37. JURISDICTION; WAIVER OF JURY TRIAL

37.1. Jurisdiction

a. Each Party agrees that it shall not be entitled to initiate any court proceedings in respect of a Dispute other than pursuant to Sections 5.q and 7 of Schedule 25 (Dispute Resolution Procedure), provided that it shall be so entitled:

i. with or without previously referring such Dispute to the Designated Senior Representatives pursuant to Section 2 of Schedule 25 (Dispute Resolution Procedure), if:
   A. the Dispute is with respect to the existence or legal validity of this Agreement; or
   B. it makes a good faith determination that a statute of limitations would expire prior to it becoming so entitled pursuant to Sections 5.q or 7, as applicable, of Schedule 25 (Dispute Resolution Procedure); and

   ii. after referring such Dispute to the Designated Senior Representatives pursuant to Section 2 of Schedule 25 (Dispute Resolution Procedure), if the Dispute is with respect to either Party’s compliance with Section 5.c.i or Section 5.c.ii of Schedule 25 (Dispute Resolution Procedure).

b. Each of the Parties hereby irrevocably submits to the jurisdiction of the United States District Court of Colorado and the State District Court of Colorado for the City and County of Denver with regard to any Dispute and irrevocably waives, to the fullest extent permitted by applicable Law:

   i. any objection it may have at any time to the laying of venue of any such action or proceeding in such court in accordance with this Section 37.1;

   ii. any claim that any such action or proceeding brought in any such court has been brought in an inconvenient forum; and

   iii. the right to object, with respect to any such action or proceeding, that such court does not have any jurisdiction over such Party.

37.2. Consent to Service of Process

Each Party irrevocably consents to service of process as provided for in Section 49.1.2.

37.3. Waiver of Jury Trial

EACH PARTY HEREBY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT THAT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY PROCEEDING. Each Party hereby:

a. certifies that no Representative or agent or attorney of any such Person has represented, expressly or otherwise, that any such Person would fail to enforce or would otherwise
challenge the foregoing waiver in the event of any suit, action or proceedings relating to this Agreement; and

b. acknowledges that it has been induced to enter into this Agreement by, among other things, the mutual waivers and certifications in this Section 37.

38. DISPUTE RESOLUTION

Except as expressly set out in this Agreement and subject to Section 37, any Dispute shall be resolved in accordance with the provisions of Schedule 25 (Dispute Resolution Procedure).
PART N: MISCELLANEOUS

39. ASSIGNMENTS AND TRANSFERS

39.1. Assignments and Transfers by Developer

Except to the extent permitted by Sections 26.2 and 27.3 (including as a result of any foreclosure or other enforcement of any security interest that Developer is permitted to grant or create pursuant to Section 27.3), Developer shall not effect, and shall not permit, any assignment, transfer, mortgage, pledge or encumbrance of any of its interests in the Project, the Site or the Work, or its interests in, or rights or obligations under this Agreement, the Subcontracts, any Contractor Bond and the Insurance Policies, without the Enterprises’ Approval.

39.2. Assignments and Transfers by the Enterprises

Each Enterprise may assign, transfer, mortgage, pledge and/or encumber its interests in, or rights or obligations under, this Agreement, any Contractor Bond, the Lenders Direct Agreement, any Principal Subcontractor Direct Agreement and/or the Insurance Policies to:

a. the other Enterprise and/or CDOT so long as:
   i. such assignment, transfer, mortgage, pledge and/or encumbrance is not prohibited by Law;
   ii. such assignment, transfer, mortgage, pledge and/or encumbrance does not alter in any material respect Developer’s or Lenders’ rights and interests with respect to the Supplemental Indenture and/or the Central 70 Note; and
   iii. following such assignment, transfer, mortgage, pledge and/or encumbrance, the holder(s) of such interests, rights and obligations shall collectively have the same or equivalent:
      A. legal authority with respect to the Project; and
      B. legal authority and financial capacity with respect to satisfying, as applicable, its or their payment obligations with respect to the Project, as the holder(s) thereof had immediately prior to such assignment, transfer, mortgage, pledge and/or encumbrance; and

b. any other Person:
   i. with the prior written consent of Developer, which consent shall not be unreasonably withheld; or
   ii. otherwise following a Change of this Agreement, but only with respect to such portion of its interest in the Project that is no longer part of the Project as a result of such Change.

40. BINDING EFFECT; SUCCESSORS AND ASSIGNS

This Agreement shall be binding upon and inure to the benefit of each Enterprise and Developer and each of their respective permitted successors and assigns.

41. SURVIVAL

The following provisions of this Agreement shall survive expiration or earlier termination of this Agreement and/or completion of the Work:

a. each Party’s representations and warranties made pursuant to Section 5.1 and, pursuant to Schedule 1 (Financial Close), subsequently repeated;

b. all rights with respect to Contractor Bonds;

c. all Warranties with respect to the Warrantied Elements pursuant to Section 9.4.
d. the indemnifications, limitations and releases set out in Sections 24 and 35;

e. the Dispute Resolution Procedure;

f. Sections 25.5.2.b and 25.5.2.c to the extent provided for in Section 25.5.2.d;

g. the handover and handback provisions set out in Sections 13 and 34 and Schedule 12 (Handback Requirements);

h. all provisions related to the consequences of termination of this Agreement, including Sections 33.1.7.a, 33.3 and 33.4;

i. Section 52;

j. Section 23.6.1 of Schedule 17 (Environmental Requirements);

k. any provision which obligates Developer or the Enterprises to reimburse the other Party for any cost and expense incurred by them prior to the termination of the Agreement, unless already settled as part of the applicable Termination Amount or otherwise;

l. any other provisions which, either expressly or by their context, are intended to operate after termination or expiration of this Agreement and/or completion of the Work; and

m. any other provisions (including Section 15) if and to the extent necessary for the interpretation or application of the foregoing.

42. CONSTRUING THIS AGREEMENT

42.1. Entire Agreement

42.1.1. This Agreement constitutes the entire agreement among the Enterprises and Developer concerning the subject matter hereof and supersedes all prior negotiations, representations, and agreements, either oral or written, among the Parties with respect to their subject matter.

42.1.2. Each of the Parties acknowledges that, except as expressly provided in this Agreement, no Party enters into this Agreement on the basis of, and no Party relies, or has relied, upon, any statement, representation, warranty or other provision (in any case whether oral, written, express or implied) made or agreed to by any Person (whether a Party to this Agreement or not) except those made pursuant to Section 5.1 and, pursuant to Sections 2.2(b) and 2.3(a) of Schedule 1 (Financial Close), subsequently repeated, where the only remedy or remedies available in respect of any misrepresentation or untrue statement made to it shall be any remedy available under this Agreement), provided that this Section 42.1.2 shall not apply to any statement, representation or warranty made fraudulently, recklessly, in bad faith, as a result of gross negligence, willfully or criminally, or to any provisions of this Agreement which were induced by the same, for which the remedies available shall be all those available under the law governing this Agreement.

42.2. Interpretation

42.2.1. The language in all parts of this Agreement shall in all cases be construed simply, as a whole and pursuant to its fair meaning and not strictly for or against any Party.

42.2.2. The Parties hereto acknowledge and agree that this Agreement is the product of an extensive and thorough arm’s length exchange of ideas, questions, answers information and drafts during the Proposal preparation process pursuant to the ITP.

42.2.3. Developer further acknowledges and agrees that it has independently reviewed this Agreement with legal counsel and other advisors and that Developer has, itself or through other arrangements, the requisite experience and sophistication to understand, interpret and agree to this Agreement. Accordingly, in the event of any ambiguity in, or dispute regarding the interpretation of, the provisions of this Agreement, the terms of this Agreement shall not be construed against the Persons that prepared them.
42.3. **Severability**

42.3.1. Notwithstanding Section 2.4.1, if any provision (or part of any provision) of this Agreement is ruled invalid (including due to Change in Law) by a court having proper jurisdiction, then the Parties shall:

a. promptly meet and negotiate a substitute for such provision or part thereof which shall, to the greatest extent legally permissible, effect the original intent of the Parties; and

b. if necessary or desirable, apply to the court which declared such invalidity for an interpretation of the invalidated provision (or part thereof) to guide the negotiations.

42.3.2. If any provision (or part of any provision) of this Agreement shall, for any reason, be held to be invalid, illegal, or unenforceable in any respect, such provision (or part thereof) shall not affect the validity, legality and enforceability of any other provision of (or the other part of such provision) or any other documents referred to in this Agreement, and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision (or part thereof) had never been contained herein.

43. **AMENDMENTS AND WAIVERS**

43.1. **Amendments**

This Agreement may only be amended by a written amendment duly executed by both Parties together with, to the extent required by Law, the Colorado State Controller or its designee, unless the amendment to this Agreement is expressly allowed or required to be made in any other manner pursuant to this Agreement.

43.2. **Rights and Remedies Cumulative**

Except to the extent otherwise expressly provided in this Agreement, including in Sections 33.4 and 35, the rights and remedies of the Enterprises hereunder are cumulative and are not exclusive of any rights or remedies that the Enterprises would otherwise have.

43.3. **Waivers**

Except to the extent otherwise expressly provided in this Agreement:

a. any waiver of, or consent to depart from, the requirements of any provision of this Agreement shall be approved in the discretion of the Party giving it and shall be effective only if it is in writing by such Party, and only in the specific instance, for the specific time, subject to the specific conditions and for the specific purpose for which it has been given;

b. no failure on the part of any Party to exercise, and no delay in exercising, any right or power under this Agreement shall operate as a waiver of such right or power; and

c. no single or partial exercise of any right or power under this Agreement, including any right to give or withhold any consent, approval or Acceptance, nor any abandonment or discontinuance of steps to enforce such a right or power, shall preclude or render unnecessary any other or further exercise of such right or the exercise of any other right.

44. **SET-OFF AND DEFAULT INTEREST**

44.1.1. The Parties shall each have their respective set-off rights pursuant to Section 5 of Part 3 of Schedule 4 (Payments) with respect to their respective payment obligations under this Agreement.

44.1.2. In the event that any of the Parties fails to pay any amount under this Agreement on the due date therefor, interest shall apply and be calculated pursuant to Section 3 of Part 3 of Schedule 4 (Payments).

45. **LIMITATION ON THIRD-PARTY BENEFICIARIES**

CDOT is a third-party beneficiary of this Agreement, and each Warranty Beneficiary is a third-party beneficiary of (a) the Warranties in relation to its Warranted Elements and (b) the obligations of Developer under Sections 9.4.1 to 9.4.5 to the extent that such obligations relate to
its Warrantied Elements. It is not otherwise intended by any of the provisions of this Agreement to create any third-party beneficiary rights hereunder, or to authorize anyone not a Party hereto to maintain a suit for personal injury or property damage pursuant to the terms or provisions hereof. Notwithstanding the foregoing, the duties, obligations and responsibilities of the Parties with respect to third parties shall remain as imposed by Law.

46. INDEPENDENT DEVELOPER

46.1. Developer as an Independent Project Contractor

Developer shall perform its duties hereunder as an independent developer and not as an employee. Neither Developer nor any agent or employee of Developer shall be deemed to be an agent or employee of the State. Developer and its employees and agents are not entitled to unemployment insurance or workers compensation benefits through the State and the State shall not pay for or otherwise provide such coverage for Developer or any of its agents or employees. Unemployment insurance benefits will be available to Developer and its employees and agents only if such coverage is made available by Developer or a third party. Developer shall pay when due all applicable employment taxes and income taxes and local head taxes incurred pursuant to this Agreement. Developer shall not have authorization, express or implied, to bind the State to any agreement, liability or understanding, except as expressly set out herein.

46.2. No Partnership or Similar Relationship

46.2.1. Nothing in this Agreement is intended or shall be construed to create any partnership, joint venture or similar relationship between Developer and the Enterprises.

46.2.2. While the term “public-private partnership” may be used on occasion to refer to relationships of the type created pursuant to this Agreement, the Parties do not have or express any intention to form or hold themselves out as a de jure or de facto partnership, joint venture or similar relationship, to share net profits or net losses, or to give the Enterprises or Developer any rights to direct or control the activities of the other or their respective Affiliates, subcontractors or consultants, except as otherwise expressly provided in this Agreement.

46.3. No Relationship with Developer’s Employees and Subcontractors

46.3.1. Other than with respect to the Lenders Direct Agreement and the Principal Subcontractor Direct Agreements, in no event shall the relationship between the Enterprises and Developer be construed as creating any relationship whatsoever, including, for certainty, a contractual relationship, between the Enterprises and:

a. Developer’s employees;
b. any Subcontractor; or
c. any other Person.

46.3.2. Neither Developer nor any of its employees or Subcontractors is or shall be deemed to be an employee or Subcontractor of the Enterprises.

46.3.3. Except to the extent as otherwise expressly provided in this Agreement, Developer has sole authority and responsibility to employ, discharge and otherwise control its employees and Subcontractors and has complete and sole responsibility as a principal for its agents, for employees and all Subcontractors and for all other Persons that Developer or any Subcontractor hires to perform or assist in performing the Work.

47. NO PERSONAL LIABILITY

Each Enterprise’s authorized representatives, including the Enterprise Representative, are acting solely as agents and representatives of the Enterprises when carrying out the provisions of or exercising the power or authority granted to them under this Agreement, and, as such, none of them shall not be liable either personally or as employees of the Enterprises for actions in their ordinary course of employment.
48. NO FEDERAL GOVERNMENT OBLIGATIONS

Developer acknowledges and agrees that, notwithstanding any concurrence or approval by the United States Federal government in of the solicitation and award of this Agreement, the United States Federal government is not a party to this Agreement and shall not be subject to any obligations or liabilities to the Enterprises, Developer, or any other Person (whether or not a Party to this Agreement) pertaining to any matter resulting from this Agreement.

49. NOTICES

49.1. Methods of Notice Submission

49.1.1. Subject to Section 49.1.2, any notice, and any other Approval, Acceptance, consent, approval or like assent, comment, Deliverable, election, demand, direction, designation, request, agreement, instrument, certificate, report or other communication required or permitted to be given or made by a Party under this Agreement (each, a "notice" or, alternatively, a "Notice") to another Party must be given in writing through the then current Document Control System (or, as applicable, the system established pursuant to Section 1.2.7 of Schedule 15 (Federal and State Requirements)), and the terms “notify” and “notified” shall refer to, respectively, the acts of giving and receiving any such notice.

49.1.2. Any:

a. service of process; and

b. other notice delivered at a time when the Document Control System or, where required pursuant to Section 1.2.7 of Schedule 15 (Federal and State Requirements), the system referred to in such Section is unavailable,

shall be given in writing by means of physical, digital or electronic communication, but, except to the extent the Enterprises otherwise Approve excluding the use of social media, messaging, broadcast and equivalent services, to the relevant Party at the following addresses, as applicable:

**Enterprises**

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<th>HPTE</th>
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<tr>
<td>HPTE Director</td>
<td>David I. Spector</td>
<td>Joshua Laipply, P.E.</td>
<td>Brent Butzin</td>
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<tr>
<td>4201 E. Arkansas Ave.</td>
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<td>Assistant Attorney General</td>
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<tr>
<td>Denver, CO 80222</td>
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<td>Transportation Unit</td>
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<tr>
<td>(303) 757-9607</td>
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<td>(303) 757-9204</td>
<td>Ralph L. Carr Colorado</td>
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<td><a href="mailto:david.spector@state.co.us">david.spector@state.co.us</a></td>
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<td><a href="mailto:joshua.laipply@state.co.us">joshua.laipply@state.co.us</a></td>
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<td>1300 Broadway, 10th Floor</td>
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<td>Denver, CO 80203</td>
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<td>(720) 508-6638</td>
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<td><a href="mailto:Brent.Butzin@coag.gov">Brent.Butzin@coag.gov</a></td>
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**Developer**

Christopher Hodgkins
Kiewit Meridiam Partners LLC
160 Inverness Drive West, Suite 110
Englewood, Colorado 80112
(212) 798-8686
I70E@meridiam.com
49.2. Time and Date of Notice Submission

49.2.1. A notice shall be deemed to have been delivered and received:
   a. if delivered through the Document Control System (or, as applicable, the system established pursuant to Section 1.2.7 of Schedule 15 (Federal and State Requirements)), when recorded as submitted by such system; and
   b. otherwise:
      i. upon receipt (confirmed by automatic answer back, read receipt or equivalent evidence of receipt), if validly transmitted by digital or electronic distribution before 3:00 p.m. (local time at the place of receipt) on a Working Day;
      ii. on the next Working Day following receipt (confirmed by automatic answer back, read receipt or equivalent evidence of receipt), if validly transmitted by digital or electronic distribution on or after 3:00 p.m. (local time at the place of receipt) on a Working Day;
      iii. upon receipt, if physically delivered in person or by courier; or
      iv. if delivered by courier or postage pre-paid certified or registered mail, on the date of receipt as shown by the addressee’s registry or certification receipt or on the date receipt at the appropriate address is refused, as shown on the records or manifest of the United States Postal Service or independent courier.

49.3. Changes in Address

The Parties will notify each other in writing of any change of address and/or contract information, such notification to become effective five Working Days after notification.

50. FURTHER ASSURANCES

Developer shall promptly execute and deliver to the Enterprises all such instruments and other documents and assurances as are reasonably requested by the Enterprises to further evidence the obligations of Developer hereunder, including assurances regarding the obligations of Subcontractors referenced herein.

51. COSTS AND EXPENSES OF THE PARTIES

Except as otherwise expressly provided in this Agreement, each Party shall bear its own costs and expenses in connection with the preparation, negotiation, execution and performance of this Agreement and all other related agreements.

52. INTELLECTUAL PROPERTY RIGHTS

52.1. Grant of License, Ownership and Use

52.1.1. Developer hereby grants to (or, with respect to any Third Party Intellectual Property, shall provide or obtain for) the Enterprises a non-exclusive, non-transferable (other than to CDOT), irrevocable, fully paid up and sub-licensable license to use the Project Intellectual Property and any Third Party Intellectual Property only:
   a. excluding the Proprietary Intellectual Property and any Third Party Intellectual Property, for the purposes of this Project or any other bridge, highway, street and road or other transportation facility of any mode (and any project related thereto) owned and operated by the Enterprises or any other State Governmental Authority, including any Related Transportation Facility; and
   b. in respect of the Proprietary Intellectual Property and, subject to Section 52.1.1.d, any Third Party Intellectual Property:
      i. to the extent reasonably necessary to effect integration with any Other Department Project; and
ii. for the purposes of this Project,

provided that:

c. the granting of such license and the Enterprises’ right to exercise their rights thereunder shall not be construed to provide the Enterprises with greater rights to oversee, direct, manage and engage in the Project and the Work than they would otherwise have under this Agreement, and the Enterprises agree that any use of Project Intellectual Property in violation of the same by themselves or any of their sublicenses shall be at their own risk, cost and expense; and

d. Developer may, to the extent it is reasonably unable to comply with Section 52.1.1.b with respect to any Third Party Intellectual Property, comply with its obligations under Section 52.1.1.b through functionally equivalent alternative arrangements subject to the consent of the Enterprises (such consent not to be unreasonably withheld).

52.1.2. Subject to Section 52.3 and the terms of any Intellectual Property Escrow, Developer shall deliver to the Department copies of all Project Intellectual Property used in providing the Work promptly following delivery of written request from the Enterprises. Subject to the terms of this Agreement, including Sections 7.3.3 and 34.2.1.c.iii, Project Intellectual Property shall remain exclusively the property of Developer (or, as applicable, another Person), notwithstanding any delivery of copies thereof to the Enterprises.

52.2. Right to Purchase

The Enterprises shall have the right to purchase from Developer a non-exclusive, non-transferable, irrevocable, fully paid up and sub-licensable license to use the Proprietary Intellectual Property on any other bridge, highway, street and road or other transportation facility of any mode (and any project related thereto) owned and operated by the Enterprises or CDOT subject to terms and conditions acceptable to the Enterprises and Developer (each acting reasonably). If requested by the Enterprises, Developer shall also use Reasonable Efforts to procure for the Enterprises a right to purchase an equivalent license to use any Third Party Intellectual Property.

52.3. Intellectual Property Escrow Agreement

52.3.1. Developer shall elect either to:

a. deliver and/or grant access to Project Intellectual Property comprised of software, source code and/or source code documentation directly to the Enterprises for purposes of fulfilling Developer’s obligations under Section 52.1, and enabling the Enterprises to exercise their rights pursuant to the license granted to them pursuant to Section 52.1.1; or

b. Developer may elect to deposit with a neutral custodian any such Project Intellectual Property (including any modification, update, upgrade, correction, revision or replacement made to or in place of the same),

provided that Developer shall not make any such election, or seek or require terms related to any resulting Intellectual Property Escrow, in a manner that is calculated or intended to directly or indirectly prejudice or frustrate the Enterprises’ ability to exercise their rights pursuant to the license granted to them pursuant to Section 52.1.1.

52.3.2. If Developer makes an election pursuant to Section 52.3.1.b, Developer shall select, subject to the Enterprises’ Approval, one or more escrow companies or other neutral custodian (each an “Intellectual Property Escrow Agent”), and establish one or more escrows (each an “Intellectual Property Escrow”) with the Escrow Agent, subject to terms and conditions acceptable to the Enterprises and Developer (each acting reasonably), for the deposit, retention, upkeep and release of such Project Intellectual Property, Intellectual Property Escrows also may include Developer-Related Entities other than Developer as parties.
52.3.3. If Developer elects to deliver such Project Intellectual Property to an Intellectual Property Escrow Agent, Developer shall make such delivery not later than the following times:

a. for pre-existing software, source code and source code documentation, immediately upon execution of this Agreement or, if provided by a Subcontractor, upon execution of the relevant Subcontract;

b. for software, source code and source code documentation incorporated into or used on or for the Project or any portion thereof, by the 15th Calendar Day after it is first incorporated or used; and

c. for any modification, update, upgrade, correction, revision or replacement made to or in place to or of any software, source code and source code documentation previously delivered pursuant to Section 52.3.3.a or 52.3.3.b, not later than the 15th Calendar Day after the end of the calendar quarter in which it is first incorporated or used.

52.3.4. The Enterprises shall be named intended third-party beneficiaries of each escrow agreement and each Intellectual Property Escrow with direct rights of enforcement against Developer (and, if applicable, any other Developer-Related Entity) and the relevant Intellectual Property Escrow Agent. Each escrow agreement shall provide that neither Developer nor the relevant Intellectual Property Escrow Agent (nor, if applicable, any other Developer-Related Entity) shall have any right to amend or supplement it, or waive any provision thereof, without the Enterprises’ prior Approval.

52.3.5. Intellectual Property Escrows shall provide rights of access, use and inspection (but not, for certainty, possession) to the Parties and their designees at any time to permit the Enterprises fully to exercise their rights pursuant to the license granted to them pursuant to Section 52.1.1 (including, on and from the Expiry Date (or, if earlier, on and from the Termination Date) such rights as are required pursuant to Section 34.2.1.c.iv), subject to terms and conditions reasonably necessary to protect the confidentiality and proprietary nature of the contents of such Intellectual Property Escrows.

52.3.6. The Intellectual Property Escrows shall survive Substantial Completion, Final Acceptance and the end of the Term regardless of the reason for a period of five years from the Expiry Date (or, if earlier, the Termination Date), or otherwise until such earlier date such time as the Parties mutually agree, in their respective sole discretion, that the Intellectual Property contained therein is of no further use or benefit to the Project.

53. SPECIAL PROVISIONS

53.1. Controller's Approval

This Agreement shall not be valid until it has been approved by the Colorado State Controller or designee.

53.2. Governmental Immunity

No term or condition of this Agreement shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protections, or other provisions, of the Colorado Governmental Immunity Act, C.R.S. §§24-10-101 et seq., or the Federal Tort Claims Act, 28 U.S.C. §§1346(b) and 2671 et seq., as applicable now or hereafter amended.

53.3. Compliance with Law

Developer shall strictly comply with all applicable Federal and State laws, rules, and regulations in effect or hereafter established, including, without limitation, laws applicable to discrimination and unfair employment practices.

53.4. Binding Arbitration Prohibited

The State does not agree to binding arbitration by any extra-judicial body or person. Any provision to the contrary in this Agreement or incorporated herein by reference shall be null and void.
53.5. **Software Piracy Prohibition**

State or other public funds payable under this Agreement shall not be used for the acquisition, operation, or maintenance of computer software in violation of federal copyright laws or applicable licensing restrictions. Developer hereby certifies and warrants that, during the term of this Agreement and any extensions, Developer has and shall maintain in place appropriate systems and controls to prevent such improper use of public funds. If the State determines that Developer is in violation of this provision, the State may exercise any remedy available at law or in equity or under this Agreement, including, without limitation, termination of this Agreement pursuant to Section 32.2.1.a for a Developer Default number (28) in Section 32.1.1, as well as any remedy consistent with Federal copyright laws or applicable licensing restrictions.

53.6. **Employee Financial Interest / Conflict of Interest**

The signatories aver that to their knowledge, no employee of the State has any personal or beneficial interest whatsoever in the service or property described in this Agreement. Developer has no interest and shall not acquire any interest, direct or indirect, that would conflict in any manner or degree with the performance of Developer’s services and Developer shall not employ any person having such known interests.

53.7. **Vendor Offset (C.R.S. §§ 24-30-202 (1) and 24-30-202.4)**

Subject to C.R.S. § 24-30-202.4 (3.5), the Colorado State Controller, or the Enterprises, may withhold payment under the State’s vendor offset intercept system for debts owed to State agencies for:

a. unpaid child support debts or child support arrearages;

b. unpaid balances of tax, accrued interest, or other charges specified in C.R.S. § 39-21-101, et seq.;

c. unpaid loans due to the Student Loan Division of the Department of Higher Education;

d. amounts required to be paid to the Unemployment Compensation Fund pursuant to Articles 70-82 of Title 8, C.R.S.; and

e. other unpaid debts owing to the State as a result of final agency determination or judicial action.

53.8. **Public Contracts for Services**

Developer certifies, warrants, and agrees that it does not knowingly employ or contract with an illegal alien who will perform work under this Agreement and will confirm the employment eligibility of all employees who are newly hired for employment in the United States to perform work under this Agreement, through participation in the E-Verify Program or the CDOT program established pursuant to C.R.S. § 8-17.5-102(5)(c), Developer shall not knowingly employ or contract with an illegal alien to perform work under this Agreement or enter into a contract with a Subcontractor that fails to certify to Developer that the Subcontractor shall not knowingly employ or contract with an illegal alien to perform work under this Agreement. Developer:

a. shall not use E-Verify Program or CDOT program procedures to undertake pre-employment screening of job applicants while this Agreement is being performed;

b. shall notify the Subcontractor and the contracting State agency within three Calendar Days if Developer has actual knowledge that a Subcontractor is employing or contracting with an illegal alien for work under this Agreement;

c. shall terminate the subcontract if a Subcontractor does not stop employing or contracting with the illegal alien within three Calendar Days of receiving the notice; and
d. shall comply with reasonable requests made in the course of an investigation, undertaken pursuant to C.R.S. § 8-17.5-102(5), by the Colorado Department of Labor and Employment.

If Developer participates in the CDOT program, Developer shall deliver to the contracting State agency, institution of higher education or political subdivision a written, notarized affirmation, affirming that Developer has examined the legal work status of such employee, and shall comply with all of the other requirements of the CDOT program. If Developer fails to comply with any requirement of this provision or C.R.S. § 8-17.5-101, et seq., the contracting State agency may terminate this Agreement for breach and, if so terminated, Developer shall be liable for damages.

54. COUNTERPARTS

This Agreement (and an amendment or waiver in respect to this Agreement) may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by each of the Parties and, to the extent required by Law, the Colorado State Controller or its delegate, shall constitute a full and original instrument for all purposes.

[remainder of page left intentionally blank; signature page follows]
IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the date it is approved and signed by the Colorado State Controller or their designee below.

KIEWIT MERIDIAM PARTNERS LLC

By: ________________________________

John Dionisio
 Authorized Person

COLORADO HIGH PERFORMANCE TRANSPORTATION ENTERPRISE

By: ________________________________

David I. Spector
 Director

COLORADO BRIDGE ENTERPRISE

By: ________________________________

Joshua Laipply, P.E
 Chief Engineer

APPROVED:
Cynthia H. Coffman, Attorney General

By: ________________________________

Brent E. Butzin
 Assistant Attorney General

ALL AGREEMENTS REQUIRE APPROVAL BY THE STATE CONTROLLER
C.R.S. § 24-30-202 requires the State Controller to approve all State Agreements. This Agreement is not valid until signed and dated below by the State Controller or its delegate. Developer is not authorized to begin performance until such time. If Developer begins performing prior thereto, the State of Colorado is not obligated to pay Developer for such performance and/or for any goods and/or services provided hereunder.

STATE CONTROLLER
Robert Jaros, CPA, MBA, JD

By: ________________________________

Date: ________________

Signature Page to Central 70 Project Agreement
ANNEX A: DEFINITIONS AND ABBREVIATIONS

Part A: Definitions

Except as otherwise specified herein, or as the context may otherwise require, the following terms have the respective meanings set out below for all purposes of this Agreement:

“Abandonment” means either:

a. Developer demonstrates through statements, acts or omissions an intent not to perform, or continue to perform, a material part of the Work; or

b. the failure to perform a material part of the Work for a continuous period of 45 Calendar Days (except to the extent that such failure is substantially consistent with the then current Project Schedule and does not otherwise constitute a breach of this Agreement), in each case unless such intention or failure is otherwise expressly permitted or excused pursuant to this Agreement, including as a result of the occurrence of any Compensation Event or Relief Event.

“Acceptance” has the meaning given to it in Section 2.2.3.a and “Accept”, “Acceptable” and “Accepted” shall be similarly construed.

“Accepted Independent Consultant” has the meaning given to it in Section 3.4.b.i of Schedule 12 (Handback Requirements).

“Access Permit” means any Special Permit and any Utility Permit.

“Account Balances” means, in respect of each bank account and/or trust account held by or on behalf of Developer (for certainty, excluding the Handback Reserve Account and the Physical Damage Proceeds Reserve):

a. the balance of such account; plus

b. to the extent a letter of credit has been issued in partial or full substitution for any amount otherwise required to stand to the credit of any such account pursuant to the Financing Documents, the undrawn principal amount of such letter of credit,

in each case as of the Termination Date.

“Active Traffic Management” means real-time management of traffic using ITS and/or Variable Message Signs.

“Activity” means each task or sub-task that is identified by Developer as being necessary to complete the Construction Work and the O&M Work During Construction, and that is included in the Project Schedule as a subcomponent of the Work Breakdown Structure.

“Actual Benchmarked Insurance Cost” means, in respect of any Insurance Review Period, the aggregate of the insurance premiums reasonably incurred by Developer to maintain the Benchmarked Insurances during such period, excluding any broker’s fees and expenses.

“Ad Valorem and Possessory Interest Tax” has the meaning given to it in Section 30.1.3.a.

“Additional Right-of-Way” means all Additional ROW Parcels held or acquired in the name of CDOT (or in such other name(s) as the Enterprises may otherwise determine in...
their discretion) pursuant to Section 7.3.1, but in each case with effect only from the Project License Start Date and only until the Project License End Date, in each case, for the relevant Additional ROW Parcel.

