

**EXECUTION VERSION**

**COLORADO HIGH PERFORMANCE TRANSPORTATION ENTERPRISE  
(HPTE)**

- and -

**PLENARY ROADS DENVER LLC  
(THE CONCESSIONAIRE)**

**AMENDED AND RESTATED CONCESSION AGREEMENT**

for US 36 and the I-25 Managed Lanes

Dated February 25, 2014



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AMENDED AND RESTATED US 36 CONCESSION AGREEMENT

PARTIES

- (1) Colorado High Performance Transportation Enterprise ("HPTE"), a government owned business and a division of the Colorado Department of Transportation ("CDOT"); and
- (2) Plenary Roads Denver LLC, a Colorado limited liability company (the "Concessionaire").

RECITALS

- (A) On June 27, 2013 (the "Contract Date"), following the completion of a competitive procurement process commenced by HPTE on February 21, 2012, the Concessionaire was selected by HPTE to undertake the Project on and subject to the terms of the concession agreement for US 36 and the I-25 Managed lanes signed on the Contract Date.
- (B) As contemplated by Section 2.6(b) of the said concession agreement,
  - (1) by a letter dated October 4, 2013 the Concessionaire requested that the Financial Close Deadline Date be extended to October 11, 2013 and by a letter dated October 4, 2013 HPTE agreed to that request;
  - (2) by a letter dated October 11, 2013 the Concessionaire requested that the Financial Close Deadline Date be extended to December 20, 2013 and by a letter dated October 11, 2013 HPTE agreed to that request; and
  - (3) by a letter dated December 20, 2013 the Concessionaire requested that the Financial Close Deadline Date be extended to January 30, 2014 and by a letter dated December 20, 2013 HPTE agreed to that request.
- (C) HPTE and the Concessionaire agreed to Amendment No. 1 to the Concession Agreement, effective as of October 4, 2013 ("Amendment No. 1").
- (D) HPTE and the Concessionaire agreed to Amendment No. 2 to the Concession Agreement, effective as of December 27, 2013 ("Amendment No. 2").
- (E) HPTE and the Concessionaire agreed to Amendment No. 3 to the Concession Agreement, effective as of January 29, 2014, which included an extension of the Financial Close Deadline Date to February 21, 2014 ("Amendment No. 3").
- (F) HPTE and the Concessionaire agreed to Amendment No. 4 to the Concession Agreement, effective as of February 21, 2014, which included an extension of the Financial Close Deadline Date to February 28, 2014 ("Amendment No. 4," and together with Amendment No. 1, Amendment No. 2 and Amendment No. 3, the "Amendments").
- (G) HPTE and the Concessionaire now desire to amend and restate the said Concession Agreement, as amended by the extensions described above and as further amended by the Amendments in its entirety upon and subject to the terms and conditions of this Amended and Restated Concession Agreement (hereinafter referred to as this "Contract", this "Agreement" or this "Concession Agreement").

**PART 1: GENERAL PROVISIONS**

**1. INTERPRETATION OF THE CONTRACT**

**1.1 Definitions**

Unless otherwise provided in an individual Schedule to this Concession Agreement, the words and expressions listed in Schedule 1 shall have the meaning given to them in Schedule 1.

**1.2 Interpretation**

In this Contract, except where the context otherwise requires:

- (a) The masculine includes the feminine and vice-versa;
- (b) The singular includes the plural and vice-versa;
- (c) A reference to any Section, sub-Section, paragraph, Schedule, recital or annex:
  - (i) Within this Contract is a reference to such Section, sub-Section, paragraph, Schedule, recital or annex of and to this Contract; and
  - (ii) Within a Schedule or annex is a reference to a Section, sub-Section, paragraph, or annex to that Schedule,in each case except where expressly stated to the contrary;
- (d) Save where otherwise provided in this Contract, any reference to this Contract or to any other document shall include any permitted variation, amendment or supplement to this Contract and/or such other document;
- (e) Any reference to any enactment, order, regulation or other similar instrument shall be construed as a reference to the enactment, order, regulation or instrument as amended, replaced, consolidated or re-enacted;
- (f) A reference to a Person includes firms, partnerships and corporations and their successors and permitted assignees or transferees;
- (g) Headings are for convenience of reference only;
- (h) Words preceding "include," "includes," "including" and "included" shall be construed without limitation by the words which follow those words;
- (i) A reference to a matter having been "agreed or determined" shall mean that the Parties have agreed the matter in writing or that the matter has been determined pursuant to the Dispute Resolution Procedure;
- (j) Words not otherwise defined that have well-known technical or construction industry meanings are used in accordance with such recognized meanings; and
- (k) The Concessionaire further acknowledges and agrees that it has independently reviewed this Contract with legal counsel, and that the Concessionaire has the



requisite experience and sophistication to understand, interpret and agree to the particular language of this Contract. Accordingly, in the event of any ambiguity in or dispute regarding the interpretation of the provisions of this Contract, the terms of this Contract shall not be construed against the Person that prepared them.

**1.3 Obligations to be Performed and exercise of rights at Each Party's Sole Expense**

Subject to any express provisions to the contrary, the obligations of each Party are to be performed and the exercise by each Party of its rights, are at that Party's sole cost and expense.

**1.4 Conflicts**

In the event of any inconsistency or conflicts between any provisions of this Contract and any other Project Document, the provision of this Contract shall prevail. This Contract and the Schedules are all essential parts of this Contract as a whole, and a requirement occurring in any part of this Contract or the Schedules is a binding contractual obligation. If there are any inconsistencies between this Contract and the Schedules which cannot be reconciled by reading all parts of this Contract and of the Schedules as mutually explanatory of one another then:

- (a) This Contract shall prevail over any of the Schedules;
- (b) Section 1 of Schedule 5 shall prevail over the other sections of Schedule 5;
- (c) Schedule 5 shall prevail over Schedule 5A and over Schedule 5B;
- (d) HPTE's Requirements shall prevail over the Concessionaire's Proposals.

To avoid doubt, to the extent that the Concessionaire's Proposals meet or exceed the requirements of the other Contract Documents then the Concessionaire is bound to perform in accordance with the Concessionaire's Proposals.

**1.5 Reference Documents**

The documents included in the Reference Documents are for information only and do not become part of this Contract merely by having been listed at Schedule 5D. The purpose of the Reference Documents is only to be part of the definition of the Concessionaire's obligations under this Contract only to the extent that HPTE's Requirements specifically refer to particular parts of the Reference Documents. A cross-reference to one of the Reference Documents does not incorporate the whole of that document or any portion of it beyond the specific part referred to.

**1.6 Acceptance**

Where in this Contract a document, decision, proposal or any other thing must be put forward by the Concessionaire for "Acceptance" by HPTE, HPTE may only decline to Accept it if:

- (a) It does not fulfill any specific criteria set out in the provision which requires the Concessionaire to seek HPTE's Acceptance;
- (b) It is, or would result in, a failure to comply with any Law;
- (c) It is not otherwise in accordance with the requirements of this Contract;

- (d) It is not in accordance with Good Industry Practice; or
- (e) It would give rise to a material risk to the health or safety of any person.

### 1.7 Indexation

Where in this Contract a number is expressed to be "indexed" that means that its value will be changed on the first day of each Year by applying the following formula:

$$V_{new} = V_{old} \times \left(1 + \frac{(I_{new} - I_{old})}{I_{old}}\right)$$

Where

$V_{new}$  is the new value for the number for that Year.

$V_{old}$  is the value for the number in the immediately preceding Year.

$I_{new}$  is the value for CPI most recently published prior to the first day of that Year.

$I_{old}$  is the value for CPI published most recently prior to the first day of the second immediately preceding Year, or, in the case of the first occasion on which this calculation is carried out, the last value of CPI prior to July 1, 2012.

Provided that where  $I_{new}$  is less than or equal to  $I_{old}$  then no calculation shall be carried out and  $V_{new}$  shall be deemed to be equal to  $V_{old}$ .

If CPI shall not be published then such other index as shall replace or supersede CPI shall be used for indexation calculations. If CPI shall be published on more than one occasion in each Year then the value of CPI shall be used which is published closest to the anniversary of the last value of CPI published prior to July 1, 2012. If there shall be no direct replacement for CPI then the Parties shall seek to agree an alternative index (which may include subjecting a published index to an agreed adjustment or correction factor). If the Parties cannot agree then the issue shall be referred to the Dispute Resolution Procedure for a decision on which other index (subject to adjustments or corrections as necessary) most closely matches how CPI would have changed if it had continued to be published.

### 1.8 Related Parties

Except to the extent expressly provided otherwise in this Contract, as between HPTE and the Concessionaire, the Concessionaire shall be responsible for the acts and omissions of the Concessionaire Related Parties in relation to or connected with the Project as if they were the acts and omissions of the Concessionaire and HPTE shall be responsible as against the Concessionaire for the acts and omissions of the HPTE Related Parties in relation to or connected with the Project as if they were the acts and omissions of HPTE. The Concessionaire shall, as between itself and HPTE, be responsible for the selection of any Concessionaire Related Party.

**1.9 Unreasonable withholding of Consent etc.**

Where this Contract provides that a consent, approval or any like matter shall not be unreasonably withheld, then that consent, approval or like matter shall not be unreasonably withheld or delayed, nor shall it be granted only subject to the imposition of unreasonable conditions.

**1.10 Status of Amendment No.1 to the Concession Agreement**

To avoid doubt, the status of Amendment No. 1 to the Concession Agreement shall be governed by Section 9(b) of that amendment which is set out in full below for ease of reference (all references to capitalized terms not otherwise defined in Schedule 1 of this Contract shall have the meanings given to them in Amendment No. 1):

- (b) Upon occurrence of the Commencement Date,
  - (i) subject to the terms of Section 9(b)(iv)(B), this Amendment shall be superseded and replaced by the terms of the Concession Agreement (as though unamended by this Amendment), provided, however, that any funds due from HPTE to the Concessionaire pursuant to the provisions of Section 6 shall be paid pursuant to that Section;
  - (ii) all payments (apart from any amounts in respect of Compensation Events paid or due and payable under the terms of this Amendment (including payments made after the Commencement Date under Section 9(b)(iv)(B)) shall be treated as having been paid as Interim Capital Payments under Section 28 of the Concession Agreement for the period beginning on January 2014, and in particular, for the purposes of calculating the Maximum Interim Capital Payment under Section 28.2 of the Concession Agreement;
  - (iii) any Utility Works and Concessionaire Financed Early Works completed under this Amendment shall be treated as having been performed under the Concession Agreement as Phase 2 Construction Work; and
  - (iv) to the extent that any Utility Works remains outstanding under the terms of this Amendment, HPTE shall have the option, at its sole discretion and upon thirty (30) days' notice prior to the Commencement Date to the Concessionaire, to:
    - (A) have such outstanding Utility Works continue to be part of the Phase 2 Construction Work under the terms of the Concession Agreement, and all provisions of the Concession Agreement shall apply to the execution of such outstanding work; or
    - (B) have such outstanding Utility Works paid under the terms of Section 6 of this Amendment; provided, however, that if HPTE elects this option then all other provisions of the Concession Agreement as to Phase 2 Construction Work except for the payments hereunder shall apply, including the imposition, for example, of all of the insurance obligations under Schedule 17 of the Concession Agreement, as though not modified by this Amendment.

In the event HPTE fails to deliver such notice within the time period specified in this Section 9(b)(iv), HPTE shall be deemed to have elected subsection (A) of this Section 9(b)(iv).

**2. CONTRACT PERIOD, CONDITIONS PRECEDENT AND FINANCIAL CLOSE**

**2.1 Contract Date**

This Concession Agreement is amended and restated as of the Commencement Date, and shall be treated as having been effective as of the Contract Date.

**2.2 Contract Period**

The Contract Period will commence on the Commencement Date, and will end on the earlier to occur of the Termination Date or the Expiration Date.

**2.3 Concessionaire Responsibility for Project Financing**

- (a) The Concessionaire is solely responsible for obtaining and repaying all financing necessary to develop, design, construct, maintain and operate the Project, at its own cost and risk and without recourse to HPTE or any HPTE Related Party except as expressly permitted or specified in this Contract.
- (b) Except in the case of PABs issued by HPTE, each bond or promissory note evidencing Senior Debt and/or Subordinated Debt must include a conspicuous recital on its face to the effect that payment of the principal and interest under that instrument:
  - (i) Does not constitute a claim against CDOT's title to or other real property interest in the Project, the Site, the Managed Lanes and/or the US 36 General Purpose Lanes, HPTE's interest under this Contract or its interest and estate in and to the Project or any part thereof,
  - (ii) Is not an obligation of any HPTE or any HPTE Related Party, moral or otherwise, and
  - (iii) Neither the full faith and credit nor the taxing power of HPTE or of any HPTE Related Party is pledged to the payment of the principal or of the interest on the instrument.
  - (iv) In the case of PAB's issued by HPTE, each bond evidencing Senior Debt must include a conspicuous recital on its face to the effect that
    - (1) the PABs are special and limited obligations of HPTE, payable from and secured by the revenues and other amounts pledged under the relevant indenture, including the payments to be made by the Concessionaire under the loan agreement entered into between HPTE and the Concessionaire in connection with the loan of the proceeds from the sale of the PABs by HPTE to the Concessionaire and

- (2) the PABs do not constitute a debt, or a pledge of the faith and credit, of HPTE, the State or any political subdivision thereof, and the holders or owners of the PABs will have no right to have taxes levied by the State of any political subdivision of the State for the payment of the principal of, premium, if any, and interest on the PABs. HPTE has no taxing power.
- (c) No Funding Agreement may secure Senior Debt or Subordinated Debt that prohibits prepayment or defeasance in the event of a termination of this Agreement for any reason provided that this Section shall not preclude the imposition of customary breakage costs in the event of a prepayment or defeasance nor shall it preclude a requirement that prepayment or defeasance can only occur on the next date when payment under the Funding Agreement would otherwise fall due;
- (d) Neither HPTE nor any HPTE Related Party will have any liability whatsoever for payment of the principal sum under any Funding Agreement (except in the case of PABs issued by HPTE which are special and limited obligations of HPTE as described in Section 2.3(b)), any other obligations issued or incurred by the Concessionaire in connection with this Contract or the Project (except to the extent provided in the HPTE-Sub-Contractor Agreement), or any interest accrued thereon or any other sum secured by any Financing Assignment. HPTE's review of any Financing Assignments or other Funding Agreements is not:
  - (i) A guarantee or endorsement of the amount due under those documents, any other obligations issued or incurred by the Concessionaire in connection with this Contract, the Project, the Base Case Financial Model or any traffic and revenue study; nor
  - (ii) A representation, warranty or other assurance as to
    - (1) the ability of the Concessionaire to perform its obligations under the Funding Agreements or any other obligations issued or incurred by the Concessionaire in connection with this Contract or the Project, or
    - (2) the adequacy of the Toll Revenues to provide for payment under the Funding Agreements or any other obligations issued or incurred by the Concessionaire in connection with this Contract or the Project.
- (e) The provisions of this Section 2.3 shall apply to Senior Debt Conduit Loan Agreements, Phase 2 TIFIA Conduit Loan Agreements and to Subordinated Debt Conduit Loan Agreements in the same way that they apply to Funding Agreements, and to any Financing Assignment which secures amounts due under any Senior Debt Conduit Loan Agreement or any Phase 2 TIFIA Conduit Loan Agreement or any Subordinated Debt Conduit Loan Agreement.

**2.4 Financial Close Procedures**

- (a) During the period between the date of this Contract and the Commencement Date, the Concessionaire agrees to provide HPTE with updates as may be reasonably requested by HPTE, including supporting documentation, regarding the status of the

financing of the Project and of the fulfilment of the other conditions precedent to Financial Close and to the Commencement Date.

- (b) The Concessionaire agrees to provide HPTE
  - (i) Complete and transparent information regarding the marketing and pricing of PABs, including the provision to HPTE of the PABs offering documentation as it is developed;
  - (ii) The ability to participate in the PABs marketing and pricing process, each in advance of the Financial Close of the PABs; and
  - (iii) A draft of the Adjusted Proposal Financial Model which the Concessionaire intends to use at Financial Close (which shall be provided 30 Business Days in advance of Financial Close recognizing, to avoid doubt, that information in the draft Adjusted Proposal Financial Model in relation to matters such as pricing of PABs will be no more than estimates until the PABs are priced).
- (c) The Concessionaire shall provide to HPTE a complete set of the draft Funding Agreements (including all Senior Debt Conduit Loan Agreements, Subordinated Debt Conduit Loan Agreements and any Phase 2 TIFIA Conduit Loan Agreements) at least 30 Business Days prior to the projected date of Financial Close (insofar as such drafts exist at that time) so that HPTE may review them:
  - (i) To satisfy itself that they comply with the requirements of Section 2.3 and that any proposed Financing Assignment complies with Section 2.4(d); and
  - (ii) To ensure consistency with the draft Adjusted Proposal Financial Model.

The Concessionaire shall provide subsequent drafts of the Funding Agreements (including drafts of Funding Agreements which are first prepared later than 30 Business Days prior to the projected date of Financial Close) and of the Adjusted Proposal Financial Model to HPTE at the same time as those drafts are distributed to other parties for review.
- (d) The Concessionaire shall not, and shall procure that any Finco shall not, enter into any Senior Funding Agreement which does not comply with Section 2.3 or which is secured by a Financing Assignment which does not comply with Section 2.5(a).
- (e) The Concessionaire shall procure that the terms and conditions of all Senior Debt Conduit Loan Agreements, Phase 2 TIFIA Conduit Loan Agreements and Subordinated Debt Conduit Loan Agreements shall match the corresponding Senior Funding Agreements, the Phase 2 TIFIA Loan and Subordinated Funding Agreements (respectively) in all material respects, except to the extent necessary to reflect the back-to-back nature of the conduit loan agreements and to properly allocate interest payments and dividends to the relevant lender.
- (f) The Adjusted Proposal Financial Model will be submitted to HPTE prior to the proposed date of Financial Close, so that the parties may agree or it can be determined that the Adjusted Proposal Financial Model to be placed into Escrow after

the date of Financial Close accurately reflects the terms and conditions of the Funding Agreements and provides the functionality required for the operation of Schedule 11 and Schedule 14 and (to avoid doubt) that it includes the receipt by the Security Trustee of the amount referred to in paragraph 12 of Schedule 2A, and the calculation of the Actual Equity IRR shall include any Supplemental Contribution Amount and any Phase 2 Completion Success Fee (each as defined in the Master Security Agreement referred to in the Phase 1 TIFIA Loan AAR Agreement) as a distribution to equity.

- (g) The Adjusted Proposal Financial Model shall be revised to incorporate the HPTE Capital Payment or the Concessionaire Capital Payment as calculated pursuant to the Financial Close Adjustment procedures contained in Section 2.7.
- (h) Within two Business Days after Financial Close, the Concessionaire will deliver to HPTE an updated Financial Model Audit Letter from the Financial Model Auditor.
- (i) The Concessionaire shall deliver to the Escrow Agent as Escrow Documents, one (1) electronic copy on CD-ROM in Microsoft Excel 2007 (or any media/software that replaces this) of the Adjusted Proposal Financial Model and the updated Financial Model Audit Letter from the Financial Model Auditor, no later than ten (10) Business Days after the Adjusted Proposal Financial Model has been agreed or determined. The Adjusted Proposal Financial Model as placed into Escrow in this form will become the first version of the Base Case Financial Model for purposes of this Contract.
- (j) The Base Case Financial Model shall be subject to the requirements described in paragraphs 3.4, 3.5 and 3.6 of Schedule 11.

**2.5 Project Financing Contracts; HPTE's Rights, Protections and Obligations**

- (a) In order to achieve Financial Close, and subsequently from time to time during the Contract Period, the Concessionaire has the right, at its sole cost and expense, to enter into a Financing Assignment subject to the following requirements:
  - (i) No Person other than a Qualifying Institution is entitled to the benefits and protections afforded by a Financing Assignment, except that Senior Lenders or Fincos may be Persons other than Qualifying Institutions so long as:
    - (1) any Financing Assignment securing such Senior Debt made by such Person is held by a Qualifying Institution acting as Security Trustee, and
    - (2) in the case of Fincos, the Senior Debt Conduit Loan Agreements and Phase 2 TIFIA Conduit Loan Agreements comply with Section 2.4(e).

PABs may be issued, acquired and held by parties other than Qualifying Institutions so long as a Qualifying Institution acts as indenture trustee for the PABs;

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- (ii) The Concessionaire is prohibited from pledging or encumbering the whole of the Concessionaire's rights under this Contract to secure any indebtedness other than indebtedness in relation to the Project, and no Financing Assignment will be effective to secure any such indebtedness,
  - (1) That is issued by any Person other than the Concessionaire, any special purpose company that directly or indirectly owns the Concessionaire and has no assets except as are directly related to the Project (or the equity interests of the Concessionaire), or any special purpose subsidiary wholly owned by such company, or an issuer of PABs the proceeds of which are to be used solely for financing the performance of the Concessionaire's obligations under this Contract, or
  - (2) The proceeds of which are used in whole or in part for any purpose other than for the financing of the Project;
- (iii) No Financing Assignment or other instrument purporting to mortgage, pledge, encumber, or create a lien on or against the rights of the Concessionaire under this Contract will extend to or affect CDOT's title to or other property interest and estate in and to the Managed Lanes or the US 36 General Purpose Lanes or any interest of HPTE or any HPTE Related Party;
- (iv) HPTE will not have any obligation arising out of any Financing Assignment unless the Concessionaire and/or the Security Trustee have notified HPTE of the existence of such Financing Assignment and HPTE has entered into a Direct Agreement with the Security Trustee as contemplated hereunder;
- (v) All Financing Assignments shall contain an express term in which, without prejudice to the Direct Agreement, the Security Trustee on behalf of itself and the beneficiaries of the Financing Assignments acknowledges that:
  - (1) The Financing Assignment will give the Security Trustee, the Senior Lenders, the Subordinated Lenders and any Finco no greater rights to or interest in the Project than the Concessionaire has from time to time pursuant to this Contract;
  - (2) HPTE has no obligation to join in, execute or guarantee any Financing Assignment;
  - (3) Neither the Security Trustee nor the Senior Lenders nor the Subordinated Lenders nor any Finco will seek any damages or other amounts from HPTE or any HPTE Related Party for a breach of this Contract, except for the rights or claims which the Security Trustee or a Senior Lender or a Subordinated Lender or a Finco may have as a successor to the Concessionaire's interests by foreclosure or transfer in lieu of foreclosure;



- (vi) No Financing Assignment will grant any right to apply funds in the Handback Reserve Fund or in the Joint Insurance Account, except for the express purposes for which the reserve or account is established.
- (b) With respect to the Phase 1 TIFIA Loan, after the final disbursement under the Phase 1 TIFIA Loan and prior to the date the Phase 1 TIFIA Loan is assigned to the Concessionaire, HPTE agrees to make a payment to TIFIA that results in a Phase 1 TIFIA Loan debt service schedule that is materially the same as the schedule contained in the Base Case Financial Model.

**2.6 Financial Close Deadline Date and Outside Date**

Change to the Financial Close Deadline Date

- (a) At any time prior to the then-current Financial Close Deadline Date the Concessionaire may submit a notice in writing to HPTE asking HPTE to extend the Financial Close Deadline Date. Any such request shall specify any change to the Planned Full Services Commencement Date and the Full Services Commencement Longstop Date which the Concessionaire considers to be necessary as a consequence of the change to the Financial Close Deadline Date (giving a reasonably detailed explanation of how the new dates have been assessed) and confirm that the Financial Close Security will remain in full force and effect up to the proposed new Financial Close Deadline Date.
- (b) On receipt of any such request HPTE may, in its absolute discretion:
  - (i) Agree to the Concessionaire's request in accordance with its terms;
  - (ii) Discuss the matter and reach agreement with the Concessionaire in relation to any change to the Financial Close Deadline Date and the terms and conditions to apply in relation to any such change; or
  - (iii) Decline to agree to any such change without giving any reason for that decision.
- (b)(1) The Outside Date referred to in the Amendments is agreed to be March 14, 2014.

Failure to achieve the Commencement Date by the Financial Close Deadline Date

- (c) If the Commencement Date fails to occur by the Financial Close Deadline Date either party may terminate this Contract by written notice to the other and upon such a termination HPTE may draw the full amount available pursuant to the Financial Close Security unless such failure is attributable to any of the following:
  - (i) If the Concessionaire provided for the issuance of PABs as part of its Financial Plan:
    - (1) the refusal or unreasonable delay of HPTE to issue the PABs in the amount the Concessionaire's underwriters are prepared to underwrite (provided that the time schedule for the issuance of the PABs provided normal and customary time periods for HPTE to issue the

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bonds as a conduit issuer) unless such refusal or delay was caused by a failure of the Concessionaire to use reasonable endeavors to achieve the objective of issuing the PABs;

- (2) the refusal of HPTE to issue the PABs or of HPTE's counsel to authorize the closing of the PABs where the bond counsel is ready to give an unqualified opinion regarding the validity of the issuance of the PABs and the tax exempt status of interest paid on the PABs unless the basis for such refusal is that it would be unreasonable for bond counsel to deliver the opinion due to terms and conditions applicable to the issuance of the PABs which have been decided upon by Concessionaire; or
  - (3) the withdrawal, rescission or revocation of the authority granted to HPTE to issue the PABs;
- (ii) There shall have occurred any outbreak of hostilities or other national or international calamity or crisis or the escalation of any thereof, the effect of such outbreak, escalation, calamity or crisis on the financial markets of the United States being such to make it impracticable for the PABs to be sold or such as to affect the availability of other financing instruments included in the Concessionaire's Financial Plan;
  - (iii) The failure of the TIFIA Joint Program Office to execute an agreement providing for the amendment and restatement of the Phase 1 TIFIA Loan on the basis set out in the Financial Plan which was part of the Proposal Financial Model unless the cause of such failure was caused by the Concessionaire not using reasonable endeavors to bring about that execution;
  - (iv) If a Phase 2 TIFIA Loan is part of the Concessionaire's Financial Plan, the failure of the TIFIA Joint Program Office to close the TIFIA Phase 2 Loan prior to the Financial Close Deadline Date in the amount envisaged in the Proposal Financial Model unless the cause of such failure was caused by the Concessionaire not using reasonable endeavors to bring about that closing; provided that it will not be deemed a failure by the TIFIA Joint Program Office to reach Financial Close if there has been a failure by the Concessionaire to satisfy any conditions precedent for the Phase 2 TIFIA Loan;
  - (v) Litigation challenging any Necessary Consent under the National Environmental Protection Act has been filed within the time limit for filing such litigation and remains pending on the Financial Close Deadline Date;
  - (vi) A breach by HPTE of any of its obligations under this Agreement;
  - (vii) The failure of HPTE to enter into the Direct Agreement with the Security Trustee;
  - (viii) An HPTE Default;

- (ix) The issuance of a temporary restraining order or other form of injunction by a court with jurisdiction that prohibits prosecution of any portion of the any portion of the Phase 2 Work or the delivery of Services in relation to the I-25 Managed Lanes that remains in force on the Financial Close Deadline Date;
  - (x) Litigation or any proceeding brought against HPTE which effectively precludes the ability to achieve Financial Close by the Financial Close Deadline Date or the Commencement Date; and
  - (xi) The credit rating given to the State in relation to its general obligations debt is downgraded to A- or lower by Standard and Poor's or A3 or lower by Moodys.
- (d) If the Commencement Date occurs on or before the Financial Close Deadline Date, or if Financial Close does not occur by the Financial Close Deadline Date and such failure is attributable to one of the matters in Section 2.6(c)(i) – (xi) then HPTE shall return the Financial Close Security to the Concessionaire within two Business Days.
- (e) If Financial Close does not occur by the Financial Close Deadline Date and such failure is attributable to one of the matters in Section 2.6(c)(i) – (xi) then HPTE shall pay the Stipend to the Concessionaire within 60 Business Days.

## **2.7 Financial Close Adjustment**

HPTE will share the outcome of changes between the Concessionaire's Financial Plan at the Proposal Due Date and Financial Close as adjusted in accordance with this Section 2.7.

On the day of Financial Close (unless the parties mutually agree to another date), the HPTE Capital Payment will be adjusted to incorporate the Financial Close Adjustment based on the following procedure:

- (a) The Adjusted Proposal Financial Model agreed pursuant to Section 2.4(f) will become the "Financial Close Adjustment Financial Model" when the parties agree:
  - (i) It has been finally amended to reflect the debt and equity structure and the other terms and conditions of the Funding Agreements (save that for the purpose of calculating the Financial Close Adjustment only) the aggregate amount of equity and Subordinated Debt will be treated as funded by \$15,000,000 of Subordinated Debt and the balance will be treated as equity); and
  - (ii) It has been amended to remove any difference between the Proposal Financial Model and the Adjusted Proposal Financial Model in relation first, to any change in the interest rate applicable to Subordinated Debt, which shall remain at 11% as shown in the Proposal Financial Model, and, second, to any matter other than the debt and equity structure, including removing any such differences between the Proposal Financial Model and the Adjusted Proposal Financial Model in the amount and timing of:
    - (1) payments to be made under the Construction Sub-Contract;

- (2) payments to be made in relation to the delivery of the Services (including costs in relation the performance of Life Cycle Maintenance and costs payable under any Tolling Services Agreement);
  - (3) payment of any other costs in relation to the Project (e.g. cost of maintaining offices, overhead items, insurance); and
  - (4) the Toll Revenues expected to be received by the Concessionaire.
- (b) The Financial Close Adjustment will be determined as follows:
- (i) Using the Financial Close Adjustment Financial Model agreed pursuant to Section 2.7(a), the Concessionaire and HPTE shall both calculate and agree on the amount of the HPTE Capital Payment such that the Equity IRR in the Financial Close Adjustment Financial Model equals the Initial Equity IRR; and
  - (ii) The Financial Close Adjustment shall be calculated as the HPTE Capital Payment set out in the definition of that term in Schedule 1 less the HPTE Capital Payment as calculated pursuant to Section 2.7(b)(i); and
- (c) The Financial Close Adjustment shall be applied as follows:

$$A - (B \times 0.67) = C$$

Where:

- A = the HPTE Capital Payment set out in the definition of that term in Schedule 1
  - B = the Financial Close Adjustment calculated in Section 2.7(b)
  - C = the adjusted HPTE Capital Payment (subject to Section 2.7(e))
- (d) If there shall be an HPTE Capital Payment then any change to the HPTE Capital Payment resulting from the operation of this Section 2.7 shall be applied pro rata to the amounts in the third column of the table in Schedule 12 so that the same percentage adjustment shall be made to each such amount, and the Interim Capital Payment Cap amounts in the fourth column of the table in Schedule 12 shall be recalculated by adding the numbers in the second and third columns of each row of that table.
- (e) If the operation of this section would result in an HPTE Capital Payment which exceeds the HPTE Capital Payment Maximum Amount then the HPTE Capital Payment shall be equal to the HPTE Capital Payment Maximum Amount.

## 2.8 The Direct Agreement

The relationship between the Security Trustee, the Senior Lenders, the TIFIA Lender and HPTE shall be governed solely by the express terms of the Direct Agreement.

## 2.9 Conditions Precedent to the Commencement Date

The Concessionaire will not commence:

- (a) Any part of the Phase 2 Work (except for design work which the Concessionaire may commence at any time at its own risk);
- (b) The delivery of the Services in respect of the I-25 Managed Lanes and the I-25 Shared Bridge Decks (nor will it receive any of Toll Revenues in relation to the I-25 Managed Lanes);

unless and until the Conditions Precedent to the Commencement Date have been satisfied (or HPTE shall have waived such conditions). Once such conditions have been satisfied or waived, HPTE shall deliver notice to that effect to the Concessionaire.

## 2.10 Commencement of Phase 2 Work and I-25 Services

Upon the occurrence of the Commencement Date, HPTE will issue NTP1. The Concessionaire will promptly begin the Phase 2 Work so as to achieve Phase 2 Work Completion on or before the Planned Full Services Commencement Date and will commence the delivery of the Services and the Snow and Ice Control Services in relation to the I-25 Managed Lanes and the I-25 Shared Bridge Decks and shall start to receive Toll Revenues in relation to the I-25 Managed Lanes.

## 2.11 Conditions Precedent to the Phase 1 Services Commencement Date

The Concessionaire will not commence delivery of the Services and the Snow and Ice Control Services in respect of the Phase 1 Managed Lanes or the Phase 1 GP Lanes (and may not receive Toll Revenues in relation to the Phase 1 Managed Lanes) until the Conditions Precedent to the Phase 1 Services Commencement Date have been satisfied (or HPTE shall have waived such conditions). Once such conditions have been satisfied or waived, HPTE shall deliver notice to that effect to the Concessionaire.

## 2.12 Commencement of Phase 1 Services

Part 2A of Schedule 2 shall have effect. Upon the occurrence of the Phase 1 Services Commencement Date, the Concessionaire will commence the delivery of the Services and the Snow and Ice Control Services in relation to the Phase 1 Managed Lanes and the Phase 1 GP Lanes.

## 2.13 Conditions Precedent to the Full Services Commencement Date

The Concessionaire will not commence delivery of the Services and the Snow and Ice Control Services in respect of the Managed Lanes as an integrated system and the US 36 General Purpose Lanes until the Conditions Precedent to the Full Services Commencement Date have been satisfied (or HPTE shall have waived such conditions). Once such conditions have been satisfied or waived, HPTE shall deliver notice to that effect to the Concessionaire.

## 2.14 Commencement of the Services in Full

Upon the occurrence of the Full Services Commencement Date, the Concessionaire will commence delivery of the Services and the Snow and Ice Control Services in relation to the Managed Lanes and the US 36 General Purpose Lanes as an integrated system.

**2.15 Waiver Rights**

HPTE may waive any of the Conditions Precedent to the Commencement Date (save for the second condition precedent to that date listed in Part 1a of Schedule 2), and any of the Conditions Precedent to the Phase 1 Services Commencement Date and any of the Conditions Precedent to the Full Services Commencement Date; provided that no Person will be entitled to assume that HPTE will waive or refuse to waive any condition precedent in the absence of strict compliance therewith. Unless HPTE waives in writing a condition precedent that requires action by the Concessionaire to be satisfied, the Concessionaire will remain bound to use reasonable endeavors to satisfy the condition precedent.

**PART 2: INFORMATION AND ADMINISTRATION**

**3. UNDERTAKINGS, REPRESENTATIONS AND WARRANTIES**

**3.1 The Concessionaire's Undertakings**

The Concessionaire hereby undertakes to HPTE that:

- (a) It will not carry out any business or other activities other than business and activities solely related to the Project unless otherwise expressly approved to do so by the HPTE in its sole discretion;
- (b) It will inform HPTE promptly upon becoming aware of the fact that litigation, arbitration or administrative proceedings or a dispute treated in another manner may be threatened or pending against the Concessionaire if such proceedings or dispute would materially adversely affect the ability of the Concessionaire or any Finco to perform its obligations under this Contract, the other Project Documents or the Funding Agreements;
- (c) It will acquire in time to perform its obligations at the time and in the manner when they fall due for performance any and all Necessary Consents to perform its obligations under this Contract, the other Project Documents and the Funding Agreements;
- (d) Each person executing any Project Document on behalf of the Concessionaire which will be executed after the Contract Date will be duly authorized to execute each such document on behalf of the Concessionaire; and
- (e) The copies of the Project Documents and the Funding Agreements to be provided to HPTE after the Contract Date will be true and complete copies of these documents as at the date when such copies are provided and, as at that time, there have been no amendments to these documents and there are no other documents which have not been provided, but which have (or may have) a material effect on the interpretation or application of any of the Project Documents or Funding Agreements;
- (f) It will not commit any Prohibited Acts.

**3.2 The Concessionaire's Warranties**

The Concessionaire hereby represents and warrants to HPTE as at the Contract Date as follows:

- (a) The Concessionaire is duly incorporated and is an existing limited liability company in accordance with the laws of the State of Colorado, and is authorized to transact business and registered with the Secretary of State in the State of Colorado, and further that as at the Contract Date it has acquired any and all Necessary Consents to perform its obligations under this Contract which fall due for performance immediately upon the Contract Date;
- (b) Each person executing this Contract (and any other Project Document which has been executed on or before the Contract Date) on behalf of the Concessionaire has

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been duly authorized to execute each such document on behalf of the Concessionaire;

- (c) Any undertakings of the Concessionaire arising from a Project Document which has been executed on or before the Contract Date represent valid and enforceable undertakings of the Concessionaire;
- (d) The Project Documents which have been executed on or before the Contract Date have been validly executed by the Concessionaire and the execution and performance by the Concessionaire of each Project Document does not contravene:
  - (i) Any Law;
  - (ii) Any organizational documents of the Concessionaire or the Sub-Contractors;  
or
  - (iii) Any obligation which is binding on the Concessionaire;
- (e) The information set out in Schedule 3 (Concessionaire Warranted Information) is true and complete in all material respects;
- (f) There is no Concessionaire Default, and no fact or event exists that with the passage of time would constitute a Concessionaire Default;
- (g) No litigation, arbitration or other dispute resolution proceedings involving the Concessionaire or, to the best of the Concessionaire's knowledge and belief (the Concessionaire having made reasonable enquiries with a view to obtaining such knowledge and belief) any Concessionaire Related Party, is pending and the Concessionaire is not aware of any threatened dispute, in each case that could materially and adversely affect the ability of the Concessionaire to perform its obligations under this Contract, the other Project Documents or the Funding Agreements;
- (h) The Concessionaire has conducted its own analysis and review of the Disclosed Data and that it has satisfied itself as to accuracy, completeness and fitness for purpose and as to its authors' expert qualifications, results and methodology and, except to the extent otherwise provided in this Contract, the Concessionaire shall not in any way be relieved from any obligation under this Contract nor shall it be entitled to claim against HPTE on the grounds that such Disclosed Data is incorrect or insufficient except to the extent expressly permitted by this Contract;
- (i) The copies of the Project Documents and the Funding Agreements provided to HPTE are true and complete copies of these documents, and, as at the Commencement Date, there have been no amendments to these documents and there are no other documents which have not been provided, but which have (or may have) a material effect on the interpretation or application of any of the Project Documents or Funding Agreements; and
- (j) There is no failure by the Concessionaire to comply with all Laws and Necessary Consents applicable to its obligations in connection with the Project Documents



which will have a material adverse effect on the Concessionaire or on the Project;  
and

- (k) Prior to the execution of this Contract, the Concessionaire, and, to the best of the Concessionaire's knowledge and belief (the Concessionaire having made reasonable enquiries with a view to obtaining such knowledge and belief) each shareholder of the Concessionaire and each Concessionaire Related Party, has not committed any Prohibited Acts.

