

# DESIGN-BUILD AGREEMENT

for

**010 MA 149 F0072 01C**  
Federal Aid No. 010-C(220)S  
**PHOENIX-CASA GRANDE HIGHWAY (I-10)**  
**I-17 (SPLIT) TO SR 202L (SANTAN)**

between



**ARIZONA DEPARTMENT OF TRANSPORTATION**

and

**Pulice Construction, Inc., FNF Construction, Inc., and  
Flatiron Constructors, Inc., A Joint Venture**

**Dated as of: January 5, 2021**

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1 **DESIGN-BUILD AGREEMENT**  
2 **I-10, I-17 (SPLIT) to SR 202L (SANTAN)**

3 This Design-Build Agreement (“Agreement”) is entered into and effective as of  
4 January 5, 2021, by and between the Arizona Department of Transportation, a public  
5 agency of the State of Arizona (“ADOT”), and Pulice Construction, Inc., an Arizona  
6 Corporation, FNF Construction, Inc., an Arizona Corporation, and Flatiron Constructors,  
7 Inc., a Delaware Corporation, a Joint Venture (the “Pulice-FNF-Flatiron Joint Venture”)  
8 (“Developer”) (“ADOT” and “Developer,” are collectively referred to herein as the “Parties”).

9 **RECITALS**

- 10 A. ADOT wishes to enter into an agreement with a private sector developer to design  
11 and build the Phoenix-Casa Grande Highway (I-10), I-17 (Split) to State Route  
12 202L (Santan) (the “Project”), as further described in the Technical Provisions.
- 13 B. ADOT issued a Request for Qualifications (as amended, the “RFQ”) on May 7,  
14 2019.
- 15 C. In response to the RFQ, ADOT received three statements of qualifications on July  
16 2, 2019 and subsequently shortlisted three entities.
- 17 D. On December 6, 2019, ADOT issued to each of the shortlisted entities a Request  
18 for Proposal (as subsequently amended by addenda, the “RFP”) to design and  
19 build the Project.
- 20 E. On August 11, 2020, ADOT received three responses to the RFP, including the  
21 response of Developer (the “Proposal”).
- 22 F. The Selection Official and an RFP evaluation committee determined that  
23 Developer was the proposer that best met the selection criteria contained in the  
24 RFP and that the Proposal provided the best value to the State of Arizona.
- 25 G. On October 16, 2020, the ADOT Director ratified the recommendation of the  
26 Selection Official and the RFP evaluation committee and authorized ADOT staff to  
27 negotiate this Agreement.
- 28 H. This Agreement and the other Contract Documents (defined in Section 1.2.1)  
29 collectively constitute a design-build agreement, as contemplated by the A.R.S. §  
30 28-7703(2).
- 31 I. The Director of ADOT has been authorized to enter into this Agreement, and the  
32 Arizona State Transportation Board has included the Project in the current ADOT  
33 Five-Year Transportation Facilities Construction Program.
- 34 J. The Parties intend for this Agreement to be a lump-sum design-build agreement  
35 obligating Developer to perform all Work by the Completion Deadlines specified  
36 herein for payment of the Contract Price, subject to certain exceptions set forth



1           herein. To allow ADOT to budget for and finance the Work and to reduce the risk  
2           of cost overruns, this Agreement includes restrictions that affect Developer's ability  
3           to make claims for increases to the Contract Price or extensions of the Completion  
4           Deadlines. Developer hereby agrees to accept such responsibilities and risks and  
5           has reflected the assumption of such responsibilities and risks in the Contract  
6           Price.

7    K.       If Developer fails to complete the Work by the Completion Deadlines set forth in  
8           the Contract Documents, and to comply with certain other deadlines and  
9           requirements specified herein, then ADOT and the members of the public  
10          represented by ADOT will suffer substantial losses and damages. The Contract  
11          Documents provide that Developer shall pay ADOT Liquidated Damages if the  
12          completion of the Project and/or other specified events are delayed or unfulfilled in  
13          amounts specified in the Contract Documents. The Parties intend that the  
14          Liquidated Damages specified in the Contract Documents are a reasonable  
15          estimate of and substitute for the damages sustained, which the Parties recognize  
16          are incapable of precise measurement.

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

**ARTICLE 1.**  
**DEFINITIONS; CONTRACT DOCUMENTS;**  
**INTERPRETATION OF CONTRACT DOCUMENTS**

**1.1 Definitions**

Definitions for the terms used in this Agreement and the other Contract Documents are contained in Exhibit 1 and in the body of this Agreement and the Technical Provisions.

**1.2 Contract Documents; Order of Precedence**

**1.2.1** The term "Contract Documents" shall mean the documents listed in this Section 1.2. Each of the Contract Documents is an essential part of the agreement between the Parties, and a requirement occurring in one is as binding as though occurring in all. The Contract Documents are intended to be complementary and to describe and provide for a complete agreement. Subject to Sections 1.2.2 through 1.2.6, in the event of any conflict among the Contract Documents, the order of precedence, from highest to lowest, shall be as set forth below:

(a) Supplemental Agreements and amendments to this Agreement (excluding amendments to the Technical Provisions which are separately addressed in subparagraphs (d) and (e), below), and all exhibits and attachments thereto;

(b) This Agreement (including all exhibits and the executed originals of exhibits that are contracts, except Exhibit 2);

(c) Developer's Proposal Commitments and Alternative Technical Concepts (ATCs) set forth in Exhibit 2-1;

(d) Amendments to the Technical Provisions, and all exhibits and attachments to such amendments;

(e) Technical Provisions and all exhibits and attachments to the Technical Provisions;

(f) The DBE Utilization Plan and OJT Utilization Plan;

(g) Special provisions in publications and manuals to the extent incorporated by reference into the Technical Provisions;

(h) Publications and manuals to the extent incorporated by reference into the Technical Provisions; and

(i) RFC Submittals developed in accordance with the Contract Documents, provided that: (i) specifications contained in the RFC Submittals shall have precedence over Plans; (ii) no conflict shall be deemed to exist between the RFC Submittals and the other Contract Documents with respect to the RFC Submittals that ADOT determines as offering to provide higher quality results than otherwise required in the other Contract

1 Documents; and (iii) any other Deviations contained in the RFC Submittals shall have  
2 priority over conflicting requirements of other Contract Documents only to the extent that  
3 the conflicts are specifically identified to ADOT by Developer and ADOT approves such  
4 Deviations in accordance with this Agreement.

5 **1.2.2** Notwithstanding the order of precedence among Contract Documents set  
6 forth in Section 1.2.1, in the event and to the extent that Exhibit 2-3 expressly specifies  
7 that it is intended to supersede specific provisions in the Contract Documents, including  
8 approved Deviations expressly listed in Exhibit 2-3, Exhibit 2-3 shall control over specific  
9 provisions of the Contract Documents. Moreover, where there are differing provisions on  
10 the same subject matter within the same Contract Document or in Contract Documents  
11 with the same level in the order of precedence, the provisions that establish the higher  
12 quality, manner or method of performing the Work or use more stringent standards shall  
13 prevail.

14 **1.2.3** In the event of a conflict among any standards, criteria, requirements,  
15 conditions, procedures, specifications or other provisions applicable to the Project  
16 established by reference to a described manual or publication within a Contract Document  
17 or set of Contract Documents, the standard, criterion, requirement, condition, procedure,  
18 specification or other provision offering higher quality or better performance will apply,  
19 unless ADOT, in its sole discretion, approves otherwise in writing; provided, however, that  
20 this Section 1.2.3 shall not supersede the order of precedence stated in Section 1.2.1.

21 **1.2.4 Proposal**

22 If Developer's Proposal, including Developer's Schematic Design, includes  
23 statements, offers, terms, concepts or designs that provide higher quality items than  
24 otherwise required by the other Contract Documents or offer to perform services or meet  
25 standards in addition to or better than those otherwise required, or otherwise contains  
26 terms or designs that are more advantageous to ADOT than the requirements of the other  
27 Contract Documents, then Developer's obligations hereunder shall include compliance  
28 with all such statements, offers, terms, concepts, and designs, which shall have the  
29 priority of Developer's Proposal Commitments.

30 **1.2.5 Project Management Plan**

31 In the event of any conflict, ambiguity or inconsistency between the Project  
32 Management Plan and any of the Contract Documents, the Contract Documents shall  
33 prevail.

34 **1.2.6 Reference Information Documents**

35 Subject to Section 6.4.2, certain Reference Information Documents, or portions  
36 thereof, are specifically referenced in the Contract Documents for the purpose of defining  
37 requirements of the Contract Documents. Reference Information Documents, or portions  
38 thereof, that are specifically referenced in the Contract Documents for the purpose of  
39 defining specific requirements, shall be deemed incorporated into the Contract

1 Documents only to the extent so referenced and with the same order of precedence as  
2 the applicable Contract Document.

### 3 **1.3 Construction and Interpretation of Contract Documents**

#### 4 **1.3.1 Interpretation**

5 The language in all parts of the Contract Documents shall in all cases be construed  
6 in light of the Contract Documents as a whole and in accordance with its plain meaning  
7 and not strictly for or against any Party. The Parties acknowledge and agree that the  
8 Contract Documents are the product of an extensive, thorough, arm’s-length exchange  
9 of ideas, questions, answers, information, and drafts during the Proposal preparation  
10 process, that each Party has been given the opportunity to independently review the  
11 Contract Documents with legal counsel, and that each Party has the requisite experience  
12 and sophistication to negotiate, understand, interpret, and agree to the particular  
13 language of the provisions of the Contract Documents. In the event of an ambiguity in or  
14 dispute regarding the interpretation of the Contract Documents, the Contract Documents  
15 shall not be interpreted or construed against the Party preparing it, and instead other rules  
16 of interpretation and construction shall be utilized. ADOT’s final answers to the questions  
17 posed during the Proposal preparation process for this Agreement shall in no event be  
18 deemed part of the Contract Documents and shall not be relevant in interpreting the  
19 Contract Documents except as they may clarify provisions otherwise considered  
20 ambiguous.

#### 21 **1.3.2 Number and Gender**

22 In the Contract Documents, terms defined in the singular have the corresponding  
23 plural meaning when used in the plural and vice versa, and words in one gender include  
24 all genders.

#### 25 **1.3.3 Headings**

26 The division of the Contract Documents into parts, articles, sections, and other  
27 subdivisions is for convenience of reference only and shall not affect the construction or  
28 interpretation of the Contract Documents. The headings in the Contract Documents are  
29 not intended to be full or precise descriptions of the text to which they refer and shall not  
30 be considered part of the Contract Documents.

#### 31 **1.3.4 References to this Agreement**

32 The words “herein”, “hereby”, “hereof”, “hereto”, and “hereunder” and words of  
33 similar import refer to this Agreement and the Contract Documents as a whole and not to  
34 any particular portion of it. The words “Article”, “Section”, “paragraph”, “sentence”,  
35 “clause”, and “Exhibit” mean and refer to the specified article, section, paragraph,  
36 sentence, clause or exhibit of, or to, this Agreement and the Contract Documents. A  
37 reference to a subsection or clause “above” or “below” refers to the denoted subsection  
38 or clause within the Section in which the reference appears.

1           **1.3.5 References to Agreements and Other Documents**

2           Unless specified otherwise, a reference to an agreement or other document is  
3 considered to be a reference to such agreement or other document (including any  
4 schedules or exhibits thereto) as it may be amended, modified or supplemented from time  
5 to time in accordance with its terms.

6           **1.3.6 References to Any Person**

7           A reference in the Contract Documents to any Person at any time refers to such  
8 Person’s permitted successors and assigns.

9           **1.3.7 Meaning of Including**

10          In the Contract Documents, the word “including” (or “include” or “includes”) means  
11 “including without limitation” and shall not be considered to set forth an exhaustive list.

12          **1.3.8 Computation of Periods**

13          If a specified date to perform any act or give any notice in the Contract Documents  
14 (including the last date “within” a specified time period) falls on a non-Business Day, such  
15 act or notice may be timely performed on the next succeeding Business Day; provided,  
16 however, that non-Business Day deadlines contained in the Contract Documents for  
17 actions to be taken in the event of an Emergency or other circumstances, where it is clear  
18 that performance is intended to occur on a non-Business Day, shall not be extended to  
19 the next succeeding Business Day. Unless otherwise noted, where the Contract  
20 Documents require notice, submittal, submission, or other provision or exchange of  
21 documents or information, “Business Day”, “Day” or “day” shall mean 8:00 a.m. to 5:00  
22 p.m. prevailing local time in Phoenix, Arizona; a transmission delivered after 5:00 p.m.  
23 shall be considered to have been received on the following Business Day, Day or day, as  
24 applicable.

25          **1.3.9 Meaning of Promptly**

26          In the Contract Documents, the word “promptly” means as soon as reasonably  
27 practicable in light of then-prevailing circumstances.

28          **1.3.10 Trade Meanings**

29          Unless otherwise defined herein, words or abbreviations that have common trade  
30 meanings are used herein in accordance with those meanings; provided, however, that  
31 such common trade meaning shall not be construed to reduce the quality of any Work to  
32 be performed or delivered under this Agreement.

33          **1.3.11 Dimensions**

34          On Plans, working drawings, and standard plans, calculated dimensions shall  
35 prevail over scaled dimensions.

1           **1.3.12 Laws**

2           Unless specified otherwise, a reference to a Law is considered to be a reference  
3 to: (a) such Law as it may be amended, modified, supplemented or interpreted by the  
4 courts from time to time; (b) all regulations and rules pertaining to or promulgated  
5 pursuant to such Law; (c) the successor to the Law resulting from recodification or similar  
6 reorganizing of Laws; and (d) all future Laws pertaining to the same or similar subject  
7 matter.

8           **1.3.13 Currency**

9           Unless specified otherwise, all statements of or references to dollar amounts or  
10 money in the Contract Documents are to the lawful currency of the United States of  
11 America.

12           **1.3.14 Time Zones**

13           Unless specified otherwise, references in the Contract Documents to time or hours  
14 shall be to Mountain Standard Time as observed in the State, which does not observe  
15 Daylight Saving Time.

16           **1.3.15 Mandatory Language**

17           Unless otherwise stated, the words “shall”, “must”, “will”, and other words  
18 commonly construed as indicative of a mandatory obligation are to be construed as  
19 imposing a mandatory requirement or obligation.

20           **1.4 Referenced Manuals, Publications, Standards, Policies, and Specifications**

21           **1.4.1** References in the Technical Provisions to manuals or other publications  
22 governing the Work shall mean the most recent edition or revision thereof and  
23 amendments and supplements thereto in effect on the Setting Date.

24           **1.4.2** In interpreting standards, policies, and specifications referenced in the  
25 Technical Provisions, the following apply:

- 26           (a)     References to the “project owner” shall mean ADOT; and
- 27           (b)     References to “plan(s)” shall mean the RFC Submittals.

28           **1.5 Errors in the Contract Documents**

29           **1.5.1** Developer acknowledges that prior to the Effective Date, Developer had  
30 sufficient opportunity to identify any Errors and potentially unsafe provisions in the  
31 Technical Provisions and other Contract Documents, and sufficient opportunity and duty  
32 to notify ADOT of such fact and of the changes to the provisions that Developer believed  
33 were the minimum necessary to render the provisions correct and safe. Developer shall  
34 not take advantage of or benefit from any Error in the Contract Documents that Developer

1 knew of or, through the exercise of reasonable care, had reason to know of prior to the  
2 Effective Date.

3 **1.5.2** If it is necessary to adopt changes to the Technical Provisions after the  
4 Effective Date to make the provisions correct and safe, such changes shall not be grounds  
5 for any adjustment to the Contract Price, adjustment of the Completion Deadlines or other  
6 Claim; provided, however, that adoption of such a change shall be treated as an ADOT-  
7 Directed Change if: (a) Developer neither knew nor had reason to know prior to the  
8 Effective Date that the provision was erroneous or created a potentially unsafe condition;  
9 or (b) Developer knew of and reported, in writing, to ADOT the erroneous or potentially  
10 unsafe provision prior to the Effective Date, and ADOT did not adopt reasonable and  
11 necessary changes. If Developer commences or continues any Work affected by such a  
12 change after the need for the change was discovered or suspected, or should have been  
13 discovered or suspected through the exercise of reasonable care, Developer shall bear  
14 any additional costs associated with redoing the Work already performed, and shall not  
15 be entitled to an increase of the Contract Price, a Completion Deadline adjustment or  
16 other Claim.

17 **1.5.3** If Developer identifies any Errors in the Contract Documents (including  
18 those Reference Information Documents described in Section 1.2.6), Developer shall  
19 promptly notify ADOT, in writing, of such Errors and obtain specific instructions from  
20 ADOT regarding any such Error before proceeding with the affected Work. If Developer  
21 fails to notify ADOT of any such Errors or elects to proceed with the affected Work prior  
22 to or without informing ADOT, Developer shall be deemed to proceed at its own risk and  
23 shall bear any additional costs, and not be entitled to an increase in the Contract Price, a  
24 Completion Deadline adjustment or other Claim associated with redoing such affected  
25 Work already performed if necessary to bring such Work into compliance with the  
26 Contract Documents.

27 **1.5.4** If Developer determines that the Contract Documents do not detail or  
28 describe sufficiently the Work or any matter relative thereto, Developer shall request  
29 further explanation from ADOT and shall comply with any explanation thereafter provided  
30 by ADOT. The fact that the Contract Documents omit minor details of any Work that are  
31 necessary to carry out the intent of the Contract Documents shall not relieve Developer  
32 from performing such omitted Work. Instead, Developer shall be deemed to have known  
33 or have had reason to know of such omission prior to the Effective Date, and shall perform  
34 such Work as if the details were fully and correctly set forth and described in the Contract  
35 Documents without entitlement to an increase in the Contract Price, a Completion  
36 Deadline adjustment, or any other Claim or Supplemental Agreement, except as  
37 specifically allowed under Article 13.

38 **1.5.5** Errors in the Schematic Design that require a Necessary Schematic ROW  
39 Change are governed by Sections 6.4.3.3 and 13.4.1.

## 40 **1.6 Reference Information Documents**

41 **1.6.1** ADOT has provided the Reference Information Documents to Developer.

1           **1.6.2** Except as provided in Sections 1.2.6 and 1.6.3, Developer acknowledges  
2 and agrees that:

3                   (a)     The Reference Information Documents are not mandatory or binding  
4 on Developer;

5                   (b)     Developer is not entitled to rely on the Reference Information  
6 Documents as presenting any design or engineering solutions or other direction, or as  
7 presenting any means or methods, for complying with the requirements of the Contract  
8 Documents, Governmental Approvals or Law;

9                   (c)     ADOT will not be liable for any causes of action, claims or Losses  
10 suffered by any Developer-Related Entity by reason of any use of information contained  
11 in, or any action or forbearance in reliance on, the Reference Information Documents;

12                   (d)     ADOT has not verified the information in the Reference Information  
13 Documents, and does not represent or warrant that the information contained in the  
14 Reference Information Documents is free from Error or that such information is in  
15 conformity with the requirements of the Contract Documents, NEPA Approval, other  
16 Governmental Approvals or Laws;

17                   (e)     Without limiting clause (d) above, ADOT makes no representations  
18 or warranties as to any surveys, data, reports or other information provided by ADOT or  
19 other Persons concerning surface conditions and subsurface conditions, including  
20 information relating to Utilities, Hazardous Materials, contaminated groundwater,  
21 archeological, paleontological, cultural and historic resources, unexploded ordnance,  
22 seismic conditions, and Threatened or Endangered Species, affecting the Work, the Site  
23 or surrounding locations;

24                   (f)     Developer shall have no right to an increase in the Contract Price, a  
25 Completion Deadline adjustment or any other Claim based on any Error in the Reference  
26 Information Documents;

27                   (g)     Developer is capable of conducting and obligated hereunder to  
28 conduct Reasonable Investigation to verify or supplement the Reference Information  
29 Documents; and

30                   (h)     If and to the extent any Developer-Related Entity uses information in  
31 the Reference Information Documents, such use is entirely at Developer's own risk and  
32 at its own discretion and Developer, not ADOT, is responsible for the use of such  
33 information.

34           **1.6.3** Section 1.6.2 shall not adversely affect the specific relief available to  
35 Developer under Article 13 for Relief Events under clauses (g), (h), (j), (k), (l) and (p) of  
36 the definition of Relief Event.

37



1    **1.7    Professional Services Licensing Requirements**

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

5    **1.8    Federal Requirements**

6    Developer shall comply and require Developer-Related Entities to comply with all Federal  
7    Requirements, including those requirements set forth in Exhibit 4. In the event of any  
8    conflict between any applicable Federal Requirements and the other requirements of the  
9    Contract Documents, the Federal Requirements shall prevail, take precedence, and be in  
10   force over and against any such conflicting provisions.

11   **1.9    Incorporation of ATCs**

12   If the Contract Documents incorporate any ATCs and either (a) Developer does not comply  
13   with one or more ADOT conditions of pre-approval for the ATC, or (b) Developer does not  
14   obtain any required third-party approval(s) for the ATC, then Developer shall comply with  
15   the requirements in the Contract Documents that would have applied in the absence of  
16   such ATC. Such compliance shall be without an increase in the Contract Price, adjustment  
17   of the Completion Deadlines (except to the extent provided otherwise in Section 13.6.3  
18   regarding Completion Deadline adjustment) or any other Claim or Supplemental  
19   Agreement.

20   **1.10   ADOT Monetary Obligations**

21   Public-private partnerships, including this Agreement, are subject to A.R.S. Title 28,  
22   Chapter 20, Article 3. Accordingly, the Project is included in the current ADOT State  
23   Transportation Improvement Program (“STIP”). All ADOT monetary obligations under the  
24   Contract Documents are subject to appropriation by the Arizona Legislature; provided,  
25   however, that in the absence of such appropriation, such monetary obligations shall be  
26   payable solely from other unencumbered, lawfully-available funds of ADOT (whether  
27   available at such time or in the future) that are not funds appropriated by the Arizona  
28   Legislature. ADOT will submit a request in accordance with applicable Law to obtain an  
29   appropriation from the Arizona Legislature, or shall perform actions permitted by Law to  
30   obtain, designate, or use any other lawfully available funds that are not funds appropriated  
31   by the Arizona Legislature. This Section 1.10 applies to all monetary obligations of ADOT  
32   set forth in the Contract Documents, notwithstanding any contrary provisions of the  
33   Contract Documents. The Contract Documents do not create a debt under the Arizona  
34   Constitution.

1 **ARTICLE 2.**  
2 **GENERAL OBLIGATIONS OF DEVELOPER; REPRESENTATIONS AND**  
3 **WARRANTIES**

4 **2.1 Term of Agreement**

5 This Agreement shall take effect on the Effective Date, and shall remain in effect  
6 until the earlier to occur of: (a) Final Acceptance; or (b) the date that this Agreement is  
7 terminated as provided herein.

8 **2.2 General Obligations of Developer**

9 **2.2.1 The Work**

10 As more fully described in the Contract Documents, Developer shall perform the Work.  
11 The Work shall include the development, design, and construction of the Project,  
12 conforming to the Basic Configuration and otherwise complying with the requirements of  
13 the Contract Documents, except as otherwise approved by ADOT in its sole discretion. All  
14 materials, services, and efforts necessary to achieve Substantial Completion and Final  
15 Acceptance of the Project on or before the applicable Completion Deadline shall be solely  
16 Developer's responsibility, except as otherwise specifically provided in the Contract  
17 Documents. Developer shall plan, schedule, and execute all aspects of the Work and shall  
18 coordinate its activities with all Persons who are directly impacted by the Work. Subject to  
19 the terms of Article 13, the cost of all Work, including such materials, services, and efforts  
20 as are necessary to complete the Work are included in the Contract Price.

21 **2.2.2 Utility Services**

22 **2.2.2.1** Developer shall provide all Utility service facilities (both on the  
23 Site and off the Site) required to carry out the Work. The Utility service facilities include  
24 those needed for power, gas, communications, water, irrigation, sewage, and drainage.  
25 Except for incremental additional costs directly attributable to a Relief Event, and where  
26 otherwise provided, Developer is responsible for all costs of such Utility service facilities,  
27 including costs of design and construction (both on the Site and off the Site),  
28 Governmental Approvals, connection fees, testing, inspection, certification, and Utility  
29 service/usage fees and charges required to perform the Work; provided, however, that  
30 Developer shall not be required to pay (a) electricity costs for the normal operation of  
31 roadway lighting, ITS, irrigation, and traffic signals, or (b) the cost of water for irrigation,  
32 except as provided in Sections 2.2.2.2(c), (d), and (e).

33 **2.2.2.2** Notwithstanding the foregoing, Developer shall pay for:

34 (a) The costs of Utility service/usage fees and charges  
35 associated with the Work;

36 (b) The costs of Utility service facilities and Utility service/usage  
37 fees and charges at any of Developer's Temporary Work Areas or field office locations  
38 (as described in Section 112.02 of the Technical Provisions);

- 1 (c) Irrigation water in excess of the maximum annual water use  
2 requirements as established in Section 800.03.04.01 of the Technical Provisions;
- 3 (d) Water used to water plants in the Developer's nursery for the  
4 Project; and
- 5 (e) Water use described in Section 800.04.03.04 of the Technical  
6 Provisions.

### 7 **2.3 Representations, Warranties, and Covenants of Developer**

8 Developer makes the representations, warranties, and covenants set forth in this  
9 Section 2.3.

10 **2.3.1** During all periods necessary for the performance of the Work, all Developer-  
11 Related Entities shall maintain all required authority, licenses, registrations, professional  
12 ability, and skills to perform the Work in accordance with the Contract Documents.

13 **2.3.2** As of the Effective Date, based upon Developer's Reasonable Investigation,  
14 Developer has evaluated the constraints affecting design and construction of the Project,  
15 including the limits of the Schematic ROW as well as the conditions of the NEPA Approval,  
16 and has concluded that the Project can be designed and built within such constraints.

17 **2.3.3** Developer has evaluated the feasibility of performing the Work within the  
18 Completion Deadlines and for the Contract Price, accounting for constraints affecting the  
19 Project, and has concluded that such performance (including achievement of Substantial  
20 Completion and Final Acceptance by the applicable Completion Deadlines for the  
21 Contract Price) is feasible and practicable.

22 **2.3.4** Prior to the Proposal Due Date, Developer conducted a Reasonable  
23 Investigation and as a result of such Reasonable Investigation is familiar with and accepts  
24 the requirements of the Work.

25 **2.3.5** Developer has familiarized itself with the requirements of any and all  
26 applicable Laws and the conditions of any required Governmental Approvals prior to  
27 entering into this Agreement. Developer shall obtain and maintain each and every  
28 Governmental Approval in due course so as to enable the Work to proceed in accordance  
29 with the Contract Documents.

30 **2.3.6** Developer has familiarized itself with the requirements of the Local  
31 Jurisdictions and the conditions therein prior to entering into this Agreement. Developer  
32 shall comply with all such requirements to enable the Work to proceed in accordance with  
33 the Contract Documents.

34 **2.3.7** All Work furnished by Developer shall be performed by or under the  
35 supervision of Persons who hold all necessary and valid licenses to perform the Work in  
36 the State, by personnel who are careful, skilled, experienced, and competent in their  
37 respective trades or professions, who are professionally qualified to perform the Work in

1 accordance with the Contract Documents, and who shall assume professional  
2 responsibility for the accuracy and completeness of the Design Documents, Construction  
3 Documents, and other documents prepared or checked by them.

4 **2.3.8** As of the Effective Date, Developer is a Joint Venture, duly organized and  
5 validly existing under the laws of the state of Arizona with all requisite power and all  
6 required licenses to carry on its present and proposed obligations under the Contract  
7 Documents. Developer has full power, right, and authority to execute and deliver the  
8 Contract Documents and the Subcontracts to which Developer is (or will be) a party and  
9 to perform each and every obligation of Developer therein.

10 **2.3.9** Developer is duly qualified to do business, and is in good standing, in the  
11 State as of the Effective Date, and will remain in good standing during the Work and for  
12 as long thereafter as any obligations remain outstanding under the Contract Documents.

13 **2.3.10** At any time a Guaranty is required to be in place pursuant to the Contract  
14 Documents, the applicable Guarantor is duly organized, validly existing, and in good  
15 standing under the laws of the state of its organization, and, except for Guarantor Flatiron  
16 Construction Corp., is duly qualified to do business in, and is in good standing in, the  
17 State. Guarantor shall remain in good standing for as long as any obligations guaranteed  
18 by such Guarantor remain outstanding under the Contract Documents, and, each such  
19 Guarantor has all requisite power and all required licenses to carry on its present and  
20 proposed obligations under the Contract Documents. In the case of Guarantor Flatiron  
21 Construction Corp., it is not doing business in the State, is not qualified to do business in  
22 the State, and has not obtained a certificate of good standing in the State; however,  
23 Guarantor Flatiron Construction Corp. has all requisite power to carry out its present and  
24 proposed obligations under the Guaranty and the Contract Documents.

25 **2.3.11** At any time a Guaranty is required to be in place pursuant to the Contract  
26 Documents, all required approvals have been obtained with respect to the execution,  
27 delivery, and performance of such Guaranty, and performance of such Guaranty will not  
28 result in a breach of or a default under the applicable Guarantor's organizational  
29 documents or any indenture or loan or credit agreement or other material agreement or  
30 instrument to which the applicable Guarantor is a party or by which its properties and  
31 assets may be bound or affected.

32 **2.3.12** Each Guaranty has been duly authorized by all necessary corporate action,  
33 has been duly executed and delivered by each Guarantor, and constitutes the legal, valid,  
34 and binding obligation of such Guarantor, enforceable in accordance with its terms,  
35 subject only to applicable bankruptcy, insolvency, and similar laws affecting the  
36 enforceability of the rights of creditors generally and the general principles of equity.

37 **2.3.13** The execution, delivery, and performance of the Contract Documents and  
38 the Subcontracts to which Developer is (or will be) a party have been (or will be) duly  
39 authorized by all necessary corporate action of Developer; each person executing the  
40 Contract Documents and the Subcontracts on behalf of Developer has been (or at the  
41 time of execution will be) duly authorized to execute and deliver each such document on

1 behalf of Developer; and the Contract Documents and the Subcontracts have been (or  
2 will be) duly executed and delivered by Developer.

3 **2.3.14** Neither the execution and delivery by Developer of the Contract Documents  
4 or the Subcontracts to which Developer is (or will be) a party, nor the consummation of  
5 the transactions contemplated hereby or thereby, is (or at the time of execution will be) in  
6 conflict with or has resulted or will result in a default under or a violation of the governing  
7 instruments or organizational documents of Developer or a breach or default under any  
8 indenture or loan or credit agreement or other material agreement or instrument to which  
9 Developer is a party or by which its properties and assets may be bound or affected.

10 **2.3.15** Each of the Contract Documents and the Subcontracts to which Developer  
11 is (or will be) a party constitutes (or at the time of execution and delivery will constitute)  
12 the legal, valid, and binding obligation of Developer, enforceable against Developer, in  
13 accordance with its terms, subject only to applicable bankruptcy, insolvency, and similar  
14 laws affecting the enforceability of the rights of creditors generally and to general  
15 principles of equity.

16 **2.3.16** As of the Effective Date, there is no action, suit, proceeding, investigation  
17 or litigation pending and served, or of which Developer is otherwise aware, against  
18 Developer which challenges Developer's authority to execute, deliver or perform, or the  
19 validity or enforceability of, the Contract Documents or the Subcontracts to which  
20 Developer is a party, or which challenges the authority of any of Developer's officials that  
21 are executing the Contract Documents or the Subcontracts; and Developer has disclosed  
22 to ADOT prior to the Effective Date any pending and un-served or threatened action, suit,  
23 proceeding, investigation or litigation with respect to such matters of which Developer is  
24 aware.

25 **2.3.17** As of the Proposal Due Date, Developer disclosed to ADOT in writing all  
26 organizational conflicts of interest of Developer and its Subcontractors of which Developer  
27 was actually aware; and between the Proposal Due Date and the Effective Date,  
28 Developer has not obtained knowledge of any additional organizational conflict of interest,  
29 and there have been no organizational changes to Developer or its Subcontractors  
30 identified in its Proposal that have not been approved in writing by ADOT. For this  
31 purpose, organizational conflict of interest has the meaning set forth in the RFP.

32 **2.3.18** To the extent the Lead Engineering Firm is not Developer, Developer  
33 represents and warrants, as of the effective date of the relevant Subcontract between  
34 Developer and the Lead Engineering Firm, as follows:

35 (a) The Lead Engineering Firm is duly organized, validly existing, and in  
36 good standing under the laws of the state of its organization and is duly qualified to do  
37 business, and is in good standing, in the State;

38 (b) The ownership interests of the Lead Engineering Firm are owned by  
39 the Persons whom Developer has set forth in a written certification delivered to ADOT  
40 prior to the Effective Date;

1 (c) The Lead Engineering Firm has the power and authority to do all acts  
2 and things and execute and deliver all other documents as are required to be done,  
3 observed or performed by it in connection with its engagement by Developer;

4 (d) The Lead Engineering Firm has (i) obtained and will maintain all  
5 necessary or required registrations, permits, licenses, and approvals required under  
6 applicable Law and (ii) the expertise, qualifications, experience, competence, skills, and  
7 know-how to perform the Work in accordance with the Contract Documents;

8 (e) The Lead Engineering Firm will comply with all health, safety, and  
9 Environmental Laws in the performance of any Work activities for, or on behalf of,  
10 Developer for the benefit of ADOT; and

11 (f) The Lead Engineering Firm is not in breach of any applicable Law  
12 that would have a material adverse effect on any aspect of the Work.

13 **2.3.19** Pursuant to A.R.S. § 35-393.01, Developer certifies that all Developer-  
14 Related Entities are not currently engaged in, and Developer agrees for the duration of  
15 this Agreement not to engage in, and to require all Developer-Related Entities not to  
16 engage in, a boycott of goods or services from Israel.  
17

18 **2.3.20** Developer, on behalf of itself and all Developer-Related Entities, warrants  
19 compliance with all federal immigration laws and regulations that relate to their employees  
20 and their compliance with A.R.S. §§ 23-214, subsection A and 41-4401. A breach of this  
21 warranty shall be deemed a material breach of the Agreement that is subject to penalties  
22 up to and including termination of the Agreement. ADOT retains the legal right to inspect  
23 the papers of any employee who performs any of the Work hereunder to ensure  
24 compliance with this warranty.  
25

26 **2.3.21** This Agreement shall be subject to available funding, and nothing in this  
27 Agreement shall bind the State to expenditures in excess of funds appropriated or  
28 otherwise allotted for the purposes outlined in this Agreement.

## 29 **2.4 Representations and Warranties of ADOT**

30 ADOT makes the representations, warranties, and covenants set forth in this  
31 Section 2.4.

32 **2.4.1** As of the Effective Date, ADOT has full power, right, and authority to  
33 execute, deliver, and perform its obligations under, in accordance with and subject to the  
34 terms and conditions of the Contract Documents to which it is a Party.

35 **2.4.2** Each Person executing this Agreement on behalf of ADOT and the Contract  
36 Documents to which ADOT is a Party, has been or at the time of execution will be duly  
37 authorized to execute each such document on behalf of ADOT.

38

1     **2.5 Survival of Representations and Warranties**

2             The representations and warranties of Developer and ADOT contained herein shall  
3 survive expiration or early termination of this Agreement.

1 **ARTICLE 3.**  
2 **MANAGEMENT SYSTEMS AND OVERSIGHT**

3 **3.1 Submittal, Review, and Approval Terms and Procedures**

4 **3.1.1 General**

5 This Section 3.1 sets forth uniform terms and procedures that shall govern all  
6 Submittals to ADOT pursuant to the Contract Documents or the Project Management Plan  
7 and component plans thereunder. This Section 3.1 governs and controls all Submittals,  
8 unless another provision in the Contract Documents expressly provides for a different time  
9 period than that stated in this Section 3.1. In the event of an ambiguity, this Section 3.1  
10 shall control.

11 **3.1.2 Time Periods**

12 **3.1.2.1** Except as otherwise provided in this Section 3.1.2 or in  
13 Section 7.5, whenever ADOT is entitled to review, comment on, review and comment on,  
14 or to affirmatively approve or accept, a Submittal, ADOT will have a period of ten Business  
15 Days to act after the date ADOT acknowledges receipt of a complete Submittal in  
16 conformity with the Contract Documents, together with a completed transmittal form in a  
17 form to be mutually agreed by the Parties and all necessary or requested information and  
18 documentation concerning the subject matter. If ADOT determines that a Submittal is not  
19 complete, ADOT will notify Developer of such determination within ten Business Days of  
20 the date ADOT acknowledges receipt of such Submittal. ADOT's review period for  
21 Developer's re-submission of a previously submitted Submittal shall be ten Business  
22 Days for each such re-submission. The Parties shall agree in good faith upon any  
23 necessary extensions of the review-comment-and-approval period to accommodate  
24 particularly complex or comprehensive Submittals.

25 **3.1.2.2** If any other provision of the Contract Documents expressly  
26 provides a longer or shorter period for ADOT to act, such period shall control over the  
27 time periods set forth in Section 3.1.2.1. If the time period for ADOT to act ends on a non-  
28 Business Day, the time period shall automatically be extended to the next succeeding  
29 Business Day.

30 **3.1.2.3** The amount of Developer's Submittals shall not exceed the  
31 number of Submittals per technical discipline stated in Section 116.03.03 of the Technical  
32 Provisions. ADOT shall have no obligation to review any Submittals that exceed the  
33 maximum number specified for each technical discipline stated in Section 116.03.03 of  
34 the Technical Provisions. Notwithstanding the foregoing, Developer may request that  
35 ADOT review Submittals that exceed the maximum number per discipline. ADOT's  
36 decision whether or not to review additional Submittals is subject to ADOT's sole  
37 discretion. If ADOT agrees to review more than the maximum number of concurrent  
38 Submittals of any particular type set forth in any provision of the Contract Documents,  
39 ADOT may extend the applicable period for it to act to such period in which ADOT can  
40 reasonably accommodate the Submittals under the circumstances and no such extension



1 shall constitute an ADOT-Caused Delay, ADOT-Directed Change, Relief Event or other  
2 basis for an increase in the Contract Price, a Completion Deadline adjustment or any  
3 other Claim. Submittals are deemed to be concurrent to the extent the review time periods  
4 available to ADOT under this Section 3.1.2 regarding such Submittals entirely or partially  
5 overlap. Whenever ADOT agrees to consider Submittals in excess of the number of  
6 concurrent Submittals otherwise permitted under the Contract Documents, Developer  
7 may establish by written notice to ADOT an order of priority for processing such  
8 Submittals and ADOT will attempt to comply with such order of priority.

9                   **3.1.2.4**       All time periods for ADOT to act shall be extended by an equal  
10 number of days as any delay caused by delay, act, omission, breach, fault or negligence  
11 of any Developer-Related Entity.

12                   **3.1.2.5**       During any time there exists a Persistent Developer Default,  
13 the applicable period for ADOT to respond to any Submittals received during such time,  
14 and not related to curing the Persistent Developer Default, shall automatically be  
15 extended by fifteen Business Days.

16                   **3.1.2.6**       ADOT may attempt, in its sole discretion, to accommodate a  
17 written request from Developer for expedited action on a specific Submittal, within the  
18 practical limitations on availability of ADOT personnel appropriate for acting on the types  
19 of Submittal in question; provided Developer sets forth in its request specific, abnormal  
20 circumstances, not caused by a Developer-Related Entity, demonstrating the need for  
21 expedited action. This provision shall not apply, however, during any time described in  
22 Section 3.1.2.4 or 3.1.2.5. If Developer submits a request under this Section 3.1.2.6,  
23 ADOT may, in its sole discretion, implement an extension of ADOT's time to respond to  
24 other then-outstanding Submittals by up to 10 Business Days per Submittal, and such  
25 extension shall not constitute an ADOT-Caused Delay, ADOT-Directed Change, Relief  
26 Event or other basis for an increase in the Contract Price, a Completion Deadline  
27 adjustment or any other Claim.

### 28                   **3.1.3 ADOT Discretionary Approvals**

29                   **3.1.3.1**       If a Submittal is one for which the Contract Documents state  
30 that approval or consent or acceptance is required from ADOT in its sole discretion or  
31 absolute discretion, then ADOT's lack of approval, determination, decision or other action  
32 within the applicable time period described in Section 3.1.2 shall be deemed disapproval.  
33 If approval is subject to the sole discretion or absolute discretion of ADOT, then ADOT's  
34 decision shall be final, binding, and not subject to the Dispute Resolution Procedures and  
35 such decision shall not constitute an ADOT-Caused Delay, ADOT-Directed Change,  
36 Relief Event or other basis for an increase in the Contract Price, a Completion Deadline  
37 adjustment or any other Claim.

38                   **3.1.3.2**       If a Submittal is one for which the Contract Documents state  
39 that approval or consent or acceptance is required from ADOT in its good faith discretion  
40 and ADOT delivers no approval, consent, determination, decision or other action within  
41 the applicable time period under Section 3.1.2, then Developer may deliver to ADOT a

1 written notice stating the date within which ADOT was to have decided or acted and that  
2 if ADOT does not decide or act within five Business Days after receipt of the notice, delay  
3 from and after lapse of the applicable time period under Section 3.1.2 may constitute  
4 ADOT-Caused Delay for which Developer is entitled to issue a Relief Event Notice under  
5 Section 13.1.2 and thereafter pursue relief subject to the requirements of Article 13. If the  
6 approval is subject to the good faith discretion of ADOT, then ADOT's decision shall be  
7 binding unless it is finally determined by clear and convincing evidence that such decision  
8 was arbitrary and capricious. If the decision is determined to be arbitrary and capricious  
9 and causes delay, it will constitute and be treated as an ADOT-Caused Delay.

10 **3.1.4 Other ADOT Approvals**

11 **3.1.4.1** Whenever the Contract Documents provide that a Submittal  
12 or other matter is subject to ADOT's approval or consent but the approval or consent is  
13 one not governed by Section 3.1.3 concerning discretionary approvals, then the standard  
14 shall be reasonableness.

15 **3.1.4.2** Whenever the reasonableness standard applies and ADOT  
16 delivers no approval, consent, determination, decision or other action within the  
17 applicable time period under Section 3.1.2, then Developer may deliver to ADOT a written  
18 notice stating the date within which ADOT was to have decided or acted and that if ADOT  
19 does not decide or act within five Business Days after receipt of the notice, delay from  
20 and after lapse of the applicable time period under Section 3.1.2 may constitute ADOT-  
21 Caused Delay for which Developer is entitled to issue a Relief Event Notice under Section  
22 13.1.2 and thereafter pursue relief subject to the requirements of Article 13.

23 **3.1.5 ADOT Review and Comment**

24 Whenever the Contract Documents provide that a Submittal or other matter is  
25 subject to ADOT's review, comment, review and comment, disapproval or similar action  
26 not entailing a prior approval, and ADOT delivers no comments, exceptions, objections,  
27 rejections or disapprovals within the applicable time period under Section 3.1.2, then  
28 Developer may proceed thereafter at its election and risk, without prejudice to ADOT's  
29 rights to later object or disapprove in accordance with Section 3.1.7.1. No such failure or  
30 delay by ADOT in delivering comments, exceptions, objections, rejections or disapprovals  
31 within the applicable time period under Section 3.1.2 shall constitute an ADOT-Caused  
32 Delay, ADOT-Directed Change, Relief Event or other basis for an increase in the Contract  
33 Price, a Completion Deadline adjustment or any other Claim. When used in the Contract  
34 Documents, the phrase "completion of the review and comment process", "comments  
35 addressed", "respond to the comments", "comments (are) (have been) resolved" or similar  
36 terminology means either (a) ADOT has reviewed, provided comments, exceptions,  
37 objections, rejections or disapprovals, and all the same have been fully resolved, or (b)  
38 the applicable time period has passed without ADOT providing any comments, exceptions,  
39 objections, rejections or disapprovals.

40

1                   **3.1.6 Submittals Not Subject to Prior Review, Comment or Approval**

2                   Whenever the Contract Documents provide that Developer is to deliver a Submittal  
3 to ADOT but express no requirement for ADOT review, comment, disapproval, prior  
4 approval or other ADOT action, then Developer is under no obligation to provide ADOT  
5 any period of time to review the Submittal or obtain approval of it before proceeding with  
6 further Work contained in the particular Submittal; however, ADOT will have the right, but  
7 is not obligated, to at any time review, comment on, take exception to, object to, reject or  
8 disapprove the Submittal in accordance with Section 3.1.7.1. No failure or delay by ADOT  
9 in delivering comments, exceptions, objections, rejections or disapprovals with respect to  
10 the Submittal shall constitute an ADOT-Caused Delay, ADOT-Directed Change, Relief  
11 Event or other basis for an increase in the Contract Price, a Completion Deadline  
12 adjustment or any other Claim.

13                   **3.1.7 Resolution of ADOT Comments and Objections**

14                   **3.1.7.1**           If the Submittal is not governed by Section 3.1.3, then ADOT's  
15 exception, objection, rejection or disapproval shall be deemed reasonable, valid, and  
16 binding if based on any of the following grounds or other grounds set forth elsewhere in  
17 the Contract Documents:

18                   (a)    The Submittal or a component thereof fails to comply, or is  
19 inconsistent with the Contract Documents or Project Management Plan (or component  
20 plans thereunder);

21                   (b)    The Submittal or subject component thereof does not comply  
22 with a standard equal to or better than Good Industry Practice;

23                   (c)    Developer has not provided all content or information required  
24 or reasonably requested in respect of the Submittal or a component thereof;

25                   (d)    Adoption of the Submittal or a component thereof, or of any  
26 proposed course of action thereunder, would result in a conflict with or violation of any  
27 Law or Governmental Approval; or

28                   (e)    In the case of a Submittal that is to be delivered to a  
29 Governmental Entity as a proposed Governmental Approval, or to obtain, modify, amend,  
30 supplement, renew, extend, waive or carry out a Governmental Approval, it proposes  
31 commitments, requirements, actions, terms or conditions that are (i) inconsistent with the  
32 Contract Documents or the Project Management Plan (or component plans thereunder),  
33 applicable Law, the requirements of Good Industry Practice, or ADOT practices for public-  
34 private contracting, or (ii) not usual and customary arrangements that ADOT offers or  
35 accepts for addressing similar circumstances affecting its projects (except if usual and  
36 customary for ADOT regarding its projects delivered via public-private contracting).