“Additional ROW Parcels” means each parcel of land that Developer proposes, at its discretion, to form part of the Additional Right-of-Way, and that subsequently becomes part of the Additional Right-of-Way, pursuant to Schedule 18 (Right-of-Way).

“Additional Survey Data” means any survey data other than the Supplied Survey Data.

“Additional Warranties” means those warranties that Developer is required to provide pursuant to Schedule 10 (Design and Construction Requirements).

“ADR” shall have the meaning given to it in Section 2(b) of Part A of Schedule 16 (Mandatory Terms).

“Affected Party” has the meaning given to it in the definition of Force Majeure Event in this Part A of Annex A (Definitions and Abbreviations).

“Affiliate” means, in relation to any Person:

a. any other Person having Control of that Person;

b. any other Person over whom that Person has Control; and

c. any Person over whom any other Person referred to in paragraph a. of this definition also has Control.

“Age” means the elapsed time since an Element was first constructed or installed or if applicable, last reconstructed, rehabilitated, restored, renewed or replaced.

“Agreed or Determined” has the meaning given to it in Section 2.2.1.

“Agreement” has the meaning given to it in the Preamble and, for certainty, includes this Annex A (Definitions and Abbreviations) and the Schedules.

“Agreement Date” has the meaning given to it in the Preamble.

“Annual O&M Report” has the meaning given to it in Section 13.2 of Schedule 11 (Operations and Maintenance Requirements).

“Appendix B Parcel” means any ROW Parcel listed in Appendix B (Known Hazardous Substances Parcels) of Schedule 17 (Environmental Requirements).

“Appendix B Parcel Costs” means the aggregate amount of Excess Costs, Milestone Payment Delay Costs and/or Delay Financing Costs resulting from the occurrence of all Appendix B Parcel Unexpected Hazardous Substances Events (for certainty, whether or not such events are also Compensation Events), excluding any such event:

a. that resulted in aggregate Excess Costs, Milestone Payment Delay Costs and Delay Financing Costs equal to or less than $20,000; and

b. to the extent that it arose as a result of any breach of Law, Governmental Approval, Permit or this Agreement, fraud, willful misconduct, criminal conduct, recklessness, bad faith or negligence by or of any Developer-Related Entity.

“Appendix B Parcel Relief Start Date” means the Calendar Day on which the aggregate amount of Appendix B Parcel Costs first equals or exceeds $25,000,000.
“Appendix B Parcel Unexpected Hazardous Substances Event”

the encountering or discovery of collectively all Unexpected Hazardous Substances on, in or under an individual Appendix B Parcel.

“Applicable Tax”

means any income tax that is imposed on Developer (or, to the extent that Developer is treated as a pass through entity for Applicable Tax purposes, on its Equity Members) by and payable to the United States, any state of the United States or any political subdivision of any state of the United States, excluding, however, any income tax that is payable to any thereof solely due to Developer or any of the Equity Members being incorporated, formed or domiciled outside of any state of the United States.

“Approval”

has the meaning given to it in Section 2.2.3.b and “Approve” and “Approved” shall be similarly construed.

“As-Built”

means the revised set of drawings, specifications, documents, data and surveys submitted by Developer and Accepted by the Department pursuant to Schedules 8 (Project Administration) and 10 (Design and Construction Requirements) and showing the exact dimensions, geometry, and location of completed Construction Work.

“Asset”

means any physical asset used from time to time by Developer or a Subcontractor to perform its obligations under this Agreement or any Subcontract, including any:

a. Element;
b. land or buildings (whether or not part of or on the Site);
c. plant or machinery;
d. equipment;
e. spare parts; and
f. tools.

“Asset Condition Inspections”

means those inspections required to be conducted pursuant to Section 8 of Schedule 11 (Operations and Maintenance Requirements) to determine the condition of all Elements and to identify structural and non-structural deficiencies which may present a potential safety hazard.

“Asset Condition Report”

means a report prepared by Developer pursuant to Section 3.5 of Schedule 12 (Handback Requirements).

“Authority Having Jurisdiction”

means the Denver Fire Department.

“Automated Vehicle Locator (AVL) System”

means the system described in Section 12 of Schedule 11 (Operations and Maintenance Requirements).

“Automatic License Plate Recognition”

means a camera-based system used to obtain an image of a vehicle’s license plate if a transponder is not detected.

“Automatic Traffic Recorder”

means a system that continuously collects vehicle volume and functional classification data using in-pavement loops and piezoelectric sensors.

“Automatic Vehicle Identification Reader”

means the system that is installed at each tolling point and used to read tag information stored inside each transponder.

“Available Insurance”

has the meaning given to it in Section 35.5.

“Average Daily Traffic”

means the average total traffic, in both directions, in one Calendar Day.
“Bare and Wet Pavement” means when a minimum of 95% of the driving surface (edge line to edge line) including shoulders is free of snow, slush and/or ice.

“Base Benchmarked Insurance Cost” means, in respect of any Insurance Review Period:

a. the greater of:
   i. the Proposal Insurance Cost; and
   ii. either:
       A. in respect of the first Insurance Review Period, the Actual Benchmarked Insurance Costs for such period; or
       B. in respect of any other Insurance Review Period, the amount calculated pursuant to paragraph a.ii.A of this definition, indexed annually in respect of each subsequent Insurance Review Period from each Insurance Renewal Date in respect of which such costs were originally paid to the corresponding Insurance Renewal Date in such subsequent Insurance Review Period,

less

b. any Base Benchmarked Insurance Deduction in respect of such Insurance Review Period.

“Base Benchmarked Insurance Deduction” means, in respect of any Uninsurable risk or any Unavailable Term that relates to any Benchmarked Insurance, an amount calculated in respect of an Insurance Review Period that equals:

a. the amount (if any) by which the Base Benchmarked Insurance Cost would have been a lesser amount had:
   i. such risk been an Uninsurable risk; or
   ii. such Insurance Term been an Unavailable Term,

in the case of either i. or ii., as of the dates by reference to which the Base Benchmarked Insurance Cost in respect of such Insurance Review Period is calculated; or

b. if, in the reasonable opinion of the Insurance Broker that prepares the applicable Joint Insurance Cost Report, it is impossible to determine an amount pursuant to paragraph a. of this definition in respect of any such Uninsurable risk or Unavailable Term, the amount (if any) by which it is reasonable to reduce the Base Benchmarked Insurance Cost under such circumstances, having due regard (to the extent possible) to:
   i. the amount by which the Actual Benchmarked Insurance Cost is less than it would have been as a result of such risk becoming an Uninsurable risk or of such Insurance Term becoming an Unavailable Term; and
   ii. the amount determined pursuant to paragraph b.ii. of this definition as a percentage of the Actual Benchmarked Insurance Cost as calculated
“Base Case Equity IRR” means the Preliminary Equity IRR as updated pursuant to Schedule 1 (Financial Close).

“Base CPP” means the “Base Capital Performance Payment” set out in Section 2(f) of Part 2 of Schedule 6 (Performance Mechanism).

“Base Financial Model” means the financial model generated and computed by spreadsheet software as submitted in the Developer’s Proposal (and subsequently replaced in this Agreement, pursuant to the Project Agreement Amendment, by the Financial Model Accepted by the Enterprises pursuant to Section 2.2(h)(i) of Schedule 1 (Financial Close)), a copy of which is attached as Schedule 26 (Base Financial Model).

“Base MPP” means the Base CPP plus the Base OMRP.

“Base OMRP” means the “Base OMR Payment” set out in Section 2(f) of Part 2 of Schedule 6 (Performance Mechanism).

“Baseline Asset Condition Inspection Plan” has the meaning given to it in Section 2.3.2 of Schedule 11 (Operations and Maintenance Requirements).

“Baseline Credit Spreads” means:

a. subject to paragraph b. of this definition, the credit spreads in the “Proposer Basis Scale” submitted by the Preferred Proposer pursuant to Section 6.6 of the Financial Proposal Submission Requirements as defined in the ITP; or

b. for purposes of Section 5 of Annex A to Schedule 1 (Financial Close), and where expressly stated that such term shall have the meaning given to it in this paragraph b., the relevant baseline credit spreads issued by the Enterprises to the Proposers pursuant to Section 4.2.3.c.ii of Part C of the ITP.

“Baseline Inspections” has the meaning given to it in Section 2.3.1.a of Schedule 11 (Operations and Maintenance Requirements).

“Baseline Schedule” means the logic-based Critical Path schedule for all Construction Work and all O&M Work During Construction which has been prepared by Developer based on the Proposal Schedule and Approved by the Enterprises pursuant to Section 3.3.4.a. of Schedule 8 (Project Administration).

“Baseline Substantial Completion Date” means the Baseline Substantial Completion Target Date, as such date may be extended from time to time pursuant to:

a. Section 15.3.1.c.iii, as a result of the occurrence of a Supervening Event; or

b. a Change documented in a Change Order.

“Baseline Substantial Completion Target Date” means March 4, 2022, as such date shall be modified on a day for day basis to reflect any delay in achieving Financial Close relative to November 30, 2017 (the date assumed in the ITP), as such modification shall be formalized pursuant to the Project Agreement Amendment in accordance with paragraph d. of the definition thereof in this Part A of Annex A (Definitions and Abbreviations).
“Baseline TIFIA Term Sheet” means the Baseline TIFIA Term Sheet attached as Exhibit 1 in Part I to the ITP as of the Final Project Information Date.

“BE” has the meaning given to it in the Preamble.

“BE Trustee” means Zions Bank, a division of ZB, National Association, the successor trustee under the Master Indenture.

“Benchmark Interest Rates” means the publicly documented interest rates of each maturity included in the following indices:

a. the LIBOR swap spot curve, as provided by Bloomberg;

b. the Overnight Index Swap curve, as provided by Bloomberg;

c. the Interpolated Curve (ICURV), as provided by Bloomberg.

d. the U.S. Spot Treasury Yield Curve;

e. the Municipal Market Data (MMD) Benchmark, as provided by Thomson Reuters;

f. the Securities Industry and Financial Markets Association (SIFMA) Municipal Swap Index (formerly known as the Bond Market Association (BMA) Municipal Swap Index); and

g. the State and Local Government Series (SLGS) index, as provided by the US Treasury.

“Benchmarked Insurance Inception Date” means the Substantial Completion Date.

“Benchmarked Insurance” means each of the Insurance Policies required pursuant to Section 2 of Schedule 13 (Required Insurances).


“Best Management Practices” has the meaning established by applicable Environmental Law governing the particular environmental media or source of Hazardous Substances such practices are intended to address or, in the absence of a particular definition under Environmental Law, shall refer to best practices commonly used to avoid a Release or exacerbation of a Release with respect to the relevant environmental media or source of Hazardous Substances.

“BNSF” means BNSF Railway Company.

“BNSF Crossing” means the existing and/or proposed crossing by the BNSF Railroad through the I-70 East corridor on the Right-of-Way as described in Section 10.1.5 of Schedule 10 (Design and Construction Requirements).

“BNSF RRA” means the railroad agreement between CDOT and BNSF in relation to the Project, a draft of which agreement was provided to the Preferred Proposer as one of the Reference Documents numbered 29.10.10.03.

“BNSF Work” means all duties and services to be furnished and provided by BNSF as required by the BNSF RRA.

“Bond Financing” means any Project Debt financing to be provided through the capital markets issuance (including through a private placement) of either:

a. PABs by the PABs Issuer; or
b. taxable bonds,

that, in the case of paragraphs a. or b., is assumed in the Base Financial Model.

“Breakage Costs” means any prepayment premiums or penalties, make-whole payments or other prepayment amounts, including costs of early termination of interest rate and inflation rate hedging, swap, collar or cap arrangements, that Developer must pay, or that may be payable or credited to Developer, under any Financing Document or otherwise as a result of the payment, redemption, acceleration or reduction of all or any portion of the principal amount of Project Debt prior to its scheduled payment date, excluding, however, any such amounts included in the principal amount of any Refinancing.

“Bridge Surcharges” means the bridge safety surcharges imposed by BE pursuant to C.R.S. § 43-4-805.

“Build America Bureau” means the Build America Bureau within the US DOT.

“Calendar Day” means a calendar day as determined by reference to the time and date in Denver, Colorado, and “day” means any such calendar day.

“Calendar Year” means each consecutive period of 12 months commencing on January 1 and ending on December 31 as each such day shall be determined by reference to the time and date in Denver, Colorado.

“Category 1 Defect” means an O&M Defect in an Element or any part of an Element which causes or has the potential to cause any one or more of the following:

a. an immediate or imminent health or safety hazard, nuisance or other similar immediate or imminent risk to Users or workers (including for example inconveniences such as delays and detours, rough rides, obstacles, slippery conditions, or issues requiring Users to make sudden evasive maneuvers);

b. an immediate or imminent risk of structural failure;

c. an immediate or imminent risk of damage to a third party’s property or equipment; and

d. an immediate or imminent risk of damage to the Environment or any Improvements.

“Category 2 Defect” means an O&M Defect in an Element or any part of an Element other than a Category 1 Defect.

“CCD Identified Future Improvements” means all projects listed in Sections 1.17.1 and 1.17.3 of Section 1 of Schedule 10 (Design and Construction Requirements).

“CDOT” has the meaning given to it in the Preamble and, for certainty, refers to the Colorado Department of Transportation acting in its own capacity and not pursuant to a delegation of authority by the Enterprises pursuant to Section 18.1.2.

“CDOT Roadways” means I-270, I-225, Vasquez Boulevard, Colorado Boulevard and Quebec Street, in each case including the ramps up to the intersecting cross-roadway (including directional island and free-flow turn lane where present).

“CDOT Standard Specifications” has the meaning given to it in Section 1.1 of Appendix A to Schedule 10A (Applicable Standards and Specifications).
“Central 70 Note” has the meaning given to it in the Supplemental Indenture.

“Chairperson” has the meaning given to it in Section 5.c.iii of Schedule 25 (Dispute Resolution Procedure).

“Change” means any change in the Work relative to what is otherwise permitted or required under this Agreement, including any change or addition to, or replacement of, a Project Standard.

“Change in Costs” means:

a. except to the extent paragraphs b. or c. of this definition apply, in respect of:

i. any Compensation Event (but, in the case of a Compensation Event falling within paragraph c.ii of the definition thereof in this Part A of Annex A (Definitions and Abbreviations), subject to the proviso to the definition of Qualifying Change in Law in this Part A of Annex A (Definitions and Abbreviations)); or

ii. any Developer Change documented in a Change Order, but only for purposes of estimating costs pursuant to Sections 2.1 (subject to the proviso to such Section) and 2.2.c of Schedule 24 (Change Procedure) and of calculating net savings pursuant to Section 3 of Schedule 24 (Change Procedure),

the effect of such Compensation Event or Developer Change (whether such effect is (I) of a one-off or recurring nature and/or (II) positive or negative) on the actual or anticipated losses, charges, liabilities and costs and expenses of Developer, including, as relevant and without double counting:

iii. any reasonable external professional costs and expenses incurred:

A. in complying with Developer’s obligations under Section 15.2.2;

B. in respect of any such Compensation Event (other than any such event as described in paragraphs d. and e. of the definition thereof in this Part A of Annex A (Definitions and Abbreviations)), in preparing any related Supervening Event Submission (or any update thereof) in compliance with Section 15.1; and

C. in respect of any Compensation Event as described in paragraphs d. or e. of the definition thereof in this Part A of Annex A (Definitions and Abbreviations), in complying with Sections 1.1.c and 1.2 of Schedule 24 (Change Procedure);

iv. any expenditure that is treated as a capital expenditure in accordance with GAAP;

v. any life-cycle, operating, maintenance or
replacement costs;

vi. any employment and labor costs;

vii. with respect to any insurance that Developer is required to obtain and maintain, or cause to be obtained and maintained, pursuant to Sections 25.1.1 and 25.1.2.c, any change in premiums, premium tax or broker’s fees and expenses, including any change therein resulting from:

A. a change in the amount of any deductible or in any amount of coverage; and
B. any other change in such insurance, including to Insurance Terms; and

viii. any financing costs (excluding any Delay Financing Costs and any Milestone Payment Delay Costs) incurred by Developer as a result of the occurrence of such Compensation Event, including:

A. any reasonable external professional costs and expenses incurred in complying with Developer’s obligations under Sections 15.5.1 and 28.4.1;
B. any such costs required to ensure Developer’s continued compliance with the Financing Agreements;
C. any reasonable commitment fees, interest costs and hedging costs, including Breakage Costs;
D. any lost interest on any of Developer’s own capital; and
E. any other such costs for debt or equity finance required pending receipt of a payment from the Enterprises in connection with such Compensation Event; and

in all cases for purposes of this paragraph a. of this definition:

ix. other than with respect to paragraphs a.iii., a.vii. or a.viii. of this definition, as any amounts falling within this definition of Change in Costs are calculated or otherwise taken into account (including through mark-ups) in accordance with Appendix A to Schedule 24 (Change Procedure); and

x. excluding:

A. any internal costs, fees or expenses of any Developer-Related Entity except to the extent expressly permitted in accordance with Appendix A to Schedule 24 (Change Procedure); and
B. any costs or expenses that are expressly
provided to be incidental and excluded pursuant to the terms of Schedule 17 (Environmental Requirements);

b. subject to Sections 15.7.1.d.ii and 33.1.6.c.i, in respect of any:
   i. Non-Appendix B Parcel Unexpected Hazardous Substances Event; or
   ii. Appendix B Parcel Unexpected Hazardous Substances Event,

   Excess Costs; and

c. subject to Section 33.1.6.c.i, in respect of any Unexpected Groundwater Contamination Event, Excess Groundwater Costs.

“Change in Law” means the coming into effect after the Setting Date of:

a. the enactment, promulgation or adoption of any Law;

b. a binding change in the judicial or administrative interpretation of any Law; or

c. any modification (including repeal) of any Law,

in each case, by a Governmental Authority that:

d. is materially different from or inconsistent with Law as in effect prior to the coming into effect of the relevant change as referenced in paragraphs a., b. or c. of this definition; and

e. was not (in the same or substantially similar form and substance to that which later comes into effect) pending, passed or adopted, including in the form of a bill or draft, as of the Setting Date,

provided that Change in Law shall exclude any such enactment, promulgation, adoption, change or modification of any (i) Federal Law (other than any Public Safety Order), (ii) State or local labor Law or (iii) State or local tax Law in each of cases (i), (ii) or (iii) of general applicability.

“Change of Control” means any direct or indirect Equity Transfer of interests in either Developer or any Equity Member that results in or could (upon the occurrence of any condition or exercise of any right or option) result in any change in the Person or Persons that has direct or indirect Control of Developer or such Equity Member, excluding:

a. any Permitted Equity Transfer; and

b. a bona fide open market transaction in securities effected on a recognized public stock exchange involving an initial public offering.

“Change Order” has the meaning given to it in Section 1.2.e of Schedule 24 (Change Procedure).

“Circuit Time for Plowing” means the total time required to fully service a designated Snow Route calculated from the time the plow vehicle leaves the yard to the time it has completed the plowing operation on the entire plow route.

“Circuit Time for” means the total time required to fully service a designated salt or liquid anti-
"Spreading" means icing/de-icing Snow Route calculated from the time the Spreader vehicle leaves the yard to the time it completes the route.

"City of Denver" means the City and County of Denver, Colorado.

"Civil Rights Requirements" has the meaning given to it in Section 1.1.1 of Schedule 15 (Federal and State Requirements).

"Claim" means any claim, demand, action, cause of action, proceeding (legal or administrative), investigation, judgment, demand, suit, dispute or liability.

"Closed Circuit Television" means cameras used for monitoring travel conditions.

"Closure" means that all or part of any travel lane, ramp, cross street, shoulder, sidewalk or driveway within the O&M Limits is closed or blocked, or that the use thereof is otherwise restricted, for a period of any duration.

"Closure Deduction Period" means, in respect of any Non-Permitted Closure, each continuous period of 15 minutes commencing from and including:

a. subject to paragraph b. of this definition, the commencement time of such Non-Permitted Closure; or

b. in the case of any Closure that is deemed to be a Non-Permitted Closure pursuant to Section 2.11.14.c or 2.11.14.d of Schedule 10 (Design and Construction Requirements), the expiry of the 30 minute period referred to in the relevant Section,

provided that, for certainty, the Closure Deduction Period during which the relevant Closure actually ends (or is deemed to end in accordance with the proviso to the definition of Non-Permitted Construction Closure in this Part A of Annex A (Definitions and Abbreviations)) will have a duration of less than 15 minutes and any reference in Schedule 6 (Performance Mechanism) to a "partial" Closure Deduction Period shall be deemed to refer to such Closure Deduction Period in respect of the relevant Non-Permitted Closure.

"Closure Default Event" means the occurrence of any of the following:

a. during the Construction Period, the cumulative amount of Construction Closure Deductions accrued during:
   i. any rolling 4 month period equals or exceeds $160,000; or
   ii. any rolling 12 month period equals or exceeds $240,000;

b. during the Operating Period, the cumulative amount of Operating Period Closure Deductions accrued during:
   i. any 1 month period equals or exceeds $600,000 (indexed); or
   ii. any rolling 4 month period equals or exceeds $800,000 (indexed); or
   iii. any rolling 12 month period equals or exceeds $1,000,000 (indexed),

provided that, for certainty, any Construction Closure Deduction or Operating Period Closure Deduction that is being disputed in good faith by
Developer shall be disregarded for purposes of determining whether a Closure Default Event has occurred until such time as it has been Agreed or Determined that the relevant deduction was valid.

“Collateral Agent” means any financial institution designated by the Lenders to act as their trustee or agent pursuant to the Financing Documents.

“Command Control and Monitoring System” means the integrated overarching system required to monitor, control and implement the various fire, life safety, and other systems located in the Cover.

“Commercial Panel” means the dispute resolution panel of such name to be established pursuant to Section 5 of Schedule 25 (Dispute Resolution Procedure).

“Committed Investment” means:

a. any form of direct investment by Equity Members in Developer, including the purchase of equity shares in Developer;

b. any Equity Member Debt; or

c. any irrevocable on-demand letter of credit issued by an Eligible Financial Institution for the account of an Equity Member naming Developer and/or Collateral Agent as beneficiary and securing the provision of any direct investment or debt referenced in paragraph a. of this definition.

“Compensable Construction Period Event” has the meaning given to it in Section 15.7.1.

“Compensable Costs” means:

a. with respect to a Compensation Event only, any Change in Costs; and;

b. with respect to any Relevant Event:

i. if Section 15.3.1.c.iii.A or 15.3.1.c.iii.B applies, any Delay Financing Costs; and

ii. if Section 15.3.1.c.ii applies, any Milestone Payment Delay Costs,
in each case for which the Enterprises are otherwise obligated to compensate Developer in respect of such event as determined pursuant to Section 15.3 (for certainty, net of any amount that Developer is (or, pursuant to Section 35.5.a, should be) entitled to recover under any Available Insurance).

“Compensation Event” means:

a. any:

i. breach of this Agreement by the Enterprises; or

ii. violation of Law by the Enterprises,

except to the extent such breach or violation is a Compensation Event under any other paragraph of this definition;
b. any:
   i. failure by the Enterprises to provide Developer with Possession of any ROW Parcel by:
      A. other than with respect to the Existing CDOT Right-of-Way, the applicable date specified in the “Date First Available for Possession” column in the table in Appendix A to Schedule 18 (Right-of-Way);
      B. with respect to the Existing CDOT Right-of-Way, issuance of NTP2; and
      C. with respect to the Maintenance Yard, the Snow and Ice Control Commencement Date;
   ii. failure by the Enterprises to continuously provide Developer with Possession of any ROW Parcel or any Additional ROW Parcel from the applicable Project License Start Date to the applicable Project License End Date;
   iii. failure by the Enterprises to comply with their obligation to complete Property Management of certain ROW Parcels pursuant to Sections 2.2.2 and 2.2.3 of Schedule 18 (Right-of-Way); or
   iv. provision by the Enterprises to Developer of Possession of any ROW Parcel subject to the rights of other Persons, restrictions or qualifications that were not identified, disclosed, expressly anticipated or in existence on or prior to the Setting Date as determined by reference to:
      A. the terms of this Agreement and each Third Party Agreement;
      B. Law;
      C. any title commitment in relation to this Project in the possession of or made available to the Preferred Proposer and/or the Developer-Related Entities;
      D. the Reference Documents;
      E. Beneficial Reuse and Materials Management Plan; and
      F. Public ROW Records;
   c. any:
      i. Discriminatory Change in Law; or
      ii. Qualifying Change in Law,
         (excluding any resulting Enterprise Change made pursuant to Section 8.6.2);
   d. delivery of a Directive Letter pursuant to Section 1.4.a of Schedule 24 (Change Procedure);
e. an Enterprise Change documented in a Change Order;

f. any of the following:
   i. any Non-Appendix B Parcel Unexpected Hazardous Substances Event;
   ii. any Appendix B Parcel Unexpected Hazardous Substances Event that:
       A. occurs during the Construction Period and:
          I. prior to the Appendix B Parcel Relief Start Date, but only with respect to, and to the extent of, the effects of such event on the Construction Work that are continuing on or after the Appendix B Parcel Relief Start Date; or
          II. on or after the Appendix B Parcel Relief Start Date; or
       B. occurs during the Operating Period;
   iii. any Unexpected Groundwater Contamination Event;
   iv. any Unexpected Utility Condition Event;
   v. the encountering or discovery of any:
      A. Unexpected Geological Conditions;
      B. Unexpected Historically Significant Remains; or
      C. Unexpected Endangered Species; or
   vi. any Unexcused Utility Owner Delay; or

g. any incident of physical damage to an Element of the Project or delay of or disruption to the Work caused by:
   i. installation, testing or maintenance of any ETC or ITS Elements by the ETC System Integrator pursuant to the E-470 TSA or the E-470 Installation Agreement;
   ii. the construction, operation or maintenance of any Other Department Project, or any other facility, infrastructure or project constructed, operated and/or maintained by or on behalf of either Enterprise and/or CDOT, within or in the vicinity of the Right-of-Way, but only to the extent not constructed, operated or maintained by Developer (or another Person under common Control with Developer) pursuant to this Agreement or otherwise; or
   iii. the installation by the Enterprises of any advertising on the Right-of-Way or any Additional Right-of-Way;

h. any breach by the City of Denver of the Denver IGA that results in:
i. the assessment of fees or expenses on Developer (or any Subcontractor) that are waived or suspended by the City of Denver under Section 4.A.(i)-(iii) and Exhibit B of the Denver IGA; or

ii. the City of Denver not accepting the quantum of fill dirt specified in Section 4.D of the Denver IGA, provided that such fill dirt satisfies the requirements specified in the Denver IGA and Reference Document 29.17.11;

i. any:

i. Enterprise Release of Hazardous Substances;

ii. Loss by Developer as a result of it being held liable as generator under 40 CFR Part 262 or arranger under CERCLA Section 107(a) with respect to any Hazardous Substances for which the Developer is not identified as the generator and arranger pursuant to Section 23.6.1.a of Schedule 17 (Environmental Requirements) notwithstanding the Parties’ agreement pursuant to Section 23.6.1.b of Schedule 17 (Environmental Requirements); or

iii. Third Party Release of Hazardous Substances that occurs during the Operating Period;

j. any physically intrusive inspection conducted pursuant to Section 21.2.1 to the extent such inspection constitutes a Compensation Event pursuant to Section 21.2.2.b;

k. the issuance of any Safety Compliance Order, excluding any such order or part thereof that orders or directs Safety Compliance that Developer is otherwise obligated to implement pursuant to this Agreement;

l. any suspension by the Enterprises pursuant to Section 23.3.1 to the extent such suspension constitutes a Compensation Event pursuant to Section 23.3.2;

m. any Required Action by the Enterprises that is not taken in response to or because of Developer’s breach of its obligations under this Agreement or any Developer Default;

n. Developer’s obligation to comply with Section 12.2.b with respect to any Related Transportation Facility that:

i. existed on the Setting Date to the extent the relevant configuration, design and use of such facility was not Known or Knowable on such date; or

ii. did not exist on the Setting Date and:

A. is not a CCD Identified Future Improvement; or

B. is a CCD Identified Future Improvement, but only to the extent the configuration, design and/or use of such improvement was not Known or Knowable on such date,
in the case of either i. or ii., to the extent such obligation
requires any expenditure that would be treated as a capital
expenditure in accordance with GAAP;

o. any:

i. execution of:

A. [Reserved.];

B. an RRA on terms not materially consistent
   with the terms set out in the most recent
draft of such agreement provided to the
Preferred Proposer as one of the Reference
Documents numbered 29.10.10.03 on or prior to the Final Project Information Date; or

C. the Cover Maintenance Agreement on
terms not materially consistent with the
terms set out in the most recent draft of such agreement provided to the Preferred
Proposer as Reference Document
numbered 29.10.14.10 on or prior to the
Final Project Information Date;

ii. designation by the Enterprises of a new Third Party
Agreement pursuant to Section 8.5.2;

iii. material amendment or modification to a Third Party
Agreement (other than any Sprint Reimbursement
Agreement);

iv. 100% Trackwork Plans and Specifications in
respect of the UPRR Crossing as referred to in
Section 10.1.2.b.i of Schedule 10 (Design and
Construction Requirements) is approved by UPRR
after the Setting Date on terms not materially
consistent with the most recent version of such
plans and specifications provided as Reference
Document 29.10.10.01 on or prior to such date; or

v. [Reserved.];

p. the issuance of any temporary restraining order, preliminary
or permanent injunction or other form of interlocutory relief
by a court of competent jurisdiction that prohibits the
prosecution of a material part of the Work;

q. any failure by the City of Denver:

i. to have the EADP (as defined in the Denver IGA)
segment from Pond 7A (Brighton West Pond) to the
South Platte River operational by June 1, 2018;

ii. to have the portion of the EADP not referred to in
paragraph q.i. of this definition operational by
September 1, 2019;

iii. to have the TBDP (as defined in the Denver IGA)
operational by September 1, 2019; or

iv. to construct the TBDP (including, for certainty, the

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EADP) materially in accordance with the specifications in the Denver IGA; and

r. any Extended Event that is not otherwise a Compensation Event specified in any of paragraphs a. to q. of this definition to the extent that such Extended Event constitutes a Compensation Event pursuant to Section 33.1.6.c.i.A;

in each case unless and to the extent such event arises as a result of any breach of Law, Governmental Approval, Permit or this Agreement, or fraud, willful misconduct, criminal conduct, recklessness, bad faith or negligence by or of any Developer-Related Entity.

“Construction Closure Deduction” means, in respect of each full or partial Closure Deduction Period that commences in respect of:

a. any Non-Permitted Construction Closure on I-70 Mainline, I-270 or I-225, $5,000 in respect of the Closure of each lane, shoulder or ramp; or

b. any other Non-Permitted Construction Closure, $2,000 in respect of the Closure of each lane, shoulder, ramp, sidewalk or driveway.

“Construction Contract” means the contract for the performance of the Construction Work and of the O&M Work During Construction entered into between Developer and the Construction Contractor in compliance with Section 17.

“Construction Contractor” means the design and construction contractor engaged by Developer under the Construction Contract.