### **3.3 HPTE's Warranties**

HPTE hereby represents and warrants to the Concessionaire as at the Contract Date as follows:

- (a) HPTE has full power, right and authority to execute, deliver and perform its obligations under, in accordance with, and subject to the terms and conditions of this Contract;
- (b) The person executing this Contract and any other Project Document executed as at the Contract Date has been duly authorized to execute such documents;
- (c) The Contract and any other Project Document executed as at the Contract Date has been validly executed by HPTE and the execution and performance by HPTE of the Contract does not contravene:
  - (i) Any Law; or
  - (ii) Any obligation which is binding on HPTE;
- (d) No litigation, arbitration or other dispute resolution proceedings involving HPTE or to the best of HPTE's knowledge and belief (HPTE having made reasonable enquiries with a view to obtaining such knowledge and belief) is pending and HPTE is not aware of any threatened dispute, in each case that could materially adversely affect the ability of HPTE to perform its obligations under this Contract or under the other Project Documents or Funding Agreements to which it is a party;
- (e) As of the Contract Date, apart from in relation to the Phase 1 TIFIA Loan, no agreement, contract, option, commitment or other right exists which binds, or which in the future may become binding on, HPTE to sell, transfer, convey, dispose of or encumber all or any part of the Project. Save in relation to the Phase 1 TIFIA Loan, HPTE has not granted or assigned any interest in Toll Revenues to any other party other than the Concessionaire pursuant to this Contract;
- (f) This Contract and any other Project Document to which HPTE is a party has been duly authorized, executed and delivered by HPTE and the obligations undertaken in such documents constitute valid and legally binding obligations of HPTE, enforceable against it in accordance with the terms of those documents, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and to general principles of equity;
- (g) There is no failure by HPTE to comply with all Laws and Necessary Consents applicable to its obligations in connection with this Contract and any other Project

Document to which it is a party as at the Contract Date which will have a material adverse effect on HPTE or on the Project;

- (h) Neither HPTE nor its advisors or agents have willfully misled the Concessionaire in respect of any of the Disclosed Data in a written communication;
- (i) There is no HPTE Default, and no fact or event exists that with the passage of time would constitute an HPTE Default; and
- (j) Other than with respect to portions of the Project Right of Way not yet acquired as of the Contract Date, and other than with respect to the bikeways forming part of the Phase 2 Works, CDOT has good and sufficient title and interest to the Project Right of Way, free and clear of all Encumbrances or other exceptions to title, except Permitted Encumbrances.

### **3.4 False or Fraudulent Statements and Claims**

The Concessionaire recognizes that the requirements of the Program Fraud Civil Remedies Act of 1986, as amended, 31 U.S.C. § 3801 et seq. and the USDOT regulations, "Program Fraud Civil Remedies," 49 C.F.R. Part 31, apply to its actions hereunder. Accordingly, by signing this Contract, the Concessionaire certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, or it may make pertaining to this Contract. In addition to other penalties that may be applicable, the Concessionaire also acknowledges that if it makes a false, fictitious, or fraudulent claim, statement, submission, or certification, the federal government reserves the right to impose the penalties of the Program Fraud Civil Remedies Act of 1986, as amended, on the Concessionaire to the extent the federal government deems appropriate.

## **4. INFORMATION PROVIDED BY HPTE**

### **4.1 Disclosed Data**

HPTE has made available to the Concessionaire certain materials, documents and data related to the Project and the Site and the Managed Lanes, including, without limitation, the Reference Documents, and other documents which were placed on an intranet site during the procurement process and have been either copied onto a CD initialed by the Parties, or certified as received by the Parties (collectively, the "Disclosed Data").

### **4.2 The Concessionaire's Investigation**

- (a) The Concessionaire shall be deemed to have:
  - (i) Satisfied itself as to the assets to which it will acquire, the rights and the nature and extent of the risks assumed by it under this Contract; and
  - (ii) Gathered all information necessary to perform its obligations under this Contract.
- (b) The Concessionaire acknowledges and confirms that, except as provided by the other express provisions of this Contract:

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- (i) No representation or warranty is made by HPTE, and the Concessionaire shall have no remedy or relief from its obligations under this Contract, arising out of any lack of completeness of the Disclosed Data, or any inaccuracy, lack of utility, lack of completeness and irrelevance of any document within the Disclosed Data;
  - (ii) The Concessionaire takes full responsibility for the performance of the Project, the adequacy of the design and any other information provided to the Concessionaire;
- (c) The Concessionaire acknowledges and agrees that it had the opportunity, prior to execution of this Contract, to review the Disclosed Data and to bring to HPTE's attention any conflicts or ambiguities contained in that data. The Concessionaire further acknowledges and agrees that:
- (i) If and to the extent the Concessionaire or anyone on the Concessionaire's behalf uses any of said information in any way, except as provided by the other express provisions of this Contract, such use is made on the basis that the Concessionaire, not HPTE, has approved and is responsible for said information; and
  - (ii) The Concessionaire is capable of conducting any and all studies, analyses and investigations as it deems advisable to change, recreate, verify or supplement said information, and, except as provided by the other express provisions of this Contract, that any use of said information is entirely at the Concessionaire's own risk and at its own discretion.

## 5. ESCROWED BASE CASE FINANCIAL MODEL AND SOURCE CODE

### 5.1 Submittal of Base Case Financial Model

The provisions of Part 2 of Schedule 11 shall apply in relation to placing the Base Case Financial Model in escrow.

### 5.2 Source Code Escrow

- (a) HPTE and the Concessionaire acknowledge that the Concessionaire and/or the Concessionaire's software suppliers may not wish to disclose directly to HPTE at the time of installation the Source Code and Source Code Documentation of software which is Proprietary Intellectual Property of the Concessionaire and/or the Concessionaire's software suppliers, as public disclosure could deprive the Concessionaire and/or the Concessionaire's software suppliers of commercial value, but that HPTE must be ensured access to such Source Code and Source Code Documentation in either of the following circumstances:
  - (i) In the case of Source Code and Source Code Documentation that is Proprietary Intellectual Property of a sub-contractor or supplier of the Concessionaire (of any tier), if this Contract is terminated for Concessionaire Default, and HPTE assumes the contract or subcontract with such software supplier, and either (A) a voluntary or involuntary bankruptcy or any other

Insolvency of the software supplier occurs or (B) the software supplier fails or ceases to provide services as necessary to permit continued use of the software by HPTE as contemplated by this Contract;

- (ii) In the case of Source Code and Source Code Documentation that is the Concessionaire's Proprietary Intellectual Property, this Contract is terminated for Concessionaire Default; or
  - (iii) Upon assignment of the Intellectual Property Rights in relation to the Source Code and/or Source Code Documentation to HPTE in accordance with the terms of this Contract.
- (b) By no later than the Commencement Date, the Phase 1 Services Commencement Date and the Full Services Commencement Date, respectively, HPTE and the Concessionaire will establish one or more escrows (the "Source Code Escrows") with the Escrow Agent on terms and conditions reasonably acceptable to HPTE and to the Concessionaire into which the Source Code and Source Code Documentation in relation to the operation and maintenance of the I-25 Managed Lanes, the Phase 1 Managed Lanes and the Managed Lanes as an integrated system (as the case may be) will be escrowed, including all relevant commentary, explanations and other documentation, as well as instructions to compile such Source Code and Source Code Documentation, and all modifications, additions or substitutions made to such Source Code and Source Code Documentation.
- (c) All Source Code Escrows shall be verified by HPTE to assure that such source code storage media is readable by HPTE and the Concessionaire shall demonstrate that all necessary components are present such that the software can be built based on such Source Code.
- (d) The escrow provided for herein will survive any termination of this Contract, regardless of the reason.
- (e) The Concessionaire will pay the reasonable costs and expenses of the Escrow Agent.

### **5.3 Confidentiality**

The Escrow Documents and the Source Code Escrows shall at all times be treated as proprietary and confidential commercial non-public information which may only be reviewed by and accessed by HPTE in accordance with this Contract. At the Concessionaire's request, commercially reasonable confidentiality agreements shall be executed and delivered to the Concessionaire by HPTE's employees or agents who review or have access to the Escrow Documents and the Source Code Escrows.

## **6. AMENDMENT OF DOCUMENTS**

### **6.1 Delivery of Documents**

The Concessionaire has provided or shall provide to HPTE copies of the Project Documents and of the Funding Agreements entered into on or before the Contract Date and/or on Financial Close.

## 6.2 New Funding Agreements and Changes to Funding Agreements

- (a) Before
- (i) entering into any Funding Agreement (other than the initial Funding Agreements); or
  - (ii) amending, or waiving its rights under the Funding Agreements (other than in relation to an Exempt Funding Agreement Transaction);

the Concessionaire shall provide notice of such proposed course of action and a draft of any proposed agreement, amendment or waiver to HPTE at least 20 Business Days prior to the date on which it is proposed to take the relevant action. If the Concessionaire's immediate counterparty to the relevant Funding Agreement is a Finco then the Concessionaire shall also procure that the same notice and details are given in relation to any Senior Debt Conduit Loan Agreement and any Phase 2 TIFIA Conduit Loan Agreement and any Subordinated Debt Conduit Loan Agreement in relation to each such agreement between the Concessionaire and the Senior Lenders, the TIFIA Lender, or the Subordinated Lenders, as the case may be.

- (b) The Concessionaire shall ensure, and shall procure that every Finco shall also ensure, that the terms and conditions of all Senior Debt Conduit Loan Agreements, Phase 2 TIFIA Conduit Loan Agreements and the Subordinated Debt Conduit Agreements continue to match the corresponding Senior Funding Agreements, the Phase 2 TIFIA Loan and the Subordinated Funding Agreements (respectively) in all material respects, except to the extent necessary to reflect the back-to-back nature of the conduit loan agreements and to properly allocate interest payments and dividends to the relevant lender.
- (c) If, at any time the Concessionaire requests any consent, approval, release or waiver or agreement to any amendment of or under a Senior Debt Conduit Loan Agreement or a Phase 2 TIFIA Conduit Loan Agreement (referred to in this Section 6.2(c) as a "**conduit consent**") then the Concessionaire shall procure that each Finco shall pass on the request for the conduit consent to the Senior Lenders and to the TIFIA Lender. If the Senior Lenders and/or the TIFIA Lender gives any conduit consent in respect of any Funding Agreement then each Finco will (or will be deemed to):
- (i) give a corresponding conduit consent in equivalent terms in relation to each of the Funding Agreement to which they are a party; and
  - (ii) do anything (including executing any document) that may reasonably be required to give effect to this Section 6.2(c).
- (d) HPTE shall be entitled to object to the Concessionaire implementing the course of action if the new Funding Agreement does not comply with this Section 6.2 or with Section 2.3 or if it is secured by a Financing Assignment which does not comply with Section 2.5(a) or if the effect of the course of action in relation to an Existing Funding Agreement would introduce any such non-compliance.

**6.3 Changes to Project Documents or Funding Agreement Not to Affect HPTE Liability**

None of the actions listed in Sections 6.3(a) or 6.3(b) shall have the effect of increasing HPTE's liabilities on early termination of this Contract unless the Concessionaire has obtained express acceptance in writing from HPTE in relation to such increased liability. The actions referred to in the previous sentence are:

- (a) The amendment or waiver of a right under any Funding Agreement or Project Document; and
- (b) Entering into any new Funding Agreement or any new Project Document.

**6.4 Copies of New or Amended Project Documents or Funding Agreements to be Provided**

If at any time an amendment is made to any Project Document or Funding Agreement, or the Concessionaire enters into a new Project Document or Funding Agreement (or any agreement which affects the interpretation or the application of any Project Document or Funding Agreement), the Concessionaire shall deliver to HPTE a conformed copy of each such amendment or agreement within ten (10) Business Days of the date of its execution or creation (as the case may be), certified as a true copy by an authorized representative of the Concessionaire.

**7. REPRESENTATIVES OF THE PARTIES AND THE CONCESSIONAIRE'S PERSONNEL**

**7.1 HPTE's Representative**

- (a) HPTE's Representative shall be such person identified from time to time as HPTE's Representative in a notice given by HPTE to the Concessionaire for the purposes of this Section 7.1. HPTE's Representative shall exercise the functions and powers of HPTE in relation to the Project which are identified in this Contract as functions or powers to be carried out by HPTE's Representative. HPTE's Representative shall also exercise such other functions and powers of HPTE under this Contract as may be notified to the Concessionaire from time to time.
- (b) Except where notified in writing by HPTE before such act or instruction, the Concessionaire and the Concessionaire's Representative shall be entitled to treat any written action or instruction by HPTE's Representative which is authorized by this Contract as being expressly authorized by HPTE and the Concessionaire and the Concessionaire's Representative shall not be required to determine whether authority has in fact been given.
- (c) Except where notified in writing by HPTE before such act or instruction, the Concessionaire and the Concessionaire's Representative shall not be entitled to treat any act or instruction by any other officer, employee or other person engaged by HPTE who is not authorized by this Contract as being authorized by HPTE and shall be required to determine by notice to HPTE whether an express authority has in fact been given.

**7.2 The Concessionaire's Representative**

The Concessionaire's Representative shall be such person identified from time to time as the Concessionaire's Representative in a notice given by the Concessionaire to HPTE for the purposes of this Section 7.2. The Concessionaire's Representative shall have full authority to act on behalf of the Concessionaire for all purposes of this Contract. Except as previously notified in writing before such act by the Concessionaire to HPTE, HPTE and HPTE's Representative shall be entitled to treat any act of the Concessionaire's Representative in connection with this Contract as being expressly authorized by the Concessionaire and HPTE and HPTE's Representative shall not be required to determine whether any express authority has in fact been given. The Concessionaire's Representative shall have the right and power to delegate its responsibilities under this Contract without notice to HPTE; provided, however, that in the event HPTE is relying on authority from the Concessionaire's Representative, such delegation shall only be effective upon written notice from the Concessionaire's Representative to HPTE; and provided further, that nothing contained herein shall in any way reduce or relieve the Concessionaire's obligations hereunder.

**7.3 Delegation of Representatives' Authority**

HPTE's Representative and the Concessionaire's Representative may each from time to time give notice to the other Party in the form of a schedule setting out the extent to which authority for managing any aspect of this Contract has been delegated to individuals other than the representative giving the notice. Subject to manifest error, each Party shall be entitled to rely on the individuals so identified as having the delegated authority set out in the schedule most recently provided to it by the other Party.

**7.4 Key Personnel**

- (a) Subject to this Section 7.4, the Concessionaire shall ensure that all individuals named as Key Personnel in the Concessionaire's Proposals on the Contract Date continue to be engaged in their respective roles on the Project. Replacements may only be appointed after HPTE's consent has been given pursuant to this Section 7.4.
- (b) If for any reason any individual in a Key Personnel role resigns, retires, dies, becomes disabled, or is terminated for cause, then the Concessionaire shall designate a replacement with equivalent expertise and experience to the unavailable individual and provide notice to HPTE setting out the identity, expertise and experience of the proposed replacement and such supporting information or evidence as HPTE may reasonably require in relation to such matters.
- (c) HPTE shall only be entitled to withhold consent to the replacement of whom it has received notice and supporting information and evidence on the grounds that that person does not have the equivalent expertise and experience to the unavailable individual as determined by HPTE acting reasonably. If HPTE withholds consent it will provide an explanation of the deficiency it identified to aid the Concessionaire in identifying personnel which HPTE can approve. In the absence of any comment or objection from HPTE to the proposed Key Personnel within a ten (10) Business Day period, HPTE shall be deemed to have consented to the appointment of the proposed substitute Key Personnel.

**7.5 The Concessionaire's Design Staff**

The Concessionaire shall ensure that all design and engineering work shall be performed by or under the supervision of persons licensed to practice architecture, engineering or surveying (as applicable) in the State, and by personnel who are careful, skilled, experienced and competent in their respective trades or professions, who are professionally qualified to perform the relevant work in accordance with this Contract, and who shall assume professional responsibility for the accuracy and completeness of the work prepared or checked by them.

**7.6 Refusal of Access**

- (a) The Concessionaire shall maintain a list of the identity of all staff that are involved in the provision of the Phase 2 Work or the Services and provide access to such list to HPTE.
- (b) HPTE reserves the right to refuse (or alternatively authorize CDOT to refuse) access to the Site and the Managed Lanes to any person if HPTE reasonably believes that the presence of such person at the Site and the Managed Lanes represents a material risk of damage to health, safety or property or is under the influence of alcohol or drugs or is acting or threatening to act in a violent manner.



**PART 3: PROPERTY**

**8. OWNERSHIP AND USE OF PROPERTY**

**8.1 Concessionaire's License to Enter Land**

- (a) For the periods referred to in Section 8.2(a) in respect of the Site and for the periods referred to in Section 8.3(a) in respect of the Managed Lanes, HTPE hereby grants to the Concessionaire for the Contract Period, subject to the conditions and terms hereafter contained, a non-exclusive license over, under, upon the Site, the I-25 Managed Lanes, the Phase 1 Managed Lanes, the Phase 2 Managed Lanes, and the US 36 General Purpose Lanes respectively for the purpose of exercising its rights and performing its obligations under this Contract in accordance with the terms of this Contract. Such license shall automatically revoke upon a termination of this Contract for any reason. The Concessionaire shall also have the right to issue sub-licenses to sub-contractors as necessary to carry out the obligations under this Contract. The license granted by this Section 8 is free of any Encumbrances save for the Permitted Encumbrances.

The Concessionaire's interest is limited to the license granted by this Section 8 and this Contract does not grant and is not intended to grant any fee simple, leasehold estate, easement or any real property interest of any kind in or to the Site or the Managed Lanes.

- (b) Subject to the terms of this Contract HPTE reserves the right of use, occupancy and ownership over, under, upon and in the lands referred to in Section 8.1(a).
- (c) HPTE agrees that it shall not, and it shall cause CDOT not to, transfer, dispose of, alienate or create any Encumbrance in, or purport to transfer or dispose of, alienate or create any Encumbrance in the land comprising the Site or the Managed Lanes while the Site is to be made available to the Concessionaire pursuant to Section 8.2 or while the Managed Lanes are permitted to be used by the Concessionaire pursuant to Section 8.3.
- (d) At all times during the Contract Period HPTE will cause CDOT to defend:
- (i) CDOT's title or real property interest to the Site and the Managed Lanes; and
  - (ii) The license granted to the Concessionaire under this Contract

against any person claiming any interest adverse to CDOT which is not a Permitted Encumbrance.

**8.2 The Site**

- (a) The periods for which HPTE grants a license to the Site to the Concessionaire pursuant to Section 8.1(a) are those periods which commence in accordance with the schedule in Section 8 of Schedule 5 for the parts of the Site identified in that schedule and which end upon Phase 2 Work Completion.

- (b) The Concessionaire and HPTE may agree in writing to revise the schedule for making the Site available set out in Section 8 of Schedule 5.
- (c) If HPTE at any time determines it will be unable to provide access to a particular parcel in accordance with Section 8 of Schedule 5 then HPTE shall notify the Concessionaire regarding the revised projected date for delivery of access. To the extent that it is reasonably practicable to do so the Concessionaire shall take action to minimize any cost and time impact and shall work around such parcel until access can be provided, including rescheduling and re-sequencing the Phase 2 Work so as to avoid any delay to the work.
- (d) If (but only if) the Concessionaire has provided HPTE written notice within ten (10) Business Days after receipt of a revised projected date for making part of the Site available to the Concessionaire, and if the lack of availability will cause a Change in Costs or adversely affect the schedule for the performance of the Phase 2 Works then a failure to make the Site available in accordance with this Section 8.2, then such occurrence shall be a Compensation Event.

**8.3 The Site and the Managed Lanes**

- (a) The periods for which HPTE grants a license to the Managed Lanes and to the US 36 General Purpose Lanes to the Concessionaire pursuant to Section 8.1(a) commence in respect of:
  - (i) The I-25 Managed Lanes upon the Commencement Date;
  - (ii) The Phase 1 Managed Lanes and the Phase 1 GP Lanes upon the Phase 1 Services Commencement Date; and
  - (iii) The Phase 2 Managed Lanes and the Phase 2 GP Lanes upon the Full Services Commencement Date;and last for the remainder of the Contract Period.
- (b) The Site, the Managed Lanes and the US 36 General Purpose Lanes will not be used by the Concessionaire for any purpose other than for the purpose of exercising its rights and performing its obligations under this Contract in accordance with the terms of this Contract.
- (c) Except as otherwise provided for in this Contract, any costs and expenses incurred in relation to the Managed Lanes and the US 36 General Purpose Lanes after the Commencement Date shall be borne by the Concessionaire.
- (d) At the end of the Services Period, the Concessionaire will deliver back the Managed Lanes to HPTE in accordance with the Handback Requirements.

**8.4 The Node 1 Building**

HPTE shall ensure that the Concessionaire shall be granted access to the Node 1 Building for the purpose of performance of its obligations under this Contract subject to and in accordance with the terms set out in Part 1 of Schedule 27. The Concessionaire shall only have a contractual right of

entry into the Node Building and shall not have, nor shall it acquire, any right, title or other interest in over or under that property.

**8.5 70th Avenue Maintenance Facility**

HPTE shall ensure that the Concessionaire shall be granted access to the 70th Avenue Maintenance Facility for the purpose of performance of Services subject to and in accordance with the terms set out in Part 2 of Schedule 27. The Concessionaire shall only have a contractual right of entry into the 70th Avenue Maintenance Facility, which includes Node 2 Building, and shall not have, nor shall it acquire, any right, title or other interest in over or under that property.

**8.6 Additional Property**

If at any time the Concessionaire requires access to or any interest in any land which does not form part of the Site or the Managed Lanes, any additional rights beyond those which the Concessionaire has in relation to any part of the Site, the responsibility and cost of securing or acquiring such access or interest shall be entirely the responsibility of the Concessionaire.

**8.7 Protests and Trespassers**

Concessionaire may request the assistance of HPTE to remove protesters or trespassers where Concessionaire demonstrates to HPTE's reasonable satisfaction that it has exercised all legal remedies available to it to remove the protesters or trespassers, and that the continued presence of the protesters or trespassers is having a material adverse effect on the conduct of the Phase 2 Work, the delivery of the Services or the collection of Toll Revenues that Concessionaire is unable to mitigate. Following such request, HPTE shall notify Concessionaire whether HPTE or CDOT can lawfully provide any assistance in relation to the removal of the protesters or trespassers that is not independently available to Concessionaire and, to the extent that such assistance can be lawfully provided, HPTE shall or shall cause CDOT to provide such assistance to the extent it is, in the discretion of HPTE, reasonable and appropriate in the circumstances to do so.

**9. ENVIRONMENTAL REQUIREMENTS**

**9.1 Environmental Requirements**

The Concessionaire shall, during the Contract Period, fully comply with all Environmental Requirements.

**9.2 Environmental Manager**

The Concessionaire shall employ or contract a suitably qualified Environmental Manager to advise on and coordinate all environmental issues throughout the Contract Period. If an environmental issue arises outside the competence or experience of the Environmental Manager then the Concessionaire shall employ or engage the services of other suitably qualified environmental specialists, as required, to support the Environmental Manager.

**9.3 Prevention**

The Concessionaire shall at all times:

- (a) Ensure that it and the Sub-Contractors use appropriate means in accordance with HPTE's Requirements to prevent (where possible) and otherwise to minimize any pollution which may be caused to the environment by the Concessionaire during the design, construction, maintenance and/or operation of the Project; and
- (b) Ensure that it, the Construction Sub-Contractor and its sub-contractors, only use explosives for the implementation of the Phase 2 Work where absolutely necessary and following obtaining the appropriate Necessary Consent.

**9.4 Responsibility for Certain Hazardous Substances**

- (a) It is recognized that HPTE or CDOT may assert that certain third persons or parties may rightfully bear the ultimate legal responsibility for any and all Hazardous Substances, which may be present on the Site and the Managed Lanes. It is further recognized that certain state and federal statutes provide that individuals and firms may be held liable for damages and claims related to Hazardous Substances which may currently be present on the Site under such doctrines as joint and several liability and/or strict liability. Accordingly, for the purposes of this Contract only, the provisions of the remaining subsections of this Section 9.4 shall have effect and shall survive the termination of this Contract.
- (b) HPTE shall be responsible or shall ensure that CDOT will be responsible in accordance with Sections 9.4(c), 9.4(d) and 9.4(e) for matters arising out of HPTE Hazardous Substances Circumstances.
- (c) If any Remediation Work shall be necessary in relation to any HPTE Hazardous Substances Circumstances then the Concessionaire shall be entitled to payment of its Change in Costs, to an extension of the Planned Full Services Commencement Date and/or the Full Services Commencement Longstop Date as is reasonably required to permit such work to be carried out and/or to such relief from its other obligations under this Contract as is reasonably necessary having regard to all the relevant circumstances. If any such Remediation Work shall be necessary during the course of carrying out the Phase 2 Work then Section 12.5 and Part 6 of Schedule 21 shall apply. Otherwise the need for the Remediation Work shall be treated as if it was a Compensation Event and Section 41 shall apply.
- (d) HPTE shall be responsible, for and shall reimburse the Concessionaire in respect of, any and all claims, proceedings, suits, demands or similar process, damages, losses, liabilities, costs and expenses, including attorneys' fees, arising out of, or in connection with,
  - (i) The existence of HPTE Hazardous Substances Circumstances (including, where applicable, the disposal thereof in accordance with Section 9.4(e)); or
  - (ii) Bodily injury (including death) to persons, damage to property or environmental removal or response costs, in each case arising out of HPTE Hazardous Substances Circumstances

to the extent that such amounts cannot be mitigated, reduced or avoided by reasonable steps taken by the Concessionaire.

- (e) As between HPTE, CDOT and the Concessionaire HPTE and/or CDOT shall be considered to be the generator and arranger and assumes generator and arranger responsibility in respect of HPTE Hazardous Substances Circumstances. For purposes of this Contract only:
  - (i) The Concessionaire shall not be required to obtain an EPA identification number or to execute any hazardous waste manifests as a "generator" in respect of any activities arising out of HPTE Hazardous Substances Circumstances; and
  - (ii) Hazardous Substances encountered which are, or arise out of, HPTE Hazardous Substances Circumstances shall be disposed of, if required by Environmental Law, utilizing an EPA identification number or other appropriate legal device obtained by, and carried in the name of, CDOT or another Person properly designated by CDOT.

**9.5 Comprehensive Environmental Response, Compensation, and Liability Act Agreement**

Without limiting their generality, the obligations of HPTE in Section 9 and the indemnities from the Concessionaire in Section 61 are intended to operate as agreements pursuant to Section 107(e) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. Section 9607(e), to insure, protect, hold harmless and indemnify the parties who have the benefit of the obligations in Section 9 and Section 61 respectively.

**PART 4: CONSTRUCTION**

**10. PROVISIONS APPLICABLE TO THE PERFORMANCE OF THE PHASE 2 WORK**

Without prejudice to the other parts of this Contract which are also applicable to the Phase 2 Work and to the performance of it, Sections 11 – 21 inclusive, apply solely to the performance of the Phase 2 Work. The provisions of Schedule 5 and Schedule 5C shall also have effect in relation to the Phase 2 Work.

**11. CONSTRUCTION**

**11.1 Obligation to Complete**

- (a) The Concessionaire will carry out and complete the Phase 2 Work:
  - (i) In accordance with the provisions of this Contract, the HPTE Phase 2 Work Requirements, the Concessionaire's Phase 2 Work Proposals and Good Industry Practice, all Necessary Consents and all applicable Law (including, without limitation C.R.S. 38-26-107); and
  - (ii) To achieve Phase 2 Work Completion by the Planned Full Services Commencement Date.
- (b) The Concessionaire will ensure that:
  - (i) All persons employed in connection with the performance of the Phase 2 Work will be skilled and experienced in their several professions, trades and callings or adequately supervised;
  - (ii) All aspects of the Phase 2 Work will be supervised by sufficient numbers of persons having adequate knowledge of such matters for the satisfactory and safe performance of the Phase 2 Work in accordance with this Contract;
  - (iii) The Phase 2 Work is maintained in good order, kept in a safe condition and protected from damage, and working areas of the Site are secure against trespassers and clean and tidy, in each case so far as is practicable having regard to the nature of the Phase 2 Work; and
  - (iv) An individual who is a registered licensed professional engineer in the State of Colorado will be "responsible charge" of the Phase 2 Work. As used in the preceding sentence, "responsible charge" means personal responsibility for the control and direction of engineering work within a professional engineer's scope of competence.
- (c) HPTE shall have the right to determine in its sole discretion acting in good faith that any individual employed by the Concessionaire or by any Sub-Contractor is acting so as to cause a material risk of damage to health, safety or property or is under the influence of alcohol or drugs or is acting or threatening to act in a violent manner, at which time at the written request of HPTE, the Concessionaire or such Sub-Contractor shall remove such Person and such Person shall not be re-employed on

the Project without the prior written approval of HPTE. If the Concessionaire or the Sub-Contractor fails to remove such individual(s), then HPTE may, in its sole discretion, suspend the portion of the Phase 2 Work on which the individual is present by delivery of written notice of such suspension to the Concessionaire, and such suspension shall in no way relieve the Concessionaire of any obligation contained in this Contract.

### **11.2 Overall Responsibility**

The obligations in Section 11.1 are each an independent obligation. In particular:

- (a) The fact that the Concessionaire has complied with the HPTE Phase 2 Work Requirements but not the Concessionaire's Phase 2 Work Proposals shall not be a defense to an allegation that the Concessionaire has not satisfied the Concessionaire's Phase 2 Work Proposals (unless it is necessary to amend the Concessionaire's Phase 2 Work Proposals under Section 14.3, in which case the Concessionaire shall be obliged to proceed in accordance with that Section); and
- (b) The fact that the Concessionaire has complied with the Concessionaire's Phase 2 Work Proposals but not HPTE's Requirements shall not be a defense to an allegation that the Concessionaire has not satisfied the HPTE Phase 2 Work Requirements.

### **11.3 Phase 2 Work Stipulations**

During the carrying out of the Phase 2 Work the Concessionaire shall or shall ensure that the Construction Sub-Contractor and its sub-contractors and/or consultants shall:

- (a) Not use or occupy or permit the Site or any land on which the Phase 2 Work is being undertaken to be used or occupied for any purpose other than the carrying out of the Phase 2 Work;
- (b) Not deposit or manufacture or permit to be deposited or manufactured on the Site or any land upon which the Phase 2 Work is being undertaken any materials which are not required for the carrying out of the Phase 2 Work;
- (c) At the Concessionaire's sole cost, transport all surplus materials arising from the Phase 2 Work and arrange for the disposal of the same at such places as may lawfully be used for disposal, and the Concessionaire shall comply with its legal obligations in relation to ensuring that such materials will not cause or give rise to pollution of the environment in contravention of any applicable Law;
- (d) Ensure that all vehicles leaving the Site are adequately cleaned to prevent the deposit of waste materials and debris on the Adjoining Property or any highway, road and/or footpath and if any such material or debris is so deposited, the Concessionaire shall forthwith employ such measures as shall be necessary to remove the material and debris and to clean and reinstate the Adjoining Property and/or any highway, road and/or footpath, as the case may be;
- (e) Not without the written consent of HPTE erect or permit or suffer to be erected on the Site any temporary structure except site accommodation usual in connection with

works of a like nature to the Phase 2 Work or as contemplated by the Concessionaire's Proposals; and

- (f) Not erect or exhibit or permit or suffer to be erected or exhibited on any part of the Site any signs or trade boards save those previously approved in writing by HPTE (such approval not to be unreasonably withheld).

## **12. SITE AND SITE CONDITIONS**

### **12.1 Site Investigation**

Except as otherwise provided for herein, the condition of the Site shall be the sole responsibility of the Concessionaire and accordingly (but without prejudice to any other obligation of the Concessionaire under this Contract), the Concessionaire shall be deemed to have:

- (a) Carried out a ground, physical and geophysical investigation and to have inspected and examined the Site and its surroundings and, where applicable, any existing structures or works in, on, under, through or over the Site;
- (b) Satisfied itself as to:
  - (i) The nature of the conditions at the Site, including the ground, ecosystem, water table and drainage, the form and nature of the Site, the load bearing and other relevant properties of the Site, the risk of injury or damage to property adjacent to or affecting the Site and to occupiers of such property, the nature of the materials (whether natural or otherwise) to be excavated, and the nature of the design, work, plant and materials necessary for the Project;
  - (ii) The adequacy of the means and rights of access to and through the Site and any accommodation it may require for the purposes of fulfilling its obligations under this Contract; and
  - (iii) The precautions and times and methods of working necessary to prevent any nuisance or interference, whether public or private, being caused to any third parties.

### **12.2 Site Condition Claims**

The Concessionaire shall not be entitled to make any claim in relation to the conditions of the Site against HPTE on any grounds, including the fact that incorrect or insufficient information on any matter relating to the Site was given to it by any person, whether or not HPTE, its contractors or agents, except as expressly set out in this Contract

### **12.3 Cost Associated with Maintaining Compliance of the Site**

Except as expressly set out in this Contract, the Concessionaire shall be responsible for, and shall compensate HPTE for any Losses that it may incur in relation to, cleaning up and otherwise dealing with any ground contamination at or from the Site so that it shall at all times comply with its obligations under this Contract including (without limitation) complying with, at its own cost, any



applicable Law and any Necessary Consents, orders, notices or directions of any Governmental Authority (whether made against HPTE or the Concessionaire).

**12.4 Governing and Adjoining Dimensions and Conditions**

Before commencing an element of the Phase 2 Work, the Concessionaire shall verify all governing dimensions and conditions at the Site and shall examine all adjoining work, which may have an impact on such Phase 2 Work. The Concessionaire shall be responsible for ensuring that the Design Documents and Construction Documents accurately depict all governing and adjoining dimensions and conditions.

**12.5 Process to be Followed for Discovery of Certain Site Conditions**

- (a) If the Concessionaire becomes aware of:
  - (i) Any on-Site material that the Concessionaire believes may contain Hazardous Substances that is required to be removed or treated; or
  - (ii) Any Differing Site Conditions;

then as a condition precedent to the Concessionaire's right to the operation of the Change Procedure, the Concessionaire shall promptly notify HPTE thereof by telephone or in person, to be followed by written notification as soon as practicable. The Concessionaire shall promptly stop work in and secure the area affected by any such matter. In such event, HPTE will inspect the area within two (2) Business Days of receipt of notification, and will advise the Concessionaire at that time whether to resume work or whether further investigation is required. Any delay resulting from HPTE inspecting the location up to two (2) Business Days shall not be considered to be a Compensation Event nor shall it give rise to a right to operate the Change Procedure.

- (b) The Concessionaire shall promptly conduct such further investigations as HPTE deems reasonably appropriate. Within five (5) Business Days after its initial notice to HPTE, the Concessionaire shall advise HPTE of any action recommended to be taken regarding the situation in writing. If Hazardous Substances are involved, the notice shall describe the type of Remediation Work, if any, which the Concessionaire proposes to undertake with respect thereto. If paleontological, archeological, cultural, or biological resources are present, the notice shall advise HPTE what course of action the Concessionaire intends to take with respect thereto and whether the location should be fenced off or whether work can resume. HPTE then will determine whether the Concessionaire's findings and proposed actions are acceptable and, in writing, either approve, or require modification of, the Concessionaire's proposed actions.
- (c) HPTE shall have the right to require the Concessionaire to recommence work in the area at any time, even though an investigation may still be ongoing (so long as such work is not in violation of any law, legal requirements or Necessary Consents and will not present a danger or safety hazard to humans or property). The Concessionaire shall promptly recommence work in the applicable area upon receipt of notification from HPTE to do so. On recommencing work, the Concessionaire shall follow all

procedures required by Law or Good Industry Practice in relation to the performance of the Phase 2 Work in circumstances where there exists the material, resources, species or condition which HPTE has determined, or preliminarily determined, to exist.

- (d) The Concessionaire shall ensure, in accordance with HPTE's determination or preliminary determination regarding the nature of the material, resources, species or condition, that all of the Concessionaire's activities and the activities of all Concessionaire Related Parties are undertaken in a manner that will minimize the effect on surrounding property and the public to the maximum extent practicable thereafter.

#### **12.6 Differing Site Conditions**

- (a) Upon the Concessionaire's fulfillment of the notification requirements, and, if applicable, the recommencement requirements of Section 12.5, and subject to the limitations contained in that section, HPTE shall be responsible for, and agrees to operate the Change Procedure to:
  - (i) Compensate the Concessionaire for additional costs and losses caused by changes in the Phase 2 Construction Work arising from Differing Site Conditions; and
  - (ii) Extend the Planned Full Services Commencement Date and the Full Services Commencement Longstop Date as the result of any delay caused by any such Differing Site Conditions.
- (b) The Concessionaire shall bear the burden of proving that a Differing Site Condition exists and that it could not reasonably have worked around the Differing Site Condition so as to avoid additional loss. Each request for the operation of the Change Procedure relating to a Differing Site Condition shall be accompanied by a statement signed by a qualified professional setting forth all relevant assumptions made by the Concessionaire with respect to the condition of the Site, justifying the basis for such assumptions, explaining exactly how the existing conditions are eligible for the operation of the Change Procedure under the terms of this Contract, and stating the efforts undertaken by the Concessionaire to find alternative design or construction solutions to eliminate or minimize the problem and the associated costs.

### **13. REINSTATEMENT AND NECESSARY CONSENTS**

#### **13.1 Reinstatement**

The Concessionaire shall at all times ensure that it, the Construction Sub-Contractor and its sub-contractors, after the completion of the Phase 2 Work, reinstates the remainder of the Site, any other Site installation areas and those areas on which equipment, instruments necessary for the implementation of the Phase 2 Work have been located and any other areas used by the Concessionaire previously to their original condition or equivalent or to the form specified in HPTE's Requirements (whichever is the higher standard).