37                   **3.1.7.2**           Developer shall respond in writing to all of ADOT's comments,  
38 exceptions, disapprovals, and objections to a Submittal and, except as provided below,  
39 make modifications to the Submittal as necessary to resolve all such comments,

1 exceptions, disapprovals, and objections, in accordance with the review processes set  
2 forth in this Section 3.1 and Section 116.03 of the Technical Provisions. However, if the  
3 Submittal is not governed by Section 3.1.3, the foregoing shall in no way be deemed to  
4 obligate Developer to incorporate any comments or resolve exceptions, disapprovals or  
5 objections that: (a) are not on any of the grounds set forth in Section 3.1.7.1 (and not on  
6 any other grounds set forth elsewhere in the Contract Documents) and (b) would result in  
7 a delay to the Critical Path on the Project Schedule, in Extra Work Costs or in Delay  
8 Costs, except pursuant to an ADOT-Directed Change. If Developer does not resolve any  
9 comment, exception, disapproval or objection, Developer shall deliver to ADOT within 30  
10 days after receipt of ADOT's comments, exceptions, disapprovals or objections, a written  
11 explanation why modifications based on such comment, exception, disapproval or  
12 objection are not required.

13 **3.1.7.3** If Developer fails to provide the required explanation to ADOT  
14 within the time period set forth in Section 3.1.7.2, in addition to constituting a  
15 Noncompliance Event as set forth in Exhibit 14, ADOT may deliver to Developer a written  
16 notice stating the date by which Developer was to have addressed ADOT's comments  
17 and that if Developer does not address those comments within five Business Days after  
18 receipt of such notice, then Developer's failure shall constitute Developer's agreement to  
19 make all changes necessary to accommodate and resolve the comment or objection at  
20 issue and full acceptance of all responsibility for such changes without the right to an  
21 ADOT-Caused Delay, Supplemental Agreement, Relief Event or other basis for an  
22 increase in the Contract Price, a Completion Deadline adjustment or any other Claim,  
23 including any Claim that ADOT assumes design or other liability.

24 **3.1.7.4** After ADOT receives Developer's explanation as to why the  
25 modifications are not required as provided in Sections 3.1.7.2 and 3.1.7.3 and Section  
26 116.03 of the Technical Provisions, if ADOT disagrees with Developer's explanation, the  
27 Parties shall attempt in good faith to informally resolve the dispute. If the Parties are  
28 unable to informally resolve the dispute within 15 days of receipt of Developer's  
29 explanation, and the Submittal is not one governed by Section 3.1.3.1, the dispute shall  
30 be resolved according to the Dispute Resolution Procedures; provided, however, that if  
31 ADOT elects to issue a Directive Letter pursuant to Section 14.3 with respect to the matter  
32 in dispute, Developer shall proceed in accordance with such Directive Letter while  
33 retaining any Claim as to the matter in dispute.

## 34 **3.1.8 Limitations on Developer's Right to Rely**

35 **3.1.8.1** No review, comment, objection, rejection, approval,  
36 disapproval, acceptance, concurrence, certification (including certificates of Substantial  
37 Completion and Final Acceptance), or Oversight by or on behalf of ADOT, including  
38 review and approval of the Project Management Plan, or lack of any such action by ADOT,  
39 shall constitute acceptance by ADOT of materials or Work, or waiver of any legal or  
40 equitable right under the Contract Documents, at Law, or in equity. ADOT will be entitled  
41 to complete and accurate Submittals, to remedies for unapproved Deviations,  
42 Nonconforming Work, and Developer Defaults, and to identify and require additional Work  
43 to bring the Work and Project into compliance with requirements of the Contract

1 Documents, regardless of whether previous review, comment, objection, rejection,  
2 approval, disapproval, acceptance, concurrence, certification or Oversight, or lack of any  
3 of the foregoing, were conducted or provided by ADOT. Without regard to any such  
4 activity or failure to conduct any such activity by ADOT, Developer at all times shall have  
5 an independent duty and obligation to fulfill the requirements of the Contract Documents.  
6 Developer agrees and acknowledges that any such activity or failure to conduct any such  
7 activity by ADOT:

8 (a) Is solely for the benefit and protection of ADOT;

9 (b) Does not relieve Developer of its responsibility for the  
10 selection and the competent performance of all Developer-Related Entities;

11 (c) Does not create or impose upon ADOT any duty, standard of  
12 care or obligation toward Developer to cause it to fulfill the requirements of the Contract  
13 Documents or toward any other Person, all of which are hereby expressly disclaimed;

14 (d) Shall not be deemed or construed as any form of warranty,  
15 express or implied, by ADOT;

16 (e) May not be relied upon by Developer or used as evidence in  
17 determining whether Developer has fulfilled the requirements of the Contract Documents;

18 (f) Shall not be deemed or construed as any assumption of risk  
19 by ADOT as to design, construction, performance or quality of Work or materials; and

20 (g) May not be asserted by Developer against ADOT as a  
21 defense, legal or equitable, to, or as a waiver of or relief from, Developer's obligation to  
22 fulfill the requirements of the Contract Documents.

23 **3.1.8.2** Developer shall not be relieved or entitled to reduction of its  
24 obligations to perform the Work in accordance with the Contract Documents, or any of its  
25 other liabilities and obligations, including its indemnity obligations, as the result of any  
26 activity identified in Section 3.1.8.1 or failure to conduct any such activity by ADOT. Such  
27 activity or failure to conduct such activity by ADOT will not relieve Developer from liability  
28 for, and responsibility to cure and correct, without the right to an increase in the Contract  
29 Price, a Completion Deadline adjustment or any other Claim, any unapproved Deviations,  
30 Nonconforming Work or Developer Defaults.

31 **3.1.8.3** Developer may proceed with Final Design or construction of  
32 elements or portions of the Project before the design of the entire Project has been  
33 completed at Developer's sole risk. Developer shall be solely responsible for correcting  
34 any Nonconforming Work at its sole expense and at the direction of ADOT.

35 **3.1.8.4** To the maximum extent permitted by Law, Developer hereby  
36 releases and discharges ADOT from any and all duty and obligation to cause the Work,  
37 the Submittals, or the Project to comply with or satisfy the standards and requirements of  
38 the Contract Documents.

1                   **3.1.8.5**           Notwithstanding the provisions of Sections 3.1.8.1, 3.1.8.2,  
2 3.1.8.3, and 3.1.8.4:

3                   (a)       Developer shall be entitled to rely on written approvals and  
4 acceptances from ADOT (i) for the limited purpose of establishing that the approval or  
5 acceptance occurred, or (ii) that are within ADOT’s sole discretion or absolute discretion,  
6 but only to the extent that Developer is prejudiced by a subsequent decision of ADOT to  
7 rescind such approval or acceptance;

8                   (b)       Developer shall be entitled to rely on specific written  
9 Deviations ADOT approves under Section 6.2.4, subject to any conditions therein;

10                  (c)       Developer shall be entitled to rely on the certificates of  
11 Substantial Completion and Final Acceptance from ADOT for the limited purpose of  
12 establishing that Substantial Completion and Final Acceptance, as applicable, have  
13 occurred, and the respective dates thereof, without prejudice to any rights and remedies  
14 available to ADOT respecting unapproved Deviations, Nonconforming Work, and  
15 Developer Defaults;

16                  (d)       ADOT is not relieved from any liability arising out of a knowing  
17 and intentional material misrepresentation under any written statement ADOT delivers to  
18 Developer; and

19                  (e)       ADOT is not relieved from performance of its express  
20 responsibilities under the Contract Documents in accordance with all standards  
21 applicable thereto.

22   **3.2    Role of General Engineering Consultant and ADOT Consultants**

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

29   **3.3    Role of and Cooperation with FHWA**

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

35   **3.4    Project Management Plan**

36                  **3.4.1** Developer is responsible for all quality assurance and quality control  
37 activities necessary to manage the Work, including the Utility Adjustment Work.

1 Developer shall undertake all aspects of quality assurance and quality control for the  
2 Project and Work in accordance with the Technical Provisions, ADOT-approved Project  
3 Management Plan, ADOT-approved Quality Management Plan, Good Industry Practice,  
4 and applicable Law.

5 **3.4.2** Developer shall develop the Project Management Plan and its component  
6 parts, plans, and other documentation in accordance with the requirements set forth in  
7 Section 111 of the Technical Provisions and Good Industry Practice. The Project  
8 Management Plan shall include all the parts, component plans, and other documentation  
9 identified in Table 111-1 of Section 111 of the Technical Provisions.

10 **3.4.3** The Project Management Plan shall meet all requirements of Good Industry  
11 Practice, including those for quality assurance and quality control, and all FHWA oversight  
12 requirements.

13 **3.4.4** Developer shall submit to ADOT, in accordance with the procedures  
14 described in Section 3.1 and the timeline set forth in Table 111-2 of Section 111 of the  
15 Technical Provisions, each component part, plan, and other documentation of the Project  
16 Management Plan and any proposed changes or additions to or revisions of any such  
17 component part, plan or other documentation. The same shall be subject to ADOT's  
18 approval, review, and comment, or other disposition as set forth in Table 111-2 of Section  
19 111 of the Technical Provisions. For components of the Project Management Plan subject  
20 to ADOT's reasonable approval (if any), it is deemed reasonable for ADOT to require  
21 changes to comply or be consistent with Good Industry Practice, applicable provisions of  
22 the Contract Documents, FHWA oversight requirements, Governmental Approvals or  
23 applicable Law, or to disapprove the Project Management Plan in whole or in part due to  
24 the failure to comply with any of the foregoing.

25 **3.4.5** Developer shall not commence or permit the commencement of any aspect  
26 of the Project's construction before the relevant component parts, plans, and other  
27 documentation of the Project Management Plan applicable to such Work have been  
28 submitted to and approved by ADOT in accordance with the procedures described in  
29 Section 3.1 and the applicable timelines set forth in Table 111-2 of Section 111 of the  
30 Technical Provisions. The applicable schedule for submitting each component part, plan,  
31 and other documentation of the Project Management Plan is set forth in the corresponding  
32 section of the Technical Provisions describing the requirements for each such component  
33 part, plan, and other documentation.

34 **3.4.6** If any part, plan or other documentation of the Project Management Plan  
35 refers to, relies on or incorporates any manual, plan, procedure or like document, then all  
36 such referenced or incorporated materials shall be submitted to ADOT for approval at the  
37 time that the relevant part, plan or other documentation of the Project Management Plan  
38 or change, addition or revision to the Project Management Plan is submitted to ADOT.

39 **3.4.7** Developer shall carry out internal audits of Developer's compliance with the  
40 Project Management Plan in accordance with the Project Management Plan. The Project

1 Management Plan shall specify the extent of such audits and the frequency with which  
2 such audits will occur, which shall be subject to ADOT's approval.

3 **3.4.8** Developer shall cause each of its Subcontractors at every level to comply  
4 with the applicable requirements of the approved Project Management Plan.

5 **3.4.9** The Quality Manager shall have authority from Developer to (a) establish  
6 and maintain the Project Management Plan, and (b) report to ADOT on the performance  
7 of the Project Management Plan. The Quality Manager shall have authority independent  
8 of the Project Manager and at least the equivalent level of authority as that of the Project  
9 Manager. The Quality Manager shall have direct reporting obligations to superiors that  
10 are above the level of the Project Manager. The Project Management Plan, including the  
11 Professional Services Quality Management Plan and Construction Quality Management  
12 Plan, shall be consistent with this Section 3.4.9. Refer to Sections 113 and 114 of the  
13 Technical Provisions for additional terms and conditions applicable to the Quality  
14 Manager and Developer's other quality management personnel.

## 15 **3.5 Traffic Management**

### 16 **3.5.1 Transportation Management Plan**

17 Developer shall be responsible for the management of traffic on the Project or traffic  
18 impacted by the Work in accordance with applicable Technical Provisions, Laws,  
19 Governmental Approvals, and the Transportation Management Plan. Developer shall  
20 prepare the Transportation Management Plan in accordance with Section 700.06.02.03 of  
21 the Technical Provisions. Developer shall perform all Construction Work in accordance  
22 with the Transportation Management Plan or updates thereto, if any. In accordance with  
23 Section 7.4, preparation of the initial Transportation Management Plan and resolution of  
24 all ADOT comments thereon shall be a condition precedent to issuance of NTP 2.

### 25 **3.5.2 ADOT's Rights**

26 Notwithstanding the foregoing, ADOT will have at all times, and without obligation  
27 or liability to Developer, the right to provide traffic management and operations on the  
28 Project, including via dynamic message signs or other means, traveler and driver  
29 information, and other public information (e.g., Amber alerts).

## 30 **3.6 Oversight, Inspection, and Testing**

31 **3.6.1** ADOT will have the right at all times to conduct Oversight to: (a) comply with  
32 FHWA or other applicable federal agency requirements; and (b) verify Developer's  
33 compliance with the Contract Documents, Project Management Plan, and any applicable  
34 Law. ADOT may designate any Person or Persons, including its consultants and  
35 independent auditors, to carry out any Oversight on ADOT's behalf. ADOT will conduct  
36 Oversight in accordance with Developer's safety procedures and manuals, and in a  
37 manner that does not unreasonably interfere with normal Project construction activity.  
38 The foregoing shall not be construed to limit ADOT's Oversight or prevent ADOT from  
39 conducting any Oversight that ADOT, in its sole discretion, deems necessary.



1           **3.6.2** ADOT’s Oversight rights shall include the following:

2           (a)     Monitoring and auditing Developer, Developer-Related Entities, and  
3 the Books and Records of the foregoing as more particularly set forth in Section 22.5;

4           (b)     Conducting periodic reviews of Project documentation and files;

5           (c)     Conducting material tests, according to ADOT’s test methods, to  
6 verify: (i) Developer’s compliance with all testing frequencies and requirements, including  
7 performance and acceptance testing set forth in the Contract Documents and the  
8 approved Project Management Plan, (ii) the accuracy of the tests, inspections, and audits  
9 performed by or on behalf of Developer pursuant to the approved Professional Services  
10 Quality Management Plan and approved Construction Quality Management Plan, and (iii)  
11 compliance of materials incorporated into the Project with the applicable requirements,  
12 conditions, and standards of the Contract Documents, Governmental Approvals, the  
13 Project Management Plan, and Law;

14          (d)     Reviewing and commenting on Submittals;

15          (e)     Reviewing records and conducting interviews as necessary to verify  
16 compliance with federal, State, and local laws and regulations;

17          (f)     Participating in meetings described in Section 3.10 to discuss design  
18 progress, construction progress, Developer’s quality control processes, audit activities,  
19 and other Project Management Plan issues;

20          (g)     Accompanying Developer on Inspections, conducting its own  
21 inspections in addition to the Inspections, assessing Developer’s records of Inspections  
22 and Project conditions, and assessing the condition of Elements;

23          (h)     Attending and witnessing Developer’s other tests and inspections,  
24 including ITS and irrigation system start-up and acceptance tests and inspections;

25          (i)     Reviewing Developer’s certification of Record Drawings and surveys  
26 and Monthly Project Schedule; and

27          (j)     Investigating and confirming Developer’s compliance with the Safety  
28 Management Plan.

29           **3.6.3** ADOT will have the right to conduct formal reviews of every Design  
30 Document and Construction Document. ADOT will have the right to conduct “over-the-  
31 shoulder” reviews of Design Documents and other Submittals in accordance with Section  
32 116.03.01 of the Technical Provisions. However, no “over-the-shoulder” review by or on  
33 behalf of ADOT shall constitute acceptance by ADOT of materials or Work or waiver of  
34 any legal or equitable right under the Contract Documents, at Law, or in equity. Whether  
35 or not “over-the-shoulder” reviews are conducted, Developer at all times shall have an  
36 independent duty and obligation to fulfill the requirements of the Contract Documents.

1           **3.6.4** Nothing in the Contract Documents shall preclude, and Developer shall not  
2 interfere with, any review, inspection or oversight of Submittals or of Work that ADOT  
3 desires to conduct, or that the FHWA or any regulatory agency with jurisdiction may desire  
4 to conduct.

### 5   **3.7   Rights of Cooperation and Access**

6           **3.7.1** Developer at all times shall coordinate and cooperate, and require its  
7 Subcontractors and Developer-Related Entities to coordinate and cooperate, with ADOT,  
8 its Authorized Representative, and its designees to facilitate ADOT Oversight activities.  
9 Developer shall cause its representatives to be available during normal business hours  
10 and at all other reasonable times for consultation with ADOT and its designees.

11           **3.7.2** Without limiting the foregoing, ADOT, its Authorized Representative, and its  
12 designees shall have the right to, and Developer shall afford them: (a) safe and  
13 unrestricted access to the Project at all times, (b) safe access during normal business  
14 hours to Developer’s Project offices and operations buildings and those of its  
15 Subcontractors, and (c) unrestricted access to data respecting the Project design,  
16 construction, and the Utility Adjustment Work.

### 17   **3.8   Testing and Test Results**

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

### 24   **3.9   Interpretive Engineering Decisions**

25           **3.9.1** Developer may apply in writing to ADOT for approval of an interpretive  
26 engineering decision concerning the meaning, scope, interpretation, and application of  
27 the Technical Provisions (an “Interpretive Engineering Decision”). If, however, meaning,  
28 scope, interpretation or application of the Technical Provisions is uncertain because of  
29 irreconcilable conflict, ambiguity or inconsistency among the Contract Documents or  
30 provisions within other Contract Documents, then this Section 3.9 shall not apply and,  
31 instead, the provisions of Section 1.2 shall apply. In response to Developer’s application  
32 for an Interpretive Engineering Decision, ADOT may issue a written approval of  
33 Developer’s proposed Interpretive Engineering Decision (if any), may issue its own  
34 Interpretive Engineering Decision or may disapprove any Interpretive Engineering  
35 Decision Developer proposes. No document, including any field directive, shall be valid,  
36 effective or enforceable as an Interpretive Engineering Decision unless expressly  
37 identified as an “Interpretive Engineering Decision” and signed by ADOT’s Design  
38 Manager, Construction Manager or Project Manager for the Project.

39           **3.9.2** Within ten Business Days after Developer applies for an Interpretive  
40 Engineering Decision, or such other time period as ADOT and Developer may agree to

1 at the time of such application, ADOT will provide its written determination including  
2 explanation of any disapproval of such application or any differing interpretation. If ADOT  
3 does not respond within such time period, the request shall be deemed disapproved. If  
4 Developer disputes ADOT's disposition of the application, such dispute shall be subject  
5 to resolution in accordance with the Dispute Resolution Procedures.

6 **3.9.3** Accepted Interpretive Engineering Decisions shall constitute provisions of  
7 the Technical Provisions and shall not constitute an ADOT-Directed Change or entitle  
8 Developer to an increase in the Contract Price, a Completion Deadline adjustment or  
9 other Claim. Subsequent ADOT written orders and directives that are issued in  
10 accordance with this Agreement, and contrary to the Interpretive Engineering Decision,  
11 shall constitute an ADOT-Directed Change.

## 12 **3.10 Meetings**

13 **3.10.1** Developer shall conduct or participate in various Project meetings with  
14 ADOT in accordance with Section 108.03 of the Technical Provisions. In addition, each  
15 Party shall conduct or participate in any other meeting set forth in other sections of the  
16 Technical Provisions or other Contract Document. At ADOT's request, Developer shall  
17 require Subcontractors and Engineers of Record to attend any such meetings.

18 **3.10.2** Developer shall conduct regular DBE/OJT meetings with ADOT's  
19 Compliance Oversight Committee at least once each month during the Work, as more  
20 particularly set forth in Section 13.02 of the DBE Special Provisions (Exhibit 7) and the  
21 OJT Special Provisions (Exhibit 8).

22 **3.10.3** Developer shall provide at least five Business Days' advance notice to  
23 ADOT prior to meeting with any Utility Company or any Governmental Entity, and ADOT  
24 shall have the right to participate in such meetings.

25 **3.10.4** For all meetings that ADOT will attend, Developer shall conduct the  
26 meetings at the collocated office, unless otherwise authorized by ADOT, and shall  
27 schedule the meetings on dates and at times reasonably convenient to both Parties.  
28 Except in the case of urgency, Developer shall provide ADOT with written notice and a  
29 meeting agenda as set forth in Section 108.03 of the Technical Provisions.

30 **3.10.5** ADOT will have the right to include representatives of FHWA or other  
31 Governmental Entities in any ADOT meetings with Developer or Subcontractors. Such  
32 representatives shall have the right to participate in such meetings and to raise questions,  
33 concerns, and opinions without restriction; provided, however, that such representatives  
34 shall not have the right to direct or control such meetings, and Developer shall take  
35 direction (if any) only from ADOT regarding performance of the Work.

## 36 **3.11 Software Compatibility**

37 **3.11.1** Unless otherwise specifically stated in the Contract Documents, all software  
38 that Developer uses for any aspect of the Project shall be compatible with software used  
39 by ADOT, and comply with the software requirements set forth in the Technical

1 Provisions. Prior to using any software or version of software not then in use by ADOT or  
2 compatible with software then in use by ADOT, Developer must obtain approval from  
3 ADOT. In addition, Developer shall provide to ADOT staff, at Developer's cost, working  
4 electronic copies of the software, any necessary licenses for ADOT's use of the software  
5 required under Section 22.7.3.1, and any training reasonably necessary to ensure that  
6 ADOT is able to use the same or compatible software as Developer.

7 **3.11.2** Developer shall submit all documents, correspondence, and Submittals to  
8 ADOT through the Electronic Document Management System in accordance with Section  
9 111.02 of the Technical Provisions.

1 **ARTICLE 4.**  
2 **PROJECT PLANNING, GOVERNMENTAL APPROVALS;**  
3 **ENVIRONMENTAL COMPLIANCE; PUBLIC INFORMATION**

4 **4.1 Planning and Engineering Activities**

5 **4.1.1** Developer, through the qualified and licensed design professionals  
6 identified in the Project Management Plan, shall perform or cause to be performed all  
7 Professional Services necessary to develop the Project and the Utility Adjustments  
8 included in the Work in accordance with the Contract Documents and Good Industry  
9 Practice.

10 **4.1.2** Before commencing any Work on any portion or aspect of the Project,  
11 Developer shall verify all governing dimensions of the Site and shall examine and account  
12 for all Related Transportation Facilities and adjoining work (including Adjacent Work) that  
13 may have an impact on such Work. Developer shall ensure that any Design Documents  
14 and Construction Documents furnished as part of the Work accurately depict all governing  
15 and adjoining dimensions.

16 **4.2 Site Conditions**

17 **4.2.1** Developer shall bear the risk of any incorrect or incomplete review in its  
18 Reasonable Investigation of the Site and surrounding locations. Developer shall bear the  
19 risk of any incorrect or incomplete information resulting from preliminary engineering  
20 activities conducted by Developer, ADOT or any other Person.

21 **4.2.2** Developer shall bear the risk of changes in surface topography, variations  
22 in subsurface moisture content, and variations in groundwater levels.

23 **4.2.3** The provisions of this Section 4.2 do not apply to, and shall not adversely  
24 affect, the specific relief available to Developer under Article 13 for Relief Events under  
25 clauses (g), (h), (j), (k), (l) and (p) of the definition of Relief Event.

26 **4.3 Governmental Approvals**

27 **4.3.1** ADOT obtained for the Project the NEPA Approval, based on the Schematic  
28 Design. Developer acknowledges that it received and is familiar with the NEPA Approval  
29 and supporting documentation, as contained in the Reference Information Documents.

30 **4.3.2** Developer hereby assumes responsibility for, and shall obtain:

31 (a) All Environmental Approvals, other than the NEPA Approval,  
32 required in connection with Developer's Schematic Design or Final Design, the Project,  
33 the Project ROW, Developer ROW, the Work or a Relief Event;

34 (b) All reevaluations, amendments, and supplements of the NEPA  
35 Approval required in connection with Developer's Schematic Design or Final Design, the  
36 Project, the Project ROW, Developer ROW, the Work or a Relief Event; and

1 (c) All other Governmental Approvals required in connection with  
2 Developer's Schematic Design or Final Design, the Project, the Project ROW, Developer  
3 ROW, or the Work.

4 **4.3.3** Developer shall deliver to ADOT true and complete copies of all new or  
5 amended Governmental Approvals, including reevaluations, amendments, and  
6 supplements of the NEPA Approval.

7 **4.3.4** Prior to submitting to a Governmental Entity any application for a  
8 Governmental Approval (or any proposed reevaluation, amendment, supplement,  
9 modification, renewal, extension or waiver of a Governmental Approval or provision  
10 thereof), Developer shall submit the same, together with any supporting environmental  
11 studies, analyses and data, to ADOT for appropriate action, if any, in accordance with  
12 Section 119.02.06 of the Technical Provisions. ADOT assumes no duty, obligation or  
13 liability regarding completeness or correctness of any such application, regardless of  
14 ADOT's approval, review, and comment, or ADOT's lack of approval, review, and  
15 comment.

16 **4.3.5** Developer shall be responsible for all necessary actions, and Developer  
17 shall bear all risk of delay and all risk of increased cost, attributable to, resulting from or  
18 arising out of: (1) any differences between Developer's Final Design for any portion of  
19 the Project and the Schematic Design or Developer's Schematic Design, including  
20 differences due to any Alternative Technical Concepts set forth in Exhibit 2-1, but  
21 excluding any differences due to an ADOT-Directed Change; or (2) differences between  
22 the construction means and methods (including temporary works) Developer chooses  
23 for any portion of the Project and those set forth, referred to or contemplated in the NEPA  
24 Approval, excluding any differences due to an ADOT-Directed Change. Such actions  
25 and risks that Developer assumes shall include:

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

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

31 (c) Obtaining and complying with all necessary new Governmental  
32 Approvals;

33 (d) Obtaining and complying with all necessary modifications, renewals,  
34 and extensions of the NEPA Approval or other existing Governmental Approvals; and

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

36 **4.3.6** If Developer is unable to obtain any of the items described in  
37 Sections 4.3.5(c) or 4.3.5(d), then Developer shall be obligated to design and construct  
38 the Project based on the Schematic Design (with changes as necessary to comply with  
39 the Technical Provisions) and the construction means and methods (including temporary

works) set forth, referred to or contemplated in the NEPA Approval, or such other design or means and methods for which Developer is able to obtain Governmental Approvals and that comply with the Contract Documents. None of the foregoing circumstances described in this Section 4.3.6 shall: (a) constitute an ADOT-Caused Delay or ADOT-Directed Change, Relief Event or other basis for an increase in the Contract Price, a Completion Deadline adjustment or any other Claim; or (b) result in any representation or warranty by ADOT as to the feasibility, accuracy or completeness of, or absence of errors in, the Schematic Design.

**4.3.7** If Developer acquires any Developer ROW or pursues any other modification of or Deviation from any Governmental Approvals, including the NEPA Approval, Developer shall first comply with, and obtain any consent or waiver required pursuant to then-existing agreements between ADOT and other Governmental Entities.

**4.3.8** Certain Governmental Entities may require that Governmental Approvals be applied for or issued in ADOT's name, or that ADOT directly coordinate with such Governmental Entities in connection with obtaining the Governmental Approvals. In such event, Developer at its expense shall provide all necessary support and efforts to apply for and obtain the Governmental Approvals in ADOT's name. Such support by Developer shall include conducting necessary field investigations, preparing mitigation analyses and studies and plans, preparing surveys, and preparing any required reports, applications, and other documents in the form approved by ADOT. Such support also may include joint coordination and joint discussions and attendance at meetings with the applicable Governmental Entity. Refer to Section 119.02.06.02 of the Technical Provisions for more specific provisions on applications for Governmental Approvals filed in ADOT's name.

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

**4.3.10** ADOT shall pay for and secure in-lieu fee credits for the Section 404 Permit for the Work, as provided in Section 119.03.07 of the Technical Provisions; provided, however, that Developer shall be responsible for paying the cost of and securing any additional in-lieu fee credits necessary due to Developer's means and methods and for any permanent impacts that may result from Developer's temporary construction activities.

#### **4.4 Environmental Compliance**

**4.4.1** Except as provided otherwise in Section 4.4.2, ADOT delegates to Developer, and Developer accepts, all ADOT obligations, commitments, and responsibilities under all Environmental Approvals. Except as provided otherwise in Section 4.4.2, Developer shall, at its sole cost and expense:

- (a) Comply with all Environmental Laws;

1 (b) Comply with all conditions and requirements imposed by all  
2 Environmental Approvals;

3 (c) Perform all commitments and mitigation measures set forth in all  
4 Environmental Approvals; and

5 (d) Undertake all actions required by, or necessary to maintain in full  
6 force and effect, all Environmental Approvals.

7 **4.4.2** ADOT retains sole responsibility for payment and performance of the  
8 environmental obligations, commitments, and responsibilities expressly identified as not  
9 delegated to Developer in the Developer's Environmental Commitments set forth in TP  
10 Attachment 119-1 of the Technical Provisions.

11 **4.4.3** Developer shall perform or cause to be performed all environmental  
12 mitigation measures required under the Contract Documents, including those set forth in  
13 Section 119 of the Technical Provisions.

14 **4.4.4** Developer shall comply with the provisions, requirements, and obligations  
15 regarding environmental compliance set forth in Section 119 of the Technical Provisions.

16 **4.4.5** Developer expressly acknowledges that the Project Environmental  
17 Commitment Requirements set forth in TP Attachment 119-1 of the Technical Provisions  
18 may not contain an exhaustive or accurate list of all environmental obligations,  
19 commitments, and responsibilities that apply to the Project. ADOT does not warrant or  
20 represent the completeness or accuracy of the Project Environmental Commitment  
21 Requirements set forth in TP Attachment 119-1 of the Technical Provisions, which is  
22 made available to Developer as a convenience to assist Developer in preparing the  
23 Environmental Management Plan. Developer is solely responsible for the completeness  
24 and accuracy of the Environmental Management Plan, including the correction of any  
25 errors or omissions in TP Attachment 119-1 of the Technical Provisions. Neither  
26 incompleteness nor inaccuracy of the Project Environmental Commitment Requirements  
27 set forth in TP Attachment 119-1 of the Technical Provisions shall alter or limit the scope  
28 of Developer's environmental compliance obligations as set forth in the Contract  
29 Documents or shall entitle Developer to an increase in the Contract Price, a Completion  
30 Deadline adjustment or any other Claim.

## 31 **4.5 Community Outreach and Public Information**

32 Developer's obligations regarding public outreach, stakeholder communications,  
33 and construction relations are set forth in Section 107.20 of the Technical Provisions.



1 **ARTICLE 5.**  
2 **RIGHT OF WAY; UTILITY ADJUSTMENTS; USE OF ADOT PROPERTY**

3 **5.1 ADOT's Role Respecting ROW Acquisition**

4  
5 **5.1.1** ADOT shall acquire all right of way for the Schematic ROW.  
6

7 **5.1.2.** Except for bridge and retaining structures, ADOT will perform Hazardous  
8 Materials Management of the Schematic ROW prior to making available any parcel within  
9 the Schematic ROW to Developer. Developer shall be responsible for Hazardous  
10 Materials Management on each parcel of Schematic ROW once such parcel is made  
11 available for Developer's access and use for the Project. Except for bridge and retaining  
12 structures, Developer's responsibility to perform Hazardous Materials Management on  
13 Schematic ROW parcels shall not affect Developer's rights under clauses (h) or (i) of the  
14 definition of Relief Event.  
15

16 **5.1.3.** Except for bridge and retaining structures and as otherwise provided in TP  
17 Attachment 118-1, ADOT will perform clearance and demolition to prepare the parcels in  
18 the Schematic ROW for Developer's use during the Project.  
19

20 **5.1.4** Developer shall be responsible for the clearance and demolition of bridge  
21 and retaining structures in the Schematic ROW and shall perform all Hazardous Materials  
22 Management necessary for such clearance and demolition. Developer shall not be  
23 entitled to an increase to the Contract Price, Completion Deadline adjustment or any other  
24 Claim due to the presence of Hazardous Materials in bridge and retaining structures.

25 **5.2 Developer's ROW Services**

26 **5.2.1 Developer ROW**

27 **5.2.1.1** Developer shall be responsible for acquiring any Developer  
28 ROW, and for all costs of such acquisition. All acquisition of Developer ROW is subject  
29 to ADOT's approval in its good faith discretion in accordance with the process set forth in  
30 Section 5.2.2.1. Developer shall be responsible for all demolition and clearance of  
31 Developer ROW. Developer shall be responsible for all Utility Adjustments and Utility  
32 Adjustment Work for Utilities located in, on or under Developer ROW and shall not be  
33 entitled to an increase to the Contract Price, a Completion Deadline adjustment or any  
34 other Claim due to such Utility Adjustment Work in, on or under Developer ROW.

35 **5.2.1.2** Developer shall be responsible for Hazardous Materials  
36 Management of Developer ROW. Except for a Relief Event under clause (i) of the  
37 definition of Relief Event and as provided in Sections 13.4.5.6 and 13.6.3, Developer shall  
38 not be entitled to an increase in the Contract Price, a Completion Deadline adjustment or  
39 any other Claim arising out of or in connection with Hazardous Materials Management in,  
40 on or under Developer ROW.

1                   **5.2.1.3**         Developer shall not be entitled to an increase in the Contract  
2 Price, a Completion Deadline adjustment, Delay Costs or any other Claim as a result of  
3 any delay associated with Developer’s acquisition of Developer ROW, except that, where  
4 such delay constitutes an ADOT-Caused Delay under clause (c) of the definition thereof,  
5 Developer may be entitled to a Completion Deadline adjustment and such adjustment of  
6 a Completion Deadline shall constitute Developer’s sole remedy due to such delay.  
7 Developer shall not be entitled to Extra Work Costs, Delay Costs or any other Claim due  
8 to an ADOT-Caused Delay under clause (c) of the definition thereof.

9                   **5.2.1.4**         With the exception of Developer’s Temporary Work Areas, if  
10 Developer is unable to acquire a parcel outside the Schematic ROW for use as Developer  
11 ROW through commercially reasonable means, and Developer demonstrates to ADOT’s  
12 satisfaction that such parcel is reasonably necessary for Developer’s Work or the Project,  
13 Developer may request that ADOT exercise its power of eminent domain to acquire the  
14 parcel. If ADOT elects to exercise eminent domain, Developer shall, without the right to  
15 an increase in the Contract Price, a Completion Deadline adjustment, or any other Claim,  
16 provide such information and assistance as is necessary for ADOT to carry out the  
17 process. ADOT’s determination of whether to exercise its power of eminent domain shall  
18 be subject to ADOT’s sole discretion. Grounds for ADOT to decline to exercise eminent  
19 domain shall include the following:

20                                   (a)    The acquisition would require changes to the environmental  
21 documents, including the NEPA Approvals, such as the need for a supplemental  
22 environmental assessment;

23                                   (b)    The acquisition would require a public hearing regarding  
24 environmental impacts;

25                                   (c)    ADOT lacks the power of eminent domain to acquire the  
26 parcel;

27                                   (d)    Developer has not demonstrated that it has exhausted  
28 commercially reasonable means to acquire the parcel; or

29                                   (e)    Developer has not demonstrated that the parcel is reasonably  
30 necessary for the Project.

31 Developer shall submit a delineation in MicroStation (V8i .dgn file format) of the ROW  
32 sought, as well as a detailed statement (i) explaining why Developer requests ADOT to  
33 exercise eminent domain, including the necessity of the parcel for the Project and (ii)  
34 providing a detailed account of all efforts by Developer to acquire the parcel. ADOT shall  
35 have 20 days from receipt of a complete submission from Developer to respond to  
36 Developer’s request.

37                   **5.2.1.5**         Developer shall be responsible for all costs of Developer  
38 ROW acquired by ADOT in accordance with Section 5.2.1.4, including the purchase price,  
39 closing costs, severance damages (including cost-to-cure damages), relocation  
40 assistance payments (if any) and title insurance premiums, any uneconomic remnants

1 that result from ADOT's acquisition of such real properties, and any other costs in  
2 accordance with the Uniform Act. ADOT shall have the option of invoicing Developer for  
3 such costs, or shall deduct such costs from Developer's progress payments until ADOT  
4 is fully reimbursed.

5 **5.2.1.6** If ADOT elects, in accordance with Section 5.2.1.4 to exercise  
6 its power of eminent domain, Developer shall be responsible for all costs incurred by  
7 ADOT associated with the process therewith. ADOT shall have the option of invoicing  
8 Developer for such costs, or shall deduct such costs from Developer's progress payments  
9 until ADOT is fully reimbursed.

10 **5.2.1.7** All Developer ROW acquired using ADOT's power of eminent  
11 domain, as provided in Section 5.2.1.4, shall be considered to have been acquired by  
12 Developer for purposes of Developer's obligations and rights hereunder with respect to  
13 the acquired parcels. The fact that ADOT elects to exercise its power of eminent domain  
14 as provided in Section 5.2.1.4 shall not alter or otherwise affect Developer's  
15 responsibilities, obligations, or rights to relief hereunder for such Developer ROW,  
16 including for the costs of the ROW, acquisition costs, Hazardous Materials Management,  
17 Differing Site Conditions, the presence of Utilities or the accuracy of Utility Information,  
18 other Site conditions, or demolition and clearing of any such ROW.

19 **5.2.1.8** Except as provided in Section 5.2.1.3 and clause (c) of the  
20 definition of ADOT-Caused Delay, Developer shall not be entitled to an increase in the  
21 Contract Price, a Completion Deadline adjustment, or any other Claim associated with  
22 ADOT's exercise of its power of eminent domain in accordance with Section 5.2.1.4, or  
23 ADOT's determination in its sole discretion not to exercise such power of eminent domain.

24 **5.2.1.9** Except for a Necessary Schematic ROW Change,  
25 Developer's inability to acquire any property outside the Schematic ROW, including where  
26 ADOT either declines to exercise eminent domain or is unable to acquire a parcel on  
27 Developer's behalf through the exercise of eminent domain, shall not entitle Developer to  
28 an increase in the Contract Price, a Completion Deadline adjustment, or any other Claim.

29 **5.2.1.10** Except as required as a direct result of an ADOT-Directed  
30 Change or a Necessary Schematic ROW Change, property outside of the Schematic  
31 ROW that is acquired for drainage easements hereunder shall be treated as Developer-  
32 Designated ROW.

33 **5.2.2 Developer ROW Acquisition**  
34

35 **5.2.2.1** Prior to acquisition of any Developer ROW, Developer shall  
36 submit to ADOT for its approval in its good faith discretion a delineation in MicroStation  
37 (V8i.dgn file format) of the ROW that Developer seeks to acquire, and ADOT shall  
38 respond to Developer's request within 20 days after receipt of a complete submission  
39 from Developer. ADOT's response may consist of rejection, unconditional approval, or  
40 approval subject to certain conditions that ADOT may require in its good faith discretion.  
41 Developer shall not acquire any additional ROW that is not approved by ADOT and

1 Developer shall comply with any conditions required by ADOT for the acquisition of  
2 Developer ROW.  
3

4 **5.2.2.2** Developer-Designated ROW that Developer acquires for  
5 permanent incorporation into the Project shall be acquired in the name of the “State of  
6 Arizona, by and through its Department of Transportation.”  
7

8 **5.2.2.3** Developer shall undertake and complete all Developer ROW  
9 acquisition in accordance with Section 118.03 of the Technical Provisions and all  
10 applicable Laws relating to such acquisition, including the Uniform Act, where applicable.

### 11 **5.2.3 Developer’s Temporary Work Areas**

12 **5.2.3.1** Developer shall acquire, or cause to be acquired, all of  
13 Developer’s Temporary Work Areas in its own name. Developer shall comply with all  
14 applicable Governmental Approvals and Laws in acquiring, maintaining or disposing of  
15 any of Developer’s Temporary Work Areas. ADOT will not exercise its power of eminent  
16 domain in connection with Developer’s acquisition of any such property right or interest  
17 for Developer’s Temporary Work Areas. ADOT will have no obligations or liabilities with  
18 respect to the acquisition, maintenance or disposition of Developer’s Temporary Work  
19 Areas. Developer shall cause the lease, license or other agreement by which Developer  
20 acquires a property right or interest in a Developer’s Temporary Work Area to contain the  
21 granting party’s express acknowledgment that ADOT shall have no liability with respect  
22 thereto. Developer shall promptly deliver a copy of such documentation to ADOT.

23 **5.2.3.2** Developer shall be responsible for and shall pay directly all  
24 costs and expenses in connection with acquiring, renting, using, maintaining, insuring,  
25 and disposing of Developer’s Temporary Work Areas that Developer determines  
26 necessary or desirable for its convenience in constructing the Project. Developer shall not  
27 be entitled to an increase in the Contract Price, a Completion Deadline adjustment or any  
28 other Claim due to such costs and expenses.

29 **5.2.4** If ADOT is obligated by Law to take title to a Replacement Utility Property  
30 Interest, then it will do so on the condition that the Utility Company concurrently accepts  
31 conveyance of title from ADOT to the Utility Company, without warranty or representation  
32 by ADOT and with the Utility Company’s written indemnification against any third-party  
33 liability that may arise out of ADOT’s status as title holder.

34 **5.2.5** Developer shall not be entitled to an increase in the Contract Price, a  
35 Completion Deadline adjustment (except to the extent provided otherwise in  
36 Section 13.6.3 regarding Completion Deadline adjustment) or any other Claim, as a result  
37 of: (a) Site conditions associated with any Developer ROW (including those relating to  
38 Hazardous Materials, Differing Site Conditions or Utilities); and (b) any delay, inability or  
39 cost associated with the acquisition of Developer’s Temporary Work Areas.

40 **5.2.6** If at any time, Developer or any Developer-Related Entity directly or  
41 indirectly (a) acquires or has previously acquired any interest in real property likely to be  
42 parcels of the Schematic ROW or the remainders of any such parcels, (b) loans or has

1 previously loaned money to any interest holder in any real property likely to be a  
2 Schematic ROW parcel and accepts as security for such loan the parcel, or the remainder  
3 of any such parcel that is not a whole acquisition, or (c) purchases or has previously  
4 purchased from an existing mortgagee the mortgage instrument that secures an existing  
5 loan against real property likely to be a Schematic ROW parcel, or the remainder of any  
6 such parcel, Developer shall promptly disclose the same to ADOT. If Developer, an Equity  
7 Member of Developer, or any subsidiary or parent company of the foregoing, acquires a  
8 real property interest, whether title or mortgage, in parcels of the Schematic ROW, the  
9 real property interest acquired or a release of mortgage as the case may be, shall be  
10 conveyed to the State of Arizona without the necessity of eminent domain and without  
11 payment to Developer, an Equity Member of Developer, or the subsidiary or parent  
12 company of the foregoing. Developer shall not acquire or permit the acquisition by any  
13 Developer-Related Entity of any real property interest in a Schematic ROW parcel,  
14 whether in fee title or mortgage, for the purpose of avoiding compliance with the Laws,  
15 practices, guidelines, procedures, and methods described in the Contract Documents  
16 concerning ROW acquisition.

### 17 **5.3 Access to Schematic ROW; Delays**

#### 18 **5.3.1 Physical Possession of Schematic ROW**

19 **5.3.1.1** ADOT will notify Developer of the availability of Schematic  
20 ROW within five Business Days after the later of: the date ADOT issues NTP 1 or the  
21 date ADOT obtains possession of such Schematic ROW. For clarity, ADOT obtains  
22 possession of a ROW parcel only after close of escrow or after ADOT pays the immediate  
23 possession bond and satisfies the conditions, if any, required under the order for  
24 immediate possession; ADOT does not obtain possession when the court issues the  
25 corresponding order for immediate possession. Developer shall be responsible for being  
26 informed of and complying with any access restrictions that may be set forth in any  
27 documents granting possession of any Schematic ROW.

28 **5.3.1.2** Upon obtaining knowledge of any anticipated delay in the  
29 dates for acquisition of any Schematic ROW, ADOT shall promptly notify Developer in  
30 writing. In such event, Developer shall immediately determine whether the delay impacts  
31 the Critical Path and, if so, to what extent it might be possible to avoid such delay through  
32 re-sequencing, reallocation or other alternative construction methods or otherwise (which,  
33 in the case of a Relief Event, shall be subject to Section 13.8.3). Developer shall promptly  
34 meet with ADOT to determine the best course of action and prepare a written report  
35 setting forth its recommendations, which recommendations shall be subject to ADOT's  
36 written approval.

#### 37 **5.3.2 Access to Schematic ROW**

38 **5.3.2.1** To the extent that Developer has not been provided with  
39 access to portions of the Schematic ROW on or prior to the date provided in TP  
40 Attachment 118-1, Acquisition/Relocation Status Report, Developer shall work around  
41 such Schematic ROW and minimize delay to the completion of the Project. Subject to all

1 other conditions to such relief, Developer may be entitled to Extra Work Costs, Delay  
2 Costs, and a Completion Deadline adjustment due to a delay described in clause (b) of  
3 the definition of ADOT-Caused Delay. Except for delays caused by the types of event  
4 described in clause (b) of the definition of “ADOT-Caused Delay”, Developer shall not be  
5 entitled to an increase in the Contract Price, a Completion Deadline adjustment or any  
6 other Claim for delays caused by the failure or inability of ADOT to provide Schematic  
7 ROW.

8 **5.3.2.2** Where Developer makes a written request for access or a  
9 temporary entry agreement for any Project ROW for which access has not yet been  
10 acquired, Developer may, with ADOT's prior written consent, which may be withheld or  
11 withdrawn at any time in ADOT's sole discretion, and subject to the provisions of Section  
12 5.3.1 and Section 118.02.02, Project ROW Status, of the Technical Provisions, negotiate  
13 with property owners or occupants for early access or temporary use of land, provided  
14 that any such negotiations shall comply in all respects with applicable Law, including the  
15 Uniform Act. Developer's negotiations with property owners or occupants for temporary  
16 entry agreements shall occur only under such terms and conditions as are stipulated by  
17 ADOT, in its sole discretion. ADOT will not be bound by the terms and conditions agreed  
18 upon by Developer and any property owner or occupant until such time as ADOT has  
19 expressly so indicated in writing (and, then, only to the extent expressly set forth therein).  
20 All temporary entry agreements must be approved by, and are subject to the approval of,  
21 FHWA.