“Construction Period” means the period that begins on the earlier to occur of the date of issuance of NTP1 and the Financial Close Date and ends on (and including) the Substantial Completion Date.

“Construction Goal Deduction” means the amount determined as “CGD” in accordance with Section 1(c) of Part 1 of Schedule 6 (Performance Mechanism).

“Construction Period OJT Goal” has the meaning given to it in Section 6.3.1.a of Schedule 15 (Federal and State Requirements).

“Construction of Relocation Acceptance Letter” or “CRAL” means a letter in the form set out in Appendix D to Section 4 of Schedule 10 (Design and Construction Requirements).

“Construction Price” $811,355,600.

“Construction Standards” means:

a. the standards and specifications listed in Schedule 10A (Applicable Standards and Specifications) including, for certainty:

i. the CDOT Standard Specifications; and

ii. the Standard Special Provisions;

b. the Project Special Provisions;

c. any other standards and specifications expressly referenced in this Agreement as applicable to the Construction Work (for certainty, excluding any Laws, Governmental Approvals
or Permits); and

d. any other standards and specifications that apply to the Construction Work (excluding, for certainty, any Laws, Governmental Approvals or Permits), including as a result of Developer's methods of performing the Construction Work, in each case in the form published or otherwise in effect as of the Final Project Information Date and as modified by the express terms of this Agreement (subject to change, addition or replacement made pursuant to Section 8.6).

“Construction Work” means all administrative, design, installation, compliance, permitting, support services, Utility Work, construction related obligations and all other tasks to be performed and provided by Developer required to comply with all requirements set out in Schedule 10 (Design and Construction Requirements) and any other provisions of this Agreement applicable to the performance of the Construction Work.

“Construction Work Small Business Goals” has the meaning given to it in Section 6.2.1 of Schedule 15 (Federal and State Requirements).

“Construction Work Value” means:

a. the Construction Price; minus

b. the Cost to Complete; minus

c. the amount of any Milestone Payments previously paid to Developer, where (for purposes of this paragraph c.) any amounts set-off by the Enterprises against any such payments pursuant to Section 5 of Part 3 of Schedule 4 (Payments) shall be counted as having been paid to Developer.

“Consumptive Use” means water that is permanently withdrawn from its source system, as further defined by Law.

“Contract Drawings” means the documents included in Schedule 10B (Contract Drawings).

“Contract Year” means a period of twelve months commencing on (and including) July 1 of each Calendar Year, provided that:

a. the first Contract Year shall be the period commencing on (and including) the Agreement Date and ending on the immediately following June 30; and

b. the final Contract Year shall be the period commencing on (and including) July 1 immediately preceding the last Calendar Day of the Term and ending on that last Calendar Day of the Term,

where each of June 30 and July 1 shall be determined by reference to the time and date in Denver, Colorado.

“Contractor Bond” means any:

a. payment and performance surety bond(s) which bonds shall be:

i. provided by and maintained with an Eligible Surety;

ii. comprised either of:

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A. a single payment and performance surety bond substantially in the form set out in Part A of Schedule 20 (Forms of Contractor Bonds); or

B. separate payment and performance surety bonds substantially in the forms set out in, respectively, Parts B and C of Schedule 20 (Forms of Contractor Bonds); and

iii. in a penal amount of not less than:

A. with respect to any individual bond delivered pursuant to Section 9.3.1.a.i (for purposes of which, each bond delivered in accordance with paragraph a.ii.B. of this definition shall constitute a separate individual bond), 50% of the aggregate value of all the Construction Work and the O&M Work During Construction to be performed during the Construction Period under the Principal Subcontracts (provided that, in the event of any self-performance of the O&M Work During Construction by Developer, the value of the O&M Work During Construction shall be deemed to equal (or, in the event that Developer is only partially self-performing such Work, for purposes of determining such penal amount, the value of the O&M Work During Construction shall be the value thereof to be performed under the Principal Subcontracts added to) Developer's budgeted amount for such self-performed O&M Work During Construction, as such budgeted amount shall be verified by the Enterprises (acting reasonably)); and

B. with respect to any individual bond delivered pursuant to Section 9.3.1.a.ii (for purposes of which, each bond delivered in accordance with paragraph a.ii.B. of this definition shall constitute a separate individual bond), 100% of the maximum amount payable by Developer to the O&M Contractor under the O&M Contract in the then current Contract Year (provided that, in the event of any self-performance of the O&M Work by Developer, such maximum amount shall be deemed to equal (or, in the event that Developer is only partially self-performing such Work, such penal amount shall be determined by adding such maximum amount to) Developer's budgeted amount for such self-performed O&M Work in such Contract Year, as such budgeted amount shall be verified by the Enterprises
or, in any case, if greater or with respect to any other part of the Work, the minimum required by Law, including C.R.S. § 38-26-106; and iv. otherwise provided in compliance with Section 9.3.1; or
b. any alternative form of payment and/or performance security provided with the Enterprises’ Acceptance pursuant to Section 9.3.3.

“Control” of a Person by another Person means that other Person (whether directly or indirectly):

a. holds either:
   i. at least 25% or more of the equity interests in such Person; or
   ii. a percentage of the equity interests in such Person that is either equal to or greater than the percentage held by any other holder; or

b. has the right to appoint, approve or remove:
   i. at least 25% of the board of directors (or equivalent) of such Person; or
   ii. a percentage of the board of directors (or equivalent) of such Person either equal to or greater than the percentage appointed, approved or removed by any other holder; or

   c. exercises control over the direction of the business, management and/or policies of such Person, including through:
      i. preferred or minority equity holder veto or voting rights (whether such rights are provided by Law or by such Person’s organizational documents or related member or shareholder agreements or similar agreements); or
      ii. any other means,

   in the case of paragraphs c.i and c.ii. to the extent such rights or other means circumvent, or appear intended to circumvent, any restrictions or obligations that would otherwise arise if this definition of Control applied.

“Control Center” means Developer’s control center for controlling the Cover MEP Systems.

“Controlling Work Item” means the Activity or work item on the Critical Path (or any Payment Milestone critical path) having the least amount of Float.

“CORA” means the Colorado Open Records Act.

“CORA Exempt Materials” means any trade secrets, privileged information and confidential commercial, financial, geological or geophysical data exempt from public disclosure under C.R.S. §§ 24-72-204(3)(a)(IV) or information that is otherwise exempt from disclosure under CORA.
“Core Proposer Team Member” means each of the following in its capacity as a “Core Proposer Team Member” as defined in the ITP:

- a. Meridiam I-70 East CO, LLC;
- b. Kiewit Development Company;
- c. Kiewit C70 Investors, LLC;
- d. Kiewit Infrastructure Co.;
- e. Parsons Brinckerhoff;
- g. Meridiam Infrastructure North America Fund II; and
- h. Kiewit Infrastructure Group, Inc.

“Corrective Action” has the meaning given to it in Section 6.5.8 of Schedule 8 (Project Administration).

“Corrective Action Plan” means Developer’s plan for taking Corrective Action in respect of systemic Nonconforming Work.

“Cost to Complete” means (without double-counting):

- a. those costs (internal and external) that the Enterprises reasonably and properly project that they (and/or CDOT) will incur in carrying out any process to request bids from any parties interested in entering into one or more contracts with the Enterprises (and/or CDOT) to conduct all Work prior to and as necessary to achieve Final Acceptance, including all costs related to the preparation of bid documentation, evaluation of bids and negotiation and execution of relevant contracts; plus

- b. the costs that the Enterprises reasonably and properly project that they (and/or CDOT) will incur in performing or having performed all Work prior to and as necessary to achieve Final Acceptance; plus

- c. any Losses resulting from the actions of Developer and any other Developer-Related Entity that the Enterprises (and/or CDOT) would, but for the termination of this Agreement, not have incurred prior to Final Acceptance; minus

- d. any insurance proceeds and proceeds of Contractor Bonds available to the Enterprises (and, for certainty, not available to the Lenders) for the purposes of achieving Final Acceptance.

“Courtesy Patrol Service Plan” means the plan referred to in Section 9.2.2.c of Schedule 11 (Operations and Maintenance Requirements).

“Cover” means the Elements to be constructed by Developer within the limits depicted in the I-70 Cover Plans, which (except to the extent otherwise specified in this Agreement) includes both “Planning Area 1” and “Planning Area 2” as depicted in the I-70 Cover Plans.

“Cover Maintenance Agreement” means the Intergovernmental Agreement among CDOT, HPTE, BE and the City of Denver in relation to the Project, a draft of which agreement was provided to the Preferred Proposer as Reference Document number
29.10.14.10.

“Cover MEP System” means the mechanical, electrical, and plumbing system and ITS and communications systems identified in Section 12 of Schedule 10 (Design and Construction Requirements) required for the Cover and the Lowered Section between Brighton Blvd. and Dahlia St.

“Cover O&M Work” means all O&M Work with respect to the Cover in relation to:

a. the Cover MEP System and associated Elements thereof described in Section 12 of Schedule 10 (Design and Construction Requirements);

b. fencing and associated support Elements at the east and west limits of the Cover;

c. all structural connections or anchors that connect to structures on top of the Cover and are embedded in or connect through the deck slab;

d. until the end of the Landscape Warranty period (as described in Section 14.11 of Schedule 10 (Design and Construction Requirements)), all landscaping, plant, soil and other vegetation and all irrigation systems; and

e. all Elements at and below (A) the protection course and root barrier protection at landscape areas and (B) the protection course at vehicular and pedestrian traffic areas (including, for certainty, the Elements referred to in paragraphs h.i to h.iv of the definition of Cover Top O&M Work in this Annex A), including:

i. structural Elements, such as deck, girders, bearings, abutments, deck joints, retaining walls, columns, piers, pier caps and approach slabs;

ii. foundation, backfill, and subsurface Elements;

iii. drainage Elements;

iv. roadway Elements; and

v. all Elements identified as Developer’s responsibility in Appendix E to Section 4 of Schedule 10 (Design and Construction Requirements).

“Cover Top Maintainer” means the City of Denver and any entity contracted by the City of Denver from time to time to carry out the Cover Top O&M Work.

“Cover Top O&M Manual” has the meaning given to it Section 3.2.3.e of Schedule 11 (Operations and Maintenance Requirements).

“Cover Top O&M Work” means any and all operations, management, administration, maintenance, repair, preservation, modification, reconstruction, rehabilitation, restoration, renewal and replacement work and activities undertaken after the Final Acceptance Date or (in the case of the elements referred to in paragraphs a. and b. of this definition) after the end of the Landscape Warranty period (as described in Section 14.11 of Schedule 10 (Design and Construction Requirements)) in relation to all Elements with respect to the Cover above (A) the protection course and root barrier protection at landscape areas and (B) the protection course at vehicular and pedestrian traffic areas, including:
a. all landscaping, planting, soil, and other vegetation;
b. all irrigation systems;
c. all drainage systems;
d. all park, pedestrian, cyclist, and other aesthetic and urban amenities, features, site furnishings, buildings and structures, such as any shade coverage and any walls;
e. all lighting, electrical and mechanical components and equipment;
f. all road, cycling, pedestrian, and park, playground, and field surfaces (including, for example, unit paving, concrete or asphalt paving, curbs, crush stone surfacing, playground surfacing, and synthetic field) and any associated grading and overlay;
g. all barriers, gates, fences (other than the fencing referred to in paragraph b. of the definition of Cover O&M Work in this Part A of Annex A (Definitions and Abbreviations)), bollards, posts, poles and railings;
h. all elements of the Project Special Provision Section 519 Garden Roof Assembly (as described in Appendix A of Section 14 of Schedule 10 (Design and Construction Requirements)), excluding:
i. the monolithic waterproofing membrane;
ii. any reinforcing and flashing;
iii. the protection course and root barrier protection at landscape areas;
iv. the protection course at vehicular and pedestrian traffic areas,
and, for certainty, including all other elements of such “Garden Roof Assembly” including:
v. insulation (EPS geofoam);
vi. drainage / water retention components;
vii. filter fabrics;
viii. soil;
ix. garden roof accessory components; and
x. erosion control materials; and
i. all other elements described in Section 14 of Schedule 10 (Design and Construction Requirements) that do not fall within the scope of the Cover O&M Work,

provided that Cover Top O&M Work shall exclude:
j. any O&M Work that falls within paragraphs a., b., c. and d. of the definition of Cover O&M Work in this Part A of Annex A (Definitions and Abbreviations); and

k. any Work required to be undertaken by Developer pursuant to Section 9 as a result of any breach of any Warranty in
relation to any of the elements of the Cover falling within the scope of this definition.

“CP Deduction Month” has the meaning given to it in Section 1(a) of Part 1 of Schedule 6 (Performance Mechanism).

“CPI” means the Consumer Price Index All items (BES Series ID CUUR0000SA), as published by the United States Department of Labor, Bureau of Labor Statistics, for which the base year is 1982-84 = 100, or if such publication ceases to be in existence, a comparable index selected by the Enterprises and approved by Developer, acting reasonably, provided that:

a. if the CPI is revised so that the base year differs from that set out above, the CPI shall be converted in accordance with the conversion factor published by the Bureau of Labor Statistics; and

b. if the Bureau of Labor Statistics otherwise alters its method of calculating such index, the Parties shall mutually determine appropriate adjustments in the affected index.

“Critical Path” means the longest sequence, in terms of time, of logically connected Activities on the Project Schedule ending with Final Acceptance, and, for certainty, the Project Schedule shall include only a single Critical Path.

“Critical Path Method” means the scheduling technique showing all Activities required to complete a task, complete with durations and relationships between Activities.

“Critical Velocity” means the minimum longitudinal air velocity required to prevent backflow of smoke, and which is a function of tunnel geometry and design fire characteristics.

“Cross Drain” means pipes or culverts that convey water without interruption from one side of a road to the other.

“CRPM” has the meaning given to it in Section 1.1.1 of Schedule 15 (Federal and State Requirements).

“Cure Period” means, for any Noncompliance Event, the “Cure Period” (if any) specified for such Noncompliance Event in Table 6A.1 or Table 6A.2, as applicable, which shall commence on and from the Noncompliance Start Time of such Noncompliance Event.

“Default Interest” means interest accruing at the Default Interest Rate on a payment that is due but unpaid.

“Default Interest Rate” means, for each Calendar Day during which Default Interest accues pursuant to this Agreement, the rate per annum equal to the 30 Calendar Day British Bankers Association LIBOR Rate (“BBA LIBOR”), as published by Reuters (or other commercially available source providing quotations of BBA LIBOR as designated by the Enterprises from time to time) at approximately 11:00 a.m., London time for dollar deposits (for delivery on the first Calendar Day on which Default Interest is due) plus 200 basis points, provided that if such rate is not available at such time for any reason, then the Default Interest rate shall be the rate per annum determined by the Enterprises as provided by a similar organization.

“Defect” means a defect, howsoever caused, affecting the condition, use, functionality or operation of any Element.
“Defect Remedy Period” means (subject to any extension pursuant to Section 12.5.2):

a. for a Category 1 Defect, the maximum time period for taking and completing the action required by Section 4.2.2 of Schedule 11 (Operations and Maintenance Requirements), being the time period set out in the column headed “Cat 1 Immediate Action” in the Performance and Measurement Tables; or

b. for a Category 2 Defect, the maximum time period for taking and completing the action required by Section 4.2.3 of Schedule 11 (Operations and Maintenance Requirements), being the time period set out in the column headed “Cat 2 Permanent Repair” in the Performance and Measurement Tables,

in each instance commencing from the time that Developer first becomes (or should have become) aware of the existence of the relevant O&M Defect, provided that, for certainty, if any such period is specified as “N/A”, the relevant O&M Defect shall be deemed to have no remedy period or, for the purposes of Schedule 6 (Performance Mechanism), no Cure Period.

“Deferred Compensation” means any adjustment made under Sections 15.4.a.iii or 15.6.3.b or any deferred payments made under Section 15.4.a.ii.

“Deferred Equity Amounts” means any unfunded or undisbursed amount of any Committed Investment that is shown in the Financial Model to be available for use prior to the anticipated Substantial Completion Date, which amount is:

a. of a type defined in paragraph a. of the definition of Committed Investment in this Part A of Annex A (Definitions and Abbreviations); or

b. of a type defined in paragraph b. of the definition of Committed Investment in this Part A of Annex A (Definitions and Abbreviations).

“Delay Financing Costs” means, in respect of any Delay Period, the aggregate of:

a. all amounts of principal that accrue with respect to the Long Term Project Debt under the Financing Documents during such period;

b. all amounts of interest (excluding default interest), together with any commitment or standby fees on undrawn loan facilities that will accrue under the Financing Documents with respect to the Long Term Project Debt during such period; and

c. reasonable financing costs and expenses that accrue during such period with respect to the Long Term Project Debt in connection with any of the foregoing.

“Delay Period” has the meaning given to it in Section 15.3.1.c.ii.

“Delay Relief Events” has the meaning given to it in paragraph a. of the definition of Relief Event in this Part A of Annex A (Definitions and Abbreviations).

“Deliverable” means any written document, drawing, report, plan or other material or information, regardless of form and including any draft, required pursuant to this Agreement to be submitted or resubmitted to the Enterprises or the Department, as applicable, for Approval, Acceptance, any other consent,
approval or like assent, or Information, excluding, for certainty, notices and correspondence.

“Deliverables Tables” has the meaning given to it in Section 1(a) of Part 1 of Schedule 3 (Commencement and Completion Mechanics).

“Denver IGA” means the Intergovernmental Agreement among CDOT, HPTE, BE and the City of Denver dated as of September 14, 2015, as supplemented by the letters dated February 21, 2017 and April 21, 2017, copies of which were included in the Reference Documents.

“Denver Planned Projects” means the projects listed in Appendix B to Section 9 of Schedule 10 (Design and Construction Requirements).

“Department” means:

a. CDOT acting pursuant to a delegation of authority by the Enterprises pursuant to Section 18.1.2; or

b. the Enterprises, but only if and to the extent that:
   i. the context may require; or
   ii. the Enterprises otherwise notify Developer.

“Department Provided Approvals” means:

a. each of the Governmental Approvals listed in Table 9-1 in Section 9.4.15 of Schedule 10 (Design and Construction Requirements);

b. each of the Governmental Approvals listed in Table 17-1 of Schedule 17 (Environmental Requirements); and

c. the “Interstate Access Request” identified in the Reference Documents.

“Design of Relocation Acceptance Letter” or “DRAL” means a letter in the form set out in Appendix C to Section 4 of Schedule 10 (Design and Construction Requirements).

“Designated Senior Representative” means:

a. in the case of Developer, its Project Manager (or, if none, an equivalent successor representative as notified by Developer to the Enterprises from time to time); and

b. in the case of the Enterprises, the director of HPTE (or an equivalent successor representative of HPTE or BE as notified by the Enterprises to Developer from time to time).

“Detailed Supervening Event Submission” has the meaning given to it in Section 15.1.2.b.ii.

“Deterioration Fraction” has the meaning set out in Section 4.3.a of Schedule 12 (Handback Requirements).

“Developer” has the meaning given to it in the Preamble.

“Developer Change” means a Change initiated by Developer pursuant to a Developer Change Notice.

“Developer Change Notice” has the meaning given to it in Section 14.1.b.
“Developer Conditions Precedent” means the conditions set out in Section 2.2 of Schedule 1 (Financial Close).

“Developer Default” has the meaning given to it in Section 32.1.1.

“Developer Default Cure Period” has the meaning given to it in Section 32.1.1.

“Developer Employee Redundancy Payments” means the amount of all payments of wages earned, accrued unused vacation time, and any other payments required by Law or required by Developer’s employment agreement with Developer’s employees, which in each case have been or will be reasonably incurred by Developer as a direct result of termination of this Agreement.

“Developer-Related Entities” means:

a. Developer;
b. the Equity Members;
c. any Indirect Equity Members;
d. Subcontractors (of any tier);
e. any other Persons (except, for certainty, the Enterprises) performing any of the Work for or on behalf of Developer;
f. any other Persons (except, for certainty, the Enterprises and any members of the general public that use or access the Project) for whom Developer may be legally or contractually responsible; and
g. the employees, agents, officers, directors, representatives and consultants of any of the foregoing.

“Developer Release of Hazardous Substances” means any Release of Hazardous Substances on, in, under, from or in the vicinity of the Site caused by Developer or any other Developer-Related Entity to the extent such Release:

a. arises as a result of any breach of Law, Governmental Approval, Permit or this Agreement, fraud, willful misconduct, criminal conduct, recklessness, bad faith or negligence by or of Developer or any other Developer-Related Entity; or
b. constitutes the Release of Hazardous Substances arranged to be brought onto the Site by Developer or any other Developer-Related Entity.

“Developer Retained Expansion” means any Other Department Project, or other facility, constructed by a Person other than Developer, that the Enterprises require Developer to operate and/or maintain pursuant to this Agreement, including pursuant to an Enterprise Change documented in a Change Order.

“Developer-risk Permit Area” means any Permit Area:

a. which is adjacent to the Additional Right-of-Way but not the Right-of-Way; and/or
b. for which access and/or use is required to be procured by Developer pursuant to a Permit for which Developer bears all risk of delay and/or all risk of cost pursuant to Section 8.4.3.b.
“Developer’s Enterprise Change Response” has the meaning given to it in Section 1.1.c.i of Schedule 24 (Change Procedure).

“Developer’s Representative” has the meaning given to it in Section 18.2.1.a.

“Directive Letter” has the meaning given to it in Section 1.4.a of Schedule 24 (Change Procedure).


“Discretion” has the meaning given to it in Section 2.2.2.b.

“Discriminatory Change in Law” means a Change in Law, the terms of which only apply to:

a. the Project, or the Project and Similar Projects; and/or

b. Developer or any Principal Subcontractor and not to other Persons (unless such Persons are public-private partnership project developers or design-build contractors engaged in Similar Projects (and in roles similar to Developer or such Principal Subcontractor on such projects)),

and in the case of each of paragraphs a. and b. excluding any Change in Law to the extent such is made in response to any breach of Law, Governmental Approval, Permit or this Agreement, or fraud, willful misconduct, criminal conduct, recklessness, bad faith or negligence of any Developer-Related Entity.

“Dispute” means any dispute between the Enterprises and Developer arising out of or in connection with this Agreement.

“Dispute Resolution Panel” or “Panel” means either the Commercial Panel or the Technical Panel.

“Dispute Resolution Procedure” means the procedure for the resolution of Disputes set out in Section 38 and Schedule 25 (Dispute Resolution Procedure).

“Distribution” means, whether in cash or in kind any:

a. dividend or other distribution by Developer in respect of share capital (or the equivalent);

b. reduction of capital, redemption or purchase of shares or any other reorganization or variation to share capital;

c. payments by Developer under any Equity Member Funding Agreements (whether of principal, interest, Breakage Costs or otherwise);

d. payment, loan, contractual arrangement or transfer of assets or rights to the extent (in each case) was neither in the ordinary course of business nor on reasonable commercial terms; or

e. the receipt of any other benefit that is not received in the ordinary course of business and on reasonable commercial terms.

“Document Control System” means the system established and maintained by Developer pursuant to Section 13.1.1 of Schedule 8 (Project Administration).
“DRIR” means the Denver Rock Island Railroad.

“DRIR Crossing” means the existing and/or proposed crossing by the DRIR Railroad through the I-70 East corridor on the Right-of-Way as described in Section 10.1.6 of Schedule 10 (Design and Construction Requirements).

“DRIR RRA” means the railroad agreement between CDOT and DRIR in relation to the Project, a draft of which agreement was provided to the Preferred Proposer as one of the Reference Documents numbered 29.10.10.03.

“DRIR Work” means all duties and services to be furnished and provided by the DRIR as required by the DRIR RRA.

“Drop Site” has the meaning given to it in Section 1.2 B of Appendix B of Schedule 11 (Operations and Maintenance Requirements).

“DPS MOA” means the Memorandum of Agreement between CDOT and School District No. 1 of the City and County of Denver dated as of October 11, 2016.

“DRTL” has the meaning given to it in Section 7 of Schedule 9 (Submittals).

“Durability Plan” means Developer’s plan for addressing the durability of all Residual Elements prepared and updated in accordance with Section 8 of Schedule 8 (Project Administration).

“E-470 Installation Agreement” means the installation task order in relation to the Project to be executed between HPTE and the ETC System Integrator pursuant to the E-470 TSA.

“E-470 TSA” means the tolling services agreement between HPTE and the ETC System Integrator dated May 7, 2015.

“ECMTP” has the meaning given to it in Section 6.1.1 of Schedule 17 (Environmental Requirements).

“ECWP” has the meaning given to it in Section 2.1.1 of Schedule 17 (Environmental Requirements).

“Electronic Toll Collection System” means the barrier free, non-cash road charging system, including all signage, civil and telecommunications infrastructure and back-office facilities, that allows free-flow movement for I-70 Mainline users to enter and exit the Tolled Express Lanes without having to stop to pay cash tolls.

“Element” means an individual component, system or subsystem of the Project, which shall, when used in relation to the O&M Work, include at a minimum a breakdown into the items described in the column headed “Element” in the Performance Requirements (as such items are further subdivided into subsections where appropriate).

“Eligible Financial Institution” means a bank or financial institution:

a. having an office in Denver, Colorado or New York, New York at which a letter of credit issued by it can be presented for payment by hand delivery, electronic means or fax; and

b. having a Minimum Issuer Rating from at least two Rating Agencies,

where for purposes of this definition “Minimum Issuer Rating” means a long-term unsecured debt rating of at least:

i. “A-” by Standard & Poor’s Ratings Services;

ii. “A-” by Fitch, Inc.;
iii. “A3” by Moody’s Investors Service, Inc.; or
iv. “A low” by DBRS, Inc.,
in each case with an outlook of “stable” or better.

“Eligible Insurer” means an insurer that:

a. is either:
   i. admitted or authorized in the State; or
   ii. if not admitted or authorized in the State, based in Bermuda, the United Kingdom or the Republic of Ireland;

b. except as otherwise Approved by the Enterprises, has either (i) a policyholder’s management and financial size category rating of not less than “A-X” according to A.M. Best's Financial Strength Rating and Financial Size Category or (ii) a rating of not less than “BBB” according to Standard and Poor's Ratings Services;

c. is not the subject of:
   i. an Insolvency Event; or
   ii. a Governmental Authority order or directive limiting its business activities as related to or affecting any Insurance Policies placed or to be placed with such insurer; and

d. satisfies any conditions imposed by the Enterprises as a condition to any Approval given pursuant to paragraph b. of this definition.

“Eligible Surety” means a surety authorized to issue bonds in the State having either:

a. a Minimum Eligible Surety Rating from at least two Rating Agencies; or

b. a rating of at least “A-” and “Class VIII” from A.M. Best Company, Inc. (but only if it is at the relevant time a Registered Rating Agency),

where for purposes of this definition “Minimum Eligible Surety Rating” means a long-term unsecured debt rating of at least:

i. “A” by Standard & Poor’s Rating Services;

ii. “A” by Fitch, Inc.;

iii. “A2” by Moody’s Investors Service, Inc.; or

iv. “A” by DBRS, Inc.,
in each case with an outlook of “stable” or better.

“Emergency” means any non-ordinary course event affecting the Project, whether directly or indirectly, that:

a. is an immediate or imminent threat, or, if not promptly addressed, a potential threat, to the safety of the public;

b. causes disruption or, if not promptly addressed, has the potential to cause disruption, to the free flow of traffic on or
a. is an immediate or imminent threat to the long term integrity of any part of the infrastructure of the Project, to the Environment, any Improvements or to property adjacent to the Project;

c. is recognized by the Enterprises or CDOT as an emergency pursuant to Fiscal Rule 2-2 of the State of Colorado Fiscal Rules; or

d. is recognized or declared as an emergency by the Governor of the State, FEMA, the U.S. Department of Homeland Security or any other Governmental Authority with legal authority to recognize or declare an emergency.

“Emergency Repair Work” means temporary and/or permanent repair work that results from an Emergency of the type specified in paragraph d. or e. of the definition thereof in this Part A of Annex A (Definitions and Abbreviations).

“Emergency Services” means any Federal, State or local police, fire, emergency or other public safety Governmental Authorities (including the National Guard), and any other security or emergency personnel acting at the direction of any Governmental Authority.

“Emerging Small Businesses” any business certified by CDOT to participate in CDOT’s ESB program that has not otherwise lost such certification due to graduation or revocation.

“Encumbrance” means any mortgage, pledge, hypothecation, deed of trust, mortgage, security interest, lien, financing statement, charge, option, assignment or encumbrance of any kind or any arrangement to provide priority or preference, including any easement, right-of-way, restriction (whether on voting, sale, transfer, disposition, use or otherwise), right, lease and other encumbrance on title to real or personal property (whether or not of record), whether voluntary or imposed by Law, and any agreement to give any of the foregoing.

“Enterprise” and “Enterprises” each has the meaning given to it in the Preamble.

“Enterprise Change” means a Change initiated by the Enterprises pursuant to an Enterprise Change Notice.

“Enterprise Change Notice” has the meaning given to it in Section 14.1.a.

“Enterprise Closing Agreements” means:

a. the Project Agreement Amendment;

b. the Lenders Direct Agreement;

c. each of the Principal Subcontractor Direct Agreements;

d. the bond purchase agreement with respect to any PABs;

e. the continuing disclosure agreement of the Enterprises with respect to any PABs;

f. the trust indenture, and any related supplement indenture, with respect to any PABs;

g. the tax compliance agreement with respect to the PABs;
h. any PABs; and
i. the loan agreement pursuant to which the BE as PABs Issuer loans the proceeds from the sale of any PABs to the Developer.

“Enterprise Conditions Precedent” means the conditions set out in Section 2.3 of Schedule 1 (Financial Close).

“Enterprise Default” has the meaning given to it in Section 32.3.1.

“Enterprise Default Cure Period” has the meaning given to it in Section 32.3.1.

“Enterprise Release of Hazardous Substances” means any Release of Hazardous Substances on, in, under, from or in the vicinity of the Site caused by the Enterprises, CDOT or any other State Governmental Authority, including any such Release caused by any Person (other than a Developer-Related Entity) in the course of acting on behalf of the Enterprises, CDOT or any other State Governmental Authority, which Release:

a. occurs:
   i. with respect to any ROW Parcel, after the Setting Date; and
   ii. with respect to any Additional ROW Parcel, on or after its Project License Start Date;

b. is required to be investigated, removed, treated, stored, transported, managed and/or remediated pursuant to Law, any Governmental Approval or Developer’s obligations under this Agreement, excluding any such Release to the extent such results in the presence of Hazardous Substances in groundwater.

“Enterprise Representative” has the meaning given to it in Section 18.2.1.a.

“Environment” means air, soils, submerged lands, surface waters (including wetlands), groundwaters, land, stream sediments, surface or subsurface strata, biological resources, including endangered, threatened and sensitive species, and natural systems, including ecosystems, historic, archeological and paleontological resources.

“Environmental Approval” means any Governmental Approval or Permit required for the Project or the Work pursuant to Environmental Law (including, for certainty, the FEIS, the ROD and any Reevaluation).