13.2 **Necessary Consents**

- (a) The Concessionaire shall be responsible for obtaining all Necessary Consents and for arranging any necessary amendments to any Necessary Consents and such responsibility shall not be in any way diminished by any Law placing responsibility for the same upon HPTE or another Person.
- (b) When reasonably requested by the Concessionaire, HPTE will use reasonable endeavors to assist the Concessionaire in obtaining any Necessary Consent; however, nothing in this Section 13.2 shall be deemed to be an undertaking by HPTE to ensure that any Necessary Consent will be obtained by the Concessionaire. At the Contract Date the Parties do not believe that there is any Necessary Consent which has not yet been obtained which can only be obtained by an application by CDOT as owner of the Site and/or the Managed Lanes. However, if the Concessionaire shall discover the need for any such Necessary Consent then HPTE's obligation under this Section shall include ensuring that CDOT executes any application for any such Necessary Consent prepared by the Concessionaire within a reasonable time after receipt of the draft completed application so that the application may be submitted by the Concessionaire on behalf of CDOT.
- (c) The Concessionaire shall:
  - (i) Within thirty (30) Business Days of the Commencement Date and thereafter on each anniversary of the Commencement Date provide to HPTE's Representative, a comprehensive list of all Necessary Consents which are required in respect of the Phase 2 Work, which have been or will be applied for and/or all the Necessary Consents obtained ("Necessary Consents List"). The Necessary Consents List shall identify the:
    - (1) date on which each such Necessary Consent application was made;
    - (2) date on which each such Necessary Consent is expected or was obtained;
    - (3) date for any renewal for each such Necessary Consent;
    - (4) any accompanying documents; and
  - (ii) As soon as reasonably practicable following a request to do so, supply free of charge to HPTE's Representative a copy of any document or documents referred to in the Necessary Consents List.

14. **PROJECT DOCUMENTATION**

14.1 **Existing Design and Design Responsibility**

- (a) The Existing Design has been prepared on behalf of HPTE and provided to the Concessionaire as part of the RFQ and RFP processes.

- (b) Notwithstanding the description, drawing, design or specification of any part of the Phase 2 Construction Work in the Existing Design or in HPTE's Requirements, or in any HPTE Change or Concessionaire Change or any consent, agreement or approval of whatever nature given by or on behalf of HPTE in respect of any matter relating to the design or execution of the Phase 2 Construction Work, the Concessionaire shall be fully responsible for the design and execution of the Phase 2 Construction Work.
- (c) The Concessionaire represents and warrants that it has employed licensed engineers who have used and will continue to use the degree of skill and care in the design of the Phase 2 Construction Work that would reasonably be expected of a competent professional, experienced in carrying out design activities of a similar nature (including having regard to the time and locality of the Phase 2 Construction Work), scope and complexity, to those in the Phase 2 Construction Work.

#### **14.2 Design Documents**

- (a) In addition to the Existing Design the Concessionaire shall produce all further drawings necessary for the carrying out and completion of the Phase 2 Construction Work, and shall ensure that such drawings are in compliance with HPTE's Requirements and the Necessary Consents (collectively, the "Design Documents") and shall produce the Construction Documents.
- (b) Following review and acceptance by the Concessionaire, Design Documents or Construction Documents created by, for or on behalf of the Concessionaire shall be submitted to HPTE for review and Acceptance to the extent and in the manner required by Schedule 5.
- (c) The Concessionaire shall allow HPTE's Representative, at any time, a reasonable opportunity to view and make copies of any Design Documents or Construction Documents which will be made available to HPTE's Representative as soon as reasonably practicable following receipt of HPTE's Representative's request.

#### **14.3 Rectification of Construction Proposals**

If the implementation of the Phase 2 Construction Work in accordance with the Concessionaire's Proposals does not fulfill the HPTE Phase 2 Work Requirements, the Concessionaire shall at its own expense amend the Concessionaire's Proposals and rectify the Phase 2 Work or any part of the Phase 2 Work affected. Such amendment shall have the effect that:

- (a) The Concessionaire's Proposals shall satisfy HPTE's Requirements; and
- (b) Following the amendment performance of the Phase 2 Work will be of at least an equivalent standard of performance to that set out in the Concessionaire's Proposals prior to their amendment (for the purpose of comparison disregarding the fault which required the amendment to be made).

**14.4 Obligations Unaffected by Review, Acceptance etc.**

To avoid doubt, Section 63.2 applies in relation to the effect or review, comment, or Acceptance by HPTE of the Design Documents and Construction Documents prepared by the Concessionaire.

**14.5 Previous Design and Phase 2 Construction Work**

Any design, design development work or Phase 2 Construction Work carried out prior to the date of this Contract will not obviate, diminish or alter the Concessionaire's obligations under this Contract.

**14.6 No Change to the Concessionaire's Proposals**

For the avoidance of doubt the Concessionaire shall not amend or change the Concessionaire's Proposals except by way of a Concessionaire Change. Where the Concessionaire Change is necessary for the Concessionaire to comply with Section 14.3, HPTE shall not be entitled to unreasonably withhold its consent to such a Concessionaire Change provided the implementation, rectification and consequential impact, is at the Concessionaire's expense.

**14.7 Utilities**

Schedule 22, Part 1 shall have effect in relation to Utilities.

**14.8 Federal Requirements**

Notwithstanding anything to the contrary contained herein, in the event of any conflict between any federal requirement and the other requirements of this Contract the federal requirements shall prevail, take precedence and be in force over and against any such conflicting provisions. The Concessionaire shall comply with all applicable federal requirements including requirements of FHWA Form 1273, see Attachment 3 to Part 1 of Schedule 13.

**14.9 Disadvantaged Business Enterprises and Emerging Small Businesses**

The Concessionaire shall comply with CDOT's Design-Build Disadvantaged Business Enterprises ("DBEs") requirements contained in Part 3 of Schedule 13. The Concessionaire shall facilitate and incorporate participation by small businesses throughout the Project, ensuring that DBEs and Emerging Small Businesses ("ESBs"), if applicable, shall have an equal opportunity to participate in the performance of contracts financed in whole or in part with federal funds. The Concessionaire shall either meet DBE goal of eleven percent (11%) established for the Project, or shall make a good faith effort to meet the DBE goal. HPTE expects the Concessionaire to facilitate and incorporate participation by small businesses throughout the Project. CDOT has established an ESB incentive for this Project, the details of which can be found in Part 3 of Schedule 13.

**15. MANAGEMENT OF THE SITE**

**15.1 Cooperation with CDOT employees and Utilities**

The Concessionaire will facilitate the work of employees of CDOT and (subject to Section 15.2) any Utility that needs to be carried out on the Site or in areas adjacent to the Site and will allow them reasonable access to the Site for this purpose.

**15.2 Permitting processes**

The Concessionaire acknowledges that certain Persons (including Utilities) have a right of access to the Managed Lanes in accordance with Law, and that this access is regulated by CDOT by the issuance of Access Permits. Schedule 22, Part 2 shall have effect, and the obligations of the Concessionaire in relation to Utilities pursuant to Section 15.1 shall be subject to compliance by any Utility exercising any such right of access with the terms of an Access Permit issued for that purpose.

**15.3 Facilities and Equipment**

The Concessionaire will make available to HPTE (and other persons acting on behalf of HPTE on the Site) facilities and equipment required by HPTE to exercise its rights and obligations under this Contract as specified in Schedule 5.

**15.4 Coordination with the Phase 1 Construction Work**

- (a) The Concessionaire shall act reasonably to coordinate its work with the work of the Phase 1 DB Contractor.
- (b) As part of the construction phasing pursuant to the Phase 1 DB Contract, in accordance with this Section (b) HPTE may require the Concessionaire to put in place and keep in place a traffic crossover so that all traffic from the crossover to the boundary between the Phase 2 Work and the Phase 1 Construction Work at Station 1388+00 will travel on the eastbound lane of US 36.
  - (i) HPTE may require the crossover to be in effect at the earliest on January 1, 2014, or at the latest on April 1, 2014. As a consequence, the part of the Site occupied by the crossover, and the eastbound lane of US 36 from the crossover to the boundary between the Phase 2 Work and the Phase 1 Construction Work at Station 1388+00 will not be available to the Concessionaire for the purpose of carrying out any Phase 2 Work.
  - (ii) The crossover shall be between station 1375+00 and 1387+00 or at such other location to the west of this location which the Concessionaire may choose.
  - (iii) During the time that the crossover is required to be in place the Concessionaire may relocate it from time to time to any location on the Site which is no further east than station 1375+00.
  - (iv) The crossover will remain in place until HPTE notifies the Concessionaire that it is no longer required.
  - (v) If the crossover is required to remain in place after December 1, 2014 such requirement shall be a Compensation Event.

**16. SUPERVISION AND REPORTING**

**16.1 Technical Representative**

- (a) By exercise of his right to delegate pursuant to Section 7.3 HPTE's Representative may specifically appoint a person from time to time to act as the Technical Representative and to exercise any of its rights under this Contract arising out of, connected to or in relation to the Phase 2 Work.
- (b) The Concessionaire acknowledges that the Technical Representative may be appointed to carry out certain functions of HPTE, and agrees to such an appointment and to replacements or further appointments notified by HPTE.
- (c) HPTE's Technical Representative shall also have the right to attend progress meetings between the Concessionaire and Construction Sub-Contractor, and shall be notified of the times and dates of such meetings.
- (d) During the Construction Period, copies of the following documents shall be submitted to the Technical Representative:
  - (i) Approved Construction Documents and Design Documents;
  - (ii) Upon request, any Sub-Contractor claims and any further documents;
  - (iii) Upon request, any technical instructions, sampling and qualification plans;
  - (iv) Qualification test results (for example, laboratory tests, geodetic survey results, quality clearances, other certificates, etc.);
  - (v) Qualification Documentation and As-Built Documents; and
  - (vi) Any other documents agreed by HPTE and the Concessionaire in advance and/or as notified from time to time by the Technical Representative to the extent available.
- (e) Any documents listed in Section 16.1(d) shall be delivered to the address of the Technical Representative within five (5) Business Days of their preparation, or within a reasonable period of time from the receipt of the notice of the Technical Representative requiring such documents as appropriate.

**16.2 Phase 2 DB Schedule**

The Concessionaire shall prepare the Phase 2 DB Schedule in accordance with the requirements of Section 2 of Schedule 5. The Initial Phase 2 DB Schedule is deemed to have been Accepted by HPTE for the purposes of Section 2 of Schedule 5 and is attached as Schedule 9.

**16.3 Notification of Delays in Progress of the Phase 2 Work**

Without prejudice to the provisions of Section 16.5 and the requirements of the Concessionaire to notify pursuant to Section 18, if either:

- (a) The Concessionaire becomes aware at any time that the actual progress of the Phase 2 Work may become or has been significantly delayed or has fallen behind the Phase 2 DB Schedule; or
- (b) Actual progress has been significantly delayed or has fallen behind the Phase 2 DB Schedule, and HPTE requests the Concessionaire to do so,

then the Concessionaire shall prepare a Recovery Schedule in accordance with the requirements of Section 2 of Schedule 5.

#### **16.4 Monthly Progress Reports**

The Concessionaire shall prepare and deliver to HPTE Monthly Progress Reports in accordance with the requirements of Section 2 of Schedule 5.

#### **16.5 Construction Period**

In addition to the other rights granted to HPTE under this Contract, during the course of the Construction Period, HPTE shall have the right to:

- (a) Receive a list of all test results (from which it may advise the Concessionaire it wishes to receive the test results themselves) via the HPTE-provided quality records database, as provided for in Section 3 of Schedule 5, and receive any progress reports and design co-operation reports of the Construction Sub-Contractor and notices of force majeure or default between the Concessionaire and/or the Construction Sub-Contractor;
- (b) If requested by HPTE receive relevant correspondence, invoices, certifications, designs, test results, notices and any other formal communication relating to this Contract exchanged between the Concessionaire and the Construction Sub-Contractor that are required for the purposes of monitoring compliance with this Contract by the Concessionaire;
- (c) Attend progress meetings as an observer between the Concessionaire and/or the Construction Sub-Contractor; and
- (d) Participate in the inspections held prior to the issuance of the Notice of Phase 2 Work Completion.

### **17. MONITORING AND INSPECTION**

#### **17.1 Right of Inspection**

- (a) The Concessionaire shall ensure that HPTE or any duly authorized representative or adviser of HPTE shall have the right (but not so as to delay or impede the progress of the Phase 2 Work) to enter the Site in order to inspect the state and progress of the Phase 2 Work (and to ascertain whether they are being properly executed) and to monitor compliance by the Concessionaire with its obligations under this Contract.



- (b) In exercising its rights under this Section 17.1, HPTE shall (and shall ensure that any of its representatives or advisers shall) at all times comply with all relevant site rules in relation to the Site.

**17.2 Right to Open Up**

- (a) Subject to Section 17.2(b) (and provided that in so doing HPTE uses reasonable endeavors to minimize disruption to the carrying out of the Phase 2 Construction Work), and without prejudice to HPTE's other rights under this Contract including Section 3 of Schedule 5, HPTE's Representative shall have the right at any reasonable time prior to the date upon which the Affidavit of Phase 2 Work Completion is issued and upon reasonable notice to request the Concessionaire to open up and inspect any part or parts of the Phase 2 Construction Work where HPTE's Representative reasonably believes that such part or parts of the Phase 2 Construction Work do not comply with the requirements of this Contract, and the Concessionaire shall comply with such request.
- (b) Prior to exercising his right pursuant to Section 17.1, HPTE's Representative shall notify the Concessionaire of his intention to exercise such right, setting out detailed reasons and providing reasonable prior notice.
- (c) If, following the exercise by HPTE's Representative of his right pursuant to Section 17.1, the inspection shows that the relevant part or parts of the Phase 2 Construction Work do comply with the requirements of this Contract, any delay or increased costs caused to the Phase 2 Construction Work by the exercise of such rights shall, subject to (and in accordance with) the provisions of Section 41, be treated as a Compensation Event.
- (d) If, following the exercise by HPTE's Representative of his right pursuant to Section 17.1, the inspection shows that the relevant part or parts of the Phase 2 Construction Work do not comply with the requirements of this Contract, the Concessionaire shall rectify and make good such matters(s) or nonconformances and any consequence of such rectification and/or making good defect(s) or nonconformances shall be carried out by the Concessionaire at no cost to HPTE, and the Concessionaire shall not be entitled to any extension of time in relation to such correction of the Phase 2 Construction Work.
- (e) If, following the exercise by HPTE's Representative of his right pursuant to Section 17.1, HPTE's Representative is of the opinion that the inspection shows that the relevant part or parts of the Phase 2 Construction Work do not comply with the requirements of this Contract, and the Concessionaire does not agree with such opinion, the matter shall be determined in accordance with the Dispute Resolution Procedure.
- (f) Without prejudice to the rights of HPTE's Representative pursuant to this Section 17.2, the Parties acknowledge that the exercise of such rights pursuant to this Section 17.2 shall not in any way affect the obligations of the Concessionaire under this Contract except as expressly set out in this Section 17 or elsewhere in this Contract.

**17.3 Health and Safety Requirements**

HPTE and any HPTE Related Party shall at all times comply with any health, safety and security requirements notified to it by the Concessionaire when exercising its rights under this Section 17.

**17.4 Supply of Information**

The Concessionaire shall supply to HPTE and any representative or adviser of HPTE visiting any part of the Site pursuant to this Section 17 such information in respect of the Phase 2 Construction Work as may reasonably be required for the purpose of reviewing compliance with this Contract.

**17.5 Increased Monitoring**

- (a) If, following any viewing, visit or inspection made by HPTE, it is discovered that there are material defects in the Phase 2 Construction Work or that the Concessionaire has materially failed to comply with HPTE's Requirements or the Concessionaire's Proposals, HPTE may (without prejudice to any other right or remedy available to it) by notice to the Concessionaire, increase the level of its monitoring of the Concessionaire until such time as the Concessionaire shall have demonstrated to the reasonable satisfaction of HPTE that it is capable of performing and will perform all its obligations under this Contract.
- (b) If HPTE issues a notice under Section 17.5(a) the Concessionaire shall bear its own costs and pay to HPTE on demand all reasonable costs and expenses incurred by or on behalf of HPTE in relation to the costs of the increased level of monitoring.

**17.6 Inspection of the Facilities**

HPTE or a representative or adviser of HPTE shall receive notice of and may, upon obtaining the consent of the relevant manufacturer or supplier (which the Concessionaire shall use reasonable endeavors to obtain), attend any tests or investigations being carried out by said manufacturer or supplier in respect of the Phase 2 Construction Work.

**17.7 The Concessionaire's Reasonable Assistance**

The Concessionaire shall ensure that reasonable facilities are made available to HPTE and any representative of HPTE and that reasonable assistance is given for the purposes of Section 17.1, Section 17.2 and Section 17.6, subject to the Concessionaire's and Construction Sub-Contractor's construction obligations not being adversely affected or interfered with and to HPTE reimbursing the Concessionaire for any reasonable costs or expenses incurred by the Concessionaire as a result of the action taken by HPTE under Section 17.1, Section 17.2 and Section 17.6.

**18. DELAYS**

**18.1 Notice**

Without prejudice to the Concessionaire's obligations under Section 2 of Schedule 5, if at any time the Concessionaire becomes aware that the Phase 2 Work will not or is unlikely to achieve Phase 2 Work Completion by the Planned Full Services Commencement Date, it shall as soon as reasonably practicable and in any event within twenty (20) Business Days of becoming aware of the likely delay give notice to HPTE to that effect specifying:

- (a) The reason for the delay or likely delay; and
- (b) An estimate of the likely effect of the delay on the receipt of the Notice of Phase 2 Work Completion (taking into account any measures that the Concessionaire proposes to adopt to mitigate the consequences of the delay in accordance with Section 18.3).

**18.2 Supply of Information concerning Delays**

Following service of a notice by the Concessionaire pursuant to Section 18.1 the Concessionaire shall promptly supply to HPTE any further information relating to the delay which:

- (a) Is received by the Concessionaire; or
- (b) Is reasonably requested by HPTE and available to the Concessionaire (including information which would be available to the Concessionaire if the Concessionaire exercised its rights under any contract to obtain or otherwise receive that information).

**18.3 Duty to Mitigate**

The Concessionaire shall take all reasonable steps to mitigate the consequences of any delay, which is the subject of a notice pursuant to Section 18.1.

**18.4 Time for Completion of the Phase 2 Work**

If the carrying out of the Phase 2 Work or any part thereof is delayed and the delay is notified to HPTE in accordance with Section 18.1 and such delay is attributable to:

- (a) A Compensation Event, then the provisions of Section 41 shall apply; or
- (b) A Relief Event, then the provisions of Section 42 shall apply; or
- (c) A Force Majeure Event, then the provisions of Section 43 shall apply.

**PART 5: COMMISSIONING AND COMPLETION**

**19. COMPLETION OF THE PHASE 2 CONSTRUCTION WORK**

**19.1 Notice by The Concessionaire**

The Phase 2 Work Completion Preliminary Requirements are that:

- (a) The Concessionaire has completed all Phase 2 Construction Work (except for Punch List items, final cleanup and other items referred to in Section 19.3).
- (b) The Concessionaire has ensured that the Phase 2 Construction Work has been performed in accordance with the requirements of the Contract.
- (c) The Concessionaire has received all applicable Necessary Consents required for the Phase 2 Construction Work to be lawfully open to traffic.
- (d) The Concessionaire has furnished to HPTE certifications from the Concessionaire's design manager, in the form appearing at Part 2 of Schedule 9, certifying that the Design Documents meet the requirements of the Contract.
- (e) The Concessionaire has furnished to HPTE certifications from the Concessionaire's project manager, in the form appearing at Part 2 of Schedule 9 certifying that the construction meets the requirements of the Contract.
- (f) The Concessionaire has furnished to HPTE certifications from the Concessionaire's quality manager, in the form appearing at Part 2 of Schedule 9, certifying that there are no outstanding non-conformances other than those identified on the Punch List.
- (g) The Concessionaire has completed the toll commissioning process described in the HPTE Phase 2 ETCS Requirements/Concessionaire's Phase 2 ETCS Proposals developed in accordance with those documents, and the components of the Phase 2 ETCS are complete, have passed all required demonstration testing (including demonstrating successful integration of the Phase 2 ETCS with the Phase 1 ETCS and the I-25 ETCS to enable the ETCS to be operated as a single system), and including demonstrating full integration with and compatibility with the Tolling Services Provider;
- (h) The Concessionaire has ensured that the Project is ready to be safely opened for traffic and that no further work is required for such opening which would involve any lane or shoulder closure.

The Concessionaire shall give notice to HPTE 20 Business Days in advance of the date when the Concessionaire expects that all of the Phase 2 Work Completion Preliminary Requirements will have been achieved, and shall give a further notice when all those requirements have been achieved.

**19.2 Correction of Non-Conformance**

Upon receipt of the Concessionaire's notice under Section 19.1, within 15 days HPTE will conduct such inspections, surveys, and/or testing as HPTE deems desirable in respect of confirming compliance with the terms of Section 19.1. If such inspections, surveys, and/or tests disclose that

any Phase 2 Work Completion Preliminary Requirements have not been fulfilled, HPTE will promptly advise the Concessionaire as to

- (a) Nonconforming Phase 2 Work (including incomplete Phase 2 Work) necessary to be corrected as a condition to Phase 2 Work Completion;
- (b) Nonconforming Phase 2 Work (including incomplete Phase 2 Work), which may be corrected after Phase 2 Work Completion as Punch List Items; and/or
- (c) Whether the Concessionaire shall reassess the accuracy and completeness of its notice.

Upon correction of the Nonconforming Phase 2 Work (including incomplete Phase 2 Work) identified as a prerequisite to Phase 2 Work Completion, the Concessionaire shall provide written notification to HPTE and HPTE will conduct additional inspections, surveys and/or tests as HPTE deems desirable in respect of confirming compliance with the terms of Section 19.1. This procedure shall be repeated until all Phase 2 Work Completion Preliminary Requirements have been achieved.

### **19.3 Conditions to Issuance of Notice of Phase 2 Work Completion**

The Concessionaire shall provide to HPTE an executed sworn Affidavit of Phase 2 Work Completion in accordance with Section 19.4 when all of the following have occurred (the "Phase 2 Work Completion Requirements"):

- (a) HPTE has received all releases for Construction Documents, Design Documents, As-Built Documents, right-of-way record maps, surveys, test data, and other deliverables required under the Contract Documents for the Project.
- (b) All of the Concessionaire's and Sub-Contractors' personnel, supplies, equipment, waste materials, rubbish, and temporary facilities related to construction have been removed from the Site, the Concessionaire has restored and repaired all damage or injury arising from such removal and the Site is in good working order and condition save to the extent that any such matter is a Punch List Item;
- (c) The Concessionaire has provided the Source Code and Source Code Documentation for the ETCS (as integrated to include the Phase 2 ETCS), that Source Code and Source Code Documentation has been validated so that it can be placed in escrow in accordance with Section 5;
- (d) The bond in support of the Concessionaire's obligations under Section 13.5 of Schedule 5 has been delivered and is in full force and effect; and
- (e) The Phase 2 Work Completion Preliminary Requirements have been achieved.

### **19.4 Requirements of Affidavit of Phase 2 Work Completion**

The Affidavit of Phase 2 Work Completion shall include the following statement:

*To the best of the Concessionaire's knowledge and belief, the Phase 2 Work under the Contract has been completed in strict accordance with the Contract, all of the Phase 2 Work Completion Requirements have been*

*achieved, and no lawful debts for labor or materials are outstanding; all requests for funds for undisputed work under the Contract, and under all billings of whatsoever nature are accurate, complete and final and no additional compensation over and above the final payments of the HPTE Capital Payment will be requested or is due under the Contract or under any adjustment issued there under for said undisputed work; there are no outstanding claims, liens or stop notices relating to the Phase 2 Work, including claims by Utility Owners; there is no existing default by the Concessionaire under any Utility Relocation Agreement, and no event has occurred which, with the passing of time or giving of notice or both, would lead to a claim relating to the Phase 2 Work or event of default under any Utility Relocation Agreement; and upon receipt of final payment, the Concessionaire and Sub-Contractors acknowledge that HPTE and any and all employees of HPTE and their authorized representatives will thereby be released, discharged and acquitted from any and all claims or liability for additional sums on account of undisputed Phase 2 Work performed under the Contract.*

If the Concessionaire is unable to provide the affidavit in the above form, the affidavit shall certify that all such outstanding matters are set forth in an attached list which shall describe the outstanding matters in such detail as may be requested by HPTE. The affidavit shall include a representation of the Concessionaire that it is diligently and in good faith contesting all such matters by appropriate legal proceedings and shall provide a status report regarding the same including an estimate of the maximum payable with respect to each such matter.

#### **19.5 Inspection and Issuance of Notice of Phase 2 Work Completion**

Within 5 Business Days after HPTE's receipt of the Affidavit of Phase 2 Work Completion, HPTE will make a final inspection, and HPTE will either issue a Notice of Phase 2 Work Completion, which shall state the date on which Phase 2 Work Completion has been achieved or notify the Concessionaire regarding any Phase 2 Work remaining to be performed. If the Phase 2 Work Completion Requirements have not been achieved then the Concessionaire shall promptly remedy the defective and/or uncompleted portions of the Phase 2 Work and/or complete the other matters which are set out in Section 19.3. Thereafter, the Concessionaire shall provide to HPTE a revised Affidavit of Phase 2 Work Completion with a new date based on when these matters have been dealt with. The foregoing procedure shall apply successively thereafter until HPTE has issued a Notice of Phase 2 Work Completion, which it shall be required to do upon the satisfaction of such requirements.

#### **19.6 Overpayments; No relief from continuing obligations**

Phase 2 Work Completion will not prevent HPTE from correcting any measurement, estimate or certificate made before or after completion of the Phase 2 Work, or from recovering from the Concessionaire, the providers of Performance Security or both, the amount of any overpayment sustained due to failure of the Concessionaire to fulfill the obligations under this Contract with respect to the Phase 2 Work. A waiver on the part of HPTE of any breach by the Concessionaire shall not be held to be a waiver of any other or subsequent breach. Receipt of the Notice of Phase 2 Work Completion shall not relieve the Concessionaire from any of its continuing obligations hereunder, or constitute any assumption of liability by HPTE.

**19.7 Effect of issue of Notice of Phase 2 Work Completion**

- (a) If HPTE disagrees with the Concessionaire's assessment that the Phase 2 Work Completion Requirements have been achieved or fails to issue a Notice of Phase 2 Work Completion in accordance with Section 19.5 the Concessionaire shall be entitled to refer the matter to the Dispute Resolution Procedure as if it constituted a Dispute.
- (b) The Parties agree that the date stated to be the date of Phase 2 Work Completion on the Notice of Phase 2 Work Completion shall be final binding and enforceable upon the Parties except in the case of fraud, collusion, bias or manifest error, unless the matter is referred for determination pursuant to the Dispute Resolution Procedure within fifteen (15) Business Days of receipt of the Notice of Phase 2 Work Completion by the Concessionaire.
- (c) For the avoidance of doubt, a Notice of Phase 2 Work Completion (whether issued by HPTE or subsequently determined pursuant to the Dispute Resolution Procedure) shall determine (and shall be conclusive evidence that) Phase 2 Work Completion has occurred for the purpose of satisfying the relevant Condition Precedent to the Full Services Commencement Date, but shall not be final and conclusive evidence that the Phase 2 Work has been constructed in accordance with this Contract. It shall also be without prejudice to:
  - (i) HPTE's rights to allocate Noncompliance Points whether or not the reason for such Noncompliance Points arose or could have been detected prior to the issue of the Notice of Phase 2 Work Completion; and
  - (ii) HPTE's rights and remedies under the HPTE-Sub-Contractor Agreements.

**19.8 Punch List Items**

This Section 19.8 shall apply to any Punch List Items outstanding at Phase 2 Work Completion,

- (a) HPTE shall, at the same time as it issues the Notice of Phase 2 Work Completion, issue to the Concessionaire a list of the relevant Punch List Items (the "Punch List").
- (b) Within five (5) Business Days of receipt of the Punch List the Concessionaire shall provide to HPTE a reasonable program for making good each Punch List Item set out in the Punch List, provided that such program shall require that each Punch List Item shall be made good within such time as is reasonably practicable.
- (c) The Parties shall seek to agree such program and in default of agreement shall refer the matter for determination under the Dispute Resolution Procedure. The program agreed or determined in accordance with this shall be known as the "Punch List Program".

The Concessionaire shall ensure that each Punch List Item is rectified in accordance with the Punch List Program. If any Punch List Item has not been rectified by the date set out in the Punch List Program, then, except in case of an emergency or a material risk to safety, or where there is a material risk that further delay could cause an emergency or material risk to safety to arise (in which

case the obligation on HPTE to give notice before proceeding to effect repairs shall not apply), HPTE shall provide written notice to the Concessionaire of its intent to effect such repairs. If the Concessionaire fails to effect such repairs within the time required by the Punch List Program, then HPTE shall be entitled to effect such repairs as may be necessary, and the Concessionaire shall pay to HPTE an amount equivalent to the actual costs of doing such repairs .

**20. LIQUIDATED DAMAGES AND FIRST SHARE OF I-25 AND PHASE 1 REVENUES**

**20.1 Delay in Achieving Phase 2 Work Completion**

The Concessionaire understands and agrees that if the Concessionaire fails to achieve Phase 2 Work Completion by the Planned Full Services Commencement Date:

- (a) HPTE will suffer substantial losses and damages. The Concessionaire acknowledges and agrees that because of the unique nature of the Project, the fact that it is an essential part of the route between Denver and Boulder and the fact that inconvenience to the traveling public will be one of the significant impacts of any completion delay, certain closure duration delays or failure to obtain access, it is impracticable and extremely difficult to ascertain and determine the actual damages which would accrue to HPTE and the public in the event of the Concessionaire's failure to achieve Phase 2 Work Completion by the applicable Planned Full Services Commencement Date. Therefore, the Concessionaire and HPTE have agreed to stipulate the amount payable by the Concessionaire in the event of its failure to achieve Phase 2 Work Completion by the Planned Full Services Commencement Date. The Concessionaire acknowledges and agrees that such Liquidated Damages are intended to compensate HPTE solely for the Concessionaire's failure to achieve Phase 2 Work Completion by the Planned Full Services Commencement Date, and shall not excuse the Concessionaire from liability for any other breach of Contract, including any failure of the Phase 2 Work to conform with the requirements of this Contract; and
- (b) it was granted the right to receive Toll Revenues generated by the I-25 Managed Lanes and by the Phase 1 Managed Lanes for (amongst other things) the purpose of performing its obligations under this Contract, including achieving Phase 2 Work Completion by the Planned Full Services Commencement date, so if that objective has not been achieved, then the Concessionaire's consideration through its right to receive and retain Toll Revenues has not all been earned and should be reduced in accordance with Section 20.2(b).

**20.2 Obligation to pay Liquidated Damages and first share of Toll Revenues**

If the Concessionaire fails to achieve Phase 2 Work Completion by the Planned Full Services Commencement Date:

- (a) The Concessionaire agrees to pay to HPTE the liquidated damages of \$3,000 per day (or portion of a day) for each day from the Planned Full Services Commencement Date until the date of the Phase 2 Work Completion; and
- (b) The Concessionaire agrees that its consideration under this Contract has not been fully earned, and will be reduced by the payment to HPTE of a share of the Toll



Revenues from the I-25 Managed Lanes and the Phase 1 Managed Lanes, collectively amounting to \$15,000 per day or portion of a day (in addition to the sum described in Section 20.2(a)) for each day from the Planned Full Services Commencement Date until the date of the Phase 2 Work Completion.

HPTE agrees that the payment of Liquidated Damages under Section 20.2(a) and the reduction of the right to receive Toll Revenues under Section 20.2(b) are the sole and exclusive remedies for, and shall constitute full and final satisfaction of, any and all damages that may be claimed by HPTE as a result of the Concessionaire not achieving Phase 2 Work Completion by the Planned Full Services Commencement Date.

**20.3 Capped Amounts**

- (a) The total aggregate amount of liquidated damages payable under Section 20.2(a) shall not exceed \$1,095,000;
- (b) The total aggregate amount of the share of Toll Revenues payable under Section 20.2(b) shall not exceed \$5,475,000

**20.4 Reasonableness of Liquidated Damage Amounts**

The Concessionaire acknowledges and agrees that the Liquidated Damages have been set based on an evaluation by HPTE of damages, it will incur if there is a failure to achieve the Full Services Commencement Date by the Planned Full Services Commencement Date. The Concessionaire and HPTE agree that the amount of such damages is a genuine pre-estimate of the loss which is reasonably expected to arise as of the date of execution of this Contract, and the Parties have agreed to such Liquidated Damages in order to fix the Concessionaire's costs and to avoid later disputes over which items are properly chargeable to the Concessionaire. The Concessionaire understands and agrees that any Liquidated Damages payable in accordance with this Section 20 are in the nature of liquidated damages and not a penalty and that such sums are reasonable under the circumstances existing as of the date of execution and delivery of this Contract. The Concessionaire further acknowledges and agrees that Liquidated Damages may be owing even though no Concessionaire Default has occurred.

**20.5 No Waiver**

Permitting or requiring the Concessionaire to continue and finish the Phase 2 Work or any part thereof after the Planned Full Services Commencement Date shall not act as a waiver of HPTE's right to receive Liquidated Damages or to receive sums in accordance with Section 20.2(a) hereunder or any rights or remedies otherwise available to HPTE.

**20.6 Sums recoverable by deduction or by invoice**

To the extent Liquidated Damages and/or sums due and payable to HPTE in accordance with Section 20.2(a) are not deducted from any amount owed by HPTE to the Concessionaire, HPTE may send the Concessionaire an invoice, and the Liquidated Damages and/or such sums shall be payable by the Concessionaire to HPTE within ten (10) Business Days after the Concessionaire's receipt of the invoice.

**21. WARRANTIES IN RELATION TO PHASE 2 GP LANES**

**21.1 Phase 2 GP Lane Warranties**

The Concessionaire warrants in relation to the Phase 2 GP Lanes that:

- (a) All design work furnished pursuant to this Contract shall be in accordance with the requirements of this Contract;
- (b) The completed Phase 2 GP Lanes shall be in accordance with the requirements of this Contract;
- (c) Materials and equipment furnished under this Contract shall be in accordance with the requirements of this Contract; and
- (d) The specifications and/or drawings selected or prepared for use during construction shall be in accordance with the requirements of this Contract.

**21.2 Phase 2 GP Lane Warranty Term**

The warranty term for each element of the Phase 2 GP Lanes shall commence upon Phase 2 Work Completion. Subject to extension under Section 21.6, the warranties regarding all elements of the Phase 2 GP Lanes shall remain in effect until one year after Phase 2 Work Completion. If the Phase 2 GP Lanes have not met the standards set forth in this Section 21 at any time within the warranty period, then the Concessionaire shall correct such work as specified below, even if the performance of such corrective work extends beyond the stated warranty period.

**21.3 Corrective Work**

- (a) Within seven (7) Business Days of receipt by the Concessionaire of notice from HPTE specifying a failure of any of the work to satisfy the Concessionaire's warranties, or of any Sub-Contractor representation, warranty, guarantee, or obligation which the Concessionaire is responsible to enforce, the Concessionaire and HPTE shall agree when and how the Concessionaire shall remedy such non-compliance. In case of an emergency as indicated by HPTE in its notice requiring immediate curative action, the Concessionaire and HPTE shall agree on a remedy promptly upon notice by HPTE of such emergency.
- (b) If the Concessionaire does not use its reasonable endeavors to proceed to effectuate such remedy within the agreed time, or if the Concessionaire and HPTE fail to reach an agreement in relation to the time for carrying out the work within such seven (7) Business Day period (or immediately, in the case of emergency conditions) (which agreement may be subject to any reservation of a right to subsequently resolve a dispute which the Concessionaire may wish to make in accordance with Section 21.3(c)), then HPTE, after notice to the Concessionaire, shall have the right to perform or have performed by third parties the necessary remedy, and the reasonable costs thereof shall be borne by the Concessionaire. HPTE may agree to accept Nonconforming Phase 2 Construction Work in accordance with the HPTE Phase 2 Construction Work Requirements.

- (c) If the Concessionaire considers that the matter identified in HPTE's notice under Section 21.3(a) is not a non-compliance for which it is responsible it may give notice to HPTE that it will proceed with the work specified by HPTE reserving to its right to have the dispute in relation to whether or not the matter is a non-compliance determined subsequently. If it is subsequently agreed or determined that the work in question was not a non-compliance then HPTE will pay the Concessionaire the costs reasonably incurred by the Concessionaire in acting in accordance with HPTE's directions.

#### **21.4 List of Warranty Work Items**

If an item requiring warranty work comes to the attention of HPTE prior to the end of the warranty period then HPTE shall give notice to the Concessionaire in relation to any such item. Additionally, HPTE and the Concessionaire shall conduct a walkthrough of the Phase 2 GP Lanes 20 Business Days prior to expiration of the warranty period and shall produce a list of those items requiring warranty work.

#### **21.5 Costs of Correction of Work**

All costs of correcting work in accordance with this Section 21, including additional testing and inspections, shall be borne by the Concessionaire. The Concessionaire shall reimburse HPTE and pay HPTE's reasonable expenses made necessary pursuant to this Section 21 within ten (10) Business Days after the Concessionaire's receipt of the invoice therefore. The Concessionaire shall be responsible for obtaining any required Necessary Consents or other consents from any other Person in connection with the warranty work contemplated herein.

#### **21.6 Warranty of Corrected Work**

The warranties shall apply to all work redone, repaired, corrected or replaced pursuant to the terms of this Contract. The warranties as to each redone, repaired, corrected or replaced element of the work shall extend beyond the original warranty period if necessary to provide at least a one (1) year warranty period following proper completion in accordance with this Section 21 of the redone, repaired, corrected or replaced work.

#### **21.7 Sub-Contractor Warranties for Phase 2 GP Lanes**

This Section 21.7 shall apply in relation to the Phase 2 GP Lanes.

- (a) Without in any way derogating the Concessionaire's own representations and warranties and other obligations with respect to all of the Phase 2 GP Lanes, the Concessionaire shall obtain from all Sub-Contractors and cause to be extended to HPTE, representations, warranties, guarantees and obligations with respect to the design, materials, workmanship, equipment, tools and supplies furnished by such Sub-Contractors corresponding to those representations, warranties, guarantees and obligations given or undertaken by the Concessionaire, including all such representations, warranties, guarantees, and obligations required to be furnished by Sub-Contractors under HPTE's Requirements. All representations, warranties, guarantees, and obligations of Sub-Contractors shall:

- (i) Be written so as to survive all HPTE and the Concessionaire inspections, tests, and approvals; and
- (ii) Run directly to and be enforceable by the Concessionaire and/or HPTE and their respective successors and assigns.

The Concessionaire hereby assigns to HPTE, without prejudice to the Concessionaire's rights which are expressly retained under the terms of the applicable agreements, all of the Concessionaire's rights and interest in all extended warranties (if any) for periods exceeding the applicable warranty period, which are received by the Concessionaire from any of its Sub-Contractors.