## 22 **5.4 Utility Adjustments**

### 23 **5.4.1 Developer's Responsibility**

24 **5.4.1.1** Developer shall coordinate and cause to be completed all  
25 Utility Adjustments necessary for the timely construction of the Project in accordance with  
26 the Contract Documents. All Utility Adjustment Work performed by Developer or a Utility  
27 Company shall comply with the Contract Documents. Developer shall coordinate,  
28 monitor, and otherwise undertake the necessary efforts to cause Utility Companies  
29 performing Utility Adjustment Work to perform such work in accordance with the Project  
30 Schedule, in coordination with the Work, and in compliance with the standards of design  
31 and construction and other applicable requirements specified in the Contract Documents.  
32 However, regardless of the arrangements made with the Utility Companies and except as  
33 otherwise provided in Article 13, Developer shall continue to be the responsible party to  
34 ADOT for timely performance of all Utility Adjustment Work in accordance with the Project  
35 Schedule.

### 36 **5.4.2 Utility Memoranda of Understanding; Utility Agreements; SRP Utilities**

37 **5.4.2.1** In performing the Utility Adjustments, Developer shall comply  
38 with Section 107.15.04.04.02, Utility Agreements, of the Technical Provisions.

39 **5.4.2.2** Except as provided in Section 107.15.04.04.02 of the  
40 Technical Provisions, for all Utility Adjustments, Developer is responsible for preparing,

1 negotiating, and entering into instruction-specific, construction-detailed Utility  
2 Agreements with all Utility Companies, regardless of whether the Utility Companies are  
3 identified in the Technical Provisions or Reference Information Documents. Utility  
4 Agreements shall comply with Section 107.15.04.04.02, Utility Agreements, of the  
5 Technical Provisions.

6 **5.4.2.3** ADOT agrees to cooperate, at its own cost, as reasonably  
7 requested by Developer in pursuing Utility Agreements, including attendance at  
8 negotiation sessions and review of Utility Agreements. Developer shall keep ADOT  
9 informed of the status of any such negotiations and shall deliver to ADOT, within ten days  
10 after execution, a true and complete copy of each Utility Agreement entered into by  
11 Developer.

12 **5.4.2.4** ADOT shall not be a party to Utility Agreements to which  
13 Developer is a party, and Developer shall cause each Utility Agreement to expressly  
14 provide that ADOT will have no liability under the Utility Agreement unless and until ADOT  
15 receives a written assignment of the Developer's interests in the Utility Agreement and  
16 assumes in writing Developer's obligations thereunder; provided, however, that  
17 Developer shall cause the Utility Agreements to designate ADOT as an intended third-  
18 party beneficiary thereof and to permit assignment of Developer's right, title, and interest  
19 thereunder to ADOT without necessity for Utility Company consent. Developer shall not  
20 enter into any agreement with a Utility Company that purports to bind ADOT in any way.

21 **5.4.2.5** If a Utility Company has proper Prior Rights Documentation in  
22 connection with a Utility Adjustment or otherwise claims that it has Prior Rights  
23 Documentation concerning real property affected by a Utility Adjustment, then Developer  
24 shall follow the process set forth in Section 107.15.04.04.01, Prior Rights Determination,  
25 and Section 107.15.04.04.02, Utility Agreements, of the Technical Provisions. In  
26 accordance with Section 107.15.04.04.02 of the Technical Provisions, ADOT will enter  
27 into a separate Utility Agreement between ADOT and the Utility Company solely for the  
28 purpose of acknowledging the Utility Company's Prior Rights Documentation, and shall  
29 enter this agreement within 90 days of the date on which ADOT determines that the Utility  
30 Company has proper Prior Rights Documentation.

31 **5.4.2.6** If Developer has prepared and negotiated an instruction-  
32 specific, construction-detailed Utility Agreement with a Utility Company and such Utility  
33 Company refuses to enter into the Utility Agreement with Developer but is willing to enter  
34 into the Utility Agreement with ADOT, ADOT will enter into the Utility Agreement directly  
35 with the Utility Company and delegate its obligations to Developer, in which case  
36 Developer shall accept such delegation and assume such obligations.

37 **5.4.2.7** Developer shall be solely responsible for the terms and  
38 conditions of all Utility Agreements into which it enters or for which it assumes obligations.  
39 Developer shall comply with and timely perform all obligations imposed on Developer by  
40 any Utility Agreement to which it is a party or which it assumes. Developer shall indemnify  
41 and hold harmless ADOT if ADOT incurs any costs whatsoever due to Developer's non-

1 compliance with a Utility Agreement to which Developer is a party or of which Developer  
2 assumes obligations.

3 **5.4.2.8** Developer shall ensure that the Utility Adjustment Work is  
4 completed in accordance with the Contract Documents, regardless of the nature or  
5 provisions of the Utility Agreements and regardless of whether Developer or its  
6 Subcontractors, or the Utility Company or its contractors, performs the Utility Adjustment  
7 Work.

8 **5.4.2.9** If a conflict occurs between the terms of a Utility Agreement  
9 and those of the Contract Documents, the terms that establish the higher quality, manner  
10 or method of performing Utility Adjustment Work, establish better Good Industry Practice,  
11 or use more stringent standards, shall prevail between Developer and ADOT. If the  
12 foregoing criteria are not met by the conflicting Utility Agreement or otherwise not relevant  
13 to the terms at issue, then the Contract Documents shall prevail, unless expressly  
14 provided otherwise in the Contract Documents.

15 **5.4.2.10** Notwithstanding the foregoing, with respect to Utility  
16 Adjustments to facilities owned by SRP ("SRP Utility Adjustment Work"), Developer shall  
17 coordinate with SRP and shall perform all work associated with preparing the Site for  
18 such SRP Utility Adjustment Work in accordance with Section 107.15.04.04.04 of the  
19 Technical Provisions. Developer shall perform potholes at the request of SRP in  
20 accordance with Section 107.15.05.02 of the Technical Provisions.

21 **5.4.2.11** To the extent that SRP performs SRP Utility Adjustment Work,  
22 subject to Section 5.4.4.9, Developer may invoice ADOT for SRP's actual costs (including  
23 taxes and bonds) of the SRP Utility Adjustment Work plus an additional 5% markup. With  
24 respect to SRP Utility Adjustment Work performed by SRP, this Section 5.4.2.11  
25 supersedes any other inconsistent provision of the Contract Documents with respect to  
26 payment for Utility Adjustment Work performed by a Utility Company. Payment for SRP  
27 Utility Adjustment Work performed by SRP shall be in accordance with Section 12.2.3.  
28 The lump-sum Contract Price in Section 12.1.1 shall be subject to adjustment based on  
29 the actual invoiced amount of SRP Utility Adjustment Work.

### 30 **5.4.3 Utility Adjustment Requirements**

31 Each Utility Adjustment (whether performed by Developer or by the Utility  
32 Company) shall comply with the Adjustment Standards, including applicable changes in  
33 Adjustment Standards. If Section 107.15.02.01, Applicable Standards, of the Technical  
34 Provisions does not provide any terms or conditions to limit a Utility Company's changes  
35 in Adjustment Standards, then Developer shall be solely responsible for negotiating any  
36 such terms and conditions in the corresponding Utility Agreement. In addition, all Utility  
37 Adjustment Work shall comply with all applicable Laws, the applicable Utility  
38 Agreement(s), and all other requirements specified in Section 107.15.01, General  
39 Requirements, and Section 107.15.02, Administrative Requirements, of the Technical  
40 Provisions.



1           **5.4.4 Utility Adjustment Risk**

2           **5.4.4.1**       Except with respect to Developer's rights to claim a Relief  
3 Event for Utility Company Delays pursuant to Section 13.4.3 or for Inaccurate Utility  
4 Information pursuant to Section 13.4.4, Developer shall not be entitled to an increase in  
5 the Contract Price, a Completion Deadline adjustment or any other Claim or Relief Event  
6 related to the Utility Adjustment Work, inaccuracy of the Utility Information or Utilities  
7 located within or outside the Project ROW or otherwise impacted by, or having an impact  
8 on, the Project or the Work.

9           **5.4.4.2**       Developer shall: (a) perform at its own cost (subject to  
10 payments out of the Contract Price) the Utility Adjustment Work itself, if permitted by the  
11 Utility Company (except that any assistance provided by any Developer-Related Entity to  
12 the Utility Company in the Utility's acquisition of Replacement Utility Property Interests  
13 shall be provided outside of the Work); or (b) reimburse (out of the Contract Price or  
14 otherwise) the Utility Company for its Utility Adjustment Work within the time and in the  
15 manner required by the applicable Utility Agreement. However, Developer has no  
16 obligation to reimburse a Utility Company for Utility Adjustment costs for any Service Line  
17 Adjustment for which the affected property owner has been compensated in connection  
18 with Project ROW acquisition. Developer is solely responsible for collecting directly from  
19 the Utility Company any reimbursement due to Developer for Betterment costs or other  
20 costs incurred by Developer for which the Utility Company is responsible under applicable  
21 Law.

22           **5.4.4.3**       For each Utility Adjustment, the eligibility of Utility Company  
23 costs (both indirect and direct) for reimbursement by Developer, as well as the  
24 determination of any Betterment or other costs due to Developer, shall be established in  
25 accordance with applicable Law, the applicable Utility Agreement(s), and the Contract  
26 Documents.

27           **5.4.4.4**       For each Utility Adjustment, Developer shall compensate the  
28 Utility Company for each Existing Utility Property Interest relinquished, to the extent  
29 ADOT would be required to do so by applicable Law or to the extent required by the  
30 applicable Utility Agreement and provided that ADOT has approved the Utility Company's  
31 claim for compensation. Developer is advised that in some cases reimbursement of the  
32 Utility Company's acquisition costs for a Replacement Utility Property Interest will satisfy  
33 this requirement.

34           **5.4.4.5**       ADOT may declare a Developer Default under clause (h) of  
35 Section 18.1.1 if Developer breaches any covenant in this Section 5.4.4 respecting  
36 reimbursement of Utility Company costs.

37           **5.4.4.6**       If for any reason Developer is unable to collect any amounts  
38 due to Developer from any Utility Company, then: (a) ADOT will have no liability for such  
39 amounts; (b) Developer shall have no right to collect such amounts from ADOT or to offset  
40 such amounts against amounts otherwise owing from Developer to ADOT; and (c)

1 Developer shall have no right to stop Work or to exercise any other remedies against  
2 ADOT on account of such failure to pay.

3 **5.4.4.7** If any Local Jurisdiction is participating in any portion of Utility  
4 Adjustment costs, Developer shall coordinate with ADOT and such Local Jurisdiction  
5 regarding accounting for and approval of those costs.

6 **5.4.4.8** Developer shall maintain a complete set of records for the  
7 costs of each Utility Adjustment (whether incurred by Developer or by the Utility  
8 Company), in a format compatible with the estimate attached to the applicable Utility  
9 Agreement and in detail sufficient to permit an audit. Developer shall obtain from the Utility  
10 Company a complete set of records of the Utility Company's costs incurred for such Utility  
11 Adjustment Work. For both Utility Company costs and Developer costs, the totals for each  
12 cost category shall be shown in such manner as to permit comparison with the categories  
13 stated on the estimate. Developer also shall indicate in these records the source of funds  
14 used for each Utility Adjustment. All records with respect to Utility Adjustment Work shall  
15 comply with the record keeping and audit requirements of the Contract Documents and  
16 applicable Law, including 23 C.F.R. Part 645, Subpart A.

17 **5.4.4.9** If Developer changes its design or construction after a Utility  
18 Adjustment has been commenced or completed, and the change in design or construction  
19 results in the need for additional Utility Adjustment Work, Developer shall be responsible  
20 for the cost of design and construction of the additional Utility Adjustment Work.  
21 Developer shall not be entitled to an increase in the Contract Price, Completion Deadline  
22 adjustment or any other Claim arising from such additional Utility Adjustment Work.

23 **5.4.4.10** If Developer causes the City of Phoenix to incur greater than  
24 800 inspection hours, as described in TP Attachment 107-2, Developer shall be  
25 responsible for the cost of the City of Phoenix's additional inspection hours. The costs of  
26 the additional hours shall be deducted from Developer's progress payments hereunder.  
27 Developer shall not be entitled to an increase in the Contract Price, a Completion  
28 Deadline adjustment or any other Claim due to such additional inspection time.

29 **5.4.5 FHWA Utility Requirements**

30 **5.4.5.1** Unless ADOT advises Developer otherwise:

31 (a) The Project is subject to 23 C.F.R. Part 645 Subpart A  
32 (including its requirements as to Plans, specifications, estimates, charges, tracking of  
33 costs, credits, billings, records retention, and audit) and FHWA's associated policies;

34 (b) Utility Agreements for Utilities shall incorporate by reference  
35 23 C.F.R Part 645 Subparts A and B and assign the obligations arising thereunder;

36 (c) Developer shall comply (and shall require the Utility  
37 Companies to comply) with 23 C.F.R Part 645 Subparts A and B as necessary for any  
38 Utility Adjustment costs to be eligible for reimbursement from any federal financing or  
39 funding; and

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

9 **5.4.5.2** Developer acknowledges, however, that Developer will not  
10 have any share in any reimbursement from FHWA or other federal financing or funding  
11 that ADOT may receive on account of Utility Adjustments.

## 12 **5.4.6 Betterments and Utility Company Projects**

13 **5.4.6.1** Developer shall address any requests by Utility Companies  
14 that Developer design or construct Betterments or Utility Company Projects. Developer  
15 may, but is not obligated to, design and construct Betterments or Utility Company  
16 Projects. Any Betterment performed as part of a Utility Adjustment, whether by Developer  
17 or by the Utility Company, shall be subject to the same standards and requirements as  
18 Utility Adjustments included in the Work, and shall be addressed in the appropriate Utility  
19 Agreement. Developer shall perform any work on a Utility Company Project only by  
20 separate contract outside of the Work, and such work shall be subject to Section 5.4.9,  
21 Applications for Utility Permits.

22 **5.4.6.2** Under no circumstances shall Developer proceed with any  
23 Betterment or Utility Company Project that is incompatible with the Project in its final  
24 configuration or is not in compliance with applicable Law, the Governmental Approvals or  
25 the Contract Documents, including the Completion Deadlines. Developer shall be liable  
26 to ADOT for any Betterments or Utility Company Projects that Developer undertakes and  
27 that adversely affect the Project.

28 **5.4.6.3** Except as provided in Section 5.4.9, Developer shall not be  
29 entitled to an increase in the Contract Price, a Completion Deadline adjustment or any  
30 other Claim in connection with any Betterment or Utility Company Project, whether  
31 performed by Developer or by the Utility Company.

32 **5.4.6.4** Developer shall indemnify ADOT in the event ADOT incurs  
33 any costs, including attorney's fees, arising from or in connection with any Betterment.

34 **5.4.6.5** Developer shall indemnify ADOT in the event that ADOT  
35 incurs any costs, including attorney's fees, arising from or in connection with any Utility  
36 Company Project that Developer accepts in response to a request by a Utility Company.

37 **5.4.6.6** Where a Utility Company performs a Utility Company Project,  
38 including where ADOT issues a permit in accordance with Section 5.4.9, Developer shall  
39 indemnify ADOT in the event that ADOT incurs any costs, including attorney's fees,

1 arising from or in connection with such Utility Company Project only to the extent of  
2 Developer's negligence, recklessness, or intentional act or omission.

### 3 **5.4.7 Failure of Utility Companies to Cooperate**

4 **5.4.7.1** Developer shall use diligent efforts to obtain the cooperation  
5 of each Utility Company as necessary for Utility Adjustments. Developer shall notify  
6 ADOT immediately if Developer becomes aware of any failure or refusal of a Utility  
7 Company to cooperate that, if it continues, could ripen into a Utility Company Delay,  
8 including if:

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

12 (b) Developer reasonably believes for any other reason that any  
13 Utility Company will not undertake or permit a Utility Adjustment in a manner consistent  
14 with the timely completion of the Project or in accordance with Law, the Governmental  
15 Approvals or the Contract Documents;

16 (c) Developer becomes aware that any Utility Company is not  
17 cooperating in a timely manner to provide agreed-upon or necessary work, reviews or  
18 approvals; or

19 (d) Any other dispute arises between Developer and a Utility  
20 Company with respect to the Project, despite Developer's diligent efforts to obtain such  
21 Utility Company's cooperation or otherwise resolve such dispute.

22 (e) Developer's notice may include a request that ADOT assist in  
23 resolving the dispute or in otherwise obtaining the Utility Company's timely cooperation.  
24 Developer shall provide ADOT with such information as ADOT requests regarding the  
25 Utility Company's failure to cooperate and the effect of any resulting delay on the Project  
26 Schedule. After delivering to ADOT any notice or request for assistance, Developer shall  
27 continue to use diligent efforts to pursue the Utility Company's cooperation.

28 **5.4.7.2** If Developer requests ADOT's assistance pursuant to Section  
29 5.4.7.1, then, subject to Section 5.4.7.3, the following provisions shall apply:

30 (a) Developer shall provide evidence reasonably satisfactory to  
31 ADOT that: (i) the subject Utility Adjustment is necessary; (ii) the time for completion of  
32 the Utility Adjustment in the Project Schedule was, in its inception, a reasonable amount  
33 of time for completion of such work, including scheduling sufficient time for Utility  
34 Company reviews of Developer's design submittals; (iii) Developer has made diligent  
35 efforts to obtain the Utility Company's cooperation; and (iv) the Utility Company is not  
36 cooperating as evidenced by any circumstance described in Section 5.4.7.1 (the  
37 foregoing clauses (a)(i) through (iv) are referred to herein as the "conditions to  
38 assistance").

1 (b) Following ADOT's receipt of satisfactory evidence, ADOT will  
2 take reasonable measures to assist Developer in obtaining the cooperation of the Utility  
3 Company or resolving the dispute; provided, however, that ADOT will have no obligation  
4 to prosecute eminent domain or other legal proceedings, or to exercise any other remedy  
5 available to it under applicable Law or existing contract, unless ADOT elects to do so in  
6 its good faith discretion.

7 (c) If ADOT holds contractual or property rights that might be  
8 used to enforce the Utility Company's obligation to cooperate, and if ADOT elects in its  
9 good faith discretion not to exercise those rights, and if such rights are assignable, then  
10 ADOT may assign those rights to Developer upon Developer's request; provided,  
11 however, that such assignment shall be without any representation or warranty as to the  
12 enforceability or effect of such rights.

13 (d) Any assistance ADOT provides shall not relieve Developer of  
14 its sole responsibility for satisfactory compliance with its obligations respecting Utility  
15 Adjustment Work and timely completion thereof, except as otherwise expressly set forth  
16 herein.

17 **5.4.7.3** If ADOT objects in writing to a request for assistance made  
18 pursuant to Section 5.4.7.1 based on Developer's failure to satisfy one or both of the  
19 conditions to assistance described in Sections 5.4.7.2(a)(i) and (ii), then Developer shall  
20 take such action as is appropriate to satisfy the condition(s) and shall then have the right  
21 to submit another request for assistance on the same subject matter. If ADOT objects in  
22 writing to a request for assistance made pursuant to Section 5.4.7.1 based on Developer's  
23 failure to satisfy one or both of the conditions to assistance described in Sections  
24 5.4.7.2(a)(iii) and (iv), then Developer shall take such action as Developer deems  
25 advisable during the ten days following receipt of ADOT's objection to obtain the Utility  
26 Company's cooperation and shall then have the right to submit another request for  
27 assistance on the same subject matter. Notwithstanding the foregoing, no resubmittal will  
28 be accepted unless all of ADOT's objections have been addressed in accordance with  
29 the preceding two sentences. This process shall be followed until Developer succeeds in  
30 obtaining the Utility Company's cooperation or in otherwise resolving the dispute or until  
31 ADOT determines, based on evidence Developer presents, that the conditions to  
32 assistance have been satisfied. Developer shall have the right to submit a dispute  
33 concerning the reasonableness of ADOT's determination for resolution under the Dispute  
34 Resolution Procedures.

35 **5.4.7.4** In certain cases where a Utility Company is not cooperating  
36 with Developer or ADOT, ADOT may, in its sole discretion and where applicable Law  
37 authorizes ADOT to take unilateral action, issue a Directive Letter directing Developer to  
38 proceed with a Utility Adjustment without a Utility Agreement or other written consent by  
39 the Utility Company. If ADOT directs Developer to perform work pursuant to this  
40 Section 5.4.7.4, then Developer, without the right to an increase in the Contract Price, a  
41 Completion Deadline adjustment or any other Claim, shall proceed with such work as if  
42 Developer has entered into a Utility Agreement providing for Developer to perform such  
43 work, and shall perform such work in accordance with applicable Adjustment Standards

1 and the requirements of the Contract Documents otherwise applicable to Developer's  
2 performance of Utility Adjustment Work.

3 **5.4.8 Security for Utility Adjustment Costs; Insurance**

4 **5.4.8.1** Developer shall satisfy all requirements in Section  
5 107.15.04.04.02 of the Technical Provisions and Utility Agreements to provide security  
6 for reimbursement of Utility Adjustment costs to which the Utility Company is entitled, in  
7 form, type and amount, and on terms provided by Section 107.15.04.04.02.G of the  
8 Technical Provisions and Utility Agreements.

9 **5.4.8.2** Developer shall satisfy all requirements in Section  
10 107.15.04.04.02.H of the Technical Provisions and Utility Agreements to provide liability  
11 insurance for the protection of the Utility Company.

12 **5.4.9 Applications for Utility Permits**

13 **5.4.9.1** Utility Companies may apply to ADOT for utility permits and  
14 other agreements and approvals to install new Utilities that would cross or longitudinally  
15 occupy the Project ROW, or to modify, upgrade, relocate or expand existing Utilities within  
16 the Project ROW for reasons other than to accommodate the Project. The provisions of  
17 Sections 5.4.9.2 through 5.4.9.5 and Section 107.15.06.06 of the Technical Provisions  
18 shall govern such Utility Company applications. Except as provided in this Section 5.4.9,  
19 no work or services required of Developer, and no accommodation of new Utilities or of  
20 modifications, upgrades, relocations or expansions of existing Utilities, pursuant hereto,  
21 shall entitle Developer to an increase in the Contract Price, a Completion Deadline  
22 adjustment or other Claim or relief.

23 **5.4.9.2** For all Utility Company applications described in  
24 Section 5.4.9.1 and pending as of or submitted after the Effective Date, Developer shall:  
25 (a) furnish to the applicants the most recent pertinent Project design information or  
26 Record Drawings, as applicable; (b) assist the applicants with information regarding the  
27 location of other proposed and existing Utilities; and (c) use commercially reasonable  
28 efforts to coordinate work schedules with the applicants so that the applicants' activities  
29 do not interfere with the Project Schedule. Developer shall keep records of its costs  
30 related to new Utilities separate from other costs.

31 **5.4.9.3** Developer shall assist ADOT in deciding whether to approve  
32 a permit or other agreement or approval applied for by a Utility Company. Within ten  
33 Business Days after receiving an application for a utility permit or other agreement or  
34 approval, Developer shall analyze the application and provide to ADOT a  
35 recommendation (together with supporting analysis) as to whether it should be approved,  
36 denied, or approved subject to conditions. Developer shall limit the grounds for its  
37 recommendation of denial or conditions to approval to (a) the grounds (as ADOT  
38 communicates to Developer from time to time) on which ADOT is legally entitled to deny  
39 or condition approval of the application, or (b) the extent that approval would result in a  
40 delay to the Critical Path.

1                   **5.4.9.4**       To the extent permitted by Law, ADOT will impose conditions  
 2 in any approved permit or other agreement or approval: (a) prohibiting the Utility  
 3 Company from interfering with Developer’s schedule for the Work or Developer’s  
 4 performance of the Work; (b) requiring the Utility Company to compensate Developer for  
 5 the adverse impact to Developer of any prohibited interference; (c) requiring the Utility  
 6 Company and its contractors to cooperate and coordinate with Developer and its  
 7 Subcontractors; and (d) requiring the Utility Company to adhere to Developer’s safety  
 8 standards and procedures whenever the Utility Company or its subcontractors are in any  
 9 active work zone of Developer or its Subcontractors.

10                   **5.4.9.5**       If Developer recommends denial of the utility permit on the  
 11 ground that issuance thereof and design and construction of the subject utility would result  
 12 in a delay to the Critical Path, and ADOT issues the utility permit, Developer may seek  
 13 relief for such issuance as an ADOT-Directed Change, provided that Developer  
 14 establishes that all other requirements for issuance of an ADOT-Directed Change are  
 15 met.

16                   **5.4.10 Assignment of Rights against Utility Companies**

17                   In the event that Developer is damaged by the wrongful actions or inactions of a  
 18 Utility Company within the Project ROW, upon receipt of a written request from Developer,  
 19 ADOT may, in its sole discretion, assign to Developer ADOT’s rights of recovery, as such  
 20 may exist, under any existing agreement between ADOT and a Utility Company, including  
 21 any utility permits, utility relocation agreements, or other agreements.

22                   **5.5 Use of Designated ADOT Property**

23                   Subject to any restrictions stated in Section 118.05 of the Technical Provisions,  
 24 ADOT will make certain property it owns available for use for Developer’s Temporary  
 25 Work Areas on the terms and conditions set forth below.

26                   **5.5.1** The properties that will be made available are the following:

<b>Parcel APN</b>	<b>Description</b>	<b>ADOT Parcel No.</b>
122-24-002D	Northwest of Salt River bridge	N/A
122-08-047 122-06-046A 122-08-046B 122-08-045 122-08-044	Along E Illini Street	7-10629 7-10630 7-10716 7-10631
123-28-074A	Northwest of Southern and I-10	7-10704
N/A	Parking Lot at Maricopa County Community College	7-11761

1           **5.5.2** If ADOT intends to convey any of the properties listed above, to lease it to  
2 another Person, or to use it for its own purposes before Developer elects to use it, ADOT  
3 will give Developer 30 days' prior written notice of such intent. If Developer delivers to  
4 ADOT written notice electing to use the property within such 30-day period, then ADOT  
5 will not convey or lease the property or use it for its own purposes. If Developer does not  
6 deliver such written notice within such 30-day period, or thereafter does not execute and  
7 deliver an encroachment permit (in accordance with Section 107.15.05.07, ADOT  
8 Encroachment Permits, of the Technical Provisions), occupancy agreement, lease  
9 agreement or other documentation required by ADOT within 30 days after receiving the  
10 same from ADOT, then the property thereupon shall cease to be available to Developer  
11 for use, unless ADOT in its sole discretion decides to again make it available.

12           **5.5.3** Developer may exercise its right to use a property by delivering to ADOT  
13 written notice electing to use the property. The written notice shall identify the property,  
14 the use(s), the date Developer is willing to take possession and use, and duration of use.

15           **5.5.4** If Developer elects to use a property, ADOT will conduct an inspection of  
16 the property to document pre-existing conditions before Developer takes use and  
17 occupancy. Developer shall review and comment on the pre-existing conditions  
18 documentation, and the Parties shall sign such documentation, after resolution of any  
19 comments, to create a record of pre-existing conditions. Developer shall be obligated to  
20 return the property to ADOT upon cessation of its use and possession in a condition at  
21 least equal to the pre-existing conditions as set forth in the signed documentation of pre-  
22 existing conditions.

23           **5.5.5** If Developer elects to use the property as a Developer's Temporary Work  
24 Area during construction, then ADOT and Developer shall promptly enter into a rent-free  
25 encroachment permit, entry agreement or other documentation as required by ADOT.  
26 Developer shall be obligated to vacate the property and return possession to ADOT not  
27 later than the date of Final Acceptance; provided that if that date is beyond the Final  
28 Acceptance Deadline, Developer shall be obligated to pay fair market rental value as  
29 determined by ADOT for the period of use beyond the Final Acceptance Deadline.

30           **5.5.6** Developer shall take the property as is, with all faults, defects, and  
31 conditions, known or unknown. ADOT shall have no obligation to provide utility services  
32 to, or maintain utility services for, any property. Developer shall have the responsibility to  
33 maintain the property in a good and safe condition and in accordance with all Laws and  
34 Governmental Approvals.

35           **5.5.7** For guidance in determining the procedures for granting use of a property,  
36 documenting the rights of use, and determining rent, terms and conditions, ADOT will  
37 refer to Chapter 3, "Renting and Leasing Operations" in the ADOT ROW Manual included  
38 in the Reference Information Documents as:

39 [https://apps.azdot.gov/files/row/Manuals/Right\\_of\\_Way\\_Property\\_Management\\_Manual](https://apps.azdot.gov/files/row/Manuals/Right_of_Way_Property_Management_Manual.pdf)  
40 [.pdf](https://apps.azdot.gov/files/row/Manuals/Right_of_Way_Property_Management_Manual.pdf)



1 **ARTICLE 6.**  
2 **DESIGN AND CONSTRUCTION**

3 **6.1 General Obligations of Developer**

4 In addition to performing all other requirements of the Contract Documents,  
5 Developer shall perform the following obligations.

6 **6.1.1** Developer shall furnish all design and other services, provide all materials,  
7 equipment and labor, and undertake all efforts necessary or appropriate (excluding only  
8 those materials, services, and efforts that the Contract Documents expressly specify will  
9 be undertaken by ADOT or other Persons) to design and construct the Project, and  
10 maintain the Project during construction, in accordance with the requirements of the  
11 Contract Documents so as to achieve Substantial Completion and Final Acceptance by  
12 the applicable Completion Deadlines.

13 **6.1.2** Developer shall provide an ADOT-approved Project Manager who: (a) will  
14 have full responsibility for the prosecution of the Work; (b) will act as agent and be a single  
15 point of contact for all matters on behalf of Developer; (c) will be present (or its approved  
16 designee will be present) at the Site at all times that Work is performed, and (d) will be  
17 available to respond to ADOT or ADOT's Authorized Representatives.

18 **6.1.3** Developer shall comply with, and require that all Subcontractors and  
19 Developer-Related Entities comply with, all requirements of all Laws applicable to the  
20 Work.

21 **6.1.4** Developer shall cooperate with ADOT, the General Engineering Consultant,  
22 Utility Companies, and Governmental Entities with jurisdiction in all matters relating to the  
23 Work, including their review, inspection, and oversight of the design and construction of  
24 the Project and the design and construction of the Utility Adjustments.

25 **6.1.5** Developer shall use commercially reasonable efforts to mitigate delay to  
26 design and construction of the Project and mitigate damages due to delay in all  
27 circumstances, to the extent possible, including by re-sequencing, reallocating, or  
28 redeploying Developer's and its Subcontractors' forces to other work, as appropriate.

29 **6.1.6** Developer shall obtain and pay the cost of obtaining and maintaining all  
30 Governmental Approvals that are required in connection with the Project and not obtained  
31 or maintained by ADOT. Developer shall not be entitled to an increase in the Contract  
32 Price, a Completion Deadline adjustment or any other Claim associated with or arising  
33 from Developer's costs or efforts to obtain and maintain all Governmental Approvals that  
34 are required for the Project.

35 **6.1.7** Developer shall be responsible for all costs or payments allocated to  
36 Developer in the Contract Documents.

37

1 **6.2 Performance, Design, and Construction Standards; Deviations**

2 **6.2.1** Developer shall construct the Project and Utility Adjustments included in  
3 the Construction Work as designed, free from Defects, and using and incorporating  
4 materials of good quality. Additionally, Developer shall furnish all aspects of the Design  
5 Work, Design Documents, and Construction Work in accordance with: (a) the  
6 requirements, terms, and conditions set forth in the Contract Documents; (b) the Project  
7 Schedule; (c) all Laws; (d) the requirements, terms, and conditions set forth in all  
8 Governmental Approvals; (e) the ADOT-approved Project Management Plan and all  
9 component plans prepared or to be prepared thereunder; (f) the Safety Management  
10 Plan; (g) all other applicable safety, environmental, and other requirements, taking into  
11 account the Project ROW limits and other constraints affecting the Project; and (h) Good  
12 Industry Practice.

13 **6.2.2** Developer also shall construct the Project and Utility Adjustments in  
14 accordance with (a) the approved RFC Submittals, and (b) the Construction Documents.

15 **6.2.3** The Project design and construction shall be subject to certification  
16 pursuant to the procedure contained in the ADOT-approved Quality Management Plan.

17 **6.2.4** Developer may apply for ADOT approval of Deviations from applicable  
18 Technical Provisions regarding the design or construction of the Project that have no  
19 impact on the cost or time to perform the Work. The Deviation approval process shall be  
20 as follows:

21 **6.2.4.1** All applications for Deviations shall be in writing. The writing  
22 shall identify the section of the Technical Provisions from which Developer seeks the  
23 Deviation, the current language of the section of the Technical Provisions, Developer's  
24 proposed new language, and other information sufficient for ADOT to evaluate the  
25 proposed Deviation.

26 **6.2.4.2** ADOT will consider, in its sole discretion, but have no  
27 obligation to approve, any such application. Developer shall bear the burden of  
28 establishing that the Deviation sought constitutes sound and safe engineering consistent  
29 with Good Industry Practice, achieves ADOT's applicable safety standards and criteria,  
30 and satisfies the purpose or intent of the applicable Technical Provision(s).

31 **6.2.4.3** No Deviation shall be deemed approved or be effective unless  
32 and until stated expressly in a writing signed by ADOT's Authorized Representative.

33 **6.2.4.4** ADOT's lack of issuance of an approval for any Deviation  
34 within ten Business Days after Developer applies therefor shall be deemed a disapproval  
35 of such application.

36 **6.2.4.5** ADOT's denial or disapproval of a requested Deviation shall  
37 be final and not subject to the Dispute Resolution Procedures.

1                   **6.2.4.6**        Except as provided in Section 6.2.6, nothing in the Contract  
2 Documents shall be construed as altering, expanding or otherwise affecting the process  
3 for acceptance of Deviations in this Section 6.2.4.

4                   **6.2.4.7**        The approval of a Deviation by ADOT shall not relieve  
5 Developer of its obligations with respect to any other component of the Contract  
6 Documents, and shall not operate as a waiver by ADOT of the right to seek relief from  
7 Developer, including by asserting a Claim against Developer, for any failure of  
8 Developer’s design or construction to comply with any other requirement of the Contract  
9 Documents. Developer shall be responsible for ensuring that any Deviation does not  
10 affect Developer’s ability to comply with any other requirement of the Contract  
11 Documents. Developer shall not be entitled to an increase in the Contract Price, a  
12 Completion Deadline adjustment, or any other Claim arising out of Developer’s inability  
13 to comply with any other provision of the Contract Documents due to an approved  
14 Deviation.

15                   **6.2.5**        Developer shall be responsible for all costs associated with implementation  
16 of a Deviation. Developer shall not be entitled to an increase in the Contract Price,  
17 Completion Deadline adjustment or any other Claim arising from an approved Deviation.

18                   **6.2.6**        If a proposed Deviation would reduce Developer’s cost of performing the  
19 Work or result in time savings, Developer shall submit the request as a Change Request  
20 in accordance with Section 14.2. ADOT’s approval or disapproval of Developer’s request  
21 shall be in accordance with Section 14.2. Any cost and time savings shall be allocated  
22 between ADOT and Developer as provided in Section 14.2.

23                   **6.2.7**        Except as set forth in Section 1.5 or 6.2.4, any changes to the Technical  
24 Provisions shall be subject to the Supplemental Agreement process in accordance with  
25 Article 14.

26                   **6.3    Changes in Basic Configuration**

27                   **6.3.1**        Developer shall not make any change in the Basic Configuration of the  
28 Project, except as approved by ADOT in its sole discretion and authorized by a  
29 Supplemental Agreement in accordance with Article 14. A Supplemental Agreement is  
30 required regardless of the reason underlying the change and regardless of whether the  
31 change increases, decreases or has no effect on Developer’s costs.

32                   **6.3.2**        If a Change Request results in a change in the Basic Configuration, and  
33 cost or time savings result from such Change Request, ADOT shall be entitled to 100%  
34 of such cost and time savings. ADOT will obtain its share of the cost savings in the manner  
35 described in Section 14.1.5.3 and the time savings in the manner described in Section  
36 14.1.5.4.

37

38

1 **6.4 Design Requirements; Responsibility for Design**

2 **6.4.1 Design Implementation and Submittals**

3 **6.4.1.1** Developer, through the qualified and licensed design  
4 professionals identified in Exhibit 9, Section 114.03 of the Technical Provisions, and  
5 Developer’s Project Management Plan, shall prepare designs, Plans, and specifications  
6 in accordance with the Contract Documents. Developer shall cause the Engineers of  
7 Record, as applicable, for the Project to sign and seal all RFC Submittals.

8 **6.4.1.2** Developer shall deliver to ADOT accurate and complete  
9 duplicates of all interim, revised, and final Design Documents (including the RFC  
10 Submittals), and Construction Documents within seven days after Developer completes  
11 preparation thereof. Developer shall construct the Project in accordance with the  
12 approved RFC Submittals and the Construction Documents.

13 **6.4.2 Developer Responsibility for Design**

14 Developer agrees that it has full responsibility for the design of the Project and that  
15 Developer will furnish the design of the Project, notwithstanding that aspects of the  
16 Schematic Design have been provided to Developer as a preliminary basis for Developer’s  
17 design. Developer specifically acknowledges and agrees that:

18 (a) Developer is not entitled to rely on: (i) the Schematic Design except  
19 as specified otherwise in Section 6.4.3.2; or (ii) any other documents or information  
20 provided by ADOT, except to the extent specifically permitted in the Contract Documents;

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

23 (c) The Technical Provisions take precedence over the Schematic  
24 Design, and that the Schematic Design may contain information that is not consistent with  
25 the Technical Provisions;

26 (d) Developer shall not be entitled to an increase in the Contract Price,  
27 a Completion Deadline adjustment, or any other Claim arising from Errors in the  
28 Schematic Design or any inconsistencies between the Technical Provisions and the  
29 Schematic Design, except only for the right to a Supplemental Agreement with respect to  
30 Necessary Schematic ROW Changes as set forth in Section 13.4.1, and subject to the  
31 requirements and limitations of Article 13;

32 (e) Developer’s warranties and indemnities hereunder cover Errors in  
33 the Project even though they may arise from or be related to Errors in the Schematic  
34 Design; and

35 (f) Developer is responsible for verifying all calculations and quantity  
36 takeoffs contained in the RFP Documents or otherwise provided by ADOT. Developer  
37 shall not be entitled to an increase in the Contract Price, a Completion Deadline

1 adjustment or any other Claim based on an Error in any calculations or quantity takeoffs  
2 contained in the RFP Documents or otherwise provided by ADOT.

### 3 **6.4.3 Changes to Schematic Design and Schematic ROW**

4 **6.4.3.1** Developer acknowledges and agrees that the requirements  
5 and constraints set forth in the Contract Documents and in the Governmental Approvals,  
6 as well as Site conditions, will impact Developer's ability to revise the concepts contained  
7 in the Schematic Design. Developer, however, may modify the Schematic Design without  
8 ADOT's prior written approval if the proposed modification:

9 (a) Meets the requirements of the Technical Provisions;

10 (b) Requires no revision, modification or amendment to the NEPA  
11 Approval, as determined in accordance with Section 119.02.06.01 of the Technical  
12 Provisions;

13 (c) Does not constitute: a Design Exception, Design Variance, or  
14 require adjustment to the Change of Access Report; and

15 (d) Does not deviate from the design concepts included in the  
16 Proposal.

17 **6.4.3.2** Developer may rely on the Schematic ROW limits, as shown  
18 on the Schematic Design, and acknowledges that it is feasible to design and develop the  
19 Basic Configuration within said Schematic ROW limits.

20 **6.4.3.3** Developer acknowledges that the Schematic Design is  
21 preliminary and subject to refinement through the Final Design process, and that  
22 Developer is not entitled to an increase in the Contract Price, a Completion Deadline  
23 adjustment or any other Claim in connection with changes in the Schematic Design,  
24 except as provided for Necessary Schematic ROW Changes to the extent allowed under  
25 Section 13.4.1.

## 26 **6.5 Cooperation with Other Contractors**

### 27 **6.5.1 Developer Duty of Cooperation**

28 **6.5.1.1** Developer acknowledges that ADOT and other Persons have  
29 awarded or plan to award contracts for construction and other work at or near the Site,  
30 and that other projects at or near the Site may be in various stages of design and  
31 construction. A list of such future contracts and projects is contained in Section 100.04.03  
32 of the Technical Provisions.

33 **6.5.1.2** Developer shall, and shall cause the Developer-Related  
34 Entities to, cooperate and coordinate the Work with other contractors, whether the  
35 contractors work for ADOT or other Persons, whose projects or work may affect the  
36 Project or the Work. Developer shall schedule and sequence the Work as reasonably

1 necessary to accommodate the projects and work of such contractors. Further, Developer  
2 shall conduct its Work and perform its obligations under the Contract Documents without  
3 interfering with or hindering the progress or completion of the projects or work being  
4 performed by other contractors.

5 **6.5.1.3** ADOT agrees to include in its contracts with other contractors  
6 entered into subsequent to the Effective Date, provisions similar to this Section 6.5.1,  
7 imposing a similar duty of cooperation among contractors.

## 8 **6.5.2 Lane Closures and Interference by Other Contractors**

9 **6.5.2.1** After Developer completes training as provided in Section  
10 700.06.04.05.01 of the Technical Provisions, ADOT will make its Event Reporting System  
11 available to Developer electronically, with read only access, so that Developer can track  
12 Lane Closure reservations by ADOT's other contractors. Developer understands and  
13 acknowledges that the reservation of Lane Closures via the Event Reporting System is  
14 on a first-come, first-served basis, that ADOT will protect the priority of Lane Closure  
15 reservations based on the time reservations are entered into the Event Reporting System,  
16 absent Emergency or other unusual circumstance, and that Lane Closures by other  
17 contractors elsewhere may constrain availability of Lane Closures by Developer on the  
18 Project. Accordingly:

19 (a) ADOT will protect from interference by ADOT's other  
20 contractors, and prioritize over conflicting Lane Closures requested by such other  
21 contractors, planned Lane Closures that Developer reserves on the Event Reporting  
22 System prior to ADOT's other contractors; and

23 (b) Developer shall have no right to ADOT's approval of Lane  
24 Closures that cannot be accommodated because of conflict with prior Lane Closure  
25 reservations by other contractors on the Event Reporting System.

26 **6.5.2.2** Provided that Developer adheres to its Project Schedule as  
27 disclosed to ADOT, ADOT will manage ADOT's other contractors to avoid their working  
28 simultaneously in Developer's work zones.

29 **6.5.2.3** Developer shall comply with the other restrictions concerning  
30 Lane Closures set forth in Section 700.06.04.05 of the Technical Provisions.

## 31 **6.5.3 Coordination with Utility Companies and Adjacent Property Owners**

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

35

36

1 **6.6 Substantial Completion; Punch List; Final Acceptance**

2 **6.6.1 Substantial Completion**

3 **6.6.1.1** ADOT will issue a written Certificate of Substantial  
4 Completion on the date that all the following conditions precedent to Substantial  
5 Completion have been met at all locations on the Site:

6 (a) All major safety features are installed and functional. For  
7 purposes of this Section, major safety features include shoulders, guardrails, striping and  
8 delineations, concrete traffic barriers, bridge railings, cable safety systems, metal beam  
9 guard fences, safety end treatments, terminal anchor sections, and crash attenuators;

10 (b) All required illumination is installed and functional;

11 (c) All required signs and signals are installed and functional;

12 (d) The need for temporary traffic controls or for Lane Closures  
13 at any time has ceased, except for temporary Lane Closures during hours of low traffic  
14 volume in accordance with and as permitted by the Transportation Management Plan  
15 solely to complete Punch List items;

16 (e) All lanes of traffic (including ramps, interchanges, overpasses,  
17 underpasses, collector-distributor roads, other crossings, and frontage roads) set forth in  
18 the Design Documents are in their final configuration and traffic can move unimpeded  
19 through the Project at the normal, posted speed;

20 (f) All required ITS systems are installed and functional, and all  
21 required ITS testing has been successfully completed in accordance with Section 700.07  
22 of the Technical Provisions;

23 (g) All Non-Conformance Reports (NCRs) have been fully  
24 resolved in accordance with the process specified in the Technical Provisions, and  
25 Developer has otherwise completed the Work in accordance with the Contract  
26 Documents and Design Documents, such that the Project is in a condition that it can be  
27 used for safe vehicular travel in all lanes at the normal, posted speed and at all points of  
28 entry and exit, subject only to Punch List items;

29 (h) Developer has completed the final lift of paving and the final  
30 coat of striping;

31 (i) All aesthetic and landscaping features for the Project have  
32 been completed in accordance with Section 800 of the Technical Provisions, and the  
33 Plans and designs prepared in accordance therewith, with the exception of completion of  
34 the Landscaping Establishment Phase; and

35 (j) All other preconditions to Substantial Completion specified in  
36 the Technical Provisions are completed.

1                   **6.6.1.2**           The procedures for notification of Substantial Completion are  
2 as follows.

3                   (a)           Developer shall provide ADOT with not less than 30 days'  
4 prior notification of the date Developer determines it will satisfy all conditions to  
5 Substantial Completion (other than issuance by ADOT of a Certificate of Substantial  
6 Completion). During such 30-day period, Developer and ADOT will meet and confer and  
7 exchange information as needed for ADOT to determine whether Developer will achieve  
8 Substantial Completion at the close of the 30-day period.

9                   (b)           During such 30-day period, ADOT will conduct an inspection  
10 of the Project and its components, a review of the applicable RFC Submittals and  
11 Construction Documents and such other investigation as may be necessary to evaluate  
12 whether Developer has achieved Substantial Completion.