“Environmental Law” means any Law applicable to the Project or the Work requiring consideration of impacts on the Environment or addressing, regulating or imposing liability, actions or standards of conduct that pertains to the Environment, Hazardous Substances, contamination of any type whatsoever, or environmental health and safety matters, and any lawful requirements and standards that pertain to the Environment, Hazardous Substances, contamination of any type whatsoever, or environmental health and safety matters, set out in any permits, licenses, approvals, plans, rules, regulations, administrative or judicial orders, ordinances or other Governmental Approvals adopted, or other criteria and guidelines promulgated, pursuant to such Law, including in each case those relating to:
a. the manufacture, processing, use, distribution, existence, treatment, storage, disposal, generation, transportation and Release of Hazardous Substances;

b. protection of wildlife, animal or plant species listed as threatened or endangered under and subject to an applicable threatened or endangered species Law, species, other sensitive species, wetlands, water courses and water bodies, antiquities, fossils, coins, articles of value, precious minerals, cultural artifacts, human burial sites and remains and other similar remains of archaeological, cultural or paleontological interest, natural resources, and of the Environment generally;

c. the operation and closure of underground storage tanks;

d. human health and safety; and

e. notification documentation and record keeping requirements relating to the foregoing.

“Environmental Manager” means the “Environmental Manager”, initially as identified in Schedule 27 (Key Personnel), subject to replacement pursuant to Section 16.2.

“Environmental Requirements” means the requirements set out in Schedule 17 (Environmental Requirements), including the obligation to comply with Environmental Law and all Environmental Approvals.

“Equity IRR” means, as of any date of calculation, the nominal post-tax internal rate of return on the total amount of Committed Investment described in paragraphs a. and b. of the definition of Committed Investment in this Part A of Annex A (Definitions and Abbreviations) made and projected, as of such date, to be made over the full Term, which rate of return shall be calculated, using the Financial Model, as the discount rate that, when applied to the equity cash flows calculated as of the relevant date, results in a net present value of zero. For purposes of this definition:

a. the phrase “post-tax” refers only to U.S. Federal and state income tax liability of Developer or its Equity Members, calculated at no greater than the maximum rate charged to domestic corporations and taking into account the deductibility of state and local taxes for Federal purposes, and specifically excludes:

i. any foreign income tax and other tax of any kind; and

ii. any withholding tax for Federal, state or local purposes, including any tax that Developer or an Equity Member is obligated to withhold on Distributions (whether actual or constructive) or other payments or allocations to Equity Members or holders of debt of or equity interests in an Equity Member under 26 U.S.C. §§ 1441–1446, notwithstanding 26 U.S.C. § 1461;

b. the phrase “equity cash flows” refers to:

i. the total amount of Distributions that, as of the date of calculation, have been made and are projected to be made during the Term; minus

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ii. the total amount of Investment described in paragraphs a. and b. of the definition of Committed Investment in this Part A of Annex A (Definitions and Abbreviations) that, as of the date of calculation, has been made and is projected to be made during the Term; and

   c. the Equity IRR as of the Financial Close Date is equal to the Base Case Equity IRR.

“Equity Market Value” means the net present value of the future nominal Distributions (post-tax on the part of Developer but pre-tax on the part of any Equity Member) of the kind referenced in paragraphs a., b. and c. of the definition of Distribution in this Part A of Annex A (Definitions and Abbreviations) as anticipated as of the Termination Date, as such net present value is determined by an Independent Market Value Appraiser:

   a. utilizing a discount rate that is based on both the performance of the Project and of other projects that are more similar than not to the Project with respect to:

      i. risk allocation (including credit risk); and

      ii. payment mechanisms (including the absence of any transfer of usage risk to Developer); and

   b. assuming:

      i. that no Termination for Convenience, termination of this Agreement for Enterprise Default or Termination by Court Ruling that arises by reason of an Enterprise Default, as applicable, has occurred; and

      ii. that the shares in Developer are freely transferable and are being sold in the open market; and

      iii. that the estimated anticipated future nominal Distributions of the kind referenced in paragraphs a. and c. of the definition of Distribution in this Part A of Annex A (Definitions and Abbreviations) (post-tax on the part of Developer but pre-tax on the part of any Equity Member) are based on the performance of the Project up to the Termination Date employing an approach that considers the Financial Model and making any adjustments for positive or negative operating performance that are not yet reflected in the Financial Model,

   where such determination:

   c. shall be made by such Independent Market Value Appraiser within 90 Calendar Days of its appointment; and

   d. except in the case of manifest error or fraud, shall be final and binding on the Parties, unless challenged by either Party within 30 Calendar Days of the date of determination by submission to the Commercial Panel for resolution in accordance with the Dispute Resolution Procedure.

“Equity Member” means any Person with a direct equity interest in Developer.
“Equity Member Debt” means any bona fide indebtedness of Developer for borrowed money that:

a. is held by any Equity Member or an Affiliate thereof; and

b. is subordinated in priority of payment and security to all Project Debt held by Persons who are not Equity Members.

“Equity Member Funding Agreement” means any loan agreement, credit agreement or other similar financing agreement or subordination agreement providing for or evidencing Equity Member Debt.

“Equity Transfer” means:

a. any sale, transfer, assignment, conveyance, or other disposal of any direct or indirect legal, beneficial or equitable ownership interests in a Person; or

b. any agreement, whether or not subject to the occurrence of any condition or exercise of any right or option, to effect any transaction specified in paragraph a. of this definition, including any pledge, mortgage, grant of any security interest, lien or other encumbrance.

“Escrow Agent” means the escrow agent appointed by the Parties pursuant to the Financial Model Escrow Agreement.

“ETC System Integrator” means the E-470 Public Highway Authority, a political subdivision of the State formed under the Public Highway Authority Law, Part 5 of Article 4 of Title 43, C.R.S.

“Exceptional Cost” means, in respect of an Insurance Review Period, the amount, if positive (and, if not, $0), calculated as:


“Exceptional Saving” means, in respect of an Insurance Review Period, the amount if positive (and, if not, $0), calculated as:


“Excess Costs” means costs and expenses of the following activities as incurred by Developer as a result of the occurrence of a Non-Appendix B Parcel Unexpected Hazardous Substances Event or an Appendix B Parcel Unexpected Hazardous Substances Event in connection with:

a. the off-site transportation and disposal of the relevant Unexpected Hazardous Substance(s):
   i. trucking costs from the Site to the applicable disposal site, as such costs and expenses are calculated in accordance with Sections 2.1, 2.3, 2.5 and 2.6 (as applicable) of Appendix A to Schedule 24 (Change Procedure); and
   ii. tipping fees at such disposal site, as such costs and expenses are calculated in accordance with Sections 2.5 and 2.6 of Appendix A to Schedule 24 (Change Procedure); and

b. the on-site investigation, removal, treatment, management and/or remediation of any:
i. non-naturally occurring radioactive waste (excluding such waste resulting from lawful household or medical uses); or

ii. lost or abandoned military-grade munitions (excluding firearms and firearms ammunition) that are at such time primed, fused, armed or otherwise prepared for use and which remain unexploded,

following advance notice of such activities to the Enterprises and other Governmental Authorities in accordance with Law, and with respect to which the Enterprises have not exercised their rights under Section 23.1.3 of Schedule 17 (Environmental Requirements) with respect to such materials,

in all cases excluding:

   c. any internal costs, fees or expenses of any Developer-Related Entity except to the extent expressly permitted in accordance with Section 2.6 of Appendix A to Schedule 24 (Change Procedure) as and to the extent provided for in paragraphs a and b of this definition; and

   d. any costs or expenses that are expressly provided to be incidental and excluded pursuant to the terms of Schedule 17 (Environmental Requirements).

"Excess Groundwater Costs" means any costs and expenses for the following as incurred by Developer:

   a. as a result of the occurrence during the Construction Period of any Unexpected Groundwater Contamination Event of the type referenced in paragraph a of the definition thereof in this Part A of Annex A (Definitions and Abbreviations):

      i. acquisition or rental costs for equipment used in the treatment and/or remediation (including directly related storage) of groundwater, as such costs and expenses are calculated in accordance with Sections 2.3 and 2.6 of Appendix A to Schedule 24 (Change Procedure); and

      ii. parts and materials (including chemicals and other substances necessary for the treatment of any Unexpected Groundwater Contamination) necessary for the operation and use of such equipment, or any previously acquired or rented equipment, as such costs and expenses are calculated in accordance with Sections 2.2, 2.3 and 2.6 of Appendix A to Schedule 24 (Change Procedure);

   b. as a result of the occurrence during either the Construction Period or the Operating Period of any Unexpected Groundwater Contamination Event of the type referenced in paragraph b of the definition thereof in this Part A of Annex A (Definitions and Abbreviations), any capital expenditure in accordance with GAAP incurred to treat and/or remediate any Unexpected Groundwater Contamination Condition to enable Developer to perform
O&M Work After Construction (whether such expenditure is incurred either during the Construction Period or during the Operating Period, provided that such expenditure (even if required to be incurred during the Construction Period) solely and exclusively relates to the performance of O&M Work After Construction) is in excess of that required to be incurred by Developer in complying with its obligations pursuant to Sections 8.4.4.e.iv and 8.4.4.h. of Schedule 10 (Design and Construction Requirements); and

c. as a result of the occurrence during the Operating Period of any Unexpected Groundwater Contamination Event of the type referenced in paragraph b. of the definition thereof in this Part A of Annex A (Definitions and Abbreviations), any other costs or expenses as described in paragraphs a.v., a.vi, and a.vii. of the definition of Change in Costs in this Part A of Annex A (Definitions and Abbreviations) to the extent the incurrence of any such costs or expenses by Developer is necessary as a result of it having incurred any capital expenditure referenced in paragraph b. of this definition (including, for certainty, as a result of the occurrence during either the Construction Period or the Operating Period of any Unexpected Groundwater Contamination Event of the type referenced in paragraph b. of the definition thereof in this Part A of Annex A (Definitions and Abbreviations)) and such costs and expenses relate to such capital expenditure,

in all cases:

d. to the extent applicable with respect to paragraphs b. and c. of this definition, as any such amounts are calculated in accordance with Appendix A to Schedule 24 (Change Procedure); and

e. excluding:

i. any internal costs, fees or expenses of any Developer-Related Entity except to the extent expressly permitted in accordance with Section 2.6 of Appendix A to Schedule 24 (Change Procedure) either (A) as and to the extent provided for in paragraphs a.i. and a.ii. of this definition or (B) with respect to the costs and expenses calculated pursuant to paragraphs b. and c. of this definition; and

ii. any costs or expenses that are expressly provided to be incidental and excluded pursuant to the terms of Schedule 17 (Environmental Requirements).

“Exclusion” has the meaning given to it in Developer Default number (10) in Section 32.1.1.

“Excused Closure” means:

a. any Closure arising as a direct result of:

i. a Compensation Event;

ii. a Relief Event;
iii. an Emergency;

iv. the performance of Snow and Ice Control Services in accordance with the requirements of Section 11 of Schedule 11 (Operations and Maintenance Requirements); or

v. Work required to be performed in connection with the removal of debris or obstructions, patrols or inspections that requires the Closure of a shoulder where such Closure is too brief to require the implementation of a Closure in accordance with Developer’s most recently Approved Transportation Management Plan;

b. any Closure under the control of the Emergency Services;

c. any Closure that:

i. was previously under the control of the Emergency Services; and

ii. continues to subsist after the Emergency Services have returned operational control of all parts of the Project affected by such Closure to Developer, provided that, if any such Closure continues to subsist for a period in excess of 30 minutes after such control has been returned to Developer, any such excess period shall not be an Excused Closure;

d. any Closure expressly ordered by, and continuing only for so long as ordered by, the Enterprises, CDOT or any Governmental Authority;

e. any Closure of a shoulder that is required for the sole purpose of performing the repair of a Category 1 Defect, but only to the extent that any such Closure persists for no longer than the Defect Remedy Period applicable to the relevant Category 1 Defect; or

f. any Closure required solely by the ETC System Integrator for the performance of its obligations pursuant to the E-470 TSA or the E-470 Installation Agreement, provided that, for certainty, to the extent that Developer performs any Work on the portion of the Project that is subject to such a Closure during such Closure, such Closure shall not be an Excused Closure within this paragraph f;

but only to the extent that, in the case of any such Closure:

g. such Closure does not arise as a result of any breach of Law, Governmental Approval, Permit or this Agreement, fraud, willful misconduct, criminal conduct, recklessness, bad faith or negligence by or of any Developer-Related Entity; and

h. Developer is using its Reasonable Efforts to:

i. mitigate the impact of the relevant Closure;

ii. reopen the affected part(s) of the Project as quickly
as possible to traffic; and

iii. if such Closure arose as the direct result of an Emergency, respond to the Emergency in accordance with the requirements of this Agreement.

“Exempt Refinancing” means:

a. any Refinancing that was fully and specifically identified and taken into account in the Base Financial Model and calculation of the Base Case Equity IRR and that, at the time of Refinancing, does not lead to a Refinancing Gain greater than zero;

b. amendments, modifications, supplements or consents to Financing Documents, excluding extensions and renewals, and the exercise by a Lender of rights, waivers, consents and similar actions, in each case:
   i. in the ordinary course of day-to-day loan administration and supervision; and
   ii. that do not individually or in the aggregate provide a financial benefit to Developer;

c. any changes in taxation or Developer’s accounting treatment or policies; and

d. any of the following acts by a Lender of senior lien priority Project Debt (including, for certainty, any TIFIA Loan):
   i. the syndication of any of such Lender’s rights and interests in the senior Financing Agreements;
   ii. the grant by such Lender of any rights of participation, or the disposition by such Lender of any of its rights or interests, in respect of the senior Financing Agreements in favor of any other Lender of senior lien Project Debt or any other investor; or
   iii. the grant by such Lender of any other form of benefit or interest in either the senior Financing Agreements or the revenues or assets of Developer, whether by way of security or otherwise, in favor of any other Lender of senior lien Project Debt or any investor;

e. any amendment, modification, or supplement of any Financing Document entered into:
   i. in connection with the financing of Deferred Compensation pursuant to Section 15.5; or
   ii. to reflect a corresponding amendment to, modification of, or Change under, this Agreement;

f. a reset of an interest rate and/or mandatory tender pursuant to the express terms of any Financing Documents; or

g. any sale of any equity interests in Developer by an Equity Member or securitization of the existing rights and/or interests attaching to any equity interests in Developer or

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any of its Equity Members, if any.


“Exit Zone” means the length of roadway between the Interior Zone and the exit Portal and which has variable illumination based upon the scene luminance exiting the Portal.

“Expiry Date” means the 30th anniversary of the Baseline Substantial Completion Date.

“Extended Event” has the meaning given to it in Section 33.1.6.a.


“FEIS” has the meaning given to it in the Recitals.


“FHWA” has the meaning given to it in the Recitals.

“FHWA 1273” has the meaning given to it in Section 2.5.1 of Schedule 15 (Federal and State Requirements).

“Final Acceptance” means the satisfaction of all Final Acceptance Conditions, as confirmed by the Enterprises’ issuance of the Final Acceptance Certificate.

“Final Acceptance Certificate” has the meaning given to it in Section 5(a) of Part 6 of Schedule 3 (Commencement and Completion Mechanics).

“Final Acceptance Conditions” has the meaning given to it in Section 1 of Part 6 of Schedule 3 (Commencement and Completion Mechanics).

“Final Acceptance Date” has the meaning given to it in Section 5(a) of Part 6 of Schedule 3 (Commencement and Completion Mechanics).

“Final Acceptance Deadline Date” means the date which is 120 Calendar Days after the Substantial Completion Date, as such deadline may be extended from time to time pursuant to:

a. Section 15.3.1.c.iii.C, as a result of the occurrence of a Supervening Event; or
b. a Change documented in a Change Order.

“Final Handback Inspection Report” means the report prepared by Developer in accordance with Section 3.12 of Schedule 12 (Handback Requirements).

“Final Payment Month” means the final month that commences during the Operating Period.

“Final Project Information Date” means the Setting Date, except that in respect of:

a. the Baseline TIFIA Term Sheet, it means July 22, 2017;
b. the IAA, it means August 22, 2017;
c. the Supplemental Indenture, it means July 7, 2017;
d. the Central 70 Note, it means July 7, 2017;
e. the Cover Maintenance Agreement, it means July 27, 2017;
f. the Beneficial Reuse and Materials Management Plan, it means September 12, 2017;
g. the CDOT Standard Specifications, it means October 1, 2017;
h. the URA with Phillips 66 Company, it means June 6, 2017;
i. the UPRR RRA, it means October 23, 2017; and
j. the DRIR RRA, it means October 23, 2017.

“Final Warning Notice” has the meaning given to it in Section 22.2.2.

“Final Financial Close” has the meaning given to it in Section 2.1(a) of Schedule 1 (Financial Close).

“Financial Close Base CPP” has the meaning given to it in Section 5(d) of Annex A to Schedule 1 (Financial Close).

“Final Financial Close Date” means the date on which Financial Close occurs.

“Final Financial Close Deadline” means January 28, 2018, as such deadline may be extended from time to time pursuant to:

a. Sections 4.2(d) or 4.3(c) of Schedule 1 (Financial Close); or

b. a Change documented in a Change Order.

“Financial Close Security” means:

a. either:
   i. one or more letters of credit in the aggregate amount of at least $20,000,000, each issued by an Eligible Financial Institution; or
   ii. one or more surety bonds in the aggregate amount of at least $20,000,000, each issued by an Eligible Surety,

in either case delivered by Developer pursuant to Section 7.3.1.f. of Part C of the ITP on or prior to the Agreement Date; and

b. any replacement letter of credit or surety bond, as applicable, delivered pursuant to Section 1.2(b) of Schedule 1 (Financial Close) that is in the same form as any letter of credit or surety bond, as applicable previously delivered pursuant to Section 7.3.1.f. of Part C of the ITP or otherwise in such other form as the Enterprises may Approve,

where, for certainty, the Financial Close Security may not be in the form of both (x) one or more such letters of credit and (y) one or more such surety bonds.

“Financial Close Termination Amount” means:

a. $2,500,000; plus

b. the lesser of:
   i. Developer’s reasonable and documented costs and expenses incurred in connection with:
      A. execution of this Agreement;
      B. the performance of any NTP1 Work; and
C. its efforts to achieve Financial Close (including, for certainty, any cost and expense of extending the expiration date of the Financial Close Security pursuant to Section 4.2(d) of Schedule 1 (Financial Close)), after the issuance of the Notice of Award and through but not including the date of delivery of any notice of termination pursuant to Schedule 1 (Financial Close); and

ii. $500,000 (or, in the event that the Enterprises extend the Financial Close Deadline pursuant to Section 4.2(d) of Schedule 1 (Financial Close), $2,000,000).

“Financial Model” means the updated Base Financial Model delivered by Developer pursuant to Schedule 1 (Financial Close), as subsequently replaced from time to time pursuant to Section 28.6 or Section 29.2.3.

“Financial Model Escrow Agreement” means the Financial Model Escrow Agreement executed by the Parties and U.S. Bank National Association as Escrow Agent in substantially the form of Schedule 23 (Form of Financial Model Escrow Agreement) on or about the date hereof or any replacement agreement entered into by the Parties.


“Financing Agreements” means:

a. the documents listed in Section A of Annex A to the Lenders Direct Agreement, executed on or about the Financial Close Date;

b. any other loan or credit agreement, trust indenture, hedging agreement, interest rate swap agreement or other agreement by, with or in favor of any Lender pertaining to Project Debt (including any Refinancing), other than Security Documents;

c. any note, bond or other negotiable or non-negotiable instrument evidencing the indebtedness of Developer for Project Debt (including any Refinancing); and

d. any amendment, supplement, variation or waiver of any of the foregoing agreements or instruments.


“First Payment Month” means the month referred to in paragraph b. of the definition of Payment Month in this Part A of Annex A (Definitions and Abbreviations).

“Float” means the amount of time that any given Activity or logically connected sequence of Activities shown on the Project Schedule may be delayed before it delays the occurrence of:

a. the Milestone Completion Date for any Payment Milestone;

b. the Substantial Completion Date; and/or

c. the Final Acceptance Date,
where such Float is identified as the amount of time between the early start date and the late start date, or the early finish date and the late finish date, for each and every Activity shown on the Project Schedule.

“Force Majeure Event” means any:

a. war, civil war, invasion or armed conflict;

b. act of terrorism or sabotage;

c. nuclear, chemical or biological contamination or emissions (including as applicable associated radiation), excluding such contamination, the source or cause of which is the result of any actions of, inaction by, or breach of contract or Law by, the Affected Party;

d. blockade or embargo; or

e. labor dispute, including a strike, lockout or slowdown, generally affecting the road construction industry in the Denver metropolitan area or a significant sector of it, that occurs after the Agreement Date and that materially and adversely affects the performance by either Party or both Parties (each an “Affected Party”) of its or their obligations under this Agreement.

“GAAP” means Generally Accepted Accounting Principles in the US as in effect from time to time.

“General Purpose Lane” means a non-tolled travel lane on the I-70 Mainline within the O&M Limits.

“General Requirements” means the requirements set out in the column headed “General Requirement” in the Performance and Measurement Tables.

“Good Industry Practice” means that degree of skill, care, prudence, foresight and practice which would reasonably and ordinarily be expected from time to time of a skilled and experienced professional designer, engineer, constructor, maintainer or operator, as applicable, engaged in the same type of activity in North America as that of Developer, or any other Person to which such term relates, seeking to comply with all Law and the same type of obligations and responsibilities in North America as the obligations and responsibilities of Developer under this Agreement and/or the obligations and responsibilities of such Person under the same or similar circumstances.

“Governmental Approval” means any approval, authorization, certification, consent, decision, exemption, filing, license, permit, agreement, concession, grant, franchise, registration or ruling issued, granted or required by or with any Governmental Authority (excluding, for certainty, any Public Utility or Railroad) for the performance of any of Developer’s obligations under this Agreement.
“Governmental Authority” means any:
   a. United States Federal, State or local government, and any political subdivision of any of them; and
   b. any interstate, governmental, quasi-governmental, judicial, public, regulatory or statutory instrumentality, administrative agency, authority, body or entity of, or formed by, any such government or subdivision thereof,
in each case other than the Enterprises.

“Grace Period” means, subject to Section 1.2(b)(i) of Part 6 of Schedule 6 (Performance Mechanism), for any Noncompliance Event, the “Grace Period” (if any) specified for such Noncompliance Event in Table 6A.1 or Table 6A.2, as applicable, which period shall commence on and from the Noncompliance Start Time of such Noncompliance Event and shall end at the same time of day as such Noncompliance Start Time on the day which is the number of days specified as the “Grace Period” for such Noncompliance Event after the day on which such Noncompliance Start Time occurs.

“Groundwater Contamination Event Period” means, with respect to any Unexpected Groundwater Contamination Condition that occurs during the Construction Period, the then current three month period ending on March 31, June 30, September 30 or December 31, as applicable.

“Guarantor” means any parent company guarantor of a Principal Subcontractor’s obligations under its Principal Subcontract.

“Handback Certificate” has the meaning given to it in Section 3.12.d of Schedule 12 (Handback Requirements).

“Handback Deliverable” means any of the following:
   a. the Handback Schedule;
   b. the Residual Life Methodology Report;
   c. each Asset Condition Report;
   d. the Initial Handback Inspection Report;
   e. the initial calculation of the Handback Reserve Amount;
   f. the Second Handback Inspection Report;
   g. the second calculation of the Handback Reserve Amount;
   h. the Third Handback Inspection Report;
   i. the third calculation of the Handback Reserve Amount; and
   j. the Final Handback Inspection Report.

“Handback Inspections” means inspections carried out pursuant to Sections 3.7, 3.10 and 3.12.a of Schedule 12, in accordance with the requirements of Section 3.6 of Schedule 12 (Handback Requirements).

“Handback Inspection Reports” means the Initial Handback Inspection Report, the Second Handback Inspection Report, the Third Handback Inspection Report, and the Final Handback Inspection Report.

“Handback Letter of Credit” has the meaning given to it in Section 4.5.a of Schedule 12 (Handback Requirements).
<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Handback Period”</td>
<td>means the period beginning on the date which is 34 months before the Expiry Date.</td>
</tr>
<tr>
<td>“Handback Renewal Elements Amount”</td>
<td>has the meaning given to it in Section 4.3.a of Schedule 12 (Handback Requirements).</td>
</tr>
<tr>
<td>“Handback Requirements”</td>
<td>means the requirements set out in Section 1 of Schedule 12 (Handback Requirements).</td>
</tr>
<tr>
<td>“Handback Reserve Account”</td>
<td>has the meaning given to it in Section 4.1 of Schedule 12 (Handback Requirements).</td>
</tr>
<tr>
<td>“Handback Reserve Amount”</td>
<td>means the sum of:</td>
</tr>
<tr>
<td></td>
<td>a. the Handback Renewal Elements Amount;</td>
</tr>
<tr>
<td></td>
<td>b. the Handback Residual Elements Amount; and</td>
</tr>
<tr>
<td></td>
<td>c. the estimated costs of performing any other Handback Work necessary to meet the Handback Requirements, in each case as determined in accordance with Sections 4.2 and 4.3 of Schedule 12 (Handback Requirements).</td>
</tr>
<tr>
<td>“Handback Reserve Proceeds”</td>
<td>means the aggregate of:</td>
</tr>
<tr>
<td></td>
<td>a. all amounts paid to the Enterprises from the Handback Reserve Account pursuant to Sections 4.4.d and 4.4.e of Schedule 12 (Handback Requirements); plus</td>
</tr>
<tr>
<td></td>
<td>b. all amounts drawn by the Enterprises on any Handback Letter of Credit pursuant to Section 4.5.b of Schedule 12 (Handback Requirements), in the case of each of paragraphs a. and b., on or following the occurrence of the Termination Date.</td>
</tr>
<tr>
<td>“Handback Reserve Standstill Period”</td>
<td>means the period on and from the date on which Developer is first required to fund the Handback Reserve Account pursuant to Section 4.2.b of Schedule 12 (Handback Requirements) to the earlier of:</td>
</tr>
<tr>
<td></td>
<td>a. the date two Calendar Years prior to the Expiry Date; and</td>
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<td></td>
<td>b. the date on which no TIFIA Loan is outstanding.</td>
</tr>
<tr>
<td>“Handback Residual Elements Amount”</td>
<td>has the meaning given to it in Section 4.3.b of Schedule 12 (Handback Requirements).</td>
</tr>
<tr>
<td>“Handback Schedule”</td>
<td>means the schedule prepared by Developer in accordance with Section 3.2 of Schedule 12 (Handback Requirements).</td>
</tr>
<tr>
<td>“Handback Work”</td>
<td>has the meaning given to it in Section 3.7.a of Schedule 12 (Handback Requirements).</td>
</tr>
<tr>
<td>“Handback Work Period”</td>
<td>means the period beginning on the date which is 58 months before the Expiry Date.</td>
</tr>
<tr>
<td>“Handback Work Schedule”</td>
<td>has the meaning given to it in Section 3.8.b.v of Schedule 12 (Handback Requirements).</td>
</tr>
<tr>
<td>“Hazardous Substances”</td>
<td>means any of the following:</td>
</tr>
<tr>
<td></td>
<td>a. any substance, product, waste or other material of any nature whatsoever which is or becomes listed, regulated, or addressed pursuant to Environmental Law;</td>
</tr>
</tbody>
</table>
b. any substance, product, waste or other material of any nature whatsoever that exceeds maximum allowable concentrations for elemental metals, organic compounds or inorganic compounds for the protection of human health and safety and/or the Environment, as defined by any Environmental Law;

c. any substance, product, waste or other material of any nature whatsoever which may give rise to liability pursuant to Environmental Law, as defined by any Environmental Law, or under any statutory or common law theory based on negligence, trespass, intentional tort, nuisance or strict liability or under any reported decisions of a State or Federal court;

d. petroleum or crude oil excluding de minimis amounts and excluding petroleum and petroleum products contained within regularly operated motor vehicles;

e. lead or lead-containing materials; and

f. asbestos or asbestos-containing materials.

“High Occupancy Vehicle” means a vehicle occupied by more than two persons.

“Holiday” means any Calendar Day that is declared or considered to be a holiday pursuant to C.R.S. §§ 24-11-101(1)-(2).

“HPTE” has the meaning given to it in the Preamble.

“IAA” means the intra-agency agreement among the Enterprises and CDOT dated as of August 22, 2017.

“I-70 Cover Plans” or “Cover Plans” means the plans for the Cover included in Schedule 10B (Contract Drawings).

“I-70 East EIS” means all versions of the NEPA documentation for the Project, including all draft and supplemental draft environmental impact statements, the FEIS and the ROD.

“I-70 Mainline” means Interstate 70, including the Tolled Express Lanes, General Purpose Lanes, auxiliary lanes, buffers, enforcement areas, shoulders, hard capped surface, ramps up to the intersecting cross-roadway (including directional island and free-flow turn lane where present) and associated collector-distributor roads.

“Improvement” means any building or structure, including any sewer or septic system, storm drain, publicly owned treatment work or waste treatment, storage or disposal system.

“Incident” means any event that impedes the normal flow of traffic.

“Incident Response Plan” has the meaning given to it in Section 9.4 of Schedule 11 (Operations and Maintenance Requirements).

“Incidental Utility Work” has the meaning given to it in the applicable URA.

“Increased Oversight Threshold” means the occurrence of any of the following:

a. during the Construction Period, the cumulative number of Noncompliance Points accrued during:

i. any rolling 12 month period equals or exceeds 90;
or

ii. any rolling 36 month period equals or exceeds 180;

or

b. during the Operating Period, the cumulative number of Noncompliance Points accrued during:

i. any rolling 12 month period equals or exceeds 120;

or

ii. any rolling 36 month period equals or exceeds 240;

provided that, for certainty, any Noncompliance Point that is being disputed in good faith by Developer shall be disregarded for purposes of determining whether the Increased Oversight Threshold has been met or exceeded until such time as it has been Agreed or Determined that the relevant Noncompliance Point was validly assigned.

“Indemnified Party” has the meaning given to it in Section 24.2.

“Independent Assurance” means the reviews and tests described in Schedule 8 (Project Administration).

“Independent Market Value Appraiser” means an independent third party expert appraiser that is nationally recognized for the conduct of valuation exercises as such appraiser is jointly appointed by the Parties, provided that, if the Parties fail to agree on the identity of such appraiser or otherwise fail to complete such appointment within 15 Working Days following any relevant Termination Date, either Party may request that the Commercial Panel select and appoint such appraiser within 15 Working Days of such Party's request.

“Independent Quality Control” means all those planned and systematic actions necessary for Developer to certify to the Department that all Work fully complies with the requirements of this Agreement and that all materials incorporated in the Work, all equipment used, and all elements of the Work will perform satisfactorily for the purpose(s) intended.

“indexed” has the meaning given to it in Section 2.3.2.

“Indirect Equity Member” means each of:

a. Meridiam Infrastructure North America Fund II in its capacity as a holder of an indirect equity interest in Developer and any intermediate Person (other than an Equity Member) through which it holds such indirect equity interest in Developer; and

b. Kiewit Development Company in its capacity as a holder of an indirect equity interest in Developer and any intermediate Person (other than an Equity Member) through which it holds such indirect equity interest in Developer,

and each of their permitted successors, assigns and transferees as holders of an indirect equity interest in Developer.

“Information” has the meaning given to it in Section 2.2.3.c.