- (b) Without prejudice to the Concessionaire's other obligations under this Section 21, upon receipt from HPTE of notice of a failure of any of the work comprised in the Phase 2 GP Lanes to satisfy any Sub-Contractor warranty, representation, guarantee, or obligation, the Concessionaire shall take reasonable steps to enforce any such representation, warranty, guarantee, or obligation, in addition to the Concessionaire's other obligations hereunder.

#### **21.8 Bikeways**

The Concessionaire gives those warranties and shall perform those obligations set out in Section 13.5 of Schedule 5.

#### **21.9 Intelligent Transportation Systems Maintenance**

The Concessionaire shall perform those maintenance and other obligations in relation to the Intelligent Transportation Systems (as defined in Schedule 5) which are set out in Section 19 of Schedule 5. Upon completion of such maintenance obligations all special tools, equipment, furnishings, and supplies purchased by and/or used by the Concessionaire, in relation to the Intelligent Transportation Systems shall be delivered to HPTE free and clear of liens, pledges, encumbrances or charges of any sort whatsoever.

#### **21.10 No Limitation of Liability**

The foregoing warranties are in addition to all rights and remedies available under this Contract or applicable Law, and shall not limit the Concessionaire's liability or responsibility imposed by the Contract Documents or applicable Law with respect to the work, including liability for design defects, latent construction defects, strict liability, negligence or fraud; provided, however, that, upon expiration of the warranties, the Concessionaire shall have no further liability to HPTE hereunder for patent construction defects in the Phase 2 GP Lanes.

#### **21.11 Warranty Beneficiaries**

In addition to benefiting HPTE and its successors and assigns, the warranties and Sub-Contractor warranties provided under this Section 21 are for the benefit of CDOT and any local agencies, and Utility Owners with respect to those portions of the work owned or controlled by each such Person and the Concessionaire agrees that HPTE may enforce such warranties on behalf of CDOT and any such local agencies, and Utility Owners to recover any loss or damage suffered by CDOT and any

such local agencies, and Utility Owners to the extent that such loss or damage could have been recovered by HPTE under this Contract if HPTE had itself suffered that loss or damage.

**21.12 Disputes**

Any disagreement between HPTE and the Concessionaire relating to this Section 21 shall be subject to the Dispute Resolution Procedure contained in Schedule 24, provided that the Concessionaire shall proceed as directed by HPTE pending resolution of the dispute.

**PART 6: PROVISION OF SERVICES**

**22. OPERATION AND MAINTENANCE**

**22.1 Services**

(A) From the Commencement Date and thereafter throughout the Contract Period in relation to the I-25 Managed Lanes and the I-25 Shared Bridge Decks;

(B) from the Phase 1 Services Commencement Date and thereafter throughout the Contract Period in relation to the Phase 1 Managed Lanes and the Phase 1 GP Lanes; and

(C) from the Full Services Commencement Date and thereafter throughout the Services Period in relation to the Managed Lanes and the US 36 General Purpose Lanes as an integrated system;

the Concessionaire shall make the Managed Lanes available for use by vehicles (subject to the Concessionaire's right to charge tolls in accordance with Section 29.1) and shall provide the Services and the Snow and Ice Control Services in each case:

- (a) in accordance with:
  - (i) This Contract;
  - (ii) In the case of the Services:
    - (1) the HPTE Service Requirements; and
    - (2) the Concessionaire's Service Proposals;
  - (iii) In the case of the Snow and Ice Control Services
    - (1) the HPTE Snow and Ice Control Service Requirements; and
    - (2) the Concessionaire's Snow and Ice Control Service Proposals;
  - (iv) Good Industry Practice;
  - (v) All applicable Law;
  - (vi) The terms and requirements of any Necessary Consents relating to the same;
- (b) so as to minimize inconvenience and disruption to the extent reasonably practicable to HPTE and users of the Managed Lanes; and
- (c) so as to minimize inconvenience to the extent reasonably practicable in accordance with Section 8 (Ownership and Use of Property).

**22.2 Requirements for Maintenance and Operating Procedures**

The Concessionaire shall ensure on a continuing basis that at all times its maintenance and operating procedures are compliant with Schedule 6 (HPTE Service Requirements) and in any event are sufficient to ensure that:

- (a) The Managed Lanes are available as required by this Contract and HPTE's Service Requirements;
- (b) It can maintain the design intention of the Maintained Elements to achieve their full working life; and
- (c) The Maintained Elements are handed back to HPTE on the Expiration Date in a condition complying with the requirements of this Section 22 and the Handback Requirements.

**22.3 Independent Obligations**

Each obligation described in Section 22.1 and Section 22.2 is an independent obligation. In particular:

- (a) The fact that the Concessionaire has provided the Services in accordance with the Concessionaire's Service Proposals, or the Snow and Ice Control Services in accordance with the Concessionaires' Snow and Ice Control Service Proposals (respectively) shall not be a defense to an allegation that the Concessionaire has failed to comply with the HPTE Service Requirements or the HPTE Snow and Ice Control Service Requirements (unless it is necessary to amend the Concessionaire's Service Proposals or the Concessionaire's Snow and Ice Control Service Proposals under the provisions of this Section set out below, in which case the Concessionaire shall be obliged to proceed in accordance with those provisions); and
- (b) The fact that the Concessionaire has provided the Services in accordance with the HPTE Service Requirements or the Snow and Ice Control Services in accordance with the HPTE Snow and Ice Control Service Requirements shall not be a defense to an allegation that the Concessionaire has failed to provide the Services in accordance with the Concessionaire's Service Proposals or the Snow and Ice Control Services in accordance with the Concessionaire's Snow and Ice Control Service Proposals.

If the implementation of the Services or the Snow and Ice Control Services in accordance with the Concessionaire's Proposals does not fulfill the HPTE Service Requirements or the HPTE Snow and Ice Control Service Requirements (respectively) the Concessionaire shall at its own expense amend the Concessionaire's Proposals. Such amendment shall have the effect that:

- (i) The Concessionaire's Proposals shall satisfy HPTE's Requirements; and
- (ii) Following the amendment, performance of the Services will be of at least an equivalent standard of performance to that set out in the Concessionaire's Proposals prior to their amendment (for the purpose of comparison disregarding the fault which required the amendment to be made).

**22.4 The Maintenance Management Plan, Transition Management Plan, the Operations Management Plan, the Safety Plan and the Communications and Marketing Plan**

- (a) The Concessionaire shall submit a Maintenance Management Plan, an Operations Management Plan, a Transition Management Plan, a Safety Plan and a Communications and Marketing Plan to HPTE for Acceptance:
  - (i) At least forty (40) Business Days prior to the projected Commencement Date in relation to the I-25 Managed Lanes and the I-25 Shared Bridge Decks;
  - (ii) At least sixty (60) Business Days prior to the projected Phase 1 Services Commencement Date in relation to the Phase 1 Managed Lanes and the Phase 1 GP Lanes;
  - (iii) At least ninety (90) Business Days prior to the projected Full Services Commencement Date in relation to the Managed Lanes and the US 36 General Purpose Lanes as an integrated system; and
  - (iv) No less than annually or, if the Concessionaire wishes to change any matter within any plan, more frequently, but no more frequently than once every three (3) months.

HPTE will review the plans and within twenty (20) Business Days it will either Accept the plans or give reasons why it will not Accept the plans in accordance with Section 22.4(b).

- (b) In each case HPTE may decline to Accept a plan if in its reasonable opinion:
  - (i) The contents of the plan, or the proposed method of performance of the activities described in the plan, would not be in accordance with the requirements of this Section 22, HPTE's Service Requirements or the Concessionaire's Service Proposals;
  - (ii) Carrying out activities in accordance with the revised plan would materially and adversely interfere with the operations of HPTE or CDOT and such interference could be avoided or mitigated by the Concessionaire;
  - (iii) The safety of users of the Managed Lanes or of the US 36 General Purpose Lanes would be adversely affected; or
  - (iv) The period for carrying out the activities described in the plan would exceed the period reasonably required for the relevant activities.
- (c) To avoid doubt, if the Concessionaire wishes to implement a Maintenance Management Plan or an Operations Management Plan, which would require a change to the Concessionaire's Proposals in any respect, then that will only be permitted if the Concessionaire has first followed the Change Procedure in order to make the relevant change to the Concessionaire's Proposals.



**22.5 Compliance with Plans**

In addition to its other obligations in relation to the performance of the Services, the Concessionaire shall perform the Services in accordance with the Maintenance Management Plan, the Operations Management Plan and the Safety Plan from time to time Accepted by HPTE in accordance with this Section 22.

**22.6 Survey/Audit Right**

- (a) Once in every year, and at additional times if HPTE reasonably believes that the Concessionaire is in breach of its obligations under this Contract, HPTE may carry out or ensure the carrying out of each of:
  - (i) A survey of the Managed Lanes by a suitably qualified independent expert (not being an employee of HPTE) and
  - (ii) An audit of the Concessionaire's records and operations (including the data collected by the Concessionaire in relation to the speed and composition of traffic travelling on the Managed Lanes and of the Tolls which have been charged) and of the Assets.
- (b) HPTE shall notify the Concessionaire in writing a minimum of ten (10) Business Days in advance of the date it wishes to carry out a survey or audit described in this Section 22.6. HPTE shall consider in good faith any reasonable request by the Concessionaire for the survey or audit to be carried out on a different date if such request is made at least five (5) Business Days prior to the notified date and the Concessionaire (acting reasonably) is able to demonstrate that carrying out the survey on the notified date would materially prejudice the Concessionaire's ability to perform its obligations or exercise its rights under this Contract.
- (c) When carrying out any survey or audit, HPTE shall use reasonable endeavors to minimize any disruption caused to the provision of the Services or the collection of Tolls by the Concessionaire. The cost of the survey or audit, except where Section 22.6(d)(iii) applies, shall be borne by HPTE. The Concessionaire shall give HPTE (free of charge) any reasonable assistance required by HPTE from time to time during the carrying out of any survey.
- (d) If a survey or an audit shows that the Concessionaire has not complied or is not complying with its obligations, including that the Concessionaire's records or data have not been maintained in accordance with this Contract or include inaccuracies, HPTE shall:
  - (i) Notify the Concessionaire of the condition which the Managed Lanes should be in to comply with its obligations or of other steps to be taken with respect to its obligations under this Contract.
  - (ii) Specify a reasonable period within which the Concessionaire must carry out such rectification and/or maintenance work, or where rectification or maintenance work cannot rectify the deficiency to take reasonable steps to prevent the recurrence of the deficiency; and

- (iii) Be entitled to be reimbursed by the Concessionaire for the reasonable cost of the survey or audit and any administrative costs incurred by HPTE in relation to the survey other than where the costs of the rectification and/or maintenance work, or work to prevent recurrence of the breach, are less than the costs of the survey in which case the cost of the survey shall be shared equally between HPTE and the Concessionaire.
- (e) The Concessionaire shall carry out such rectification and/or maintenance work, or modify its practices or procedures as is necessary to correct, or prevent recurrence of, deficiencies found as a consequence of a survey or audit within the period reasonably specified by HPTE and any costs it incurs in carrying out such rectification and/or maintenance work and/or modification of practices or procedures shall be at the Concessionaire's own expense.

**22.7 Stipulations Applicable to the Performance of the Services**

- (a) The Concessionaire shall perform the Services exclusively using materials and equipment
  - (i) In accordance with the HPTE Service Requirements; and
  - (ii) To the extent that the HPTE Service Requirements either are silent in relation to the nature of the materials and equipment to be used, or permit selection of materials and equipment which comply with a generic description, which are selected in accordance with Good Industry Practice applicable at the time of performance of the Services.
- (b) The Concessionaire will ensure that:
  - (i) All persons employed in connection with the performance of the Services will be skilled and experienced in their several professions, trades and callings or adequately supervised;
  - (ii) If any person employed in connection with the performance of the Services works directly on the maintenance of highways then:
    - (1) the rates of pay for such persons will be no less than comparable to the lower of a) the then-minimum pay per hour received by CDOT's Transportation Maintenance I employees; Class Code D7D1TX (in each year as applicable, the "CDOT Employee Rate"); or b) \$18.63 per hour, indexed; and
    - (2) the dollar value of the employer's contribution to the cost of healthcare and dental plans offered to such persons will be no less than the lower of a) the contribution then offered by CDOT to CDOT's Transportation Maintenance I employees, Class Code D7D1TX and b), the contributions set out below, indexed.

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<u>Medical Insurance</u>	Employee Only	Employee Spouse +	Employee Child(ren) +	Employee Spouse Child(ren) +
CDOT contribution	\$368.42	\$623.42	\$659.66	\$914.50

<u>Dental Insurance</u>	Employee Only	Employee Spouse +	Employee Child(ren) +	Employee Spouse Child(ren) +
CDOT contribution	\$23.80	\$39.00	\$41.18	\$56.38

- (3) To determine the CDOT Employee Rate and medical and dental benefits, Concessionaire shall refer to the following on a yearly basis:

The Compensation Plan for the current State of Colorado fiscal year, compiled and published by the Colorado Division of Human Resources, or any successor plan or report, which can be found as of the Contract Date at:

<http://www.colorado.gov/cs/Satellite?c=Page&cid=1213089701845&pagename=DPA-DHR%2FDHRLLayout>

and

The current Total Compensation Summary and applicable back up documentation for State of Colorado employees published by the Colorado Division of Human Resources, which can be found as at the Contract Date at:

<http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251760267947&ssbinary=true>

The obligations of Section 22.7(b)(ii) do not apply to any person who is employed by a Sub-Contractor and who regularly works on the maintenance of highways other than the Managed Lanes and the US 36 General Purpose Lanes.

- (iii) All aspects of the Services will be supervised by sufficient numbers of persons having adequate knowledge of such matters for the satisfactory and safe performance of the Services in accordance with this Contract;
- (iv) Any area where the Services are carried out is maintained in good order, kept in a safe condition and protected from damage, and working areas of the Managed Lanes and/or the US 36 General Purpose Lanes are secure against

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trespassers and clean and tidy in each case so far as is practicable having regard to the nature of the Services which are being performed; and

- (v) An individual who is a registered licensed professional engineer in the State of Colorado will be "responsible charge" of Life Cycle Maintenance Work. As used in the preceding sentence, "responsible charge" means personal responsibility for the control and direction of engineering work within a professional engineer's scope of competence.
- (c) During the carrying out of the Services the Concessionaire shall or shall ensure that the Operations Sub-Contractor and its sub-contractors and/or consultants shall:
- (i) Not use or occupy or permit any land on which the Services are is being carried out to be used or occupied for any purpose other than the carrying out of the Services;
  - (ii) Not deposit or manufacture or permit to be deposited or manufactured on any land upon which the Services are being carried out any materials which are not required for the carrying out of the Services;
  - (iii) At the Concessionaire's sole cost, transport all surplus materials arising from the Services and arrange for the disposal of the same at such places as may lawfully be used for disposal, and the Concessionaire shall comply with its legal obligations in relation to ensuring that such materials will not cause or give rise to pollution of the environment in contravention of any applicable Law;
  - (iv) Not without the written consent of HPTE erect or permit or suffer to be erected on or near to the Managed Lanes and/or the US 36 General Purpose Lanes any temporary structure except site accommodation usual in connection with works of a like nature to the Services or as contemplated by the Concessionaire's Proposals; and
  - (v) Not erect or exhibit or permit or suffer to be erected or exhibited on any part of the Site any signs or trade boards save those previously approved in writing by HPTE (such approval not to be unreasonably withheld).
- (d) For the avoidance of doubt the Concessionaire shall not amend or change the Concessionaire's Service Proposals or the Concessionaire's Snow and Ice Control Service Proposals except by way of a Concessionaire Change. Where the Concessionaire Change is necessary for the Concessionaire to comply with Section 22.3 or in order to comply with any Law HPTE shall not be entitled to unreasonably withhold its consent to such a Concessionaire Change provided the implementation, rectification and consequential impact, is at the Concessionaire's expense save in relation to any Change in Law which is a Qualifying Change in Law, in which case Section 44 shall apply.
- (e) The Concessionaire acknowledges that certain Persons (including Utilities) have a right of access to the Managed Lanes in accordance with Law, and that this access is regulated by CDOT by the issue of Access Permits. Schedule 22, Part 2 shall have

effect, and subject to compliance by any Person exercising any such right of access with the terms of an Access Permit issued for that purpose, the Concessionaire shall permit such Person to have access to the Managed Lanes.

- (f) The Concessionaire will make available to HPTE (and other persons acting on behalf of HPTE on the Site) reasonable facilities and equipment required by HPTE to exercise its rights and obligations under this Contract as specified in Schedule 6.
- (g) The Concessionaire shall ensure that HPTE or any duly authorized representative or adviser of HPTE shall have the right on the giving by HPTE of reasonable notice except in case of emergency (but not so as to delay or impede the progress of the Services) to enter the Managed Lanes and/or the US 36 General Purpose Lanes in order to inspect the performance of the Services (and to ascertain whether they are being properly executed) and to monitor compliance by the Concessionaire with its obligations under this Contract.
- (h) In exercising its rights under Section 22.7, HPTE shall (and shall ensure that any of its representatives or advisers shall) at all times comply with all relevant site rules in relation to the Managed Lanes and/or the US 36 General Purpose Lanes.

**22.8 Failure to make Managed Lanes available**

In the event of any failure by the Concessionaire to comply with this Contract, with the consequence that the Managed Lanes are not available for use by vehicles in accordance with this Contract for a period of five (5) days following notice to the Concessionaire, then HPTE shall be entitled to exercise its right of access and take such reasonable steps to make the Managed Lanes available for use, and the Concessionaire shall pay any costs or expenses incurred in doing so to HPTE.

**22.9 Performance of the Services through the Concessionaire's own work force or through sub-contractors**

The Services, or any element of the Services, and the Snow and Ice Control Services may be performed through the Concessionaire's own personnel, materials and equipment, or, subject to Section 46, by contracting to one or more separate Persons with the expertise, qualifications, experience, competence, skills, know-how and equipment to perform the responsibilities being contracted.

**22.10 Transitional arrangements in respect of I-25 Managed Lanes**

- (a) For the purpose of determining whether there is any defect in the I-25 Managed Lanes and for the purpose of determining the Asset Condition Score in relation to I-25 (including in relation to the operation of Schedule 10) paragraph 1.4.1.1 of Schedule 6 shall apply to set the average international roughness index requirements for five years after the Commencement Date.
- (b) If the initial inspection of the I-25 Managed Lanes referred to in Section 2.3.5 of Schedule 6 reveals any Category 1 Defect or Category 2 Defect (as those terms are defined in Schedule 6) then, to the extent that they are not corrected before the Commencement Date, either the Concessionaire shall correct those defects in each case as required by Schedule 6, provided that the period for such correction work

shall commence on the Commencement Date, or, HPTE may waive the requirement to correct such defect. In either case, no Noncompliance Points shall be allocated in relation to such defects unless the obligation to correct the defect has not been waived and the Concessionaire shall fail to correct those defects in accordance with this Section 22.10(b). HPTE shall reimburse the Concessionaire for the reasonable cost incurred in the correction of such defects (in excess of the costs which the Concessionaire would have incurred if the defects had not existed, taking into account in particular the Concessionaire's obligation to perform the I-25 Initial Work Package). To the extent that the performance of the correction work in accordance with Good Industry Practice causes a loss of Toll Revenue then the HPTE shall reimburse such loss to the Concessionaire.

- (c) If, prior to the Commencement Date, there shall have been any loss or damage to the I-25 Managed Lanes Assets or the Node 2 Building and the relevant I-25 Managed Lane Asset or the Node 2 Building, in each case which would cause a failure to comply with HPTE's Service Requirements, and such loss or damage has not been repaired or replaced by the Commencement Date then such loss and damage shall be treated as if it had been caused by a Compensation Event and Section 41 shall apply save to the extent that HPTE waives or modifies the obligation to comply with HPTE's Service Requirements.

**23. THE PHASE 1 SERVICES COMMENCEMENT DATE AND INTERFACE WITH THE PHASE 1 DB CONTRACT**

**23.1 The Concessionaire's knowledge of the Phase 1 DB Contract and of the Phase 1 ETCS Installation Contract**

The Concessionaire has been provided with a copy of the Phase 1 DB Contract, the Phase 1 ETCS Installation Contract and all Phase 1 Change Orders in place prior to the Commencement Date, and shall be deemed to have full knowledge of all such matters. A list of all Phase 1 Change Orders issued between the Contract Date and the Commencement Date is provided as Schedule 4 to this Contract.

**23.2 Consultation in relation to Phase 1 Change Orders and amendments to the Phase 1 ETCS Installation Contract**

HPTE shall cause CDOT to act in accordance with this Section 23.2.

- (a) If CDOT wishes to initiate a Phase 1 CDOT Initiated Discretionary Change Order, then this Section 23.2(a) shall apply.
  - (i) Except in case of urgency, when as much time as can reasonably be allowed without incurring additional cost under the Phase 1 DB Contract, no later ten (10) Business Days prior to CDOT issuing a Directive Order (as such term is defined in the Phase 1 DB Contract), CDOT shall (1) notify the Concessionaire of its intent to supply a Directive Order; (2) provide a draft of the Directive Order; and (3) an explanation for the need for such Phase 1 CDOT Initiated Discretionary Change Order.

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- (ii) If the Concessionaire wishes to contend that the proposed Phase 1 CDOT Initiated Discretionary Change Order is a Material Phase 1 Change Order, then the Concessionaire must give HPTE notice of that contention containing reasonable details of the basis for the Concessionaire's contention within ten (10) Business Days of receipt of the Directive Order.
  - (iii) In any event, during the ten (10) Business Day period CDOT will provide the Concessionaire with a reasonable opportunity for consultation with CDOT prior to issuing a Directive Order, in particular so that the Concessionaire and CDOT may consult on whether any modifications to the proposed Directive Order will have the result that the resultant Phase 1 Change Order will not be a Material Phase 1 Change Order. CDOT shall have no obligation to amend or otherwise modify its proposed Directive Order.
  - (iv) If the Concessionaire fails to give HPTE notice that it considers the proposed Phase 1 CDOT Initiated Discretionary Change Order to be a Material Phase 1 Change Order in the ten (10) Business Day period referred to above, then the Phase 1 CDOT Initiated Discretionary Change Order shall be deemed not to be a Material Phase 1 Change Order.
- (b) Upon the occurrence of a Phase 1 Mandatory Change Order, this Section 23.2(b) shall apply.
  - (i) CDOT shall promptly notify the Concessionaire of the request from the Phase 1 DB Contractor for the change order and promptly provide all material received by CDOT relating to such Phase 1 Mandatory Change Order to the Concessionaire.
  - (ii) If the Concessionaire wishes to contend that the Phase 1 Mandatory Change Order is a Material Phase 1 Change Order, then the Concessionaire must give HPTE notice of that contention containing reasonable details of the basis for the Concessionaire's contention within seven (7) Business Days of receipt of the information referred to in Section 23.2(b)(i).
  - (iii) In any event to the extent the terms of the Phase 1 DB Contract provide time, CDOT and the Concessionaire will consult regarding the Phase 1 Mandatory Change Order, in particular with a view to establishing whether it is possible to implement the Phase 1 Mandatory Change Order without it being a Material Phase 1 Change Order.
  - (iv) Notwithstanding the foregoing, CDOT shall have the sole discretion to address the Phase 1 Mandatory Change Order pursuant to the terms of the Phase 1 DB Contract. CDOT shall continue promptly to provide all documents and materials relating to the Phase 1 Mandatory Change Order to the Concessionaire.
- (c) Upon the occurrence of a Phase 1 DB Contractor Initiated Discretionary Change Order, this Section 23.2(c) shall apply.

- (i) CDOT shall (1) promptly notify the Concessionaire of the requested change order from the Phase 1 DB Contractor; and (2) provide all material received by CDOT relating to such Phase 1 DB Contractor Initiated Discretionary Change Order.
  - (ii) If the Concessionaire wishes to contend that the Phase 1 DB Contractor Initiated Discretionary Change Order is a Material Phase 1 Change Order, then the Concessionaire must give HPTE notice of that contention containing reasonable details of the basis for the Concessionaire's contention within seven (7) Business Days of receipt of the information referred to in Section 23.2(c)(i).
  - (iii) In any event to the extent the terms of the Phase 1 DB Contract provide time, CDOT and the Concessionaire will consult regarding the Phase 1 DB Contractor Initiated Discretionary Change Order, in particular with a view to establishing whether it is possible to implement the Phase 1 Mandatory Phase 1 DB Contractor Initiated Discretionary Change Order without it being a Material Phase 1 DB Contractor Initiated Discretionary Change Order.
  - (iv) CDOT shall use reasonable endeavors to enforce its rights against the Phase 1 DB Contractor with respect to the Phase 1 DB Contractor Initiated Discretionary Change Order based on the input from the Concessionaire. CDOT shall continue to provide all documents and materials relating to the Phase 1 DB Contractor Initiated Discretionary Change Order to the Concessionaire as promptly as possible.
- (d) In any case where the Concessionaire has given notice that it considers a proposed Phase 1 Change Order to be a Material Phase 1 Change Order, the Concessionaire and HPTE shall discuss the matter with a view to agreeing whether or not this is the case. If the Parties do not reach agreement within seven (7) Business Days after the Concessionaire has given such notice, then either Party may refer the matter to the Dispute Resolution Procedure.
  - (e) If they agree or determine that a Phase 1 Change Order is a Material Phase 1 Change Order, then the Parties shall treat such Material Phase 1 Change Order as an HPTE Change and apply Schedule 21 (Change Procedure) as it relates to HPTE Changes.
  - (f) If CDOT wishes to agree to any amendment to the Phase 1 ETCS Installation Contract then it shall consult with the Concessionaire, and will not agree to any such amendment without the consent of the Concessionaire, which shall not be unreasonably withheld.

**23.3 Process in relation to the Phase 1 DB Contract and the Phase 1 ETCS Installation Contract leading to the Phase 1 Services Commencement Date**

HPTE will give notice to the Concessionaire stating the expected date for acceptance of the Phase 1 Managed Lanes under the Phase 1 DB Contract and the Phase 1 ETCS:



- (a) No later than one (1) year prior to the Planned Phase 1 Services Commencement Date;
- (b) After that, at intervals of two (2) months until four (4) months before the expected date for acceptance of the Phase 1 Managed Lanes under the Phase 1 DB Contract; and
- (c) After that, at intervals of one (1) week until the Phase 1 Services Commencement Date.

**23.4 Collaboration in Operation of Phase 1 Acceptance Procedures**

HPTE shall cause CDOT to act in accordance with Section 23.4(a) to (f) when CDOT is exercising its rights pursuant to Sections 20 and 21 of the Phase 1 DB Contract and in accordance with Section 23.4 (g) when CDOT is exercising its rights pursuant to the Phase 1 ETCS Installation Contract.

Phase 1 DB Contract

- (a) CDOT will promptly provide the Concessionaire with a copy of all material communications and written information which it receives from the Phase 1 DB Contractor in relation to Sections 20 and 21 of the Phase 1 DB Contract and will provide the Concessionaire with an opportunity for consultation with CDOT prior to CDOT making any material reply.
- (b) CDOT will provide the Concessionaire with a reasonable opportunity:
  - (i) To review the results of previous inspections, surveys and/or tests which are relied upon by CDOT and/or the Phase 1 DB Contractor to establish that it's work conforms with the Phase 1 DB Contract;
  - (ii) For consultation with CDOT prior to CDOT deciding upon those inspections, surveys and/or tests and/or walkthroughs which CDOT will carry out pursuant to Section 20 or Section 21 of the Phase 1 DB Contract;
  - (iii) To attend and witness all such inspections, surveys and/or tests and/or walkthroughs referred to in 23.2(a)(ii);
  - (iv) To provide to CDOT views on the outcome of these inspections, surveys and/or tests and/or walkthroughs referred to in 23.2(a)(i) and/or 23.2(a)(ii); and
  - (v) To propose the matters to be included in any Punch List (as that term is defined in the Phase 1 DB Contract) to be issued to the Phase 1 DB Contractor.
- (c) If CDOT and the Concessionaire do not agree on any matter in relation to the operation of Section 20 or 21 of the Phase 1 DB Contract, then:
  - (i) Either party may refer the matter to an Independent Expert and the Independent Expert and the parties shall act in accordance with paragraphs 5 – 13 of Part 3 of Schedule 24, which paragraphs shall apply notwithstanding that the Dispute is a Works Dispute and not a Services Dispute. The decision

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of the Independent Expert shall be final and binding for all purposes. To avoid doubt, neither of paragraph 14 of Part 3 of Schedule 24 nor Part 2 of Schedule 24 shall apply to a Dispute which is the subject of this Section 23.4(c).

- (ii) After the Independent Expert has given his decision on any Dispute referred pursuant to Section 23.4(c)(i) CDOT shall operate the terms of Section 20 and 21 of the Phase 1 DB Contract in accordance with the decision of the Independent Expert. To avoid doubt, this may include CDOT asserting against the Phase 1 DB Contractor the decision of the Independent Expert in relation to whether or not Project Completion or Final Acceptance (each as defined in the Phase 1 DB Contract) as the case may be, has occurred. It may also involve CDOT conducting any dispute resolution process which may subsequently arise in relation to any such matter under the Phase 1 DB Contract or alternatively CDOT may take steps itself and at its own cost to rectify any matter which the Independent Expert has decided to be necessary to rectify so as to achieve Project Completion or Final Acceptance (as the case may be).
- (d) CDOT shall enforce its rights against the Phase 1 DB Contractor so that the Phase 1 DB Contractor corrects those items on any Punch List issued under the Phase 1 DB Contract or CDOT shall correct those items itself.
- (e) The Concessionaire shall promptly report to CDOT any matter amounting to a failure by the work under the Phase 1 DB Contract to satisfy the warranties given by the Phase 1 DB Contractor under Section 21 of the Phase 1 DB Contract. Thereafter, CDOT shall use reasonable endeavors to enforce its rights against the Phase 1 DB Contractor so that the Phase 1 DB Contractor corrects those matters and shall include the Concessionaire's costs in relation to such matters as its own costs to be recovered from the Phase 1 DB Contractor.
- (f) The Concessionaire shall act reasonably and in good faith in its response to CDOT in relation to the matters which are the subject of this Section 23.4 and shall provide its views and information to CDOT promptly and in any event in sufficient time to enable CDOT to comply with its obligations under the Phase 1 DB Contract.

### Phase 1 ETCS Contract

- (g) HPTE will promptly provide the Concessionaire with a copy of all material communications and written information which it receives from E-470 in relation to Acceptance Testing and the Acceptance Plan, Operational Readiness, Punch List Items System Testing (as those matters are defined in the Phase 1 ETCS Contract) and will provide the Concessionaire with a reasonable opportunity:
  - (i) For consultation with HPTE prior to HPTE making any material reply
  - (ii) To review the results of previous inspections, surveys and/or tests which are relied upon by HPTE and/or E-470 to establish that it's work conforms with the Phase 1 DB Contract;

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- (iii) For consultation with HPTE prior to HPTE deciding upon those inspections, surveys and/or tests which HPTE will carry out pursuant to the Phase 1 ETCS Contract;
  - (iv) To attend and witness all such inspections, surveys and/or tests;
  - (v) To provide to HPTE with its views on the outcome of those inspections, surveys and/or tests; and
  - (vi) To propose the matters to be included in any Punch List (as that term is defined in the Phase 1 ETCS Contract) to be issued to the E-470.
- (h) If HPTE and the Concessionaire do not agree on any matter in relation to the operation of the Phase 1 ETCS Contract, then:
- (i) Either party may refer the matter to an Independent Expert and the Independent Expert and the parties shall act in accordance with paragraphs 5 – 13 of Part 3 of Schedule 24, which paragraphs shall apply notwithstanding that the Dispute is a Works Dispute and not a Services Dispute. The decision of the Independent Expert shall be final and binding for all purposes. To avoid doubt, neither of paragraph 14 of Part 3 of Schedule 24 nor Part 2 of Schedule 24 shall apply to a Dispute which is the subject of this Section 23.4(h).
  - (ii) After the Independent Expert has given his decision on any Dispute referred pursuant to Section 23.4(h) HPTE shall operate the terms of the Phase 1 ETCS Contract in accordance with the decision of the Independent Expert. To avoid doubt, this may include HPTE asserting against the E-470 the decision of the Independent Expert in relation to whether or not Operational Readiness System Acceptance (each as defined in the Phase 1 ETCS Contract) as the case may be, has occurred. It may also involve HPTE conducting any dispute resolution process which may subsequently arise in relation to any such matter under the Phase 1 ECTS Contract or alternatively HPTE may take steps itself and at its own cost to rectify any matter which the Independent Expert has decided to be necessary to rectify so as to achieve Operational Readiness or System Acceptance (as the case may be).
- (i) HPTE shall enforce its rights against the Phase 1 ETCS Contractor so that the Phase 1 ETCS Contractor corrects those items on any Punch List issued under the Phase 1 ETCS Contract or HPTE shall correct those items itself.
  - (j) The Concessionaire shall promptly report to HPTE any matter amounting to a failure by the work under the Phase 1 ETCS Contract to satisfy the warranties given by E-470 under the Phase 1 ETCS Contract. Thereafter, HPTE shall use reasonable endeavors to enforce its rights against the E-470 so that the E-470 corrects those matters and shall include the Concessionaire's costs in relation to such matters as its own costs to be recovered from E-470.
  - (k) The Concessionaire shall act reasonably and in good faith in its response to HPTE in relation to the matters which are the subject of this Section 23.4 and shall provide its

views and information to HPTE promptly and in any event in sufficient time to enable HPTE to comply with its obligations under the Phase 1 ETCS Contract.

**23.5 Delay in acceptance of Phase 1 DB Contract and Phase 1 ETCS**

Provided that HPTE has kept the Concessionaire informed in accordance with Section 23.3, HPTE shall have no liability to the Concessionaire under this Contract or on any other basis whatsoever for any delay to the Phase 1 Services Commencement Date caused by acceptance of the Phase 1 Managed Lanes or the Phase 1 ETCS occurring after the Planned Phase 1 Services Commencement Date unless acceptance of the Phase 1 Managed Lanes or the Phase 1 ETCS does not take place until after the Phase 1 Services Commencement Compensation Date. A failure to achieve acceptance of the Phase 1 Managed Lanes or the Phase 1 ETCS until after the Phase 1 Services Commencement Compensation Date shall be a Compensation Event save to the extent that it was caused by a breach of this Contract by the Concessionaire.

**23.6 Phase 1 Latent Defects**

If the Concessionaire encounters any Phase 1 Latent Defect, then that shall be treated as a Compensation Event.

**24. PROCEDURES RELATING TO LIFE CYCLE MAINTENANCE WORK**

**24.1 Rolling Life Cycle Maintenance Plan**

- (a) No later than ninety (90) days before the beginning of each calendar year after the Full Services Commencement Date, the Concessionaire will annually prepare and deliver to HPTE for its review a full five (5)-year Life Cycle Maintenance Plan in accordance with HPTE's Service Requirements and including
  - (i) All Life Cycle Maintenance which in the view of the Concessionaire should be carried out in relation to the Managed Lanes;
  - (ii) Identifying all Non-Separable Tasks.
- (b) The Concessionaire will reasonably consider any changes or additions proposed by HPTE to the proposed Life Cycle Maintenance Plan in relation to Non-Separable Tasks and will modify the Life Cycle Maintenance Plan to reflect those changes and additions which are consistent with fulfilling the Concessionaire's obligations and HPTE's obligations under this Contract. HPTE will deliver its comments to the Concessionaire within forty-five (45) days after the Concessionaire has delivered each proposed Life Cycle Maintenance Plan to HPTE in accordance with Section 24.1(a).

**24.2 Disputes relating to Life Cycle Maintenance Plan**

In the event of any Dispute relating to a Life Cycle Maintenance Plan, HPTE and the Concessionaire will endeavor in good faith to resolve any such Dispute within sixty (60) days after it is provided to HPTE. Any Disputes raised by HPTE with respect to the Life Cycle Maintenance Plan must be based on whether changes to the Life Cycle Maintenance Plan (including its underlying assumptions):

- (a) Are required in order to avoid a breach by the Concessionaire of its obligations under this Contract or
- (b) Are necessary as the then proposed Life Cycle Maintenance Plan will cause HPTE to be in breach of its obligations under this Contract.

If no agreement is reached within such sixty (60)-day period as to any such matter, either Party may submit the Dispute to the Dispute Resolution Procedure. Until resolution of any Dispute relating to a Life Cycle Maintenance Plan, the treatment of the disputed tasks in the most recently approved Life Cycle Maintenance Plan will remain in effect and govern the requirements relating to such tasks.

#### **24.3 Failure to comply with Life Cycle Maintenance Plan**

If the Concessionaire fails to complete any Non-Separable Task in accordance with this Contract and the applicable Life Cycle Maintenance Plan, HPTE may, but is not obligated to proceed in accordance with this Section 24.3. If HPTE elects to proceed with this Section 24.3 then:

- (a) HPTE shall give notice to the Concessionaire that, unless within 20 Business Days the Concessionaire presents its proposals in relation to the matters set out in Section 24.4(b), then HPTE will either carry out such task or correct such defective work using HPTE personnel, materials and equipment or procure the services for such task or corrective work by one or more contractors;
- (b) If the Concessionaire does not present its proposals in relation to the matters set out in Section 24.4(b) within 20 Business Days of HPTE's notice under Section 24.3(a) then HPTE will be entitled to demand that the Concessionaire pay to HPTE an amount equal to HPTE's good faith estimate of the costs it will incur to complete such task or corrective work, plus an additional 10% contingency, and HPTE's third-party costs incurred to procure such contract(s) and the Concessionaire shall pay such amount within 20 Business Days of receipt of the demand.
- (c) If HPTE's costs to complete such tasks and any third-party costs incurred to procure such contract(s) are greater or less than the amount the Concessionaire previously paid to HPTE under this Section 24.3, the Concessionaire will pay to HPTE an amount equal to such excess or HPTE will reimburse the excess funds paid by the Concessionaire, as applicable. The Concessionaire or HPTE will make such payment not later than thirty (30) days after HPTE has finalized its calculation of the costs to complete such tasks and any third-party costs to procure such contract(s) and demand has been made for such payment.
- (d) HPTE shall return any unused contingency amount to the Concessionaire upon completion of the relevant task.

#### **24.4 Performance of Non-Separable Tasks**

- (a) The performance of Non-Separable Tasks will be carried out by the Concessionaire entering into contracts with third parties for Non-Separable Tasks in accordance with this Section 24.4.