13                   (c)           Developer shall provide ADOT a second notification when  
14 Developer determines it has satisfied all conditions to Substantial Completion, other than  
15 issuance by ADOT of a Certificate of Substantial Completion. Within five days after  
16 expiration of the 30-day period and ADOT's receipt of the second notification, ADOT will  
17 either: (A) issue the Certificate of Substantial Completion; or (B) notify Developer, setting  
18 forth, as applicable, why the Project has not reached Substantial Completion. If ADOT  
19 and Developer cannot agree as to the date of Substantial Completion, such dispute shall  
20 be resolved according to the Dispute Resolution Procedures.

21                   **6.6.2 Punch List**

22                   The Project Management Plan shall establish procedures and schedules for  
23 preparing a Punch List and completing Punch List work. Such procedures and schedules  
24 shall conform to the following provisions.

25                   **6.6.2.1**           The schedule for preparation of the Punch List shall be  
26 consistent and coordinated with the inspections to verify that Developer has achieved  
27 Substantial Completion, as set forth in Section 6.6.1.

28                   **6.6.2.2**           Developer shall prepare and maintain the Punch List.  
29 Developer shall provide ADOT not less than five days' prior notice of the date when  
30 Developer will commence Punch List field inspections and Punch List preparation. ADOT  
31 may, but is not obligated to, participate in the development of the Punch List. If ADOT  
32 participates in the development of the Punch List, each Party shall have the right to add  
33 items to the Punch List, but neither shall remove any item added by the other Party without  
34 such other Party's express permission.

35                   **6.6.2.3**           The Punch List shall solely consist of items of Work requiring  
36 correction, fine-tuning, or adjustment. The Punch List shall not contain any items of Work  
37 that Developer is commencing or performing for the first time, regardless of whether  
38 Developer contends that the item of Work does not need to be commenced to achieve  
39 the conditions to Substantial Completion. The Punch List shall not contain any  
40 Nonconforming Work for which an NCR has been issued.



1                   **6.6.2.4**       Developer shall immediately commence work on the Punch  
2 List items and diligently prosecute such work to completion, consistent with the Contract  
3 Documents, within the time period to be set forth in the Project Management Plan and in  
4 any case within 90 days after receipt of the Certificate of Substantial Completion.

5                   **6.6.3 Final Acceptance**

6                   **6.6.3.1**       ADOT will issue a Certificate of Final Acceptance when all of  
7 the following conditions have been satisfied:

8                               (a)     Completion of the Landscaping Establishment Phase as  
9 described in Section 800.04.06 of the Technical Provisions;

10                              (b)     ADOT has issued a Certificate of Substantial Completion for  
11 the Project;

12                              (c)     All Punch List items have been completed and delivered to  
13 the reasonable satisfaction of ADOT;

14                              (d)     ADOT has received the As-Built Schedule required by Section  
15 108.04.02.12 of the Technical Provisions;

16                              (e)     ADOT has received a complete set of the Record Drawings  
17 and, as applicable, Design Documents, in the form and with the content required by  
18 Section 116.05.04 of the Technical Provisions, the Electronic Document Management  
19 System records required by Section 111.02 of the Technical Provisions, and a complete,  
20 indexed set of all Proprietary Intellectual Property pursuant to Section 22.7.1.2;

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

29                              (g)     All component parts, plans, and documentation of the Project  
30 Management Plan required to be prepared, submitted, and approved prior to Final  
31 Acceptance have been so prepared, submitted, and approved;

32                              (h)     All Submittals required by the Project Management Plan or  
33 Contract Documents to be submitted to and approved by ADOT prior to Final Acceptance  
34 have been submitted to and approved by ADOT, in the form and with the content required  
35 by the Project Management Plan or Contract Documents;

36                              (i)     All personnel, supplies, equipment, waste materials, rubbish,  
37 and temporary facilities of each Developer-Related Entity have been removed from the

1 Project ROW, Developer has restored and repaired all damage or injury arising from such  
2 removal to the satisfaction of ADOT, and the Site is in good working order and condition;

3 (j) Developer has delivered to ADOT a certification representing  
4 that there are no outstanding Claims (for purposes of this certification, the term "Claim"  
5 shall include all facts which may give rise to a Claim) of Developer or claims or stop  
6 notices of any Subcontractor, Supplier, laborer, Utility Company or other Persons with  
7 respect to the Work, other than:

8 i. Any previously submitted unresolved Claims of Developer and any claims  
9 or stop notices of a Subcontractor, Supplier, laborer, Utility Company or  
10 other Persons being contested by Developer (in which case the certification  
11 shall include a list of all such matters with such detail as is requested by  
12 ADOT and, with respect to all claims or stop notices of a Subcontractor,  
13 Supplier, laborer, Utility Company, and other Person, shall include a  
14 representation by Developer that it is diligently and in good faith contesting  
15 such matters by appropriate legal proceedings that shall operate to prevent  
16 the enforcement or collection of the same); and

17 ii. Amounts owed to Utility Companies that have not yet been invoiced to  
18 Developer, provided that Developer has made diligent efforts to obtain  
19 invoices therefor;

20 (k) Developer has paid in full all Liquidated Damages and  
21 Noncompliance Charges that are owing to ADOT pursuant to this Agreement and are not  
22 the subject of a Dispute, and has provided to ADOT security for the full amount of  
23 Liquidated Damages and Noncompliance Charges that may then be the subject of an  
24 unresolved Dispute;

25 (l) There exist no uncured Developer Defaults other than those  
26 that would be cured by the achievement of Final Acceptance;

27 (m) ADOT has received from Developer and accepted the Final  
28 DBE Utilization Summary Report and the Summary Certification of Final DBE Payments  
29 for Professional Services and Construction DBE utilization, as required by Sections 18.02  
30 and 20.0 of the DBE Special Provisions (Exhibit 7);

31 (n) ADOT has received from Developer and accepted all final  
32 documentation for the Project, including, if applicable, Good Faith Effort documentation,  
33 as required by the OJT Special Provisions (Exhibit 8); and

34 (o) All of Developer's other obligations under the Contract  
35 Documents (other than obligations that by their nature are required to be performed after  
36 Final Acceptance) have been satisfied in full or waived by ADOT.

37 **6.6.3.2** Developer shall provide ADOT with 30 days' notice of the date  
38 when Developer expects to satisfy all conditions to Final Acceptance other than issuance  
39 by ADOT of a Certificate of Final Acceptance. During the 30-day period following receipt

1 of such notification, Developer and ADOT will meet and confer and exchange information  
2 as necessary to determine whether Developer will satisfy the conditions to Final  
3 Acceptance at the close of the 30-day period.

4 **6.6.3.3** During such 30-day period, ADOT will conduct an inspection  
5 of the Punch List items to the extent not previously completed, a review of the Record  
6 Drawings, and such other investigation as may be necessary to evaluate whether  
7 Developer has satisfied the conditions to Final Acceptance.

8 **6.6.3.4** Within five days after expiration of such 30-day period, ADOT  
9 will either: (i) issue a Certificate of Final Acceptance for the Project; or (ii) notify Developer  
10 setting forth, as applicable, why Final Acceptance has not been achieved. If ADOT and  
11 Developer cannot agree as to the date of Final Acceptance, such issue shall be a Dispute  
12 eligible for resolution according to the Dispute Resolution Procedures.

### 13 **6.6.4 Early Completion Incentive**

14 **6.6.4.1** For each day early that Developer achieves Substantial  
15 Completion, measured by the number of days prior to the Substantial Completion  
16 Deadline that ADOT issues the Certificate of Substantial Completion (inclusive of the date  
17 of issuance but not of the Substantial Completion Deadline), Developer shall be entitled  
18 to an additional payment of \$50,000 per day, up to a total of 60 days. Developer shall  
19 receive such payment, if any, as a lump sum in the progress payment subsequent to the  
20 month in which ADOT issues the Certificate of Substantial Completion.

### 21 **6.7 Nonconforming and Defective Work**

22 **6.7.1** If Nonconforming Work is discovered, ADOT will have the right, exercisable  
23 in its sole discretion, to direct Developer, at Developer's sole cost and without the right to  
24 an increase in the Contract Price, a Completion Deadline adjustment or a Claim of any  
25 kind, to rectify the Nonconforming Work so that it complies with the Contract Documents.  
26 For the avoidance of doubt, ADOT's sole discretion applies to its decision whether to  
27 require rectification of Nonconforming Work; whether Nonconforming Work has occurred  
28 is not a matter within ADOT's sole discretion.

29 **6.7.2** If, at Developer's request, ADOT elects to accept Nonconforming Work,  
30 ADOT may recover from Developer 100% of the cost savings, if any, of Developer  
31 associated with its failure to perform the Work in accordance with requirements of the  
32 Contract Documents (in addition to any other adjustment of the Contract Price), plus the  
33 amount of any increase in costs ADOT will incur to operate and maintain the Project after  
34 Substantial Completion that is attributable to the Nonconforming Work. In determining  
35 Developer's cost savings, the Parties shall take into account: (a) all avoided costs of  
36 Developer, including avoided design, material, equipment, labor, construction, testing,  
37 commissioning, acceptance and overhead costs, and avoided costs due to time savings.  
38 ADOT will have the right to deduct such cost savings from any sums owed by ADOT to  
39 Developer pursuant to this Agreement.

1           **6.7.3** Nothing contained in the Contract Documents shall in any way limit the right  
2 of ADOT to assert claims for damages resulting from patent or latent defects in the Work  
3 for the period of limitations prescribed by applicable Law, and the foregoing shall be in  
4 addition to any other rights or remedies ADOT may have hereunder or under Law.

## 5   **6.8   Hazardous Materials Management**

6           **6.8.1** Without limiting ADOT’s role or responsibilities set forth in Sections 5.1,  
7 6.8.6, 6.8.7, and 13.4.7, and except as provided otherwise below, Developer shall  
8 undertake Hazardous Materials Management of all Hazardous Materials and Recognized  
9 Environmental Conditions, including contaminated groundwater, in accordance with  
10 applicable Law, Governmental Approvals, the Hazardous Materials Management Plan,  
11 and all applicable provisions of the Contract Documents.

12           **6.8.2** Developer shall have the following duties to avoid or mitigate adverse  
13 financial and schedule impacts of Hazardous Materials and Recognized Environmental  
14 Conditions:

15                   **6.8.2.1**           Developer shall adopt design and construction techniques for  
16 the Project that avoid the need for Hazardous Materials Management.

17                   **6.8.2.2**           If, having met its obligation under Section 6.8.2.1, Developer  
18 is unable to avoid Hazardous Materials or Recognized Environmental Conditions,  
19 Developer shall incorporate design modifications and construction techniques to minimize  
20 costs of Hazardous Materials Management, including minimization of ADOT’s long-term  
21 costs for Hazardous Materials Management.

22                   **6.8.2.3**           Where Hazardous Materials Management is unavoidable or is  
23 required by applicable Law, Developer shall utilize appropriately trained and licensed  
24 personnel to conduct the Hazardous Materials Management activities.

25           **6.8.3** If Developer encounters Hazardous Materials or Recognized Environmental  
26 Conditions in connection with the Project, the Site or Work, in an amount, type, quality or  
27 location that would require reporting or notification to any Governmental Entity or other  
28 Person or taking any preventive or remedial action, in each case under applicable Law,  
29 Governmental Approvals, the Hazardous Materials Management Plan or any applicable  
30 provision of the Contract Documents, Developer shall promptly notify ADOT in writing and  
31 advise ADOT of any obligation to notify State or federal agencies under applicable Law.  
32 If ADOT discovers Hazardous Materials or Recognized Environmental Conditions in  
33 connection with the Project, the Site or the Work, ADOT will promptly notify Developer in  
34 writing of such fact.

35           **6.8.4** The rights of ADOT to step in and carry out the Hazardous Materials  
36 Management obligations of Developer are as set forth in Sections 6.8.4.1 and 6.8.4.2.

37                   **6.8.4.1**           If, within a reasonable time after discovery of Hazardous  
38 Materials or Recognized Environmental Conditions, taking into consideration the nature  
39 and extent of the contamination, the type and extent of action required, and the potential

1 impact upon Developer's schedule to perform the Work, Developer has not undertaken  
2 the Hazardous Materials Management required of it under Section 6.8.1, ADOT may  
3 provide Developer with written notice that ADOT will undertake the Hazardous Materials  
4 Management itself. ADOT thereafter may undertake the Hazardous Materials  
5 Management actions it deems necessary and appropriate. Without limiting ADOT's role  
6 or responsibilities set forth in Section 6.8.6, Developer shall reimburse to ADOT on a  
7 current basis within ten days of request therefor, the reasonable costs, including ADOT's  
8 Recoverable Costs, that ADOT incurs in carrying out such Hazardous Materials  
9 Management actions. ADOT will have no liability or responsibility to Developer arising out  
10 of ADOT's Hazardous Materials Management actions and such actions shall in no event  
11 constitute the basis of a Relief Event or other Claim, or otherwise entitle Developer to an  
12 increase in the Contract Price or adjustment of a Completion Deadline.

13 **6.8.4.2** Notwithstanding Section 6.8.4.1, if Developer notifies ADOT  
14 that Developer desires to preserve claims against other potentially responsible parties,  
15 then ADOT will undertake all commercially reasonable efforts to preserve such claims  
16 consistent with either the National Oil and Hazardous Substances Pollution Contingency  
17 Plan, 40 C.F.R § 300, or comparable State regulations and standards.

18 **6.8.5** Sections 13.4.5 and 13.6 address Developer's rights to adjustments to the  
19 Contract Price and Completion Deadlines with respect to Hazardous Materials.

20 **6.8.6** Off-site disposal of Hazardous Materials is subject to the provisions of  
21 Sections 6.8.6.1 and 6.8.6.2.

22 **6.8.6.1** As between Developer and ADOT, ADOT will be considered  
23 the sole generator and arranger under 40 C.F.R. Part 262 and will sign manifests for the  
24 off-site disposal of Hazardous Materials other than for: (a) Developer Release of  
25 Hazardous Materials; (b) Hazardous Materials that migrate from points of origin located  
26 outside the boundaries of the Project ROW where the source of such Hazardous  
27 Materials is a Developer-Related Entity in the course of performing Work; (c) Hazardous  
28 Materials that Developer handles and disposes of negligently; (d) Hazardous Materials  
29 for which Developer is or becomes a generator under applicable Law or Governmental  
30 Approvals; and (e) Hazardous Materials present in or on Developer ROW.  
31 Notwithstanding the foregoing, ADOT may elect, by written notice to Developer, to have  
32 another responsible party (instead of ADOT, and other than a Developer-Related Entity)  
33 assume generator and arranger status and liability, or sign manifests, for which ADOT is  
34 otherwise responsible under this Section 6.8.6.1.

35 **6.8.6.2** To the extent permitted by applicable Law, as between ADOT  
36 and Developer, ADOT will take and assume sole responsibility and liability for third party  
37 claims, causes of action, and Losses arising out of or resulting from the off-site disposal  
38 of Hazardous Materials for which ADOT is the generator pursuant to this Section 6.8.6,  
39 specifically excluding liability for off-site disposal that ADOT elects to have a responsible  
40 party assume as provided in Section 6.8.6.1.

1           **6.8.7** Developer shall not be required to engage in Hazardous Materials  
2 Management with respect to Release of Hazardous Materials onto the Project or Project  
3 ROW at any time where such Release of Hazardous Materials is from a vehicle operating  
4 or located within the Project ROW or from such vehicle's cargo, unless it is from a vehicle  
5 of or operated by a Developer-Related Entity or from such vehicle's cargo in the course  
6 of performing Work. Without limiting the foregoing, if it is necessary to dispose of Project  
7 material because it becomes contaminated by such a Release of Hazardous Materials  
8 (other than by a Developer-Related Entity in the course of performing Work or from such  
9 vehicle's cargo), Developer shall not be responsible for such disposal. For purposes  
10 hereof, "vehicle" has the meaning set forth in A.R.S. § 28-101, and also means railroad  
11 train and aircraft.

12           **6.8.8** ADOT has exclusive decision-making authority regarding selection of the  
13 destination facility to which Hazardous Materials will be transported whenever it acts as  
14 generator or arranger. The foregoing shall not preclude or limit any rights or remedies  
15 that ADOT may have against Developer-Related Entities, Governmental Entities or other  
16 third parties, including prior owners, lessees, licensees, and occupants of any parcel of  
17 land that is or becomes part of the Project ROW.

18           **6.8.9** As between Developer and ADOT, Developer shall be considered the sole  
19 generator and arranger and shall sign manifests for: (a) each Developer Release of  
20 Hazardous Materials; (b) Hazardous Materials that migrate from points of origin located  
21 outside the boundaries of the Project ROW where the source of such Hazardous  
22 Materials is a Developer-Related Entity in the course of performing Work; (c) Hazardous  
23 Materials that Developer handles and disposes of negligently; (d) Hazardous Materials  
24 for which Developer is or becomes a generator under applicable Law or Governmental  
25 Approvals; and (e) Hazardous Materials present in or on Developer ROW. The foregoing  
26 shall not preclude or limit any rights or remedies that Developer may have against any  
27 Governmental Entity or any other third parties, including existing or prior owners, lessees,  
28 licensees, and occupants of any parcel of land that is or becomes part of the Project  
29 ROW, excluding, however, the State, ADOT, and their respective agents. To the extent  
30 permitted by applicable Law, Developer shall indemnify, save, protect, and defend ADOT  
31 from claims, demands, causes of action, and Losses arising out of or resulting from the  
32 off-site disposal of such Hazardous Materials for which Developer is considered the  
33 generator or arranger pursuant to this Section 6.8. The foregoing indemnity shall survive  
34 the expiration or termination of this Agreement.

35           **6.8.10** In the event that Developer has a good faith and bona fide claim against a  
36 third party arising from Releases of Hazardous Materials by such third party who is not a  
37 Developer-Related Entity, ADOT may, in its sole discretion, and upon receipt of a written  
38 request from Developer, assign and subrogate its rights of recovery to Developer, as such  
39 may exist.

## 40   **6.9    Title**

41           Developer warrants that it owns, or will own, and has, or will have, good and  
42 marketable title to all materials, equipment, tools, and supplies furnished, or to be

1 furnished, by it and its Subcontractors that become part of the Project or are purchased  
2 for ADOT for the operation, maintenance or repair thereof, free and clear of all Liens. Title  
3 to all of such materials, equipment, tools, and supplies that are delivered to the Site shall  
4 pass to ADOT, free and clear of all Liens, upon the sooner of: (a) incorporation into the  
5 Project, or (b) payment by ADOT to Developer of invoiced amounts pertaining thereto.  
6 Notwithstanding any such passage of title, Developer shall retain sole care, custody, and  
7 control of such materials, equipment, tools, and supplies and shall exercise due care with  
8 respect thereto until Substantial Completion or, with respect to such materials, equipment,  
9 tools, and supplies that are necessary for Developer to satisfy its obligations under the  
10 Agreement, until such obligations are satisfied or until Developer is terminated pursuant  
11 to Articles 18 or 23.

## 12 **6.10 Site Security**

13 Commencing upon issuance of NTP 2, Developer shall provide appropriate  
14 security for the Site, and shall take all reasonable precautions and provide protection to  
15 prevent damage, injury, or Loss to the Work and materials and equipment to be  
16 incorporated therein, as well as all other property at or on the Site, whether owned by  
17 Developer, ADOT, or any other Person. Developer shall comply with Section 115.02.01.13  
18 of the Technical Provisions.

## 19 **6.11 Maintenance During Construction**

20 **6.11.1** Commencing upon issuance of NTP 2 and continuing thereafter during the  
21 Work, Developer shall be responsible for (a) maintenance of the existing facilities  
22 throughout the Project ROW to the extent set forth in Section 105.15 of the Technical  
23 Provisions, and (b) maintenance of all improvements Developer constructs for the Project;  
24 provided, however, that Developer's maintenance responsibility for portions of such  
25 improvements owned by third parties shall extend until the control of and maintenance  
26 responsibility for such portions are officially transferred to the respective third parties but  
27 in no event beyond Final Acceptance.

28 **6.11.2** ADOT may determine that Maintenance During Construction in addition to  
29 that described in Section 105.15 of the Technical Provisions is required during the Work  
30 for the portions of the Project ROW being used by the traveling public. If ADOT orders  
31 any such additional Maintenance During Construction, Developer will be paid therefor  
32 through an ADOT-Directed Change and Supplemental Agreement. Such additional  
33 Maintenance During Construction may include, but is not limited to, additional sweeping,  
34 roadway and subgrade repair, safety feature repair, debris removal, repair of pedestrian  
35 features, and other maintenance necessary to provide a smooth and safe traveled way.  
36 Notwithstanding the foregoing, Developer shall repair any damage caused by its  
37 operations and activities without the right to an increase in the Contract Price, a  
38 Completion Deadline adjustment or any other Claim.

39

40

1 **6.12 Aesthetics and Landscaping; Landscaping Establishment Phase**

2 **6.12.1** Developer shall perform, or cause to be performed, all aesthetics and  
3 landscaping Work for the Project, including landscape establishment, in accordance with  
4 Section 800 of the Technical Provisions.

5 **6.12.2** Developer shall be solely responsible for all costs relating to the aesthetics  
6 and landscaping Work for the Project, including landscape establishment, except for the  
7 costs of materials, services, and efforts (if any) that the Contract Documents expressly  
8 state ADOT or other Persons will perform.

9 **6.12.3 Landscape Establishment; Cost of Watering Plants**

10 **6.12.3.1** Developer shall meet, or cause to be met, the landscape  
11 establishment requirements, including plant watering, set forth in Section 800 of the  
12 Technical Provisions.

13 **6.12.3.2** On or about 300 days after Substantial Completion,  
14 Developer and ADOT will jointly inspect plant materials installed as part of the  
15 landscaping Work. No later than 20 days after completing this inspection, Developer will  
16 prepare a written report describing what (if any) of such installed plant materials (a) died,  
17 (b) failed to establish a root system reasonably expected for plant materials of a similar  
18 type, nature, and maturity, and (c) failed to show a growth habit reasonably expected for  
19 plant materials of a similar type, nature, and maturity.

20 **6.12.3.3** If the report described in Section 6.12.3.2 identifies any of the  
21 conditions described in clause (a), (b) or (c) therein, then no later than 20 days after  
22 preparing the report, Developer shall submit a written landscape restoration plan to ADOT  
23 setting forth the actions Developer will take to replace dead and underperforming plant  
24 materials, and to ensure the conditions described in said report do not reoccur. The  
25 landscape restoration plan will be subject to ADOT's reasonable approval.

26 **6.12.3.4** Developer shall complete all necessary replacement plantings  
27 no later than 30 days after ADOT approves the landscape restoration plan described in  
28 Section 6.12.3.3.

29 **6.13 Clayton Act Assignment**

30 Developer shall assign to ADOT all right, title, and interest in and to all claims and  
31 causes of action it may have under Section 4 of the Clayton Act (15 U.S.C. Sec. 15),  
32 arising from purchases of goods, services or materials pursuant to the Contract  
33 Documents or any Subcontract. This assignment shall become automatically effective  
34 when ADOT tenders Final Payment to Developer, without further documentation or  
35 acknowledgment by the Parties.



1 **ARTICLE 7.**  
2 **TIME; NOTICES TO PROCEED; PROJECT SCHEDULE AND PROGRESS**

3 **7.1 Time of Essence**

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

14 **7.2 Notices to Proceed**

15 **7.2.1** Authorization allowing Developer to proceed with the Work shall be  
16 provided through ADOT's issuance of NTPs. Developer acknowledges and agrees that  
17 ADOT has no obligation to issue an NTP for Work under this Agreement, and further  
18 agrees that unless and until ADOT issues NTP 1, ADOT will have no liability to Developer  
19 under this Agreement except as provided otherwise in Section 23.4.1. Developer further  
20 acknowledges and agrees that ADOT's liability under this Agreement shall be limited to  
21 payment owing for Work authorized under NTPs actually issued.

22 **7.3 Issuance of NTP 1**

23 ADOT may issue NTP 1, provided that Developer has complied with and satisfied  
24 all conditions precedent to issuance of NTP 1 set forth in the Contract Documents.  
25 Issuance of NTP 1 authorizes Developer to do only the following:

26 (a) Mobilize, including establishing the collocated office;

27 (b) Prepare all component parts, plans, and documentation of the Project  
28 Management Plan, including: (i) a Quality Management Plan (e.g., for general  
29 requirements, Professional Services, and Construction Work components); and (ii) a  
30 Public Involvement Plan;

31 (c) Prepare the Environmental Management Plan, Safety Management Plan,  
32 Transportation Management Plan, Storm Water Pollution Prevention Plan, and Noxious  
33 and Invasive Species Control Plan;

34 (d) Prepare the detailed, resource, and cost loaded Project Baseline Schedule;

35 (e) Prepare the Segment Limits Map;

36 (f) Prepare the Submittal Schedule;

- 1 (g) Prepare the final DBE Utilization Plan;
- 2 (h) Prepare the final OJT Utilization Plan;
- 3 (i) Enter the Project ROW to which ADOT has made access available to  
4 conduct surveys and site investigations, including geotechnical, Hazardous Materials,  
5 and Utilities investigations, provided that Developer shall not conduct any ground-  
6 disturbing activities within or outside the Schematic ROW until ADOT has received and  
7 approved, as provided in the Technical Provisions, the Environmental Management Plan,  
8 and Storm Water Pollution Prevention Plan;
- 9 (j) Commence acquisition of approved Developer ROW;
- 10 (k) Commence negotiating Utility Agreements with Utility Companies;
- 11 (l) At Developer's option, commence Design Work, provided that ADOT will  
12 not pay for or commence review of Design Documents until Developer satisfies all  
13 conditions precedent set forth in Section 7.5;
- 14 (m) Prepare the Basis of Design Report described in Section 100.03.02 of the  
15 Technical Provisions;
- 16 (n) Prepare the bulletin boards described in Section 112.01 of the Technical  
17 Provisions;
- 18 (o) Prepare the sample Vehicle Project Logo described in Section 112.03.04 of  
19 the Technical Provisions;
- 20 (p) Prepare the Existing Conditions Site Documentation described in Section  
21 117.01 of the Technical Provisions;
- 22 (q) Prepare the Utility Coordination Plan described in Section 107.15.04.01 of  
23 the Technical Provisions;
- 24 (r) Prepare the Plant Inventory described in Section 800.02.03 of the Technical  
25 Provisions;
- 26 (s) Prepare the Drainage Inventory described in Section 500.02.02 of the  
27 Technical Provisions; and
- 28 (t) Prepare the ITS Inventory described in Section 700.07.02.02 of the  
29 Technical Provisions.

## 30 **7.4 Issuance of NTP 2**

31 **7.4.1** ADOT may issue NTP 2 when all of the following conditions have been  
32 satisfied:

- 1 (a) If applicable under this Agreement, the Guarantees in favor of ADOT  
2 required under Section 9.3 have been executed and delivered to ADOT and are in full  
3 force and effect;
- 4 (b) All insurance policies required under Article 10 have been obtained  
5 and are in full force and effect, and Developer has delivered to ADOT written binding  
6 verifications of coverage from the relevant issuers of such insurance policies;
- 7 (c) Developer has developed and delivered to ADOT and ADOT has  
8 approved, in accordance with Section 3.4, the component parts, plans, and  
9 documentation of the Project Management Plan designated "Required Prior to NTP 2" in  
10 Table 110-1 of Section 110 of the Technical Provisions;
- 11 (d) Developer has developed and delivered to ADOT the Collocated  
12 Office Layout Plan and all ADOT comments thereon have been resolved, and Developer  
13 has completed the improvements for, and made available to ADOT for occupancy, the  
14 ADOT office space in the collocated office space, in accordance with Section 112.02 of  
15 the Technical Provisions;
- 16 (e) Developer has developed and delivered to ADOT the Network  
17 Administration Plan and all ADOT comments thereon have been resolved;
- 18 (f) Developer has developed and delivered to ADOT and ADOT has  
19 approved the detailed, resource, and cost loaded Project Baseline Schedule;
- 20 (g) Developer has developed and delivered to ADOT and ADOT has  
21 approved the Segment Limits Map;
- 22 (h) Developer has developed and delivered to ADOT and ADOT has  
23 approved the Design Submittal Schedule;
- 24 (i) Developer has developed and delivered to ADOT and ADOT has  
25 approved the Basis of Design Report;
- 26 (j) Developer has developed and delivered to ADOT and ADOT has  
27 approved the Draft SWPPP;
- 28 (k) Developer has developed and delivered to ADOT the Transportation  
29 Management Plan and all ADOT comments thereon have been resolved;
- 30 (l) Developer has developed and delivered to ADOT and ADOT has  
31 approved the Utility Coordination Plan;
- 32 (m) Developer has developed and delivered to ADOT the Preliminary  
33 Plant Inventory and all ADOT comments thereon have been resolved;
- 34 (n) Developer has developed and delivered to ADOT and ADOT has  
35 approved the final DBE Utilization Plan;

1 (o) Developer has developed and delivered to ADOT and ADOT has  
2 approved the Public Involvement Plan;

3 (p) Developer has developed and delivered to ADOT the ITS Inventory  
4 as described in Section 700.07.02.02 of the Technical Provisions, and all ADOT  
5 comments thereon have been resolved;

6 (q) Developer has developed and delivered to ADOT the Visual  
7 Animation of Developer's Schematic Design in accordance with Section 116.02.05.03 of  
8 the Technical Provisions, and all ADOT comments thereon have been resolved;

9 (r) The Parties have conducted the initial partnering workshop as set  
10 forth in Section 21.1.2.2;

11 (s) All representations and warranties of Developer set forth in  
12 Section 2.3 shall be and remain true and correct in all material respects;

13 (t) There exists no uncured Developer Default for which Developer has  
14 received written notice from ADOT;

15 (u) Developer has obtained any adjustment to the Change of Access  
16 Report, as required by Section 116.03.03 of the Technical Provisions;

17 (v) Developer has developed and delivered to ADOT and ADOT has  
18 approved the final OJT Utilization Plan;

19 (w) Developer has submitted to ADOT an OJT Commitment/Schedule  
20 containing all the information specified in Section 923-3.01 of the OJT Special Provisions  
21 (Exhibit 8);

22 (x) Developer has developed and delivered to ADOT and ADOT has  
23 approved the Vehicle Project Logo;

24 (y) Developer has erected in a location approved by ADOT the bulletin  
25 board(s) described in Section 112.01 of the Technical Provisions;

26 (z) Developer has developed and delivered to ADOT the Noxious and  
27 Invasive Species Control Plan described in Section 800.02.05 of the Technical  
28 Provisions, and all ADOT comments thereon have been resolved;

29 (aa) Developer has developed and delivered to ADOT the Existing  
30 Conditions Site Documentation, as described in Section 117.01 of the Technical  
31 Provisions, and all ADOT comments thereon have been resolved;

32 (bb) Developer has developed and delivered to ADOT and ADOT has  
33 approved all other Submittals designated as "Required Prior to NTP 2" in Table 110-1 of  
34 Section 110 of the Technical Provisions; and

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

4 **7.4.2** Issuance of NTP 2 authorizes Developer to perform Work not  
5 authorized under Section 7.3, and related activities pertaining to the Project.

6 **7.5 Conditions to Design Work Review and Payment**

7 **7.5.1** Notwithstanding any contrary provision of Section 3.1.2, ADOT will have no  
8 obligation to commence its review of, or pay Developer for, any Design Work until all of  
9 the following conditions precedent have been satisfied:

10 (a) ADOT has issued NTP 1;

11 (b) ADOT has received and approved, as provided in the Technical  
12 Provisions, the Quality Management Plan (general requirements and Professional  
13 Services), the Submittal Schedule, and the Basis of Design Report;

14 (c) ADOT has received from Developer all the Professional Services  
15 DBE Intended Participation Affidavit Summaries then required under Section 12.02 of the  
16 DBE Special Provisions (Exhibit 7); and

17 (d) ADOT has received and approved the final DBE Utilization Plan with  
18 respect to Developer's plan to meet the Professional Services DBE Goal.

19 **7.5.2** ADOT may reject, without review, any Design Document submitted to  
20 ADOT before the date that the conditions precedent set forth in Section 7.5.1 are satisfied.  
21 All time periods available to ADOT for review or approval of any Design Document  
22 submitted to ADOT shall not commence running until Developer satisfies the conditions  
23 set forth in Section 7.5.1, and shall be subject to Section 3.1.2.3.

24 **7.6 Conditions to Commencement of Construction**

25 **7.6.1 Construction Work Generally**

26 Developer shall not commence or permit or suffer commencement of construction  
27 of any portion of the Project until ADOT issues NTP 2 and all of the following conditions  
28 have been satisfied:

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

32 (b) ADOT or Developer, as applicable, has (i) obtained an order for  
33 immediate possession, (ii) closed the acquisition of the parcel, or (iii) otherwise obtained  
34 permanent right of entry through settlement, negotiation, the condemnation process or

1 otherwise for Project ROW necessary to commence construction of the applicable portion  
2 of the Project;

3 (c) Developer has satisfied for the applicable portion of the Project all  
4 applicable pre-construction requirements contained in the Environmental Approvals and  
5 other Governmental Approvals;

6 (d) Developer has delivered to ADOT all Submittals relating to the  
7 applicable Construction Work required by the Project Management Plan or Contract  
8 Documents, in the form and with the content required by the Project Management Plan or  
9 Contract Documents;

10 (e) Developer has adopted written policies establishing ethical  
11 standards of conduct for all Developer-Related Entities, including Developer's supervisory  
12 and management personnel in dealing with (i) ADOT and the General Engineering  
13 Consultant and (ii) employment relations, in accordance with Section 8.9; and

14 (f) Developer has provided to ADOT at least ten days' advance written  
15 notification of the date Developer determines that it will satisfy all of the conditions set forth  
16 in this Section 7.6.1.

## 17 **7.6.2 Existing ITS Improvements and Existing Conditions**

18 **7.6.2.1** Developer shall repair, reconstruct or replace existing ITS  
19 improvements where Developer's design or construction requires repair, reconstruction  
20 or replacement, and Developer shall be responsible for the cost thereof. ADOT  
21 anticipates it will require Developer to construct certain additional ITS improvements  
22 identified in the ITS inventory, following the process described in Section 700.07.02.02 of  
23 the Technical Provisions, as one or more ADOT-Directed Changes. Accordingly, except  
24 for repair, reconstruction or replacement of existing ITS improvements required by  
25 Developer's Project design or construction, Developer shall not commence, or permit or  
26 suffer commencement of, construction of ITS improvements identified by Developer in  
27 the ITS inventory until ADOT issues a corresponding Supplemental Agreement or  
28 Directive Letter therefor pursuant to Article 14. Developer's entitlement to an increase in  
29 the Contract Price and Completion Deadline adjustment, if any, for such Work shall be as  
30 set forth in Section 13.4.9.1.

31 **7.6.2.2** Developer shall inspect the condition of items identified in  
32 Section 117.01 of the Technical Provisions, and shall repair, replace, or construct repairs  
33 or replacements of all such items that are no longer fit for use. Developer shall be  
34 responsible for the cost of such repair or replacement if Developer's design requires or  
35 will require repair or replacement of such items. ADOT may request that Developer repair  
36 or replace other items through one or more ADOT-Directed Changes. Developer's  
37 entitlement to an increase in the Contract Price and Completion Deadline adjustment, if  
38 any, for such Work shall be as set forth in Section 13.4.9.2.

39

1           **7.6.3 Utility Adjustments**

2           Developer shall not commence or permit or suffer commencement of construction  
3 of a Utility Adjustment included in the Construction Work until ADOT issues NTP 2, all of  
4 the conditions set forth in Section 7.6 that are applicable to the Utility Adjustment (reading  
5 such provisions as if they referred to the Utility Adjustment) have been satisfied, and the  
6 following additional requirements have been satisfied:

7                   (a) Except as otherwise provided in Section 5.4.7.4, the Utility  
8 Adjustment is covered by an executed Utility Agreement;

9                   (b) Developer has submitted to ADOT the Submittals described in  
10 Section 107.15 of the Technical Provisions concerning the Utility Adjustment; and

11                   (c) Developer has obtained ADOT review and approval of any other  
12 matters respecting the Utility Adjustment that are required under any applicable federal  
13 requirements.

14                   (d) The foregoing shall not prevent a Utility Company from commencing  
15 a Utility Adjustment that the Utility Company is self-performing prior to ADOT’s issuance  
16 of NTP 2, provided that the Utility Company has obtained all necessary approvals to  
17 commence such work.

18           **7.7 NOT USED**

19           **7.8 Completion Deadlines**

20                   **7.8.1 Substantial Completion Deadline**

21           Developer shall achieve Substantial Completion of the Project not later than the  
22 Substantial Completion Deadline.

23                   **7.8.2 Final Acceptance Deadline**

24           Developer shall achieve Final Acceptance of the Project not later than the Final  
25 Acceptance Deadline.

26                   **7.8.3 No Completion Deadline Adjustment**

27           Except as otherwise specifically provided in Articles 13 and 14, ADOT will have no  
28 obligation to adjust a Completion Deadline and Developer shall not be relieved of its  
29 obligation to comply with the Project Schedule and to achieve Substantial Completion and  
30 Final Acceptance of the Project by the applicable Completion Deadlines for any reason.

31  
32  
33

1     **7.9     Scheduling of Design, Construction, and Payment**

2             **7.9.1     Project Schedule**

3             Developer shall undertake and complete the Work in accordance with the Project  
4     Schedule prepared in conformance with Section 108.04 of the Technical Provisions. The  
5     Parties shall use the Project Schedule for planning and monitoring the progress of the  
6     Work and as the basis for determining the amount of monthly progress payments to be  
7     made to Developer.

8             **7.9.2     Float**

9             All Float contained in the Project Schedule, as shown in the Preliminary Project  
10     Baseline Schedule or as generated thereafter, shall be a shared, jointly owned Project  
11     resource available to either Party or both Parties as needed to absorb delay caused by  
12     Relief Events or any other event. All Float and corresponding Controlling Work Items shall  
13     be shown as such in the Project Schedule on each affected schedule path. ADOT will have  
14     the right to examine the identification of (or failure to identify) Float and Controlling Work  
15     Items on the Project Schedule in determining whether to approve the Project Schedule.  
16     Once identified, Developer shall monitor, account for, and maintain Float in accordance  
17     with critical path methodology and Section 108.04.02.02.F of the Technical Provisions.  
18     Developer shall submit a Time Impact Analysis within 10 days of the day on which Float  
19     is 75% consumed.

20             **7.9.3     Progress Payment Scheduling**

21             The Project Schedule shall provide for payment of the Contract Price to be made  
22     solely on the basis of progress by Developer.

23             **7.10     Recovery Schedule**

24             **7.10.1** If at any time the Work on any Critical Path item is delayed for a period that  
25     exceeds the time set forth in Section 108.04.02.10 of the Technical Provisions (including  
26     delays for which Developer may be entitled to a Completion Deadline adjustment under  
27     Article 13), or as otherwise provided in Section 108.04.02.10 of the Technical Provisions,  
28     Developer shall prepare and submit to ADOT for review and approval a Recovery  
29     Schedule meeting the requirements set forth in Section 108.04.02.10 of the Technical  
30     Provisions. In addition, if Developer fails to meet any Completion Deadline, as the same  
31     may be extended pursuant to this Agreement, then Developer shall prepare and submit  
32     to ADOT for review and approval a Recovery Schedule meeting the requirements set  
33     forth in Section 108.04.02.10 of the Technical Provisions and demonstrating Developer’s  
34     proposed plan to achieve Substantial Completion and Final Acceptance with as little  
35     additional delay as possible.

36             **7.10.2** Except as otherwise provided in Article 13, all costs incurred by Developer  
37     in preparing, implementing, and achieving the Recovery Schedule shall be borne by  
38     Developer and Developer shall not be entitled to an increase in the Contract Price, a  
39     Completion Deadline adjustment or any other Claim as a result thereof.



1           **7.10.3** If Developer fails to provide an acceptable Recovery Schedule as required  
2 herein and in Section 108.04.02.10 of the Technical Provisions, then, in addition to any  
3 other rights and remedies in favor of ADOT arising out of such failure, ADOT will have the  
4 right to withhold 10% of progress payments until such time as Developer has prepared  
5 and ADOT has approved such Recovery Schedule. Payment of any such amounts  
6 withheld by ADOT shall be due from ADOT to Developer not later than the Developer  
7 Cycle Key Date first occurring after the date ADOT approves the corresponding Recovery  
8 Schedule. Any failure or delay in Developer's submittal or ADOT's approval of a Recovery  
9 Schedule shall not entitle Developer to an increase in the Contract Price, a Completion  
10 Deadline adjustment or any other Claim under the Contract Documents.

1 **ARTICLE 8.**  
2 **SUBCONTRACTING AND LABOR PRACTICES**

3 **8.1 Non-Discrimination; Equal Employment Opportunity**

4 **8.1.1** Developer shall not, and shall cause the Developer-Related Entities not to,  
5 discriminate on the basis of race, age, color, religion, national origin or sex in the  
6 performance of the Work under the Contract Documents.

7 **8.1.2** Developer shall comply, and shall cause the Developer-Related Entities to  
8 comply, with all applicable state and federal civil rights laws. Developer and the  
9 Developer-Related Entities will not discriminate against any employee or applicant for  
10 employment because of race, age, color, religion, sex or national origin. Developer will  
11 take affirmative action to ensure that applicants are employed and that employees are  
12 treated during employment without regard to their race, age, color, religion, sex or national  
13 origin. Such action shall include, but is not limited to, the following: employment,  
14 upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or  
15 termination, rates of pay or other forms of compensation, and selection for training,  
16 including apprenticeship. Developer shall post in conspicuous places, available to  
17 employees and applicants for employment, notices setting forth the provisions of this non-  
18 discrimination clause.

19 **8.1.3** Developer shall include Sections 8.1.1 and 8.1.2 in every Subcontract.  
20 Developer shall additionally require that all Subcontractors include Sections 8.1.1 and  
21 8.1.2 in each further Subcontract (with appropriate changes in the names of the parties),  
22 so that such provisions will be binding upon each and every entity that performs any Work  
23 on the Project. Notwithstanding the foregoing requirements, Developer, each  
24 Subcontractor and every further subcontractor thereof, shall be responsible for  
25 compliance with all applicable Laws concerning non-discrimination and equal  
26 employment opportunity.

27 **8.2 DBE Requirements and Small Business Opportunity**

28 **8.2.1** ADOT has established goals for DBE utilization (“DBE Goals”) for different  
29 parts of the Work on the Project. DBE Goals for the Project, which Developer commits to  
30 achieve or use Good Faith Efforts to achieve, are calculated and shall be credited in  
31 relation to the portion of the total Contract Price, as applicable, allocated to the following  
32 components of the Work:

33 (a) Professional Services DBE Goal – 7.03% of the total Contract Price  
34 allocated to Professional Services

35 (b) Construction DBE Goal – 10.33% of the total Contract Price allocated  
36 to Construction Work.

37 **8.2.2** For purposes of Sections 8.2.1(a) and 8.2.1(b), the Contract Price shall be  
38 allocated between Professional Services and Construction Work according to the

1 allocations in the ADOT-approved Project Baseline Schedule; and the sum of such  
2 allocations shall equal the total Contract Price.

3 **8.2.3** ADOT strongly encourages Developer to use additional DBEs above the  
4 DBE Goals in an effort to help ADOT meet its overall DBE goals and help ADOT meet  
5 the maximum feasible portion of its DBE goals through race neutral means as outlined in  
6 49 CFR Part 26.

7 **8.2.4** ADOT's DBE Special Provisions, applicable to the Project, are set forth in  
8 Exhibit 7. The purpose of ADOT's DBE Special Provisions is to ensure that DBEs have  
9 an equal opportunity to participate in the performance of contracts financed in whole or in  
10 part with federal funds. Developer shall comply with all applicable requirements set forth  
11 in ADOT's DBE Special Provisions and the provisions in Developer's approved DBE  
12 Utilization Plan.

13 **8.2.5** Within 30 days after issuance of NTP 1, Developer shall (a) revise and  
14 convert its Preliminary DBE Utilization Plan, included in Developer's Proposal, into a more  
15 detailed, final DBE Utilization Plan and (b) submit it to ADOT for approval in ADOT's good  
16 faith discretion.

17 **8.2.5.1** The final DBE Utilization Plan shall affirmatively respond to  
18 and resolve ADOT's comments on and revisions to the draft final DBE Utilization Plan.