“Initial Handback Inspection Report” means the report prepared by Developer in accordance with Section 3.8 of Schedule 12 (Handback Requirements).

“Initial Warning Notice” has the meaning given to it in Section 22.2.1.
“Initial O&M Contract Expiration Date” has the meaning given to it in Section 17.1.2.e.

“Insolvency Event” means, in respect of any Person,

a. any of:
   i. the commencement of a voluntary case under Federal bankruptcy law;
   ii. the filing of a petition seeking to take advantage of any other law, domestic or foreign, relating to bankruptcy, insolvency, reorganization, winding up or composition for adjustment of debts;
   iii. the application for or the consent to the appointment of, or the taking of possession by, a receiver, custodian, trustee, or liquidator of itself or of a substantial part of its property, domestic or foreign;
   iv. the admission in writing of its inability to pay its debts as they become due;
   v. the making of a general assignment for the benefit of creditors; or
   vi. the taking of any corporate (or equivalent) action for the purpose of authorizing any of the foregoing; or
b. the commencement of a case or other proceeding against such Person in any court of competent jurisdiction seeking:
   i. relief under Federal bankruptcy law or under any other law, domestic or foreign, relating to bankruptcy, insolvency, reorganization, winding up or adjustment of debts; or
   ii. the appointment of a trustee, receiver, custodian, liquidator or the like for such Person or for all or any substantial part of their respective assets, domestic or foreign,

and:

A. the petition that commenced such case or proceeding is not contested by such Person within the amount of time provided under Law; or
B. either: (I) such case or proceeding continues without dismissal or stay for a period of 60 Calendar Days; or (II) an order granting the relief requested in such case or proceeding (including, but not limited to, an order for relief under such Federal bankruptcy law) is entered and not appealed to the extent that the order for relief is stayed.

“Insolvent” means the condition of a Person in respect of whom an Insolvency Event has occurred.

“Inspection” means the organized examination or formal evaluation of Work, including
manufacturing, design, and maintenance practices, processes, and products, document control and shop drawing review, to ensure that the practices, processes, and products comply with the quality requirements contained in this Agreement.

“Inspecting Parties” has the meaning given to it in Section 19.1.3.a and “Inspecting Party” means any one of them.

“Insurance Broker” means Developer’s insurance broker, provided that such broker shall at all times be a reputable international insurance broker of good standing.

“Insurance Cost Decrease” means, if (a) the Actual Benchmarked Insurance Cost minus the Project Insurance Change (which, for certainty, can be less than $0) is less than (b) the Proposal Benchmarked Insurance Cost, subject to the procedure set out in Section 25.7, the amount determined as follows:

\[ \text{“Insurance Cost Decrease”} = (\text{PBIC} - \text{ABIC}) - \text{PIC} \]

where:

\* “PBIC” is the Proposal Benchmarked Insurance Cost;
\* “ABIC” is the Actual Benchmarked Insurance Cost; and
\* “PIC” is any Project Insurance Change (which, for certainty, can be less than $0).

“Insurance Cost Increase” means, if (a) the Actual Benchmarked Insurance Cost minus the Project Insurance Change (which, for certainty, can be less than $0) is greater than (b) the Base Benchmarked Insurance Cost, subject to the procedure set out in Section 25.7, the amount determined as follows:

\[ \text{“Insurance Cost Increase”} = (\text{ABIC} - \text{BBIC}) - \text{PIC} \]

where:

\* “ABIC” is the Actual Benchmarked Insurance Cost;
\* “BBIC” is the Base Benchmarked Insurance Cost; and
\* “PIC” is any Project Insurance Change (which, for certainty, can be less than $0).

“Insurance Policies” has the meaning given to it in Section 25.1.1.

“Insurance Renewal Date” means the first anniversary of the Benchmarked Insurance Inception Date and, thereafter, each date falling on the anniversary of the prior Insurance Renewal Date.

“Insurance Review Period” means:

a. the two year period commencing on the Benchmarked Insurance Inception Date and ending on the Calendar Day immediately prior to the second Insurance Renewal Date; and

b. each subsequent two year period commencing on each even-numbered anniversary of the Benchmarked Insurance Inception Date and ending on the Calendar Day immediately prior to the second anniversary of the first day of such two year period,

in the case of either paragraphs a. or b., except where the end of such period lies beyond the last Calendar Day of the Term, in which case the
relevant Insurance Review Period shall end on the last Calendar Day of the Term.

“Insurance Term” means a provision that must be included in one or more of the Insurance Policies in order for Developer to comply with Section 25.1.1.

“Intellectual Property” means all current and future legal and/or equitable rights and interests in or to know-how, patents (including applications), copyrights (including moral rights), trademarks (registered and unregistered), service marks, trade secrets, designs (registered and unregistered), utility models, circuit layouts, business and internet domain names, inventions, solutions embodied in technology and other intellectual activity and applications of or for any of the foregoing subsisting in or relating to the Project or Project design data including:

a. algorithms, software, source code and source code documentation used in connection with the Project; and

b. the Financial Model (including (i) formulas and (ii) data (such data including all back-up information in any media or format (digital or otherwise) regarding the basis for Developer’s assumptions, estimates, projections and calculations contained in or derived from the Financial Model)).

“Intellectual Property Escrow” has the meaning given to it in Section 52.3.2.

“Intellectual Property Escrow Agent” has the meaning given to it in Section 52.3.2.

“Intelligent Transportation Systems” or “ITS” means the information and communication technologies used to inform roadway users, collect data and collect tolls.

“Interior Zone” means the length of roadway between the Transition Zone and the Exit Zone and which has constant illumination.


“ITP” has the meaning given to it in the Recitals.

“Joint Insurance Cost Report” has the meaning given to it in Section 25.7.2.

“Key Financial Event” means any of the following:

a. the Preferred Proposer:
   i. assumed a TIFIA Financing in its Base Financial Model and a TIFIA Event occurs; and/or
   ii. assumed a Bond Financing using PABs in its Base Financial Model and a PABs Event occurs; or

b. on any Calendar Day in any applicable Protection Period the cumulative effect of fluctuations in applicable Benchmark Interest Rates, together with any changes in credit spreads applicable to a Bond Financing (excluding any private placement that is not also an offering under Rule 144A and Regulation S of the Securities Act of 1933), during the applicable Protection Period would result in an increase to
the Base CPP in an amount that would result in an upward adjustment to the Base MPP of more than 10% as determined pursuant to Annex A to Schedule 1 (Financial Close) assuming, for such purposes, that such adjustment were to be made on such day;

c. the Enterprises conclude, in their reasonable opinion, that either of the foregoing events referred to in paragraphs a or b of this definition is likely to occur and, in the case of paragraph b, is likely to occur on the Financial Close Date;

d. the issuance of any temporary restraining order, preliminary or permanent injunction or other form of interlocutory relief by a court of competent jurisdiction that prohibits the prosecution of a material part of the Work, which order, injunction or other relief remains in effect on the Financial Close Deadline;

e. the Enterprises, in their reasonable discretion, notify Developer that there is an unacceptable risk that any lawsuit filed in a court of competent jurisdiction could result in a Termination by Court Ruling; or

f. if any prospective Lender (including, for certainty, any underwriter) reasonably invokes a condition in its “Debt Commitment Letter” (as defined in the ITP) provided with the Preferred Proposer’s Proposal that, as of the Financial Close Date, there be an absence of:

i. any Material Litigation filed after the Financial Proposal Deadline; or

ii. any new orders, rulings or other actions by the court presiding over any Material Litigation filed on or prior to the Financial Proposal Deadline that would, as reasonably determined by the prospective Lenders (including, for certainty, any underwriters), materially increase the likelihood that such Material Litigation could result in a Termination by Court Ruling,

by giving written notice thereof to Developer (with a copy to the Enterprises) at least 30 Calendar Days prior to the Financial Close Deadline (or, with respect to any new order, ruling or other action which occurs within 30 Calendar Days of the Financial Close Deadline, promptly after the occurrence of such event),

in each case unless and to the extent such event arises as a result of any breach of Law, Governmental Approval, Permit or this Agreement, or fraud, willful misconduct, criminal conduct, recklessness, bad faith or negligence by or of any Developer-Related Entity.

"Key Milestone" means each of the dates for issuance of NTP1 and NTP2, the Snow and Ice Control Commencement Date, each of the Milestone Completion Target Dates, the Baseline Substantial Completion Date, the Final Acceptance Date and each of the dates for submission of Deliverables by Developer as specified in the DRTL.

Annex A-51
"Key Personnel" means the individuals identified in Schedule 27 (Key Personnel) to fill the various job positions set out in that Schedule, and any replacement personnel Accepted pursuant to Section 16.1.

"Key Ratios" means:

- a. the Total Debt Service Coverage Ratio ((i) prior to Financial Close, as such term is defined in the Baseline TIFIA Term Sheet and (ii) following Financial Close, as such term is defined in the TIFIA Loan Agreement), or any equivalent ratio calculated with respect to Project Debt that is not comprised of a TIFIA Loan; and

- b. at any time that a TIFIA Loan is outstanding, the Project Life Coverage Ratio ((i) prior to Financial Close, as such term is defined in the Baseline TIFIA Term Sheet and (ii) following Financial Close, as such term is defined in the TIFIA Loan Agreement).

"Known or Knowable" means any risk, information, matter or thing that on or prior to the Setting Date:

- a. was identified, described or expressly anticipated in the Project Information or the I-70 East EIS, or in any Department Provided Approval;

- b. was otherwise disclosed to or known by the Preferred Proposer or a Developer-Related Entity; or

- c. could reasonably have been known, identified, discovered, observed or anticipated by the Preferred Proposer (and, to the extent in existence at such time, Developer) undertaking due diligence pursuant to Good Industry Practice, and taking into account (without limitation):
  
  i. the provisions of the ITP with respect to the conduct of due diligence;

  ii. the Enterprises’ approval of and response to Proposers’ diligence-related requests and comments submitted pursuant to the ITP to the extent such diligence-related request or comment was:

     A. submitted by the Preferred Proposer; or

     B. submitted by other Proposers and made available to the Preferred Proposer prior to the Setting Date;

  iii. the availability and contents of all Project Information, Department Provided Approvals, the I-70 East EIS and all other available Environmental Approvals, Governmental Approvals, and all other requirements, manuals, guidance, reports and other information referenced by:

     A. any of the Environmental Requirements;

     B. the Phase I environmental site assessments included in the Reference
C. the opportunity to review all Law.

“Laboratory” means the testing laboratory of Developer, CDOT or any other certified testing laboratory.

“Law” means:

- any:
  - statute, law (including common law), code, regulation, ordinance or rule;
  - binding judgment, judicial or administrative order or decree (other than one rendered pursuant to the Dispute Resolution Procedure);
  - written directive, guideline, policy requirement, methodology or other governmental restriction or requirement (including those resulting from an initiative or referendum process, but excluding those by the Enterprises within the scope of their administration of this Agreement); and
  - similar form of decision of or determination by, or any written interpretation or administration of any of the foregoing by, any Governmental Authority, in each case that is applicable to or has an impact on the Project or the Work (where such applicability or impact shall be determined by reference to the context in which the term Law is used), whether taking effect before or after the Agreement Date, including Environmental Laws, but excluding Governmental Approvals and Permits; and
  - any Public Safety Order.

“Lender” means any Person that provides or holds and is owed repayment of Project Debt, together with their respective successors, assigns, participating parties, trustees and agents, including any Collateral Agent.

“Lenders Direct Agreement” means the agreement in substantially the form attached in Schedule 19 (Forms of Direct Agreements) by and among the Enterprises, Developer, and the Lender (or if there is more than one Lender, the Collateral Agent on behalf of the Lenders).

“Lenders' Liabilities” means, as of the Termination Date, the aggregate of (without double-counting):

- all:
  - principal;
  - capitalized interest, accrued interest and default interest (but, with respect to default interest, only to the extent that it arose as a result of the Enterprises making any payment later than the date that it was due under this Agreement);
  - customary and reasonable lender, agent and
trustee fees, costs and expenses; and

iv. lease financing obligations,

owing or outstanding to the Lenders by Developer under or pursuant to the Financing Documents on the Termination Date; plus

b. any Breakage Costs payable by Developer that arise as a result of the early termination of this Agreement on the Termination Date; minus

c. any Breakage Costs payable or credited to Developer that arise as a result of the early termination of this Agreement on the Termination Date,

provided that, with respect to the period from the Termination Date to and including the date of payment by the Enterprises of the undisputed portion of the Termination Amount:

d. any net payments or net receipts under any interest rate or inflation rate hedging agreement or other derivative facility that is in effect on the Termination Date but not terminated until such date of payment; and

e. other than with respect to any termination as a consequence of a Developer Default, any amount of interest that falls within paragraph a.ii. of this definition, that will accrue during such period,

shall also be taken into account in the calculation of the Lenders’ Liabilities.

“Level of Service” means, in relation to the O&M Work, the level of service as described in CDOT’s Maintenance Level of Service Manual.

“Limited O&M Work” means any and all operations, management, administration, maintenance and Routine Maintenance activities, in each case required to be carried out by Developer to:

a. comply with all the requirements set out in Schedule 11 (Operations and Maintenance Requirements) (including, for certainty, the requirements set out in Appendix A-1 and Appendix A-2 thereto) associated with:

i. Snow and Ice Control Services;

ii. performance of the courtesy patrol service pursuant to Section 10 of, and Appendix B to, Schedule 11 (Operations and Maintenance Requirements);

iii. sweeping and cleaning (including complying with Section 1.1 and Section 17 of each of Appendix A-1 and Appendix A-2 of Schedule 11 (Operations and Maintenance Requirements));

iv. Incident response;

v. its obligations with respect to ITS and ETC facilities as set out in Sections 2.2.6.b and 3.2.8.d. of Schedule 11 (Operations and Maintenance Requirements); and

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vi. its obligations with respect to lighting as set out in Sections 2.2.8 and 3.2.11.b. of Schedule 11 (Operations and Maintenance Requirements), other than graffiti removal on lighting;

b. comply with any other provisions of this Agreement applicable to the performance of all activities that fall within paragraph a. of this definition; and

c. without prejudice to any of its other notification or reporting obligations under this Agreement (including under Schedule 6 (Performance Mechanism) or Schedule 11 (Operations and Maintenance Requirements)), provide the Department with notification of O&M Defects (assuming for the purposes of this paragraph c. that the definition of O&M Defects in this Part A of Annex A (Definitions and Abbreviations) applies to all Elements within or forming part of the Limited O&M Work Segments, regardless of whether the Developer is required to perform Limited O&M Work thereon or not) within the Limited O&M Work Segments as observed by Developer while performing any activity that falls within paragraph a. or b. of this definition, during the Construction Period or the Operating Period, as applicable.

“Limited O&M Work Segments” means:

a. the segment of the I-70 Mainline from the I-25/I-70 interchange to I-70 Brighton Boulevard interchange (including its associated infrastructure (including all roadway lanes, ramps, shoulders, and structures));

b. the segment of the I-70 Mainline from I-70 Chambers Road interchange to I-70 Tower Road interchange (including its associated infrastructure (including all roadway lanes, ramps, shoulders, and structures)); and

c. the structure, with number E-17-AED, on the I-70 westbound entrance ramp from Central Park Boulevard,

in the case of each of paragraphs a. to c. of this definition, to the extent within the O&M Limits.

“Local Agency” means any local Governmental Authority other than the State or an agency thereof.

“Local Agency Roadway” means roadways (whether owned by a Local Agency or CDOT) excluding CDOT Roadways and the I-70 Mainline.

“Local Hiring Goal” has the meaning given to it in Section 6.3.1.b of Schedule 15 (Federal and State Requirements).

“Long Term Project Debt” means the aggregate amount of Project Debt that by its terms or pursuant to the Financial Model:

a. is scheduled to remain outstanding after the Substantial Completion Date; and

b. not scheduled to be repaid with a Milestone Payment (including the Substantial Completion Payment).

“Longstop Date” means the date that occurs 585 Calendar Days after the Baseline
Substantial Completion Date (for certainty, as the Baseline Substantial Completion Date may be extended from time to time), as such Longstop Date may be extended from time to time pursuant to:

a. Section 15.3.1.c.iii, as a result of the occurrence of a Supervening Event; or

b. a Change documented in a Change Order.

“Loss” or “Losses” means any loss, damage, cost, expense, charge, fee, injury, liability, obligation, judgment, penalty or fine, in each case including attorneys’, accountants’ and expert witnesses’ fees and expenses (including those incurred in connection with the enforcement of any indemnity or other provision of this Agreement).

“Lowered Section” means the segment of the I-70 Mainline between Brighton Boulevard and Dahlia Street where the proposed vertical profile is modified below existing ground.

“Maintenance Management Information System” means the system required to be established and maintained by Developer in accordance with of Section 7 of Schedule 11 (Operations and Maintenance Requirements).

“Maintenance Management Plan” or “MMP” means the plan referred to in Section 5 of Schedule 11 (Operations and Maintenance Requirements) that sets out how Developer will comply with its maintenance obligations under this Agreement (as updated in accordance with Schedule 11 (Operations and Maintenance Requirements)).

“Maintenance Rectification Costs” means:

a. all Losses that the Enterprises determine they and/or CDOT are reasonably likely to incur as a direct result of the termination of this Agreement after the Substantial Completion Date, including (without double-counting):

i. those costs (internal and external) that the Enterprises reasonably and properly project that they (and/or CDOT) will incur in carrying out any process to request bids from any parties interested in entering into one or more contracts with the Enterprises (and/or CDOT) to conduct all remaining Work, including all costs related to the preparation of bid documentation, evaluation of bids and negotiation and execution of relevant contracts; plus

ii. those costs (internal and external) that the Enterprises reasonably and properly project that they (and/or CDOT) will incur in relation to:

A. remediation or, if remediation is not possible or would cost more than renewal, renewal of any Nonconforming Work performed by Developer; and

B. rectification or cure of any breach of this Agreement by Developer; plus

iii. those costs (internal and external) that the Enterprises reasonably and properly project they (and/or CDOT) will incur through the remainder of the Term in order to perform the Work in
accordance with the terms of this Agreement, but only to the extent such projected costs exceed the costs assumed in the Financial Model if the Work had been performed by Developer; minus

b. any Handback Reserve Proceeds; minus
c. any amounts standing to the credit of the Physical Damage Proceeds Reserve that the Enterprises are entitled to retain pursuant to Section 25.5.2.d.

“Maintenance Yard” means the maintenance yard located within the southeast quadrant of the interchange at Havana Street and within the Existing CDOT Right-of-Way.

“Managed Lanes” has the same meaning as Tolled Express Lanes.

“Master Indenture” means the Master Trust Indenture, dated as of December 15, 2010, between BE and the BE Trustee.

“Material Litigation” means any lawsuit filed in a court of competent jurisdiction that:

a. seeks to overturn, set aside, enjoin, or otherwise inhibit the implementation of any Department Provided Approval based on alleged non-compliance with Law, including NEPA; or
b. could result in a Termination by Court Ruling.

“Materials Management Plan” means the “MMP” prepared by Developer in accordance with Section 23.8 of Schedule 17 (Environmental Requirements).

“Measurement Criteria” means, in respect of an Element, the measurement criteria applicable to such Element specified in the “Measurement Criteria” column in the Performance and Measurement Tables (as updated in accordance with Schedule 11 (Operations and Maintenance Requirements)).

“Microwave Vehicle Radar Detection” means a side fire radar used to collect point data of volume, occupancy, speed and classification on each lane of travel.

“Mile High Courtesy Patrol” is the courtesy patrol program operated by CDOT.

“Milestone 1” means the Construction Work between Sand Creek Bridge and Chambers Road (Station 2192+00 to 2448+00) comprising the addition of one Tolled Express Lane in each direction within the limits.

“Milestone 2” means the Construction Work between Dahlia Street and Sand Creek Bridge (Station 2091+00 to 2192+00) comprising the addition of one Tolled Express Lane in each direction within the limits.

“Milestone 3” means the Construction Work between Brighton Blvd and Dahlia Street (Station 2000+00 to 2091+00) comprising westbound I-70 and 46th Avenue/Stapleton Drive (north of I-70), and the UPRR Crossing.

“Milestone 4” means the Construction Work between Brighton Blvd and Dahlia Street (Station 2000+00 to 2091+00) comprising eastbound I-70 and 46th Avenue/Stapleton Drive (south of I-70).

“Milestone Completion” means the satisfaction of all Milestone Completion Conditions, as confirmed by the Enterprises’ issuance of the Milestone Completion Certificate.

“Milestone Completion Certificate” has the meaning given to it in Section 5(a) of Part 4 of Schedule 3 (Commencement and Completion Mechanics).

“Milestone Completion” has the meaning given to it in Section 1 of Part 4 of Schedule 3.
“Milestone Completion Date” has the meaning given to it in Section 5(a) of Part 4 of Schedule 3 (Commencement and Completion Mechanics).

“Milestone Completion Punch List” has the meaning given to it in Section 2(a) of Part 7 of Schedule 3 (Commencement and Completion Mechanics).

“Milestone Completion Punch List Items” has the meaning given to it in Section 2(a) of Part 7 of Schedule 3 (Commencement and Completion Mechanics).

“Milestone Completion Target Date” means each of:

- a. for Milestone 1, November 18, 2019;
- b. for Milestone 2, October 20, 2020;
- c. for Milestone 3, September 26, 2020; and
- d. for Milestone 4, September 5, 2021,

as each such date shall be modified on a day for day basis to reflect any delay in achieving Financial Close relative to November 30, 2017 (the date assumed in the ITP), as such modification shall be formalized pursuant to the Project Agreement Amendment in accordance with paragraph d. of the definition thereof in this Part A of Annex A (Definitions and Abbreviations).

“Milestone Delay Period” has the meaning given to it in Section 15.3.1.c.ii.

“Milestone Payment” has the meaning given to it in Section 1 of Schedule 5 (Milestone Payments).

“Milestone Payment Delay Costs” means, in respect of any Milestone Delay Period, the aggregate of:

- a. all amounts (excluding default interest) of interest, together with any commitment or standby fees on undrawn loan facilities, that will accrue under the Financing Documents during such Milestone Delay Period; and
- b. only if Section 33.1.6.c.i.C.I applies, all amounts of principal that will fall due for payment from the date on which termination of this Agreement would have otherwise been effective,

in each case with respect to the Project Debt scheduled (as determined by reference to the Financial Model) to have been repaid by the Milestone Payment (or a portion thereof) (including, for certainty, the Substantial Completion Payment) following Milestone Completion of the relevant Payment Milestone or, as applicable, Substantial Completion.

“Milestone Payment Request Due Date” has the meaning given to it in Section 2 of Schedule 5 (Milestone Payments).

“Milestone Payment Request” has the meaning given to it in Section 2 of Schedule 5 (Milestone Payments).

“month” means a month as determined by reference to the time and date in Denver, Colorado.

“Monthly Construction Closure Deduction” means, for any month, an amount equal to the sum of the Construction Closure Deductions that accrued during such month, calculated in accordance with Section 3 of Part 1 of Schedule 6 (Performance Mechanism).
“Monthly Deductions Report” means a report submitted by Developer to the Enterprises pursuant to Section 2.1 of Part 1 of Schedule 4 (Payments), Section 3.1 of Part 2 of Schedule 4 (Payments) or Section 4(b)(ii) of Schedule 5 (Milestone Payments).

“Monthly Noncompliance Deduction” means, for any month, an amount equal to the sum of the deductions that accrued during such month in respect of Noncompliance Events, calculated in accordance with, as applicable, Section 2 of Part 1 of Schedule 6 (Performance Mechanism) or Section 2 of Part 3 of Schedule 6 (Performance Mechanism).

“Monthly O&M Report” has the meaning given to it in Section 13.1 of Schedule 11 (Operations and Maintenance Requirements).

“Monthly Operating Period Closure Deduction” means, for any month, an amount equal to the sum of the Operating Period Closure Deductions that accrued during such month, calculated in accordance with Section 3 of Part 3 of Schedule 6 (Performance Mechanism).

“Monthly Performance Deduction” means, for any month, an amount equal to the aggregate of the Monthly Noncompliance Deduction and the Monthly Operating Period Closure Deduction, in each case, for such month.

“Monthly Progress Schedule” means the monthly updated program schedule submitted pursuant to Section 3.3.5 of Schedule 8 (Project Administration).

“MOT Task Force” means a team established by Developer pursuant to Section 2.2.6 of Schedule 10 (Design and Construction Requirements) to assume proper coordination with Governmental Authorities affected by the Work, in relation to maintenance of traffic.

“MOT Variance” means a variance to the requirements applicable to Closures, detours and any other restrictions set out in Section 2 (Maintenance of Traffic) of Schedule 10, as Approved by the Department or approved by the relevant Local Agency, as applicable, in accordance with Section 2.3 of Schedule 10 (Design and Construction Requirements).

“NEPA” has the meaning given to it in the Recitals.

“New Environmental Approvals” means any of the following:

a. a new Environmental Approval; and

b. a modification, renewal or extension of an existing Environmental Approval.

“No Better and No Worse” shall be interpreted pursuant to Section 28.2.

“No Conflict Form” means a form set out in Appendix A to Section 4 of Schedule 10.

“No-deductible Event” means any Compensation Event described in paragraphs a., b.i., b.ii., b.iii., d., e., i.i., l. or o. of the definition thereof in this Part A of Annex A (Definitions and Abbreviations).

“Noncompliance and Closure Database” means the database described in Section 2 of Part 6 of Schedule 6 (Performance Mechanism).

“Noncompliance Cure Period” means:

a. for any Noncompliance Event for which the Cure Period is specified in days, each continuous period of “x” days commencing from and including:
i. if such Noncompliance Event does not have a Grace Period, the Noncompliance Start Time of such Noncompliance Event; or

ii. if such Noncompliance Event has a Grace Period, the expiry of such Grace Period,

in the case of i. and ii., to and excluding the Noncompliance Rectification Time of such Noncompliance Event, where “x” equals the number of days specified as the Cure Period for such Noncompliance Event; and

b. for any Noncompliance Event for which the Cure Period is specified in hours or months, each continuous period of “x” hours or months, respectively, commencing from and including the Noncompliance Start Time of such Noncompliance Event to and excluding the Noncompliance Rectification Time of such Noncompliance Event, where “x” equals the number of hours or months, as applicable, specified as the Cure Period for such Noncompliance Event, provided that, for certainty, the Noncompliance Cure Period during which the Noncompliance Rectification Time occurs in respect of the relevant Noncompliance Event will have a duration of less than "x" days, hours or months, as applicable, and any reference in Schedule 6 (Performance Mechanism) to a "partial" Noncompliance Cure Period shall be deemed to refer to such Noncompliance Cure Period for the relevant Noncompliance Event.

“Noncompliance Default Event” means the occurrence of any of the following:

a. during the Construction Period, the cumulative number of Noncompliance Points accrued during:
   i. any rolling 12 month period equals or exceeds 135; or
   ii. any rolling 36 month period equals or exceeds 270; or

b. during the Operating Period, the cumulative number of Noncompliance Points accrued during:
   i. any rolling 12 month period equals or exceeds 180; or
   ii. any rolling 36 month period equals or exceeds 360; provided that, for certainty, any Noncompliance Point that is being disputed in good faith by Developer shall be disregarded for purposes of determining whether the Noncompliance Default Event has occurred until such time as it has been Agreed or Determined that the relevant Noncompliance Point was validly assigned.

“Noncompliance Event” means any failure:

a. set out in Table 6A.1 which occurs during the Construction Period; and

b. set out in Table 6A.2 which occurs during the Operating Period.
“Noncompliance Points” means the points accrued by Developer in respect of the occurrence of Noncompliance Events in accordance with Part 4 of Schedule 6 (Performance Mechanism).

“Noncompliance Rectification Time” means, in respect of any Noncompliance Event which has a Cure Period, the date and time that the Noncompliance Event is fully cured.

“Noncompliance Start Time” means, for any Noncompliance Event, whether or not such Noncompliance Event has a Cure Period, the date and time that the Noncompliance Event occurs, provided that, for certainty, for any Noncompliance Event that is a failure to remedy a Category 1 Defect or a Category 2 Defect within the Defect Remedy Period, the Noncompliance Start Time shall be the date and time that the applicable Defect Remedy Period expires.

“Noncompliance Rectification Time” means, in respect of any Noncompliance Event which has a Cure Period, the date and time that the Noncompliance Event is fully cured.

“Nonconforming Work” means Work performed by Developer that does not meet the requirements of this Agreement.

“Nonconforming Work Change” has the meaning given to it in Section 2.1.b.ii of Schedule 24 (Change Procedure).

“Nonconforming Work Remedy” means action taken by Developer to ensure that any Nonconforming Work meets the requirements of this Agreement.

“Non-Appendix B Parcel Unexpected Hazardous Substances Event” the encountering or discovery of collectively all Unexpected Hazardous Substances on, in or under:

a. an individual ROW Parcel that is not an Appendix B Parcel; or
b. a Permit Area (excluding any Developer-risk Permit Area).

“Non-Permitted Closures” means:

a. during the Construction Period, any Non-Permitted Construction Closure; or
b. during the Operating Period, any Non-Permitted Operating Period Closure.

“Non-Permitted Construction Closure” means any Closure that occurs during the Construction Period:

a. that:
   i. results in any breach of, or is not permitted by, any of Sections 2.5.3, 2.6, 2.7, 2.9, 2.11.5, 2.11.6, 2.11.7.a, 2.11.9, 2.11.10, 2.11.11, 2.11.12 or 2.11.19 of Schedule 10 (Design and Construction Requirements), unless such Closure has been Approved by the Department or approved by the relevant Local Agency, as applicable, as a MOT Variance; and
   ii. is not an Excused Closure; or
b. is deemed to be a Non-Permitted Construction Closure pursuant to Section 2.11.14.c of Schedule 10 (Design and Construction Requirements), provided that, if any Closure that occurs during the Construction Period is not a Non-Permitted Construction Closure when it starts, but during such Closure circumstances commence to apply that would have resulted in such Closure being a Non-Permitted Construction Closure if such circumstances had applied to such Closure when it started, then the portion of such Closure
that continues while such circumstances apply shall be deemed to be a Non-Permitted Construction Closure (and such deemed Non-Permitted Construction Closure shall be deemed to start when such circumstances commence to apply and to end when they cease to apply).

“Non-Permitted Operating Period Closure” means a Closure that occurs during the Operating Period in an O&M Segment:

a. that:
   i. is not a Permitted Operating Period Closure; and
   ii. is not an Excused Closure; or

b. is deemed to be a Non-Permitted Operating Period Closure pursuant to Section 2.11.14.d of Schedule 10 (Design and Construction Requirements), provided that, if any Closure that occurs during the Operating Period is not a Non-Permitted Operating Period Closure when it starts, but during such Closure circumstances commence to apply that would have resulted in such Closure being a Non-Permitted Operating Period Closure if such circumstances had applied to such Closure when it started, then the portion of such Closure that continues while such circumstances apply shall be deemed to be a Non-Permitted Operating Period Closure (and such deemed Non-Permitted Operating Period Closure shall be deemed to start when such circumstances commence to apply and to end when they cease to apply).

“notice” (or “Notice”) has the meaning given to it in Section 49.1.1.