- (b) When a Non-Separable Task is shown on a Life Cycle Maintenance Plan then at least one hundred and twenty (120) Business Days before the date shown on the Life Cycle Maintenance Plan for performance of the Non-Separable Task (the "Non-Separable Task Date") the Parties shall endeavor to agree:
- (i) Whether HPTE wishes to incur the responsibility of paying its share of the cost of the Non-Separable Task;
  - (ii) The scope of the Non-Separable Work Package;
  - (iii) The form and contents of the tender documents to be delivered to prospective tenderers, which shall include terms and conditions for the contract of the Non-Separable Work Package which provide:
    - (1) For direct contractual recourse by CDOT against the contractor carrying out the Non-Separable Work Package;
    - (2) For any mandatory provisions (such as requirements relating to the Davis-Bacon Act, or relating to disadvantaged business enterprises, or relating to small business enterprises) which are required to be imposed in accordance with conditions necessary to permit funds which CDOT plans to use to pay for its portion of the Non-Separable Work Package to be used for that purpose;
    - (3) For any mandatory requirements in relation to the tendering procedure to be used which are required to be followed in accordance with conditions necessary to permit funds which CDOT plans to use to pay for its portion of the Non-Separable Work Package to be used for that purpose;
    - (4) Appropriate rights of inspection for CDOT in relation to the carrying out of the Non-Separable Task;
    - (5) An invoicing procedure which complies with CDOT's then-customary requirements;
    - (6) Warranties in favor of CDOT in relation to the Non-Separable Task in accordance with Good Industry Practice; and
    - (7) Provisions requiring the tenderers to separately identify the part of the contract price attributable to the performance of the Non-Separable Task.
- (c) If HPTE does not wish to incur its share of the cost of the Non-Separable Task, then Section 24.4(k) shall apply.
- (d) No later than one hundred (100) Business Days before each Non-Separable Task Date, the Concessionaire shall prepare and deliver to HPTE a draft Non-Separable Proposal, which shall incorporate all of the matters agreed by the Parties.

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- (e) If the Parties are unable to agree any of the matters set out in the Non-Separable Proposal then either Party may refer the matter to the Dispute Resolution Procedure.
- (f) The Concessionaire shall manage the Non-Separable Work Package tendering process in accordance with the Non-Separable Proposal agreed or determined in accordance with this Section 24.4 and shall invite tenders from contractors on the list of pre-qualified contractors maintained by CDOT for works in the nature of the Non-Separable Work Package.
- (g) The Concessionaire shall provide to HPTE as soon as reasonably practicable a copy of the tender documents and each response to the tender documents.
- (h) Following the expiration of the tender period for the return of responses to the tender documents, the Concessionaire shall determine, following consultation with HPTE, which tender to select from responsive bidders whose bids conform to the requirements included in the request for proposals.
- (i) The Concessionaire shall by no later than seventy (70) Business Days before the Non-Separable Task Date select the lowest responsive tender from a responsible tenderer received in respect of the provision of the Non-Separable Work Package. Subject to HPTE providing evidence reasonably satisfactory to the Concessionaire that it will be able to pay to the Concessionaire the part of the price attributable to the Non-Separable Task, the Concessionaire shall enter into a contract for the performance of the Non-Separable Work Package and shall use reasonable endeavors to ensure that the Non-Separable Work Package shall be performed in accordance with that contract.
- (j) Upon receipt of any invoice which complies with the requirements of the contract for the Non-Separable Work Package and any necessary supporting documentation, which contains an element of the contract price attributable to the Non-Separable Task, the Concessionaire shall promptly submit an invoice for the Non-Separable Price Percentage of that element of the contract price to HPTE, together with the invoice and supporting documentation, and HPTE shall make payment of that amount in sufficient time for the Concessionaire to pay the contractor in accordance with the terms of the contract for the Non-Separable Work Package.
- (k) If HPTE does not wish to incur the cost of a work package, including the Non-Separable Task notwithstanding that the Concessionaire was justified in including the Non-Separable Task in the Life Cycle Maintenance Plan, then unless HPTE and the Concessionaire can reach agreement on terms by which the Concessionaire shall bear the full cost of the Non-Separable Task subject to subsequent reimbursement (with interest at a rate to be agreed) by HPTE:
  - (i) The Concessionaire shall be released from the obligation to perform the Non-Separable Task until such time as HPTE is willing to incur the cost of a work package including the Non-Separable Task;
  - (ii) The deferral of the Non-Separable Task shall be a Compensation Event and Section 41 shall apply; and

- (iii) When HPTE is willing to incur the cost of a work package including the Non-Separable Task, then this Section 24.4 shall apply, save that any increase in the price of carrying out the Non-Separable Task caused by the deferral shall be borne by HPTE.

**24.5 I-25 Bridges and I-25 Sub-Grade**

- (a) HPTE shall ensure that CDOT will maintain and repair the sub-grade supporting the pavement for the I-25 Managed Lanes and structures within that sub-grade (save in relation to Routine Maintenance activities to be performed by the Concessionaire) in accordance with Good Industry Practice.
- (b) The Concessionaire shall carry out and complete the I-25 Initial Work Package as part of the Phase 2 Construction Work.
- (c) The Concessionaire shall carry out Routine Maintenance and Life Cycle Maintenance (to avoid doubt, including the I-25 Preventative Maintenance Program) on the I-25 Bridge Deck Superstructure.
- (d) The Concessionaire shall carry out the I-25 Preventative Maintenance Program on the I-25 Bridge Deck Superstructure. To avoid doubt, to the extent that any aspect of implementation of the I-25 Preventative Maintenance Program comprises Life Cycle Maintenance then the provisions of this Contract applicable to Life Cycle Maintenance shall apply, otherwise the provisions of this Contract applicable to Routine Maintenance shall apply to the performance of that work.
- (e) HPTE through CDOT shall carry out the routine and lifecycle maintenance of the I-25 Bridge Substructures. HPTE through CDOT shall respond to and repair any damage caused to the I-25 Bridge Substructures through accidents or those matters specified in paragraph (a) of the definition of Relief Events. HPTE shall ensure that CDOT shall carry out its obligations under this Section 24.5(e) in accordance with Good Industry Practice.
- (f) If it is necessary to close the I-25 Managed Lanes or a portion thereof for CDOT to perform maintenance on the I-25 Shared Bridge Deck Substructures, the sub-grade supporting the pavement for the I-25 Managed Lanes or structures within that sub-grade (but, to avoid doubt, excluding any closures required to deal with CDOT's response to the matters described in the second sentence of Section 24.5(e)) then, unless the need to carry out that maintenance work was caused by a breach by the Concessionaire of this Contract (and in particular a failure to implement the I-25 Preventative Maintenance Program), such closure shall be a Compensation Event provided that the compensation in relation to the Concessionaire's loss of revenue shall be established as if any such closure had been required pursuant to Section 29.7(c) so that Sections 29.7(c)(ii) to 29.7(c)(v) shall apply and such closure shall be counted as a closure pursuant to Section 29.7(c) for the purpose of the operation of that Section.



**PART 7: QUALITY, SAFETY AND HPTE INTERVENTION**

**25. QUALITY**

**25.1 Quality Management**

- (a) The Concessionaire shall prepare, implement and continually maintain in respect of each phase of the Project Quality Management Documentation to evidence its quality assurance and quality control system in accordance with Good Industry Practice in accordance with
  - (i) Section 3 of Schedule 5 in relation to the Phase 2 Construction Work; and
  - (ii) Section 1.7.3 of Schedule 6 in relation to the Services.

The Concessionaire shall ensure that each of the Construction Sub-Contractor and the Operations Sub-Contractor prepares, complies with, and applies, the provisions of the Schedules referred to above.

**25.2 Quality Audit**

HPTE may from time to time carry out a reasonable audit of the Concessionaire's and the Sub-Contractors' quality management procedures and documentation to ensure control of the performance of the obligations under this Contract.

**26. SAFETY**

**26.1 Work Safety and Law**

The Concessionaire shall comply with and shall ensure that the Concessionaire Related Parties comply with Law regulating work safety.

**26.2 Regulations regarding co-ordination of design, construction and safety**

- (a) The Concessionaire shall be entirely responsible for the safety of any design which forms part of the Phase 2 Construction Work and/or the Services and for the adequacy, stability and safety of all site operations and methods of construction and other activities which it performs to implement the Phase 2 Work and the Services.
- (b) The Concessionaire shall at all times and from time-to-time designate a person to be responsible for the health and safety matters and notify full details of such person to HPTE. The person may be a separate individual in relation to the Phase 2 Work and in relation to the Services, respectively. The Concessionaire shall provide and maintain, at the Site (in respect of the Phase 2 Work) or at its principal place of business (in respect of the Services), an accident book which shall be open to inspection by HPTE's Representative or HPTE's safety adviser.
- (c) The Concessionaire shall ensure that it and any Concessionaire Related Parties at all times take such precautions as are appropriate in accordance with Good Industry

Practice to protect the health and safety of all persons employed in the provision of the Services or otherwise entitled to be at or in the vicinity of the Site.

**26.3 Work Safety Cooperation**

The Concessionaire shall cooperate in any investigation carried out by HPTE or on HPTE's behalf and/or any Governmental Authority's behalf related to the breach of work safety or safety of operation in the performance of the Phase 2 Work or Services and:

- (a) Shall use all reasonable endeavors to enable HPTE (and/or any other Governmental Authority entitled to make such investigation) to interview staff of the Concessionaire (or other Concessionaire Related Parties) in connection with the investigation; and
- (b) Shall provide to HPTE copies of documents, records and other similar reference materials that HPTE reasonably requires for the purpose of the investigation pursuant to this Section 26, unless under Law such reference materials are confidential. HPTE shall be entitled to keep such reference materials for potential use in the investigation.

**27. HPTE STEP-IN**

**27.1 HPTE Self-Help Rights**

If HPTE reasonably believes that it needs to take action in connection with the Services:

- (a) Because a serious risk exists to the health or safety of persons or property or to the environment; and/or
- (b) To discharge a constitutional or statutory duty, or otherwise to discharge a duty imposed on HPTE by any Law,

then HPTE shall be entitled to take action in accordance with Section 27.2 to Section 27.4.

**27.2 Notice of Election of Self-Help Rights**

Except in the case of an emergency, in which case the obligations of this Section 27.2 shall not be applicable, if Section 27.1 applies and HPTE wishes to take action, HPTE shall notify the Concessionaire in writing of the following:

- (a) The action it wishes to take;
- (b) The reason for such action;
- (c) The date it wishes to commence such action;
- (d) The time period the Concessionaire has to take action before HPTE will step in;
- (d) The time period which it believes will be necessary for such action; and
- (e) To the extent practicable, the effect on the Concessionaire and its obligation to provide the Services during the period such action is being taken.

**27.3 HPTE Required Actions**

Following service of such notice and expiration of any time within which the Concessionaire was to take action, HPTE shall take such action as notified under Section 27.2 and any consequential additional action as it reasonably believes is necessary (together, the "Required Action"), and the Concessionaire shall give all reasonable assistance to HPTE while it is taking the Required Action. HPTE shall provide the Concessionaire with notice of completion of the Required Action and shall use reasonable endeavors to provide such advance notice as is reasonably practicable of its anticipated completion.

**27.4 Other Consequences of Exercise of Self-Help Remedies**

- (a) In the event of any self-help by HPTE in accordance with this Section 27, the Concessionaire shall be entitled to receive the Toll Revenues collected in relation to the Managed Lanes during the relevant period.
- (b) If the intervention in accordance with this Section 27 is carried out by HPTE as a result of a breach of the Concessionaire's obligations under this Contract, any costs of HPTE incurred as a result of the intervention shall be payable by the Concessionaire to HPTE and may be retained by HPTE from the Toll Revenues which would otherwise be paid to the Concessionaire.
- (c) If the intervention in accordance with this Section 27 is carried out by HPTE otherwise than as a result of a breach of the Concessionaire's obligations under this Contract, or the occurrence of a Relief Event or a Force Majeure Event then the intervention shall be a Compensation Event.

**PART 8: FINANCIAL MATTERS**

**28. HPTE CAPITAL PAYMENTS**

**28.1 Application for an Interim Capital Payment**

Whenever a Construction Sub-Contract Price Payment is due the Concessionaire may also apply for an Interim Capital Payment in accordance with this Section 28.

**28.2 Maximum Interim Capital Payment**

The maximum amount of the Interim Capital Payment which may be applied for shall be an amount up to the full amount of the Construction Sub-Contract Price Payment which is due so long as the aggregate value of the Interim Capital Payments made at the date when the Interim Capital Payment shall be paid does not exceed the Interim Capital Payment Cap applicable to the period ending with that date.

**28.3 Supporting Documentation Required for Interim Capital Payments**

Applications for an Interim Capital Payment may not be made more than once every calendar month. When making an application for an Interim Capital Payment, the Concessionaire shall submit to HPTE all the supporting documentation required by the TIFIA Lender pursuant to the terms of the Phase 2 TIFIA Loan and any other documentation submitted to the Senior Lenders when applying to draw funds under those facilities in order to establish that the amount of the Construction Sub-Contract Price Payment is due and payable under the Construction Sub-Contract. If no application is being made to draw funds from the Phase 2 TIFIA Loan when an application is made for an Interim Capital Payment then the Concessionaire shall submit all the supporting documentation which would have been required if such a drawing were being made.

**28.4 Timing of Interim Capital Payment**

HPTE will make payment of the Interim Capital Payment within fifteen (15) Business Days after the day when the last of the requirements in the next sentence has been fulfilled. The requirements for payment are that:

- (a) HPTE has received an invoice, supported by the documentation required pursuant to Section 28.3; and
- (b) The Concessionaire has complied with its obligations to provide the Monthly Progress Report, the Monthly Progress Schedule and the Monthly Maintenance Progress Report as required by Section 2 of Schedule 5.

**28.5 Application of Utility Works Payments and Aggregate Value of Interim Capital Payments**

Notwithstanding anything else in this Section 28 the aggregate value of all Interim Capital Payments shall not exceed the HPTE Capital Payment. To avoid doubt the aggregate value of Interim Capital Payments shall include payments made under Amendment No.1 in accordance with section 9(b) of Amendment No. 1 (quoted at Section 1.10 of this Contract) including payments for Utility Works made after the Commencement Date under the terms of Section 6 of Amendment No. 1 if HPTE has exercised the option to pay for Utility Works in this manner.

**28.6 Encumbrance of funds to pay the HPTE Capital Payment Maximum Amount**

HPTE hereby represents and warrants as of the Contract Date that (a) the HPTE Capital Payment Maximum Amount subject to and as set forth in this Contract will be encumbered under this Contract at the Commencement Date, (b) HPTE has due authority under the Funding Advancements for Surface Transportation and Economic Recovery Act of 2009, title 43, Article 4, Part 8, Colorado Revised Statutes to pay Concessionaire's invoices with respect to HPTE Capital Payments delivered hereunder up to the HPTE Capital Payment Maximum Amount, (c) HPTE funds in an amount equal to the HPTE Capital Payment Maximum Amount have been budgeted, allocated and otherwise made available to HPTE and (d) a sufficient unencumbered balance of such amount remains available for payment in Fund Number 536, COFRS Org Code 8620, Function 3020/3200, COFRS Object Code 2311 participating, COFRS Appropriation Code, 536, WBS Element 20062.10.20 / 20062.20.10.

**29. TOLLING**

**29.1 Tolling of the Managed Lanes**

- (a) From and after
  - (i) The Commencement Date in relation to the I-25 Managed Lanes;
  - (ii) The Phase 1 Services Commencement Date in relation to the Phase 1 Managed Lanes, and
  - (iii) The Full Services Commencement Date in relation to the Managed Lanes as an integrated system,

and continuing during the Services Period, the Concessionaire will have the exclusive right to receive from HPTE, in accordance with the arrangements referred to in Section 29.1(b), those Tolls which have been established by HPTE in accordance with the terms of this Contract. Except as otherwise provided in this Contract, from the Commencement Date until the end of the Services Period the Concessionaire will have the exclusive right to receive and retain such Tolls.

- (b) In order to give effect to the Concessionaire's right to receive Tolls, HPTE will be party to any Tolling Services Agreement through which Tolls are collected, and, by the terms of that Tolling Services Agreement, will irrevocably direct the relevant Tolling Services Provider to hold all Tolls collected exclusively to the order of the Concessionaire (so that, at the point when such Tolls are collected they shall be treated as the property of the Concessionaire and not of HPTE) and pay them to the account held for the purpose of receipt of revenues by the Concessionaire's Security Trustee or, if there shall be no Security Trustee, to the account directed by the Concessionaire. HPTE shall not have any right of set-off against such Tolls.
- (c) Schedule 16 shall have effect.
- (d) The Concessionaire acknowledges and agrees that it will not be entitled to receive from HPTE any compensation, return on investment or other profit for providing the

Services other than the right to receive the Tolls and to receive payments expressly specified in this Contract.

**29.2 Limitations on the Right to Impose Tolls**

The Concessionaire's rights under Section 29.1(a) are limited by, and conditioned on, compliance by the Concessionaire with applicable Law and all other provisions in this Contract, including as provided in Schedule 16.

**29.3 Electronic Toll Collection System (ETCS)**

During the Services Period the Concessionaire will operate the ETCS. If the Concessionaire selects an ETCS other than that installed at the Full Services Commencement Date, it will coordinate with HPTE prior to the implementation or any change of such system to ensure interoperability and compatibility with the system then utilized on other State Highways in accordance with applicable Law. If HPTE intends to change or seek a change in any State interoperability or compatibility standards, requirements or protocols for toll collection systems, HPTE shall cause CDOT to coordinate with the Concessionaire prior to the implementation of such change so as to minimize the loss of Toll Revenues, disruption and cost to the Concessionaire, but HPTE will not be liable in any event for any loss of revenues, disruption or cost attributable to such change.

**29.4 Toll Collection Administration**

- (a) The Concessionaire will be responsible for all toll transaction account management services provided to users of the Managed Lanes. HPTE acknowledges that these services will be provided at the outset pursuant to the Tolling Services Agreement. Notwithstanding that acknowledgement, the Concessionaire will have full responsibility for the acts and omissions of the Tolling Services Provider as it would for any other Sub-Contractor.
- (b) The Concessionaire may only enter into a new Tolling Services Agreement (with the existing Tolling Services Provider or with a new Tolling Services Provider) if (in addition to the other provisions applicable to amendment of or entry into new Project Documents) that proposed course of action has been Accepted by HPTE. HPTE will be entitled to decline to Accept the course of action:
  - (i) If HPTE considers that the course of action carries a material risk of avoidable inconvenience or poor service to users of the Managed Lanes; or
  - (ii) If HPTE wishes to order a TSP Change, which HPTE must order within two months of receiving the Concessionaire's request to enter into a new Tolling Services Agreement if it wishes to decline to accept the Concessionaire's request on the ground in this Section 29.4(b)(ii) provided that such period of two months shall be reduced to the extent reasonably necessary in any case where the Concessionaire (acting reasonably) notifies HPTE that the reason for the change is to address unacceptably poor performance by the then-incumbent Tolling Services Provider.

- (c) If HPTE wishes to order a TSP Change having declined to Accept a change in accordance with Section 29.4(b) then HTPE shall act in accordance with the provisions of Section 29.10.
- (d) Except in relation to the implementation of a TSP Change, when the provisions of Section 29.10 shall apply, HPTE will not exercise its right to terminate the Tolling Services Agreement without the consent of the Concessionaire, such consent not to be unreasonably withheld.

**29.5 HOV Enforcement Services**

- (a) In order to deter users of the Managed Lanes from wrongfully declaring that they are not a Tolloed Vehicle, and to enforce the applicable Law against users of the Managed Lanes who do make such wrongful declarations, the Concessionaire may enter into contracts with the CSP or such other law enforcement agency having jurisdiction in relation to the Managed Lanes as it may, in its absolute discretion, chose to contract with.
- (b) The Concessionaire will not engage or permit the engagement of private security services to provide traffic patrol or traffic law enforcement services on the Managed Lanes; provided that this Section 29.5 does not preclude the Concessionaire from engaging private security firms or employing other appropriate security devices, vehicle occupancy detection equipment or other automated technology to protect, collect and enforce the payment of Tolls, or to identify toll violators, subject to compliance with law. This Section 29.5 also does not limit the Concessionaire's right to enforce any private rights and civil remedies available to it respecting toll violations. However, the Concessionaire shall not permit any private security firms engaged for this purpose to stop vehicles, apprehend road users, or engage in any other direct enforcement activity on the Managed Lanes.
- (c) HPTE will not have any responsibility or liability to the Concessionaire resulting from or otherwise relating to the failure of the CSP or any other public agencies to provide policing services.
- (d) The Parties further understand and agree that, as the Managed Lanes will constitute part of the State Highway system, the CSP and other public agencies will have access to the Managed Lanes and jurisdiction to enforce the laws and regulations of the State as they apply to the Managed Lanes.

**29.6 Toll Payment Violations**

- (a) The Concessionaire may contract with the Tolling Services Provider or another Person for the provision of services to enforce the collection of Tolls and Civil Penalties. To the extent necessary to comply with Law, but not so as to undertake any responsibility for payment or any other matter under any such agreement (unless otherwise consented to by HPTE), HPTE will be party to that contract. To the extent that the actions under that contract result in the collection of Tolls and Civil Penalties, to the extent that any funds are not retained by the Person providing the services HPTE consents to all such amounts being remitted by that Person to the Concessionaire and retained by the Concessionaire.

- (b) When the Department of Revenue of the State has the infrastructure in place to permit the enforcement of the provisions of CRS 43-4-808(g) (preventing the renewal of the registration of vehicles in cases of non-payment of tolls, administrative fees and civil penalties) HPTE will promptly direct the Concessionaire to report any such failure to pay to the department, or ensure that such reports shall be made.
- (c) If the HPTE Toll Violation Rules are amended or replaced and the Concessionaire has not approved in writing to amendment or replacement unless such written approval was unreasonably withheld such amendment or replacement of the HPTE Toll Violation Rules shall be a Compensation Event.
- (d) The Concessionaire understands and agrees that HPTE does not, and will not be deemed to, guarantee collection or collectability of Tolls or Civil Penalties.

**29.7 Emergency and Other Suspension of Tolls or Closure of the Managed Lanes**

- (a) If the Managed Lanes or a portion of the Managed Lanes is temporarily ordered to be closed pursuant to applicable Law (including by order of any member of a law enforcement agency with jurisdiction over the Managed Lanes or a portion of them or of any member of a fire department acting in his capacity as such in each case as a consequence of weather conditions, an accident on the Managed Lanes or the General Purpose Lanes or any other matter which could give rise to a risk to the safety of those using the Managed Lanes or the General Purpose Lanes regardless of whether that order is given directly to the Concessionaire or to HPTE), HPTE will have no liability to the Concessionaire for the loss of Toll Revenues or the increase in costs or expenses attributable to any such closure.
- (b) If Toll collection on the Managed Lanes or a portion of the Managed Lanes is temporarily suspended pursuant to applicable Law (including by order of any member of a law enforcement agency with jurisdiction over the Managed Lanes or a portion of them regardless of whether that order is given directly to the Concessionaire or to HPTE), HPTE will have no liability to the Concessionaire for the loss of Toll Revenues or the increase in costs or expenses attributable to suspensions of up to an aggregate of twelve (12) hours in each Year and any loss in Toll Revenue or increases in costs or expenses attributable to suspensions over an aggregate of twelve (12) hours in each year shall be treated as a Compensation Event.
- (c) In addition to suspensions and closures referred to in Section 29.7(a) and Section 29.7(b) HPTE may by notice to the Concessionaire require suspension of toll collection on, or closure of, the Managed Lanes or a portion of the Managed Lanes with immediate effect either for a specified period or until HPTE gives the Concessionaire notice that the closure is ended and/or that toll collection may be resumed. HPTE's notice may be given by telephone in case of urgency and subsequently confirmed in writing. If HPTE gives such notice, then:
  - (i) The Concessionaire shall immediately cease toll collection or close the Managed Lanes for the period specified in the notice or until HPTE gives notice that toll collection may be resumed;
  - (ii) In the case of a closure or suspension of less than three (3) hours:



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- (1) If the number of closures or suspensions of less than three (3) hours which have been required (including the suspension in question) is less than four (4) in any rolling period of twelve (12) months HPTE will have no liability to the Concessionaire for the loss of Toll Revenues attributable to the closure or suspension;
    - (2) If Section 29.7(c)(ii)(1) does not apply then the closure or suspension shall be treated as a closure or suspension to which Section 29.7(c)(iii) applies;
  - (iii) If the number of closures or suspensions of less than twenty-four (24) hours which have been required (including the suspension in question) is less than two (2) in any rolling period of twelve (12) months HPTE will have no liability to the Concessionaire for the loss of Toll Revenues attributable to the closure or suspension. In the case of any closure or suspension of more than three (3) hours but less than three (3) days to which the preceding sentence does not apply, HPTE shall pay the Concessionaire the average Toll Revenues actually collected during the same time of day on the same days of the week during the period of two (2) weeks prior to the closure or suspension and two (2) weeks after the closure or suspension;
  - (iv) In the case of a closure or suspension of more than three (3) days but less than fifteen (15) days HPTE shall pay the Concessionaire the average Toll Revenues actually collected during the same time of day on the same days of the week during the period of three (3) months prior to the closure or suspension and three (3) months after the closure or suspension;
  - (v) In the case of a closure or suspension of more than fifteen (15) days HPTE shall pay to the Concessionaire an amount which will place the Concessionaire in a position which is no better and no worse than it would have been if the closure or suspension had not occurred.
- (d) In all cases where payments are due to be made to the Concessionaire by HPTE pursuant to this Section 29.7:
- (i) HPTE shall make payment to the Concessionaire in relation to each day during which a closure or suspension was in force within three (3) Business Days after that day;
  - (ii) Where calculation of the payment involves using the value of Toll Revenues which will be collected after the date when payment is due, then the calculation shall be made on the basis of Toll Revenues predicted in the Base Case Financial Model and a balancing payment made by HPTE to the Concessionaire or by the Concessionaire to HPTE within ten (10) Business Days after all of the actual data necessary to make the calculation is available.
- (e) This Section 29.7 shall not apply to closures or suspensions brought about as a consequence of Force Majeure Events or Relief Events and shall not apply to I-25

North Permitted Closure Events (which events shall not be counted as a closure or suspension for any purpose of this Section 29.7).

**29.7A I-25 North Managed Lanes Installation Project**

- (a) HPTE may require the three I-25 North Permitted Closure Events, and shall have no obligation to pay any compensation or give any other relief to the Concessionaire in relation to any of the I-25 North Permitted Closure Events unless the closure does not end to allow the relevant portion of the Managed Lanes to re-open by 5.00 am.
- (b) If an I-25 North Permitted Closure Event does not finish to allow the relevant portion of the Managed Lanes to re-open by 5.00 a.m. then HPTE shall pay to the Concessionaire the I-25 North Liquidated Damages. The Parties acknowledge and agree that the I-25 North Liquidated Damages have been set based on an evaluation by the Concessionaire of damages it will incur if there is a failure to confine the lane closures to an I-25 North Permitted Closure Event. The Concessionaire and HPTE agree that the amount of such damages is a genuine pre-estimate of the loss which is reasonably expected to arise as of the date of execution of this Contract, and the Parties have agreed to such I-25 North Liquidated Damages in order to fix the HPTE's costs and to avoid later disputes over which items are properly chargeable to HPTE. The Parties agree that any I-25 North Liquidated Damages payable are in the nature of liquidated damages and not a penalty and that such sums are reasonable under the circumstances existing as of the date of execution and delivery of this Contract.

**29.8 Other Transportation Developments**

- (a) Without prejudice to the Concessionaire's rights arising out of any Compensation Event in relation to an Unplanned Revenue Impacting Facility, HPTE and any HPTE Related Party will have the unfettered right in its or their sole discretion and at any time and from time to time, without liability to the Concessionaire, regardless of impacts on Toll Revenues, to develop, expand, improve, modify, upgrade, add capacity to, reconstruct, rehabilitate, restore, renew replace or close any existing or new transportation or other facilities of any type whatsoever. This right extends to facilities which pass over the Managed Lanes and whether or not they have a direct physical connection to the Managed Lanes or the US 36 General Purpose Lanes. It applies whether or not the facilities are identified in any transportation plans, and whether or not the facilities will or may affect the project, its operation and maintenance, the number of users and/or the amount of Toll Revenue.
- (b) To avoid doubt, the rights in the preceding Section 29.8(a) may be exercised without any obligation on the part of HPTE or on any HPTE Related Party to compensate the Concessionaire unless there shall be a Compensation Event in relation to an Unplanned Revenue Impacting Facility.
- (c) In particular, the Concessionaire agrees and acknowledges that CDOT has the right to complete the Ultimate Configuration without any liability to the Concessionaire on the part of HPTE or CDOT. HPTE will work with CDOT to minimize disruption to the Managed Lanes.

**29.9 Revenue Risk Related to Traffic Volume**

Except for its specific obligations to the Concessionaire under the terms and conditions of this Contract, HPTE will not have any risk related to actual traffic volume, including but not limited to the risk that actual traffic volume is less than the traffic volume projected in the Base Case Financial Model.

**29.10 TSP Changes**

- (a) If HPTE wishes to order a TSP Change it shall give notice to the Concessionaire:
  - (i) Identifying the proposed Tolling Services Provider;
  - (ii) Providing a draft Tolling Services Agreement including full detail of all fees and expenses which will be charged under the draft Tolling Services Agreement;
  - (iii) Setting out the functionality of the system which the proposed Tolling Service Provider will use to deliver its services;
  - (iv) Setting out the terms of the proposed security which will be provided to the Concessionaire for performance of the proposed Tolling Services Provider's obligations under the draft Tolling Services Agreement;
  - (v) Undertaking to pay the reasonable costs of the Concessionaire in relation to any modification of the Concessionaire's systems reasonably necessary for the Concessionaire to interface with the systems of the proposed Tolling Services Provider; and
  - (vi) Any other facts or matters which HPTE considers to be material in this context.
- (b) The Parties shall endeavor to agree on the terms of the Tolling Services Agreement and all of the other matters referred to in Section 29.10(a) within three months following the receipt of HPTE's notice under Section 29.10(a).
- (c) The Concessionaire shall be entitled to decline to enter into the new Tolling Services Agreement with the proposed Tolling Services Provider if:
  - (i) The fees and expenses payable under the draft Tolling Services Agreement are in excess of the fees and expenses payable under the then-current Tolling Services Agreement and HPTE does not agree to pay the excess to the Concessionaire in time for the Concessionaire to meet its obligations under the draft Tolling Services Agreement;
  - (ii) The position of the Concessionaire under the draft Tolling Services Agreement and the other arrangements referred to in Section 29.10(a) is otherwise less advantageous to the Concessionaire than its position under the equivalent arrangements in force associated with the then-current Tolling Services Agreement and HPTE does not agree to arrangements (whether by

indemnity, reimbursement or otherwise) which offset the detriment to the Concessionaire which would then arise; or

- (iii) The technical approach of the new Tolling Services Provider to delivery of its services are likely to deliver a less reliable service to the Concessionaire or carries a material risk of avoidable inconvenience or poor service to users of the Managed Lanes.
- (d) If the Parties agree to the terms of the Tolling Services Agreement and all of the other matters referred to in Section 29.10(a) then:
  - (i) The Concessionaire shall promptly exercise its right to terminate its then-current Tolling Services Agreement (and HPTE will pay the Concessionaire any reasonable contract breakage costs properly payable in accordance with the then-current Tolling Services Agreement), and enter into the new Tolling Services Agreement and other arrangements referred to in Section 29.10(a) so that such new arrangement shall come into force immediately on termination of the then-current Tolling Services Agreement; and
  - (ii) HPTE shall pay to the Concessionaire the reasonable costs which it incurs in relation to any modification of the Concessionaire's systems and processes including any training and any other transition costs reasonably necessary for the Concessionaire to interface with the systems of the proposed Tolling Services Provider (on the basis that HPTE will pay the Concessionaire in sufficient time for the Concessionaire to make any payments to third parties which are necessary in order to carry out such modifications when those payments fall due to those third parties);
- (e) If the Concessionaire considers that it is entitled to decline to enter into the new Tolling Services Agreement on one of the grounds set out in Section 29.10(c) and HPTE does not agree then either Party may refer the matter to the Dispute Resolution Procedure to determine whether one of those grounds exists, provided that prior to or during operation of the Dispute Resolution Procedure HPTE may modify any part of the matters described in its notice under Section 29.10(a), and/or may make modified proposals with regard to arrangements to mitigate the detriment to the Concessionaire on which the Concessionaire's objection is based and the Dispute Resolution Procedure shall determine the validity of the Concessionaire's objection on the basis of any such modification rather than on the basis of HPTE's original propositions.

**30. HPTE PAYMENTS FOR GP ROUTINE MAINTENANCE SERVICES AND FOR SNOW AND ICE CONTROL SERVICES AND THE CONCESSIONAIRE'S PAYMENTS OF SUB-CONTRACTORS**

**30.1 Payment of the GP Routine Maintenance Fee, Snow and Ice Control Services Fee and reimbursement in relation to the I-25 Shared Bridge Decks**

- (a) If HPTE accepted the Concessionaire's GP Routine Maintenance Fee for the GP Routine Maintenance Services prior to the Contract Date, then HPTE shall pay to the Concessionaire the GP Routine Maintenance Fee in accordance with Schedule 15.

- (b) HPTE shall pay to the Concessionaire the Snow and Ice Control Services Fee for each month in accordance with Schedule 15.
- (c) HPTE shall reimburse to the Concessionaire the Non-Separable Percentage of the cost of Routine Maintenance (including, to avoid doubt, the cost of the performance of the I-25 Preventative Maintenance Program to the extent that such work does not comprise Life Cycle Maintenance) on the I-25 Shared Bridge Decks.

**30.2 Invoices from the Concessionaire to HPTE**

Within ten (10) Business Days of the end of each relevant month, the Concessionaire shall submit to HPTE an invoice showing:

- (a) If HPTE accepted the Concessionaire's GP Routine Maintenance Fee for the GP Routine Maintenance Services prior to the Contract Date, the GP Routine Maintenance Fee for that month;
- (b) The GP Snow and Ice Control Services Fee and a breakdown of any applicable reductions in accordance with Schedule 25; and
- (c) The cost incurred during the month in relation to Routine Maintenance activities on the I-25 Shared Bridge Decks, and the Non-Separable Percentages of those amounts;
- (d) The amount due by way of reimbursement of the cost of courtesy patrols pursuant to Section 4.4.1.1 of Schedule 6; and
- (e) The total which is due.

**30.3 Payment**

Unless HPTE disputes an amount contained in the invoice it shall pay that amount (or the undisputed portion of that amount) within twenty (20) Business Days of the date when the invoice and all supporting information was actually delivered to HPTE in a form and substance satisfactory to HPTE. Concessionaire shall comply with the provisions of CRS 38-26-107 for the Phase 2 Construction Work, as provided in Section 11.1(a)(i).

**30.4 The Concessionaire to pay Sub-Contractors**

The Concessionaire shall pay its Sub-Contractors (including the Construction Sub-Contractor and the Operations Sub-Contractor) promptly and in any event, when the Concessionaire receives a payment from HPTE to the Concessionaire, part of which will be used to pay a Sub-Contractor, all payments must be provided to the Concessionaire's Sub-Contractors no later thirty-one (31) days following payment from HPTE if the Sub-Contractor is satisfactorily performing under its contract with the Concessionaire. If, and to the extent that, the Construction Sub-Contractor receives a payment from the Concessionaire which was funded by a payment which the Concessionaire received from HPTE, and if that payment will be used by the Construction Sub-Contractor to pay a Sub-Contractor working for the Construction Sub-Contractor, then the Concessionaire shall ensure that the Construction Sub-Contractor will make payments in compliance with the terms of Colorado Revised Statute § 24-91-103(2) (2012) provided that (to avoid doubt) if the Construction Sub-Contractor would have been excused from the obligation to make any payment to a Sub-Contractor

pursuant to § 24-91-103(2) (2012) for any reason (including that the Sub-Contractor was not satisfactorily performing under its Sub-Contract with the Construction Sub-Contractor) then the Concessionaire shall not be obliged to ensure that the Construction Sub-Contractor pays the Sub-Contractor until the circumstances excusing such obligation no longer prevail.

**30.5 Set-Off**

- (a) HPTE may set-off against any sum owing to the Concessionaire any amount expressly due under this Contract which is agreed or determined to be due from the Concessionaire to HPTE.
- (b) The Concessionaire may set-off against any sum owing to HPTE any amount expressly due under this Contract which is agreed or determined to be due from HPTE to the Concessionaire.

**31. REIMBURSEMENT OF HPTE COSTS**

On the first day of each Year the Concessionaire shall pay the HPTE Cost Reimbursement Amount to HPTE.

**32. HPTE-CDOT AGREEMENT**

- (a) HPTE shall, at all times, perform all of its obligations under the HPTE-CDOT Agreement and shall promptly enforce any and all rights it has against CDOT under the HPTE-CDOT Agreement, in each case, unless the failure to perform an obligation or to enforce any right has received the prior written approval of the Concessionaire. Further HPTE shall not terminate, amend or otherwise modify the HPTE-CDOT Agreement without first receiving the prior written approval of the Concessionaire.
- (b) HPTE shall, at all times, perform all of its obligations under the RTD-CDOT-HPTE Agreement and shall promptly enforce, and shall ensure that CDOT enforces, any and all rights they each respectively have against RTD under the RTD-CDOT-HPTE Agreement, in each case, unless the failure to perform an obligation or to enforce any right has received the prior written approval of the Concessionaire. Further HPTE shall not, and shall ensure that CDOT shall not:
  - (i) terminate the RTD-CDOT-HPTE Agreement; or
  - (ii) amend or otherwise modify the RTD-CDOT-HPTE Agreement in a manner which could be reasonably expected to adversely affect HPTE's ability to perform its obligations under this Contract;

without first receiving the prior written approval of the Concessionaire.

**33. CASHFLOW SHARING**

The provisions of Schedule 14 (Cash Flow Sharing) shall apply in respect of sharing certain cash flows of the Concessionaire.

**34. BASE CASE FINANCIAL MODEL**

**34.1 Provisions Applicable to the Base Case Financial Model, Including Updates and Revisions**

Part 2 of Schedule 11 shall have effect.

**34.2 Grant of License to Base Case Financial Model**

The Concessionaire grants to HPTE and its successors a license to use the Base Case Financial Model and any subsequent updated version of the Base Case Financial Model commencing from its delivery to the Termination Date, or to the date of full settlement of all mutual claims arising out of this Contract the Parties may have against each other if such a date occurs after Termination Date, for any purpose in connection with this Contract and/or the Project. The license granted by this Section 34.2 shall not be transferable or assignable by HPTE except to any Person to whom this Contract may be transferred in accordance with Section 60 and then only for purposes in connection with this Contract and/or the Project.