19 **8.2.5.2** The final DBE Utilization Plan shall include the following  
20 components:

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

24 (b) Professional Services DBE Intended Participation Affidavits,  
25 in the form attached to the DBE Special Provisions (Exhibit 7), from each DBE identified  
26 to work on the Project's Design Work;

27 (c) DBE Subcontractor Intended Participation Affidavits, in the  
28 form attached to the DBE Special Provisions (Exhibit 7), for each DBE identified to work  
29 on the Project's Construction Work;

30 (d) Updated Proposal Forms H-6 and H-7 identifying additional  
31 scopes of Work for future DBE participation, with more detailed information, including:

32 i. Expanded descriptions of the types of proactive DBE  
33 and small business bid-specific marketing, recruitment, outreach, and community  
34 engagement efforts that Developer will implement while preparing for and undertaking  
35 the Work so as to include DBEs and small businesses on the Project. Include processes  
36 for timely communications, outreach methods that Developer will use, and a process for  
37 keeping track of potential DBEs, small businesses, and other Subcontractors on the  
38 Project. Include proposed innovative methods for (1) involving new and emerging DBEs,

1 and (2) identifying firms that might potentially be certified as DBEs and assisting them to  
2 become DBE-certified and be involved in the Project. Discuss how these efforts will flow  
3 through tiers of Subcontractors on the Project;

4 ii. Description of efforts Developer has made and will  
5 make to recruit and utilize non-engineering design and construction related DBE firms  
6 such as graphic design and printing, marketing, outreach, training, employment services,  
7 and catering companies to help meet the DBE Goals;

8 iii. Description of proposed DBE capacity-building efforts  
9 to be implemented throughout the Work, including methods to assist DBEs with record-  
10 keeping and compliance, bonding, financing, access to supplies, and other capabilities;

11 iv. Description of the estimated DBE participation  
12 schedule for each phase/segment of the Work that Developer identifies pursuant to the  
13 Preliminary Project Baseline Schedule, including anticipated Subcontracts and  
14 estimated dollar amounts to be awarded to DBEs in each phase/segment. Include a  
15 table/diagram of an estimated schedule that illustrates projected work sequencing of  
16 DBE utilization in each phase/segment;

17 v. Description of processes and procedures that  
18 Developer will use to monitor, track, document, and report DBE progress and DBE  
19 utilization, and to maintain and adjust the DBE participation schedule to help ensure  
20 achievement of the DBE Goals. Include time intervals at which Developer will employ  
21 these processes and procedures;

22 vi. Description of specific measures that Developer will  
23 undertake throughout the duration of the Work to achieve the DBE Goals, including  
24 training workshops, technical and financial assistance, support services, mentor/protégé  
25 relationships, recruiting, and encouraging potential DBEs to obtain certification, etc.  
26 Include a proposed schedule of events/activities;

27 vii. Description of Developer's data collection and  
28 monitoring systems. Include how Developer will track DBE recruitment and awards  
29 during each phase/segment of the Work, and how Developer will report DBE payments  
30 and utilization to ADOT. Describe the expected frequency and comprehensiveness of  
31 the efforts;

32 viii. Description of how Developer will manage DBEs and  
33 small business Subcontractors on the Project, including processes for project  
34 management, technical performance reviews, feedback, and dispute resolution to  
35 resolve issues that may arise;

36 ix. Description of other procedures and processes for  
37 meeting DBE requirements, such as documenting and submitting affidavits for additional  
38 DBEs committed to the Project to meet or exceed the DBE Goals, prompt pay  
39 requirements, and substitution/replacement of DBEs; and

1 x. Description of any other innovative or additional Good  
2 Faith Efforts activities already undertaken or ones Developer plans to undertake that are  
3 not listed above or listed in 49 CFR Part 26.

4 **8.2.5.3** Issuance of NTP 2 is conditioned on first obtaining ADOT's  
5 approval of the final DBE Utilization Plan. The approved DBE Utilization Plan shall be  
6 considered a Contract Document, with an order of precedence as provided by Section  
7 1.2.1.

8 **8.2.6** Developer shall provide information and documentation that demonstrates  
9 its continued Good Faith Efforts throughout the Work to meet the DBE Goals in  
10 accordance with 49 CFR Part 26, Appendix A and the ADOT-approved DBE Utilization  
11 Plan. The efforts employed must at a minimum include those that one could reasonably  
12 expect a contractor to take if the contractor were actively and aggressively trying to obtain  
13 DBE participation sufficient to meet the DBE Goals. (See 49 C.F.R Part 26, Appendix A.)

14 **8.2.7** Developer shall not cancel or terminate any Subcontract with a DBE firm  
15 except in accordance with all requirements and provisions applicable to cancellation or  
16 termination of Subcontracts with DBE firms set forth in ADOT's DBE Special Provisions  
17 (Exhibit 7).

18 **8.2.8** For purposes of measuring achievement of or Good Faith Efforts to achieve  
19 the DBE Goals, the dollar amount of Supplemental Agreements that:

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

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

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

29 **8.2.9** Developer shall carry out, and shall cause the Subcontractors to carry out,  
30 applicable requirements of 49 C.F.R Part 26 in the award and administration of USDOT  
31 assisted contracts. Failure by Developer to carry out these requirements is a material  
32 breach of this Agreement, which may result in such remedies available under applicable  
33 Law or as ADOT deems appropriate (subject to Developer's rights to notice and  
34 opportunity to cure set forth in this Agreement). Remedies ADOT deems appropriate are  
35 more particularly provided in this Agreement, which may include:

36 (a) Withholding certain monthly progress payments;

37 (b) Assessing sanctions as set forth in ADOT's DBE Special Provisions  
38 (Exhibit 7);

- 1 (c) Liquidated damages;
- 2 (d) Termination of this Agreement; and
- 3 (e) Disqualifying Developer and its Affiliates from future bidding as non-  
4 responsible.

5 **8.2.10** Pursuant to 49 C.F.R. Part 26.39, ADOT’s DBE program includes an  
6 element to incorporate contracting requirements to facilitate participation by Small  
7 Business Concerns (SBCs) in federally funded contracts. SBCs are for-profit businesses  
8 registered to do business in Arizona and that meet the Small Business Administration  
9 size standards for average annual revenue criteria for its primary North American Industry  
10 Classification System code. While the SBC component of ADOT’s DBE program does not  
11 require utilization goals on projects, ADOT strongly encourages Developer to utilize small  
12 businesses that are registered in AZ UTRACS, in addition to DBEs meeting the  
13 certification requirement. Visit AZ UTRACS at //adot.dbesystem.com/ to search for  
14 registered SBCs that can be used on the Project. SBC utilization on the Project must also  
15 be tracked and reported to ADOT on a monthly basis along with required DBE outreach  
16 efforts and utilization.

17 **8.3 On-the-Job Training**

18 **8.3.1** ADOT has established goals for OJT participation in the Construction Work  
19 (“OJT Goals”). The OJT Goals for the Project, which Developer commits to achieve or  
20 use Good Faith Efforts to achieve, are:

- 21 (a) Minimum of 33,000 OJT Trainee hours on the Project, with a  
22 minimum of 600 training hours for each OJT Trainee;
- 23 (b) Minimum of 14 OJT Trainees must each complete at least 2,000  
24 hours on the Project in the same trade or work classification; and
- 25 (c) Minimum of 5 OJT Trainees must complete hours solely on the  
26 Project necessary to achieve journey-level status (a minimum of 2,000 must be completed  
27 by these OJT Trainees solely on the Project).

28 **8.3.2** ADOT’s OJT Special Provisions, applicable to the Project, are set forth in  
29 Exhibit 8. The purpose of ADOT’s OJT Special Provisions is to ensure that inexperienced  
30 and untrained workers have a substantial opportunity to participate in the performance of  
31 the Construction Work through apprenticeships, training, and similar measures to  
32 maintain and grow a diverse, skilled work force. Developer shall perform and comply with  
33 all requirements set forth in the OJT Special Provisions and the provisions in Developer’s  
34 approved OJT Utilization Plan.

35 **8.3.3** Within 30 days after issuance of NTP 1, Developer shall: (a) revise and  
36 convert its Preliminary OJT Utilization Plan, included in the Proposal, into a more detailed,  
37 final OJT Utilization Plan; and (b) submit this plan to ADOT for approval in ADOT’s good  
38 faith discretion.

1                   **8.3.3.1**       The OJT Utilization Plan shall affirmatively respond to and  
2 resolve ADOT’s comments on and revisions to the draft final OJT Utilization Plan.

3                   **8.3.3.2**       The OJT Utilization Plan shall include an overview of  
4 Developer’s understanding of the Project’s OJT requirements and Developer’s  
5 commitment to meeting or using Good Faith Efforts to meet the OJT Goals and all other  
6 OJT requirements. The OJT Utilization Plan must additionally contain the following:

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

14                              ii. Description of the types of proactive OJT marketing,  
15 recruitment, outreach, and community engagement efforts Developer made prior to the  
16 Effective Date and will make through Substantial Completion to secure the participation  
17 of women, minority, veteran, and disadvantaged trainees for the Project. Include  
18 information about Developer’s OJT Trainee screening, hiring, and processes to retain  
19 OJT Trainees;

20                              iii. Description of specific Good Faith Efforts measures that  
21 Developer will undertake through Substantial Completion to achieve the OJT Goals;

22                              iv. Description of Developer’s OJT program, which Developer will  
23 use to train and educate women, minority, veteran, and disadvantaged individuals in  
24 various construction related crafts during each phase/segment of the Construction Work,  
25 as such phase/segment is identified in the Preliminary Project Baseline Schedule.  
26 Developer’s OJT program shall include training goals and details for on-site and off-  
27 site/classroom training, estimated training schedule timeframes specific to each job  
28 classification, number of trainees per classification, and the estimated start dates for each  
29 classification;

30                              v. An estimated OJT participation schedule for each  
31 phase/segment of the Construction Work, and a description of processes and procedures  
32 Developer will use to document changes/adjustments to the OJT participation schedule  
33 to achieve the OJT Goals. Include time intervals at which these processes and  
34 procedures will be employed; and

35                              vi. Description of Developer’s data collection and monitoring  
36 systems, including tracking of OJT Trainee recruits and reporting of OJT hours and  
37 trainee completion/graduation/termination to ADOT for each phase/segment of the  
38 Construction Work. Include information about the expected frequency and  
39 comprehensiveness of these efforts.

1                   **8.3.3.3**        Issuance of NTP 2 is conditioned on first obtaining such ADOT  
2 approval of the OJT Utilization Plan. The approved OJT Utilization Plan shall be  
3 considered a Contract Document with an order of precedence as provided by Section  
4 1.2.1.

5                   **8.3.4**        No earlier than ADOT's approval of the final OJT Utilization Plan, and no  
6 later than 30 days prior to the start of the Construction Work, Developer shall comply with  
7 the reporting requirements in Sections 923-3.01 and 923-6 of the OJT Special Provisions  
8 (Exhibit 8). Failure to submit the required documentation within the specified deadline  
9 shall be cause to deny credit for any work performed by the OJT Trainee prior to approval  
10 and delay approval of Developer's monthly progress payment.

11                   **8.3.5**        The foregoing shall not preclude the same individual OJT Trainees from  
12 satisfying each of the OJT Goals. Developer shall distribute the number of OJT Trainees  
13 among work classifications on the basis of Developer's need and the availability of  
14 journey persons in the various classifications. Developer will be credited for each Trainee  
15 employed on the Project in an ADOT or State approved apprenticeship program.

## 16 **8.4     Subcontracts**

17                   **8.4.1**        Developer shall retain or cause to be retained only Subcontractors who are  
18 qualified, experienced, and capable in the performance of the portion of the Work  
19 assigned. Developer shall ensure that each Subcontractor has at the time of execution of  
20 the corresponding Subcontract, and maintains at all times during performance of the  
21 assigned Work, all licenses required by applicable Laws, and all insurance required by  
22 the Contract Documents. Subject to Section 10.1.6.1, if Developer believes that a  
23 Subcontractor is unable to obtain a particular insurance policy because such policy is not  
24 commercially available or is cost prohibitive, Developer shall propose, prior to submission  
25 of the Professional Services Subcontractor Request Form or Construction Subcontractor  
26 Request Form, as applicable, an alternative policy to ADOT for the Subcontractor, which  
27 proposed alternative shall provide sufficient coverage for the Work to be performed by  
28 the Subcontractor, and ADOT shall determine in its good faith discretion whether to  
29 accept such substitute insurance coverage in place of any requirement specified in Exhibit  
30 11. Developer shall retain, employ, and utilize the firms and organizations specifically  
31 listed in the Project Management Plan to fill the corresponding Subcontractor positions  
32 listed therein.

33                   **8.4.2**        Developer shall comply with the following Subcontractor reporting  
34 requirements.

35                   **8.4.2.1**        For each Subcontract (regardless of tier), Developer shall  
36 submit to ADOT a completed Professional Services Subcontractor Request Form or  
37 Construction Subcontractor Request Form, as applicable, not later than seven days  
38 before the Subcontractor commences work. Examples of the Professional Services  
39 Subcontractor Request Form and Construction Subcontractor Request Form are  
40 provided in Exhibits 5-1 and 5-2, respectively. Developer shall electronically access and  
41 submit the forms to ADOT, as required by ADOT.



1                   **8.4.2.2**       For each Subcontractor (regardless of tier) that performs  
2 Construction Work, Developer shall submit to ADOT written notice of the Subcontractor's  
3 start date not later than 48 hours before the Subcontractor commences work or, for those  
4 Subcontractors identified in the Proposal and starting on or within 48 hours of the Effective  
5 Date, not later than 48 hours after the start date.

6                   **8.4.2.3**       Except for DBE Subcontracts, Developer shall submit to  
7 ADOT a copy of each executed Subcontract (regardless of tier) not later than 60 days  
8 after the Subcontractor commences work. For each DBE Subcontractor, however,  
9 Developer shall submit to ADOT a copy of the executed Subcontract, not later than when  
10 required in Section 12.03 of the DBE Special Provisions (Exhibit 7).

11                   **8.4.2.4**       For each Subcontractor (DBE and non-DBE), Developer shall  
12 comply with the prompt payment requirements and payment and payroll reporting  
13 requirements set forth in Sections 12.5 and 12.6.

14                   **8.4.3**       The retention of Subcontractors by Developer will not relieve Developer of  
15 its responsibility hereunder or for the quality of the Work or materials provided by it.  
16 Developer shall supervise and be fully responsible to ADOT for the acts, omissions,  
17 negligence, intentional misconduct, or breach of applicable Law, contract or  
18 Governmental Approval by any Developer-Related Entity or by any member or employee  
19 of Developer or any Developer-Related Entity, as though Developer directly employed all  
20 such individuals. No Subcontract entered into by Developer will impose any obligation or  
21 liability upon ADOT to any such Subcontractor or any of its employees. Nothing in this  
22 Agreement creates any contractual relationship between ADOT and any Subcontractor.

23                   **8.4.4**       The following requirements shall apply to Subcontracts.

24                   **8.4.4.1**       Developer shall, prior to soliciting any bids for performance of  
25 work or labor or rendering of services relating to the design or construction of the Project  
26 or for special fabrication and installation of a portion of the Work, submit to ADOT for its  
27 review and comment a procedure for the conduct of the bidding process applicable to  
28 Subcontracts. Developer may use procedures set forth in the ADOT Standard  
29 Specifications or may submit alternative procedures to ADOT for approval in ADOT's sole  
30 discretion. Developer shall not enter into any Subcontract, except in accordance with the  
31 foregoing procedure. Notwithstanding the foregoing, this Section 8.4.4.1 shall not apply  
32 to any Subcontracts entered during the first sixty days following the Effective Date.

33                   **8.4.4.2**       As soon as Developer identifies a potential Subcontractor for  
34 a potential Subcontract, but in no event later than five days after executing the  
35 Subcontract, Developer shall provide in writing to ADOT the Subcontractor's name,  
36 address, phone number and license number with the Register of Contractors, the name  
37 of the Subcontractor's authorized representative, and a description of work to be  
38 performed by such Subcontractor.

1                   **8.4.4.3**        Within each executed Subcontract, Developer shall clearly  
2 and expressly identify where each of the requirements set forth in Section 8.4.5 are  
3 located.

4                   **8.4.5** Each Subcontract shall:

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

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

12                   (c)        Expressly include Form FHWA-1273, except to the extent provided  
13 otherwise in Part I, General, of Form FHWA-1273, and expressly include the general  
14 wage decisions applicable to the Project and set forth in Attachment 3-a to Exhibit 4  
15 (Federal Prevailing Wage Rates), except to the extent provided otherwise in Part I,  
16 General, of Form FHWA-1273;

17                   (d)        Provide that ADOT is a third-party beneficiary of the Subcontract with  
18 the right to enforce all terms of the Subcontract for its own benefit;

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

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

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

38                   (h)        Not be assignable by the Subcontractor to any Person other than  
39 ADOT (or its successor, assignee or designee) without Developer's prior consent;

1 (i) Expressly require that the Subcontractor will: (1) maintain usual and  
2 customary Books and Records for the type and scope of business operations in which it  
3 is engaged (e.g., constructor, equipment Supplier, designer, service provider) and  
4 maintain records for disputed work in compliance with Section 22.4.5; (2) permit audit of  
5 Books and Records with respect to the Project or Work by each of Developer and ADOT  
6 pursuant to Section 22.5; and (3) provide progress reports to Developer appropriate for  
7 the type of work it is performing sufficient to enable Developer to provide the reports it is  
8 required to furnish ADOT under this Agreement;

9 (j) Include the right of Developer to terminate the Subcontract in whole  
10 or in part upon any Termination for Convenience of this Agreement without liability of  
11 Developer or ADOT for the Subcontractor's lost profits, business opportunity or other  
12 consequential damages;

13 (k) Expressly require the Subcontractor to participate in meetings  
14 between Developer and ADOT, upon ADOT's request, concerning matters pertaining to  
15 such Subcontract or the work thereunder, provided that all direction to such Subcontractor  
16 shall be provided by Developer, and provided further that nothing in this clause (k) shall  
17 limit the authority of ADOT to give such direction or take such action which, in its sole  
18 opinion, is necessary to remove an immediate and present threat to the safety of life or  
19 property;

20 (l) Include an agreement by the Subcontractor to give evidence in any  
21 dispute resolution proceeding pursuant to Article 21, if such participation is requested by  
22 either ADOT or Developer;

23 (m) Expressly include a provision prohibiting cross-contract offset  
24 between the parties thereto, meaning that if a Subcontractor is performing work on  
25 multiple contracts for the other party to the Subcontract or the other party's affiliates, the  
26 other party or its affiliate shall not withhold payment from the Subcontractor on its  
27 Subcontract because of disputes or claims on another contract;

28 (n) Expressly include Sections 8.1.1 and 8.1.2 (with appropriate  
29 changes in the names of the parties);

30 (o) Expressly include in every Subcontract (including purchase orders  
31 and in every Subcontract of any Developer-Related Entity for the Work), provisions to  
32 effectuate the DBE requirements and require that they be included in all Subcontracts at  
33 lower tiers, so that such provisions will be binding upon each Subcontractor. All  
34 Subcontracts of any tier, including those with DBE firms, and all contracts with Suppliers,  
35 shall require compliance with 49 C.F.R Part 26 and include the DBE Special Provisions  
36 (Exhibit 7). The requirements of this subparagraph (o) shall not apply to Subcontracts at  
37 any tier with ADOT or Governmental Entities;

38 (p) Expressly include in every Subcontract for Construction Work  
39 (including purchase orders and in every Subcontract of any Developer-Related Entity for  
40 Construction Work), provisions to effectuate the OJT requirements, and require that they

1 be included in all Subcontracts at lower tiers, so that such provisions will be binding upon  
2 each such Subcontractor. All Subcontracts for Construction Work of any tier, including  
3 those with DBE firms, shall include the OJT Special Provisions (Exhibit 8) and require  
4 compliance with the provisions of Form FHWA-1273, 23 U.S.C § 140(a), and 23 C.F.R §  
5 230.111. The requirements of this subparagraph (p) shall not apply to Subcontracts at  
6 any tier with ADOT or Governmental Entities;

7 (q) Expressly require the Subcontractor to make payments to its lower  
8 tier Subcontractors, and be liable for interest payments to such Subcontractors, as set  
9 forth in Sections 12.5.1 and 12.5.2, respectively;

10 (r) Contain no waiver of the prompt payment protections for the  
11 Subcontractor provided under Section 12.5 and A.R.S. § 28-411(C), (D), and (E);

12 (s) Expressly provide that all claims and charges of the Subcontractor  
13 and its Subcontractors at any tier shall not attach to any interest of ADOT in the Project  
14 or the Project ROW;

15 (t) Expressly include a covenant, expressly stated to survive termination  
16 of the Subcontract, to promptly execute and deliver to ADOT a new contract between the  
17 Subcontractor and ADOT on the same terms and conditions as the Subcontract, in the  
18 event: (1) the Subcontract is rejected by Developer in bankruptcy or otherwise wrongfully  
19 terminated by Developer; or (2) ADOT delivers a request for such new contract following  
20 termination or expiration of this Agreement;

21 (u) Be consistent in all other respects with the terms and conditions of  
22 the Contract Documents to the extent such terms and conditions are applicable to the  
23 scope of work of a Subcontractor, and include all provisions required by this Agreement;  
24 and

25 (v) Expressly include paragraphs 1 through 6 of Attachment 6 to Exhibit  
26 4 (Appendix A to USDOT Standard Title VI Assurances and Non-Discrimination  
27 Provisions: Contractor Assurances).

28 **8.4.6** Developer shall not amend any Subcontract with respect to any of the  
29 foregoing matters without the prior consent of ADOT.

30 **8.4.7** Developer shall not enter into any Subcontracts with any Person then  
31 debarred or suspended from submitting bids by any agency of the State or the U.S.  
32 federal government.

33 **8.4.8 Additional Requirements for Independent Quality Firm Subcontract(s)**

34 **8.4.8.1** Developer shall directly subcontract all Independent Quality  
35 Firm ("IQF") services, described in Sections 113.01 and 114.03.03 of the Technical  
36 Provisions, to one or more IQF Subcontractors.

1                   **8.4.8.2**       At no time shall any IQF Subcontractor be an Affiliate of  
2 Developer or an Affiliate of a Subcontractor.

3                   **8.4.8.3**       Unless Developer first clearly demonstrates to ADOT that an  
4 IQF Subcontractor has committed a material default that has not been cured after a  
5 reasonable cure period, Developer shall not terminate any Subcontract with an IQF  
6 Subcontractor, or permit or suffer any substitution or replacement of any IQF  
7 Subcontractor, unless so authorized in writing by ADOT in its sole discretion.

8   **8.5    Responsibility for Developer-Related Entities**

9                   Developer shall supervise and be responsible for the acts, omissions, negligence,  
10 intentional misconduct, or breach of applicable Law, contract or Governmental Approval  
11 by any Developer-Related Entity, as though Developer directly employed all such Persons.

12   **8.6    Key Personnel**

13                   **8.6.1   Availability of Key Personnel**

14                   **8.6.1.1**       Except as provided in Section 8.6.3.1, (a) Developer  
15 represents, warrants, and covenants that all Key Personnel are available for and will  
16 perform the roles identified for them in Exhibit 9, and (b) Developer shall not replace or  
17 permit replacement of any individual filling a Key Personnel position without ADOT's prior  
18 written approval.

19                   **8.6.1.2**       Developer shall cause the individuals filling Key Personnel  
20 positions to maintain active involvement in the prosecution and performance of the Work  
21 sufficient for satisfactory performance of the tasks to be performed by such Key  
22 Personnel. Developer shall cause each Key Personnel to comply with the required time  
23 commitments specified in Exhibit 9. In addition to the foregoing, ADOT has the right to  
24 require a greater time commitment, up to full time commitment, from any individual filling  
25 a Key Personnel position during the Work, if ADOT, in its good faith discretion, determines  
26 such additional commitment of time is necessary for satisfactory prosecution and  
27 performance of the Work.

28                   **8.6.1.3**       Developer shall provide phone, e-mail addresses, and mobile  
29 telephone numbers for all Key Personnel to ADOT. ADOT must be able to contact a Key  
30 Personnel 24 hours per day, seven days per week. Developer shall prepare and submit  
31 to ADOT before the first day of each month, a schedule divided into three 8-hour blocks  
32 per day identifying one on-call Key Personnel and one back-up Key Personnel available  
33 during each 8-hour block for each day in the coming month. If ADOT attempts, but cannot  
34 make contact with the on-call Key Personnel or the backup, Developer shall be liable for  
35 liquidated damages in the amount of \$500 per hour or portion thereof that ADOT is unable  
36 to make such contact.

37

38

1                   **8.6.2 Liquidated Damages for Key Personnel**

2                   **8.6.2.1**       If individuals filling certain Key Personnel positions (i) are not  
3 performing the roles identified for those individuals in Exhibit 9, (ii) do not maintain active  
4 involvement in the prosecution and performance of the Work, or (iii) do not commit the  
5 amount of time specified in Exhibit 9 for the particular Key Personnel role, Developer  
6 acknowledges that ADOT, the Work, and the Project will suffer significant and substantial  
7 Losses due to the unavailability of that individual.

8                   **8.6.2.2**       Developer and ADOT acknowledge that it is impracticable and  
9 extremely difficult to determine the actual Losses that would accrue to ADOT in the event  
10 of such unavailability of Key Personnel. Accordingly, and subject to Section 8.6.3, if at  
11 any time, an individual filling a Key Personnel position shown in the table in this Section  
12 8.6.2.2 is (i) not performing the role identified for that individual in Exhibit 9, (ii) not actively  
13 involved in the prosecution and performance of the Work (regardless of whether the  
14 individual is replaced by another individual approved by ADOT), or (iii) not committing the  
15 amount of time specified in Exhibit 9 for the particular Key Personnel role, Developer shall  
16 pay ADOT Liquidated Damages in the amount set forth in this Section 8.6.2.2 based on  
17 the individual's Key Personnel position.

<b>Key Personnel Position</b>	<b>Liquidated Damages</b>
Project Manager	\$275,000.00
Construction Manager	\$225,000.00
Design Manager	\$225,000.00
Maintenance of Traffic Manager	\$225,000.00
Public Relations Manager	\$225,000.00

18                   **8.6.2.3**       Developer understands and agrees that any Liquidated  
19 Damages payable under Section 8.6.2.2 are not a penalty and that such sums are  
20 reasonable under the circumstances existing as of the Effective Date. The Parties have  
21 agreed to Liquidated Damages under this Section 8.6.2 to fix and limit Developer's costs  
22 and to avoid later disputes over the amount of damages that ADOT has suffered and are  
23 properly chargeable to Developer.

24                   **8.6.2.4**       ADOT will have the right to deduct Liquidated Damages owing  
25 from Developer to ADOT under Section 8.6.2.2 from amounts owing from ADOT to  
26 Developer under the Agreement; to invoice Developer for the Liquidated Damages owing  
27 from Developer to ADOT, such invoice payable in accordance within the time specified  
28 therein; or to collect such Liquidated Damages from any letter of credit, bond or Guaranty  
29 furnished under this Agreement.

1           **8.6.3 Limitations on Liquidated Damages for Unavailability of Key**  
2 **Personnel**

3           **8.6.3.1**       Developer shall not be liable for Liquidated Damages under  
4 Section 8.6.2.2 under the following conditions:

5                       (a)       Developer removes or replaces an individual filling a Key  
6 Personnel position with ADOT’s written consent, which shall be provided or withheld in  
7 ADOT’s sole discretion;

8                       (b)       An individual filling a Key Personnel position is unavailable  
9 because of death, retirement, injury or termination of employment with the applicable  
10 Developer-Related Entity (except where the individual moves to an affiliated entity);  
11 provided, however, that in each such case, Developer shall, within fifteen Days of the  
12 individual becoming unavailable, propose to ADOT a replacement individual for the Key  
13 Personnel position, which individual shall be subject to ADOT’s approval. The individual  
14 proposed must meet the minimum requirements for the Key Personnel position specified  
15 in Exhibit 9. Developer shall be liable for the Liquidated Damages specified in Section  
16 8.6.2.2 if Developer does not propose an individual that meets the requirements of the  
17 Key Personnel position within the time specified in this Section 8.6.3.1(b); or

18                      (c)       Developer may replace the individual identified as the initial  
19 Public Relations Manager as of the Effective Date in Exhibit 9 one time without liability for  
20 the Liquidated Damages specified in Section 8.2.2.2 for the Public Relations Manager  
21 position, provided that Developer proposes a replacement that is acceptable to ADOT  
22 and such replacement commences work no later than the day following departure of the  
23 initial individual identified on the Effective Date in Exhibit 9. Any further replacement of  
24 the Public Relations Manager shall be subject to Liquidated Damages under Section  
25 8.6.2.2.

26           **8.6.3.2**       Developer may replace the individual filling the position of  
27 Project Manager, Construction Manager, Design Manager, and Maintenance of Traffic  
28 Manager with another individual approved by ADOT one time (in each case) without  
29 incurring Liquidated Damages under Section 8.6.2.2, but only if: (a) Developer has  
30 completed at least 70% of the Work; (b) the Work is progressing on schedule; and (c)  
31 there exist no uncured Developer Defaults. Subsequent replacements of individuals filling  
32 any such position shall be subject to Liquidated Damages under Section 8.6.2.2.  
33 Replacement of an individual filling a Key Personnel position due to unavailability, as set  
34 forth Section 8.6.3.1(b), shall not be considered a prior replacement that would preclude  
35 a substitution in accordance with this Section 8.6.3.2.

36           **8.6.3.3**       If an individual filling a Key Personnel position is unavailable  
37 because ADOT does not issue NTP 1 within 180 days after the Proposal Due Date,  
38 through no act, omission, negligence, intentional misconduct, or breach of applicable  
39 Law, contract or Governmental Approval of any Developer-Related Entity, then Developer  
40 shall have 30 days after issuance of NTP 1 to identify a replacement for such Key  
41 Personnel position without incurring Liquidated Damages under Section 8.6.2.2. The

1 proposed replacement must comply with the minimum requirements specified in Exhibit  
2 9 for the particular Key Personnel position. Upon ADOT's approval of the replacement  
3 individual(s), such individual(s) shall be considered Key Personnel under this Agreement,  
4 including for purposes of Section 8.6.2.2 relative to Liquidated Damages.

5 **8.6.4 Liquidated Damages for Failure to Timely Replace Key Personnel**

6 **8.6.4.1** In addition to any Liquidated Damages that may apply under  
7 Section 8.6.2, Developer shall pay ADOT Liquidated Damages in the amount of \$2,000  
8 for each day that any Key Personnel position is not replaced, commencing on the sixtieth  
9 day that the Key Personnel position remains unfilled and ending on the day that Developer  
10 fills the Key Personnel position in accordance with this Agreement. The Liquidated  
11 Damages payable under this Section 8.6.4 shall be applicable regardless of the reason  
12 for the departure of the individual previously filling the Key Personnel role, and regardless  
13 of whether Liquidated Damages are applicable under Section 8.6.2 or excused under  
14 Section 8.6.3.1(b).

15 **8.6.4.2** Developer understands and agrees that any Liquidated  
16 Damages payable under this Section 8.6.4 are not a penalty and that such sums are  
17 reasonable under the circumstances existing as of the Effective Date. The Parties have  
18 agreed to Liquidated Damages under this Section 8.6.4 to fix and limit Developer's costs  
19 and to avoid later disputes over the amount of damages that ADOT has suffered and are  
20 properly chargeable to Developer due to Developer's failure to replace Key Personnel  
21 members timely.

22 **8.6.4.3** ADOT will have the right to deduct Liquidated Damages owing  
23 from Developer to ADOT under Section 8.6.4 from amounts owing from ADOT to  
24 Developer under the Agreement; to invoice Developer for the Liquidated Damages owing  
25 from Developer to ADOT, such invoice payable in accordance with the time specified  
26 therein; or to collect such Liquidated Damages from any letter of credit, bond or Guaranty  
27 furnished under this Agreement.

28 **8.7 Subcontracts with Affiliates**

29 **8.7.1** Developer shall have the right to have Work and related services performed  
30 by Affiliates only in accordance with the following terms and conditions (in addition to all  
31 other general requirements for Subcontracts set forth in this Agreement):

- 32 (a) Developer shall execute a written Subcontract with the Affiliate;
- 33 (b) The Subcontract shall comply with all applicable provisions of this  
34 Article 8, be consistent with Good Industry Practice, and be in form and substance  
35 substantially similar to Subcontracts then being used by Developer for similar Work or  
36 services with unaffiliated Subcontractors;
- 37 (c) The Subcontract shall set forth the scope of work and services and  
38 all the pricing, terms, and conditions respecting the scope of work and services;



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

6 (e) No Affiliate shall be engaged to perform any Work or services that  
7 any Contract Documents or the Project Management Plan or any component part, plan  
8 or other documentation thereunder require to be performed by an independent party or a  
9 party that is not an Affiliate of Developer (such as IQF services). No Affiliate shall be  
10 engaged to perform any Work or services that would be inconsistent with Good Industry  
11 Practice.

12 **8.7.2** In addition to compliance with Section 8.4.2, before entering into a written  
13 Subcontract with an Affiliate or any supplement or amendment thereto, Developer shall  
14 submit a true and complete copy of the proposed Subcontract to ADOT for review and  
15 comment. ADOT will have 20 days after receipt to deliver its comments to Developer, and  
16 ADOT may in its sole discretion condition its approval of the Subcontract or any  
17 supplement or amendment thereto on Developer's compliance with ADOT's comments.

18 **8.7.3** Developer shall make no payments to Affiliates for work or services in  
19 advance of provision of such work or services, except for reasonable mobilization  
20 payments or other payments consistent with arm's length, competitive transactions of  
21 similar scope. ADOT shall not be liable to Developer for any payments made in violation  
22 of this Section 8.7.3.

## 23 **8.8 Labor Standards**

24 **8.8.1** Developer shall at all times comply, and require by Subcontract that all  
25 Subcontractors and Suppliers comply, with all applicable federal and State labor,  
26 occupational safety, and health standards, rules, regulations, and federal and State  
27 orders.

28 **8.8.2** All individuals performing Work shall have the skill and experience and any  
29 licenses required to perform the Work assigned to them.

30 **8.8.3** If any individual employed by Developer or any Subcontractor is not  
31 performing the Work in a proper, safe, and skillful manner, or fails to perform effectively,  
32 then Developer shall, or shall cause such Subcontractor to, remove such individual and  
33 such individual shall not be re-employed on the Work. If, after notice from ADOT and  
34 reasonable opportunity to cure, such individual is not removed or if Developer fails to  
35 ensure that skilled and experienced personnel are furnished for the proper performance  
36 of the Work, then ADOT may (i) require Developer or the Subcontractor to remove such  
37 individual or replace such individual with properly skilled personnel or (ii) suspend the  
38 affected portion of the Work by delivery of notice of such suspension to Developer. Such  
39 suspension by ADOT pursuant to Section 8.8.3 (ii) shall be considered a suspension for  
40 cause and shall in no way relieve Developer of any obligation contained in the Contract

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

### 3 **8.9 Ethical Standards**

4 **8.9.1** Within 90 days after the Effective Date, Developer shall adopt written  
5 policies establishing ethical standards of conduct applicable to all Developer-Related  
6 Entities, including Developer's supervisory and management personnel, in dealing with:  
7 (1) ADOT and the General Engineering Consultant; and (2) employment relations. Such  
8 policy shall be subject to review and comment by ADOT prior to adoption. Such policy  
9 shall include standards of ethical conduct concerning the following:

10 (a) Restrictions on gifts and contributions to, and lobbying of, ADOT, the  
11 Arizona State Transportation Board, the General Engineering Consultant, and any of the  
12 respective commissioners, directors, officers, and employees of any of the foregoing;

13 (b) Protection of employees from unethical practices in selection, use,  
14 hiring, compensation or other terms and conditions of employment, or in promotion and  
15 termination of employees;

16 (c) Protection of employees from retaliatory actions (including  
17 discharge, demotion, suspension, threat, harassment, pay reduction or other  
18 discrimination in the terms and conditions of employment) in response to reporting of  
19 illegal (including the making of a false claim), unethical or unsafe actions or failures to act  
20 by any Developer-Related Entity;

21 (d) Restrictions on directors, members, officers or supervisory or  
22 management personnel of any Developer-Related Entity engaging in any transaction or  
23 activity, including receiving or offering a financial incentive, benefit, loan or other financial  
24 interest, that is, or to a reasonable person appears to be, in conflict with or incompatible  
25 with the proper discharge of duties or independence of judgment or action in the  
26 performance of duties, or adverse to the interests of the Project or employees;

27 (e) Restrictions on use of office or job position for a purpose that is, or  
28 would to a reasonable person appear to be, primarily for the private benefit of a director,  
29 member, officer or supervisory or management person, rather than primarily for the  
30 benefit of Developer or the Project, or primarily to achieve a private gain or an exemption  
31 from duty or responsibility for a director, member, officer or supervisory or management  
32 person; and

33 (f) Restrictions on directors, members, officers or employees of any  
34 Developer-Related Entity performing any of the Work if the performance of such services  
35 would be prohibited under ADOT's published conflict of interest rules and policies  
36 applicable to the Project, or would be prohibited under applicable Laws.

37 **8.9.2** Developer shall cause its directors, members, officers, and supervisory and  
38 management personnel, and include contract provisions requiring those of all other  
39 Developer-Related Entities, to adhere to and enforce the adopted policy on ethical

1 standards of conduct. Developer shall establish systems and procedures to promote and  
2 monitor compliance with the policy.

### 3 **8.10 Prevailing Wages**

4 **8.10.1** Developer shall pay or cause to be paid to all applicable workers employed  
5 by it or its Subcontractors to perform the Work not less than the prevailing rates of wages,  
6 as provided in the statutes and regulations applicable to public works contracts, including  
7 the Davis-Bacon Act, and as provided in Attachment 3-a to Exhibit 4 (“Federal Prevailing  
8 Wages Rates”). Developer shall comply and cause its Subcontractors to comply with all  
9 Laws pertaining to prevailing wages. For the purpose of applying such Laws, the Project  
10 shall be treated as a public work paid for in whole or in part with public funds (regardless  
11 of whether public funds are actually used to pay for the Project). The foregoing shall not  
12 apply to Subcontracts at any tier with ADOT or Governmental Entities.

13 **8.10.2** It is Developer’s sole responsibility to determine the wage rates required to  
14 be paid. If rates of wages and benefits applicable to the Project change from those  
15 provided in Attachment 3-b to Exhibit 4, Developer shall bear the cost of such changes  
16 and shall not be entitled to an increase in the Contract Price or a Completion Deadline  
17 adjustment, and shall have no other Claim against ADOT on account of such changes.  
18 Without limiting the foregoing, no Claim will be allowed that is based upon Developer’s  
19 lack of knowledge or a misunderstanding of any such requirements or Developer’s failure  
20 to include in the Contract Price adequate increases in such wages from those in  
21 Attachment 3-b to Exhibit 4. The provision of wage rates in Attachment 3-b to Exhibit 4  
22 shall not be impact or abrogate Developer’s responsibility to pay the Federal Prevailing  
23 Wage Rates applicable to the Project.

24 **8.10.3** Developer shall comply and cause its Subcontractors to comply with all  
25 Laws regarding notice and posting of intent to pay prevailing wages, of prevailing wage  
26 requirements, and of prevailing wage rates.

### 27 **8.11 Uniforms**

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

1 **ARTICLE 9.**  
2 **PERFORMANCE AND PAYMENT BONDS; GUARANTEES**

3 **9.1 Provision of Bonds**

4 Developer shall provide to ADOT performance and payment bonds securing  
5 Developer's obligations during the Work, and Developer shall maintain such bonds in full  
6 force and effect as described in this Section 9.1.

7 **9.1.1 Performance Bond**

8 **9.1.1.1** On or before the Effective Date, Developer shall have  
9 delivered to ADOT the Performance Bond in the amount of \$250,000,000.00.

10 **9.1.1.2** ADOT will provide a release of the Performance Bond  
11 provided that (and upon such date thereafter that) all of the following have occurred:

12 (a) Final Acceptance has occurred;

13 (b) There exists no Developer Default; and

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

16 **9.1.2 Payment Bond**

17 **9.1.2.1** On or before the Effective Date, Developer delivered to ADOT the  
18 Payment Bond in the amount of \$250,000,000.00.

19 **9.1.2.2** ADOT will provide a release of the Payment Bond upon:

20 (a) Receipt of (i) evidence satisfactory to ADOT that all Persons eligible  
21 to file a claim against the Payment Bond have been fully paid, and (ii) unconditional  
22 releases of claims and stop notices from all Subcontractors who filed preliminary notices  
23 of a claims against the Payment Bond (or evidence satisfactory to ADOT that any such  
24 claims and stop notices have been secured by a separate bond(s), which separate  
25 bond(s), with the exception of the amount, shall meet the requirements for the Payment  
26 Bond set forth in Section 9.1.3); and

27 (b) Expiration of the statutory period for Subcontractors to file a claim  
28 against the Payment Bond, if no claims have been filed.

29 **9.1.3** Each Performance Bond and Payment Bond required hereunder shall be  
30 issued by a Surety that is: (a) licensed and authorized to do business in the State; (b)  
31 listed on the "Department of the Treasury's Listing of Approved Sureties (Department  
32 Circular 570)" (found at [www.fiscal.treasury.gov/fsreports/ref/suretybnd/c570.htm](http://www.fiscal.treasury.gov/fsreports/ref/suretybnd/c570.htm)); and  
33 (c) rated in one of the top two categories (i.e., AA- or its equivalent) by two nationally-  
34 recognized rating agencies (Fitch Ratings, Moody's Investor Service and Standard &

1 Poor's) or rated at least A minus ("A-") or better and Class VIII or better according to A.M.  
2 Best and Company's Financial Strength Rating and Financial Size Category, or as  
3 otherwise approved by ADOT in its sole discretion. If any bond previously provided  
4 becomes ineffective, or if the Surety that provided the bond no longer meets the foregoing  
5 requirements, Developer shall provide a replacement bond in the same form and, if  
6 applicable, with the same multiple obligee rider, issued by a Surety meeting the foregoing  
7 requirements, or other assurance satisfactory to ADOT in its sole discretion. If any bond  
8 is provided by co-Sureties and at least one of the co-Sureties meets the foregoing  
9 requirements and is liable for the full amount of the bond, then no replacement bond shall  
10 be required so long as such co-Surety continues to meet the foregoing requirements.

11 **9.1.4** If the Contract Price is increased in connection with a Supplemental  
12 Agreement, ADOT may, in its sole discretion, require a corresponding and proportionate  
13 increase in the amount of each Performance Bond and Payment Bond, or alternative  
14 security. A reduction in the Contract Price in connection with a Supplemental Agreement  
15 shall not result in any decrease to the amount of each Performance Bond and Payment  
16 Bond.

## 17 **9.2 No Relief of Liability**

18 Notwithstanding any other provision in the Contract Documents, performance by a  
19 Surety or Guarantor of any of the obligations of Developer under the Contract Documents  
20 shall not relieve Developer of any of its other obligations hereunder, including the payment  
21 of Liquidated Damages.

## 22 **9.3 Guaranty**

23 **9.3.1** Flatiron Construction Corp. (the "Guarantor") is the Guarantor guaranteeing  
24 Developer's obligations under the Contract Documents as of the Effective Date and has  
25 provided a guaranty in accordance with the form attached as Exhibit 10 (the "Guaranty").

26 **9.3.2** If at any time during the course of this Agreement the total combined  
27 Tangible Net Worth of Developer and the Guarantor is less than \$250,000,000.00,  
28 Developer shall provide, not later than 30 days thereafter, one or more additional  
29 guarantees so that the combined Tangible Net Worth of Developer and the applicable  
30 Guarantors is at least \$250,000,000.00.

31 **9.3.3** If this Agreement is executed by or permissibly assigned to a Developer that  
32 is a joint venture, each joint venture member shall be jointly and severally liable for any  
33 and all of the duties and obligations of Developer under the Contract Documents.

34 **9.3.4** The Tangible Net Worth of each joint venture member will be counted  
35 toward the Tangible Net Worth requirement.

36 **9.3.5** Each Guaranty shall be in the form attached as Exhibit 10 together with  
37 appropriate evidence of authorization, execution, delivery, and validity thereof, and shall  
38 guarantee the Guaranteed Obligations. Developer shall provide an opinion from the

1 Guarantor's legal counsel, in form and substance acceptable to ADOT, concerning due  
2 authorization, execution, delivery, validity, and enforceability of each Guaranty.

3 **9.3.6** Developer may replace an existing Guaranty with a new Guaranty only with  
4 prior approval by ADOT. Any new Guaranty shall be provided in the form attached as  
5 Exhibit 10 together with appropriate evidence of authorization, execution, delivery, and  
6 validity thereof, and with legal opinions as required by Section 9.3.5, and shall guarantee  
7 the Guaranteed Obligations. The Guaranty being replaced shall remain in effect until the  
8 approved replacement Guaranty becomes effective.

1 **ARTICLE 10.**  
2 **INSURANCE; RISK OF LOSS; CLAIMS AGAINST THIRD PARTIES**

3 Developer shall procure and keep in effect, or cause to be procured and kept in  
4 effect, the insurance policies in accordance with the requirements in this Article 10 and  
5 Exhibit 11.

6 **10.1 General Insurance Requirements**

7 **10.1.1 Qualified Insurers**

8 Each of the insurance policies required hereunder shall be procured from an  
9 insurance carrier or company that, at the time coverage under the applicable policy  
10 commences is: (a) authorized to do business in the State and has a current policyholder's  
11 management and financial size category rating of not less than "A –, VII" according to A.M.  
12 Best's Insurance Reports Key Rating Guide; or (b) otherwise approved by ADOT.

13 **10.1.2 Premiums, Deductibles, and Self-Insured Retentions**

14 Developer shall timely pay, or cause to be paid, the premiums for all insurance  
15 required under this Agreement. Subject to Section 10.3 and Articles 13 and 14, Developer  
16 shall be responsible for and ADOT will have no liability for any deductibles, self-insured  
17 retentions, and amounts or damages in excess of the coverage provided. In the event that  
18 any required coverage is provided under a self-insured retention, Developer shall ensure  
19 that the entity responsible for the self-insured retention has an authorized representative  
20 issue a letter to ADOT, at the same time the insurance policy is to be procured, stating  
21 that it shall protect and defend ADOT to the same extent as if a commercial insurer  
22 provided coverage for ADOT.

23 **10.1.3 Primary Coverage**

24 Each insurance policy shall provide that the coverage is primary and  
25 noncontributory coverage with respect to any other insurance available to ADOT and the  
26 other Indemnified Parties, except for coverage that by its nature cannot be written as  
27 primary. For each property policy, such policy shall provide that the coverage thereof is  
28 primary and noncontributory with respect to all insureds as their interest may appear. Any  
29 insurance or self-insurance beyond that specified in this Agreement that is maintained by  
30 an insured or any additional insured shall be excess of such insurance and shall not  
31 contribute with it.

32 **10.1.4 Project-Specific Insurance**

33 Except as expressly provided otherwise in Exhibit 11, all insurance policies required  
34 hereunder shall be purchased specifically and exclusively for the Project and extend to all  
35 aspects of the Work, with coverage limits devoted solely to the Project. Insurance  
36 coverages under corporate insurance programs with dedicated Project-specific limits and  
37 identified allocation of funds to the Project are acceptable, provided that the limits are

1 unimpaired and they otherwise meet all requirements described in this Section 10.1 and  
2 Exhibit 11.