“Notice of Award” means the notice issued on August 24, 2017 by the Enterprises notifying the Preferred Proposer of its selection as the Preferred Proposer.

“Notice of Possession” means a notice delivered by the Enterprises to Developer specifying the Calendar Day (the “Possession Date”) on which the Enterprises shall deliver to Developer Possession of one or more ROW Parcels or Additional ROW Parcels identified in such notice.

“Notifiable Refinancing” means any Refinancing that is not a Qualifying Refinancing.

“NTP1” has the meaning given to it in Section 4 of Part 1 of Schedule 3 (Commencement and Completion Mechanics).

“NTP1 Conditions” has the meaning given to it in Section 1 of Part 1 of Schedule 3 (Commencement and Completion Mechanics).

“NTP1 Work” means:

a. the design Work;

b. preparatory testing and Right-of-Way investigation Work that is authorized by CDOT right of entry permits obtained by Developer pursuant to Section 1.2 of Schedule 18 (Right-of-Way) prior to the issuance of NTP1; and

c. preparatory Work necessary to develop the Deliverables required to be submitted by Developer to satisfy the NTP1 Conditions.

“NTP2” means the notice that constitutes “NTP2” in accordance with Sections 4(a) and 5 of Part 2 of Schedule 3 (Commencement and Completion Mechanics).
"NTP2 Conditions" has the meaning given to it in Section 1 of Part 2 of Schedule 3 (Commencement and Completion Mechanics).

"NTP3" has the meaning given to it in Section 3 of Part 3 of Schedule 3 (Commencement and Completion Mechanics).

"NTP3 Conditions" has the meaning given to it in Section 1 of Part 3 of Schedule 3 (Commencement and Completion Mechanics).

"Offsite Outfall System" means the drainage system to be constructed pursuant to Section 8.4.9.a of Schedule 10 (Design and Construction Requirements) conveying flows generated from outside the Site and capturing the flow preventing it from draining into the Lowered Section, that will be located to the south of I-70 Mainline and consists of ponds and large Storm Drains, routed through Globeville Park and with a discharge into the South Platte River.

"Onsite Outfall System" means the drainage system to be constructed pursuant to Section 8.4.9.b of Schedule 10 (Design and Construction Requirements) conveying flows generated from the onsite roadway area located within the Lowered Section to the north, with a discharge into the South Platte River.

"O&M Contract" means the contract for the performance of the O&M Work excluding the O&M Work During Construction entered into between Developer and the O&M Contractor in compliance with Section 17, provided that, if and to the extent of any self-performance of the O&M Work by Developer, references to such term shall be construed either as references to this Agreement, or as inapplicable, as the context may require.

"O&M Contractor" means the Subcontractor engaged by Developer under the O&M Contract, provided that, if and to the extent of any self-performance of the O&M Work by Developer, references to such term shall be construed either as references to Developer, or as inapplicable, as the context may require.

"O&M Defect" means:

a. any Defect in an Element or any part of an Element;

b. any failure of an Element or any part of an Element to comply with the applicable General Requirement or any other requirement set out in this Agreement, in any such case as a result of Developer’s failure to perform any of its obligations under Schedule 11 (Operations and Maintenance Requirements); and

c. any failure of an Element or any part of an Element to meet or exceed the Target for the applicable Measurement Criteria, in any such case as a result of Developer’s failure to perform any of its obligations under Schedule 11 (Operations and Maintenance Requirements).

"O&M Limits" means:

a. prior to (and including) the Substantial Completion Date, the O&M Limits during Construction; and

b. after the Substantial Completion Date, the O&M Limits After Construction.

"O&M Limits After Construction" means the limits specified in the drawings referred to in Section 3.1 of Schedule 11 (Operations and Maintenance Requirements), as Accepted by the Department (as updated in accordance with Schedule 11 (Operations...
“O&M Limits During Construction” means the limits specified in the drawings referred to in Section 2.1 of Schedule 11 (Operations and Maintenance Requirements), as Accepted by the Department (as updated in accordance with Schedule 11 (Operations and Maintenance Requirements)).

“O&M Limits Reference Drawings” means the drawings provided as Reference Documents and listed in document number 29.11.01 of Schedule 29 (Reference Documents).

“O&M Period During Construction” means the period commencing on the date of issuance of NTP2 and ending on (and including) the Substantial Completion Date (or, if earlier, the Termination Date).

“O&M Quality Management Plan” means the plan described in Section 5.4 of Schedule 11 (Operations and Maintenance Requirements) (as updated in accordance with Schedule 11 (Operations and Maintenance Requirements)).

“O&M Safety Plan” means the plan described in Section 5.3 of Schedule 11 (Operations and Maintenance Requirements), (as updated in accordance with Schedule 11 (Operations and Maintenance Requirements)).

“O&M Segment” means any one of the following segments of the Project within the Site along I-70 Mainline including I-70 Mainline and associated ramps, cross streets, CDOT Roadways and Local Agency Roadways:

<table>
<thead>
<tr>
<th>O&amp;M Segment</th>
<th>Start</th>
<th>End</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>274.000 (I-25 Interchange)</td>
<td>276.572 (Colorado Blvd)</td>
</tr>
<tr>
<td>2</td>
<td>276.572 (Colorado Blvd.)</td>
<td>278.548 (Quebec St.)</td>
</tr>
<tr>
<td>3</td>
<td>278.548 (Quebec St.)</td>
<td>282.563 (I-225)</td>
</tr>
<tr>
<td>4</td>
<td>282.563 (I-225)</td>
<td>285.727 (Tower Road)</td>
</tr>
</tbody>
</table>

“O&M Standards” means:

a. any standards and specifications expressly referenced in this Agreement (including in Section 1.1.5 of Schedule 11 (Operations and Maintenance Requirements)) as applicable to the O&M Work (excluding, for certainty, any Laws, Governmental Approvals or Permits); and

b. any standards and specifications that apply to the O&M Work (excluding, for certainty, any Laws, Governmental Approvals or Permits), including as a result of Developer's methods of performing the O&M Work,

in each case in the form published or otherwise in effect as of the Final Project Information Date (subject to change, addition or replacement pursuant to Section 8.6).

“O&M Work” means any and all operations, management, administration, maintenance, repair, preservation, modification, reconstruction, rehabilitation, restoration, renewal and replacement work and activities, including Routine Maintenance, Renewal Work and Work undertaken pursuant to the Handback Requirements, in each case required to be carried out by Developer to comply with all requirements set out in Schedule 11 (Operations and Maintenance Requirements) and any other provisions of this Agreement applicable to the performance of the O&M Work during the Construction Period or the Operating Period, as applicable, provided that, for
certainty:

a. O&M Work shall only include Limited O&M Work with respect to the Limited O&M Work Segments; and

b. O&M Work shall exclude Cover Top O&M Work.

“O&M Work After Construction” means any and all O&M Work required to be performed by Developer during the Operating Period pursuant to Section 3 and other provisions of Schedule 11 (Operations and Maintenance Requirements).

“O&M Work During Construction” means any and all O&M Work required to be performed by Developer during the O&M Period During Construction pursuant to Section 2 and other provisions of Schedule 11 (Operations and Maintenance Requirements).

“OP Deduction Month” has the meaning given to it in Section 3.2 of Part 2 of Schedule 4 (Payments).

“Operations Goal Deduction” means the amount calculated in accordance with Section 1(d) of Part 2 of Schedule 6 (Performance Mechanism).

“Operating Period” means the period that begins on the Calendar Day after the Substantial Completion Date and ends on the earlier of the Expiry Date and the Termination Date.

“Operating Period Closure Deduction” means, in respect of each full or partial Closure Deduction Period that commences in respect of any Non-Permitted Operating Period Closure:

a. if such Closure Deduction Period commences on a Calendar Day that is not during a Weekend and is not a Holiday, the amount set out in the Operating Period Closure Deductions Table for the type of Closure that caused such Non-Permitted Operating Period Closure;

b. if such Closure Deduction Period commences on a Calendar Day that is during a Weekend, 50% of the amount set out in the Operating Period Closure Deductions Table for the type of Closure that caused such Non-Permitted Operating Period Closure; or

c. if such Closure Deduction Period commences on a Calendar Day that is a Holiday, 150% of the amount set out in the Operating Period Closure Deductions Table for the type of Closure that caused such Non-Permitted Operating Period Closure,

subject, in the case of paragraphs a., b. and c., to the provisions of Section 2 of Part 5 of Schedule 6 (Performance Mechanism).

“Operating Period Closure Deductions Table” means the table set out in Section 3.2 of Part 3 of Schedule 6 (Performance Mechanism) (subject to amendment pursuant to Section 3.3 of Part 3 of Schedule 6 (Performance Mechanism)).

“Operating Period Small Business Goals” has the meaning given to it in Section 6.2.2.a of Schedule 15 (Federal and State Requirements).

“Operations Management Plan (OMP)” means the plan referred to in Section 9 of Schedule 11 (Operations and Maintenance Requirements) that sets out how Developer will comply with its operations obligations under this Agreement (as updated in accordance with Schedule 11 (Operations and Maintenance Requirements)).

“Organizational Conflict of” means an organizational conflict of interest as described in 2 C.C.R. 601-15...
Interest” Sec. 7 or as defined under 23 CFR § 636.116, where for purposes of 23 CFR § 636.116:

a. the “person” referred to in that definition was a Core Proposer Team Member or a contractor, subcontractor, advisor, consultant or subconsultant to the Preferred Proposer or any Core Proposer Team Member; and

b. the “owner” referred to in that definition is each Enterprise and CDOT.

“Other Construction Work” has the meaning given to it Section 2.a of Part II of Appendix A to Schedule 15 (Federal and State Requirements).

“Other Department Project” means any Related Transportation Facility that is:

a. constructed and operated and/or maintained by or on behalf of the Enterprises and/or CDOT (other than by Developer to the extent such project is not a Developer Retained Expansion) during the Term; and

b. not otherwise incorporated in the Project under the terms of this Agreement.

“Other Department Project Procurement Material” means any design brief, specification, information memorandum, request for qualification, request for proposal, contract or other documentation issued or otherwise made available by the Enterprises and/or CDOT in connection with the tender or procurement of any Other Department Project.

“PABs” means bonds, notes or other evidence of indebtedness issued by the PABs Issuer in the form of “private activity bonds” that are also “exempt facility bonds” under the Internal Revenue Code, where such issuance is made pursuant to the provisions of Internal Revenue Code Sections 142(a)(15) and (m).

“PABs Event” means, at any time after the issuance of the Notice of Award, either:

a. the relevant allocation of PABs is rescinded or reduced by US DOT or otherwise expires without renewal with the effect that the PABs allocation shall not be available to Developer to the extent assumed in its Base Financial Model; or

b. the PABs Issuer unreasonably (i) delays issuance (including through an unreasonable delay in release of the PABs Issuer’s legal opinion or in the delivery of any other document reasonably necessary for such issuance) of, or (ii) refuses to issue the PABs in the amount that Developer’s underwriters are otherwise prepared to underwrite, provided that Developer’s time schedule for the issuance of the PABs includes normal and customary time periods for the PABs Issuer to issue the PABs as a conduit issuer,

provided that neither of the events referred to in paragraphs a. and b. of this definition shall be deemed to be a PABs Event if such event arises as a result of any breach of Law, Governmental Approval or this Agreement, fraud, willful misconduct, criminal conduct, recklessness, bad faith or negligence by or of the Preferred Proposer or any Developer-Related Entity.

“PABs Issuer” means BE acting solely in the capacity of a conduit issuer of PABs under the authority of Law.
"Parties" means, collectively, the Enterprises and Developer, and "Party" means either the Enterprises (taken together) or Developer.

"Payment Milestone" means any of Milestone 1, Milestone 2, Milestone 3 or Milestone 4.

"Payment Month" means:

a. each month that commences during the Operating Period;

and

b. the month during which the Substantial Completion Date occurs.

"Payment Request" means a payment request submitted by Developer to the Enterprises pursuant to Section 2.1 or 2.2 of Part 2 of Schedule 4 (Payments).

"Performance and Measurement Tables" means the performance and measurement tables set out in Appendix A-1 and Appendix A-2 to Schedule 11 (Operations and Maintenance Requirements) for, respectively, the O&M Period During Construction and the Operating Period (as the same may be updated from time to time in accordance with Schedule 11 (Operations and Maintenance Requirements)).

"Performance Payment" means any monthly payment payable by the Enterprises pursuant to Section 1 of Part 2 of Schedule 6 (Performance Mechanism).

"Performance Requirements" means the requirements set out in the column headed “Performance Requirements” in the Performance and Measurement Tables.

"Permission to Enter Property Form" means CDOT Form 730 “Permission to Enter Property”.

"Permit Area" means any area adjacent to any ROW Parcel or any Additional ROW Parcel for which access and/or use is required to be procured by Developer pursuant to a Permit in order to perform the Work.

"Permits" means any permit, license, temporary crossing agreement or right-of-entry agreement issued, granted or entered into by or with any Governmental Authority, Utility Owner or Railroad in connection with the performance of any of Developer’s obligations under this Agreement.

"Permitted Encumbrances" means:

a. any Encumbrance expressly permitted by Section 27.3;

b. any Encumbrance for taxes, assessments or governmental charges or levies not yet due and payable, or any Encumbrance for taxes, assessments or governmental charges or levies being contested in good faith and by appropriate proceedings for which adequate reserves have been established in accordance with GAAP; and

c. sublicenses expressly permitted under Section 7.2.2.

"Permitted Equity Transfer" means an Equity Transfer arising as a direct result of:

a. a bona fide open market transaction in securities effected on a recognized public stock exchange, excluding such transactions involving an initial public offering of Developer (whether through a direct offering or an offering of an intermediate holding company);

b. a bona fide crowdfunding transaction in securities issued
pursuant to an exemption from registration in compliance with the JOBS Act of 2012 or any equivalent or successor Law provided that:

i. no Change of Control occurs as a result of such transaction; and

ii. the Enterprises have provided their prior consent to such transaction, such consent not to be unreasonably withheld;

c. the grant or enforcement of security over the membership interests in Developer to Lenders pursuant to the Financing Documents exclusively for purposes of securing the Project Debt, subject to the terms and conditions contained in this Agreement;

d. a transfer of interests between:

i. managed funds that are under common ownership or control; or

ii. the general partner or the manager (or the parent company of such general partner or manager) and any managed funds under common ownership or control with such general partner or manager (or parent company of such general partner or manager),

provided that the relevant funds and the general partner or manager of such funds (or the parent company of such general partner or manager) have been approved by the Enterprises in writing prior to the Agreement Date;

e. a reorganization or transfer of interests within a group of Persons under common Control of direct or indirect ownership interests in any Person or of any intermediate entity in the chain of ownership of such Person so long as there is no substantive change in the entity or group of entities that ultimately have (individually or collectively) Control of such Person; or

f. a donation of legal, beneficial or equitable ownership interests in a Person to an independent non-profit organization registered with the State and exempt from taxation under Section 501(c)(3) of the Internal Revenue Code provided that:

i. no Change of Control occurs as a result of such transaction; and

ii. the Enterprises have provided their prior consent to such transaction, such consent not to be unreasonably withheld.
“Permitted Operating Period Closure” means any Closure which occurs during the Operating Period and is required for the purposes of Developer performing O&M Work in compliance with the most recently Accepted Maintenance Management Plan (including, for certainty, in the case of Renewal Work, the most recently Accepted Renewal Work Plan) that:

a. does not result in a breach of any of, and is permitted by, Sections 2.5.3, 2.6, 2.7, 2.9, 2.11.5, 2.11.9, 2.11.10, 2.11.11, 2.11.12 or 2.11.19 of Schedule 10 (Design and Construction Requirements), as if the provisions of such Sections applied to the performance of O&M Work, as applicable, during the Operating Period (and, for certainty, any Closure that is permitted by Section 2.11.6 of Schedule 10 (Design and Construction Requirements) during the Construction Period shall not constitute a Permitted Operating Period Closure); or

b. if such Closure does not satisfy the requirement set out in the first sentence of paragraph a. of this definition, has been Approved by the Department or approved by the relevant Local Agency, as applicable, as a MOT Variance.

“Persistent Breach” has the meaning given to it in Section 22.2.2.e.

“Person” means any of a natural person, a corporation, a limited liability company, a trust, a partnership, a limited liability partnership, a joint stock company, a consortium, a joint venture, an unincorporated association or any other entity recognized as having legal personality under the laws of the State, in each case as the context may require.

“Physical Damage Proceeds” has the meaning given to it in Section 25.5.1.a.

“Physical Damage Proceeds Reserve” has the meaning given to it in Section 25.5.2.a.

“Point of Slope Selection” means the location at which the roadside slope adjacent to the pavement ends, and the cut, or fill slope begins.

“Portal” means the face of the Cover where the Threshold Zone begins.

“Possession” means, in relation to any ROW Parcel or any Additional ROW Parcel, the right to access and use such ROW Parcel or Additional ROW Parcel in accordance with the terms of this Agreement, subject to:

a. rights, including statutory or public franchise rights, of Governmental Authorities, Utility Owners, Railroads and third parties, including:

   i. as contemplated by the Third Party Agreements; and

   ii. as such access and use may be permitted and regulated by CDOT including through the issuance of Access Permits;

b. rights, including rights of access, granted to the Enterprises and CDOT and each of their employees, agents, consultants and subcontractors and to other Persons under this Agreement;

c. restrictions on access and/or use applicable to any such
ROW Parcel or any such Additional ROW Parcel set out in:

i. easement deeds, right of entry permits and/or any Governmental Approval or Permit;

ii. any title commitments or American Land Title Association maps related to the Right-of-Way as set out in the Reference Documents; or

iii. the Beneficial Reuse and Materials Management Plan or the Materials Management Plan, and in either case later recorded;

d. any other easements, zoning restrictions, regulations, rights of way and similar restrictions on real property imposed by Law, any Governmental Approval or Permit;

e. any other restrictions or qualifications set out in Schedule 18 (Right-of-Way), including the establishment of hold off zones pursuant to Section 5.1 thereof; or

f. any other express restrictions or qualifications set out in this Agreement, including in Section 9.1.b.

“Possession Date” has the meaning given to it in the definition of Notice of Possession in this Part A of Annex A (Definitions and Abbreviations).

“Pre-Refinancing Equity IRR” means, in relation to a Refinancing, the nominal post-tax Equity IRR calculated (using the Financial Model as updated, including as to the actual revenue and cost performance of the Project, so as to be current immediately prior to the Refinancing) on the date immediately preceding the date on which such Refinancing is put into place.

“Precipitation Event” means any type of event or occurrence causing slippery road conditions including snow, drifting snow, freezing rain, sleet, ice and frost.

“Preferred Alternative” means the alternative identified as the “Preferred Alternative” pursuant to NEPA in the FEIS related to the Project.

“Preferred Proposer” has the meaning given to it in the Recitals.

“Preliminary Equity IRR” has the meaning given to it in the Recitals.

“Preliminary Supervening Event Submission” has the meaning given to it in Section 15.1.2.b.i.

“Principal Indemnified Parties” has the meaning given to it in Section 24.2.

“Principal Subcontractor Direct Agreement” means any agreement in substantially the form attached as Schedule 19 (Forms of Direct Agreements) by and among the Enterprises, Developer and a Principal Subcontractor.

“Principal Subcontractors” means:

a. the Construction Contractor;

b. the O&M Contractor; and

c. any other Subcontractor under a Principal Subcontract of the type referenced in paragraph c. of the definition thereof in this Part A of Annex A (Definitions and Abbreviations).

“Principal Subcontracts” means:
a. the Construction Contract;
b. the O&M Contract; and
c. any other Subcontract between Developer and another Subcontractor that individually, or in aggregate with all other Subcontracts between Developer and such Subcontractor, has a value as determined by the Enterprises (acting reasonably) in excess of (A) 10% of the Construction Work in aggregate, (B) 40% of the O&M Work in any given Contract Year or (C) 15% of the O&M Work in any given consecutive five Contract Year period during the Operating Period, as applicable.

"Private Utility" means a Utility that is owned by a Private Utility Owner.

"Private Utility Owner" means each of:

a. AT&T Corp.;
b. Comcast Holdings Corporation;
c. Level 3 Communications, Inc.;
d. MCI Communications Services, Inc. d/b/a Verizon Business Services;
e. NuStar Logistics, L.P.;
f. Phillips 66 Company;
g. Public Service Company of Colorado;
h. Qwest Corporation d/b/a CenturyLink QC;
i. Sprint; and
j. Zayo Group, LLC,
or any Affiliate of the same with which the CDOT enters into a URA.

"Process Control" means the activities performed by or on behalf of Developer to ensure and document that a product meets the requirements of this Agreement, which activities may include checking, materials handling and construction procedures, calibrations and maintenance of equipment, shop drawing review, document control, production process control, and any sampling, testing, and inspection done for such purposes.

"Programmatic Agreement" means the Programmatic Agreement Among Federal Highway Administration, Colorado State Historic Preservation Officer, and Colorado Department of Transportation Regarding Implementation of The Interstate 70 East Corridor Project - Interstate 25 to Tower Road.

"Progress Report" means Developer’s progress submittal described in Section 4 of Schedule 8 (Project Administration).

"Progress Schedule" means the Project Schedule provided with the Progress Report as set out in Section 3.3.5 of Schedule 8 (Project Administration).

"Prohibited Act" means:

a. an act committed in contravention of Section 8.3.2;
b. offering, giving or agreeing to give to any Governmental Authority (including either Enterprise or CDOT) or any public official, civil servant, officer, director, agent or employee of
any such Governmental Authority, any bribe, gift or
consideration of any kind as an inducement, commission or
reward:

i. for doing or not doing (or for having done or not
having done) any act in relation to the obtaining or
performance of this Agreement or any other related
contract with either Enterprise or the Federal
government or the State, or any other
Governmental Authority (including CDOT);

ii. for showing or not showing favor or disfavor to any
Person in relation to this Agreement or any other
related contract with either Enterprise or the Federal
government or the State, or any other
Governmental Authority (including CDOT); or

c. defrauding or attempting to defraud or conspiring to defraud
either Enterprise or the Federal government or the State, or
any division, subdivision or agency of either of them
(including CDOT),

in each case regardless of whether or not it is a criminal offence pursuant to
Law.

“Project”

has the meaning given to it in the Recitals.

“Project Agreement”

shall have the same meaning as Agreement.

“Project Agreement Amendment”

means an amendment to this Agreement to become effective on the
Financial Close Date, which shall reflect any adjustments or amendments
that have been accepted or agreed, as applicable, by the Enterprises and
Developer pursuant to Annex A to Schedule 1 (Financial Close), including:

a. the Financial Close Base CPP calculated pursuant to
Section 4(g) of Annex A to Schedule 1 (Financial Close);

b. the Base Case Equity IRR calculated pursuant to
Section 4(h) of Annex A to Schedule 1 (Financial Close);

c. the replacement of the Base Financial Model attached as
Schedule 26 (Base Financial Model) with a copy of the
Financial Model Accepted by the Enterprises pursuant to
Section 2.2(h)(i) of Schedule 1 (Financial Close); and

d. amendments to the definitions of “Baseline Substantial
Completion Target Date” and “Milestone Completion Target
Date” in this Part A of Annex A (Definitions and
Abbreviations) in each case to reflect, on a day for day
basis, any delay in achieving Financial Close relative to
November 30, 2017 (the date assumed in the ITP).

“Project Debt”

means bona fide indebtedness (including subordinated indebtedness) under
the Financing Agreements for or in respect of funds borrowed or incurred
(including bona fide indebtedness with respect to any financial insurance
issued for funds borrowed) or for the value of goods or services rendered or
received, the repayment of which has specified payment dates and, in any
such case, is secured by one or more Security Documents, where such
Project Debt:

a. includes, subject to the exclusions in paragraph b. of this
definition:

i. principal, capitalized interest, accrued interest, customary and reasonable lender, financial insurer, agent and trustee fees, costs, expenses and premiums with respect thereto, payment obligations under interest rate and inflation rate hedging agreements or other derivative facilities with respect thereto, reimbursement obligations with respect thereto, lease financing obligations, and Breakage Costs; and

ii. PABs and TIFIA Loans (and TIFIA guaranties and credit support), together with the obligations arising thereunder; and

b. excludes:

i. Equity Member Debt;

ii. any indebtedness of Developer or any Equity Member of Developer that is secured by any interests less than Developer’s entire interest in, and its rights and obligations under, this Agreement, such as indebtedness secured only by an assignment of economic interest in Developer or of rights to cash flow or dividends from Developer;

iii. any increase in indebtedness to the extent resulting from an agreement or other arrangement Developer enters into or first becomes obligated to repay after it was aware (or should have been aware, with reasonable due diligence) of the occurrence or prospective occurrence of an event of termination under the Agreement, including Developer’s receipt of a Termination Notice and/or occurrence of an Enterprise Default of the type entitling Developer to terminate the Agreement; and

iv. any such indebtedness that would otherwise be Project Debt to the extent the Collateral Agent has not notified the Enterprises of such indebtedness and the related Financing Documents in accordance with this Agreement.

“Project Directory” means the directory described in Section 12 of Schedule 8 (Project Administration).

“Project Information” has the meaning given to it in Section 3.1.a.

“Project Insurance Change” means any net increase or net decrease in the Actual Benchmarked Insurance Cost relative to the Proposal Insurance Cost (including any such increase or decrease resulting from a change in the amount of any deductible or resulting from Developer’s claims history in relation to the Project), excluding only any increase or decrease:

a. arising from:

i. any unavoidable circumstances generally prevailing in the Relevant Insurance Markets; and

ii. any claims history in relation to the Project resulting
from the acts or omissions of the Enterprises and/or CDOT; or

b. taken into account in any calculation of Change in Costs made pursuant to this Agreement,

with the amount of any such net increase or net decrease to be expressed as a positive number in the event of a net increase and a negative number in the event of a net decrease.

“Project Intellectual Property” means Intellectual Property created, used, applied or reduced to practice by Developer or any other Developer-Related Entity in connection with the Project or the Work, but excluding that which is:

a. owned by the Enterprises, CDOT, or otherwise made available to Developer by the Enterprises pursuant to this Agreement and as a result of its performance of the Work; or

b. owned by any Person other than the Enterprises, CDOT or a Developer-Related Entity.

“Project License” has the meaning given to it in Section 7.2.1.a.

“Project License End Date” means, for each ROW Parcel and each Additional ROW Parcel, the earliest of:

a. the date on which the Project License is revoked pursuant to Section 7.2.1.c;

b. the Substantial Completion Date with respect to any ROW Parcels and any Additional ROW Parcels (or any portion of any thereof) that are outside the O&M Limits After Construction;

c. with respect to any such ROW Parcel and any Additional ROW Parcel that is provided in the form of a Temporary ROW Easement, the date specified in or required by the terms of such easement; and

d. with respect to any ROW Parcel on which the Maintenance Yard is located, the effective date of any termination of the Project License with respect thereto pursuant to Section 7.2.1.d.

“Project License Start Date” means, for each ROW Parcel and each Additional ROW Parcel, the Possession Date specified in the Notice of Possession delivered by the Enterprises to Developer pursuant to Section 7.2.1.b with respect to such parcel.

“Project Records” has the meaning given to it in Section 19.1.1.

“Project Schedule” means, initially, the Baseline Schedule and, once Approved pursuant to Section 3.3 of Schedule 8 (Project Administration), the then current Revised Baseline Schedule.

“Project Special Provisions” means the Project Special Provisions set out in Appendix A to any Section of Schedule 10 (Design and Construction Requirements).
“Project Standards” means:

a. the Construction Standards; and

b. the O&M Standards.

“Project Third Parties” means each counterparty (excluding any Party to this Agreement and CDOT) to a Third Party Agreement.

“Property Management” has the meaning given to it in Section 2.1.1 of Schedule 18 (Right-of-Way).

“Proposal” means the Preferred Proposer’s Proposal, as defined in, and submitted by it in response to, the ITP.

“Proposal Benchmarked Insurance Cost” means, in respect of any Insurance Review Period:

a. the Proposal Insurance Cost with respect to the applicable Insurance Review Period; minus

b. the Base Benchmarked Insurance Deduction in respect of the applicable Insurance Review Period.

“Proposal Insurance Cost” means, in respect of any Insurance Review Period:

a. $921,689, indexed annually from July 1, 2017 to the first day of such Insurance Review Period; plus

b. the amount calculated pursuant to paragraph a. of this definition, indexed from the first day of such Insurance Review Period to the second Insurance Renewal Date in such Insurance Review Period.

“Proposal Schedule” means the draft Baseline Schedule submitted by the Preferred Proposer with Developer’s Proposal pursuant to Section 2.3.3. of Part F of the ITP.

“Proposer” and “Proposers” each has the meaning given to it in the Recitals.

“Proprietary Intellectual Property” means Project Intellectual Property that is patented or copyrighted by any Developer-Related Entity (other than Developer), or, if not patented or copyrighted, is created, held and managed as a trade secret or confidential, proprietary information by the relevant Developer-Related Entity, excluding any item of Project Intellectual Property that is produced for multiple purposes and is not unique to the technology that is being applied to or for the Project.

“Protection in Place” subject to Section 4.1.4 of Schedule 10 (Design and Construction Requirements), has the meaning given to it in the applicable URA.

“Protection Period” means the period from 3:00 pm Eastern Standard Time on July 18, 2017 to and including:

a. with respect to any TIFIA Financing, the date that any loan agreement evidencing TIFIA Financing is entered into between Developer and US DOT; and

b. with respect to any Bond Financing, the date of the signing of the bond purchase agreement among Developer, the underwriters as bond purchasers and, in respect of any issuance of PABS, the PABs Issuer.

“Public ROW Records” means any record affecting a ROW Parcel that is maintained by:

a. the Colorado Department of Public Health and Environment,
the Colorado Department of Labor and Employment, Division of Oil and Public Safety, or the EPA; or

b. the:
   i. County Assessor’s office;
   ii. County Treasurer’s office; or
   iii. office of the Clerk and Recorder,

with respect to paragraph b., for the county in which the ROW Parcel is located, to the extent that such records were referenced in any title commitment in the possession of or made available to the Preferred Proposer and/or the Developer-Related Entities on or prior to the Setting Date.

“Public Safety Order” means a rule, order or directive from the U.S. Department of Homeland Security, the State Department of Public Safety (including the Division of Homeland Security and Emergency Management) or by any Emergency Service regarding specific security threats to the Project or the region within the State in which the Project is located or which the Project serves, to the extent such rule, order or directive:

a. requires specific changes in Developer’s normal design, construction, operation or maintenance procedures in order to comply therewith; and

b. must be complied with by Developer (or any Principal Subcontractor in connection with performance of the Work) as a matter of Law.

“Public Utility” means a Utility that is owned by a Publicly Owned Utility.

“Publicly Owned Utility” means each of:

a. Aurora Water;

b. the City and County of Denver, acting through its Board of Water Commissioners;

c. the City and County of Denver Wastewater Management Division; and

d. the Metropolitan Wastewater Reclamation District.

“Punch List” means each Milestone Completion Punch List and the Substantial Completion Punch List.

“Punch List Item” means any minor Defect or Nonconforming Work which individually, and in aggregate with all other such Punch List Items, will not have any material or adverse effect on the normal, uninterrupted and safe use and operation of the affected Element of the Project for its intended purpose.