**35. PERFORMANCE MONITORING**

**35.1 Performance Monitoring Reports**

- (a) The Concessionaire shall monitor the provision of the Services in accordance with this Contract and shall compile a Monthly Service Report and an Annual Performance Report in accordance with Section 1.8 of Schedule 6.
- (b) If for a specific month the Noncompliance Revenue Share has been recorded incorrectly in the Monthly Service Report, the Monthly Service Report shall be modified (and the amount of the relevant Noncompliance Revenue Share to be paid by the Concessionaire, if any, shall also be adjusted).
- (c) Each of the Concessionaire and HPTE shall notify the other Party in writing as soon as it becomes aware of an error contained in a particular Monthly Service Report. Immediately after such a notice, the Parties shall take all steps to agree:
  - (i) The modifications that need to be made to the Monthly Service Report,
  - (ii) The amount by which the Noncompliance Revenue Share needs to be adjusted, and
  - (iii) The final amount of the Noncompliance Revenue Share.

If the Parties fail to reach agreement within five (5) Business Days of the date of the notice, the matter shall be settled in accordance with the Dispute Resolution Procedure.

- (d) The procedure in accordance with Section 35.1(a) to Section 35.1(c) may only be followed if either Party gives a notice challenging the contents of the Monthly Service Report for a particular month no later than by the end of the seventh (7th) month following the month covered by the Monthly Service Report in question.

**35.2 Noncompliance Points**

Schedule 10 shall have effect.

**35.3 Monitoring by HPTE**

At any time during the Services Period, and at its own cost, HPTE may carry out checks on the Concessionaire in relation to the performance of its obligations under this Contract, including the checking of the provision of the Services in accordance with this Contract; and during such performance monitoring, the Concessionaire shall provide HPTE with any cooperation as may be reasonably required (such as to provide helpdesk records and to allow HPTE to participate in performance monitoring). HPTE shall inform the Concessionaire about the results of such monitoring.



**PART 9: INSURANCE**

36. **NUMBER NOT USED**

37. **REQUIRED INSURANCES**

37.1 **Specific Insurance Requirements for Work**

No later than the Commencement Date, the Concessionaire shall, prior to the carrying out of any building or demolition work on the Managed Lanes, take out and maintain or ensure the maintenance of the insurances described in Part 1 of Schedule 17 (Required Insurances) and any other insurances as may be required by Law. These insurances must be effective in each case not later than the date on which the relevant risk commences.

37.2 **Specific Insurance Requirements for Services**

No later than:

- (a) The Commencement Date, in relation to the Services to be provided in respect of the I-25 Managed Lanes;
- (b) The Phase 1 Services Commencement Date, in relation to the Services to be provided in respect of the Phase 1 Managed Lanes and the Phase 1 GP Lanes; and
- (c) The Full Services Commencement Date in relation to the remainder of the Services;

the Concessionaire shall take out and maintain or ensure the maintenance of the insurances described in Part 2 of Schedule 17 (Required Insurances) and any other insurances as may be required by Law in each case until the end of the Services Period.

37.3 **No action to Prevent Payment of Claims**

No party to this Contract shall take any action or fail to take any reasonable action, or (insofar as it is reasonably within its power) permit anything to occur in relation to it, which would entitle any insurer to refuse to pay any claim under any insurance policy in which that party is an insured, a co-insured or additional insured Person.

37.4 **Insurance Terms**

With the exception of the insurances required by Law, the insurances referred to in Section 37.1 and Section 37.2 shall:

- (a) Subject to Section 37.5 below, name the Concessionaire as a named insured with any other party maintaining the insurance;
- (b) Comply with the requirements set out in Part 3 of Schedule 17 (Required Insurances); and
- (c) In respect of the Physical Damage Policies, provide for payment of any proceeds received by the Concessionaire to be applied in accordance with Section 38.

**37.5 Evidence of Insurance and Payments**

The Concessionaire shall provide to HPTE:

- (a) Copies, on request, of all insurance policies referred to in Section 37.1 and Section 37.2 (together with any other information reasonably requested by HPTE relating to such insurance policies), and HPTE shall be entitled to inspect them during ordinary business hours; and
- (b) Evidence that the premiums payable under all insurance policies have been paid and that the insurances are in full force and effect in accordance with the requirements of this Section 37 and Schedule 17 (Required Insurances).

**37.6 Renewal Certificates**

Renewal certificates or such other evidence of renewal as may be acceptable to HPTE in relation to the insurances referred to in Section 37.1 and Section 37.2 shall be obtained as and when necessary, and copies shall be forwarded to HPTE as soon as possible but in any event no later than ten (10) Business Days before the renewal date.

**37.7 Self-Help Insurance Right**

If the Concessionaire is in breach of Section 37.1 or Section 37.2 above, HPTE shall give notice of such breach to the Concessionaire and, if such breach continues for a period of five (5) Business Days following such notice, HPTE (acting reasonably in making the following choice) may either pay any premiums, fees, broker's costs or other expenses required to keep such insurance in force or itself procure such insurance and pay the premiums, fees, broker's costs or other expenses for that insurance, and the Concessionaire must, in either case, pay such amounts to HPTE on written demand.

**37.8 Claims**

The Concessionaire shall give HPTE notification within twenty (20) Business Days after any claim in excess of \$500,000 (Indexed) on any of the insurance policies referred to in this Section 37 accompanied by full details of the incident giving rise to the claim.

**37.9 Insurance is not a Relief from Underlying Liabilities**

Neither failure to comply nor full compliance with the insurance provisions of this Contract shall limit or relieve the Concessionaire of its liabilities and obligations under this Contract.

**37.10 Insurance Responsibility**

The insurance premium and all costs and fees in respect of the insurances referred to in Section 37.1 and Section 37.2 shall be the responsibility of the Concessionaire.

**37.11 Insurance Providers**

The insurances referred to in this Section 37 shall be effected with insurers approved by HPTE, such approval not to be unreasonably withheld and such approval will not be withheld in relation to any

insurer with both an A.M. Best Financial Strength Rating of A- or better and an A.M. Best Financial Size Category of Class X or better.

**37.12 Indexing of Indemnity and Deductibles**

The limit of indemnity and the maximum deductibles for each of the Required Insurances shall be Indexed as required in accordance with Schedule 17. After indexation has been applied for the first time the Concessionaire's obligation shall be to obtain (or to ensure that its Sub-Contractors obtain) insurance where the limit of indemnity and maximum deductibles are as close to the indexed values as is reasonably obtainable in the insurance market.

**37.13 Cross Claims**

The Concessionaire shall make claims against the Required Insurances and/or any other insurances that the Concessionaire has in place to the extent available to reduce the amount of any claim of the Concessionaire against HPTE pursuant to this Contract. The amount of any claim of the Concessionaire against HPTE pursuant to this Contract, including in relation to Compensation Events, Relief Events and Force Majeure Events, shall be reduced by the amount recovered by the Concessionaire under the Required Insurances and/or any other insurances that the Concessionaire has in place or the amount which the Concessionaire should have recovered had the Concessionaire made appropriate claims against the Required Insurances and/or any other insurances and/or maintained the Required Insurances in accordance with and subject to the requirements of this Contract.

**38. REINSTATEMENT**

**38.1 Use of Insurance Proceeds**

All insurance proceeds received under any Physical Damage Policies shall be applied to repair, reinstate and replace each part or parts of the Managed Lanes and the Assets in respect of which such proceeds were received.

**38.2 Threshold Amount for Insurance Proceeds**

All insurance proceeds paid under a Physical Damage Policy in respect of a single event (or a series of related events) in an amount in excess of \$500,000 (Indexed) shall be paid into the Joint Insurance Account.

**38.3 Occurrence of a Relevant Incident**

Without prejudice to the obligations of the Concessionaire pursuant to HPTE's Service Requirements and the Concessionaire's Service Proposals to respond to emergency situations, where a claim is made or proceeds of insurance are received or are receivable under any Physical Damage Policy in respect of a single event (or a series of related events) (the "Relevant Incident") in an amount in excess of \$250,000 (Indexed):

- (a) If the matter which caused the Relevant Incident has also caused damage to the US 36 General Purpose Lanes so that there is any Non-Separable Reinstatement Work, then the provisions of Section 38.4 shall first apply to the development of the Reinstatement Plan. If there shall be no Non-Separable Reinstatement Work then the remainder of this Section 38.3 shall apply.

- (b) The Concessionaire shall promptly carry out the works necessary (the "Reinstatement Work") to repair, reinstate or replace the assets which are the subject of the relevant claim or claims and shall regularly keep HPTE informed in relation to the progress of the Reinstatement Work.
- (c) Prior to the earlier to occur of the Termination Date or the Expiration Date, any amounts standing to the credit of the Joint Insurance Account (the "Relevant Proceeds") (together with any interest accrued) may be withdrawn by the Concessionaire from the Joint Insurance Account as required to enable it to make payments in accordance with the terms of the contractual arrangements entered into to effect the Reinstatement Work and to meet any other reasonable costs and expenses of the Concessionaire for the purpose of funding the Reinstatement Work, and the Parties shall operate the signatory requirements of the Joint Insurance Account to give effect to such payments. Following the earlier to occur of the Termination Date or the Expiration Date, HPTE may withdraw amounts standing to the credit of the Joint Insurance Account for the purposes of funding any Reinstatement Work.
- (d) HPTE agrees and undertakes that, subject to compliance by the Concessionaire with its obligations under this Section 38, and provided that the Concessionaire ensures that the Reinstatement Work is carried out and completed in accordance with this Section 38.3, it shall not exercise any right which it might otherwise have to terminate this Contract by virtue of the event which gave rise to the claim for the Relevant Proceeds.
- (e) HPTE undertakes to use reasonable endeavors to assist the Concessionaire in the carrying out of the Reinstatement Work.
- (f) After the Reinstatement Work has been implemented to the reasonable satisfaction of HPTE and in accordance with this Section 38.3 (or HPTE, acting reasonably, otherwise agrees that the application of the Relevant Proceeds to the Reinstatement Work is not necessary). HPTE shall permit withdrawal by the Concessionaire of any Relevant Proceeds then held in the Joint Insurance Account that have not been paid under this Section 38.3 in respect of the Relevant Incident, together with any interest accrued.

**38.4 Non-Separable Reinstatement Work**

- (a) Subject to Section 38.6, the performance of Non-Separable Reinstatement Work shall be carried out by the Concessionaire entering into contracts with third parties in accordance with this Section 38.4.
- (b) In the case a Relevant Incident involving Non-Separable Reinstatement Work, within five (5) Business Days of such Relevant Incident (the "Non-Separable Reinstatement Date"), the Parties shall endeavor to agree:
  - (i) The fair and reasonable estimate of the proportionate share of the Non-Separable Reinstatement Work allocated to the Managed Lanes and the US 36 General Purpose Lanes, with the Concessionaire responsible for the

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Managed Lanes portion and HPTE responsible for the US 36 General Purpose Lanes, and a proportionate share for any shared portion of the Non-Separable Reinstatement Work.

- (ii) The scope of the work package which includes the Non-Separable Reinstatement Work (the "Non-Separable Reinstatement Work Package");
- (iii) A Reinstatement Plan which will include the form and contents of the tender documents to be delivered to prospective tenderers, which shall include terms and conditions for the contract of the Non-Separable Reinstatement Work Package which provide:
  - (1) for direct contractual recourse by CDOT against the contractor carrying out the Non-Separable Reinstatement Work Package;
  - (2) for any mandatory provisions (such as requirements relating to the Davis-Bacon Act, or relating to disadvantaged business enterprises, or relating to small business enterprises) which are required to be imposed in accordance with conditions necessary to permit funds which CDOT plans to use to pay for its portion of the Non-Separable Reinstatement Work Package to be used for that purpose;
  - (3) for any mandatory requirements in relation to the tendering procedure to be used which are required to be followed in accordance with conditions necessary to permit funds which CDOT plans to use to pay for its portion of the Non-Separable Reinstatement Work Package to be used for that purpose;
  - (4) appropriate rights of inspection for CDOT in relation to the carrying out of the Non-Separable Reinstatement Work;
  - (5) an invoicing procedure which complies with CDOT's then-customary requirements;
  - (6) warranties in favor of CDOT in relation to the Non-Separable Reinstatement Work in accordance with Good Industry Practice; and
  - (7) provisions requiring the tenderers to separately identify the part of the contract price attributable to the performance of the Non-Separable Reinstatement Work.
- (c) If HPTE does not wish to incur the share of the cost for the US 36 General Purpose Lanes of the Non-Separable Reinstatement Work Package, then Section 38.4(h) shall apply.
- (d) No later than five (5) Business Days after the parties have agreed the matters referred to in Section 38.4(b), the Concessionaire shall prepare and deliver to HPTE a draft Reinstatement Plan, which shall incorporate all of the matters agreed by the Parties.

- (e) If the Parties are unable to agree any of the matters set out in the Reinstatement Plan then either Party may refer the matter to the Dispute Resolution Procedure.
- (f) The Concessionaire shall manage the Non-Separable Reinstatement Work Package tendering process in accordance with the Reinstatement Plan.
- (g) Upon receipt of any invoice under the contract for the Non-Separable Reinstatement Work Package, which contains an element of the contract price attributable to the Non-Separable Reinstatement Work, the Concessionaire shall promptly submit an invoice for the Non-Separable Reinstatement Work Package attributable to the General Purposes Lanes portion of that element of the contract price to HPTE, and HPTE shall make payment of that amount in sufficient time for the Concessionaire to pay the contractor in accordance with the terms of the contract for the Non-Separable Reinstatement Work Package.
- (h) If HPTE does not wish to incur the cost of Non-Separable Reinstatement Work, notwithstanding that such Non-Separable Reinstatement Work applies all or in part to the US 36 General Purpose Lanes, then unless HPTE and the Concessionaire can reach agreement on terms by which the Concessionaire shall bear the full cost of the Non-Separable Reinstatement Work subject to subsequent reimbursement (with interest at a rate to be agreed not to exceed LIBOR plus 200 bps) by HPTE:
  - (i) The Concessionaire shall be released from the obligation to perform the Non-Separable Reinstatement Work in relation to the US 36 General Purpose Lanes (and may perform reinstatement work to the Managed Lanes alone if it is technically feasible to do so); and
  - (ii) The failure of action by HPTE, and the additional costs incurred by Concessionaire in addressing the Non-Separable Reinstatement Work in relation to the Managed Lanes alone will be a Compensation Event and Section 41 shall apply.
- (i) To avoid doubt, time reasonably taken to act in accordance with the provisions of this Section 38.6 shall be included as a consequence of the Relief Event which gave rise to the Non-Separable Reinstatement Work.

### **38.5 Implementation of Non-Separable Reinstatement Work**

The Concessionaire shall effect the Non-Separable Reinstatement Work in accordance with the Reinstatement Plan, and:

- (a) Shall enter into contractual arrangements in accordance with the process for procuring the contractual arrangement set out in the Reinstatement Plan;
- (b) Prior to the earlier to occur of the Termination Date or the Expiration Date, any Relevant Proceeds (together with any interest accrued) may be withdrawn by the Concessionaire from the Joint Insurance Account as required to enable it to make payments in accordance with the terms of the contractual arrangements entered into to effect the Non-Separable Reinstatement Work and to meet any other reasonable costs and expenses of the Concessionaire for the purpose of funding the Non-

Separable Reinstatement Work, and the Parties shall operate the signatory requirements of the Joint Insurance Account to give effect to such payments. Following the earlier to occur of the Termination Date or the Expiration Date, HPTE may withdraw amounts standing to the credit of the Joint Insurance Account for the purposes of funding any Non-Separable Reinstatement Work;

- (c) HPTE agrees and undertakes that, subject to compliance by the Concessionaire with its obligations under this Section 38, and provided that the Concessionaire ensures that the Non-Separable Reinstatement Work is carried out and completed in accordance with this Section 38.5, it shall not exercise any right which it might otherwise have to terminate this Contract by virtue of the event which gave rise to the claim for the Relevant Proceeds;
- (d) HPTE undertakes to use reasonable endeavors to assist the Concessionaire in the carrying out of the Reinstatement Plan;
- (e) After the Reinstatement Plan has been implemented to the reasonable satisfaction of HPTE and in accordance with this Section 38.5 (or HPTE, acting reasonably, otherwise agrees that the application of the Relevant Proceeds to the Non-Separable Reinstatement Work is not necessary), HPTE shall permit withdrawal by the Concessionaire of any Relevant Proceeds then held in the Joint Insurance Account that have not been paid under this Section 38.5 in respect of the Relevant Incident, together with any interest accrued; and
- (f) The Concessionaire shall be solely responsible for the payment of any deficiency in relation to the cost of repair or replacement of the Managed Lanes.

### **38.6 CDOT action under Emergency Contracting Procedures**

In any case where CDOT is able to use the emergency contracting procedures in the then-current version of its construction manual in relation to any Non-Separable Reinstatement Work, if CDOT considers in good faith that it will more rapidly be able to carry out sufficient reinstatement work for the US 36 General Purpose Lanes to be re-opened to traffic more quickly than would be possible by following the procedures under Sections 38.4 and 38.5 then CDOT may proceed to carry out such reinstatement work at its own risk. If CDOT's work results in the Managed Lanes also re-opening to traffic then the Concessionaire shall reimburse CDOT's reasonable costs less the Non-Separable Price Percentage of those costs save to the extent that CDOT's actions prevent recovery by the Concessionaire of any part of such cost from the Required Insurances. To avoid doubt, any inability of the Concessionaire to recover under the Required Insurances shall not release it from an obligation to reimburse CDOT under the preceding sentence of an amount up to the level of the relevant deductible under the Required Insurances. The obligations of the Concessionaire under Sections 38.4 and 38.5 shall be modified to the extent reasonably necessary to take account of the fact that CDOT has procured such reinstatement work.

### **38.7 Compliance with HPTE's Requirements**

Where insurance proceeds are to be used in accordance with this Contract to repair, reinstate or replace any part of any of the Managed Lanes, the US 36 General Purpose Lanes or any Asset, the Concessionaire shall carry out such repair, reinstatement or replacement in accordance with HPTE's

Requirements and the Concessionaire's Proposals so that on completion of the work the provisions of this Contract are complied with.

**39. UNINSURABILITY**

**39.1 No Obligation to Insure an Uninsurable Risk**

Nothing in Section 37 shall oblige the Concessionaire to take out insurance in respect of a risk which is Uninsurable, except where the predominant cause of the risk being Uninsurable is any act(s) or omission(s) of the Concessionaire or a Concessionaire Related Party.

**39.2 Uninsurable Event**

If a risk usually covered by builders' all risks insurance, property damage insurance, business interruption (but not loss of profits) general liability insurance, or workers compensation insurance in each case required under this Contract becomes Uninsurable then:

- (a) The Concessionaire shall notify HPTE within five (5) Business Days of the risk becoming Uninsurable; and
- (b) If both Parties agree, or it is determined in accordance with the Dispute Resolution Procedure, that the risk is Uninsurable and that the risk being Uninsurable is not caused by the actions of the Concessionaire or a Sub-Contractor (of any tier);

the Parties shall meet to discuss the means by which the risk should be managed or shared. To avoid doubt, if a risk referred to in the previous sentence is required to be covered by the umbrella policies described in Schedule 17, Part 1, Section 2.4 or Schedule 17, Part 2, Section 1.5, then Sections 39.2, 39.3 and 39.4 apply if those risks become Uninsurable under such umbrella policies.

**39.3 Management of Risk**

If the requirements of Section 39.2 above are satisfied, but the Parties cannot agree as to how to manage the risk, then:

- (a) In respect of such general commercial liability insurance only, HPTE shall (at HPTE's option) either pay to the Concessionaire an amount equal to the amount calculated in accordance with Part 5 (Compensation on Termination for Force Majeure and Uninsurability) of Schedule 23 (Compensation on Termination) and this Contract will terminate or elect to allow this Contract to continue and Section 39.3(b) below shall thereafter apply in respect of such risk; and
- (b) In respect of Concessionaire's all risks insurance, property damage insurance, general commercial liability insurance (if HPTE elects to allow this Contract to continue in accordance with Section 39.3(a)) delay in startup and business interruption insurance (but not loss of profits) or statutory insurances, this Contract shall continue and on the occurrence of the risk (but only for as long as such risk remains Uninsurable) HPTE shall (at HPTE's option) either pay to the Concessionaire an amount equal to insurance proceeds that would have been payable had the relevant insurance continued to be available and this Contract will continue, or an amount equal to the amount calculated in accordance with Part 5 (Compensation on Termination for Force Majeure and Uninsurability) of Schedule 23 (Compensation on



Termination) plus (in relation to general commercial liability insurance only) the amount of insurance proceeds that would have been payable to the Concessionaire whereupon this Contract will terminate; and

- (c) Where pursuant to Section 39.3(a) and Section 39.3(b) this Contract continues, then the Concessionaire shall pay to HPTE in each Year for which the relevant insurance is not maintained, an amount equal to the premium paid by the Concessionaire in respect of the relevant risk in this Year prior to it becoming Uninsurable (Indexed from the date that the risk becomes Uninsurable). Where the risk is Uninsurable for part of a Year, only the payment by the Concessionaire shall be determined proportionally to the number of months for which the risk was Uninsurable; and
- (d) Where pursuant to Section 39.3(a) and/or Section 39.3(b) this Contract continues, the Concessionaire shall approach the insurance market at least every four (4) months to establish whether the risk remains Uninsurable. As soon as the Concessionaire is aware that the risk is no longer Uninsurable, the Concessionaire shall take out and maintain or ensure the taking out and maintenance of insurance (to be incepted as soon as is reasonably practicable) for such risk in accordance with this Contract.

#### **39.4 Relevant Payment**

If, pursuant to Section 39.3(b), HPTE elects to make payment to the Concessionaire (such that this Contract will terminate) ("Relevant Payment"), the Concessionaire shall have the option (exercisable in writing within twenty (20) Business Days of the date of such election by HPTE (the "Option Period")), to pay to HPTE on or before the end of the Option Period, an amount equal to the insurance proceeds that would have been payable had the relevant risk not become Uninsurable, in which case this Contract will continue (and the Relevant Payment will not be made by HPTE), and the Concessionaire's payment shall be applied for the same purpose and in the same manner as insurance proceeds would have been applied had the relevant risk not become Uninsurable.

#### **40. UNAVAILABLE TERMS AND CONDITIONS**

##### **40.1 Applicability of Unavailable Insurance Terms or Payments**

If, upon the renewal of any insurance which the Concessionaire is required to maintain or to ensure the maintenance of pursuant to this Contract:

- (a) Any Insurance Term is not available to the Concessionaire in the worldwide insurance markets with reputable insurers of good standing; and/or
- (b) The insurance premium payable for insurance incorporating such Insurance Term is such that the Insurance Term is not generally being incorporated in insurance procured in the worldwide insurance market with reputable insurers of good standing by contractors in the United States,

(other than, in each case, by reason of one or more actions of the Concessionaire and/or any Sub-Contractors of the Concessionaire (of any tier)) then Section 40.2 shall apply.

**40.2 Waiver Where Insurance Term Not Available**

If it is agreed or determined by HPTE that Section 40.2 applies, then HPTE shall waive the Concessionaire's obligations in Section 37 and/or Schedule 17 (Required Insurances) in respect of that particular Insurance Term, and the Concessionaire shall not be considered in breach of its obligations regarding the maintenance of insurance pursuant to this Contract as a result of the failure to maintain insurance incorporating such Insurance Term for so long as the relevant circumstances described in this Section 40 continue to apply to such Insurance Term.

**40.3 Alternatives to Any Insurance Term**

To the extent that the Parties agree (acting reasonably), or it is determined pursuant to the Dispute Resolution Procedure, that an alternative or replacement term and/or condition of insurance is available to the Concessionaire in the worldwide insurance market with reputable insurers of good standing, which if included in the relevant insurance policy would fully or partially address the Concessionaire's inability to maintain or ensure the maintenance of insurance with the relevant Insurance Term, at a cost which equivalent contractors are (at such time) generally prepared to pay, the Concessionaire shall maintain or ensure the maintenance of insurance including such alternative or replacement term and/or condition.

**40.4 Compensation to HPTE for Exercising Waiver of Unavailable Insurance Term**

Where HPTE has exercised the waiver pursuant to Section 40.2, it shall be entitled to be paid by the Concessionaire an amount equal to the amount paid for the particular Insurance Term in the preceding year (using a reasonable estimate of such amount where a precise figure is not available) less any annual amount paid or payable by the Concessionaire to maintain and/or ensure the maintenance of any (whether full or partial) alternative or replacement insurance in respect of such Insurance Term pursuant to Section 40.3.

**40.5 Notice of Insurance Term Being Unavailable and Discussion on Risk Management**

The Concessionaire shall notify HPTE as soon as reasonably practicable and in any event within five (5) Business Days of becoming aware that Section 40.1(a) and/or Section 40.1(b) are likely to apply or (on expiry of the relevant insurance then in place) do apply in respect of an Insurance Term (irrespective of the reason for the same). The Concessionaire shall provide HPTE with such information as HPTE reasonably requests regarding the unavailability of the Insurance Term, and the Parties shall meet to discuss the means by which such unavailability should be managed as soon as is reasonably practicable.

**40.6 Maintenance**

If Section 40.1(a) and/or Section 40.1(b) apply in respect of an Insurance Term (irrespective of the reasons for the same), the Concessionaire shall approach the insurance market at least every four (4) months to establish whether Section 40.1(a) and/or Section 40.1(b) remain applicable to the Insurance Term. As soon as the Concessionaire is aware that Section 40.1(a) and/or Section 40.1(b) has ceased to apply to the Insurance Term, the Concessionaire shall take out and maintain or ensure the taking out and maintenance of insurance (to be incepted as soon as is reasonably practicable) incorporating such Insurance Term in accordance with this Contract.

**PART 10: EXTERNAL EVENTS**

**41. COMPENSATION EVENTS**

**41.1 Compensation Events and their consequences**

If, as a result of the occurrence of a Compensation Event:

- (a) The Concessionaire is unable to commence Services for the Phase 1 Managed Lanes on or before the Phase 1 Services Commencement Compensation Date;
- (b) The Concessionaire is unable to achieve the Full Services Commencement Date on or before the Planned Full Services Commencement Date or, following the Planned Full Services Commencement Date, before the Full Services Commencement Longstop Date;
- (c) The Concessionaire is unable to comply with any of its obligations under this Contract; and/or
- (d) The Concessionaire incurs costs or loses revenue,

then the Concessionaire is entitled to apply for relief from its obligations and/or relief from the allocation of Noncompliance Points and/or from any right which HPTE would otherwise have to assert that circumstances amounted to a Concessionaire Default and/or claim compensation under and in accordance with this Contract.

**41.2 Compensation Events affecting the Phase 2 Work**

The process for obtaining compensation and relief in relation to any Compensation Event affecting the Phase 2 Work shall be the process for obtaining a Change Order pursuant to Part 6 of Schedule 21 and the remaining provision of this Section 41 shall not apply to such Compensation Events.

**41.3 Obtaining Relief and Compensation for Compensation Event**

Subject to Section 41.5 below, to obtain relief and/or claim compensation the Concessionaire must:

- (a) As soon as practicable, and in any event within fifteen (15) Business Days after it becomes aware that the Compensation Event has caused or is likely to cause a breach of an obligation under this Contract and/or the Concessionaire to incur costs or lose revenue, give to HPTE a notice of its claim for payment of compensation and/or relief from its obligations under this Contract and/or from the allocation of Noncompliance Points and/or from the risk of there being a Concessionaire Default;
- (b) Within ten (10) Business Days of receipt by HPTE of the notice referred to in Section 41.3(a) above, give full details of the Compensation Event and the extension of time and/or relief and/or any Estimated Change in Costs claimed; and

**41.4 Compensation Events and Their Consequences**

If the Concessionaire has complied with its obligations under Section 41.3, and demonstrated:

- (i) That the Compensation Event was the cause of the Estimated Change in Costs and/or breach of the Concessionaire's obligations under this Contract; and
- (ii) The steps which the Concessionaire has taken to mitigate the Estimated Change in Costs, and/or the need for relief from the obligations under this Contract;

then, subject to the remainder of this Section 41.4:

- (a) HPTE shall compensate the Concessionaire for the actual Change in Costs incurred down to the date of the claim within twenty (20) Business Days of its receipt of the claim made under Section 41.3(b);
- (b) In the case of the Estimated Change in Costs anticipated to be incurred after the date of the claim made under Section 41.3(b), HPTE shall compensate the Concessionaire by making Revenue Compensation Payments in accordance with Part 2 of Schedule 11; and/or
- (c) HPTE shall give the Concessionaire the non-financial remedies provided by Section 41.1 in respect of the Compensation Event.

The Concessionaire shall not be entitled to financial or non-financial remedies to the extent that the Concessionaire and the Sub-Contractors could have avoided the Compensation Event or its consequences, or mitigated or recovered those consequences, by steps which they might, reasonably be expected to have taken (without incurring material expenditure) upon becoming aware of the Compensation Event.

#### **41.5 Failure to Provide Timely Information**

Compliance with the requirements set out in Section 41.3 above (in particular with regard to the time for delivery of information), shall be a condition precedent to the Concessionaire's right to any extension of time, compensation or relief in respect of the events for which the information is delayed.

#### **41.6 Further Information**

The Concessionaire shall notify HPTE if at any time it receives or becomes aware of any further information relating to the Compensation Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading.

#### **41.7 Applicability of Dispute Resolution Procedure**

If the Parties cannot agree the extent of any relief under this Contract or HPTE disagrees that a Compensation Event has occurred (or as to its consequences), or that the Concessionaire is entitled to any relief under this Section 41, the Parties shall resolve the matter in accordance with the Dispute Resolution Procedure.

## 42. RELIEF EVENTS

### 42.1 Relief Events and their consequences

If and to the extent that a Relief Event:

- (a) Is the cause of a delay in achieving the Planned Full Services Commencement Date; and/or
- (b) Adversely affects the ability of the Concessionaire to perform any of its obligations under this Contract,

then the Concessionaire is entitled to apply for relief from its obligations and/or relief from the allocation of Noncompliance Points and/or from any right which HPTE would otherwise have to assert that circumstances amounted to a Concessionaire Default.

### 42.2 Relief Events affecting the Phase 2 Work

The process for obtaining relief in relation to any Relief Event affecting the Phase 2 Work shall be the process for obtaining a Change Order pursuant to Part 6 of Schedule 21 and the remaining provision of this Section 42 shall not apply to such Relief Events. The process for obtaining an extension to the Planned Full Services Commencement Date and/or the Full Services Commencement Longstop Date in relation to any Relief Event affecting the Phase 2 Work shall be the process for obtaining a Change Order pursuant to Part 6 of Schedule 21.

### 42.3 Obtaining Relief for Relief Event

To obtain relief, the Concessionaire must:

- (a) As soon as practicable, and in any event within twenty (20) Business Days after it becomes aware that the Relief Event has adversely affected the ability of the Concessionaire to perform its other obligations, give to HPTE a notice of its claim for relief from its obligations under this Contract, including full details of the nature of the Relief Event, the date of occurrence and its likely duration; and
- (b) Within five (5) Business Days of receipt by HPTE of the notice referred to in Section 42.3(a), give full details of the relief claimed.

### 42.4 Right to Relief

If the Concessionaire has complied with its obligations under Section 42.3, and demonstrated:

- (a) That the Relief Event was the cause of the breach of the Concessionaire's obligations under this Contract; and
- (b) The steps which the Concessionaire has taken to mitigate the need for relief from the obligations under this Contract;

then, subject to the remainder of this Section 42.4, HPTE shall give the Concessionaire the remedies provided by Section 42.1 in respect of the Relief Event. The Concessionaire shall not be entitled to remedies to the extent that the Concessionaire and the Sub-Contractors could have

avoided the Relief Event or its consequences, or mitigated or recovered those consequences, by steps which they might, reasonably be expected to have taken (without incurring material expenditure) upon becoming aware of the Relief Event.

**42.5 Failure to Provide Timely Information**

Compliance with the requirements set out in Section 42.3 above (in particular with regard to the time for delivery of information), shall be a condition precedent to the Concessionaire's right to any extension of time, or relief from its obligations under this Contract in respect of the events for which the information is delayed.

**42.6 Further Information**

The Concessionaire shall notify HPTE if at any time it receives or becomes aware of any further information relating to the Relief Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading.

**42.7 Reduction of Snow and Ice Services Fee and GP Routine Maintenance Fee for Force Majeure**

To the extent that a Relief Event prevents or diminishes the performance of the Snow and Ice Services and/or the GP Routine Maintenance Services then HPTE shall be entitled to a fair and reasonable reduction in the Snow and Ice Services Fee and/or the GP Routine Maintenance Services Fee, respectively, which may be a reduction to zero for the relevant period if no such services are being provided. The reduction shall be such amount as shall be agreed or determined.

**42.8 Applicability of Dispute Resolution Procedure**

If the Parties cannot agree on the extent of the relief required, or HPTE disagrees that a Relief Event has occurred or that the Concessionaire is entitled to relief from obligations under this Contract, the Parties shall resolve the matter in accordance with the Dispute Resolution Procedure.

**43. FORCE MAJEURE**

**43.1 Occurrence of a Force Majeure Event**

Subject to the next sentence, neither Party shall be entitled to bring a claim for a breach of obligations under this Contract by the other Party or incur any liability to the other Party for any Losses incurred by that other Party, or to claim that there are circumstances amounting to Concessionaire Default or HPTE Default (as the case may be) or, in the case of HPTE, to allocate Noncompliance Points to the Concessionaire, to the extent that in each case a Force Majeure Event occurs and the party in question is prevented from carrying out obligations by that Force Majeure Event. However, a Force Majeure Event shall not give HPTE the right to claim relief from the obligation to make a payment which it is required to make under this Contract.

**43.2 Force Majeure Events affecting the Phase 2 Work**

The process for obtaining an extension to the Planned Full Services Commencement Date and/or the Full Services Commencement Longstop Date in relation to any Force Majeure Event affecting the Phase 2 Work shall be the process for obtaining a Change Order pursuant to Part 6 of Schedule

21 and Section 43.3 and Section 43.4 shall not apply to changing such dates as a consequence of Force Majeure Events.

**43.3 Notice of Force Majeure Event**

On the occurrence of a Force Majeure Event, the Affected Party shall notify the other Party as soon as practicable. The notification shall include details of the Force Majeure Event, including evidence of its effect on the obligations of the Affected Party and any action proposed to mitigate its effect.

**43.4 Right to Relief**

If the Concessionaire has complied with its obligations under Section 43.3, and demonstrated:

- (a) That the Force Majeure Event was the cause of the breach of the Concessionaire's obligations under this Contract; and
- (b) The steps which the Concessionaire has taken to mitigate the need for relief from the obligations under this Contract;

then, subject to the remainder of this Section 43.4, HPTE shall give the Concessionaire the remedies provided by Section 43.1 in respect of the Force Majeure Event. The Concessionaire shall not be entitled to remedies to the extent that the Concessionaire and the Sub-Contractors could have avoided the Force Majeure Event or its consequences, or mitigated or recovered those consequences, by steps which they might, reasonably be expected to have taken (without incurring material expenditure) upon becoming aware of the Force Majeure Event.

**43.5 Reduction of Snow and Ice Services Fee and GP Routine Maintenance Fee for Force Majeure**

To the extent that a Force Majeure Event prevents or diminishes the performance of the Snow and Ice Services and/or the GP Routine Maintenance Services then HPTE shall be entitled to a fair and reasonable reduction in the Snow and Ice Services Fee and/or the GP Routine Maintenance Services Fee, respectively, which may be a reduction to zero for the relevant period if no such services are being provided. The reduction shall be such amount as shall be agreed or determined.

**43.6 Consultation After Force Majeure Event**

As soon as practicable following the notification referred to in Section 43.3, the Parties shall consult with each other in good faith and use reasonable endeavors to agree to appropriate terms to mitigate the effects of the Force Majeure Event and facilitate the continued performance of this Contract.

**43.7 Termination Rights**

If no such terms are agreed on or before the date falling eighty (80) Business Days after the date of the commencement of the Force Majeure Event and such Force Majeure Event is continuing or its consequence remains such that the Affected Party is unable to comply with its obligations under this Contract for a period of more than one hundred and twenty (120) Business Days, then, subject to Section 43.8, either Party may terminate this Contract by giving twenty (20) Business Days written notice to the other Party.

#### 43.8 Termination Effects

If this Contract is terminated under Section 43.7 or Section 43.9:

- (a) The provisions of Part 5 of Schedule 23 shall apply in respect of compensation on termination for a Force Majeure Event; and
- (b) HPTE may require the Concessionaire to transfer its title, interest and rights in and to any Assets (or such part of the Assets as may be required by HPTE) to HPTE and CDOT.

#### 43.9 Termination Options

If the Concessionaire gives notice to HPTE under Section 43.7 that it wishes to terminate this Contract, then HPTE has the option either to accept such notice or to respond in writing on or before the date falling ten (10) Business Days after the date of its receipt stating that it requires this Contract to continue. If HPTE gives the Concessionaire such notice, then:

- (a) HPTE shall pay to the Concessionaire, the estimated Toll Revenues projected to be received in accordance with the Base Case Financial Model and the Concessionaire shall pay all Toll Revenue which it receives to HPTE from the day after the date on which this Contract would have terminated under Section 43.7 as if the Services were being fully provided; and
- (b) This Contract will not terminate until expiration of written notice of at least twenty (20) Business Days from HPTE to the Concessionaire that it wishes this Contract to terminate.

#### 43.10 Mitigation

The Parties shall at all times following the occurrence of a Force Majeure Event use reasonable endeavors to prevent and mitigate the effects of the Force Majeure Event.

#### 43.11 End of Force Majeure Event

The Affected Party shall notify the other Party as soon as practicable after the Force Majeure Event ceases or no longer causes the Affected Party to be unable to comply with its obligations under this Contract. Following such notification, this Contract shall continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event.