3 **10.1.5 Verification of Coverage; ADOT Right to Remedy Developer Failure to**  
4 **Insure**

5 **10.1.5.1** At each instance Developer is required to initially obtain or  
6 cause to be obtained each insurance policy, and thereafter not later than ten days prior  
7 to the expiration date of each insurance policy, Developer shall deliver to ADOT a  
8 certificate of insurance. Each required certificate must meet the requirements of ADOT  
9 and, to the extent permitted under applicable Laws, state the identity of all carriers, named  
10 insureds, and additional insureds required under the Contract Documents, state the type  
11 and limits of coverage, deductibles, and cancellation provisions of the policy, include as  
12 attachments all additional insured and waiver of subrogation endorsements required  
13 under the Contract Documents, and be signed by an authorized representative of the  
14 insurance company shown on the certificate or its agent or broker. Each required  
15 certificate of insurance evidencing coverage must be signed by a representative or agent  
16 of the insurance company with proof that the signer is an authorized representative or  
17 agent of such insurance company and is authorized to bind it to the coverage, limits, and  
18 termination provisions shown. Each such certificate of insurance shall be accompanied  
19 by a letter signed by Developer confirming that the insurance represented in the certificate  
20 of insurance fully complies with all provisions of this Article 10 and Exhibit 11.

21 **10.1.5.2** In addition, within a reasonable time after availability (but not  
22 to exceed 30 days), Developer shall deliver to ADOT: (i) a complete certified copy of each  
23 insurance policy or modification, or renewal or replacement insurance policy and all  
24 endorsements thereto and (ii) evidence of payment of the premium therefor.

25 **10.1.5.3** If Developer has not provided ADOT with proof of coverage of  
26 required insurance and payment within five days after ADOT delivers to Developer a  
27 written request therefor or notice of a Developer Default under Section 18.1.1 and  
28 demand for the foregoing proof of coverage, ADOT may, in addition to any other available  
29 remedy, without obligation or liability and without further inquiry as to whether such  
30 insurance is actually in force:

31 (a) Obtain such an insurance policy; and Developer shall  
32 reimburse ADOT for the cost thereof upon demand; and

33 (b) Suspend all or any portion of Work for cause and close the  
34 Project until ADOT receives from Developer such proofs of coverage in compliance with  
35 this Section 10.1 (or until ADOT obtains an insurance policy, if it elects to do so).

36 **10.1.6 Subcontractor Insurance Requirements**

37 **10.1.6.1** Developer shall comply with the obligations regarding  
38 Subcontractor's insurance set forth in Exhibit 11. Developer shall cause each  
39 Subcontractor to provide to ADOT insurance coverage and proof of such coverage in the  
40 manner and in the form consistent with the requirements in this Agreement. If a



1 Subcontractor is unable to obtain a particular insurance policy because such policy is not  
2 commercially available or is cost prohibitive, Developer shall propose, prior to submission  
3 of the Professional Services Subcontractor Request Form or Construction Subcontractor  
4 Request Form, as applicable, an alternative policy to ADOT for the particular  
5 Subcontractor, which proposed alternative shall provide sufficient coverage for the Work  
6 to be performed by the Subcontractor, and ADOT shall determine in its good faith  
7 discretion whether to accept such substitute insurance coverage in place of any  
8 requirement specified in Exhibit 11. ADOT shall have 10 days to respond to Developer's  
9 request. Provided that ADOT responds to Developer's request within 10 days of receipt  
10 of a complete submission from Developer, Developer shall not be entitled to an increase  
11 in the Contract Price, a Completion Deadline adjustment, or any other Claim associated  
12 with a request that ADOT approve an alternative insurance policy for a Subcontractor.

13 **10.1.6.2** If any Subcontractor fails to procure and keep in effect the  
14 insurance required of such Subcontractor specified in Exhibit 11 or such alternative  
15 coverage as ADOT may accept in accordance with Section 10.1.6.1, and ADOT asserts  
16 the same as a Developer Default hereunder, then Developer may, within the applicable  
17 cure period, cure such Developer Default by:

18 (a) Causing such Subcontractor to obtain the requisite insurance  
19 and providing to ADOT proof of insurance;

20 (b) Procuring the requisite insurance for such Subcontractor and  
21 providing to ADOT proof of insurance; or

22 (c) Terminating the Subcontractor and removing its personnel  
23 from the Site.

24 ADOT may pursue the remedies available to it for a Developer Default if Developer  
25 fails to cure a Subcontractor's failure to procure and keep in effect the insurance required  
26 of such Subcontractor.

### 27 **10.1.7 Policies with Insureds in Addition to Developer**

28 All insurance policies that are required to insure Persons (whether as named or  
29 additional insureds) in addition to Developer shall be endorsed to comply with the following  
30 provisions:

31 (a) The insurance policy shall be written and/or endorsed so that no acts  
32 or omissions of an insured shall terminate or otherwise adversely impact coverage of the  
33 other insureds. Without limiting the foregoing, the policy shall be written and/or endorsed  
34 so that any failure on the part of a named insured to comply with reporting provisions or  
35 other conditions of the insurance policies, any breach of warranty, any action or inaction  
36 of a named insured or others, or any change in ownership of all or any portion of the  
37 Project shall not affect coverage provided to the other named insureds or additional  
38 insureds (and their respective members, directors, officers, employees, agents and, if  
39 applicable, ADOT Consultants);

1 (b) The insurance shall apply separately to each named insured and  
2 additional insured against which a claim is made or suit is brought, except with respect to  
3 the limits of the insurer's liability or joint defense of insureds;

4 (c) The insurance policy shall provide and/or be endorsed to provide  
5 separate and distinct limits for each line of coverage. The policy shall have separate and  
6 unimpaired aggregate limits for each line of coverage on the policy and shall not be  
7 eroded by any claim, allegation, and/or loss, except with respect to the insurers' limits of  
8 liability or joint defense of insureds. The policies shall not contain any limitations,  
9 conditions, restrictions, and/or exceptions to coverage in addition to those that apply to  
10 the insurance policy generally; for purposes of clarity, the policy limits shall apply equally  
11 for each of the insureds and shall be unaffected by any actual or alleged acts, errors,  
12 omissions, misrepresentations, negligence, and/or breach of any policy provision that  
13 would otherwise result in forfeiture or reduction of coverage of any other insureds covered  
14 under the policy; and

15 (d) All endorsements adding ADOT and the other additional insureds as  
16 required by the Contract Documents to the required insurance policies shall contain no  
17 limitations, conditions, restrictions or exceptions to coverage in addition to those that  
18 apply under the insurance policy generally and that are commercially available, and shall  
19 state that the interests and protections of each such additional insured shall not be  
20 affected by any misrepresentation, act or omission of a named insured or any breach by  
21 a named insured of any provision in the policy that would otherwise result in forfeiture or  
22 reduction of coverage.

### 23 **10.1.8 Additional Terms and Conditions**

24 **10.1.8.1** Each insurance policy shall be endorsed to state that  
25 coverage cannot be canceled, voided, suspended, adversely modified, or reduced in  
26 coverage or in limits (including for non-payment of premium) except after 30 days' prior  
27 notice (or ten days in the case of cancellation for non-payment of premium) by registered  
28 or certified mail, return receipt requested, has been given to, at a minimum, ADOT and  
29 Developer; provided, however, that (a) no such notice from the insurer shall be required  
30 for reduction in limits due to claims payments, and (b) if Developer establishes that an  
31 endorsement compliant with this paragraph is not available as set forth in Section 10.1.12,  
32 Developer may obtain an endorsement that is as comparable as possible. The  
33 endorsement required by this Section 10.1.8.1 shall not include any limitation of liability  
34 of the insurer for failure to provide the required notice.

35 **10.1.8.2** The commercial general liability insurance policy shall cover  
36 liability arising out of the acts or omissions of Developer's employees engaged in the  
37 Work as well as employees of Subcontractors if Subcontractors are covered by a  
38 Developer-controlled insurance program. If any Subcontractor is not covered by such  
39 Developer-controlled insurance program, then such Subcontractor shall provide  
40 commercial general liability insurance to cover liability arising out of the activities of  
41 Subcontractor's employees engaged in the Work.

1                   **10.1.8.3** If Developer’s or any Subcontractor’s activities involve  
2 transportation of Hazardous Materials, the automobile liability insurance policy for  
3 Developer or such Subcontractor shall be endorsed to include for private, non-commercial  
4 vehicles Motor Carrier Act Endorsement-Hazardous Materials Clean Up (MCS-90).

5                   **10.1.8.4** Each insurance policy shall provide coverage on an  
6 “occurrence” basis and not a “claims made” basis (with the exception of any professional  
7 liability policy).

8                   **10.1.9 Waivers of Subrogation**

9                   Subject to the self-insurance provision below, ADOT waives all rights against the  
10 Developer-Related Entities, and Developer waives all rights against the Indemnified  
11 Parties, for any claims to the extent covered by insurance obtained pursuant to this Article  
12 10, except such rights as the Parties may have to the proceeds of such insurance. For the  
13 avoidance of doubt, and subject to the self-insurance provision below, such mutual waivers  
14 shall not apply to claims denied by the insurer, or otherwise not covered by insurance  
15 obtained pursuant to this Section 10.1.9. If Developer is deemed to self-insure a claim or  
16 loss under Section 10.2.4, then Developer’s waiver shall apply as if it carried the required  
17 insurance. Developer shall require all Subcontractors to provide similar waivers in writing  
18 each in favor of all other Persons enumerated in this Section 10.1.9. Subject to Section  
19 10.1.12, each policy, including worker’s compensation if permitted under the applicable  
20 worker’s compensation insurance laws, shall include a waiver of any right of subrogation  
21 against the Indemnified Parties or the insurer’s consent to the insured’s waiver of recovery  
22 in advance of loss. However, no waiver of subrogation rights under any policy providing  
23 professional liability coverage to the insureds shall be required of any party.

24                   **10.1.10 No Recourse for Premium or Other Insurance Payments**

25                   Developer shall have no recourse against ADOT for payment of premiums or other  
26 amounts with respect to the insurance required to be provided by Developer hereunder,  
27 except to the extent of ADOT’s obligation to pay the Contract Price or to the extent such  
28 costs are recoverable under Articles 13 or 14.

29                   **10.1.11 Support of Indemnifications**

30                   The insurance coverage provided, or caused to be provided, hereunder by  
31 Developer shall not limit Developer’s indemnification obligations under the Contract  
32 Documents.

33                   **10.1.12 Inadequacy or Unavailability of Required Coverages**

34                   **10.1.12.1** ADOT makes no representation that the coverage amounts  
35 specified in the Contract Documents for any insurance policy or approved variances  
36 therefrom are adequate to protect Developer from or against any liabilities assumed upon  
37 execution of the Contract Documents, to ADOT, or to any other Person. No such limits of  
38 liability and/or approved variances therefrom shall prevent ADOT from enforcing the  
39 remedies provided under the Contract Documents to the extent permissible by law.

1 Developer shall have no Claim or other recourse against ADOT premised on the limits of  
2 liability specified for any insurance policy or approved variances therefrom.

3 **10.1.12.2** Developer shall not be entitled to an increase in the Contract  
4 Price, any extension of the Completion Deadlines or any other Claim resulting from or  
5 arising out of the unavailability of any coverage or acceptable alternatives as required in  
6 the Contract Documents.

7 **10.1.12.3** ADOT will be entitled to a reduction in the Contract Price if,  
8 pursuant to the conditions in this Agreement, ADOT agrees to accept alternative policies  
9 providing less than equivalent coverage and Developer is not obligated to self-insure for  
10 such risks. The amount of reduction of the Contract Price shall equal 115% of the  
11 reduction in premium that Developer obtains, using as a baseline the insurance quotes  
12 or estimates included in the DPDs (or based on other evidence of insurance premiums  
13 as of the Proposal Due Date if the DPDs do not provide adequate information).

14 **10.1.13 Insurance Premium Increases**

15 **10.1.13.1** Except as otherwise provided in Section 10.1.12, Developer  
16 shall bear the risk of any insurance premium increases and shall not be entitled to an  
17 increase in the Contract Price, a Completion Deadline adjustment or any other Claim for  
18 such increases.

19 **10.1.14 Defense Costs**

20 No defense costs shall be included within or erode the limits of coverage of any of  
21 the insurance policies, except that (a) litigation and mediation defense costs may be  
22 included within the limits of coverage of professional and pollution liability policies,  
23 (b) investigation and expert defense costs may also be included within the limits of  
24 coverage of professional liability policies, and (c) other defense costs may be included  
25 within the limits of coverage of professional and pollution liability policies with ADOT's prior  
26 written approval.

27 **10.1.15 Contesting Denial of Coverage**

28 If any insurance carrier for an insurance policy required to be maintained by this  
29 Agreement denies coverage with respect to any claims reported to such carrier, Developer  
30 shall be responsible for contesting the insurance carrier's denial of coverage and for all  
31 costs associated with contesting the denial of coverage. Developer shall not be entitled to  
32 an increase in the Contract Price, a Completion Deadline adjustment or any other Claim  
33 arising from such denial of coverage, nor shall Developer be relieved of any liability to  
34 ADOT or of its indemnity obligations to the Indemnified Parties.

35 **10.1.16 Umbrella and Excess Policies**

36 Developer shall have the right to satisfy the requisite insurance coverage amounts  
37 for liability insurance through a combination of primary policies and umbrella or excess  
38 policies. Umbrella and excess policies shall comply with the required form of underlying

1 policies and shall comply with all insurance requirements, terms, and provisions set forth  
2 in this Agreement for the applicable type of coverage.

3 **10.1.17 Additional Insurance Policies**

4 If Developer carries insurance coverage in addition to that required under this  
5 Agreement, then Developer shall include ADOT and its members, directors, officers,  
6 employees, agents, and ADOT Consultants as additional insureds thereunder, if and to  
7 the extent they have an insurable interest, unless ADOT grants an exception in writing.  
8 The additional insured endorsements shall be as described in Section 10.1.7(d) and  
9 Developer shall provide ADOT evidence of coverage and a copy of the policy as described  
10 in Section 10.1.5. The provisions of Sections 10.1.5, 10.1.7, 10.1.9, 10.1.10, 10.1.15 and  
11 10.2 shall apply to all such policies of insurance coverage.

12 **10.1.18 Contractor-Controlled Insurance Program**

13 Nothing in this Agreement, including in Exhibit 11, is intended or shall be construed  
14 to preclude use of a contractor-controlled insurance program to fulfill the insurance  
15 requirements under this Agreement.

16 **10.2 Prosecution of Claims**

17 **10.2.1** Unless otherwise directed by ADOT in writing, Developer shall be  
18 responsible for reporting and processing all potential claims by ADOT or Developer  
19 against the insurance policies required hereunder. Developer agrees to report timely to  
20 the insurer(s) under such insurance policies any and all matters that may give rise to an  
21 insurance claim by Developer or ADOT or another Indemnified Party, and to promptly and  
22 diligently pursue such insurance claims in accordance with the claims procedures  
23 specified in such insurance policies, whether for defense or indemnity or both. Developer  
24 shall enforce all legal rights against the insurer under the applicable insurance policies  
25 and applicable Laws to collect thereon, including pursuing necessary litigation and  
26 enforcement of judgments, provided that Developer shall be deemed to have satisfied  
27 this obligation if a judgment is not collectible after exhausting all lawful and diligent means.

28 **10.2.2** Developer shall immediately notify ADOT, and thereafter keep ADOT fully  
29 informed, of any incident, potential claim, claim or other matter of which Developer  
30 becomes aware that involves or could conceivably involve an Indemnified Party.

31 **10.2.3** ADOT agrees to promptly notify Developer of incidents that involve ADOT's  
32 interests, potential claims against ADOT, and matters that may give rise to a claim against  
33 ADOT that may be covered by insurance, to tender to the insurer ADOT's defense of the  
34 claim under such insurance policies, and to cooperate with Developer as necessary for  
35 Developer to fulfill its duties hereunder.

36 **10.2.4** If in any instance Developer has not performed its obligations respecting  
37 insurance coverage set forth in this Agreement or is unable to enforce and collect any  
38 such insurance for failure to assert claims in accordance with the terms of the insurance  
39 policies or to prosecute claims diligently, then for purposes of determining Developer's

1 liability and the limits thereon or determining reductions in compensation due from ADOT  
2 to Developer on account of available insurance, Developer shall be treated as if it elected  
3 to self-insure up to the full amount of insurance coverage that would have been available  
4 had Developer performed such obligations and not committed such failure. Nothing in the  
5 Contract Documents shall be construed to treat Developer as electing to self-insure where  
6 Developer is unable to collect due to the bankruptcy or insolvency of any insurer that at  
7 the time the insurance policy is written meets the rating qualifications set forth in this  
8 Article 10.

9 **10.2.5** If in any instance Developer has not promptly performed its obligation to  
10 report to applicable insurers and process any potential insurance claim tendered by  
11 ADOT or another Indemnified Party, then ADOT or the other Indemnified Party may, but  
12 is not obligated to: (a) notify Developer of ADOT's or the other Indemnified Party's intent  
13 to report or tender the claim directly to the insurer and thereafter process the claim; and  
14 (b) proceed with reporting and processing the claim if ADOT or the other Indemnified  
15 Party does not receive from Developer, within five days after so notifying Developer,  
16 written proof that Developer has reported the claim directly to the insurer. ADOT or the  
17 other Indemnified Party may dispense with such notice to Developer if ADOT or the other  
18 Indemnified Party have a reasonable belief that reporting the claim in fewer than five days  
19 is necessary to preserve the claim or is in the best interest of ADOT or the Indemnified  
20 Party.

21 **10.2.6** Developer shall deliver to ADOT a report, on a policy-by-policy basis, within  
22 30 days after cumulative payments made by the insurer under any coverage with an  
23 aggregate limit exceed (a) 25% of the aggregate limit and (b) each additional 10%  
24 increment of the aggregate limit thereafter. The report shall identify the affected policy  
25 and limit of coverage, state the amount and nature of each claim paid, and state the  
26 balance of the coverage limit remaining available.

27 **10.3 Risk of Loss or Damage to Project; Use of Insurance Proceeds**

28 **10.3.1** Developer shall rebuild, repair, restore or replace all loss, damage or  
29 destruction to the Project, or to materials, equipment, supplies, and maintenance  
30 equipment purchased for permanent installation in, or for use during construction or  
31 maintenance during construction of, the Project, whether within or outside the Project  
32 ROW, regardless of who has title thereto under the Contract Documents and regardless  
33 of the cause of the loss, damage or destruction; provided, however, that, upon  
34 acceptance by a third party, Developer shall not be responsible for rebuilding, repairing,  
35 restoring or replacing Project-related property that will be maintained by such third party,  
36 unless such property is damaged due to negligent or willful acts of a Developer-Related  
37 Entity.

38 **10.3.2** Developer shall ensure that ADOT (a) is named as loss payee under all  
39 builder's risk insurance policies required by this Agreement and (b) will have the exclusive  
40 right to receive claims payments from the insurers under such policies to the extent ADOT  
41 has a financial interest in the covered property. ADOT will hold all insurance proceeds it  
42 receives as loss payee or otherwise for any insured loss under such policies in a separate

1 insurance proceeds account for the purposes of, and to be applied in accordance with,  
2 this Section 10.3. If loss, damage or destruction to the Project is deemed to be self-  
3 insured by Developer under Section 10.2.4, then, within 30 days after ADOT's written  
4 request, Developer shall pay to ADOT, as loss payee, the amount of insurance proceeds  
5 deemed owing. ADOT will hold and dispense such payment from Developer in the same  
6 manner it would hold proceeds from a third-party insurer.

7 **10.3.3** If the loss, damage or destruction to the Project is from a risk or event  
8 covered by a builder's risk policy required by this Agreement or by deemed self-insurance  
9 under Section 10.2.4 and the loss, damage or destruction is not attributable to a Relief  
10 Event for which ADOT owes compensation to Developer under Article 13, then:

11 (a) ADOT will remit to Developer all claims payments paid to ADOT, as  
12 loss payee, from the insurer under the builder's risk policy within ten Business Days after  
13 ADOT receives each such payment; provided, however, that remittance of such insurance  
14 proceeds to Developer shall not be a condition precedent to Developer's obligation to  
15 perform the repair or replacement Work and shall not entail that the repair or replacement  
16 Work has been approved and accepted by ADOT; and

17 (b) Developer shall bear all costs, including delay and disruption costs,  
18 of repair or replacement Work not covered by available insurance proceeds, including the  
19 amount of deductibles or self-insured retentions, and any costs in excess of insurance  
20 coverage limits.

21 **10.3.4** If the loss, damage or destruction to the Project is from a risk or event  
22 covered by a builder's risk policy required by this Agreement or by deemed self-insurance  
23 under Section 10.2.4 and the loss, damage or destruction is caused by a Relief Event,  
24 then:

25 (a) Subject to the terms and conditions of Article 13, ADOT will  
26 reimburse Developer for Extra Work Costs and Delay Costs of the repair or replacement  
27 Work to the Project performed by Developer and owing pursuant to the terms and  
28 conditions of this Agreement and the applicable Supplemental Agreement, regardless of  
29 the amount of insurance proceeds or the timing of claims payments by the insurers,  
30 subject, however, to (i) any Claim Deductibles and (ii) ADOT's right to set off such  
31 reimbursements by any deemed self-insurance that Developer fails to pay to ADOT;

32 (b) If there are any insurance or deemed self-insurance proceeds  
33 available after paying or reimbursing ADOT for such Extra Work Costs and Delay Costs  
34 (excluding any Claim Deductible), ADOT will next apply such available insurance  
35 proceeds to reimburse Developer for its costs to repair or replace the items of property  
36 described in Section 10.3.7;

37 (c) Subject to the terms and conditions of Article 13, ADOT will bear the  
38 Extra Work Costs and Delay Costs of the repair or replacement work to the Project not  
39 covered by available insurance proceeds or deemed self-insurance under Section 10.2.4,

1 including the amount of deductibles or self-insured retentions and any costs in excess of  
2 insurance coverage limits; and

3 (d) Developer shall bear all the costs described in Section 10.3.7 not  
4 covered under clause (b) above.

5 **10.3.5** If the loss, damage or destruction to the Project is from a risk or event that  
6 this Agreement does not require to be covered by a builder's risk policy and the loss,  
7 damage or destruction is not attributable to a Relief Event for which ADOT owes  
8 compensation and/or a Completion Deadline adjustment to Developer under Article 13,  
9 then Developer shall bear all Extra Work Costs and Delay Costs, and shall not be entitled  
10 to a Completion Deadline adjustment, for the repair or replacement Work to the Project,  
11 subject, however, to Developer's rights under Section 10.4.

12 **10.3.6** If the loss, damage or destruction to the Project is from a risk or event that  
13 this Agreement does not require to be covered by a builder's risk policy and the loss,  
14 damage or destruction is attributable to a Relief Event, then:

15 (a) Developer shall bear the Extra Work Costs and Delay Costs for the  
16 repair or replacement Work to the Project up to any applicable Claim Deductible;

17 (b) Subject to the terms and conditions of Article 13, ADOT will bear all  
18 further Extra Work Costs and Delay Costs for the repair or replacement Work to the  
19 Project; and

20 (c) Developer shall bear all the costs described in Section 10.3.7.

21 **10.3.7** Except to the extent there are available insurance proceeds as provided in  
22 Section 10.3.3 or 10.3.4(b), Developer shall bear all costs, including Extra Work Costs  
23 and Delay Costs, to repair or replace, and shall not be entitled to an increase in the  
24 Contract Price, a Completion Deadline adjustment or any other Claim arising from any  
25 loss, damage or destruction caused by a Relief Event or other event (except ADOT's  
26 gross negligence, recklessness or willful misconduct) to:

27 (a) Any tools, machinery, equipment, facilities, protective fencing, job  
28 trailers, scaffolding or other items of any Developer-Related Entity used in the  
29 performance of the Work but not intended for permanent installation into the Project;

30 (b) Any machinery, equipment, facilities, materials, inventory, supplies,  
31 and other property of any Developer-Related Entity outside the Project ROW; or

32 (c) Any machinery, equipment, facilities, materials, inventory, supplies,  
33 and other property of any Developer-Related Entity while in transit to the Site.

34 **10.3.8** Developer's rights, if any, to a Completion Deadline adjustment in the event  
35 of loss, damage or destruction to the Project shall be limited to situations where the loss,  
36 damage or destruction is caused by a Relief Event and shall be subject to the applicable  
37 provisions of Article 13.



1 **10.4 Claims Against Third Parties**

2 **10.4.1** Developer shall have the right to pursue claims against third parties for  
3 damage caused to the Project, including but not limited to, a vehicle collision, vandalism  
4 or other acts of damage or destruction by third parties, except as provided otherwise in  
5 Section 10.4.3.

6 **10.4.2** Except as provided otherwise in Section 10.4.3, if ADOT receives payment  
7 from a third party arising from damage to the Project caused by the third party, ADOT will  
8 hold and use such funds in the same manner as provided for holding and using insurance  
9 proceeds under Section 10.3.

10 **10.4.3** Sections 10.4.1 and 10.4.2 shall not apply to the extent Developer is entitled  
11 under this Agreement to compensation from ADOT for the cost to repair or replace the  
12 destruction or damage to the Project (e.g., damages in excess of the Claim Deductible  
13 due to a collision described in clause (h) of the definition of Force Majeure Event).

14 **10.5 General Insurance Disclaimer**

15 Developer and each Subcontractor have the sole responsibility to acquire and  
16 maintain insurance coverage suitable for the Work to be performed under the Contract  
17 Documents, whether or not specified herein.

18 **10.6 Approval and Modifications**

19  
20 ADOT, in consultation with the State’s risk management department, reserves the  
21 right to review or make modifications to the insurance limits, required coverages, and/or  
22 endorsements throughout the Work, as deemed necessary. Such actions may be made  
23 by administrative action by ADOT. To the extent that such action increases Developer’s  
24 costs of maintaining required insurance, Developer may request relief for such action as  
25 an ADOT-Directed Change.

1 **ARTICLE 11.**  
2 **ASSIGNMENT OF WARRANTIES**

3 **11.1 Warranties**

4 **11.1.1** Developer shall assign, and cause all Subcontractors to assign, any  
5 warranties received or otherwise acquired in connection with the installation of any  
6 products or materials incorporated into the Project.

7 **11.1.2** The foregoing requirement shall not apply to standard, pre-specified  
8 manufacturer warranties of mass-marketed materials, products (including software  
9 products), equipment or supplies where the warranty cannot be extended to ADOT using  
10 commercially reasonable efforts. In such case, Developer shall prosecute any remedies  
11 available under such warranties for as long as such warranties may be valid, including if  
12 after Final Acceptance. Upon notice from ADOT, Developer agrees to pursue any  
13 necessary remedies under such warranties to cause the correction of any defects in the  
14 warranted materials or products until such time as the applicable warranty expires.

**ARTICLE 12.**  
**PAYMENT FOR SERVICES**

**12.1 Contract Price**

**12.1.1 Contract Price Amount**

(a) As full compensation for the Work and all related obligations to be performed by Developer under the Contract Documents, ADOT will pay to Developer the lump sum "Contract Price." The Contract Price as used herein shall mean the lump sum amount of \$615,600,950.00, subject to adjustment from time to time to account for adjustments in Supplemental Agreements and with respect to SRP Utility Adjustment Work (line RI-47 of Exhibit 2-4.1), which shall only be paid based on the actual invoiced value of work performed in accordance with Section 5.4.2.11. Except as provided in Section 6.6.4 and this Section 12.1.1, the Contract Price shall be increased for payment of Extra Work Costs or Delay Costs, or decreased, only by a Supplemental Agreement issued in accordance with Articles 13 or 14. Developer shall not be entitled to any other payments or compensation from ADOT in connection with the Project except as provided for as an increase to the Contract Price by Supplemental Agreement. The Contract Price shall be paid in accordance with Sections 12.2 and 12.4.

(b) If Developer does not perform one or more of the Utility Adjustments on which Developer bid an amount greater than \$0 in lines NFA-40(a-h) (Tempe non-prior rights utilities) or NFA-42(a-e) (Phoenix non-prior rights utilities) of Exhibit 2-4.1, the Contract Price shall be reduced by the amount bid for the corresponding item(s). Such reduction shall be in accordance with the process set forth in Section 14.1.5.

**12.1.2 Items Included in Contract Price**

**12.1.2.1** Developer acknowledges and agrees that, subject only to Developer's rights under Article 13, the Contract Price includes:

(a) All designs, equipment, materials, labor, insurance and bond premiums, home office, jobsite and other overhead, profit and services relating to Developer's performance of its obligations under the Contract Documents (including all Work, equipment, materials, labor, and services provided by Subcontractors and intellectual property rights necessary to perform the Work);

(b) Performance of each and every portion of the Work;

(c) The cost of obtaining all Governmental Approvals (except those previously obtained by ADOT) related to the Work;

(d) All costs of compliance with and maintenance of the Governmental Approvals and compliance with Laws related to the Work, except to the extent compliance with or maintenance of Governmental Approvals is the responsibility of Utility Companies;

1 (e) Payment of any taxes, duties, permit, and other fees or  
2 royalties imposed with respect to the Work and any equipment, materials, labor or  
3 services included therein; and

4 (f) Compensation for all risks and contingencies assigned to or  
5 assumed by Developer under the Contract Documents.

## 6 **12.2 Invoicing and Payment for the Contract Price**

7 The following process shall apply to invoicing and payment of (a) the Contract  
8 Price, and, as applicable, (b) Extra Work Costs and Delays Costs reimbursable to  
9 Developer for repair or replacement Work under Section 10.3.3(a).

### 10 **12.2.1 NTP 1 Work**

11 **12.2.1.1** Any Design Work that Developer performs prior to  
12 satisfaction of the conditions precedent set forth in Section 7.5 shall be at Developer's  
13 risk, and ADOT will have no obligation to pay for or review any Design Work prior to  
14 satisfaction of such conditions precedent.

15 **12.2.1.2** Subject to Section 12.2.1.1, ADOT will pay Developer for work  
16 authorized by NTP 1 not more often than monthly, based on approved Draw Requests,  
17 as follows:

18 (a) For NTP 1 mobilization, subject to compliance with Section  
19 12.3.4.1, in two equal installments with the first two Draw Requests after NTP 1, as set  
20 forth in Section 12.3.4.2 (a) and (b);

21 (b) For each item that is a Submittal under "Base NTP 1 Work  
22 Effort" in Exhibit 2-4.1, other than Design Documents, (i) 50% of the amount shown for  
23 that Submittal in Exhibit 2-4.1 with the next Draw Request after ADOT receives a  
24 complete draft of the Submittal, unless ADOT determines the draft is inadequate, and (ii)  
25 the remaining payment with the next Draw Request after ADOT approves the final  
26 Submittal;

27 (c) For Design Work, monthly according to a Draw Request for  
28 progress made;

29 (d) For the premiums for bonds and insurance associated with  
30 NTP 1 Work, in accordance with Section 12.3.4.3; and

31 (e) For all other items, monthly according to actual documented  
32 costs incurred and included in a Draw Request, with any balance of the bid item total  
33 remaining at issuance of NTP 2 payable in the next Draw Request thereafter.

34 **12.2.1.3** Invoices for work authorized by NTP 1 shall comply with the  
35 provisions of this Section 12.2. Invoices for premiums for bonds and insurance for NTP 1  
36 Work shall comply with the provisions of Section 12.3.4.3.

1                   **12.2.2 Draft Draw Request Package for Work and Monthly Progress Meeting**

2                   **12.2.2.1**     On or about the 22nd day of each month following the  
3 issuance of NTP 1 and continuing through the Draw Request for the Final Payment,  
4 Developer shall deliver to ADOT a draft Draw Request for the prior monthly period, in the  
5 form required by ADOT, together with drafts of all materials, reports, schedules,  
6 certifications, and other submittals for that month listed in Section 12.2.3.2.

7                   **12.2.2.2**     Developer and ADOT shall attend monthly progress  
8 meetings. At each monthly progress meeting, Developer’s and ADOT’s Authorized  
9 Representatives shall ascertain the progress of the Work and verify the quantities for any  
10 unit priced Work. Developer’s and ADOT’s Authorized Representatives shall review the  
11 draft Draw Request reflecting the value of Work completed as of the date of the progress  
12 meeting. They shall determine and calculate the value of Work completed:

13                                 (a) As provided in Section 12.2.1.2 for NTP 1 Work;

14                                 (b) Based on quantities and unit prices for unit priced Work;

15                                 (c) Based on time and materials for Force Account Work in  
16 accordance with Exhibit 13; and

17                                 (d) For all other Work, based on the percentage completion of  
18 Project Schedule activities and the values distributed to such activities in the Progress  
19 Schedule.

20                   **12.2.3 Delivery of Draw Request for Payment of Contract Price**

21                   **12.2.3.1**     Within seven days after each monthly progress meeting,  
22 Developer shall submit to ADOT an electronic copy of a Draw Request for the Work  
23 performed under the Contract Documents during the preceding month, in a form  
24 acceptable to ADOT and meeting all the requirements specified herein, except as  
25 otherwise approved by ADOT. Each Draw Request shall be based upon and use the  
26 amounts set forth in the approved draft Draw Request and may not include any amounts  
27 not approved by ADOT in the monthly progress meeting reviewing such draft Draw  
28 Request.

29                   **12.2.3.2**     Contents of Draw Request

30                                 (a) Each Draw Request must contain the following items:

31   i.         Draw Request cover sheet;

32   ii.        An updated Schedule Narrative as described in  
33 Section 108.04.02.04 of the Technical Provisions and Monthly Progress Schedule as  
34 described in Section 108.04.02.07 of the Technical Provisions;

- 1                   iii.       Certification by Developer that all Work that is the  
2 subject of the Draw Request fully complies with the requirements of the Contract  
3 Documents subject to any exceptions identified in the certification;
- 4                   iv.       Monthly report of personnel hours;
- 5                   v.       Draw Request data sheet(s) and supporting  
6 documents, as required by ADOT to support and substantiate the amount requested  
7 (based on invoices, receipts, and other evidence establishing the number of units  
8 delivered for unit priced Work; based on Exhibit 13, Section 1.2 for Force Account Work;  
9 and based on the Project Schedule for all other Work);
- 10                  vi.       DBE Monthly Utilization Progress Report in a format  
11 reasonably satisfactory to ADOT as required in Section 18.02.2 of the DBE Special  
12 Provisions (Exhibit 7);
- 13                  vii.       The monthly report of hours for each OJT Trainee  
14 required by Section 923-6(A) of the OJT Special Provisions (Exhibit 8);
- 15                  viii.       The amount of Developer's cumulative draw in  
16 comparison to Developer's anticipated draw contained in Exhibit 6. Developer shall state  
17 if the Draw Request will cause Developer to exceed Developer's anticipated draw  
18 contained in Exhibit 6, and, if so, provide a revised schedule of anticipated draws through  
19 Final Acceptance;
- 20                  ix.       If the Draw Request includes Utility Work, a summary  
21 narrative of the Utility Work performed during the applicable month, and, for Utility Work  
22 performed by a Utility Owner, except for SRP Utility Adjustment Work performed by SRP,  
23 invoices and records showing that Developer has paid the Utility Owner for such Utility  
24 Work. For SRP Utility Adjustment Work performed by SRP, Developer shall include  
25 copies of all invoices received from SRP in the period covered by Developer's Draw  
26 Request, plus the amount of Developer's markup as provided in Section 5.4.2.11;
- 27                  x.       Information showing all amounts for which ADOT is  
28 withholding payment, including outstanding Non-Conformance Reports and other bases  
29 for withholding payment under the Contract Documents, and the amount of payment  
30 withheld; and
- 31                  xi.       Such other items as ADOT reasonably requests.
- 32                  (b)       In addition to the requirements set forth in Section 12.2.3.2(a),  
33 no Draw Request shall be considered complete unless it:
- 34                    i.       Describes in detail the status of completion as it relates  
35 to the Project Schedule;
- 36                    ii.       Sets forth separately and in detail the related payments  
37 that are then due in accordance with the Project Schedule as of the end of the prior month;

1                   iii.       Sets forth in detail the amounts paid to Subcontractors  
2 and Suppliers (including those at lower tiers) from the payments made by ADOT to  
3 Developer with respect to the Draw Request submitted two months prior;

4                   iv.       Includes affidavits of payment and unconditional  
5 waivers of claims in form satisfactory to ADOT executed by Developer and each  
6 Subcontractor with respect to all amounts paid in connection with the Draw Request  
7 submitted two months prior; and

8                   v.       Sets forth separately and in detail the total amount due  
9 from Utility Companies for (A) Utility Betterments and (B) any other Work for which the  
10 Utility Company is responsible for the cost.

11                   **12.2.3.3**       Except for SRP Utility Adjustment Work performed by SRP,  
12 Developer shall not be entitled to payment from ADOT for Utility Work performed by a  
13 Utility Owner until Developer has paid the Utility Owner for such Utility Work.

14                   **12.2.3.4**       For SRP Utility Adjustment Work performed by SRP,  
15 Developer is not required to pay SRP prior to submitting SRP's invoices as provided in  
16 Section 12.2.3.2(a)(ix). Developer shall pay SRP within 10 days of receipt of payment  
17 from ADOT for all valid SRP invoices submitted with Developer's Draw Request. Within  
18 10 days of making payment to SRP, Developer shall submit to ADOT proof of payment  
19 to SRP for each SRP invoice for which Developer has received payment from ADOT.

20                   **12.2.3.5**       Developer acknowledges that ADOT will obtain funding for  
21 portions of the Work from various sources, and agrees to segregate billings for all such  
22 Work in a format reasonably requested by ADOT and with detail and information as  
23 reasonably requested by ADOT.

24                   **12.2.4 Draw Request Cover Sheet Contents**

25                   The Draw Request cover sheet shall include (a) Project number and title, (b) Draw  
26 Request number (numbered consecutively starting with "1"), (c) Total amount paid to  
27 Developer as of the date on which the Draw Request is submitted, and (d) authorized  
28 signature, title of signer, and date of signature.

29                   **12.2.5 Certification by Professional Services Quality Manager and**  
30 **Independent Quality Firm**

31                   Each Draw Request shall include a certificate signed and sealed by the  
32 Professional Services Quality Manager and the Independent Quality Firm, as appropriate,  
33 in a form acceptable to ADOT, certifying that:

34                   (a)       Except as specifically noted in the certification, all Work that is the  
35 subject of the Draw Request, including that of Professional Services firms,  
36 Subcontractors, and Suppliers, has been checked or inspected by the Professional  
37 Services Quality Manager, with respect to Professional Services, and the Independent  
38 Quality Firm, with respect to the Construction Work;

1 (b) Except as specifically noted in the certification, all Work that is the  
2 subject of the Draw Request conforms to the requirements of the Contract Documents;

3 (c) All of the measures and procedures provided in the Professional  
4 Services Quality Management Plan and the Construction Quality Management Plan are  
5 functioning properly and are being followed;

6 (d) The Professional Services percentages and construction  
7 percentages stated are accurate; and

8 (e) All quantities for which payment is requested on a unit price basis  
9 are accurate.

10 **12.2.6 Payment by ADOT**

11 **12.2.6.1** Within seven days after ADOT receives the Draw Request  
12 (including all materials and reports required under Section 12.2.3.2) and the related Draw  
13 Request certificate, ADOT will review the Draw Request and all attachments thereto for  
14 consistency with the draft Draw Request package prepared at the most recent monthly  
15 progress meeting and conformity with all requirements of the Contract Documents, and  
16 shall notify Developer of the amount approved for payment and specify the reason for  
17 disapproval of any remaining invoiced amounts. Developer may include such disapproved  
18 amounts in the next month's draft Draw Request after correction of the deficiencies noted  
19 by ADOT.

20 **12.2.6.2** No later than the Developer Cycle Key Date first occurring  
21 after the seven day period described in Section 12.2.6.1, ADOT will pay Developer the  
22 amount of the Draw Request approved for payment less any amounts that ADOT is  
23 otherwise entitled to withhold or deduct.

24 **12.2.6.3** For Work authorized by NTP 1, ADOT will not have any  
25 obligation to pay Developer any amount that:

26 (a) Is inconsistent with Section 12.2.1; or

27 (b) Was not approved during the monthly progress meeting  
28 review of the draft invoice for such month.

29 **12.2.6.4** For Work authorized by NTP 2, in no event shall ADOT have  
30 any obligation to pay Developer any amount that:

31 (a) Would result in payment for any activity in excess of the value  
32 of the completed percentage of such activity (for non-unit priced Work);

33 (b) Was not approved during the monthly progress meeting  
34 review of the draft invoice for such month; or



1 (c) Would result in aggregate payments in excess of the overall  
2 completion percentage for the Project multiplied by the Contract Price (for non-unit priced  
3 Work).

## 4 **12.3 Limitations, Deductions, and Exclusions**

### 5 **12.3.1 Deductions and Withholdings**

6 **12.3.1.1** ADOT may deduct from each payment of the Contract Price,  
7 including the Final Payment, any of the following applicable to the Work or accruing prior  
8 to Final Acceptance:

9 (a) Any ADOT or third party Losses for which Developer is  
10 responsible hereunder and which are not covered by insurance proceeds, except in the  
11 case where the underlying claim against Developer is the subject of a legitimate dispute;

12 (b) Any Liquidated Damages or Noncompliance Charges that  
13 have accrued as of the date of the application for payment;

14 (c) Any sums expended by or owing to ADOT as a result of  
15 Developer's failure to maintain the Record Drawings;

16 (d) Any sums expended by ADOT in performing any of  
17 Developer's obligations under the Contract Documents that Developer has failed to  
18 perform or that Developer has performed in a manner that does not meet the standards  
19 of the Contract Documents; and

20 (e) Any other sums that ADOT is entitled to recover or withhold  
21 from Developer under the terms of this Agreement, including any carry-over deductions  
22 (including for Noncompliance Charges and Liquidated Damages) or other adjustments  
23 from prior months that Developer has not satisfied as of the date ADOT makes payment.

24 **12.3.1.2** The failure by ADOT to deduct any of the sums set forth in  
25 Section 12.3.1 from a payment shall not constitute a waiver of ADOT's right to such sums.

### 26 **12.3.2 Progress Payment Limitations for Certain Items**

27 Developer shall withhold from its progress payment billing certain amounts as  
28 follows:

29 (a) 2% of line 9 of Exhibit 2-4.1 until receipt by ADOT of all Final Design  
30 materials for all components of the Design Documents for which Developer has requested  
31 payment;

32 (b) 2% of line 9 of Exhibit 2-4.1 until receipt by ADOT of all Record  
33 Drawings and as-built materials for all Work items for which Developer has requested  
34 payment; and

1 (c) 2% of lines 36, 46, and 47 of Exhibit 2-4.1 until receipt by ADOT of  
2 information showing that all permits have been fully obtained for all Elements for which  
3 Developer has requested payment.

4 Developer may submit the remaining amounts for the foregoing in the Draw  
5 Request for the month in which Developer submits the complete information described  
6 above.

### 7 **12.3.3 Unincorporated Materials; Long Lead Items**

8 **12.3.3.1** ADOT will not pay Developer for materials not yet  
9 incorporated in the Work unless all of the following conditions are met:

10 (a) Material shall be: (i) delivered to the Site; (ii) delivered to  
11 Developer and promptly stored by Developer in bonded storage at a location approved  
12 by ADOT in its good faith discretion; or (iii) stored at a Supplier's fabrication site, which  
13 must be a bonded commercial location approved by ADOT, in its good faith discretion;

14 (b) If such materials are stored at any site not approved by ADOT,  
15 Developer shall accept responsibility for and pay all personal and property taxes that may  
16 be levied against ADOT by any state or subdivision thereof on account of such storage  
17 of such material;

18 (c) IQF has certified that the quantity of materials is correct and  
19 accurate;

20 (d) IQF has certified that the materials contain no defects and  
21 meet the requirements of the Contract Documents;

22 (e) Developer shall submit certified bills for such materials with  
23 the Draw Request, as a condition to payment for such materials. ADOT will allow only  
24 such portion of the amount represented by these bills as, in its good faith discretion, is  
25 consistent with the reasonable cost of such materials; and

26 (f) All such materials that meet the requirements of the Contract  
27 Documents shall be and become the property of ADOT. Developer at its own cost shall  
28 promptly execute, acknowledge, and deliver to ADOT proper bills of sale or other  
29 instruments in writing in a form acceptable to ADOT conveying and assuring to ADOT title  
30 to such material included in any Draw Request, free and clear of all Liens. Developer, at  
31 its own cost, shall conspicuously mark such material as the property of ADOT, shall not  
32 permit such materials to become commingled with non-ADOT-owned property or with  
33 materials that do not conform with the Contract Documents, and shall take such other  
34 steps, if any, as ADOT may require or regard as necessary to vest title to such material  
35 in ADOT free and clear of Liens.

36 **12.3.3.2** For the avoidance of doubt, ADOT will not pay Developer for  
37 long lead items ordered for the Project unless such items meet the requirements set forth  
38 in Section 12.3.3.1.

1                   **12.3.4 Mobilization Payments; Bond and Insurance Premiums**

2                   **12.3.4.1**       Developer shall not be entitled to payment for mobilization  
3 until Developer has obtained all insurance coverage required by Article 10 and has  
4 provided proof of coverage thereof to ADOT.

5                   **12.3.4.2**       Upon compliance with Section 12.3.4.1 and subject to Section  
6 12.2, Developer shall be entitled to payment for mobilization in an amount equal to the  
7 lesser of (1) the bid item price for mobilization set forth in Exhibit 2-4.1 or (2) 5% of the  
8 Contract Price (other than mobilization). This amount shall be fixed and not subject to  
9 adjustment by any Relief Event, Claim or Supplemental Agreement, and shall be paid in  
10 installments as follows:

11                               (a) The first payment for mobilization shall be in an amount not to  
12 exceed 10% of the total payment for mobilization, payable as part of the first Draw  
13 Request following NTP 1;

14                               (b) The second payment for mobilization shall be in an amount  
15 not to exceed 10% of the total payment for mobilization, payable as part of the second  
16 Draw Request following NTP 1;

17                               (c) The third payment for mobilization shall be in an amount not  
18 to exceed 30% of the total payment for mobilization, payable as part of the first Draw  
19 Request following NTP 2;

20                               (d) The fourth payment for mobilization shall be in an amount not  
21 to exceed 25% of the total payment for mobilization, payable as part of the first Draw  
22 Request after 5% of the Contract Price is earned on items other than mobilization; and

23                               (e) The fifth payment for mobilization shall be in the remaining  
24 amount of the total payment for mobilization, payable as part of the first Draw Request  
25 after 10% of the Contract Price is earned on items other than mobilization.