“Qualifying Change in Law” means:

a. a Change in Law that requires Developer to incur any additional expenditure that (i) would be treated as a capital expenditure in accordance with GAAP and (ii) is in connection with the performance of O&M Work After Construction (whether such expenditure is required to be incurred either during the Construction Period or during the...
Operating Period); or

b. any enactment, promulgation, adoption, change or modification of Federal Law with respect to the investigation, removal, treatment, storage, transportation, management and/or remediation of (i) Unexpected Groundwater Contamination Conditions or (ii) Unexpected Hazardous Substances that would, in the case of (i) or (ii), constitute a Change in Law if proviso (i) to the definition of Change in Law in this Part A of Annex A (Definitions and Abbreviations) were disregarded that requires Developer to incur any additional expenditure that (A) would be treated as a capital expenditure in accordance with GAAP and (B) is in connection with the performance of O&M Work After Construction (whether such expenditure is required to be incurred either during the Construction Period or during the Operating Period),

excluding in the case of a. and b. any:

c. Discriminatory Change in Law; and

d. Change in Law that is made in response to any breach of Law, Governmental Approval, Permit or this Agreement, or fraud, willful misconduct, criminal conduct, recklessness, bad faith or negligence of any Developer-Related Entity, provided that any Change in Costs payable to Developer as a result of the occurrence of a Compensation Event falling within this definition shall not include any Change in Costs of Developer that do not solely and exclusively relate to the performance of O&M Work After Construction.

“Qualifying Refinancing” means any Refinancing that will give rise to a Refinancing Gain greater than zero which is not an Exempt Refinancing.

“Quality Assurance Oversight” means the act of testing or inspecting of the Work performed by qualified testing or inspecting personnel employed by the Department or its designated agent to independently establish conformity to this Agreement.

“Quality Management Plan” means, from time to time, the then current plan that satisfies the requirements of Section 6 of Schedule 8 (Project Administration) and has been submitted by Developer and Approved by the Department pursuant to Schedule 8 (Project Administration).

“Quality Records Database” means the secure web-based application for recording results of the Department verification reviews and responses to nonconformance notices, as described in Schedule 8 (Project Administration).

“Railroad” means either the tracks, bridges and systems used for rail traffic in the vicinity of I-70 Mainline, or the UPRR, BNSF or DRIR, as the context may require.

“Railroad Forces” means Railroad engineering and construction personnel, or Railroad designated contractors employed or contracted directly by the respective Railroad.

“Rating Agency” means each of:

a. Fitch, Inc.;
provided in each case that such entity is at the relevant time a Registered Rating Agency.

“Reasonable Efforts” means all those steps in the power of the relevant Party that are capable of producing the desired result, being steps which a prudent, determined and reasonable person desiring to achieve that result would take, provided that, subject to its other express obligations under this Agreement:

a. where the relevant Party is either the Enterprises or Developer, the relevant Party shall not be required to expend funds except for those:
   i. reasonably incidental or ancillary to the steps to be taken by the relevant Party (including its reasonable travel expenses, correspondence costs and general overhead expenses); or
   ii. that the other Party agrees to reimburse in advance; and

b. where the relevant Party is the Enterprises (or the Department), the Enterprises (or, as applicable, the Department) shall not be required to:
   i. take any action to the extent uncommitted budgeted funds are unavailable to undertake such action;
   ii. take any action that is contrary to this Agreement, Law, any Governmental Approval or the public interest, or decline, refrain or abstain from taking any action that is in the public interest, as determined by the Enterprises in their discretion;
   iii. exercise or refrain, decline or abstain from exercising any statutory or administrative law power, authority or discretion;
   iv. undertake any mitigation measure that might be available as a result of its status as a Governmental Authority, and that would not normally be available to a private commercial counterparty to an agreement such as this Agreement;
   v. take a position that would not be usual and customary for the Enterprises or CDOT to take in addressing similar circumstances affecting other projects (except for usual and customary arrangements that are incompatible with the Project’s contracting methodology); or
   vi. refrain from concurring with a position taken by any Governmental Authority if the Enterprises believe that position to be correct.

“Recognized Hazardous Materials” has the meaning given to it in Section 23.1.1 of Schedule 17 (Environmental Requirements).
“Reconciliation” has the meaning given to it in Section 15.6.2.

“Reevaluation” means any NEPA evaluation required or prepared pursuant to 23 CFR § 771.129.

“Reference Design” means the preliminary technical blueprint and description of essential design elements for the Project set out in the Reference Documents.

“Reference Document” means each of the materials, documents and data listed in Schedule 29 (Reference Documents) and made available prior to the Final Project Information Date pursuant to Section 3.1.a.

“Refinancing” means:

a. any amendment, variation, novation, supplement or replacement of any Financing Document;

b. the exercise of any right, or the grant of any waiver or consent, under any Financing Document;

c. the disposition of any rights or interests in, or the creation of any rights of participation in respect of, any Financing Document (other than any Equity Member Funding Agreement) or the creation or granting of any other form of benefit or interest in either a Financing Document or the contracts, revenues or assets of Developer whether by way of security or otherwise; or

d. any other arrangement put in place by Developer or another person which has an effect which is similar to any of a. to c. above or which has the effect of limiting Developer’s ability to carry out any of a. to c. above.

“Refinancing Gain” means an amount equal to the greater of zero and an amount equal to (A-B-C), where:

A = the net present value (using the Base Case Equity IRR as the discount rate) of the Distributions projected immediately prior to the Refinancing (taking into account the effect of the Refinancing and using the Financial Model as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made over the remaining term of this Agreement following the Refinancing;

B = the net present value (using the Base Case Equity IRR as the discount rate) of the Distributions projected immediately prior to the Refinancing (but without taking into account the effect of the Refinancing and using the Financial Model as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made over the remaining term of this Agreement following the Refinancing; and

C = any adjustment required to increase the Pre-Refinancing Equity IRR to the Base Case Equity IRR, if applicable.

“Registered Rating Agency” means a nationally recognized statistical rating organization registered with the Office of Credit Rating of the U.S. Securities and Exchange Commission.

“Reinstatement Plan” has the meaning given to it in Section 25.5.1.b.i.

“Reinstatement Work” has the meaning given to it in Section 25.5.1.a.

“Related Transportation Facility” means any existing and future bridge, highway, street and road or other transportation facility of any mode, including:
a. directly related component facilities; and
b. upgrades and expansions thereof,

that, in any such case, are or will be connecting with, or crossing under or over, the Project, but which is not (at the relevant time) part of the Project, including:
c. Denver Planned Projects; and
d. all CCD Identified Future Improvements.

“Release” means any emission, spill, seepage, leak, escape, leaching, discharge, injection, pumping, pouring, emptying, dumping, disposal, migration, or release of Hazardous Substances from any source into or upon the Environment or any Improvement, including any of the foregoing, or any other action, that exacerbates an existing Release or condition of Hazardous Substances contamination.

“Release for Construction Documents” means the drawings (including plans, elevations, sections, details and diagrams), specifications, shop drawings, drawings, samples, reports and calculations approved by Developer for construction as required by Schedule 8 (Project Administration).

“Relevant Contract Year” has the meaning given to it in Section 2.3.

“Relevant Event” means any Delay Relief Event or Compensation Event.

“Relevant Insurance Markets” the insurance markets which collectively insure the majority of transportation related infrastructure projects in the United States from time to time, which as of the Agreement Date are New York, Bermuda and London.

“Relevant Milestone Payment Request Due Date” has the meaning given to it in Section 2(a) of Schedule 5 (Milestone Payments).

“Relevant Obligation” has the meaning given to it in Section 24.2.g.i.

“Relief Event” means:

a. any of the following (“Delay Relief Events”):
   i. any Unexcused Railroad Delay;
   ii. any Unexpected Governmental Approval Delay;
   iii. any breach by the City of Denver of the Denver IGA that results in:
      A. the duration of any street occupancy permit issued by the City of Denver not being for a duration equal to the Reasonable Construction Time Period (as defined in Section 4.A.(iii) of the Denver IGA) plus 10% of that time period; or
      B. the City of Denver unreasonably withholding or delaying any permit that it is required to issue in connection with the Construction Work pursuant to Section 4.A.(iv) of the Denver IGA,

      provided that Developer has complied with the City of Denver permit process set out in Reference
iv. any Force Majeure Event or any Relief Event to the extent that such event constitutes a Delay Relief Event pursuant to Section 33.1.6.c.i.C.II;

b. any Force Majeure Event;

c. any:
   i. fire or explosion;
   ii. geomagnetic storm; or
   iii. earthquake;

d. riot or illegal civil commotion;

e. any Change in Law (excluding (i) any Discriminatory Change in Law and (ii) any Qualifying Change in Law);

f. any Third Party Release of Hazardous Substances that occurs during the Construction Period;

g. any accidental loss or damage to the Right-of-Way, any Additional Right-of-Way or any Permit Areas (excluding Developer-risk Permit Areas) in respect of which Developer holds Permits;

h. any failure by the City of Denver:
   i. to provide to Developer within 15 Working Days any comments in connection with the Construction Work that it is required to provide in relation to any submittal within 10 “business days” pursuant to the Preamble in Exhibit K of the Denver IGA; or
   ii. in the event that any 10 “business day” period referred to in the Preamble in Exhibit K of the Denver IGA is adjusted as contemplated in such Preamble, to provide to Developer within five Working Days of the expiry of such adjusted period comments in connection with the Construction Work that is the subject of the relevant submittal;

i. any incident of physical damage to an Element of the Project or delay of or disruption to the Work caused by a failure by the Cover Top Maintainer to perform the City of Denver’s obligations in accordance with the applicable terms of the Cover Maintenance Agreement during the Operating Period;

j. Developer’s obligation to comply with Section 12.2.b with respect to any Related Transportation Facility that is not Known or Knowable (other than with respect to any required capital expenditure, to which paragraph n. of the definition of Compensation Event in this Part A of Annex A (Definitions and Abbreviations) shall apply);

k. any weather event manifesting severe and historically unusual wind and/or liquid precipitation conditions directly affecting any part of the Site that is recognized as a “severe local storm”, or “flood” event by the National Oceanic and Atmospheric Administration.
Atmospheric Administration’s National Weather Service in a published notice, alert or warning (a “Severe Weather Event”);

l. any delay of or disruption to the Work caused by the operation or maintenance of the Limited O&M Work Segments, but only to the extent such operation or maintenance is not the responsibility of Developer (or another Person under common Control with Developer) pursuant to this Agreement or otherwise; or

m. any unusual and unreasonable delay by the Colorado Department of Public Health and Environment in issuing, agreeing to modify, renewing or extending any Remediation Activities Discharging to Surface Waters Permit, Stationary Source Air Quality Permit or Subterranean Dewatering or Well Development Permit,

in each case unless and to the extent such event arises as a result of any breach of Law, Governmental Approval, Permit or this Agreement, or fraud, willful misconduct, criminal conduct, recklessness, bad faith or negligence by or of any Developer-Related Entity.

“Renewal Element” means an Element which has a Useful Life Baseline Requirement specified in Appendix B to Schedule 12 (Handback Requirements).

“Renewal Work” means maintenance, repair, reconstruction, rehabilitation, restoration, renewal or replacement of any Element (excluding any Element within or that forms part of the Limited O&M Work Segments) or part thereof that is not normally included, in accordance with Good Industry Practice, as an annually recurring cost in maintenance and repair budgets for transportation facilities (and associated equipment) of a similar nature and located in a similar environment to the Project.

“Renewal Work DBE Goal” has the meaning given to it in Section 6.2.2.f of Schedule 15 (Federal and State Requirements).

“Renewal Work OJT Goal” has the meaning given to it in Section 6.3.2 of Schedule 15 (Federal and State Requirements).

“Renewal Work Plan” means the plan described in Section 6.1 of Schedule 11 (Operations and Maintenance Requirements) (as updated in accordance with Schedule 11 (Operations and Maintenance Requirements)).

“Renewal Work Schedule” means the schedule required as part of the Renewal Work Plan.

“Representatives” has the meaning given to it in Section 18.2.1.a.

“Requested Relocation” subject to Section 4.1.4 of Schedule 10 (Design and Construction Requirements), means any Utility Relocation of a Private Utility that the relevant Private Utility Owner requests be performed by Developer pursuant to the terms of any URA.

“Required Action” has the meaning given to it in Section 23.4.3.

“Required Environmental Approvals” has the meaning given to it in Section 8 of Schedule 17 (Environmental Requirements).

“Required Guarantor” means any Guarantor for a Principal Subcontractor (or any member thereof) whose Work is not completed at the relevant time, provided that such
Guarantor shall cease to be a Required Guarantor at such time that the Enterprises Accept written evidence submitted by Developer that the relevant Principal Subcontractor (taking into account any other guaranties) possesses the financial and technical capability to perform or cause the performance of all remaining Work under the relevant Principal Subcontract in full compliance with its terms in the absence of the support of such Guarantor.

"Required Principal Subcontractor Member" means any member of a Principal Subcontractor which Principal Subcontractor’s Work is not completed at the relevant time, provided that such member shall cease to be a Required Principal Subcontractor Member at such time that the Enterprises Accept written evidence submitted by Developer that the relevant Principal Subcontractor (absent such member, and taking into account any guaranties) possesses the financial and technical capability to perform or cause the performance of all remaining Work under the relevant Principal Subcontract in full compliance with its terms in the absence of such member.

"Rescue Refinancing" means a Refinancing by the Lenders upon the occurrence of a default or an event of default under the Financing Agreements.

"Residual Element" means an Element which has a specified Residual Life Minimum Requirement in Appendix A to Schedule 12 (Handback Requirements).

"Residual Life" means, for an Element, the period remaining until the Element will next require reconstruction, rehabilitation, restoration, renewal or replacement.

"Residual Life at Handback" means the Residual Life of an Element calculated at the Expiry Date determined through the application of the Residual Life Methodology and Residual Life inspections and by assuming that the Element is subject to maintenance after the Expiry Date to the same standards and requirements, and at the same frequency, as Developer is required to perform Routine Maintenance on such Element in accordance with the terms of this Agreement.

"Residual Life Minimum Requirement" means, for any Residual Element, the number of years of Residual Life at Handback specified in the “Residual Life at Handback” column for such Residual Element in Appendix A to Schedule 12 (Handback Requirements).

"Residual Life Methodology” or “RLM” means the evaluation and calculation methodology by which the Residual Life of any Element will be calculated at the Expiry Date (including (a) the methodology by which any necessary Renewal Work will be identified and (b) in the case of bridge decks, methodology that complies with the requirements set out in Section 2.1.a of Schedule 12 (Handback Requirements)) to ensure that each Residual Element meets or exceeds its Residual Life Minimum Requirement.

"Residual Life Methodology Report” means the report prepared by Developer in accordance with Section 3.3 of Schedule 12 (Handback Requirements).

"Restricted Change” means any Enterprise Change (or aspect thereof) proposed in an Enterprise Change Notice or a Directive Letter that would, if implemented:

a. require the Work (as changed by the proposed Enterprise Change) to be performed in a way that:

i. violates Law;

ii. is inconsistent with Good Industry Practice; or

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iii. gives rise to a material risk to the health or safety of any person; or

b. cause the revocation of any existing Governmental Approval, Permit or third party consent that is necessary for the performance of the existing Work under circumstances such that it would be impossible or highly unlikely that Developer would be able to obtain a new or amended equivalent Governmental Approval, Permit or third party consent relating to the Work (as changed by the proposed Enterprise Change);

c. materially and adversely affect Developer’s ability to carry out the Work; and/or

d. materially and adversely change the nature of the Project (including its risk profile).

“Restricted Transfer Period” means the period commencing on the Agreement Date and ending on (but not including) the second anniversary of the Substantial Completion Date.

“Reviewable Deliverable” means any Deliverable that is a Deliverable for Approval, a Deliverable for Acceptance or a Deliverable for Information.

“Revised Baseline Schedule” means the then current revision to the Baseline Schedule (including to any prior Revised Baseline Schedule), which has been submitted by Developer and Approved by the Enterprises pursuant to Section 3.3.4.b of Schedule 8 (Project Administration).

“RFC Documents” means Release for Construction Documents.

“RFP” has the meaning given to it in the Recitals.

“Right-of-Way” means, collectively, all of the land, improvements and fixtures that are located within all ROW Parcels, but in each case with effect only from the Project License Start Date and only until the Project License End Date, in each case, for the relevant ROW Parcel.

“Right-of-Way Betterment” means appreciation in the value of a property due to beneficial public works executed in its near vicinity.

“Right-of-Way Relocation” means displacing a current resident or occupant to a new location.

“ROD” has the meaning given to it in the Recitals.

“ROD Construction Limits” means the construction limits of the Project identified in Reference Document 29.10.9.07.

“Routine Maintenance” means maintenance activities that are scheduled in advance and occur on a regular basis, such as weekly, monthly, quarterly, semi-annually or annually, which are normally included as an annually recurring cost in maintenance and repair budgets for transportation facilities (and associated equipment) of similar natures and in similar environmental conditions as the Project.

“Routine O&M Work ESB Goal” has the meaning given to it in Section 6.2.2.b of Schedule 15 (Federal and State Requirements).

“Routine O&M Work” means all O&M Work, excluding Renewal Work.

“ROW Parcel” means each parcel of land that either:

a. is referred to in the “Parcel #” column in the ROW Schedule, each as identified in the Right-of-Way Exhibits in
the Contract Drawings; or

b. comprises part of the Existing CDOT Right-of-Way,

but, with respect to any partial acquisition identified in the ROW Schedule, only including any part thereof that Developer elects to have the Department acquire and deliver pursuant to Section 1.3 of Schedule 18 (Right-of-Way).

“ROW Schedule” means the table set out in Appendix A to Schedule 18 (Right-of-Way).

“RRA” means any of:

a. the BNSF RRA;

b. the DRIR RRA; and

c. the UPRR RRA.

“Safety Compliance” means any and all improvements, repair, reconstruction, rehabilitation, restoration, renewal, replacement and/or changes in configuration or procedures in relation to the Project to correct a specific safety condition or risk in relation to the Project that the Enterprises, CDOT or another Governmental Authority that has relevant jurisdiction have reasonably determined to exist.

“Safety Compliance Order” means a written order or directive from the Enterprises to Developer to implement Safety Compliance, provided that such order or directive shall not be used to effect a change to the Technical Requirements or the Project Standards or safety-related portions of the Work affected by a Change in Law.

“Schedule Delay Period” has the meaning given to it in Section 15.3.1.c.i.

“SDBPP” has the meaning given to it in Section 5.1 of Schedule 15 (Federal and State Requirements).

“Second Handback Inspection Report” means the report prepared by Developer in accordance with Sections 3.11.a.i and 3.11.b of Schedule 12 (Handback Requirements).

“Security Documents” means:

a. the documents listed in Section B of Annex A to the Lenders Direct Agreement executed on or about the Financial Close Date; and

b. any other mortgage, deed of trust, guarantee, pledge, lien, indenture, trust agreement, hypothecation, assignment, collateral assignment, financing statement under the Uniform Commercial Code of any jurisdiction, security instrument or other charge or encumbrance of any kind, including any lease in the nature of a security instrument, given to any Lender as security for Project Debt or Developer’s obligations pertaining to Project Debt to the extent permitted by this Agreement.

“Service Line” means:

a. a Utility line, the function of which is to directly connect the improvements on an individual property to another Utility line located off such property, which other Utility line connects more than one such individual line to a larger system; or
b. a Utility line on public or private property that services structures located on such property.

“Setting Date” means April 25, 2017.

“Severe Weather Event” has the meaning given to it in paragraph k. of the definition of Relief Event in this Part A of Annex A (Definitions and Abbreviations).

“Similar Project” means any highway facility within the State or elsewhere in the United States, including a construction or reconstruction project involving such a facility, that is more similar than not to the Project based on any one or more of the following elements: size, value, scope, technical complexity, geography, usage and risk profile.

“Site” means, at any time:

a. the Right-of-Way;
b. any Additional Right-of-Way;
c. any Permit Areas in respect of which Developer holds Permits at that time; and
d. any Temporary Properties in respect of which Developer owns or holds Temporary Property Rights at that time.

“Small Business and Workforce Goals” has the meaning given to it in Section 6.1 of Schedule 15 (Federal and State Requirements).

“Snow and Ice Control Commencement Date” has the meaning given to it in Section 3 of Part 3 of Schedule 3 (Commencement and Completion Mechanics).

“Snow and Ice Control Equipment” has the meaning given to it in Section 11.6 of Schedule 11 (Operations and Maintenance Requirements).

“Snow and Ice Control Plan” means the plan described in Section 9.3 of Schedule 11 (Operations and Maintenance Requirements).

“Snow and Ice Control Services” means the snow and ice control services as described in Section 11 of Schedule 11 (Operations and Maintenance Requirements).

“Snow Route” means the documented configuration and path(s) traversed by a snowplow or Spreader documented in Developer’s Snow and Ice Control Plan.

“Special Events” means events expected to produce higher than average traffic on the I-70 East Corridor.

“Special Permit” means a Permit issued by CDOT to permit a Person with a right under Law to have access to the Right-of-Way and any Additional Right-of-Way for a purpose which does not include carrying out any excavation in order to exercise that right.

“Special Provisions” means Sections 36, 46.1 and 53.

“Specialist Inspections” means inspections of specified Elements or components for which testing, special tools or equipment are necessary, including inspections required to be undertaken in accordance with Section 8.4 of Schedule 11 (Operations and Maintenance Requirements).

“Specified Additional Insured” means:

a. each Indemnified Party;
b. any Railroad, including its officers, directors and employees,
to the extent required to be treated as an additional insured under any RRA;

c. any Utility Owner, including its officers, directors and employees, to the extent required to be treated as an additional insured under any URA, and Sprint;

d. any Lender, to the extent required to be an additional insured under any Financing Document; and

e. any other Person as and when agreed by the Parties or otherwise reasonably required by the Enterprises.

“Spreader” means a vehicle capable of spreading salt, de-icers and anti-icers.

“Sprint” has the meaning given to it in Section 4.1.3 of Schedule 10 (Design and Construction Requirements).

“Sprint Reimbursement Agreement” has the meaning given to it in Section 4.1.3 of Schedule 10 (Design and Construction Requirements).

“Sprint Work Order” has the meaning given to it in Section 4.1.3 of Schedule 10 (Design and Construction Requirements).


“Standard Specifications” means the CDOT Standard Specifications.

“State” means the State of Colorado.

“State Sales Tax” has the meaning given to it in Section 30.1.3.b.

“Storm Drain” means a network of pipes that connects inlets, manholes, and other drainage features to an outfall.

“Subcontract” means any contract (at any tier) entered into by Developer, the Construction Contractor, the O&M Contractor or a Subcontractor including a Supplier with one or more third parties directly in connection with the carrying out of the Work or any of Developer’s other obligations under this Agreement.

“Subcontractor” means any party, other than Developer, to a Subcontract.

“Subcontractor Breakage Costs” means Losses that have been or will be reasonably and properly incurred by Developer under a Principal Subcontract as a direct result of the termination of this Agreement (and which Losses shall not include lost profit or lost opportunity, but may, for certainty, include payment to a Principal Subcontractor for work performed prior to the Termination Date, but not yet paid for by Developer), but only to the extent that:

a. the Losses are incurred in connection with the Project and in respect of the Work required to be performed by Developer, including:

i. any materials or goods ordered or Subcontracts placed that cannot be cancelled without such Losses being incurred;

ii. any expenditure incurred in anticipation of the performance or the completion of Work in the future; and

iii. the cost of demobilization including the cost of any
the Losses are incurred under arrangements and/or agreements that are consistent with terms that have been entered into in the ordinary course of business and on an arm’s length basis, and that otherwise comply with this Agreement; and

c. Developer and the relevant Principal Subcontractor have each used their Reasonable Efforts to mitigate such Losses.

“Substantial Completion” means the satisfaction of all Substantial Completion Conditions, as confirmed by the Enterprises’ issuance of the Substantial Completion Certificate.

“Substantial Completion Certificate” has the meaning given to it in Section 5(a) of Part 5 of Schedule 3 (Commencement and Completion Mechanics).

“Substantial Completion Conditions” has the meaning given to it in Section 1 of Part 5 of Schedule 3 (Commencement and Completion Mechanics).

“Substantial Completion Date” has the meaning given to it in Section 5(a) of Part 5 of Schedule 3 (Commencement and Completion Mechanics).

“Substantial Completion Deduction Amount” means the amount calculated in accordance with Section 1 of Part 1 of Schedule 6 (Performance Mechanism).

“Substantial Completion Milestone Payment” means the Milestone Payment payable in respect of the achievement of Substantial Completion.

“Substantial Completion Payment” has the meaning given to it in Section 3(b) of Schedule 5 (Milestone Payments).

“Substantial Completion Punch List” has the meaning given to it in Section 2(b) of Part 7 of Schedule 3 (Commencement and Completion Mechanics).

“Substantial Completion Punch List Items” has the meaning given to it in Section 2(b) of Part 7 of Schedule 3 (Commencement and Completion Mechanics).

“Supervening Event” means any:

a. Relief Event;

b. Compensation Event; or

c. Appendix B Parcel Unexpected Hazardous Substances Event to the extent that it does not constitute a Compensation Event.

“Supervening Event Submission” means any Preliminary Supervening Event Submission or any Detailed Supervening Event Submission.

“Supervening Event Notice” has the meaning given to it in Section 15.1.2.a.

“Supplemental Indenture” means the Supplemental Trust Indenture between BE and the BE Trustee, amending and supplementing the Master Indenture, to be entered into in accordance with Section 2.3(e)(i) of Schedule 1 (Financial Close).

“Supplied Survey Data” means the survey data for the Construction Work identified in the Reference Documents.

“Supplier” means a Subcontractor that primarily provides goods and/or materials, but
not services, under the terms of its Subcontract.

“Table 6A.1” means Table 6A.1 set out in Appendix A to Schedule 6 (Performance Mechanism).

“Table 6A.2” means Table 6A.2 set out in Appendix A to Schedule 6 (Performance Mechanism).

“Target” means, in respect of an Element, the condition of such Element specified in the “Target” column in the Performance and Measurement Tables (as updated in accordance with Schedule 11 (Operations and Maintenance Requirements)).

“Tax” means any Federal, State, local or foreign income, margin, gross receipts, sales, use, excise, transfer, consumer, license, payroll, employment, severance, stamp, business, occupation, premium, windfall profits, environmental (including taxes under Section 59A of the Internal Revenue Code of 1986), customs, permit, capital stock, franchise, profits, withholding, social security (or similar), unemployment, disability, real property, personal property, registration, value added, alternative or add-on minimum, estimated or other tax, levy, impost, duty, fee or charge imposed, levied, collected, withheld or assessed at any time, whether direct or indirect, relating to, or incurred in connection with, the Project, the performance of the Work, the Milestone Payments, Performance Payments, other compensation or act, business, status or transaction of any Developer-Related Entity, including any interest, penalty or addition thereto, in all cases whether disputed or undisputed.

“Technical Deliverable” means any Deliverable that Developer is required to submit pursuant to Schedules 8 (Project Administration), 10 (Design and Construction Requirements), 11 (Operations and Maintenance Requirements), 12 (Handback Requirements), 14 (Strategic Communications), 17 (Environmental Requirements) and 18 (Right-of-Way).

“Technical Panel” means the dispute resolution panel of such name to be established pursuant to Section 5 of Schedule 25 (Dispute Resolution Procedure).


“Technical Requirements” means the obligations of, and any requirements to be satisfied by, Developer under any of Schedules 8 (Project Administration), 9 (Submittals), 10 (Design and Construction Requirements), 11 (Operations and Maintenance), 12 (Handback Requirements), 17 (Environmental Requirements) and 18 (Right-of-Way) and Table 6A.1 and Table 6A.2.

“Temporary Easement” means any temporary easement in an area that is outside the Right-of-Way or any Additional Right-of-Way, but which is required for performing the Construction Work within the Right-of-Way or any Additional Right-of-Way.

“Temporary ROW Easement” means any temporary easement in an area that is part of the Right-of-Way or any Additional Right-of-Way.

“Temporary Property” means:

a. Temporary Easements; and

b. other areas not within the Right-of-Way or any Additional Right-of-Way in which Developer is performing Work for a temporary period, such as temporary Construction Work.
sites, lay down areas, staging areas, storage areas, stockpiling areas, earthwork material borrow sites, equipment parking areas and similar areas.

“Temporary Property Rights” means, in respect of any Temporary Property, any right or interest in, or in respect of, such Temporary Property.

“Term” has the meaning given to it in Section 4.2.

“Termination Amount” means, with respect to any termination of this Agreement prior to the Expiry Date, the amount of compensation, if any, owing from the Enterprises to Developer as determined pursuant to this Agreement.

“Termination by Court Ruling” means the issuance of a final, non-appealable court order by a court of competent jurisdiction:

a. to the effect that this Agreement is void and/or unenforceable, or impossible to perform in its entirety;

b. to the effect that either of the Enterprises lacked the authority to execute, deliver and/or perform this Agreement;

c. permanently enjoining or prohibiting performance or completion of a material portion of the Work;

d. requiring the Enterprises or CDOT, individually, or in concert with one another and/or the FHWA, to undertake additional or supplemental evaluations, studies or other work under NEPA or other Law that, in the Enterprises’ discretion, is impracticable in light of the purpose and intent of this Agreement; or

e. upholding the binding effect on Developer or the Enterprises and/or CDOT of a Change in Law that causes impossibility of performance of a fundamental obligation by Developer or the Enterprises under this Agreement or impossibility of exercising a fundamental right of Developer or the Enterprises under this Agreement.

“Termination Date” means the effective date of any early termination of this Agreement as determined pursuant to Schedule 1 (Financial Close) or Sections 33.1.2 through 33.1.7, as applicable.

“Termination Deduction Amount” means, without double-counting, any:

a. accrued Monthly Construction Closure Deductions, Construction Goal Deductions, Monthly Operating Period Closure Deductions, Monthly Noncompliance Deductions and Operations Goal Deductions that, as of the Termination Date, have not been taken into account in the calculation of any payment actually made to Developer by the Enterprises prior to the Termination Date; and

b. any other amount that the Enterprises are entitled to set-off against the Termination Amount pursuant to Section 5(a) of Part 3 of Schedule 4 (Payments).

“Termination for Convenience” has the meaning given to it in Section 33.1.2.a.

“Termination for Extended Events” has the meaning given to it in Section 33.1.6.a.
“Termination Insurance Proceeds” means all proceeds from insurance payable to Developer under any Available Insurance coverage, or that should otherwise be collectible by Developer from that portion of the Available Insurance that is required to be maintained by Developer pursuant to Section 25 and Schedule 13 (Required Insurances), in any such case on or after the Termination Date.

“Termination Notice” means a notice of termination issued pursuant to Section 33.1.

“Test” or “Testing” means the procedure and method of acquiring and recording physical data and comparing it to set standards and submitting a statement to such conditions or operations as will lead to its Acceptance or rejection (deficiency, defective condition, nonconformance) of the item.

“Third Handback Inspection Report” means the report prepared by Developer in accordance with Sections 3.11.a.ii and 3.11.b of Schedule 12 (Handback Requirements).