### 44. CHANGE IN LAW

#### 44.1 Qualifying Change in Law

If a Qualifying Change in Law occurs or is shortly to occur, then either Party may notify the other of its likely effects, giving details of its opinion of:

- (a) Any necessary change in the Phase 2 Work and/or the Service;
- (b) Whether any changes are required to the terms of this Contract to deal with the Qualifying Change in Law;



- (c) Whether relief from compliance with obligations is required, including the obligation of the Concessionaire to achieve the Planned Full Services Commencement Date and/or meet HPTE's Requirements and/or the Concessionaire's Proposals during the implementation of any relevant Qualifying Change in Law;
- (d) Any loss of revenue that will result from the relevant Qualifying Change in Law;
- (e) Any Estimated Change in Costs that result from the Qualifying Change in Law; and
- (f) Any Capital Expenditure that is required or no longer required as a result of a Qualifying Change in Law taking effect during the Services Period,

in each case giving in full detail the procedure for implementing the change in the Phase 2 Work and/or the Services. Responsibility for the costs of implementation (and any resulting variation to the projected Toll Revenues) shall be dealt with in accordance with Section 44.2 to Section 44.5.

#### **44.2 Change Procedure**

As soon as practicable after receipt of any notice from either Party under Section 44.1, the Parties shall apply Schedule 21 (Change Procedure) in order to discuss and agree to the issues referred to in Section 44.1 and any ways in which the Concessionaire can mitigate the effect of the Qualifying Change in Law. In applying Schedule 21 (Change Procedure) the Parties shall take into account (*inter alia*):

- (a) Providing evidence that the Concessionaire has used reasonable endeavors (including, where practicable, the use of competitive quotes) to oblige the Sub-Contractors to minimize any increase in costs and maximize any reduction in costs;
- (b) Demonstrating how any Capital Expenditure to be incurred or avoided is being measured in a cost-effective manner, including showing that when such expenditure is incurred or would have been incurred, foreseeable Changes in Law at that time have been taken into account by the Concessionaire;
- (c) Giving evidence as to how the Qualifying Change in Law has affected prices charged by any similar businesses to the Project, including similar businesses in which the Equity Members or their Affiliates carry on business;
- (d) Demonstrating that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain assets that have been affected by the Qualifying Change in Law concerned, has been taken into account in the amount which in its opinion has resulted or is required under Section 44.1(e) and/or Section 44.1(f).

#### **44.3 Capital Expenditures**

If the Parties agree or it is determined under the Dispute Resolution Procedure that the Concessionaire is required to incur additional Capital Expenditure due to a Qualifying Change in Law then the Concessionaire shall use its reasonable endeavors to obtain funding for such Capital Expenditure on terms reasonably satisfactory to it and to the Senior Lenders and the TIFIA Lender.

**44.4 Failure to Obtain Funding**

If the Concessionaire has used reasonable endeavors to obtain funding for the Capital Expenditure referred to in Section 44.3, but has been unable to do so (in whole or in part) within forty (40) Business Days of the date that the agreement or determination referred to in Section 44.3 occurred, then HPTE shall pay to the Concessionaire an amount equal to that Capital Expenditure on or before the date falling twenty (20) Business Days after the Capital Expenditure has been incurred.

**44.5 Loss of Toll Revenues or Additional Recurring Costs**

Any compensation payable under this Section 44 to compensate for projected loss of Toll Revenues shall be determined and made in accordance with Part 2 of Schedule 11.

**45. CHANGE PROCEDURE**

The provisions of Schedule 21 (Change Procedure) shall apply in respect of HPTE Changes and Concessionaire Changes.

**46. SUB-CONTRACTS**

**46.1 Restriction on Sub-Contracting**

Subject to Section 46.2 and Section 46.3, the Concessionaire shall not sub-contract, assign, charge, sell, bargain, pledge, transfer or create a lien over the benefit of this Contract in whole or in part except with the prior written consent of HPTE (save in the case of a Financing Assignment which complies with Section 2.7 and, to the extent applicable, Sections 6.3 and 6.4).

**46.2 Sub-Contractors**

- (a) HPTE acknowledges that the Concessionaire has entered into agreements with the Sub-Contractors and HPTE consents to the entry into the Sub-Contracts described in Schedule 4 by the Concessionaire as of the Commencement Date.
- (b) To the extent that it has not done so at the Contract Date, the Concessionaire shall enter into Sub-Contracts with the Sub-contractors identified in the Proposal.
- (c) The Concessionaire shall not terminate any Sub-Contract, or permit or suffer any substitution or replacement (by way of assignment of the Sub-Contract, transfer to another of any material portion of the scope of work, or otherwise) of such Sub-Contractor, except in the case of material default by the Sub-Contractor or with HPTE's prior written approval in its good faith discretion. For Sub-Contractors not known as of the Contract Date, the Concessionaire's selection thereof shall be subject to HPTE's prior written approval in HPTE's good faith discretion.

**46.3 Sub-Contract Provisions**

- (a) Each Sub-Contract shall:
  - (i) Expressly include the requirements and provisions of this Contract regarding Intellectual Property rights and licenses

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- (ii) Expressly require the Sub-Contractor to participate in meetings between the Concessionaire and HPTE where requested by the Concessionaire or HPTE concerning matters pertaining to such Sub-Contractor, its work or the coordination of its work with other Sub-Contractors, provided that all direction to such Sub-Contractor shall be provided by the Concessionaire;
  - (iii) Expressly include requirements that: the Sub-Contractor
    - (1) will maintain usual and customary books and records for the type and scope of operations of business in which it is engaged;
    - (2) permit audit thereof with respect to the Project by each of the Concessionaire and HPTE and the Independent Engineer in accordance with this Contract on reasonable notice and frequency;
    - (3) provide progress reports to the Concessionaire appropriate for the type of work it is performing sufficient to enable the Concessionaire to provide the reports It is required to furnish HPTE under this Contract;
  - (iv) Include the right of the Concessionaire to terminate the Sub-Contract in whole or in part upon any termination of this Contract for any reason, without liability of the Concessionaire or HPTE for the Sub-Contractor's lost profits or business opportunity other than in accordance with the express provisions of this Contract; and
  - (v) Expressly provide that any purported amendment with respect to any of the foregoing matters without the prior written consent of HPTE shall be null and void.
- (b) Additional Requirements for the Construction Sub-Contract and Operation Sub-Contracts
- (i) Before entering into a Construction Sub-Contract or Operation Sub-Contract (other than Operation Sub-Contracts for routine janitorial services and routine supply of materials) or any supplement or amendment thereto, the Concessionaire shall submit a true and complete copy of the proposed Construction Sub-Contract or Operation Sub-Contract to HPTE for review and comment. HPTE may disapprove only if the Construction Sub-Contract or Operation Sub-Contract
    - (1) does not comply, or is Inconsistent, in any material respect with the applicable requirements of this Contract, including that it does not comply or is inconsistent with this Section 46;
    - (2) does not incorporate the applicable federal requirements set forth in Schedule 13;
    - (3) increases HPTE's liability; or
    - (4) adversely affects HPTE's step-in rights.

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- (ii) The Construction Sub-Contract and each Operation Sub-Contract, except the Tolling Services Agreement, also shall expressly require the personal services of and not be assignable by the Construction Sub-Contractor or Operation Sub-Contractor, without the Concessionaire's and HPTE's prior written consent each in its sole discretion, provided that this provision shall not prohibit the subcontracting of portions of the work or services provided under the Sub-Contract.
- (c) the Concessionaire shall have the right to have work and services performed by Affiliates only under the following terms and conditions:
  - (i) The Concessionaire shall execute a written Sub-Contract with the Affiliate;
  - (ii) The Sub-Contract shall comply with all applicable provisions of this Section 46.3, be consistent with Good Industry Practice, and be in form and substance substantially similar to Sub-Contracts then being used by the Concessionaire or Affiliates for similar work or services with unaffiliated Sub-Contractors;
  - (iii) The Sub-Contract shall set forth the scope of work and services and all the pricing, terms and conditions respecting the scope of work and services;
  - (iv) The pricing, scheduling and other terms and conditions of the Sub-Contract shall be no less favorable to the Concessionaire than those that the Concessionaire could reasonably obtain in an arms' length, competitive transaction with an unaffiliated contractor. the Concessionaire shall bear the burden of proving that the same are no less favorable to the Concessionaire, and
  - (v) Before entering into a written Sub-Contract with an Affiliate or any supplement or amendment thereto, the Concessionaire shall submit a true and complete copy of the proposed Sub-Contract to HPTE for review and comment. HPTE shall have 20 days after receipt to deliver its comments to the Concessionaire. If the Sub-Contract with the Affiliate is a Sub-Contract, and such Affiliate's selection as a Sub-Contractor is not known as of the Contract Date, the Affiliate shall be subject to HPTE's approval as provided in Section 46.3.
- (d) The Concessionaire shall make no payments to Affiliates for work or services in advance of provision of such work or services, except for reasonable mobilization payments or other payments consistent with arm's length, competitive transactions of similar scope. Payments in violation of this provision shall be excluded from the calculation of compensation pursuant to Schedule 23 and shall not be included as costs of the Concessionaire for the purposes of Schedule 14.

### 46.4 Liability

The sub-contracting by the Concessionaire of any of the Phase 2 Work or Services shall not relieve the Concessionaire of any obligations under this Contract for any breach of the obligations arising under this Contract, or for the actions of negligence and/or defaults by any Concessionaire Related

Party. The Concessionaire shall not be released from any of its obligations under this Contract as a result of the termination of the appointment of a Sub-Contractor for any reason.

**46.5 HPTE-Sub-Contractor Agreements**

The Concessionaire will:

- (a) Deliver the HPTE-Sub-Contractor Agreements from the Construction Sub-Contractor and the Operation Sub-Contractor to HPTE on the date of this Contract;
- (b) Not engage any new or any replacement Sub-Contractor in connection with the Project unless such Person has delivered to HPTE a duly executed agreement substantially in the form of the HPTE-Sub-Contractor Agreement set out in Schedule 19 duly executed, and in each case such HPTE-Sub-Contractor Agreements must be delivered to HPTE before such entity carries out or commences any of its obligations under the relevant contract or appointment.

**47. CHANGE OF CONTROL**

**47.1 Structure of the Concessionaire**

The Concessionaire represents to HPTE that at the date of this Contract the legal and beneficial ownership of the Concessionaire is as set out in Schedule 3 (Concessionaire Warranted Information) and that no arrangements are in place that have or may have or result in any sale, transfer or disposal of any legal, beneficial, equitable or other interest in any or all of the shares in the Concessionaire, other than arrangements that have been disclosed to HPTE in the letter from the Concessionaire to HPTE dated June 27, 2013. HPTE's acknowledgement of these arrangements is without prejudice to Section 47.2, and does not amount to any approval by HPTE for the purpose of that Section.

**47.2 Lock Up Period**

Subject to Section 47.3, during:

- (a) The Lock Up Period; or
- (b) Any period when there has been a Concessionaire Default that has not been remedied or an event has occurred that with the lapse of time, the giving of notice or otherwise would constitute a Concessionaire Default,

unless it has first obtained HPTE's prior written approval (which may be given subject to conditions) the Concessionaire shall ensure that there will be no:

- (i) Sale, transfer, or other disposal of any direct or indirect legal, beneficial, equitable or other ownership interest in the Concessionaire which, when taken together with any other such transfer or disposal during the relevant period gives rise to a Change of Control;
- (ii) Grant of any security interest, lien or other encumbrance over any legal, beneficial, equitable or other direct or indirect ownership interest in the Concessionaire, except as required by any Funding Agreement;

- (iii) Agreement in respect of any legal, beneficial, equitable or other direct or indirect ownership interest in the Concessionaire, or in respect of any votes attached to any such shares held by such Person in the Concessionaire other than (A) customary shareholder, partnership or organizational agreements among the Equity Members as of the Commencement Date, or (B) as required by any Funding Agreements, in each case solely with respect to the governance and management of the Concessionaire; or
- (iv) Agreement, whether or not subject to any condition precedent or subsequent, to do any of the foregoing.

**47.3 Permitted Transactions During Lock Up Period**

The following matters shall not be or give rise to breaches of Section 47.2:

- (a) Any bona fide open market transactions in securities effected on a recognized public stock exchange, excluding such transactions involving an initial public offering;
- (b) Any bona fide transaction involving securities or beneficial interests in the ultimate parent organization of a shareholder, member, partner or joint venture member of the Concessionaire, unless the transferee in such transaction is at the time of the transaction suspended or debarred or subject to a proceeding to suspend or debar from bidding, proposing or contracting with any Federal department or the State or any division of the State;
- (c) A reorganization or transfer of direct or indirect interests in the Concessionaire or of any intermediate entity in the chain of ownership so long as there occurs no change in the entity with ultimate power to Control the Concessionaire;
- (d) The exercise of preferred or minority equity holder veto or voting rights (whether provided by Law or by the Concessionaire's organizational documents or related member or shareholder agreements or similar agreements in the case of such agreements in the form that they are in place at the start of the relevant period) over major business decisions of the Concessionaire;
- (e) The grant of security pursuant to the Funding Agreements in accordance with this Contract, or the exercise of remedies by the Security Trustee or the Senior Lenders, TIFIA Lender, or the Subordinated Lenders thereunder, including foreclosure;
- (f) Transfers of direct or indirect ownership interests in the Concessionaire (as applicable) between or among any members of a fund constituted as a limited partnership so long as there is no change of Control of the general partner of that limited partnership; or
- (g) A transfer of interests between managed funds that are under common ownership or control but excluding any case where the interests are controlled by different management after the transfer.

**47.4 Post Lock Up Period**

Following the Lock Up Period and in any period when Section 47.2 does not apply, the Concessionaire will ensure that there will be no Change of Control of the Concessionaire, unless HPTE has approved such Change of Control based upon a determination in accordance with Section 47.5.

**47.5 Disapproval of Change of Control**

HPTE's approval of a Change of Control may be withheld or made subject to conditions of the provision of reasonable additional security or other reasonable arrangements if, acting reasonably, HPTE determines that the proposed transaction or transactions bringing about the Change of Control is or are prohibited by law or that after such Change of Control the Concessionaire's ability to perform the obligations and covenants of the Concessionaire pursuant to this Contract will be materially adversely affected, which determination may be based upon, or take into account, one or more of the following factors:

- (a) The financial strength and integrity of those who will exercise Control over the Concessionaire after the Change of Control (including the members of the corporate group or groups which such persons own or Control, and any proposed managers or operating partners and each of their respective Affiliates); and
- (b) The experience of those who will exercise Control over the Concessionaire after the Change of Control (including the members of the corporate group or groups which such persons own or Control, and any proposed managers or operating partners and each of their respective Affiliates) in operating toll roads or highways and performing other projects (including the absence of criminal, civil or regulatory claims or actions against any such Person and the quality of any such Person's past or present performance on other projects).

**PART 11: HANDBACK AND TERMINATION OF THE CONTRACT**

**48. HANDBACK**

**48.1 Handback Requirements**

The Concessionaire shall ensure that the Maintained Elements will meet the Residual Life Requirements at the Expiration Date.

**48.2 Handback Plan**

- (a) The Concessionaire shall prepare a Handback Plan that contains the methodologies and activities to be undertaken or employed to meet the Handback Requirements and obtain Acceptance from HPTE. The Concessionaire shall submit the Handback Plan, including a Residual Life Methodology plan, to HPTE for review and Acceptance no later than the first day of the fifth full calendar year before the Expiration Date.
- (b) The Concessionaire shall perform an initial, an intermediate, and a final Residual Life Inspection that covers all Maintained Elements within the Managed Lanes as noted below. Within thirty (30) Business Days following performance of each Residual Life Inspection, the Concessionaire shall submit to HPTE the findings of the inspection, Residual Life test results and Residual Life calculations.
- (c) On the Expiration Date, the Concessionaire shall certify in writing to HPTE that all Maintained Elements of the Managed Lanes meet or exceed their respective Residual Life Requirements defined herein.

**48.3 Residual Life Inspections**

- (a) The Concessionaire shall engage a suitably qualified independent expert (not being an employee of the Concessionaire) (the "Residual Life Expert") to perform Residual Life Inspections and testing with appropriate coverage such that the results are representative of all the Maintained Elements. The Residual Life Inspections shall comply with the requirements set out in the Handback Requirements as applicable to each of the Maintained Elements.
- (b) HPTE will be given the opportunity to participate in any of the inspections and/or tests and shall be given a minimum of thirty (30) Business Days' notice prior to the performance of any such tests. The Concessionaire shall deliver to HPTE, within ten (10) Business Days after it is created, the output data arising from any testing and any interpretation thereof made by the Residual Life Expert.

**48.4 Initial Residual Life Inspection**

Between sixty-five (65) and sixty (60) months prior to the Expiration Date, the Concessionaire shall direct the Residual Life Expert to perform an initial Residual Life Inspection ("Initial Inspection") of all Maintained Elements. Within thirty (30) days following performance of the Initial Inspection, the Concessionaire shall submit the Initial Inspection report to HPTE, which will contain the findings of the Initial Inspection, including Residual Life test results, any relevant report(s) by independent



testing organizations, and the Residual Life Expert's calculation of the projected Residual Life on the Expiration Date for each inspected Maintained Element and the Residual Life Expert's estimate of the Renewal Amount.

**48.5 Intermediate Residual Life Inspection**

Between twenty-one (21) and eighteen (18) months before the Expiration Date, the Concessionaire shall direct the Residual Life Expert to perform an intermediate Residual Life Inspection ("Intermediate Inspection") including all Maintained Elements, regardless of whether the Concessionaire has undertaken Renewal Works for a particular Maintained Element in the period since the Initial Inspection. Within thirty (30) Business Days following performance of the Intermediate Inspection, the Concessionaire shall submit the Intermediate Inspection report to HPTE, which will contain the findings of the inspection and set out a proposal as to any revision or addition to the Renewal Works. The Concessionaire's findings should set out:

- (a) Any revisions or additions to the Renewal Works required to ensure that all Maintained Elements of the Maintained Elements will, on the Expiration Date, comply with the Handback Requirements;
- (b) Proposals as to any revisions to the Handback Plan as a consequence of such revisions or additions to the Renewal Works; and
- (c) Estimates of any changes in the Renewal Amount as a consequence of such revisions or additions to the Renewal Works.

**48.6 Final Residual Life Inspection**

Between one-hundred and twenty (120) and sixty (60) days before the Expiration Date, the Concessionaire shall direct the Residual Life Expert to perform a final Residual Life Inspection ("Final Inspection") including all Maintained Elements within the Managed Lanes, regardless of whether the Concessionaire has undertaken Renewal Works for a particular Maintained Element in the period since the Initial Inspection and Intermediate Inspection. Within thirty (30) Business Days following performance of the Final Inspection, the Concessionaire shall submit the Final Inspection report to HPTE, which will contain the findings of the inspection.

**48.7 Incorporating the Renewal Works into the Life Cycle Maintenance Plan and Subsequent Updates**

- (a) After completion of the Initial Inspection, the Concessionaire shall provide to HPTE a report on the condition of the Maintained Elements and a notice setting out a proposal as to the Renewal Works, timing for the performance of the Renewal Works and the Renewal Amount. The Renewal Works shall be the work designated as required to meet the Handback Requirements. The proposals made on Renewal Works, the timing for those works and the Renewal Amount shall be based on the following:
  - (i) The assessment and calculation of Residual Life for each Maintained Element; and

- (ii) The assumption that the Maintained Elements will be maintained in accordance with the Service Requirements for the remainder of the Services Period.
- (b) HPTE may, within ninety (90) days after receipt of the proposal notice from the Concessionaire, object to the proposals with respect to any or all of the Renewal Works, the timing for those works or the Renewal Amount. If no agreement is reached between HPTE and the Concessionaire within sixty (60) days of the Concessionaire's receipt of HPTE's notice, then the matter may be referred to the Dispute Resolution Procedure.
- (c) Once the scope of the Renewal Works and the timing for that work is agreed or determined it shall be incorporated into the Life Cycle Maintenance Plan and the provisions of Section 24 shall apply to the performance of that work.
- (d) After HPTE receives the Intermediate Inspection findings, including any proposed modifications to the Renewal Works, the timing for those works or the Renewal Amount, HPTE may, within ninety (90) days after receipt of the notice from the Concessionaire, object to the proposals with respect to any or all of those matters. If no agreement is reached between HPTE and the Concessionaire within sixty (60) days of the Concessionaire's receipt of HPTE's notice, then the matter may be referred to the Dispute Resolution Procedure for determination. Upon conclusion of the Dispute Resolution Procedure, the Concessionaire shall ensure that the Renewal Works are carried out in accordance with the Handback Plan. If necessary, once the remaining scope of the Renewal Works and the timing for that work is agreed or determined they shall be incorporated into the Life Cycle Maintenance Plan, and the provisions of Section 24 shall apply to the performance of that work.

#### **48.8 Handback Reserve**

Within six (6) months after agreement or determination of the Renewal Amount, the Concessionaire shall immediately either:

- (a) Pay 20% of the Renewal Amount into an interest bearing account (the "Handback Reserve Fund"), opened by HPTE and maintained until this Contract has expired or terminated; or
- (b) Provide an irrevocable letter of credit, in form and substance reasonably satisfactory to HPTE for the same amount.

The amount in the Handback Reserve Fund shall be reviewed after the Intermediate Inspection and adjusted, up or down, to take into account any change in the value of the Renewal Amount.

#### **48.9 Handback Certificate and Completion of Renewal Works**

- (a) After receipt of the Final Inspection report, within sixty (60) days, HPTE will do one of the following:
  - (i) Issue a Handback Certificate to the Concessionaire; or

- (ii) Notify the Concessionaire in writing of the decision not to issue a Handback Certificate and state the reasons for this decision.
- (b) HPTE may withhold the Handback Certificate if:
  - (i) The Concessionaire has not completed all Renewal Works, or
  - (ii) The Maintained Elements, for any other reason, do not comply with the Handback Requirements.
- (c) If HPTE withholds the Handback Certificate, it shall give notice describing any aspect of the Maintained Elements that does not comply with the Handback Requirements and describing the work necessary to achieve compliance. The Concessionaire may, within thirty (30) days after receipt of the notice, object to any matter set out therein. If, after good faith efforts on behalf of both Parties no agreement is reached within sixty (60) days after HPTE's receipt of the Concessionaire's notice, the matter may be referred to the Dispute Resolution Procedure.

**48.10 Handback Reserve Fund Use**

- (a) If HPTE issues a Handback Certificate, or if it is determined that HPTE should have done so, then amounts held in the Handback Reserve Fund will be released to the Concessionaire or if the Concessionaire elected to post a letter of credit HPTE will return the letter of credit to the Concessionaire.
- (b) If at the Expiration Date further work is necessary for the Maintained Elements to meet the Handback Requirements then HPTE shall give notice to the Concessionaire and, if the Concessionaire does not complete such further work within a period of forty-five (45) Business Days following such notice, HPTE will have the right to draw upon the Handback Reserve Fund or letter of credit in the amount required to address such failures up to the full amount of the security available.
- (c) Any amounts held in the Handback Reserve Fund will be released to the Concessionaire, or any letter of credit which has been provided by the Concessionaire will be returned to the Concessionaire once all of the Maintained Elements meet the Handback Requirements.

**49. CONSEQUENCES OF TERMINATION OR EXPIRATION**

**49.1 Transfer of Materials**

The Concessionaire shall within twenty (20) Business Days of the Expiration Date (or, if earlier, the Termination Date, if applicable) hand over to HPTE all documents (or complete and accurate copies to the extent originals are not required), records, books, data and/or information in the possession, custody or power of the Concessionaire relating to and/or touching upon the Assets, the design, installation, maintenance and/or replacement of the Managed Lanes and the Assets and the carrying out of the Services other than any of such documents, records, books, data and/or information of a financial nature which will not be relevant to the provision of services equivalent to the Services after the Termination Date or the Expiration Date (as the case may be). Documents, records, books, data

and/or information kept or stored on computer shall be surrendered, released and/or handed-over to HPTE by whatever means and in whatever format HPTE may reasonably require.

**49.2 Service Requirements**

- (a) Following the service of a Termination Notice;
- (b) Following termination of this Contract when a Termination Notice is not served;
- (c) At any time during the Contract Period upon request from HPTE; and
- (d) No later than six (6) months and no earlier than twelve (12) months before the Expiration Date,

the Concessionaire shall supply to HPTE within twenty (20) Business Days of the relevant date or request all information reasonably required by HPTE to carry out the Services (including information on the identity, terms and conditions of employment of all employees of the Concessionaire or any sub-contractor (including the Sub-Contractors) employed in the provision of the Services and information relating to the Managed Lanes, the US 36 General Purpose Lanes and the Assets). The Concessionaire shall warrant that, to the best of its knowledge and belief, such information is accurate in all material respects.

**49.3 Assignment of Contracts and Intellectual Property**

On the Expiration Date (or if earlier, on the Termination Date, if applicable) the Concessionaire shall:

- (a) Subject to the Direct Agreement, assign and transfer to HPTE or any Person nominated by HPTE the benefit of all and any contracts or arrangements (as may be reasonably required by HPTE) it may have with any third parties in relation to the Project and shall, if for any reason it cannot assign the same, declare a trust of all its beneficial interest in the same for the benefit of HPTE; and
- (b) Take such action in relation to Intellectual Property rights as is required pursuant to Section 59,

and the Concessionaire hereby irrevocably and unconditionally appoints HPTE as the Concessionaire's lawful attorney (and to the complete exclusion of any rights that the Concessionaire 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 49.3 as the attorney may think fit.

**49.4 Transfer of Assets**

Subject to Sections 49.5, 49.8 and 49.10 below and the Direct Agreement, unless HPTE elects in writing to the contrary, the Concessionaire shall transfer its rights, title and interest in and to the Transferrable Assets (or such part of the Transferrable Assets as may be required by HPTE) to HPTE (or any Person designated by HPTE), on and with effect from the Expiration Date or, if earlier, the Termination Date (as the case may be) for no additional payment and in accordance with the Handback Requirements.

**49.5 Final Six Months**

During the final six (6) months of this Contract or during the period from service of any Termination Notice until the Termination Date of this Contract, and in either case for a reasonable period thereafter, the Concessionaire shall cooperate fully with the transfer of responsibility for the Services (or any part of the Services) to HPTE or any New Concessionaire of such services the same or similar to the Services, and for the purposes of this Section 49.5 the meaning of the term "cooperate" shall include:

- (a) Interfacing with HPTE and/or any New Concessionaire, and providing reasonable assistance and advice concerning the Services and their transfer to HPTE or to such New Concessionaire;
- (b) Allowing any New Concessionaire access (at reasonable times and on reasonable notice) to the Managed Lanes, the US 36 General Purpose Lanes and the Assets but not so as to interfere with or impede the provision of the Service;
- (c) Providing to HPTE and/or to any New Concessionaire all and any information concerning the Managed Lanes, the Phase 2 Work, the Assets and the Services which is reasonably required for the efficient transfer of responsibility for performance of the Project but, for the avoidance of doubt, information which is commercially sensitive to the Concessionaire or a Sub-Contractor shall not be provided (and for the purposes of this Section 49.5, commercially sensitive shall mean information which would, if disclosed to a competitor of the Concessionaire or a Sub-Contractor, give that competitor a competitive advantage over the Concessionaire or a Sub-Contractor and thereby prejudice the business of the Concessionaire or a Sub-Contractor); and
- (d) Transferring its rights, title and interest in and to the Assets (or such part of the Assets as may be required by HPTE) to the New Concessionaire with effect on and from the Termination Date or the Expiration Date.

**49.6 Retender Notice**

On or before a date falling no later than eighteen (18) months prior to the Expiration Date, HPTE shall notify the Concessionaire in writing whether it wishes to retender the provision of the Services.

**49.7 Retender**

If HPTE wishes to retender the provision of the Services then:

- (a) The Concessionaire shall do all necessary acts (including entering into any contracts) to ensure that the successor Concessionaire obtains all of its rights, title and interest in and to the Assets (or such part of the Assets as may be required by HPTE) with effect on and from the Expiration Date or Termination Date, and
- (b) HPTE will bear all costs of any retendering of this Contract on the Expiration Date or Termination Date.

**49.8 Election to Transfer to HPTE**

If HPTE does not wish to retender the Services then subject to Section 49.9 the Assets (or such part of the Assets as may be required by HPTE) shall transfer to HPTE (or any Person designated by HPTE), on the Expiration Date or Termination Date, and the Concessionaire shall do any necessary acts (including entering into any contracts) to ensure that HPTE (or any Person designated by HPTE), obtains all of its rights, title and interest in the Assets (or such part of the Assets as may be required by HPTE) with effect on and from the Expiration Date or the Termination Date.

**49.9 Transfer to HPTE or New Concessionaire**

The Concessionaire shall use all reasonable endeavors:

- (a) So as to facilitate the smooth transfer of responsibility for the Services to a New Concessionaire or to HPTE (or any Person designated by HPTE), as the case may be, and the Concessionaire shall take no action at any time during the Contract Period or thereafter which is calculated or intended, directly or indirectly, to prejudice or frustrate or make more difficult such transfer; and
- (b) To transfer to the New Concessionaire, and shall provide all reasonable assistance to the New Concessionaire in relation to the transfer of, all Necessary Consents, in each case to the extent that the same are transferable by Law.

**49.10 Survival**

Upon the occurrence of the Expiration Date, or if applicable, the Termination Date, the provisions of Section 43, this Section 49, Section 50 and Section 51 shall survive such expiration or termination, and in the event of a termination, the provision by which a Party has terminated, and any provisions necessary for the interpretation of those provisions together with any other provisions which, either expressly or by their context, are intended to operate after termination or expiration of this Contract.

**50. TERMINATION FOR CONCESSIONAIRE DEFAULT**

**50.1 Termination Notice**

If a Concessionaire Default has occurred and HPTE wishes to terminate this Contract, it must serve a Termination Notice on the Concessionaire. The Termination Notice must specify:

- (a) The type and nature of Concessionaire Default that has occurred, giving reasonable details; and
- (b) That in the case of any Concessionaire Default referred to in items (a), (c), (d), (e) and (f) of the definition of Concessionaire Default have occurred, then this Contract will terminate on the day falling forty (40) Business Days after the date the Concessionaire receives the Termination Notice, unless:
  - (i) In the case of any Concessionaire Default falling under item (a) of the definition of Concessionaire Default the Concessionaire puts forward an acceptable rectification Contract Schedule within twenty (20) Business Days after the date the Concessionaire receives the Termination Notice (and

implements such Contract Schedule in accordance with its terms and rectifies the Concessionaire Default in accordance with the Contract Schedule); or

- (ii) In the case of any Concessionaire Default falling within items (a), (c), (d), (e) and (f) of the definition of Concessionaire Default the Concessionaire rectifies the Concessionaire Default within forty (40) Business Days after the date the Concessionaire receives the Termination Notice; or
- (c) That in the case of any other Concessionaire Default (not being items (a), (c),(d), (e) and (f) of the definition of Concessionaire Default), this Contract will terminate on the date falling twenty (20) Business Days after the date the Concessionaire receives the Termination Notice.

#### **50.2 Rectification of Concessionaire Default**

In the case of any Concessionaire Default referred to in items (a), (d), (e) and (f) of the definition of Concessionaire Default, if the Concessionaire either rectifies the Concessionaire Default within the time period specified in the Termination Notice, or implements the Accepted rectification Contract Schedule, if applicable, in accordance with its terms, the Termination Notice will be deemed to be revoked and this Contract will continue.

#### **50.3 Express Termination Rights**

If:

- (a) In the case of a Concessionaire Default within item (a) of the definition of Concessionaire Default if no acceptable rectification Contract Schedule has been put forward pursuant to Section 50.1(b)(i) and the Concessionaire fails to rectify the Concessionaire Default within the time period specified in the Termination Notice; or
- (b) In the case of a Concessionaire Default within items (c), (d), (e) and (f) of the definition of Concessionaire Default, the Concessionaire fails to rectify the Concessionaire Default within the time period specified in the Termination Notice,

then subject to the Direct Agreement, HPTE may give notice stating that this Contract will terminate on the date falling ten (10) Business Days after the date of receipt of such notice.

#### **50.4 Failure of Rectification**

If the Concessionaire fails to implement any rectification Contract Schedule in accordance with its terms, subject to the Direct Agreement, this Contract will terminate on the date falling ten (10) Business Days after the date of notification to the Concessionaire of such failure to comply.

#### **50.5 Compensation**

The provisions of Part 3 of Schedule 23 shall apply in respect of compensation on termination following Concessionaire Default.

**51. PERSISTENT BREACH**

**51.1 Continuation of Breach**

If a particular breach during the Services Period (other than any breach for which Noncompliance Points could have been awarded in accordance with Schedule 10) has continued for more than fourteen (14) days or occurred more than three (3) times in any six (6) month period then HPTE may serve a warning notice on the Concessionaire:

- (a) Specifying that it is a formal warning notice;
- (b) Giving reasonable details of the breach; and
- (c) Stating that the breach is a breach which, if it recurs frequently or continues, may result in a termination of this Contract.

**51.2 Final Warning Notice**

If, following service of a warning notice the breach specified has continued beyond thirty (30) days or recurred two (2) or more times in the six (6) month period after the date the warning notice was served, then HPTE may serve another notice (a "Final Warning Notice") on the Concessionaire:

- (a) Specifying that it is a Final Warning Notice;
- (b) Stating that the breach specified has been the subject of a warning notice served within the six (6)-month period prior to the date of service of the Final Warning Notice; and
- (c) Stating that if the breach continues, or recurs, for more than fourteen (14) days or recurs two (2) or more times within the six (6)-month period after the date of service of the Final Warning Notice, this Contract may be terminated.

**51.3 Termination Right**

In the circumstances contemplated by Section 51.2(c), this Contract will terminate on the date falling ten (10) Business Days after the date of notification of such failure to comply with the Concessionaire. A warning notice may not be served in respect of any breach which has previously been counted in the making of a separate warning notice.

**51.4 Compensation**

The provisions of Part 3 of Schedule 23 shall apply in respect of compensation on termination following termination pursuant to this Section 51.

**52. TERMINATION FOR COMMISSION OF PROHIBITED ACT**

**52.1 Entering Contract not a Prohibited Act**

The Concessionaire warrants that in entering into this Contract it has not committed any Prohibited Act.



**52.2 Prohibited Act by Sub-Contractor or Similar Party**

If the Concessionaire or any Sub-Contractor (or anyone employed by or acting on behalf of any of them) or any of its or their agents or shareholders commits any Prohibited Act, then HPTE shall be entitled to act in accordance with the provisions of this Section 52.

**52.3 Prohibited Act by the Concessionaire or Employee (Not Independently)**

If a Prohibited Act is committed by the Concessionaire or by an employee not acting independently of the Concessionaire, then HPTE may terminate this Contract by giving notice to the Concessionaire.

**52.4 Prohibited Act by the Concessionaire Employee (Independently)**

If the Prohibited Act is committed by an employee of the Concessionaire acting independently of the Concessionaire, then HPTE may give notice to the Concessionaire of termination and this Contract will terminate, unless within twenty (20) Business Days of receipt of such notice the Concessionaire terminates the employee's employment and (if necessary) procures the performance of such part of the Phase 2 Work and/or Services by another person.

**52.5 Prohibited Act by Sub-Contractor (Not Independently)**

If the Prohibited Act is committed by a Sub-Contractor or by an employee of that Sub-Contractor not acting independently of that Sub-Contractor, then HPTE may give notice to the Concessionaire of termination and this Contract will terminate, unless within twenty (20) Business Days of receipt of such notice the Concessionaire terminates the relevant Project Document and thereafter procures the performance of such part of the Phase 2 Work and/or Services by another person.

**52.6 Prohibited Act by the Sub-Contractor Employee (Independently)**

If the Prohibited Act is committed by an employee of a Sub-Contractor acting independently of that Sub-Contractor, then HPTE may give notice to the Concessionaire of termination and this Contract will terminate, unless within twenty (20) Business Days of receipt of such notice the Sub- Contractor terminates the employee's employment and (if necessary) the Concessionaire or the Sub-Contractor (as the case may be) thereafter procures the performance of such part of the Phase 2 Work and/or Services by another person.

**52.7 Prohibited Act by Non-Specified Party**

If the Prohibited Act is committed by any other persons not specified in Section 52.2 to Section 52.6, then HPTE may give notice to the Concessionaire of termination and this Contract will terminate, unless within twenty (20) Business Days of receipt of such notice the Concessionaire procures the termination of such person's employment and of the appointment of his or her employer (where not employed by the Concessionaire or a Sub-Contractor) and (if necessary) procures the performance of such part of the Phase 2 Work and/or Services by another person.

**52.8 Notice of Termination**

Any notice of termination under this Section 52 shall specify:

- (a) The nature of the Prohibited Act;

- (b) The identity of the party whom HPTE believes has committed the Prohibited Act;
- (c) The date on which this Contract will terminate, in accordance with the applicable provision of this Section 52.

**52.9 Compensation**

The provisions of Part 4 of Schedule 23 shall apply in respect of compensation on termination.

**53. VOLUNTARY TERMINATION BY HPTE**

**53.1 HPTE's Right to Terminate**

HPTE may terminate this Contract at any time on or before the Expiration Date by complying with its obligations under Section 53.2 below and providing to the Concessionaire evidence of its ability to fund the amount required to be paid to the Concessionaire under Part 2 of Schedule 23.

**53.2 Notice of Termination**

If HPTE wishes to terminate this Contract under this Section 53, it must give a notice to the Concessionaire stating:

- (a) That HPTE is terminating this Contract under this Section 53;
- (b) That this Contract will terminate on the date falling forty (40) Business Days after the date of receipt of the notice; and
- (c) Whether HPTE has chosen to exercise its option under Section 53.3.

**53.3 Transfer of Assets**

On termination, HPTE shall have the option to require the Concessionaire to transfer its rights, title and interest in and to the Transferrable Assets to HPTE or to another Person as directed by HPTE.

**53.4 Timing of Termination**

This Contract will terminate on the date falling forty (40) Business Days after the date of receipt of the notice referred to in Section 53.2 above. The provisions of Part 2 of Schedule 23 shall apply in respect of compensation on termination pursuant to this Section 53.

**54. TERMINATION FOR HPTE DEFAULT**

**54.1 Termination Notice**

If a HPTE Default has occurred and the Concessionaire wishes to terminate this Contract, the Concessionaire must serve a Termination Notice on HPTE within thirty (30) Business Days of becoming aware of HPTE Default.

**54.2 Specification of HPTE Default**

The Termination Notice must specify the type of HPTE Default which has occurred entitling the Concessionaire to terminate.

**54.3 Timing of Termination**

The Contract will terminate on the day falling thirty (30) Business Days after the date HPTE receives the Termination Notice, unless HPTE rectifies the HPTE Default within thirty (30) Business Days of receipt of the Termination Notice.

**54.4 Compensation**

The provisions of Part 2 of Schedule 23 shall apply in respect of compensation on termination following HPTE Default.