26 Multiple installments for mobilization payment shall not be contained in the same Draw  
27 Request.

28                   **12.3.4.3**       ADOT will pay Developer as part of the first Draw Request  
29 following NTP 1 the portion of the Contract Price allocable to bond and insurance  
30 premiums incurred as of the date of such Draw Request and as set forth in Exhibit 2-4.1.

31                   **12.3.5 Equipment**

32                   ADOT will not pay for direct costs of equipment. Costs of equipment, whether new,  
33 used or rented, and to the extent not included in the mobilization payments under Section  
34 12.3.4, shall be allocated to and paid for as part of the activities with which the equipment  
35 is associated, in a manner which is consistent with the requirements of Exhibit 13, Section  
36 1.2.3.

1           **12.3.6 Monthly Progress Schedule**

2           ADOT may elect to withhold 2% of each approved Draw Request until approval of  
3 the Monthly Progress Schedule as described in Section 108.04.02.07 of the Technical  
4 Provisions. Developer may include any previously withheld amounts in the Draw Request  
5 for the month in which the Monthly Progress Schedule receives approval.

6           **12.4 Final Payment**

7           Final Payment for all Work will be made as follows.

8           **12.4.1 Application for Final Payment**

9                   **12.4.1.1**       Fifteen days prior to the date on which Developer believes that  
10 it will meet the conditions of Final Acceptance, Developer shall prepare and submit to  
11 ADOT a proposed Application for Final Payment showing the proposed total amount due  
12 to Developer as of the date of Final Acceptance, including any amounts owing from  
13 Supplemental Agreements.

14                   **12.4.1.2**       In addition to meeting all other requirements for Draw  
15 Requests hereunder, the Application for Final Payment shall propose a schedule of  
16 payments that are in accordance with future Developer Cycle Key Dates.

17                   **12.4.1.3**       The Application for Final Payment shall list all outstanding  
18 Relief Event Notices and Relief Requests, stating the amount at issue associated with  
19 each such Relief Event Notice and Relief Request.

20                   **12.4.1.4**       The Application for Final Payment shall also be accompanied  
21 by:

22                               (a) Information addressing the status of all existing or threatened  
23 claims and stop notices of Subcontractors, Suppliers, laborers, Utility Companies, and/or  
24 other third parties against Developer, ADOT or the Project;

25                               (b) Consent of any Guarantors and Surety to the proposed  
26 payment schedule;

27                               (c) Such other documentation as ADOT may reasonably require;  
28 and

29                               (d) The release described in Section 12.4.3, executed by  
30 Developer.

31                   **12.4.1.5**       Prior applications and payments shall be subject to correction  
32 in the Application for Final Payment. Relief Event Notices and Relief Requests filed  
33 concurrently with the Application for Final Payment must be otherwise timely and meet  
34 all requirements under Article 13.

1           **12.4.2** ADOT’s obligation to make payment to Developer based on the Application  
2 for Final Payment is conditioned on ADOT’s receipt of an executed release meeting the  
3 requirements of Section 12.4.3 and otherwise satisfactory in form and content to ADOT.  
4 The payment amount will be reduced by any amounts deductible under Section 12.3.

5           **12.4.3** Developer shall execute a release that (i) releases ADOT from any and all  
6 Claims of Developer arising from the Work, and (ii) releases and waives any claims  
7 against the Indemnified Parties, excluding only those matters identified in any Relief  
8 Event Notices and Relief Requests that have been timely delivered and are listed as  
9 outstanding in the Application for Final Payment. The release shall be accompanied by a  
10 sworn affidavit from Developer certifying that:

11                   (a) All Work complies with the Contract Documents;

12                   (b) Developer has resolved any claims made by Subcontractors,  
13 Suppliers, Utility Companies, laborers, or other third parties against Developer, ADOT or  
14 the Project (except those listed by Developer in accordance with Section 12.4.1.4(a));

15                   (c) Developer has no reason to believe that any Person has a valid claim  
16 against Developer, ADOT or the Project that has not been communicated in writing by  
17 Developer to ADOT as of the date of the certificate; and

18                   (d) All guarantees, warranties, the Payment Bond, and the Performance  
19 Bond are in full force and effect.

20           **12.4.4** Relief Requests submitted prior to the Application for Final Payment that  
21 are not in dispute shall be reconciled in the Application for Final Payment.

22           **12.4.5** ADOT may withhold from the Final Payment such amount as ADOT deems  
23 advisable to cover any amounts owing or that may become owing to ADOT by Developer,  
24 including costs to complete or remediate uncompleted Work or Nonconforming Work.

25           **12.4.6** ADOT will review Developer’s proposed Application for Final Payment, and  
26 within 20 Business Days after receipt will deliver to Developer any changes or corrections.  
27 Any changes or corrections made pursuant to this Section 12.4.6 will be reflected in an  
28 updated payment schedule showing the amount owed to Developer by applicable period.

29           **12.4.7** ADOT will fulfill its payment obligations in respect of the Work under this  
30 Agreement by paying the amounts identified in Section 12.4.6, in accordance with the  
31 schedule described in Section 12.4.6.

## 32 **12.5 Prompt Payment to Subcontractors**

33           **12.5.1** Upon receipt of payment from ADOT, Developer shall pay each  
34 Subcontractor with which it holds a direct Subcontract within seven days after Developer  
35 receives payment from ADOT, out of the amount paid to Developer on account of such  
36 Subcontractor’s portion of the Work, the amount to which such Subcontractor is entitled,  
37 less any retainage provided for in the Subcontract. Developer shall pay retainage, if any,

1 on a Subcontractor's Work within ten days after satisfactory completion of all of the  
2 Subcontractor's Work. For the purpose of this Section 12.5.1, satisfactory completion  
3 shall have been accomplished when:

4 (a) The Subcontractor has fulfilled the Subcontract requirements and the  
5 requirements under the Contract Documents for the subcontracted Work, including the  
6 submission of all submittals required by the Subcontract and Contract Documents; and

7 (b) The Work done by the Subcontractor has been inspected and  
8 approved by Developer (and the IQF, as applicable) and the final quantities of the  
9 Subcontractor's Work have been determined and agreed upon.

10 **12.5.2** If Developer fails to pay a Subcontractor within the time periods set forth in  
11 Section 12.5.1, Developer shall pay the Subcontractor interest on the unpaid balance,  
12 beginning on the eighth day or tenth day, as applicable, at a rate of 1% per month or  
13 fraction of a month.

14 **12.5.3** A.R.S. §§ 28-411(C), (D), and (E) shall apply to all Work.

15 **12.5.4** Developer's submission of an invoice to ADOT for payment constitutes a  
16 representation that the work of the Subcontractors included in the invoice was  
17 satisfactorily performed.

18 **12.5.5** Except for retainage, if any, Developer may exclude from its Draw Request  
19 or Application for Final Payment, as applicable, and thereby withhold, payments to a  
20 Subcontractor only if the Subcontractor's work is deficient, incomplete or otherwise not in  
21 compliance with the terms of the Contract Documents applicable to the Subcontractor's  
22 work. If any Subcontractor is not paid promptly, Developer shall provide to the  
23 Subcontractor and to ADOT via the comment section of ADOT's DBE System a written  
24 explanation of the reasons and when payment can be expected. Developer shall provide  
25 such explanation within seven days after the time the Subcontractor was otherwise  
26 entitled to payment.

27 **12.5.6** If a dispute arises between Developer and a Subcontractor regarding  
28 prompt payment or withholding of payment, Developer shall immediately provide to ADOT  
29 a written explanation of the matter in dispute and update ADOT monthly on the status of  
30 the dispute until it is resolved. Developer shall implement and use the dispute resolution  
31 process in the applicable Subcontract to resolve payment disputes as quickly as possible.

32 **12.5.7** ADOT reserves the right to request and receive documents from Developer,  
33 all Subcontractors of any tier, and Suppliers to determine whether prompt payment  
34 requirements were met.

35

36

37

1 **12.6 Subcontractor Payment and Payroll Reporting**

2 **12.6.1 Subcontractor Payment Reporting**

3 **12.6.1.1** Developer shall report on a monthly basis the amounts earned  
4 by and paid to all DBE and non-DBE Subcontractors. Developer shall deliver this report  
5 to ADOT by the 15th day of each month, for the preceding month, using the Monthly DBE  
6 Subconsultant/Subcontractor Payment Form and Monthly Non-DBE  
7 Subconsultant/Subcontractor Payment Form, as applicable, provided in Attachments G  
8 and H, respectively, of the DBE Special Provisions (Exhibit 7). Developer shall separately  
9 report Professional Services and Construction Work using separate forms.

10 **12.6.1.2** Developer’s reports pursuant to Section 12.6.1.1 shall include  
11 all lower-tier Subcontractors regardless of whether the Subcontractor is a DBE under a  
12 Subcontract with another DBE. For each DBE trucking operation, Developer shall also  
13 indicate the type of trucking operation performed, the number of trucks owned/leased, the  
14 number of trucks working on the Site or off the Site, rate per hour/ton/load, etc., duration  
15 or amount, and total dollar value and DBE credit for trucking services for the month.  
16 Developer shall provide copies of truck leases, for verification as needed, upon request  
17 of ADOT.

18 **12.6.1.3** Developer shall enter the same information required under  
19 Sections 12.6.1.1 and 12.6.1.2 by the 15th day of each month into ADOT’s web-based  
20 DBE System (available at <https://adot.dbesystem.com/>) for payments made to DBEs and  
21 other Subcontractors for the previous month. This includes all lower-tier subcontracting  
22 regardless of whether the Subcontractor is a DBE under a Subcontract with another DBE.  
23 Developer shall separately enter payments made for Professional Services and  
24 Construction Work into ADOT’s web-based DBE System.

25 **12.6.1.4** Developer shall require that all DBE and non-DBE  
26 Subcontractors verify payments using the DBE System by responding to automated  
27 emails generated by ADOT’s web-based DBE System each month. Developer shall  
28 actively monitor ADOT’s web-based DBE System on a regular basis to ensure that all  
29 DBE and non-DBE Subcontractors verify receipt of payment by the last day of each month  
30 for the previous month’s payment. Furthermore, Developer shall proactively work to  
31 resolve any payment discrepancies on the DBE System between payment amounts it  
32 reports and payment confirmation amounts reported by DBE and non-DBE  
33 Subcontractors on a monthly basis.

34 **12.6.1.5** If no payments are made to any Subcontractor, DBE or non-  
35 DBE during a given month, Developer shall enter the dollar value “0” for that month and  
36 indicate clearly that (a) no work was done, (b) no invoices were submitted by the  
37 Subcontractor requiring payment during that month, or (c) the Subcontractor’s work was  
38 and remains deficient, incomplete or otherwise not in compliance with the terms of the  
39 Contract Documents.

40

1                   **12.6.2 Subcontractor Payroll Reporting**

2                   No later than the 15th day of every month, Developer shall submit complete and  
3 accurate payrolls to ADOT's web-based certified payroll tracking system (LCPtracker) for  
4 all Work performed by all DBE and non-DBE Subcontractors (regardless of tier) during the  
5 previous month. If ADOT does not receive all such payrolls by this deadline, ADOT will  
6 identify in a written notice to Developer any missing payrolls and other discrepancies or  
7 inaccuracies, and the following shall apply:

8                   (a)       If Developer does not submit the missing or corrected payrolls within  
9 ten days of the notice date, ADOT will have the right to withhold \$2,500.00 per missing  
10 or inaccurate payroll, as applicable, from each subsequent progress payment until  
11 Developer cures;

12                   (b)       If Developer cures within 90 days of the notice date, ADOT will pay  
13 any corresponding, accumulated withholdings with the next progress payment; and

14                   (c)       If Developer does not cure within 90 days after the notice date, then,  
15 with respect to each missing or inaccurate payroll, ADOT will have the right to retain the  
16 accumulated withholdings as Liquidated Damages. These Liquidated Damages shall be  
17 in addition to any other rights or remedies ADOT may have hereunder or at Law or in  
18 equity.



1 **ARTICLE 13.**  
2 **RELIEF EVENTS**

3 This Article 13 sets forth the requirements for obtaining monetary and schedule  
4 relief under the Contract Documents due to Relief Events. Developer hereby  
5 acknowledges and agrees that the Contract Price provides for full compensation for  
6 performance of all the Work, and the Completion Deadlines provide reasonable and  
7 adequate time to perform the Work required within the Completion Deadlines, subject only  
8 to those exceptions specified in this Article 13. The compensation amounts, Completion  
9 Deadline adjustments, and performance relief specified in this Article 13 shall represent  
10 the sole and exclusive right against ADOT, the State and their respective successors,  
11 assigns, agencies, divisions, officeholders, officers, directors, commissioners, agents,  
12 representatives, consultants, and employees to compensation, damages, deadline  
13 extension, and performance relief for the adverse financial and schedule effects of any  
14 event affecting the Work, the Project or Developer. No award of compensation or damages  
15 shall be duplicative. Developer unconditionally and irrevocably waives the right to any  
16 claim against ADOT, the State, and their respective successors, assigns, agencies,  
17 divisions, officeholders, officers, directors, commissioners, agents, representatives,  
18 consultants, and employees for any monetary compensation, Completion Deadline  
19 adjustment or other relief except to the extent specifically provided in this Article 13. The  
20 foregoing waiver encompasses all theories of liability, whether in contract, tort (including  
21 negligence), strict liability, equity, *quantum meruit* or otherwise, and encompasses all  
22 theories to extinguish contractual obligations, including impracticability, mutual or  
23 unilateral mistake, and frustration of purpose. Notwithstanding anything to the contrary  
24 herein, no liability of Developer that arose before the occurrence of the Relief Event giving  
25 rise to a claim under this Article 13 shall be excused as a result of the occurrence. Nothing  
26 in the Technical Provisions shall have the intent or effect or shall be construed to create  
27 any right of Developer to any claim for additional monetary compensation, Completion  
28 Deadline adjustment or other relief. The provisions of this paragraph shall not affect  
29 Developer's rights and protections under Section 6.8 or Developer's remedies under the  
30 Contract Documents in the event of an ADOT Default or upon early termination of this  
31 Agreement.

32 **13.1 Relief Event Claim Process**

33 **13.1.1 General Provisions**

34 **13.1.1.1** This Section 13.1 applies to all Relief Events, except certain  
35 Relief Events that are an ADOT-Directed Change. The process for ADOT-Directed  
36 Changes shall be through a Supplemental Agreement or Directive Letter pursuant to  
37 Sections 14.1 and 14.3, respectively; provided, however, that this Section 13.1 shall apply  
38 if the Parties disagree as to whether an ADOT-Directed Change has occurred or the  
39 extent of an ADOT-Directed Change, including in the circumstances provided under  
40 Sections 14.1.6, 14.3.4, and 14.3.5.

41 **13.1.1.2** To the extent that a Subcontractor claims relief from  
42 Developer due to a Relief Event, any such request shall be deemed to have been directly

1 incurred by Developer for purposes of evaluating the merits of any Relief Event Notice,  
2 Relief Request or other Claim against ADOT for such Relief Event. No Subcontractor  
3 shall have the right to request relief directly from ADOT; all such claims by Subcontractors  
4 must be submitted by Developer and Developer shall be responsible for pursuing such  
5 claims on behalf of its Subcontractors.

## 6 **13.1.2 Relief Event Notice**

7 **13.1.2.1** If at any time Developer determines that a Relief Event has  
8 occurred or is imminent, Developer shall, within the time frame provided in Section 13.1.7,  
9 submit a written Relief Event Notice to ADOT. ADOT will promptly acknowledge receipt  
10 of each Relief Event Notice.

11 **13.1.2.2** The Relief Event Notice shall include, to the maximum extent  
12 of the information then available:

13 (a) A description of the Relief Event and its date of occurrence or  
14 inception in reasonable detail;

15 (b) The provisions of the Contract Documents applicable to,  
16 governing, or otherwise affecting or affected by the Relief Event;

17 (c) Developer's preliminary good faith estimate of the anticipated  
18 adverse and beneficial effects (including cost impacts) of the Relief Event and the basis  
19 for such estimate;

20 (d) Developer's preliminary good faith estimate of the Critical  
21 Path impact directly attributable to the Relief Event and the basis for such estimate;

22 (e) Developer's initial analysis of any adverse effect of the Relief  
23 Event on its ability to perform its obligations under this Agreement;

24 (f) The actions Developer has taken prior to the Relief Event  
25 Notice to prevent, and proposes to take thereafter to mitigate, the cost, delay, and other  
26 consequences of the Relief Event; and

27 (g) The type and amount of insurance that may be applicable and  
28 amounts that have been or are anticipated to be collected under such insurance.

29 **13.1.2.3** The nature and scope of the potential Claim stated in the  
30 Relief Event Notice shall remain consistent (except for reductions) for the remainder of  
31 the Relief Event Claim process and, if applicable, during any subsequent Dispute  
32 Resolution Procedures, except with respect to consequences of a Relief Event that  
33 (a) are of a different nature or scope, (b) first arise or occur after Developer delivers the  
34 Relief Event Notice to ADOT, and (c) could not have been anticipated through the  
35 exercise of reasonable diligence and Good Industry Practice prior to delivering the Relief  
36 Event Notice to ADOT. If any such new consequences arise or occur prior to submission

1 of the Relief Request, Developer shall report them to ADOT by a supplemental Relief  
2 Event Notice.

3 **13.1.2.4** Developer shall submit the Relief Event Notice on a  
4 standardized form approved by ADOT. Prior to submission of the first Relief Event Notice,  
5 Developer shall prepare a draft Relief Event Notice form that includes all of the information  
6 required by Section 13.1.2.2 for ADOT's review and approval.

7 **13.1.2.5** Developer shall assign an exclusive identification number for  
8 each Relief Event Notice, starting with One and thereafter in chronological sequence. The  
9 exclusive identification number shall be used on each of the following corresponding  
10 documents: (a) Relief Request; (b) supplemental Relief Event Notices and submissions;  
11 and (c) final documentation of the Relief Event claim.

12 **13.1.2.6** If a single Relief Event is the cause of a continuing delay, only  
13 one Relief Event Notice shall be necessary.

### 14 **13.1.3 Relief Request**

15 **13.1.3.1** Developer shall, within 60 days after delivery of the Relief  
16 Event Notice, submit to ADOT a Relief Request that provides Developer's complete  
17 reasoning for additional compensation for Extra Work Costs or Delay Costs, Completion  
18 Deadline adjustments, and other requested relief relating to the Relief Event. ADOT will  
19 promptly acknowledge receipt of each Relief Request. The Relief Request shall include  
20 the following information, to the maximum extent then available:

21 (a) Full details of the Relief Event, including its nature, the date  
22 of its occurrence, its duration (to the extent that the Relief Event and the effects thereof  
23 have ceased, or estimated duration to the extent that the Relief Event and the effects  
24 thereof have not ceased), affected locations, and items of Work affected;

25 (b) Identification of the substance of any material oral  
26 communications between ADOT and Developer, if any, relating to the Relief Event and  
27 the name of the person or persons making such oral communications;

28 (c) Identification of the specific provisions of the Contract  
29 Documents that Developer claims entitles Developer to the relief sought, and a complete,  
30 detailed statement that explains the reasons why the provisions entitle Developer to that  
31 relief. Developer shall additionally include any documents or other materials that  
32 Developer contends support entitlement to the relief sought. If Developer seeks relief for  
33 ADOT's alleged breach of the Contract Documents, then Developer shall identify the  
34 specific provisions of the Contract Documents that ADOT allegedly breached and the  
35 actions constituting the breach;

36 (d) Where Developer makes a request for a Completion Deadline  
37 adjustment, a Time Impact Analysis of the Project Schedule that: (i) identifies Controlling  
38 Work Items and Critical Path (with activity durations, predecessor, and successor  
39 activities and resources, including total Float), and illustrates the effect of schedule

1 changes or disruptions on the Completion Deadlines; and (ii) complies with the  
2 requirements of Section 108.04.02.11 of the Technical Provisions;

3 (e) A detailed, itemized estimate of all amounts claimed for Extra  
4 Work Costs and Delay Costs to the extent such amounts are eligible for compensation  
5 under this Article 13 for the Relief Event in question. All such amounts shall comply with  
6 Exhibit 13 and be broken down in terms of the eligible direct costs for labor (including, as  
7 applicable, hourly wage rates, fringe benefits rates, and burden), materials, equipment,  
8 third party fees and charges, extra insurance, and performance and payment security  
9 (e.g., bonds and letters of credit), as applicable, and other direct costs, including  
10 expenses and profit, and any other cost category or categories ADOT reasonably  
11 specifies;

12 (f) Only if Developer makes a request for a Completion Deadline  
13 adjustment, and if so requested by ADOT in its sole discretion, a detailed, itemized  
14 estimate of all acceleration costs associated with meeting the non-adjusted Completion  
15 Deadlines, as well as any additional costs permitted hereunder. If Developer reasonably  
16 believes that it is not feasible to recover to the non-adjusted Completion Deadlines, or  
17 that the costs associated with such a recovery are prohibitive, then Developer shall so  
18 state and provide its applicable, supporting analysis;

19 (g) The effect of the Relief Event on Developer's ability to perform  
20 any of its obligations under this Agreement, including details of the relevant obligations,  
21 the effect on each such obligation, and the likely duration of that effect;

22 (h) An explanation of the measures that Developer has previously  
23 taken to prevent, and proposes to undertake to mitigate, the costs, delay, and other  
24 consequences of the Relief Event; and

25 (i) The type and amount of insurance that may be applicable and  
26 amounts that have been or are anticipated to be collected under such insurance.  
27 Developer shall provide a copy of every notice letter and/or claim submitted to an insurer  
28 or other party that may be liable to reimburse or indemnify Developer due to the Relief  
29 Event. If the Relief Event may be covered by Developer's self-insurance or a Developer-  
30 controlled insurance program, Developer shall provide documentation of any claim  
31 against such insurance that it prepares in the ordinary course of business.

32 **13.1.3.2** Developer shall submit the Relief Request on a standardized  
33 form approved by ADOT. Prior to submission of the first Relief Request, Developer shall  
34 submit a draft form of Relief Request that contains the information required by Section  
35 13.1.3.1 to ADOT for its review and approval.

36 **13.1.3.3** If, following issuance of any Relief Request, Developer  
37 receives or becomes aware of any further information or estimates relating to the Relief  
38 Event and its impact on cost, schedule, Closures or performance of Work, including  
39 information on new consequences as described in Section 13.1.2.3, Developer shall  
40 submit such further information to ADOT as soon as possible. ADOT may request from

1 Developer any further information that ADOT may reasonably require, and Developer  
2 shall supply the same within the time period stated in ADOT's request for additional  
3 information.

4 **13.1.3.4** Neither the fact that Developer submits to ADOT a Relief  
5 Request, nor the fact that ADOT keeps account of the costs of labor, materials, or  
6 equipment or time, shall in any way be construed as establishing the validity of the Relief  
7 Request or the Claims therein or method of computing any adjustment to the Contract  
8 Price or Completion Deadlines.

9 **13.1.4 ADOT Evaluation and Response to Relief Request; Negotiations**

10 **13.1.4.1** ADOT will evaluate the information presented in the Relief  
11 Request and provide a written response to Developer within 45 days, or any extension  
12 thereof agreed by the Parties, after receipt by ADOT; provided, however, that ADOT shall  
13 have no obligation to review a Relief Request that does not fully comply with the  
14 requirements of Section 13.1.3. Provided that Developer has complied with the  
15 requirements of Sections 13.1.2 and 13.1.3, and ADOT provides a written response within  
16 such 45-day period stating that there are matters in dispute regarding the Relief Request,  
17 such matters in dispute shall be considered a Dispute for which Developer may initiate  
18 the Dispute Resolution Procedures in Article 21. If ADOT does not provide Developer a  
19 written response within the 45-day period, and Developer has complied with all  
20 requirements of Sections 13.1.2 and 13.1.3, then the Relief Request shall be considered  
21 a Dispute for which Developer may initiate the Dispute Resolution Procedures in Article  
22 21.

23 **13.1.4.2** If Developer does not comply in full with the requirements of  
24 Section 13.1.2 and 13.1.3, ADOT may respond within the 45-day time period that  
25 Developer has not fully complied therewith. Such response by ADOT shall not constitute  
26 recognition that the Relief Request is a Dispute eligible for resolution by the Dispute  
27 Resolution Procedures. Developer shall have the option to the withdraw the Relief  
28 Request or to correct the deficiencies therein and resubmit it for ADOT's consideration.  
29 The requirement to re-submit an incomplete Relief Request shall not relieve Developer  
30 of the time limitations provided in Section 13.1.7, subject to any extensions of such time  
31 limitations provided in Section 13.1.7. ADOT's time to respond before a matter is eligible  
32 for resolution by the Dispute Resolution Procedures provided by Section 13.1.4.1 shall  
33 commence only when Developer submits all information required by Sections 13.1.2 and  
34 13.1.3, unless ADOT agrees otherwise.

35 **13.1.5 Final Documentation of Relief Event Claim**

36 **13.1.5.1** Within 30 days of the completion of Work related to a Relief  
37 Event that is the subject of a Relief Request, and provided it has been not determined  
38 (whether by the Dispute Resolution Procedures or otherwise) that Developer is not  
39 entitled to the relief requested in its Relief Request, Developer shall submit to ADOT the  
40 full and final documentation of the Relief Event Claim. Pertinent information, references,  
41 arguments, and data to support the Relief Event Claim shall be included in the full and

1 final documentation, including updated analyses, descriptions, actual amounts and  
2 impacts, specific dates for Completion Deadline adjustments, and other documentation  
3 covering the same scope of information as required in Section 13.1.3.1 for the Relief  
4 Request.

5 **13.1.5.2** Without limiting the foregoing, if Developer claims  
6 compensation under Section 13.2, and except to the extent that such compensation is  
7 the subject of a previous written agreement by the Parties to be paid as a negotiated fixed  
8 price (which shall be subject to Exhibit 13), Developer shall provide an itemized  
9 accounting of the actual direct costs. The accounting shall break down such costs in terms  
10 of labor (including burden), materials, equipment, third party fees (e.g., permit fees, plan  
11 check fees, and charges), and other direct costs and indirect costs, overhead, and any  
12 other cost category reasonably requested by ADOT. The labor, materials, and equipment  
13 cost categories shall account for the following items:

14 (a) As to labor: a listing of individuals, classifications, regular  
15 hours, and overtime hours worked, dates worked, and other pertinent information related  
16 to the requested payment of labor costs;

17 (b) As to materials: invoices, purchase orders, location of  
18 materials either stored or incorporated into the Project, dates materials were transported  
19 to the Site or incorporated into the Project, and other pertinent information related to the  
20 requested payment of material costs; and

21 (c) As to equipment: a detailed description of the affected  
22 equipment (including make, model, and serial number), hours of use, dates of use, and  
23 equipment rates. Equipment rates shall be determined pursuant to Exhibit 13, Section  
24 1.2.3 as of the first date when the affected work related to the Relief Event claim was  
25 performed.

26 **13.1.5.3** Developer shall submit the full and final documentation of the  
27 Relief Event Claim on a standardized form approved by ADOT, and shall certify the Relief  
28 Event Claim to be accurate, truthful, and complete. Information submitted subsequent to  
29 the full and final documentation submittal will not be considered. No full and final  
30 documentation of the Relief Event Claim will be considered that does not have the same  
31 nature, scope (except for reductions) and circumstances, and basis of the Relief Event  
32 Claim, as those specified in the Relief Event Notice and any supplements submitted in  
33 accordance with Section 13.1.2.3 and in the Relief Request.

34 **13.1.6 ADOT Response to Final Documentation; Supplemental Agreement**

35 **13.1.6.1** ADOT's failure to respond to a complete and final  
36 documentation of a Relief Event Claim that Developer submits in accordance with Section  
37 13.1.5 within 45 days after ADOT's receipt shall constitute ADOT's rejection of the Relief  
38 Event Claim, and shall thereafter constitute a Dispute subject to the Dispute Resolution  
39 Procedures. Developer shall not be entitled to re-submit disputes for which the Dispute

1 Resolution Procedures have previously determined that Developer is not entitled to the  
2 relief sought.

3 **13.1.6.2** If ADOT finds the Relief Event Claim or any part thereof to be  
4 valid, or if the Relief Event Claim or any part thereof is deemed to be valid as a result of  
5 completion of the Dispute Resolution Procedures, ADOT will:

6 (a) Deliver to Developer notice authorizing such partial or whole  
7 Relief Event Claim;

8 (b) Pay such Relief Event Claim to the extent deemed valid (as  
9 to Extra Work Costs and Delay Costs, by one of the methods set forth in Section 13.2.2);  
10 and

11 (c) Grant a commensurate Completion Deadline adjustment, if  
12 applicable, as provided for in the Contract Documents.

13 **13.1.6.3** The Parties shall thereafter promptly execute a Supplemental  
14 Agreement documenting the Relief Event Claim or part thereof that ADOT finds to be  
15 valid or that is determined to be valid through the Dispute Resolution Procedures.

#### 16 **13.1.7 Waiver by Developer**

17 Time is of the essence in Developer's delivery of its written Relief Event Notice,  
18 supplemental Relief Event Notice(s), if any, and Relief Request.

19 **13.1.7.1** If, for any reason, Developer fails to deliver a written Relief  
20 Event Notice or supplement thereto in compliance with all applicable requirements:

21 (a) Within 45 days following the date (for purposes of this Section  
22 13.1.7, the "starting date") on which Developer first became aware (or should have been  
23 aware, using all reasonable due diligence) of the potential Relief Event (or, in the case of  
24 a supplement, the new consequences described in Section 13.1.2.3), Developer shall be  
25 deemed to have irrevocably and forever waived and released the portion of any Claim or  
26 right to relief for any adverse effect attributable or related to the Relief Event accruing  
27 after such 45-day deadline and until the date Developer submits the written Relief Event  
28 Notice or supplement thereto; and

29 (b) Within 90 days following the starting date, Developer shall be  
30 deemed to have irrevocably and forever waived and released any and all Claim or right  
31 to relief for any adverse effect attributable or related to such Relief Event; and

32 (c) If for any reason Developer fails to deliver the written Relief  
33 Request in accordance with Section 13.1.3 within 60 days after the date of the Relief  
34 Event Notice, Developer shall be deemed to have irrevocably and forever waived and  
35 released any and all Claim or right to relief for any effect attributable or related to such  
36 Relief Event; provided, however, that if Developer submits a Relief Request within 60  
37 days of the date of the Relief Event Notice and ADOT responds as provided in Section

1 13.1.4.2 that Developer’s Relief Request is not complete due to Developer’s failure to  
2 comply in full with Section 13.1.3, Developer shall have until the later of (a) 30 days after  
3 receipt of ADOT’s notice pursuant to Section 13.1.4.2 or (b) 60 days after the date of the  
4 Relief Event Notice, to comply in full with Section 13.1.3 before the waiver in this Section  
5 13.1.7.1(c) becomes effective.

6 **13.1.8 Open Book Basis**

7 Developer shall share with ADOT all data, documents, and information, and shall  
8 conduct all discussions and negotiations pertaining to a claimed Relief Event on an Open  
9 Book Basis.

10 **13.2 Payment for Extra Work Costs and Delay Costs**

11 **13.2.1** Except as provided otherwise in this Agreement, as applicable and subject  
12 to the requirements of this Article 13, ADOT will compensate Developer as an increase  
13 to the Contract Price for Extra Work Costs directly attributable to the occurrence of a  
14 Relief Event and Delay Costs directly attributable to a Relief Event Delay, provided that  
15 Developer shall not be entitled to Delay Costs unless the Relief Event Delay meets the  
16 requirements for a Completion Deadline extension hereunder. Developer shall not be  
17 entitled to an increase in the Contract Price for any extra work or delays other than as  
18 specifically provided hereunder for Extra Work Costs and Delay Costs.

19 **13.2.2** ADOT will compensate Developer for amounts due for Extra Work Costs  
20 and Delay Costs: (a) to the extent permitted by Law, as a lump sum payment; (b) as  
21 progress payments invoiced as Work is completed; or (c) through any combination of the  
22 above, as determined by ADOT in its sole discretion but subject to Section 13.2.4.

23 **13.2.3** ADOT will provide Developer with notice of the method chosen for paying  
24 Developer for the Extra Work Costs and Delay Costs owed.

25 **13.2.4** Following receipt of complete and conforming Relief Event Claim  
26 documentation pursuant to Sections 13.1.2, 13.1.3, and 13.1.5, if ADOT chooses to  
27 compensate Extra Work Costs or Delay Costs, as applicable, owed under this Section  
28 13.2:

29 (a) As a lump sum payment other than a negotiated fixed price, then  
30 payment of all undisputed amounts will be due and owing not later than the Developer  
31 Cycle Key Date first occurring after ADOT’s receipt of all pertinent data, documents, and  
32 information on an Open Book Basis with respect to such Extra Work Costs or Delay Costs,  
33 as applicable;

34 (b) As a lump sum payment that is a negotiated fixed price, then  
35 payment(s) of all undisputed amounts will be due and owing not later than the Developer  
36 Cycle Key Date first occurring after ADOT receives from Developer all documentation  
37 required pursuant to the negotiated fixed price terms necessary to receive scheduled  
38 payments under the negotiated fixed price terms with respect to such Extra Work Costs  
39 or Delay Costs, as applicable; and



1 (c) As progress payments invoiced as Work is completed, then payment  
2 of all undisputed amounts will be due and owing not later than the Developer Cycle Key  
3 Date first occurring after each date ADOT receives from Developer an invoice, not more  
4 often than monthly, of such Extra Work Costs or Delay Costs incurred, as applicable, for  
5 such Work during the previous month, which invoice shall be itemized as set forth in  
6 Section 13.1.5 and by the components of Extra Work Costs or Delay Costs, as applicable,  
7 allowable under Exhibit 13.

8 **13.2.5** If any portion of the Extra Work Costs and Delay Costs consist of costs of  
9 design or construction not then performed, then ADOT will have no obligation to make  
10 advance payments and shall have the right to pay such portion in monthly progress  
11 payments in accordance with Article 12 and ADOT's standard practices and procedures  
12 for paying its contractors and applicable Laws.

13 **13.2.6** If ADOT elects to make monthly or other periodic payments, at any later  
14 time it may choose to complete compensation through a lump sum payment of the present  
15 value, determined in accordance with Section 13.2.7, of the remaining Extra Work Costs  
16 and Delay Costs.

17 **13.2.7** For the purpose of any discounting of future cost impacts, the Parties shall  
18 use as the discount rate the then-applicable yield on U.S. Treasury bonds having a tenor  
19 closest in length to the then-remaining length of the Work plus 100 basis points.

20 **13.2.8** Extra Work Costs and Delay Costs attributable to a Relief Event shall:

21 (a) Exclude:

22 (i) Third-party entertainment costs, lobbying and political  
23 activity costs, costs of alcoholic beverages, costs for first class travel in excess of  
24 prevailing economy travel costs, and costs of club memberships, in each case to the extent  
25 that such costs would not be reimbursed to an employee of ADOT in the regular course of  
26 business; and

27 (ii) Unallowable costs under the following provisions of the  
28 federal Contract Cost Principles, 48 C.F.R. §§ 31.205: 31.205-8 (contributions or  
29 donations), 31.205-13 (employee morale, health, welfare, food service, and dormitory  
30 costs and credits), 31.205-14 (entertainment costs), 31.205-15 (fines, penalties, and  
31 mischarging costs), 31.205-27 (organization costs), 31.205-34 (recruitment costs),  
32 31.205-35 (relocation costs), 31.205-43 (trade, business, technical, and professional  
33 activity costs), 31.205-44 (training and education costs), and 31.205-47 (costs related to  
34 legal and other proceedings);

35 (b) Exclude amounts paid or to be paid to Affiliates in excess of the  
36 pricing Developer could reasonably obtain in an arm's length, competitive transaction with  
37 an unaffiliated Subcontractor;

38 (c) Exclude costs incurred in investigating, analyzing, asserting,  
39 pursuing or enforcing any Relief Event, Claim or Dispute. Such excluded costs include

1 legal, accounting, financial advisory, and technical advisory fees and expenses, such as,  
2 but not limited to, those costs incurred in connection with preparing Relief Event Notices,  
3 Relief Requests, final documentation of Claims in respect of Relief Events, and materials  
4 prepared for the Dispute Resolution Procedures;

5 (d) Take into account any savings in costs or time resulting from the  
6 Relief Event;

7 (e) Be subject to Developer's obligation to prevent and to mitigate cost  
8 increases and augment cost decreases in accordance with Section 13.8; and

9 (f) Exclude any amounts covered by applicable insurance required in  
10 Exhibit 11 or deemed self-insurance, as more particularly provided in Section 13.5.

11 **13.2.9** ADOT, at its election, may offset any amounts owing to Developer for Relief  
12 Events against any amounts due and owing to ADOT from Developer pursuant to this  
13 Agreement, such offset rights being in addition to ADOT's offset rights under Section  
14 18.2.4.

15 **13.2.10** Developer's entitlement to Delay Costs is subject to Developer  
16 demonstrating that the Project Schedule in the absence of the Relief Event Delay  
17 contained a reasonable amount of time to complete the Work.

### 18 **13.3 Claim Deductible**

19 **13.3.1** Except as provided in this Section 13.3, each separate occurrence of a  
20 Relief Event for which Developer makes a Claim seeking the recovery of Extra Work  
21 Costs and Delay Costs, as applicable, shall be subject to the Claim Deductible. The Claim  
22 Deductible reflects the Parties' agreement that: (a) Developer shall bear the financial risks  
23 for Extra Work Costs and Delay Costs, as applicable, for each separate occurrence of a  
24 Relief Event, up to the Claim Deductible; and (b) except as otherwise provided in this  
25 Article 13, ADOT will compensate Developer for Extra Work Costs and Delay Costs, as  
26 applicable, to which Developer proves it is entitled, in excess of the Claim Deductible;  
27 and provided that the Claim complies in all respects with Section 13.1.3

28 **13.3.2** The Claim Deductible shall not apply to a Claim seeking recovery for a  
29 Relief Event set forth in clauses (a), (b), (c), (d), (f), (h) (but only as to ADOT Releases of  
30 Hazardous Materials), (n) or (p) of the definition of Relief Event.

### 31 **13.4 Other Deductibles; Special Provisions**

32 Developer's rights and remedies respecting certain Relief Events and Losses are  
33 subject to the provisions of this Section 13.4. The provisions of this Section 13.4 supersede  
34 any contrary provisions of this Agreement, provided, however, that any limitations on  
35 Developer's entitlement to relief stated elsewhere in the Contract Documents shall not be  
36 affected by or deemed inconsistent with this Section 13.4. This Section 13.4 does not  
37 replace or supersede the other conditions and requirements for obtaining relief under this  
38 Article 13.

1                   **13.4.1 Necessary Schematic ROW Changes**

2                   **13.4.1.1**       A Necessary Schematic ROW Change shall arise only where  
3 all the following criteria are satisfied:

4                               (a) Developer establishes with clear and convincing evidence  
5 that it is not physically possible, including through commercially reasonable design  
6 modifications, to deliver the Basic Configuration within the Schematic ROW; and

7                               (b) A Necessary Schematic ROW Change shall not include areas  
8 outside the Schematic ROW for Temporary Construction Easements.

9                   **13.4.1.2**       The impacts of a Necessary Schematic ROW Change are  
10 allocated as follows.

11                               (a) Developer shall be entitled to Delay Costs and Completion  
12 Deadline adjustment only if (1) Developer notifies ADOT, by Relief Event Notice (and  
13 thereafter follows the Relief Event process set forth in Sections 13.1.2 through 13.1.8), of  
14 the Necessary Schematic ROW Change, including a reasonable identification of the  
15 subject property required to deliver the Basic Configuration, within 360 days after NTP 2,  
16 (2) ADOT is unable to deliver access to the necessary additional ROW for demolition and  
17 clearing within 180 days after Developer and ADOT agree on any additional ROW  
18 necessary for Developer to comply with the Basic Configuration, and (3) the delay affects  
19 the Critical Path. The percentage of both Delay Costs and Completion Deadline  
20 adjustment to which Developer shall be entitled, however, shall vary based on when  
21 Developer delivers to ADOT the appropriate Relief Event Notice, as follows:

22                                       i.       100% if Developer notifies ADOT within 120 days,  
23 inclusive, of NTP 2;

24                                       ii.       75% if Developer notifies ADOT within 240 days,  
25 inclusive, of NTP 2;

26                                       iii.       50% if Developer notifies ADOT within 360 days,  
27 inclusive, of NTP 2; and

28                                       iv.       No compensation for Delay Costs and no Completion  
29 Deadline adjustment if Developer notifies ADOT on or after the 361st day after NTP 2.

30                               (b) ADOT shall acquire any additional ROW that ADOT  
31 determines is necessary. Developer shall bear Extra Work Costs for any re-design and  
32 construction for the necessary additional ROW; and ADOT will bear Extra Work Costs for  
33 Environmental Approvals, demolition and clearing, Utility Adjustments, and Hazardous  
34 Materials Management. Developer shall be responsible for obtaining such additional  
35 Environmental Approvals, and for performing the demolition and clearing, Utility  
36 Adjustments, and Hazardous Materials Management for the additional ROW.

37

1                   **13.4.2 Condemnation for Developer ROW**

2                   If a Relief Event occurs under clause (d) of the definition of Relief Event (concerning  
3 ADOT-Caused Delay) where the ADOT-Caused Delay is under clause (c) of such  
4 definition (concerning a time period to make available to Developer parcels ADOT agrees  
5 to condemn, in accordance with Section 5.2.1.4), then Developer shall not be entitled to  
6 an increase in the Contract Price, a Completion Deadline adjustment or any other Claim  
7 or Supplemental Agreement on account of, and Developer shall have the sole risk arising  
8 out of:

9                   (a)       The refusal of any Governmental Entity that owns or controls requested  
10 ROW to grant necessary rights of access, entry, and use to ADOT after ADOT makes  
11 diligent efforts to negotiate acquisition of such requested ROW; or

12                   (b)       The holding by the court in any condemnation action for the taking of  
13 requested ROW to the effect that: (i) ADOT’s power of eminent domain does not extend  
14 to such ROW; or (ii) the proposed condemnation does not satisfy legal requirements for  
15 necessity of the taking.

16                   **13.4.3 Utility Company Delay**

17                   **13.4.3.1**       Developer shall not be entitled to Extra Work Costs relating to  
18 Utility Company Delay, except for such Extra Work Costs allowable under Section 13.8.3  
19 to mitigate Delay Costs.

20                   **13.4.3.2**       Developer may be entitled to a Completion Deadline  
21 adjustment for delay to the Critical Path that is directly attributable to Utility Company  
22 Delay.

23                   **13.4.3.3**       Developer shall not be entitled to any Claim for Delay Costs  
24 for the first 60 days of Relief Event Delay caused by one or more Utility Company  
25 Delay(s). Once the cumulative Relief Event Delay caused by one or more Utility Company  
26 Delay(s) exceeds 60 days, Developer may be entitled to Delay Costs for further days of  
27 Relief Event Delay caused by Utility Company Delay(s). For purposes of determining the  
28 60 day period in which no Delay Costs are available, the duration of any Utility Company  
29 Delay that satisfies the conditions for a Relief Event Delay hereunder shall be counted  
30 toward the 60 day period, whether or not concurrent with another Relief Event Delay.

31                   **13.4.4 Inaccurate Utility Information**

32                   The following limitations apply to the Relief Event set forth in clause (g) of the  
33 definition thereof (concerning Inaccurate Utility Information).

34                   **13.4.4.1**       Developer’s compensation for Extra Work Costs shall be  
35 limited to the aggregate Extra Work Costs of the Utility Work (including reimbursements  
36 payable to Utility Companies) that Developer would not have incurred if the Utility  
37 Information had been reasonably accurate.

1                   **13.4.4.2**     Developer may be entitled to compensation for reasonable  
2 and necessary costs to acquire Replacement Utility Property Interests for Adjustment of  
3 a Utility due to Inaccurate Utility Information only where:

4                   (a)       It is not physically possible, including through  
5 commercially reasonable design modifications as described in Section 13.4.1.1(a), to  
6 perform the subject Utility Adjustment within the Schematic ROW or to use Protection in  
7 Place; and

8                   (b)       The Utility Company is not legally responsible under  
9 Law for the acquisition costs, such as in the case of a Replacement Utility Property  
10 Interest that is not for a Betterment or Utility Company Project.

11                   **13.4.4.3**     Developer may be entitled to Delay Costs due to Inaccurate  
12 Utility Information only if the subject Utility is not a Service Line.

13                   **13.4.4.4**     Developer may be entitled to a Completion Deadline  
14 adjustment due to Inaccurate Utility Information only if the subject Utility is not a Service  
15 Line.

16                   **13.4.4.5**     Developer shall not be entitled to an increase in the Contract  
17 Price, a Completion Deadline adjustment or any other Claim due to Inaccurate Utility  
18 Information that affects or concerns work outside the Schematic ROW.

19                   **13.4.5 Hazardous Materials**

20                   **13.4.5.1**     This Section 13.4.5 supersedes any Relief Event other than  
21 that under clauses (h) and (i) of the definition of Relief Event that might otherwise be  
22 triggered by the presence, existence or Release of Hazardous Materials.

23                   **13.4.5.2**     If there occurs any Relief Event under clause (h) of the  
24 definition of Relief Event within the Schematic ROW, and if Developer timely satisfies the  
25 terms and conditions for asserting a Relief Event set forth in Section 13.1, then Developer  
26 may be entitled to a Completion Deadline adjustment, Extra Work Costs and Delay Costs  
27 directly attributable to Hazardous Materials Management of such Hazardous Materials,  
28 subject to each of the following.