“Third Party Agreements” means:

a. the URAs;

b. the RRAs;

c. the Denver IGA;

d. the E-470 Installation Agreement;

e. the E-470 TSA;

f. the DPS MOA;

g. the Cover Maintenance Agreement; and

h. any agreement that is designated as a Third Party Agreement by the Enterprises in a notice delivered pursuant to Section 8.5.2.a, in each case as amended or modified pursuant to Section 8.5.2.b.

“Third Party Intellectual Property” means any Intellectual Property used or applied by Developer or any Developer-Related Entity in connection with the Project or the Work which is owned by any Person other than the Enterprises, CDOT or a Developer-Related Entity.

“Third Party Release of Hazardous Substances” means any Release of Hazardous Substances on, in, under, from or in the vicinity of the Site caused by any Person that is not a Developer-Related Entity, either Enterprise or CDOT, which Release:

a. occurs:

i. with respect to any ROW Parcel, after the Setting Date; and

ii. with respect to any Additional ROW Parcel, on or after its Project License Start Date; and

b. is required to be investigated, removed, treated, stored, transported, managed and/or remediated pursuant to Law, any Governmental Approval or Developer’s obligations under this Agreement, excluding any such Release to the extent such results in the presence of Hazardous Substances in groundwater.

“Threshold Zone” means the length of roadway between the Portal and the Transition Zone.

“TIFIA Betterments” means all betterments in a financial term of the TIFIA Financing as compared to the Baseline TIFIA Term Sheet, net of any adverse changes in financial terms as compared to the Baseline TIFIA Term Sheet that are required by the Build America Bureau other than as a condition of accepting a change in terms proposed by Developer or made in response to Developer's financial condition or plan.

“TIFIA Event” means, at any time after the issuance of the Notice of Award, either:

a. the Build America Bureau decides not to, or is unable to, provide credit assistance to Developer:
   i. in an amount at least equal to the lesser of:
      A. 33% of reasonably anticipated “Eligible Project Costs” (as defined in 23 U.S. Code § 601(a)(2)); or
      B. if the TIFIA Loan does not receive an “Investment Grade Rating”, the amount of the “Initial Senior Obligations” (as such terms are defined in the Baseline TIFIA Term Sheet),
   in each case as determined by reference to the Preferred Proposer’s Proposal; or
   ii. other than with respect to TIFIA Betterments to the extent such are, in aggregate, positive, on terms materially consistent with the terms of (or, with respect to Key Ratios, identical to or more favorable to Developer than), the Baseline TIFIA Term Sheet; or
b. after the Agreement Date, the Build America Bureau fails to work diligently and reasonably towards achieving Financial Close by the Financial Close Deadline (including unreasonable negotiation),

provided that neither of the events referred to in paragraphs a. or b. of this definition shall be deemed to be a TIFIA Event if:

c. the Preferred Proposer, Developer or any other Developer-Related Entity failed to comply with the requirements of Section 3.3 of Part B of the ITP or otherwise sought to achieve TIFIA Betterments on its own behalf or on behalf of its Lenders;

d. Developer has failed to use Reasonable Efforts to achieve Financial Close, which Reasonable Efforts shall include:
   i. complying with Build America Bureau policy requirements to the extent publicly disclosed or of which Developer is otherwise aware;
   ii. negotiating in good faith mutually agreeable terms and conditions with the Build America Bureau, including by making commercially reasonable concessions in connection with concessions by the

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iii. furnishing all required information and credit ratings in a timely manner; or
e. such event arises as a result of any breach of Law, Governmental Approval or this Agreement, fraud, willful misconduct, criminal conduct, recklessness, bad faith or negligence by or of the Preferred Proposer or any Developer-Related Entity.

“TIFIA Financing” means any debt financing to be provided by the US DOT pursuant to TIFIA that is assumed in the Base Financial Model.

“TIFIA Loan” means a loan from the US DOT pursuant to the federal credit assistance program established pursuant to TIFIA.

“TIFIA Loan Agreement” has the meaning given to it in Section A of Annex A to the Lenders Direct Agreement entered into on or about the Financial Close Date.

“Tolled Express Lane” means the lanes on the I-70 Mainline where operational strategies are proactively implemented and managed in response to changing conditions.

“Tow Plow” means a snow plow blade mounted on a ballasted trailer that is towed behind a conventional plow or combination plow/spreader truck, where controls in the towing vehicle deploy the tow plow into an adjacent lane, permitting two lanes to be plowed by a single tow vehicle.

“Transferrable Assets” means all Assets, including all transferrable warranties with respect to such Assets, except:

a. any Asset that falls within paragraphs c., d., e. or f. of the definition of Assets in this Part A of Annex A (Definitions and Abbreviations) that:

i. is not affixed to any Element, the Right-of-Way or any Additional Right-of-Way; and

ii. to the extent customarily located or used on any part of the Site in connection with the Project:

A. is not owned by Developer;

B. was not purchased by another Developer-Related Entity primarily or exclusively funds received, directly or indirectly, from the Enterprises; and

b. any Temporary Properties, and any buildings located on such properties.

“Transition Zone” means the length of roadway between the Threshold Zone and the Interior Zone and which has variable illumination depending upon the illumination in the Threshold Zone to allow adaption to the Interior Zone illumination, and the length of which is determined by the posted vehicle speed.

“Transportation Commission” has the meaning given to it in the Recitals.

“Transportation Demand Model” means a program that encompasses tools to help with traffic congestion mitigation by offering alternatives to the single occupant vehicle.

“Transportation” means, from time to time, the then current plan that satisfies the
“Management Plan” means requirements of Section 2.2.3 of Schedule 10 (Design and Construction Requirements) and has been submitted by Developer and Approved by the Department pursuant to Schedule 10 (Design and Construction Requirements).

“Travel Time Indicators” means the system of antennas and readers that detect toll tag transponders in vehicles.

“Ultimate” has the same meaning as given to the Preferred Alternative.

“Unavailable Term” means any Insurance Term that, at the time an Insurance Policy is obtained or renewed:

a. is not available to Developer in the worldwide insurance market from Eligible Insurers on terms required by this Agreement; or

b. is not generally being incorporated in insurance procured in the worldwide insurance market from Eligible Insurers by contractors in relation to transportation related infrastructure projects in the United States due to the level of the insurance premium payable for insurance incorporating such Insurance Term,

provided that, for certainty, an Unavailable Term shall not include any risk or peril that is Uninsurable.

“Unexcused Railroad Delay” means:

a. any breach of a RRA by a Railroad; or

b. to the extent not otherwise constituting such a breach:

i. any unexcused delay (as determined by reference to the relevant RRA) by a Railroad in performing any work required to be performed by it, or in reviewing or approving any Deliverable for Third Party Review (as such term is defined in Schedule 9 (Submittals)) required to be reviewed or approved by it, under the relevant RRA; or

ii. any unreasonable withholding by any Railroad with relevant jurisdiction under the terms of a RRA or otherwise of the issuance or renewal of any Permit necessary for the performance of the Work.

“Unexcused Utility Owner Delay” means:

a. any breach of a URA or Utility Work Order by a Utility Owner; or

b. to the extent not otherwise constituting such a breach:

i. any unexcused delay (as determined by reference to the relevant URA and/or relevant Utility Work Order) by a Utility Owner in performing any work required to be performed by it, or in reviewing or approving any Deliverable for Third Party Review (as such term is defined in Schedule 9 (Submittals)) required to be reviewed or approved by it, under the relevant URA and/or Utility Work Order; or

ii. any unreasonable withholding by any Utility Owner
with relevant jurisdiction under the terms of a URA or otherwise of the issuance or renewal of any Permit necessary for the performance of the Work, provided that, for certainty, references in this definition to:

   c. any “URA” shall include any Sprint Reimbursement Agreement; and
   d. a “Utility Work Order” shall include any Sprint Work Order; and
   e. any breach of a Utility Work Order in paragraph a. of this definition shall, as it applies to a Sprint Work Order, mean any failure by Sprint to comply with the terms specified in such Sprint Work Order that apply to Sprint notwithstanding it is not a party to such Sprint Work Order.

“Unexpected Endangered Species” means any animal or plant species listed as threatened or endangered under and subject to an applicable threatened or endangered species Law found at the Right-of-Way, or at any Permit Areas (excluding Developer-risk Permit Areas) in respect of which Developer holds a Permit, the temporary, continual or habitual presence of which on the Right-of-Way or any such Permit Area was not Known or Knowable at the Setting Date.

“Unexpected Geological Conditions” means any subsurface or latent geological conditions encountered at the exact bore hole locations identified in:

   a. the boring logs set out in Appendices B and D1 of the Final Preliminary Subsurface Investigation Report I-70 East Corridor Project Partial Cover Lowered Alternative with Managed Lanes Options Brighton Boulevard to Chambers Road Denver, Colorado CDOT Project No: FBR 0709-234 (19631) prepared by Yeh and Associate, Inc. dated September 21, 2015; and
   b. the boring logs set out in Appendix C of the Preliminary Subsurface Investigation Report for Partial Cover Lowered (PCL) Alternative I-70 East Corridor EIS CDOT Region 6 prepared by Yeh and Associates, Inc. dated October 31, 2012; and
   c. the boring logs set out in Appendix B of the Addendum Final Preliminary Subsurface Investigation Report I-70 East Corridor Project Partial Cover Lowered Alternative with Managed Lanes Options Brighton Boulevard to Chambers Road Denver, Colorado CDOT Project No: FBR 0709-234 (19631) prepared by Yeh and Associate, Inc. dated June 9, 2016,

in each case that differ materially from those conditions indicated in such boring logs for such bore hole locations, which conditions were not Known or Knowable at the Setting Date.

“Unexpected Governmental Approval Delay” means, in the event that:

   a. the Enterprises have complied with their obligations under Section 8.4.4.a; and
   b. in order so to comply, the Enterprises were, pursuant to paragraph a. or paragraph b. of the definition of Reasonable Efforts in this Part A of Annex A (Definitions and
any resulting unusual and unreasonable delay by a Governmental Authority in issuing, agreeing to modify, renewing or extending any Governmental Approval or Permit that would have been avoided if the Enterprises had taken the relevant action referred to in paragraph b. of this definition.

"Unexpected Groundwater Contamination Condition" means, in respect of groundwater present in or under any part of the Right-of-Way and any Permit Areas in respect of which Developer holds a Permit (other than any Developer-risk Permit Area) which groundwater is ultimately subject to discharge through any single discharge point pursuant to an applicable Governmental Approval, any Hazardous Substance contamination in such groundwater at concentration levels that are required to be investigated, removed, treated, stored, transported, managed or remediated pursuant to Law or Developer’s obligations under this Agreement, as and to the extent such contamination and concentration levels are established at such single discharge point pursuant to Section 23.4.4 of Schedule 17 (Environmental Requirements), excluding any such contamination:

a. by a substance identified in the “Chemical Name” column in Appendix C (Groundwater Benchmark Concentrations) of Schedule 17 (Environmental Requirements) at concentration levels at or below the applicable value set out in the “Value” column in that Appendix C; or

b. to the extent such contamination constitutes a Developer Release of Hazardous Substances.

"Unexpected Groundwater Contamination Event" means:

a. in respect of any single Groundwater Contamination Event Period, the encountering, discovery and/or continued existence (as applicable) of, collectively, all Unexpected Groundwater Contamination Conditions during such period which conditions require temporary treatment or remediation during the Construction Period as part of the performance of the Construction Work; and

b. during both the Construction Period and the Operating Period the encountering or discovery of, collectively, all Unexpected Groundwater Contamination Conditions which conditions require permanent and ongoing treatment or remediation pursuant to Law or Developer’s obligations under this Agreement during the Operating Period and to enable Developer to perform O&M Work After Construction.

"Unexpected Hazardous Substances" means any Hazardous Substances (including soil or surface water contaminated with Hazardous Substances) present on, in or under any part of the Right-of-Way, or any Permit Areas in respect of which Developer holds a Permit, at concentration levels or in quantities that are required to be investigated, removed, treated, stored, transported, managed or remediated pursuant to Law or Developer’s obligations under this Agreement, excluding any such Hazardous Substances:

a. present in any groundwater;
b. present in any soil that (for certainty, absent any treatment) meets criteria for reuse, disposal or release on-Site:
   i. under Law;
   ii. pursuant to any Permit or Governmental Approval; or
   iii. in accordance with the Materials Management Plan and the Beneficial Reuse and Materials Management Plan,

   including, for certainty, any such Hazardous Substances that meet such criteria but which cannot be, or are not, reused, disposed of or released on-Site due to:
   iv. there being no available on-Site location to so reuse, dispose of or release such materials; or
   v. any action or decision by or of any Developer-Related Entity;

c. present on, in or under any Developer-risk Permit Area;

d. present in any “Near Surface Soil” (as defined in the Beneficial Reuse and Materials Management Plan) west of Colorado Boulevard;

e. required to be investigated, removed, treated, stored, transported, managed and/or remediated by either Party in complying with its Property Management obligations pursuant to Section 2.2 of Schedule 18 (Right-of-Way);

f. present on or in:
   i. any building, bridge or structure, including any subsurface structure or facility connected to any such building, bridge or structure; or
   ii. any underground storage tank registered with the Colorado Department of Labor and Employment, Division of Oil and Public Safety; or

g. to the extent such constitutes a:
   i. Developer Release of Hazardous Substances;
   ii. Enterprise Release of Hazardous Substances; or

“Unexpected Historically Significant Remains” means any antiquities (including structures), fossils, coins, articles of value, cultural artifacts, human burial sites and remains and other similar remains of archaeological, historical, cultural or paleontological interest on or under any part of the Right-of-Way, or of any Permit Areas (excluding Developer-risk Permit Areas) in respect of which Developer holds a Permit, which were not Known or Knowable at the Setting Date.

“Unexpected Utility Condition” means any Utility present on the Right-of-Way, or on any Permit Areas (excluding Developer-risk Permit Areas) in respect of which Developer holds a Permit, that was not identified or was incorrectly shown, identified or described in the Utility Data, in each case excluding:

a. any Utility to the extent it was Known or Knowable, which for
such purposes shall be deemed to include any Utility that:

i. is located at or less than 10 feet distant from the horizontal centerline indicated therefor in the Utility Data (without regard to vertical location); and/or

ii. has an actual nominal diameter (excluding casings and any other appurtenances) within 12 inches of the size indicated in the Utility Data;

b. any Utility installed on any part of the Right-of-Way after the Project License Start Date, or on any Permit Area after Developer secured a Permit providing access and/or use to or of such area; and

c. any Service Line.

“Unexpected Utility Condition Event” means the encountering or discovery of any Unexpected Utility Condition.

“Uniform Act” means the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act, P.L. 91-646.

“Uninsurable” means a risk or peril, at the time an Insurance Policy is required to be obtained or renewed:

a. for which Insurance Policies are not available to Developer in the worldwide insurance market from Eligible Insurers on terms required by this Agreement; or

b. that is not generally being insured against in insurance procured in the worldwide insurance market from Eligible Insurers by contractors in relation to transportation-related infrastructure projects in the United States due to the level of the insurance premium payable for insuring such risk.

“unreasonably withheld” has the meaning given to it in Section 2.2.2.a.

“UPRR” means Union Pacific Railroad Company.

“UPRR Crossing” means the existing and/or proposed crossing by the UPRR Railroad through the I-70 East corridor on the Right-of-Way as described in Section 10.1.2 of Schedule 10 (Design and Construction Requirements).

“UPRR Pepsi Lead Crossing” means the existing and/or proposed crossing of Brighton Boulevard by the UPRR Railroad through the I-70 East corridor on the Right-of-Way as described in Section 10.1.3 of Schedule 10 (Design and Construction Requirements).

“UPRR RRA” means the railroad agreement with respect to the UPRR Crossing, the UPRR Pepsi Lead Crossing and the UPRR York Street Crossing among CDOT, the City of Denver and UPRR in relation to the Project, a draft of which agreement was provided to the Preferred Proposer as one of the Reference Documents numbered 29.10.10.03.

“UPRR Work” means all duties and services to be furnished and provided by the UPRR as required by the UPRR RRA, as applicable.

“UPRR York Street Crossing” means the existing and/or proposed crossing of York Street by the UPRR Railroad through the I-70 East corridor on the Right-of-Way as described in Section 10.1.4 of Schedule 10 (Design and Construction Requirements).
“URA” means:

a. the utility relocation agreements (copies of each of which were provided in the Reference Documents) between CDOT and each of the Publicly Owned Utilities and the Private Utility Owners (other than Sprint); and

b. any Sprint Reimbursement Agreement.

“US DOT” means the United States Department of Transportation.

“Useful Life” means, for an Element, the period following its first construction or installation, or following its last reconstruction, rehabilitation, restoration, renewal or replacement, until the Element will next require reconstruction, rehabilitation, restoration, renewal or replacement.

“Useful Life Baseline Requirement” means, for any Renewal Element, the number of years specified in the “Useful Life” column for such Renewal Element in Appendix B to Schedule 12 (Handback Requirements).

“Useful Life Baseline Requirements Table” means the table set out in Appendix B to Schedule 12 (Handback Requirements) (as updated in accordance with Section 6.1.4 of Schedule 11 (Operations and Maintenance Requirements)).

“User” means any person that is on or about the Project or any portion thereof, or is otherwise making use of the Project for any purpose.

“Utility” means a privately, publicly or cooperatively owned line, facility and/or system for producing, transmitting or distributing communications, cable television, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, or any other similar commodity including:

a. the necessary appurtenances to any such line, facility and/or system; and

b. any Service Line connecting directly to any such line, facility and/or system, regardless of the ownership of such Service Line,

provided that, for certainty, stormwater facilities, irrigation ditches, Intelligent Transportation Systems, Variable Message Signs, video and video detection systems, traffic signals and street lighting shall not constitute “Utilities”.

“Utility Betterment” subject to Section 4.1.4 of Schedule 10 (Design and Construction Requirements), has the meaning given to “Betterment” in the applicable URA.

“Utility Data” means the Utility Drawings, the Utility Matrix, pothole log, manhole tabulation and other Utility information provided in the Reference Documents.

“Utility Drawings” means the Utility plan design sheets provided in the Reference Documents, as updated from time to time by Developer pursuant to Section 4 of Schedule 10 (Design and Construction Requirements).

“Utility Matrix” means the Construction Work “Utility Matrix” provided in the Reference Documents, as updated from time to time by Developer pursuant to Section 4.3.2.c of Schedule 10 (Design and Construction Requirements).

“Utility No-Conflict Close Out Form” means the form provided in Appendix A of Section 4 to Schedule 10 (Design and Construction Requirements).

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“Utility Owner” means the owner of a Utility.

“Utility Permit” means a Permit issued by CDOT to permit a Utility Owner with a right under Law to have access to the Right-of-Way and any Additional Right-of-Way in order to exercise that right.

“Utility Relocation” subject to Section 4.1.4 of Schedule 10 (Design and Construction Requirements), has the meaning given to “Relocation” in the applicable URA.

“Utility Relocation Standards” subject to Section 4.1.4 of Schedule 10 (Design and Construction Requirements), has the meaning given to “Relocation Standards” in the applicable URA.

“Utility Work” means any portion of the Construction Work relating to Utility Relocations, Utility Betterments or Requested Relocations, including but not limited to the Activities listed in Section 4.2.9 of Schedule 10 (Design and Construction Requirements).

“Utility Work Order” subject to Section 4.1.4 of Schedule 10 (Design and Construction Requirements), has the meaning given to “Work Order” in the applicable URA and shall be substantially in the form provided in Appendix B of Section 4 to Schedule 10 (Design and Construction Requirements).

“Variable Message Sign” means the large dynamic display used for user alerts and notifications.

“Variable Toll Message Sign” means the static sign with electronic Variable Message Sign inserts that is utilized to display the specific tolls for each segment of the corridor.

“Warrantied Elements” means the Elements of the Construction Work to be maintained by the applicable Warranty Beneficiaries on and from the Final Acceptance Date (or, in the case of the elements referred to in paragraphs a. and b. of the definition of Cover Top O&M Work in this Part A of Annex A (Definitions and Abbreviations), from the end of the Landscape Warranty period (as described in Section 14.11 of Schedule 10 (Design and Construction Requirements)) in the areas depicted:

a. with respect to the City of Denver as a Warranty Beneficiary, as “Local Agency Operations & Maintenance Work” in Reference Document 29.11.01 and as “Planning Area 2” in the I-70 Cover Plans;

b. with respect to Denver Public Schools as a Warranty Beneficiary, as “Planning Area 1” in the I-70 Cover Plans; and

c. with respect to CDOT as a Warranty Beneficiary, as “Department Operations & Maintenance Work” in Reference Document 29.11.01.

“Warranties” has the meaning given to it in Section 9.4.1.

“Warranty Beneficiaries” has the meaning given to it in Section 9.4.2.a.

“Warranty Defects List” has the meaning given to it in Section 9.4.5.

“Warranty Period” has the meaning given to it in Section 9.4.3.

“Weekend” means the 48 hour period commencing on a Saturday at 12.00am and ending on the next Sunday at 11.59pm.

“WDP” has the meaning given to it in Section 5.1 of Schedule 15 (Federal and State
"Work" means all of the work and services and performance of obligations, or any of it, to be undertaken or provided by Developer pursuant to this Agreement, including the Construction Work and the O&M Work.

"Work Breakdown Structure" means the organized hierarchical division of Activities which shall be the basis for organizing all Work, as described in this Agreement. Requirements for the Work Breakdown Structure are set out in Schedule 8 (Project Administration).

"Work Product" means any document, drawing, report, plan, application, data, work product or other material or information, regardless of form, and including any draft specifically developed by Developer under the terms of this Agreement on or after the Agreement Date (and excluding, for certainty, any Proprietary Intellectual Property and any Third Party Intellectual Property incorporated therein).

"Workforce Development Goals" has the meaning given to it in Section 6.3 of Schedule 15 (Federal and State Requirements).

"Working Day" means any Calendar Day that is not a Saturday, a Sunday or Holiday.
Part B: Abbreviations

Except as otherwise specified herein or as the context may otherwise require, the following abbreviations set out below are provided as references for purposes of the Technical Requirements, Table 6A.1 and Table 6A.2 only:

“ABC” means aggregate base course.
“AC” means alternating current.
“ACL” means access control list.
“ADA” means Americans with Disabilities Act.
“AID” means automatic incident detection.
“AHJ” means Authority Having Jurisdiction.
“ALPR” means Automatic License Plate Recognition.
“AMCA” means Air Movement and Control Association.
“ANSI” means American National Standards Institute.
“APCD” means Air Pollution Control Division.
“APEN” means Air Pollution Emission Notice.
“ATM” means Active Traffic Management.
“ATR” means Automatic Traffic Recorders.
“AVI” means Automatic Vehicle Identification.
“AVL” means Automated Vehicle Locator.
“BACR” means Baseline Asset Condition Report.
“BMP” means Best Management Practices.
“CCD” means City and County of Denver.
“CCMS” means Command, Control, and Monitoring System.
“CCP” means Crisis Communications Plan.
“CCTV” means Closed Circuit Television.
“CDPHE” means Colorado Department of Public Health and Environment.
“CDPS” means Colorado Discharge Permit System.
“CDPS-SCP” means Colorado Discharge Permit System-Stormwater Construction Permit.
“CFD” means Computational Fluid Dynamics Model.
“CLOMR” means Conditional Letter of Map Revision.
“CMS” means cable management system.
“COTS” means conventional, off-the-shelf.
“CPCM” means Construction Process Control Manager.
“CPM” means Critical Path Method.
“CPW” means Colorado Parks and Wildlife.
“CRAL” means Construction of Relocation Acceptance Letter.
“CSL” means cross sonic log.
“CSP” means Colorado State Patrol.
“CTMC” means Colorado Transportation Management Center.
“CTMS” means Colorado Transportation Management Software.
“CUHP/EPA-SWM” means Colorado Urban Hydrograph Procedure/Environmental Protection Agency Storm Water Management Model.
“CWCP” means Construction Work Communications Plan.
“CWDM” means coarse wavelength division multiplexing.
“CVS” means Cover Ventilation System.
“DBE” means Disadvantaged Business Enterprise.
“DCS” means Document Control System.
“DPCM” means Design Process Control Manager.
“DRAL” means Design of Relocation Acceptance Letter.
“DRIRR” means Denver Rock Island Railroad.
“DTD” means Division of Transportation Development.
“DWDM” means dense wavelength division multiplexing.
“ECS” means Erosion Control Supervisor.
“ECWP” means Environmental Compliance Work Plan.
“EDB” means extended detention basins.
“EDP” means electrical distribution panels.
“EIS” means Environmental Impact Statement.
“EM” means Environmental Manager.
“EPA” means Environmental Protection Agency.
“ERP” means Emergency Response Plan.
“ESAL” means 18-kip Equivalent Single Axle Loads.
“ESB” means Emerging Small Business.
“ETC” means Electronic Toll Collection.
“FCM” means fracture critical member.
“FDAS” means Fire Detection and Alarm System.
“FEE” means Fee interest or ownership of the fee simple estate in real property.
“FFFS” means Fixed Firefighting System.
“FMV” means Fair Market Value.
“GUI” means graphical user interface.
“GPS” means Global Positioning System.
“HBP” means hot bituminous pavement.
“HDPE” means high-density polyethylene.
“HGL” means hydraulic grade line.
“HLMR” means high load multi-rotational.
“HMA” means hot mix asphalt.
“HOV” means high occupancy vehicle.
“HVAC” means heating, ventilation, and air conditioning.
“IA” means Independent Assurance.
“IAR” means Interstate Access Request.
“IDQM” means Independent Design Quality Manager.
“IESNA” means Illumination Engineering Society North America.
“IGMP” means Internet Group Management Protocol.
“IMP” means Incident Management Plan.
“IQC” means Independent Quality Control, which for certainty is the same as “ICQC” as defined in the CDOT Field Materials Manual.
“IQCF” means the Independent Quality Control firm or function group, as described in Section 6.2.5.b of Schedule 8 (Project Administration).
“IQCM” means Independent Quality Control Manager.
“INWMP” means Integrated Noxious Weed Management Plan.
“IP” means Internet Protocol.
“IRI” means International Roughness Index.
“ISO” means International Organization for Standardization.
“ITS” means Intelligent Transportation Systems.
“IVR” means Interactive Voice Response.
“LCD” means Liquid Crystal Display.
“LED” means light emitting diode.
“LEP” means Limited English Proficient.
“LFD” means load factor design.
“LFR” means a load factor rating.
“LOMR” means Letter of Map Revision.
“LP” means Lighting Protection.
“LRFD” means load resistance factor design.
“LFR” means aggregate base course.
“LSOH” means low smoke, zero halogen.
“LUS” means Lane Use Signal.
“M-E” means mechanistic-empirical.
"MEP" means mechanical, electrical, and plumbing.
"MHCP" means Mile High Courtesy Patrol.
"MHT" means Methods of Handling Traffic.
"MMP" means Materials Management Plan (in the context of Construction Work, and otherwise as the context may provide).
"MMIS" means Maintenance Management Information System.
"MOCP" means Maintenance and Operations Communications Plan.
"MOT" means maintenance of traffic.
"MVRD" means Microwave Vehicle Radar Detection.
"MS4" means Municipal Separate Storm Sewer System.
"MSE" means mechanically stabilized earth.
"MTIP" means Materials Testing and Inspection Plan.
"MW" means megawatts.
"NCN" means Nonconformance Notice.
"NCHRP" means National Cooperative Highway Research Program.
"NCR" means Nonconformance Report.
"NDRD" means New Development Redevelopment.
"NEC" means National Electric Code.
"NEPA" means the National Environmental Policy Act.
"NIOSH" means National Institute for Occupational Safety and Health.
"NIST" means National Institute of Standards and Technology.
"NSBA" means National Steel Bridge Alliance.
"NTCIP" means National Transportation Communications for ITS Protocol.
"NTP" means Notice to Proceed.
"O&M" means Operations and Maintenance.
"OCR" means Optical Character Recognition.
"OJT" means On the Job Training.
"OMP" means Operations Management Plan.
"OMQMP" means O&M Quality Management Plan.
"OTIS" means Online Transportation Information System.
"PA" means Public Address.
"PC" means Process Control.
"PCCP" means Portland cement concrete pavement.
"PCM" means Project Communications Manager.
"PDA" means Pile Driving Analyzer.
"PE" means Permanent Easement.
"PIARC" means Permanent International Association of Road Congresses.
"PIP" means Public Information Plan.
"PLC" means programmable logic controller.
"PoE" means Power over Ethernet.
"PMP" means Project Management Plan.
"PNS" means Pacific Northwest Snow Fighters.
"POSS" means Point of Slope Selection.
"PQM" means Project Quality Manager.
"PSQF" means Permanent Stormwater Quality Facilities.
"PTFE" means polytetrafloroethylene.
"PTI" means Post-Tensioning Institute.
"PUC" means Public Utility Commission.
"PVC" means polyvinyl chloride.
"QC" means Quality Control.
"QMP" means Quality Management Plan.
"QMS" means Quality Management System.
"QRD" means Quality Records Database.
"RAP" means Recycled Asphalt Pavement.
“REC” means Recognized Environmental Condition.
“RFC” means Release for Construction.
“RFP” means Request for Proposals.
“RHM” means Recognized Hazardous Material.
“ROD” means Record of Decision.
“ROW” means Right-of-Way.
“RPM” means Reflective Pavement Markers.
“RTD” means Regional Transportation District.
“RTK” means Real Time Kinematic.
“RTM” means Requirements Traceability Matrix.
“RWIS” means Road Weather Information System.
“SAP” means Sampling Analysis Plan.
“SB” means Colorado Senate Bill.
“SCADA” means Supervisory Control and Data Acquisition.
“SCP” means Stormwater Construction Permit.
“SFF” means small form-factor pluggable.
“SMA” means stone matrix asphalt.
“SMFO” means Single-Mode Fiber Optic.
“SMP” means Safety Management Plan.
“SMVMS” means Side Mounted Variable Message Signs.
“SOLIT” means Safety of Life in Tunnels.
“SOV” means single occupancy vehicle.
“SPCC” means Spill Prevention Control and Countermeasures.
“TCP” means Temporary Traffic Control Plan.
“TDC” means Traffic Data Collection Unit.
“TDM” means Travel Demand Management.
“TE” means Temporary ROW Easement.
“TMOSS” means Terrain Modeling Survey System.
“TMP” means Transportation Management Plan.
“TOP” means Transportation Operations Plan.
“TSS” means total suspended solids.
“TTI” means Travel Time Indicators.
“UDFCD” means Urban Drainage and Flood Control District.
“UE” means Utility easements.
“UNCC” means Utility Notification Center of Colorado.
“UPRR” means Union Pacific Railroad.
“UPS” means Uninterruptible Power Supply.
“URA” means Utility Relocation Agreement.
“USFWS” means U.S. Fish and Wildlife Service.
“VA” means Voice Alarm.
“VCS” means ventilation control system.
“VFD” means Vacuum Fluorescent Display.
“VMS” means Variable Message Sign.
“VTMS” means Variable Toll Message Sign.
“WBS” means a Work Breakdown Structure.
“WDP” means Workforce Development Plan.
“WQCV” means Water Quality Capture Volume.