**PART 12: FINAL PROVISIONS**

**55. CONFIDENTIALITY**

**55.1 Disclosure**

The Parties agree that the provisions of this Contract and each other Project Document shall not be treated as Confidential Information and may be disclosed without restriction.

**55.2 Receipt of Confidential Materials**

The Parties shall keep confidential all Confidential Information received by one Party from the other Party relating to this Contract and the other Project Documents or the Project and shall use all reasonable endeavors to prevent their employees and agents from making any disclosure to any Person of any such Confidential Information.

**55.3 Applicability of Section 55.2**

Section 55.2 shall not apply to:

- (a) Any disclosure of information required or permitted by Law, including to CORA (including as described in Section 56 of this Contract);
- (b) Any disclosure of information that is reasonably required by any persons engaged in the performance of their obligations under this Contract for the performance of those obligations;
- (c) Any matter which a Party can demonstrate is already or becomes generally available and in the public domain otherwise than as a result of a breach of this Section 55;
- (d) Any disclosure to enable a determination to be made under the Dispute Resolution Procedure or in connection with a dispute between the Concessionaire and any of its Sub-Contractors and any other Sub-Contractors in relation to the Contract or the Project;
- (e) Any disclosure which is required pursuant to any statutory or legal (including any order of a court of competent jurisdiction) obligation placed upon the party making the disclosure or the rules of any stock exchange or governmental or regulatory authority having the force of law or if not having the force of law, compliance with which is in accordance with the general practice of persons subject to the stock exchange or governmental or regulatory authority concerned;
- (f) Any disclosure of information which is already lawfully in the possession of the receiving Party, prior to its disclosure by the disclosing Party;
- (g) Any provision of information to the Parties' own professional advisers or insurance advisers or, where it is proposed that a Person should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to the Concessionaire to enable it to carry out its obligations under this Contract, or may wish to acquire shares in the Concessionaire in accordance with the provisions of this

Contract, to that Person or their respective professional advisers but only to the extent reasonably necessary to enable a decision to be taken on the proposal;

- (h) Any disclosure by HPTE of information relating to the design, construction, operation and maintenance of the Project and such other information as may be reasonably required for the purpose of conducting a due diligence exercise, to any proposed new contractor, its advisers and lenders, should HPTE decide to retender this Contract;
- (i) Any registration or recording of the Necessary Consents and property registration required;
- (j) Any disclosure of information by HPTE to any other department, office or agency of any State or to the Federal Highways Authority or to the Federal Transit Administration, or their respective advisers;
- (k) any Person engaged in providing services to HPTE for any purpose related to or ancillary to this Contract (provided that HPTE shall have obtained a confidentiality undertaking from such Person matching HPTE's obligations of confidentiality under this Contract); or
- (l) Any disclosure for the purpose of:
  - (i) The examination and certification of HPTE's or the Concessionaire's accounts; or
  - (ii) Complying with a proper request from either Party's insurance adviser, or insurer on placing or renewing any insurance policies;
- (m) Where disclosure is permitted under this Section 55.3, save to the extent that the disclosure is required by Law and the Law does not permit the imposition of conditions or obligations in relation to such disclosure, the party providing the information shall ensure that the recipient of the information shall be subject to the same obligation of confidentiality as that contained in this Contract.

#### **55.4 Information relating to the Public**

Where the Concessionaire, in carrying out its obligations under this Contract, is provided with Confidential Information relating to a member of the public, the Concessionaire shall not disclose or make use of any such information otherwise than for the purpose for which it was provided, unless the Concessionaire has obtained the prior written consent of such Person and the prior written consent of HPTE.

### **56. THE CONCESSIONAIRE'S RECORDS AND PROVISION OF INFORMATION; COLORADO OPEN RECORDS ACT**

#### **56.1 Maintenance of Records**

The Concessionaire shall (and shall ensure that each Sub-Contractor shall) at all times:

- (a) Maintain a full record of particulars of the costs of performing the Phase 2 Work and the Services;

- (b) Upon request by HPTE, provide a written summary of any of the costs referred to in Section 56.1(a), including details of any funds held by the Concessionaire specifically to cover such costs, in such form and detail as HPTE may reasonably require to enable HPTE to monitor the performance by the Concessionaire of its obligations under this Contract; and
- (c) Provide such facilities as HPTE may reasonably require for its representatives to visit any place where the records are held and examine the records maintained under this Section 56.

**56.2 Accounting**

Compliance with Section 56.1 shall require the Concessionaire to keep (and where appropriate to ensure that each Sub-Contractor shall keep) books of account in accordance with Good Industry Practice with respect to this Contract, showing in detail:

- (a) Administrative overheads;
- (b) Payments to Sub-Contractors and by Sub-Contractors to Sub-Contractors;
- (c) Capital and revenue expenditure; and
- (d) Such other items as HPTE may reasonably require from time to time to conduct costs audits for the purpose of this Contract,

and the Concessionaire shall have (and ensure that each Sub-Contractor shall have) the books of account evidencing the items listed in Section 56.2(a) to Section 56.2(d), available for inspection by HPTE (and its advisers) at reasonable times and upon reasonable notice, and shall promptly present a written report of these to HPTE as and when requested from time to time.

**56.3 Phase 2 Work Records**

The Concessionaire shall maintain or ensure that detailed records relating to the performance of the Phase 2 Work and the delivery of the Services are maintained, in each case in accordance with Good Industry Practice, the requirements of this Contract and any applicable Law.

**56.4 Worker Safety and Maintenance**

Without prejudice to Section 56.3, the Concessionaire shall maintain or ensure that the following are maintained:

- (a) A full record of all incidents relating to health, safety and security which occur during the term of this Contract; and
- (b) Full records of all maintenance procedures carried out during the term of this Contract,

and the Concessionaire shall have the items referred to in Section 56.4(a) and Section 56.4(b) available for inspection by HPTE (and its advisors) upon reasonable notice, and shall present a report of them to HPTE as and when requested from time to time.

**56.5 Examination and Retention**

The Concessionaire shall permit all records referred to in this Section 56 to be examined and copied from time to time by HPTE's Representative and other representatives of HPTE who reasonably require access to the same. The records referred to in this Section 56 shall be retained for a period of at least five (5) years. Upon termination of this Contract, and if HPTE wishes to enter into another contract for the operation and management of a project the same as or similar to the Project, the Concessionaire shall (and shall ensure that the Sub-Contractors will) comply with all reasonable requests of HPTE to provide information relating to the Concessionaire's costs of operating and maintaining the Project. All information referred to in this Section 56 is subject to the obligations set out in Section 55.

**56.6 Requested Records**

The Concessionaire shall:

- (a) Provide at the request of HPTE any information relating to the Project that HPTE may reasonably require;
- (b) Provide to HPTE copies of its annual report and accounts within twenty (20) Business Days of publication; and
- (c) Place into escrow a copy of the Base Case Financial Model at the date of this Contract and (as the same may be amended) within twenty (20) Business Days of any amendment thereto.

**56.7 Colorado Open Records Act**

Notwithstanding anything to the contrary contained in this Contract, the Concessionaire acknowledges and agrees that all records, documents, drawings, plans, specifications, and other materials directly related to the Project, including materials submitted to HPTE by the Concessionaire, are subject to the provisions of CORA. The Concessionaire shall be solely responsible for all determinations made by it under CORA and for clearly and prominently labeling each and every page or sheet of its materials with trade secret, privileged information, or confidential commercial, financial, geological, or geophysical data as it determines to be appropriate. The Concessionaire is advised to contact legal counsel concerning such act and its application to the Concessionaire.

- (a) If any of the materials submitted by the Concessionaire to HPTE are clearly and prominently labeled trade secret, privileged information, or confidential commercial, financial, geological, or geophysical data by the Concessionaire, HPTE will endeavor to advise the Concessionaire of any request for the disclosure of such materials prior to making any such disclosure. HPTE will not be responsible or liable to the Concessionaire or any other Person for the disclosure of any such labeled material, if the disclosure is required by Law, by court order or occurs through inadvertence or mistake on the part of HPTE.
- (b) In the event of litigation concerning the disclosure of any material submitted by the Concessionaire to HPTE, HPTE's sole involvement will be as a stakeholder retaining the material until otherwise ordered by a court, and the Concessionaire shall be fully

responsible for otherwise prosecuting or defending any action concerning the materials at its sole expense and risk.

- (c) In the event HPTE receives a CORA request for documents that are in the custody and control of the Concessionaire, the Concessionaire shall cooperate with HPTE in responding to the request in a timely manner under CORA.

**57. REMEDIES AND LIABILITY**

**57.1 Sole Remedies in General; the Concessionaire**

Subject to Section 57.4, the Concessionaire's sole remedy in relation to matters for which an express right or remedy is stated in this Contract shall be that right or remedy and the Concessionaire shall have no additional right or remedy however arising.

**57.2 Sole Remedy for Compensation Event**

The Concessionaire's sole remedy in relation to any Compensation Event shall be the operation of Section 41.4.

**57.3 Sole Remedy for Failure to Provide Services**

Subject to :

- (a) Any other express right of HPTE pursuant to this Contract;
- (b) Section 57.4, and
- (c) HPTE's right to claim, on or after termination of this Contract, the amount of its reasonable losses suffered or incurred by it as a result of rectifying or mitigating the effects of any breach of this Contract by the Concessionaire, save to the extent that the same has already been recovered by HPTE pursuant to this Contract or has been taken into account to calculate any compensation payable by HPTE pursuant to Section 43 and Section 50 to Section 54 (inclusive),

the sole remedy of HPTE in respect of a failure by Concessionaire to provide the Services in accordance with this Contract shall be the operation of Schedule 10.

**57.4 Remedies**

Without prejudice to the other rights and remedies under the express terms of this Contract, nothing in Sections 57.1 or 57.3 shall prevent or restrict the right of HPTE or the Concessionaire (respectively) to seek any non-financial remedies from the court.

**57.5 HPTE Breach**

The Concessionaire shall not be held to be failing to comply with its obligations under this Contract to the extent that such failure to comply is as a result of HPTE's breach of its obligations hereunder.



**57.6 Loss Payments**

Notwithstanding any other provision of this Contract, neither Party shall be entitled to recover compensation under this Contract or any other Project Document or any other agreement in relation to the Project in respect of any loss that it has incurred (or any failure of the other Party) to the extent that it has already been compensated in respect of that loss or failure pursuant to this Contract, any other Project Document or otherwise.

**57.7 Insurance Applicability**

The Concessionaire shall not be entitled to any payment which would have been due under this Contract to the extent that the Concessionaire is or should be able to recover the amount of such payment under any policy of insurance required to be maintained in accordance with this Contract (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 the Concessionaire (or any Concessionaire Related Party), including but not limited to non-disclosure or under-insurance) or any other policy of insurance which the Concessionaire has taken out and maintained.

**57.8 Termination Only in Accordance with Terms of Contract**

This Contract shall only terminate in accordance with the express provisions of this Contract.

**57.9 Waiver of Consequential Damages**

Except as expressly provided in this Contract to the contrary, neither party shall be liable to the other for any punitive, indirect, incidental or consequential damages of any nature, whether arising out of a breach of this Contract, tort (including negligence) or other legal theory of liability.

**58. THE CONCESSIONAIRE NOT AN AGENT OF HPTE**

**58.1 Concessionaire as an Independent Contractor**

The Concessionaire is an independent contractor, and nothing contained in the Contract Documents shall be construed as constituting any relationship with HPTE other than that of Project concessionaire and independent contractor. It is the express intent and agreement of the Parties that nothing in the Contract Documents is intended or shall be construed to create any landlord-tenant, lessor-lessee of real property, optionor-optionee, vendor-purchaser, or mortgagor-mortgagee relationship between HPTE and the Concessionaire.

**58.2 No Partnership or Similar Relationship**

Nothing in the Contract Documents is intended or shall be construed to create any partnership, joint venture or similar relationship between the Concessionaire and HPTE. While the term "public-private partnership" may be used on occasion to refer to contractual relationships of the type hereby created, the Parties do not thereby 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 HPTE or the Concessionaire any rights to direct or control the activities of the other or their respective Affiliates, contractors or consultants, except as otherwise expressly provided in this Contract.

**58.3 HPTE has no relationship with Concessionaire's Employees**

In no event shall the relationships between HPTE and the Concessionaire be construed as creating any relationships whatsoever between HPTE and the Concessionaire's employees. Neither the Concessionaire nor any of its employees is or shall be deemed to be an employee of HPTE. Except as otherwise specified in the Contract Documents, the Concessionaire has sole authority and responsibility to employ, discharge and otherwise control its employees and has complete and sole responsibility as a principal for its agents, for all Sub-Contractors and for all other Persons that the Concessionaire or any Sub-Contractor hires to perform or assist in performing the Phase 2 Work or the Services.

**59. INTELLECTUAL PROPERTY RIGHTS**

**59.1 HPTE Rights**

HPTE grants a non-exclusive license to the Concessionaire and to each Concessionaire Related Party for the purposes of the Phase 2 Work, operation of the Project and provision of the Services for a period from the Commencement Date until the Termination Date to use:

- (a) The Existing Design; and
- (b) The I-25 Managed Lanes IP.

In each, however, only to the extent HPTE owns or has a license to those matters, and provided that HPTE makes no representation or warranty of any kind related to such licenses; and provided further, HPTE will make available to the Concessionaire, without charge, and without representation or warranty of any kind, any documents in the possession of HPTE relating to the planning, design, engineering and permitting of the Project that the Concessionaire elects to or is directed to carry out.

**59.2 Concessionaire Intellectual Property**

All Concessionaire Intellectual Property will remain exclusively the property of the Concessionaire, notwithstanding any delivery of copies thereof to HPTE. Upon the expiration or earlier termination of, or any assignment by the Concessionaire of its rights under, this Contract for any reason whatsoever, HPTE will have a nonexclusive, nontransferable, irrevocable, fully paid up license to use the Concessionaire Intellectual Property solely in connection with the Project. HPTE will not at any time sell any such Concessionaire Intellectual Property or use or allow any party to use any such Concessionaire Intellectual Property for any purpose whatsoever other than in connection with the Project. Subject to Sections 55 and 56, HPTE will not disclose any Concessionaire Intellectual Property (other than to its concessionaires, contractors, employees, attorneys and agents in connection with the Project who agree to be bound by any confidentiality obligations of HPTE relating thereto), and HPTE will enter into a confidentiality agreement reasonably requested by the Concessionaire with respect to any such Concessionaire Intellectual Property. The Concessionaire will continue to have a full and complete right to use any and all duplicates or other originals of its Proprietary Intellectual Property in any manner it chooses.

**59.3 Purchase Right**

HPTE will have the right to purchase from the Concessionaire a nonexclusive, nontransferable, irrevocable, fully paid up license to use the Concessionaire Intellectual Property on any other tolled

State Highway owned and operated by HPTE or other State agency upon commercially reasonable terms to be agreed or determined.

**59.4 Third Party Rights**

With respect to any Concessionaire Intellectual Property owned by a Person other than the Concessionaire or HPTE, the Concessionaire will obtain from such owner, concurrently with execution of any contract or purchase order with such owner, both for the Concessionaire and HPTE, nonexclusive, nontransferable, irrevocable, fully paid up (other than with respect to ongoing maintenance and support fees) licenses to use such Concessionaire Intellectual Property solely in connection with the Project, of at least identical scope, purpose, duration and applicability as the licenses granted by Section 59.2. The Concessionaire will use reasonable endeavors to obtain from such owner a right in favor of HPTE to purchase from such owner a nonexclusive, nontransferable, irrevocable, fully paid up license to use such owner's Concessionaire Intellectual Property on any other tolled State Highway owned and operated by HPTE or other State agency for \$10.00. The limitations on disclosure by HPTE set forth in Section 59.2 will also apply to HPTE's licenses in such Proprietary Intellectual Property.

**59.5 Hold Harmless**

The Concessionaire shall hold HPTE harmless on demand for all damage suffered by HPTE or HPTE Related Parties as a result of claims of third parties raised against them in connection with their use of the subject matters of Intellectual Property in accordance with any license obtained by the Concessionaire in accordance with Section 59.4.

**60. ASSIGNMENT**

**60.1 Assignment by HPTE**

Subject to giving the Concessionaire not less than 60 Business Days' notice (unless any Law has the effect that notice cannot be given that far in advance, in which case HPTE shall give the Concessionaire such period of notice as is permitted by the Law), if Financial Close has occurred HPTE may transfer and assign its interests, in whole or in part, in the Project, this Contract and any other Project Documents to any other public agency or public entity of the State as required by Law, including any successor entity or organization created by Law, including by operation of law; provided, that

- (a) the successor or assignee has assumed all of HPTE's, duties and liabilities pursuant to this Contract and the other Project Documents then in effect and
- (b) the successor or assignee has provided the Concessionaire with an unqualified legal opinion setting forth the unconditional legal authority of such entity to assume and perform all of HPTE's obligations as set forth in the Contract and the other Project Documents then in effect or that are anticipated to be in effect, and with evidence of such entity's sufficient financial resources to honor and perform the same, provided that if the successor or assignee has succeeded to or has been assigned HPTE's rights under the HPTE-CDOT Agreement or has entered into an agreement with CDOT in substantially the same terms as the HPTE-CDOT Agreement then that shall be conclusively deemed to be evidence of sufficient financial resources for these purposes.

**60.2 Assignment by the Concessionaire**

The Concessionaire shall not assign, underlet, charge, sell, bargain or otherwise transfer this Contract in whole or in part except with the prior written consent of HPTE; provided, however, that the Concessionaire may grant security over the benefit of this Contract in favor of the Senior Lenders, TIFIA Lender, and the Subordinated Lenders pursuant to the terms of this Contract.

**61. INDEMNIFICATION**

**61.1 General Indemnities**

Subject to Section 61.3, the Concessionaire shall release, defend, indemnify and hold harmless HPTE, and CDOT, and for RTD in its capacity as a Project participant, but not consequent to RTD's normal course of transit operations, and each of their respective agents and consultants, respective successors and assigns and respective shareholders, officers, directors, agents and employees (each an "Indemnified Party" and collectively referred to as the "Indemnified Parties") from and against any and all claims, causes of action, suits, judgments, disputes, demands, investigations, legal or administrative proceedings, penalties, fines, damages, losses, liabilities, costs and expenses, including any injury to or death of persons or damage to or loss of property (including damage to utility facilities) (in each case, each such action or assertion of liability or responsibility in relation to an Indemnified Party by a Person who is not a party to the Contract or an Affiliate of a party is referred to as a "Claim"), and including all expenses and attorneys', accountants' and expert witness fees and costs, arising out of, relating to or resulting from any Claim asserted against an Indemnified Party by any Person who is not a party to the Contract or an Affiliate that is based on:

- (a) The breach or alleged breach of this Contract by the Concessionaire;
- (b) The failure or alleged failure by any Concessionaire Related Party to comply with any applicable Environmental Laws or other Laws or legal requirements (including legal requirements regarding handling, generation, treatment, storage, transportation and disposal of Hazardous Substances and legal requirements to pay any taxes or similar charges to any governmental or taxing authority on any basis whatsoever) or Necessary Consents in performing its obligations under this Contract;
- (c) Any actual or alleged patent or copyright infringement or other allegedly or actual improper appropriation or use of trade secrets, patents, proprietary information, know-how, copyright rights or inventions in the performance of the Concessionaire's obligations under this Contract, or arising out of any use in connection with the Phase 2 GP Lanes or the Project of methods, processes, designs, information or other items furnished or communicated by the Concessionaire to HPTE or another Indemnified Party pursuant to this Contract; provided that this indemnity shall not apply to any infringement resulting from the applicable Indemnified Party's failure to comply with specific written instructions regarding use provided to such Indemnified Party by the Concessionaire;
- (d) Any actual or alleged negligent act or omission or willful misconduct of any Concessionaire Related Party;
- (e) Any and all claims for recovery of any non-payment which are filed by sub-contractors of the Concessionaire (of any tier) with an Indemnified Party in

connection with the Phase 2 Work or the Services, including all expenses and attorneys', accountants' and expert witness fees and costs incurred in discharging any claim, unless HPTE is in default in payments owing to Concessionaire and such payment default has caused the non-payment to the sub-contractor; and

- (f) Any spill or release or threatened spill or release of Hazardous Substances:
  - (i) Attributable to the negligence, willful misconduct or breach of contract by the Concessionaire, including the exacerbation of any existing Hazardous Substances; or
  - (ii) Which was brought onto or generated on the Managed Lanes by the Concessionaire.

### **61.2 Design Defects**

Subject to Section 61.3, the Concessionaire shall release, defend, indemnify and hold harmless the Indemnified Parties from and against any and all Claims in each case, if asserted or incurred by or awarded to any third party, relating to or resulting from errors in the Design Documents, including any errors which were included in the Basic Configuration or Reference Documents to the extent that a designer acting in accordance with the Concessionaire's obligations under this Contract should have identified such errors. The Concessionaire agrees that, because the Basic Configuration and Reference Documents are subject to review and modification by the Concessionaire, it is appropriate for the Concessionaire to assume liability for errors in the completed Project even though they may be related to errors in the Basic Configuration or Reference Documents.

### **61.3 Losses Due to Negligence of Indemnified Parties**

The Concessionaire's indemnity obligation under Section 61.1 and Section 61.2 shall not extend to any loss, damage or cost to the extent that such loss, damage or cost was caused by:

- (a) The negligence, bad faith, fraud or willful misconduct of such Indemnified Party or its agents, servants or independent contractors who are directly responsible to such Indemnified Party (in other words, a comparative negligence standard shall apply);
- (b) The breach of HPTE of its obligations under this Contract, or a breach of any representation or warranty by HPTE under this Contract; or
- (c) Any Indemnified Party's violation of any Laws.

### **61.4 Claims by Employees**

The indemnification obligation under this Section 61 in relation to Claims against an Indemnified Party by an employee of the Concessionaire, a Sub-Contractor, 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 the Concessionaire or a Sub-Contractor under workers' compensation, disability benefit or other employee benefits laws.

### 61.5 Reliance on the Concessionaire's Performance

The Concessionaire hereby acknowledges and agrees that it is the Concessionaire's obligation to cause the Project to be designed and to construct the Project in accordance with the Contract Documents. The Concessionaire further agrees that any review, acceptance and/or approval by HPTE and/or others hereunder shall not relieve the Concessionaire of any of its obligations under the Contract Documents or in any way diminish its liability for performance of such obligations or its obligations to provide indemnities hereunder.

### 61.6 Indemnities in Connection with Utilities

- (a) The Concessionaire is advised that each Utility Relocation Agreement contains provisions for the Concessionaire to indemnify, save and hold harmless the Utility Owner, its employees and agents as a result of any act or omission by the indemnifying contractor. The Concessionaire hereby agrees to and shall perform and comply with such provisions of the Utility Relocation Agreements for the benefit of the Utility Owners, their employees and agents.
- (b) The Concessionaire is also advised that the Utility Relocation Agreements may include certain agreements by HPTE to indemnify, defend and hold harmless the Utility Owners with respect to certain matters to the same extent as HPTE. The Concessionaire's obligation under this Section 61.6 shall automatically apply to require it to release, indemnify, defend and hold harmless the Utility Owners, in addition to the Indemnified Parties, with respect to all such matters.

### 61.7 Indemnification Process

- (a) 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 indemnities under this Section 61, HPTE shall by writing as soon as practicable after receipt of the Claim, (a) inform Concessionaire of the Claim, and (b) send to Concessionaire a copy of all written materials HPTE has received asserting such Claim; provided, however, that any failure to give such prompt notice will not constitute a waiver of any rights of HPTE, except to the extent that the rights of the Concessionaire are actually prejudiced thereby.
- (b) The Concessionaire will be entitled and obligated to appoint counsel of its choice at the expense of the Concessionaire to represent an Indemnified Party in any action for which indemnification is sought (in which case the Concessionaire will not thereafter be responsible for the fees and expenses of any separate counsel retained by that Indemnified Party except as set forth below); *provided, however*, that such counsel will be satisfactory to such Indemnified Party and in the case of an HPTE or CDOT Indemnified Party, subject to the approval of the State Attorney General's office, and in the case of an RTD Indemnified Party, subject to the approval of RTD General Counsel's office. The counsel appointed by the Concessionaire in the case of an HPTE or CDOT Indemnified Party may only act pursuant to an appointment by the State Attorney General's Office as Special Assistant Attorney General, and the in the case of an RTD Indemnified Party may only act pursuant to approval by the RTD General Counsel's office. Notwithstanding the Concessionaire's appointment of counsel to represent an Indemnified Party in any action, such Indemnified Party will

have the right to employ separate counsel, and the Concessionaire will bear the reasonable fees, costs and expenses of such separate counsel, if:

- (i) the use of counsel chosen by the Concessionaire to represent the Indemnified Party would present such counsel with a conflict of interest;
  - (ii) the actual or potential defendants in, or targets of, any such action include both the Indemnified Party and the Concessionaire and the Indemnified Party will have reasonably concluded that there may be legal defenses available to it and/or other Indemnified Party which are different from or additional to those available to the Concessionaire;
  - (iii) the Concessionaire will not have employed counsel to represent the Indemnified Party within a reasonable time after notice of the institution of such action; or
  - (iv) the Concessionaire provides prior written approval to the Indemnified Party to employ separate counsel at the Concessionaire's expense.
- (c) The Concessionaire will not be liable for any settlement or compromise by an affected Indemnified Party of a Claim except with the Concessionaire's prior written consent, which consent will not be unreasonably withheld, or except where the settlement or compromise is approved by the court after the Concessionaire receives reasonable notice and the opportunity to be heard and such court approval has become final and non-appealable.

**62. ENTIRE AGREEMENT**

This Contract constitutes the entire agreement between HPTE and the Concessionaire concerning the subject matter hereof and supersedes all prior negotiations, representations, and agreements about them, either oral or written. Each of the Parties acknowledges that except as expressly set out in this Contract, each Party does not enter into this Contract on the basis of and does not rely, and has not 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 Contract or not) except those expressly repeated or referred to in this Contract and the only remedy or remedies available in respect of any misrepresentation or untrue statement made to it shall be any remedy available under this Contract; provided, however, that this Section 62 shall not apply to any statement, representation or warranty made fraudulently, or to any provisions of this Contract which were induced by fraud, for which the remedies available shall be all those available under the law governing this Contract.

**63. WAIVER AND CONSEQUENCES OF REVIEW, ACCEPTANCE, ETC OF DOCUMENTS BY HPTE**

**63.1 Waiver**

Any waiver of, or consent to depart from, the requirements of any provision of this Contract shall be effective only if it is in writing and signed by the Party giving it, and only in the specific instance and for the specific purpose for which it has been given. No failure on the part of any Party to exercise, and no delay in exercising, any right under this Contract shall operate as a waiver of such right. No

single or partial exercise of any such right shall preclude any other or further exercise of such right or the exercise of any other right.

**63.2 Review of Documents by HPTE**

No obligation of the Concessionaire under or in accordance with this Contract:

- (a) To carry out the design of the Phase 2 Construction Work;
- (b) To complete the Phase 2 Work;
- (c) To carry out the Services; or
- (d) Of any other description whatsoever according to this Contract,

shall be modified, diminished or otherwise affected by any document, plan, specification, methodology or any other proposal pertaining to that obligation unless it is first approved or Accepted by HPTE in writing after it has received sufficient opportunity to review and comment upon it, irrespective of whether this Contract required such comment, approval or Acceptance to have been obtained by the Concessionaire.

**64. NOTICES**

**64.1 Notice Deliveries**

Whenever under the provisions of this Contract it will be necessary or desirable for one party to serve any approval, notice, request, demand, report or other communication on another party, the same will be in writing and will not be effective for any purpose unless and until actually received by the addressee or unless served (i) personally, (ii) by independent, reputable, overnight commercial courier, (iii) by facsimile transmission, where the transmitting party includes a cover sheet identifying the name, location and identity of the transmitting party, the phone number of the transmitting device, the date and time of transmission and the number of pages transmitted (including the cover page), where the transmitting device or receiving device records verification of receipt and the date and time of transmission receipt and the phone number of the other device, and where the facsimile transmission is immediately followed by service of the original of the subject item in another manner permitted herein or (iv) by deposit in the United States mail, postage and fees fully prepaid, registered or certified mail, with return receipt requested, addressed as follows:

The Concessionaire	HPTE
Brian Clark	US 36 Coordinator
Plenary Roads Denver LLC 400 Burrard Street, Suite 2000 Vancouver, BC V6C 3A6 Attention: Rajan Bains/Rob Law	Colorado Department of Transportation High Performance Transportation Enterprise 4201 East Arkansas Avenue Denver, Colorado 80222
Facsimile: (604) 638-3838	Facsimile Number: (303) 757-9656



Plenary Roads Finco LP

1700 Lincoln Street, Suite 3800  
Denver, CO 80202

Facsimile Number: (303) 839-3838

**64.2 Changes to Notices; Physical Receipt**

Any party may, from time to time, by notice in writing served upon the other parties as aforesaid, designate an additional and/or a different mailing address or an additional and/or a different Person to whom all such notices, requests, demands, reports and communications are thereafter to be addressed. Any notice, request, demand, report or other communication served personally will be deemed delivered upon receipt, if served by mail or independent courier will be deemed delivered 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, and if served by facsimile transmission will be deemed delivered on the date of receipt as shown on the received facsimile (provided, that the original is thereafter delivered as aforesaid).

**65. SEVERABILITY**

If any one or more term, condition or provision of this Contract shall, for any reason, be held to be invalid, illegal, or unenforceable in any respect, such term, condition or provision shall not affect the validity, legality and enforceability of any other provision of or any other documents referred to in this Contract, and this Contract shall be construed as if such invalid, illegal, or unenforceable provision had never been contained herein.

**66. LIMITATION ON THIRD-PARTY BENEFICIARIES**

It is not intended by any of the provisions of this Contract to create any third-party beneficiary 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, except to the extent that specific provisions (such as the warranty and indemnity provisions) identify third parties and state that they are entitled to benefits hereunder. The duties, obligations, and responsibilities of the Parties to the Contract Documents with respect to such third parties shall remain as imposed by law. The Contract Documents shall not be construed to create a contractual relationship of any kind between HPTE and a Sub-Contractor or any other Person except the Concessionaire, and then, only subject to the terms of this Contract.

**67. FURTHER ASSURANCES**

The Concessionaire shall promptly execute and deliver to HPTE all such instruments and other documents and assurances as are reasonably requested by HPTE to further evidence the obligations of the Concessionaire hereunder, including assurances regarding assignments of Sub-Contractors contained herein.

**68. GOVERNING LAW**

The law of the State of Colorado, and rules and regulations issued pursuant thereto, shall be applied in the interpretation, execution, and enforcement of this Contract. Any provision included or incorporated herein by reference which conflicts with said laws, rules, and regulations shall be null and void. Any provision incorporated herein by reference which purports to negate this 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 Contract, to the extent capable of execution.

**69. DISPUTE RESOLUTION AND JURISDICTION**

**69.1 Application of Dispute Resolution**

The provisions of Schedule 24 (Dispute Resolution Procedure) shall apply in respect of dispute resolution.

**69.2 Venue**

The venue for any arbitration proceeding in connection with this Contract shall be Denver, Colorado, and venue for any legal action in connection with this Contract shall lie in the District Court in and for the City and County of Denver.

**70. AMENDMENTS**

This Contract may only be amended by written amendments signed by both Parties unless the amendment to this Contract or, as the case may be, change in the scope of the rights and obligations of the Parties is allowed in any other manner under any of the provisions of this Contract.

**71. COSTS AND EXPENSES OF THE PARTIES**

**71.1 Contract and Project Document Costs**

Except where otherwise stated, each Party shall bear its own costs and expenses (including advisers' fees and expenses) in connection with the preparation, negotiation, execution and completion of this Contract and the other Project Documents.

**71.2 Stipend**

Notwithstanding the provisions of Section 71.1, the Concessionaire shall pay to HPTE \$1,000,000 on the Commencement Date to be used by HPTE to fund the payment of stipends for the unsuccessful proposer and to partly fund costs incurred by HPTE in relation to the procurement process leading to execution of this Contract and in relation to satisfying Conditions Precedent to the Commencement Date.

**72. NO PERSONAL LIABILITY**

HPTE's authorized representatives are acting solely as agents and representatives of HPTE when carrying out the provisions of or exercising the power or authority granted to them under the Contract Documents. They shall not be liable either personally or as employees of HPTE for actions in their ordinary course of employment.

**73. COPIES OF CORRESPONDENCE TO HPTE**

The Concessionaire shall copy HPTE on all written correspondence pertaining to this Contract between the Concessionaire and any Person other than the Concessionaire's Sub-Contractors, consultants and attorneys.

**74. DEFAULT INTEREST**

In case of default of either Party in the performance of its payment obligations, the Parties have agreed that interest will be added to any late payment from the due date down to the date of payment or cure at the Default Interest Rate. All such interest shall be calculated on the basis of a 360-day year for the actual days elapsed.

**75. SPECIAL PROVISIONS**

**75.1 Governmental Immunity**

No term or condition of this Contract 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, CRS §24-10-101 et seq., or the Federal Tort Claims Act, 28 USC §§1346(b) and 2671 et seq., as applicable now or hereafter amended.

**75.2 Independent Contractor**

The Concessionaire shall perform its duties hereunder as an independent contractor and not as an agent. Neither the Concessionaire nor any agent or employee of the Concessionaire shall be deemed to be an agent of the State. The Concessionaire 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 the Concessionaire or any of its agents or employees. Unemployment insurance benefits will be available to the Concessionaire and its employees and agents only if such coverage is made available by the Concessionaire or a third party. The Concessionaire shall pay when due all applicable employment taxes and income taxes and local head taxes incurred pursuant to this Contract. The Concessionaire shall not have authorization, express or implied, to bind the State to any agreement, liability or understanding, except as expressly set forth herein. The Concessionaire shall:

- (a) Provide and keep in force workers' compensation and unemployment compensation insurance in the amounts required by Law;
- (b) Provide proof thereof when requested by the State; and
- (c) Be solely responsible for its acts and those of its employees and agents.

**75.3 Compliance with Law**

The Concessionaire 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.

**75.4 Software Piracy Prohibition**

State or other public funds payable under this Contract shall not be used for the acquisition, operation, or maintenance of computer software in violation of federal copyright laws or applicable licensing restrictions. The Concessionaire hereby certifies and warrants that, during the term of this Contract and any extensions, the Concessionaire has and shall maintain in place appropriate systems and controls to prevent such improper use of public funds. If the State determines that the Concessionaire is in violation of this provision, the State may exercise any remedy available at law or in equity or under this Contract.

**75.5 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 Contract. The Concessionaire has no interest and shall not acquire any interest, direct or indirect, that would conflict in any manner or degree with the performance of the Concessionaire's Services, and the Concessionaire shall not employ any person having such known interests.

**75.6 Vendor Offset**

Subject to CRS §24-30-202.4(3.5), HPTE may withhold payment under the State's vendor offset intercept system for:

- (a) Debts owed by the Concessionaire to State agencies for unpaid balances of tax, accrued interest or other charges specified in CRS §39-21-101 et seq.;
- (b) Amounts required to be paid to the State's Unemployment Compensation Fund; and
- (c) Other unpaid debts of the Concessionaire owing to the State as a result of final agency determination or judicial action.

**75.7 Public Contracts for Services**

The Concessionaire certifies, warrants, and agrees that it does not knowingly employ or contract with an illegal alien who will perform work under this Contract and will confirm the employment eligibility of all employees who are newly hired for employment in the United States to perform work under this Contract through participation in the E-Verify Program or Colorado Department of Labor and Employment program established pursuant to CRS §8-17.2-102(5)(c). The Concessionaire shall not knowingly employ or contract with an illegal alien to perform work under this Contract or enter into a contract with a potential Sub-Contractor that fails to certify to the Concessionaire that the potential Sub-Contractor shall not knowingly employ or contract with an illegal alien to perform work under this Contract. The Concessionaire:

- (a) Shall use E-Verify Program or Colorado Department of Labor and Employment program procedures to undertake pre-employment screening of job applicants while this Contract is being performed;
- (b) Shall notify the Sub-Contractor and HPTE within three (3) days if the Concessionaire has actual knowledge that a Sub-Contractor is employing or contracting with an illegal alien for work under this Contract;

**EXECUTION VERSION**

- (c) Shall terminate the Sub-Contract if a Sub-Contractor does not stop employing or contracting with the illegal alien within three (3) days of receiving the notice; and
- (d) Shall comply with reasonable requests made in the course of an investigation undertaken pursuant to CRS §8-17.5-102(5)(a) by the Colorado Department of Labor and Employment.

If the Concessionaire participates in the Colorado Department of Labor and Employment program, the Concessionaire shall deliver to HPTE a written, notarized affirmation, affirming that the Concessionaire has examined the legal work status of such employee and shall comply with all of the other requirements of the Colorado Department of Labor and Employment program. If the Concessionaire fails to comply with any requirement of this provision or CRS §8-17.5-101 et seq., such action shall be deemed a Concessionaire Default (subject to both the cure and termination rights provided for in this Contract).

**76. COUNTERPARTS**

This Contract 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 the State Controller shall constitute a full and original instrument for all purposes.

**[remainder of page left intentionally blank; signature page follows]**

**HPTE**

By:   
Name: Michael L. Cheroutes  
Title: HPTE Director

**PLENARY ROADS DENVER LLC**

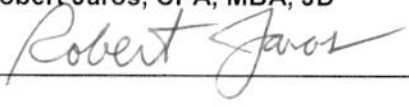
By: \_\_\_\_\_  
Brian Clark  
Vice President

By: \_\_\_\_\_  
A. Philip Dreaver  
Vice President

**ALL CONTRACTS REQUIRE APPROVAL BY THE STATE CONTROLLER**

CRS §24-30-202 requires the State Controller to approve all State Contracts. This Contract is not valid until signed and dated below by the State Controller or delegate. Contractor is not authorized to begin performance until such time. If Contractor begins performing prior thereto, the State of Colorado is not obligated to pay Contractor for such performance or for any goods and/or services provided hereunder.

**STATE CONTROLLER**  
**Robert Jaros, CPA, MBA, JD**


By: 

Date: \_\_\_\_\_

**HPTE**

By: \_\_\_\_\_  
Name: Michael L. Cheroutes  
Title: HPTE Director

**PLENARY ROADS DENVER LLC**

By:   
Brian Clark  
Vice President

By:   
A. Philip Dreaver  
Vice President

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<p><b>STATE CONTROLLER</b> Robert Jaros, CPA, MBA, JD</p> <p>By: _____</p> <p>Date: _____</p>
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