29                   (a)       Such Extra Work Costs shall be limited as set forth in Section  
30 13.4.5.4 and shall be subject to adjustment as provided in Section 13.5.

31                   (b)       If (i) the Hazardous Materials are contained in soils or other  
32 solid materials or objects that may be returned to trenches or other areas of excavation  
33 within or adjacent to the Project ROW pursuant to regulations, policies or approvals of  
34 applicable Governmental Entities, and (ii) the excavation of such contaminated soils or  
35 other solid materials or objects is undertaken for any purpose or reason other than the  
36 fact of contamination, then the Extra Work Costs shall be limited to the reasonable out-  
37 of-pocket costs of handling such contaminated soils, materials, and objects in excess of

1 the out-of-pocket costs Developer would incur to handle the same if they were not  
2 contaminated.

3 (c) If the Hazardous Materials are contained in soils or other solid  
4 materials or objects that are removed from the Site for any purpose or reason other than  
5 the fact of contamination, then the Extra Work Costs for which ADOT is liable shall be  
6 limited to the incremental increase in out-of-pocket cost to excavate, handle, contain,  
7 haul, transport, remove, remediate, and dispose of the soils or other solid materials or  
8 objects over the out-of-pocket cost to excavate, handle, contain, haul, transport, remove,  
9 remediate, and dispose of such soils or other solid materials or objects if they did not  
10 contain Hazardous Materials.

11 (d) If avoidance or remediation of such Hazardous Materials is  
12 capable of being accomplished under applicable Laws and Governmental Approvals  
13 through measures less costly than excavation, removal, and off-site disposal of  
14 contaminated soil and groundwater, or less costly than return to trenches and other areas  
15 of excavation, then ADOT will only be liable for the least costly alternative. Such alternate,  
16 less costly measures may include (i) design modifications and construction techniques to  
17 avoid such Hazardous Materials or reduce the quantities to be excavated, handled,  
18 contained, hauled, transported, removed, remediated, and disposed off-site, and (ii) on-  
19 site containment and institutional controls. If, however, Developer demonstrates that the  
20 total cost of alternate measures, including Delay Costs to be borne by Developer, will  
21 exceed the total cost of excavation, removal, and off-site disposal or return to trenches  
22 and other areas of excavation, including Delay Costs to be borne by Developer, then  
23 Developer shall not be obligated to implement the alternate measure. Developer shall  
24 respond to all reasonable requests by ADOT for supporting information regarding such  
25 cost comparison.

26 (e) The Extra Work Costs available under this Section 13.4.5.2  
27 are subject to the Claim Deductible, except with respect to ADOT Releases of Hazardous  
28 Materials.

29 **13.4.5.3** If there occurs any Relief Event under clause (i) of the  
30 definition of Relief Event, and if Developer timely satisfies the terms and conditions for  
31 asserting a Relief Event set forth in Section 13.1, Developer may be entitled to a  
32 Completion Deadline adjustment, Extra Work Costs, and Delay Costs directly attributable  
33 to Hazardous Materials Management of such Hazardous Materials, subject to Sections  
34 13.4.5.4 and 13.5.

35 **13.4.5.4** None of the following liabilities, costs, expenses, and Losses  
36 shall be chargeable against or reimbursable by ADOT:

37 (a) Liabilities, costs, expenses, and Losses to the extent  
38 attributable to Developer Releases of Hazardous Materials;

1 (b) Liabilities, costs, expenses, and Losses that could be avoided  
2 by the exercise of Good Industry Practice to mitigate and reduce cost, including exercise  
3 of Developer's duties to avoid and mitigate set forth in Section 6.8.2;

4 (c) Costs and expenses to investigate and characterize  
5 Hazardous Materials, except with respect to Hazardous Materials of an unexpected and  
6 extraordinary quantity or toxicity;

7 (d) Developer Releases of Hazardous Materials;

8 (e) Liabilities, costs, expenses, and Losses incurred attributable  
9 to acts or omissions of any Developer-Related Entity that exacerbate release of, or costs  
10 to undertake Hazardous Materials Management of Hazardous Materials;

11 (f) Liabilities, costs, expenses, and Losses incurred attributable  
12 to acts or omissions of any Developer-Related Entity that increase the costs to undertake  
13 Hazardous Materials Management of ADOT Releases of Hazardous Materials, to the  
14 extent of such increased costs;

15 (g) Liabilities, costs, expenses, and Losses incurred if ADOT is  
16 not afforded the opportunity to inspect sites containing Hazardous Materials or ADOT  
17 Releases of Hazardous Materials before Developer takes any action that would inhibit  
18 ADOT's ability to ascertain, based on a site inspection, the nature and extent of the  
19 Hazardous Materials, except for Developer's Emergency actions necessary to stabilize  
20 and contain a sudden release or otherwise required by Law to address the Emergency  
21 immediately;

22 (h) Liabilities, costs, expenses, and Losses with respect to  
23 Hazardous Materials in, on or under locations Developer is required to avoid pursuant to  
24 the Technical Provisions; and

25 (i) Liabilities (except generator liability to the extent assumed by  
26 ADOT under Section 6.8.6.1), costs, expenses, delays, and Losses with respect to  
27 Hazardous Materials in, on or under Developer ROW, provided that this limitation shall  
28 not apply to a Relief Event under clause (i) of the definition of Relief Event.

29 **13.4.5.5** Extra Work Costs for off-site disposal of soils contaminated  
30 with Hazardous Materials for which ADOT is liable under this Section 13.4.5 shall be  
31 determined by applying the same unit price (per ton or cubic yard) that applies to  
32 Developer under the Subcontract for off-site disposal of Hazardous Materials of similar  
33 character for which Developer is not compensated by ADOT. If no such Subcontract  
34 exists, or if no such unit price is stated in such Subcontract, then the unit price shall not  
35 exceed the unit price ADOT could obtain through competitive low bid from a qualified  
36 contractor for such work.

37 **13.4.5.6** Except for a Relief Event under clause (i) of the definition of  
38 Relief Event as provided Section 13.4.5.3, Developer shall not be entitled to Extra Work  
39 Costs or Delay Costs due to the presence of Hazardous Materials outside the Schematic

1 ROW or Hazardous Materials Management outside the Schematic ROW. Developer's  
2 entitlement to a Completion Deadline adjustment due to Hazardous Materials in, on or  
3 under Developer ROW is set forth in Sections 13.4.5.3 and 13.6.3.

4 **13.4.6 Differing Site Conditions**

5 Developer's entitlement to Extra Work Costs, Delay Costs, and Completion  
6 Deadline adjustment for Differing Site Conditions shall be subject to the following  
7 conditions.

8 **13.4.6.1** If Developer believes it has encountered Differing Site  
9 Conditions, Developer shall immediately notify ADOT thereof telephonically or in person,  
10 to be followed immediately by written notification. Developer shall be responsible for  
11 determining the appropriate action to be undertaken, subject to concurrence by ADOT. In  
12 the event that any Governmental Approvals specify a procedure to be followed, Developer  
13 shall follow the procedure set forth in the applicable Governmental Approvals.

14 **13.4.6.2** Developer shall bear the burden of proving that a Differing Site  
15 Condition exists and that Developer could not reasonably have worked around the  
16 Differing Site Condition so as to avoid additional cost or delay.

17 **13.4.6.3** Each Relief Event Notice and Relief Request relating to a  
18 Differing Site Condition shall include a statement by a Professional Engineer setting forth  
19 all relevant assumptions made by Developer with respect to the condition of the affected  
20 area, justifying the basis for such assumptions, explaining exactly how the existing  
21 conditions differ from those assumptions, and stating the efforts Developer undertook to  
22 find alternative design or construction solutions to eliminate or minimize the effect of the  
23 conditions and the associated costs.

24 **13.4.6.4** Unless Developer proves that a Differing Site Condition  
25 exists, Developer shall not be entitled to an increase in the Contract Price, a Completion  
26 Deadline adjustment or any other Claim in connection with work stoppages in the affected  
27 area during the period of time Developer investigates conditions in the affected area.

28 **13.4.6.5** Developer shall not be entitled to an increase in the Contract  
29 Price, a Completion Deadline adjustment or any other Claim for a Differing Site Condition  
30 or other Relief Event arising from Developer's reliance on or use of geotechnical  
31 information provided by ADOT related to the Salt River Bridge.

32 **13.4.6.6** Developer shall not be entitled to an increase in the Contract  
33 Price, a Completion Deadline adjustment or any other Claim for Differing Site Conditions  
34 in, on or under Developer ROW or otherwise outside the Schematic ROW.

35 **13.4.7 Change in Law**

36 **13.4.7.1** New or revised State statutes adopted after the Setting Date  
37 that change, add to or replace applicable standards, criteria, requirements, conditions,  
38 procedures, and specifications, including Safety Standards relating to the Work, as well



1 as revisions to the Technical Provisions to conform to such new or revised State statutes,  
2 shall be treated as a Change in Law (clause (m) of the definition of Relief Event) rather  
3 than an ADOT-Directed Change to the Technical Provisions; provided, however, that  
4 changes in Adjustment Standards due to new or revised State statutes shall constitute  
5 neither a Change in Law nor an ADOT-Directed Change. The foregoing shall not  
6 otherwise alter or amend the definition of Change of Law.

#### 7 **13.4.8 Change in Adjustment Standards**

8 Developer shall not be entitled to an increase in the Contract Price, a Completion  
9 Deadline adjustment or any other Claim due to a Change in Adjustment Standards.

#### 10 **13.4.9 ADOT-Directed Changes for ITS Improvements or Existing Conditions** 11 **Improvements**

12 **13.4.9.1** Developer's entitlement to an increase in the Contract Price,  
13 a Completion Deadline adjustment or any other Claim for ADOT-Directed Changes to  
14 construct ITS improvements not required as part of Developer's design or construction,  
15 as described in Section 7.6.2.1, shall be as follows.

16 (a) If ADOT issues the corresponding Supplemental Agreement  
17 or Directive Letter within 30 days after ADOT receives the ITS Inventory from Developer,  
18 then Developer shall be entitled to the Extra Work Costs to complete the ITS  
19 improvements but shall not be entitled to any Delay Costs or Completion Deadline  
20 adjustment therefor.

21 (b) If ADOT issues the corresponding Supplemental Agreement  
22 or Directive Letter later than 30 days after ADOT receives the ITS Inventory from  
23 Developer, then Developer shall be entitled to the Extra Work Costs to complete the ITS  
24 improvements and may be entitled to Delay Costs and Completion Deadline adjustment  
25 directly attributable to the delayed issuance of the Supplemental Agreement or Directive  
26 Letter.

27 **13.4.9.2** Developer's entitlement to an increase in the Contract Price,  
28 a Completion Deadline adjustment or any other Claim for ADOT-Directed Changes to  
29 construct repairs or replacements of existing conditions (other than ITS improvements)  
30 described in Section 7.6.2.2 shall be as follows.

31 (a) Developer shall not be entitled to an ADOT-Directed Change  
32 where its own Project design or construction requires removal, repair, reconstruction or  
33 replacement of any such existing conditions (other than ITS improvements).

34 (b) Subject to Section 13.4.9.2(a), Developer shall be entitled to  
35 the Extra Work Costs to complete the repairs or replacements of existing conditions (other  
36 than ITS improvements) and any Delay Costs or Completion Deadline adjustment due to  
37 delays to the Critical Path caused by the addition of the repairs or replacements of existing  
38 conditions (other than ITS improvements) to the Work.

1           **13.4.10           Collision During the Work**

2           If a Force Majeure Event as described in clause (h) of the definition thereof occurs,  
3 Developer may be entitled to Extra Work Costs only for the repair or replacement of  
4 damage or destruction to the affected bridge structure, noise wall, retaining wall or  
5 overhead sign structure. Developer may additionally be entitled to Delay Costs and  
6 adjustment of a Completion Deadline due to a Force Majeure Event described in clause  
7 (h) of the definition thereof.

8           **13.4.11           Contract Price Adjustment Due to Delay in NTP 1**

9                   **13.4.11.1**    If ADOT does not issue NTP 1 within 180 days after the  
10 Proposal Due Date, and to the extent such delay is not caused in whole or in part by an  
11 act, omission, negligence, intentional misconduct, or breach of applicable Law, contract  
12 or Governmental Approval by any Developer-Related Entity, the Contract Price shall be  
13 subject to adjustment, as described in this Section 13.4.11.

14                   **13.4.11.2**    The Contract Price adjustment shall be applied to the period  
15 beginning on the date of issuance of NTP 1.

16                   **13.4.11.3**    The Contract Price for Work performed on and after the date  
17 of issuance of NTP 1 will be adjusted pursuant to a Supplemental Agreement solely by  
18 adding to the Contract Price the “adjustment amount” (or “Δ”), calculated in accordance  
19 with this Section 13.4.11.3, and without the right to any additional increase in the Contract  
20 Price.

21                   
$$\Delta = N \times \text{Contract Price} \times (([A-B]/B)/T)$$

22                   Where:

23                   Δ is the adjustment amount distributed on a pro rata basis over the  
24 remaining payments of the Contract Price set forth in Exhibit 6;

25                   “N” is the number of days in the period starting on the 181st day after the  
26 Proposal Due Date and ending on the effective date of NTP 1;

27                   “A” is the CCI value published for the month in which the effective date of  
28 NTP 1 occurs;

29                   “B” is the CCI published for the month which contains the day that is N +15  
30 days prior to the 15th day of the month which contains the effective date  
31 of NTP 1; and

32                   “T” is the number of days between the 15th of the month for which the CCI  
33 value for “A” was taken and the 15th of the month for which the CCI  
34 value for “B” was taken.

1                   **13.4.11.4** In the event of a delay to NTP 1 as described in this  
2 Section 13.4.11, Developer will be entitled to request a Supplemental Agreement to  
3 extend a Completion Deadline in accordance with Section 13.6.

#### 4                   **13.4.12 Force Majeure due to Pandemic or Epidemic**

5                   **13.4.12.1** If a Force Majeure Event as described in clause (i)(1)-(4) of  
6 the definition thereof occurs, Developer may be entitled to a Completion Deadline  
7 adjustment. If a Force Majeure Event as described in clauses (i)(1) or (i)(2) of the  
8 definition thereof occurs, Developer may be entitled to Extra Work Costs, and such Extra  
9 Work Costs shall be subject to the Claim Deductible. Developer shall not be entitled to  
10 Extra Work Costs due to the occurrence of a Force Majeure Event as described in clauses  
11 (i)(3) or (i)(4) of the definition thereof.

12                   **13.4.12.2** Developer shall not be entitled to any Claim for Delay Costs  
13 for the first 30 days of Relief Event Delay caused by the occurrence of a Force Majeure  
14 Event as described in clause (i) of the definition thereof. Once the cumulative Relief Event  
15 Delay caused by one or more Force Majeure Events as described in clause (i) of the  
16 definition thereof exceeds 30 days, Developer may be entitled to Delay Costs for further  
17 days of Relief Event Delay caused by the occurrence of a Force Majeure Event as  
18 described in clause (i) of the definition thereof. For purposes of determining the 30 day  
19 period in which no Delay Costs are available, the duration of any Force Majeure Event as  
20 described in clause (i) of the definition thereof that satisfies the conditions for a Relief  
21 Event Delay hereunder shall be counted toward the 30 day period, whether or not  
22 concurrent with another Relief Event Delay. This Section 13.4.12.2 substitutes for the  
23 Claim Deductible with respect to Delay Costs for a Force Majeure Event as described in  
24 clause (i) of the definition thereof.

#### 25                   **13.5 Insurance Adjustments**

26                   **13.5.1** Application of insurance proceeds in the event of any loss, damage or  
27 destruction to the Project is governed by Section 10.3.

28                   **13.5.2** In all other circumstances, each Claim seeking the recovery of  
29 compensation for Extra Work Costs and Delay Costs, as applicable, shall be net of all  
30 insurance available to Developer, or deemed to be self-insured by Developer under  
31 Section 10.2.4, with respect to the Relief Event giving rise to the Extra Work Costs or  
32 Delay Costs. The amount of such insurance or deemed self-insurance shall be subtracted  
33 from the amount of the Claim before determining the amount of Extra Work Costs and  
34 Delay Costs to be charged against the Claim Deductible.

#### 35                   **13.6 Effect of Relief Events on Completion Deadlines, Performance, Developer** 36 **Default, Noncompliance Points, and Deductions**

37                   **13.6.1** Subject to Section 13.6.2 and satisfaction of any conditions or requirements  
38 set forth in the Contract Documents, including in Sections 13.1 and 13.4, Developer may  
39 be entitled to an extension of applicable Completion Deadlines by the period that the end  
40 of the Critical Path extends beyond the original Completion Deadline due to any Relief

1 Event Delay that Developer cannot reasonably avoid through mitigation as required under  
2 Section 13.8. Notwithstanding the foregoing, Developer shall not be entitled to an  
3 extension of applicable Completion Deadlines to the extent that a Relief Event Delay is  
4 concurrent with another delay not caused by a Relief Event, except that, where the Relief  
5 Event Delay is an ADOT-Caused Delay, Developer may be entitled to an extension of  
6 applicable Completion Deadlines even if concurrent with another delay not caused by a  
7 Relief Event. Developer's entitlement to any Completion Deadline adjustment under the  
8 Contract Documents is subject to Developer demonstrating that the Project Schedule in  
9 the absence of the Relief Event contained a reasonable amount of time to complete the  
10 Work that is the subject of the Relief Event. All Completion Deadline adjustments are  
11 subject to this Section 13.6.1, notwithstanding anything to the contrary in the Contract  
12 Documents.

13 **13.6.2** As an alternative to the Completion Deadline adjustment(s) to which  
14 Developer is otherwise entitled under Section 13.6.1, ADOT in its sole discretion may pay  
15 Developer acceleration costs, as contemplated in Sections 13.1.3.1(f) and 14.1.3(c). In  
16 such cases, ADOT's election to pay acceleration costs in lieu of Completion Deadline  
17 adjustment(s) shall be set forth in the applicable Supplemental Agreement.

18 **13.6.3** Subject to Section 13.6.1, Developer may be entitled to an extension of  
19 applicable Completion Deadlines by the period that the end of the Critical Path extends  
20 beyond the original Completion Deadline due to (a) a Relief Event Delay that impacts  
21 activities on the Critical Path that is directly attributable to existence or occurrence of a  
22 Relief Event under clause (h) of the definition of Relief Event on or directly affecting  
23 Developer ROW, or (b) unreasonable delay, beyond Developer's reasonable control, in  
24 obtaining new or modified Governmental Approvals necessary for implementing an  
25 approved ATC; provided that the cumulative extensions of a Completion Deadline under  
26 this Section 13.6.3 shall not exceed 120 days. The foregoing extension of applicable  
27 Completion Deadlines shall be the exclusive remedy for the existence or occurrence of a  
28 Relief Event under clause (h) of the definition of Relief Event relating to or affecting  
29 Developer ROW, and Developer shall not be entitled to Delay Costs, Extra Work Costs  
30 or any other Claim arising therefrom.

31 **13.6.4** Developer shall not be excused from timely payment of monetary  
32 obligations under this Agreement due to the occurrence of a Relief Event. Developer shall  
33 not be excused from compliance with the Contract Documents or applicable Laws due to  
34 the occurrence of a Relief Event, except temporary inability to comply due solely and  
35 directly to the Relief Event.

36 **13.6.5** Developer shall be entitled to rely upon the occurrence of a Relief Event as  
37 a defense against a Developer Default where the occurrence of the Relief Event causes  
38 such Developer Default; provided, however, that this defense shall not apply if actions or  
39 omissions by a Developer-Related Entity other than the Relief Event, but occurring at or  
40 around the same time, result in a Developer Default.

1           **13.6.6** Refer to Section 16.5 regarding the effect of a Relief Event on the accrual  
2 of Noncompliance Events and Noncompliance Points and assessment of Noncompliance  
3 Charges for Noncompliance Events.

4           **13.5.10** Refer to Sections 19.2.3 and 19.2.4 regarding the effect of a Relief Event  
5 on Liquidated Damages for Lane Closures.

## 6 **13.7 Exclusive Relief; Release of Claims**

7           The relief provided through agreement or pursuant to the Dispute Resolution  
8 Procedures for a Relief Event shall represent the sole right to compensation, damages,  
9 and other relief from the adverse effects of a Relief Event. As a condition precedent to  
10 ADOT's obligation to pay any compensation amount or grant or abide by such relief,  
11 Developer shall execute a full, unconditional, irrevocable waiver and release, in form  
12 reasonably acceptable to ADOT, of any other Claims, Losses or rights to relief associated  
13 with such Relief Event and the facts or events underlying such Relief Event.

## 14 **13.8 Prevention and Mitigation**

15           **13.8.1** Developer shall be entitled to the relief and protection provided under this  
16 Article 13 only if the occurrence of a Relief Event and the effects of such occurrence:

17                   (a) Are beyond the reasonable control of Developer-Related Entities;

18                   (b) Are not due to any act, omission, negligence, recklessness, willful  
19 misconduct, fault, breach of contract, or breach of the requirements of the Contact  
20 Documents, or violation of Law or a Governmental Approval of or by any of the Developer-  
21 Related Entities; and

22                   (c) Could not have been avoided by the exercise of caution, due  
23 diligence or reasonable efforts by Developer-Related Entities.

24           **13.8.2** Developer shall take all steps reasonably necessary to mitigate the  
25 consequences of any Relief Event, including all steps that would generally be taken in  
26 accordance with Good Industry Practice.

## 27 **13.8.3 Re-sequencing and Re-scheduling of Work**

28           **13.8.3.1** Without limiting Section 13.8.2, Developer shall not be entitled  
29 to an increase in the Contract Price, Completion Deadline adjustment or other Claim or  
30 relief for impacts that could have been avoided through re-sequencing and re-scheduling  
31 of the Work or other work-around measures; provided, however, that Developer shall not  
32 be required to implement mitigation measures where the cost thereof would exceed the  
33 Extra Work Costs and Delay Costs if the mitigation measures were not implemented.

34           **13.8.3.2** Whenever a Relief Event occurs and Developer submits an  
35 original or supplemental Relief Event Notice for Extra Work Costs or Delay Costs,  
36 Developer shall concurrently submit to ADOT an analysis of potential re-sequencing, re-

1 scheduling, and other work-around measures and a comparison of the estimated costs  
2 thereof to the estimated savings in the Extra Work Costs or Delay Costs that would result.

3 **13.8.3.3** Developer shall cooperate with ADOT to identify the re-  
4 sequencing, re-scheduling, and other work-around measures that will maximize  
5 mitigation of costs to ADOT, taking into account the cost of the potential re-sequencing,  
6 re-scheduling, and other work-around measures.

7 **13.8.3.4** ADOT will compensate Developer for the reasonable costs of  
8 re-sequencing, re-scheduling, and other work-around measures authorized in writing by  
9 ADOT pursuant to this Section 13.8.3, in the same manner it compensates for Extra Work  
10 Costs and Delay Costs under Section 13.2.

11 **13.8.4** Without limiting Section 13.8.3, if any claim is asserted or administrative  
12 proceeding, litigation or other legal action is brought against Developer by any third party  
13 (other than a Developer-Related Entity) seeking relief that would or could entitle  
14 Developer to Extra Work Costs, Delay Costs or Completion Deadline adjustment if  
15 determined adversely to Developer, then Developer, at its expense, shall defend against  
16 such claim, administrative proceeding, litigation or other legal action diligently and  
17 professionally, shall not interfere with or resist ADOT's intervention in the claim  
18 negotiations or administrative proceeding, litigation or other legal action, and shall actively  
19 assist and cooperate with ADOT in its defense against the claim, administrative  
20 proceeding, litigation or other legal action. At the request of either Party, both Parties shall  
21 enter into, or cause their respective legal counsel to enter into, a joint defense agreement  
22 setting forth terms for their joint cooperation and defense. The Parties may mutually  
23 choose, but are not obligated, to be jointly represented by legal counsel in such  
24 administrative proceeding, litigation or other legal action.

25 **13.8.5** For further mitigation obligations of Developer respecting Hazardous  
26 Materials and Recognized Environmental Conditions, refer to Section 6.8.2.

1 **ARTICLE 14.**

2 **ADOT-DIRECTED CHANGES; DEVELOPER CHANGES; DIRECTIVE LETTERS**

3 **14.1 ADOT-Directed Changes**

4 **14.1.1 ADOT's Right to Issue Supplemental Agreement**

5 **14.1.1.1** ADOT may, at any time and from time to time, without notice  
6 to any Surety, authorize or require, pursuant to a Supplemental Agreement, changes in  
7 the Work (including reductions in the scope of the Work) or in terms and conditions of the  
8 Technical Provisions (including changes in the standards applicable to the Work).

9 **14.1.1.2** ADOT also shall have the right to issue a Supplemental  
10 Agreement for any other event that the Contract Documents expressly state shall be  
11 treated as an ADOT-Directed Change.

12 **14.1.1.3** ADOT's changes to the Work shall be documented through  
13 issuance of an ADOT-Directed Change or Directive Letter. No document, including any  
14 field directive, comment to a Submittal, correspondence discussing the Contract or the  
15 Work, or otherwise, shall be valid, effective or enforceable as an ADOT-Directed Change  
16 or a Supplemental Agreement unless expressly identified as such and signed by (i) the  
17 ADOT project director, (ii) the ADOT construction manager for ADOT-Directed Changes  
18 and Supplemental Agreements less than \$350,000, or (iii) another ADOT individual  
19 identified in a written notice from the project director or construction manager to  
20 Developer as having authority to execute Supplemental Agreements.

21 **14.1.1.4** ADOT may in its discretion unilaterally issue a Supplemental  
22 Agreement that amends this Agreement if there is no effect on the Developer's costs or  
23 schedule. Such discretion shall be limited to ministerial and administrative changes  
24 necessary for ADOT's proper administration of this Agreement.

25 **14.1.2 Request for Change Proposal**

26 **14.1.2.1** If ADOT desires to issue an ADOT-Directed Change or to  
27 evaluate whether to initiate such a change, then ADOT may, at its sole discretion, issue  
28 a Request for Change Proposal. The Request for Change Proposal shall set forth the  
29 nature, extent, and details of the proposed ADOT-Directed Change. ADOT may, in its  
30 sole discretion, determine whether to implement the potential change after consideration  
31 of Developer's response.

32 **14.1.2.2** Within five Business Days after Developer receives a Request  
33 for Change Proposal, or such longer period to which the Parties may mutually agree,  
34 ADOT and Developer shall consult to define the proposed scope of the change. Within  
35 five Business Days after the initial consultation, or such longer period to which the Parties  
36 may mutually agree, ADOT and Developer shall consult concerning the estimated  
37 financial, schedule, and other impacts.

1                   **14.1.3 Response to Request for Change Proposal**

2                   As soon as possible through the exercise of diligent efforts, and in any event within  
3 60 days following ADOT’s delivery to Developer of a Request for Change Proposal,  
4 Developer shall provide ADOT with a response that contains a detailed assessment of the  
5 cost, schedule, and other impacts of the proposed ADOT-Directed Change, including the  
6 following:

7                   (a)     Developer’s detailed estimate of the impacts on costs of carrying out  
8 the proposed ADOT-Directed Change, including any Extra Work Costs or Delay Costs,  
9 or reduction in costs to Developer;

10                  (b)     A Time Impact Analysis in accordance with Section 108.04.02.11 of  
11 the Technical Provisions showing the effect of the proposed ADOT-Directed Change on  
12 the Project Schedule, including achievement of the Completion Deadlines, taking into  
13 consideration Developer’s duty to mitigate any delay, or any time saved by  
14 implementation of the proposed ADOT-Directed Change;

15                  (c)     If so requested by ADOT, in its sole discretion, an alternative cost  
16 and schedule proposal showing the acceleration costs associated with meeting  
17 Completion Deadlines without an adjustment, as well as any additional costs permitted  
18 hereunder; and

19                  (d)     Any other relevant information related to carrying out the proposed  
20 ADOT-Directed Change.

21                   **14.1.4 Negotiation and Directed Changes**

22                   **14.1.4.1**     Following ADOT’s receipt of Developer’s response to the  
23 Request for Change Proposal and of such further assessment by ADOT and its  
24 consultants of the cost, schedule, and other impacts of the proposed ADOT-Directed  
25 Change, if ADOT decides, in its sole discretion, to proceed with the proposed ADOT-  
26 Directed Change, ADOT and Developer shall exercise good faith efforts to negotiate a  
27 mutually acceptable Supplemental Agreement, including: (a) if applicable, adjustment of  
28 the Completion Deadlines; and (b) either (i) if applicable, any Extra Work Costs or Delay  
29 Costs to which Developer is entitled, and the timing and method for payment of any Extra  
30 Work Costs or Delay Costs (in accordance with Sections 13.2.4 and 13.2.5) or (ii) if  
31 applicable, any net cost savings and schedule savings to which ADOT is entitled under  
32 Section 14.1.5 and the timing and method for realizing such cost savings.

33                   **14.1.4.2**     If ADOT and Developer are unable to reach agreement on a  
34 Supplemental Agreement, ADOT may, in its sole discretion, elect to resolve the  
35 disagreement according to the Dispute Resolution Procedures with or without issuing a  
36 Directive Letter. If ADOT elects not to issue a Directive Letter, Developer shall not  
37 implement the proposed ADOT-Directed Change until resolution by the Dispute  
38 Resolution Procedures. If ADOT delivers to Developer a Directive Letter pursuant to  
39 Section 14.3.1 directing Developer to proceed with performance of the Work in question  
40 notwithstanding such disagreement, then: (a) Developer shall implement and perform the



1 Work in question as directed by ADOT; and (b) ADOT will make interim payment(s) to  
2 Developer on a monthly progress payment basis for the reasonable documented Extra  
3 Work Costs that are not disputed by ADOT, if any, and Delay Costs that are not disputed  
4 by ADOT, if any, in question, subject to subsequent adjustment through the Dispute  
5 Resolution Procedures. ADOT will additionally make an adjustment to the Completion  
6 Deadlines, if any, as determined by agreement or through the Dispute Resolution  
7 Procedures.

#### 8 **14.1.5 Reductive ADOT-Directed Changes**

9 **14.1.5.1** In addition to a Request for Change Proposal, ADOT may  
10 deliver to Developer a written notice that, in ADOT's opinion, an ADOT-Directed Change  
11 will reduce Developer costs or result in the saving of time. In such event, ADOT may  
12 prepare an analysis and a detailed assessment of the cost and schedule impacts of the  
13 proposed ADOT-Directed Change, either independently of or in reply to Developer's  
14 written response to a Request for Change Proposal, including the following:

15 (a) ADOT's estimate of the impacts on costs of carrying out the  
16 proposed ADOT-Directed Change;

17 (b) The effect of the proposed ADOT-Directed Change on  
18 shortening the Project Schedule and Completion Deadlines; and

19 (c) Any other relevant information related to carrying out the  
20 proposed ADOT-Directed Change.

21 **14.1.5.2** Developer and ADOT thereafter shall cooperate in good faith  
22 to determine the estimated net cost savings and time savings, if any, attributable to the  
23 Request for Change Proposal or ADOT-Directed Change. Any dispute regarding such  
24 savings shall be resolved according to the Dispute Resolution Procedures.

25 **14.1.5.3** ADOT will be entitled to 100% of the estimated net cost  
26 savings, if any, attributable to any reductive ADOT-Directed Change. Such net cost  
27 savings shall include the net reduction, if any, in labor, material, equipment, and overhead  
28 and profit costs associated with the ADOT-Directed Change. ADOT shall receive such  
29 savings: (a) as periodic payments from Developer, (b) as an adjustment to the Contract  
30 Price, or (c) through any combination of the foregoing, as selected by ADOT. ADOT also  
31 may take such reduction in labor, material, equipment, and overhead and profit costs as  
32 a credit against any sums owed by ADOT to Developer under the Contract Documents.  
33 If ADOT selects periodic payments from Developer, such payments shall be due and  
34 owing to ADOT monthly on the last day of each month.

35 **14.1.5.4** ADOT will be entitled to 100% of the effect of the proposed  
36 ADOT-Directed Change on shortening the Project Schedule and Completion Deadlines.  
37 The time savings shall be realized by subtracting the number of days saved from the  
38 number of days remaining until the Substantial Completion Deadline in effect the day  
39 before the corresponding Supplemental Agreement is executed. The resulting number

1 of days remaining shall become the Substantial Completion Deadline in the  
2 corresponding Supplemental Agreement.

### 3 **14.1.6 ADOT-Directed Changes as a Relief Event**

4 If Developer contends that an ADOT-Directed Change has occurred and ADOT  
5 has either not issued (a) a Supplemental Agreement therefor or (b) a Request for Change  
6 Proposal, then, if Developer seeks to assert that a Relief Event has occurred, Developer  
7 shall comply with and be subject to the procedures under Section 13.1 for Relief Event  
8 Claims and the remainder of Article 13, and shall not have the right to initiate the Dispute  
9 Resolution Procedures until permitted by Article 13. This Section 14.1.6 shall not apply to  
10 the inability to agree to a Supplemental Agreement after ADOT's issuance of a Request  
11 for Change Proposal, as described in Section 14.1.4.2.

## 12 **14.2 Developer Changes**

13 **14.2.1** By submittal of a written Change Request using the form provided in Exhibit  
14 12, with supplementary information as needed or required, Developer may request ADOT  
15 to approve:

- 16 (a) Modifications to the Technical Provisions; or
- 17 (b) Modifications to Developer's Proposal Commitments.

18 Any such Change Request shall only request an adjustment to the foregoing that  
19 is of equal or better quality than the original Technical Provisions or Developer's Proposal  
20 Commitments, unless ADOT agrees otherwise, which decision shall be in ADOT's sole  
21 discretion. The Change Request shall set forth Developer's detailed estimate of net  
22 impacts (positive and negative) on costs and schedule attributable to the requested  
23 change, consistent with applicable provisions of this Agreement. Developer shall submit a  
24 Time Impact Analysis in accordance with Section 108.04.02.11 of the Technical Provisions  
25 with any Change Request that affects a Completion Deadline.

26 **14.2.2** ADOT, in its sole discretion (and, if ADOT so elects, after receiving a  
27 comprehensive report, the cost of which is borne by Developer, from an independent  
28 engineer regarding the proposed Change Request), may accept or reject any Change  
29 Request proposed by Developer. If ADOT accepts such Change Request, Developer  
30 shall execute a Supplemental Agreement and shall implement such change in  
31 accordance with the Supplemental Agreement, applicable Technical Provisions, the  
32 Project Management Plan, Good Industry Practice, and all applicable Laws. No  
33 acceptance of a Change Request by ADOT shall be deemed to take effect unless  
34 documented in a written Supplemental Agreement signed by ADOT's Authorized  
35 Representative or by his/her designee appointed in writing. No such Supplemental  
36 Agreement shall constitute an ADOT-Directed Change regardless of its title, designation  
37 or wording.

38 **14.2.3** Developer shall solely bear the risk of any increase in the costs of the Work  
39 or other costs, and for any additional risks, resulting from a Change Request accepted by

1 ADOT. Developer shall not be entitled to an increase in the Contract Price, a Completion  
2 Deadline adjustment or any other Claim for delays or other impacts resulting from a  
3 Change Request accepted by ADOT, except where explicitly approved by ADOT.

4 **14.2.4** Without limiting the foregoing, Developer shall compensate ADOT for any  
5 incremental increase in ADOT's overhead, administrative, and out-of-pocket costs  
6 resulting from a Change Request accepted by ADOT. Developer shall make payment in  
7 the amount and at the time or times agreed upon in the Supplemental Agreement. If  
8 ADOT and Developer are unable to agree to the terms of such Supplemental Agreement,  
9 then either Party may initiate the Dispute Resolution Procedures for the purpose of fixing  
10 the incremental increase in ADOT's overhead, administrative, and out-of-pocket costs  
11 resulting from a Change Request accepted by ADOT.

12 **14.2.5** Except as provided in Section 6.3.2, to the extent a Change Request  
13 accepted by ADOT results in a net cost savings to Developer, ADOT will be entitled to  
14 50% of such savings. ADOT will obtain its share of the savings in the manner described  
15 in Section 14.1.5.3. To the extent a Change Request results in time savings, ADOT shall  
16 be entitled to 50% of such time savings, calculated in the manner described in Section  
17 14.1.5.4, except that 50% of the days saved shall be subtracted from the Substantial  
18 Completion Deadline.

19 **14.2.6** Developer may implement and permit a Utility Company to implement,  
20 without a Change Request or Supplemental Agreement, changes to a Utility Adjustment  
21 design that does not vary from the Technical Provisions.

22 **14.2.7** Certain minor changes without significant cost savings may be approved, in  
23 ADOT's sole discretion, in writing by ADOT as Deviations, as described in Section 6.2.4,  
24 and in such event shall not require a Supplemental Agreement. Any other change in the  
25 requirements of the Contract Documents shall require a Supplemental Agreement.

26 **14.3 Directive Letters**

27 **14.3.1** ADOT may at any time issue a Directive Letter to Developer regarding any  
28 matter for which a Supplemental Agreement can be issued or in the event of any  
29 disagreement regarding the scope of the Work or whether Developer has performed in  
30 accordance with the requirements of the Contract Documents. ADOT shall state in each  
31 Directive Letter whether the directive therein is Work that is within the scope of Work set  
32 forth in the Contract Documents, is an addition to the scope of the Work in the Contract  
33 Documents, or is a reduction to the scope of Work in the Contract Documents. No  
34 document, including any field directive, comment to a Submittal, correspondence  
35 discussing the Contract or the Work, or otherwise, shall be valid, effective or enforceable  
36 as a Directive Letter unless expressly identified as a "Directive Letter" and signed by (i)  
37 the ADOT project director, (ii) the ADOT construction manager for Directive Letters  
38 pertaining to Work with a value of less than \$350,000, or (iii) another ADOT individual  
39 identified in a written notice from the project director or construction manager to  
40 Developer as having authority to execute Directive Letters.

1           **14.3.2** The Directive Letter will state that it is issued under this Section 14.3, will  
2 describe the Work in question and, if the Directive Letter concerns a matter for which a  
3 Supplemental Agreement can or will be issued, will provide for, as applicable, payment  
4 of Extra Work Costs and Delay Costs, if any, or reductions in compensation, if any, and  
5 schedule adjustment, if any, directly attributable to such matters. Any such adjustment of  
6 the Contract Price shall not be applicable until execution of the corresponding  
7 Supplemental Agreement.

8           **14.3.3** Developer shall proceed immediately as directed in the Directive Letter,  
9 including by commencing any Work described therein within the time specified in the  
10 Directive Letter.

11           **14.3.4** If the Directive Letter states that the Work therein is an addition to the scope  
12 of Work in the Contract Documents, but ADOT and Developer disagree as to the extent  
13 of the addition to the scope of Work, Developer shall have the right to assert that an  
14 ADOT-Directed Change has occurred. In such situation, Developer shall comply with and  
15 be subject to the procedures under Section 13.1 for Relief Event Claims and the  
16 remainder of Article 13, to the extent of the disagreement of the change in the scope of  
17 the Work.

18           **14.3.5** If the Directive Letter states that the Work is within Developer's original  
19 scope of Work set forth in the Contract Documents or is necessary to comply with the  
20 requirements of the Contract Documents, Developer shall proceed with the Work as  
21 directed, but shall have the right to assert that an ADOT-Directed Change has occurred.  
22 In such situation, Developer shall comply with and be subject to the procedures under  
23 Section 13.1 for Relief Event Claims and the remainder of Article 13.

24           **14.3.6** The fact that a Directive Letter was issued by ADOT will not be considered  
25 evidence that an ADOT-Directed Change occurred.

1 **ARTICLE 15. THIRD PARTY AGREEMENTS**

2  
3 **15.1 Delegation of Obligations**

4  
5 Developer shall perform and comply with all obligations assigned to Developer under or  
6 pursuant to the Third-Party Agreements, as provided in Table 100-2 of the Technical  
7 Provisions.

8  
9 **15.2 Changes to Third-Party Agreements**

10 **15.2.1** The executed Third-Party Agreements as they existed on the Effective Date  
11 are set forth in the Reference Information Documents.

12 **15.2.2** If Developer’s design or Developer’s performance of the Work necessitates  
13 a change to a Third-Party Agreement, or issuance of a new Third-Party Agreement,  
14 Developer shall be responsible for obtaining the amended or new Third-Party Agreement  
15 and performing the obligations thereunder. No such amended or new Third-Party  
16 Agreement shall entitle Developer to an increase in the Contract Price, adjustment of the  
17 Completion Deadlines or any other Claim or Supplemental Agreement.

18 **15.2.3** Developer shall perform and comply with such ADOT obligations as ADOT  
19 may delegate to Developer that are contained in Third-Party Agreements entered into  
20 after the Effective Date. Developer may request relief for such additional obligations as  
21 an ADOT-Directed Change.

1 **ARTICLE 16.**  
2 **NONCOMPLIANCE EVENTS AND NONCOMPLIANCE POINTS**

3 **16.1 Noncompliance Points**

4 **16.1.1** Noncompliance Points shall be used to measure Developer’s performance  
5 of certain obligations listed in the Noncompliance Event Table (Exhibit 14) and trigger  
6 remedies described in this Article 16 for breaches and failures to perform any such  
7 obligations (i.e., Noncompliance Events). The Noncompliance Event Table lists the  
8 Noncompliance Events and the corresponding cure period that is available to Developer  
9 for each Noncompliance Event. Inclusion in the Noncompliance Event Table of a  
10 Noncompliance Event bears no implication regarding the materiality of the underlying  
11 breach or failure to perform. For purposes of this Section 16.1, references to “cure  
12 periods” shall mean those cure periods and repair response times listed or referenced in  
13 the Noncompliance Event Table.

14 **16.1.2** The Noncompliance Event Table contains a representational, but not  
15 exhaustive, list of Noncompliance Events possible under the Contract Documents.  
16 Accordingly, ADOT, from time to time, may add new Noncompliance Events to the  
17 Noncompliance Event Table, or modify existing Noncompliance Events, subject to the  
18 terms and conditions of this Section.

19 **16.1.2.1** For any new Noncompliance Event that ADOT adds to the  
20 Noncompliance Event Table, ADOT will establish the applicable assessment category  
21 (“A” or “B,” as more fully described in Section 16.3), number of Noncompliance Points,  
22 Noncompliance Charges, and cure period. ADOT’s right to make additions to the  
23 Noncompliance Event Table shall not be exercised in a manner to expand, nor shall it be  
24 deemed to expand, Developer’s obligations under the Contract Documents; but rather to  
25 add to or eliminate from the Noncompliance Event Table existing contractual obligations  
26 for which Noncompliance Points may be assessed. Developer shall not be entitled to an  
27 increase in the Contract Price, a Completion Deadline adjustment or any other Claim for  
28 additions or adjustments ADOT makes under this Section 16.1.2.1, provided that the  
29 addition or adjustment complies with Section 16.1.2.2.

30 **16.1.2.2** ADOT’s right to add existing contractual obligations to the  
31 Noncompliance Event Table is limited such that the total number of Noncompliance  
32 Points and total Noncompliance Charges set forth in the Noncompliance Event Table, as  
33 it exists on the Effective Date, shall not increase. To avoid a net increase in the total  
34 number of Noncompliance Points and total Noncompliance Charges, ADOT may elect to  
35 (a) remove contractual obligations and reduce Noncompliance Points allocated to listed  
36 contractual obligations in the Noncompliance Event Table or (b) remove or reduce  
37 Noncompliance Charges allocated to listed contractual obligations in the Noncompliance  
38 Event Table. Further, ADOT will have no right to assess Noncompliance Points or  
39 Noncompliance Charges on account of a Noncompliance Event that occurs prior to the  
40 addition of the subject existing contractual obligation(s) to the Noncompliance Event  
41 Table.

1 **16.2 Assessment Notification and Cure Process**

2 **16.2.1 Notification Initiated by Developer; Monthly Reporting**

3 **16.2.1.1** As an integral part of Developer’s self-monitoring obligations,  
4 Developer shall establish within 60 days after NTP 1 and thereafter maintain an electronic  
5 database of all Noncompliance Events, which shall at a minimum provide the following  
6 information for each Noncompliance Event:

7 (a) Description of the Noncompliance Event, including its item  
8 number set forth in the first column of the applicable Noncompliance Event Table;

9 (b) Date and time the Noncompliance Event commenced;

10 (c) Location of the Noncompliance Event (if applicable);

11 (d) Applicable cure period;

12 (e) Whether the Noncompliance Event was cured during the  
13 applicable cure period;

14 (f) Date and time of cure (if any);

15 (g) Status of Noncompliance Event;

16 (h) The number of Noncompliance Points (if any) to be assessed;  
17 and

18 (i) The amount of Noncompliance Charges to be assessed.

19 **16.2.1.2** Developer shall retain each Noncompliance Event entry in  
20 the electronic database until at least three years after the date of cure.

21 **16.2.1.3** Commencing on the Effective Date, Developer shall deliver  
22 to ADOT, by the 15<sup>th</sup> day of each month, a monthly report of all Noncompliance Events  
23 that occur during the immediately preceding month, and any Noncompliance Events from  
24 previous months that remain uncured as of the start of the preceding month. For each  
25 such Noncompliance Event, the monthly report must provide the same information  
26 required in the electronic database, as described in Section 16.2.1.1.

27 **16.2.1.4** Within a reasonable time after receiving the monthly report,  
28 ADOT will deliver to Developer a written notice setting forth:

29 (a) ADOT’s determination whether the Noncompliance Events  
30 reported as cured were cured within the applicable cure periods; and

31 (b) The Noncompliance Points and Noncompliance Charges to  
32 be assessed.

1           **16.2.2 Notification Initiated by ADOT**

2           If ADOT believes that a Noncompliance Event specified in the Noncompliance  
3 Event Table has occurred but has not been entered into the electronic database, ADOT  
4 may deliver to Developer a notice of determination, in writing or via electronic mail  
5 describing the following:

- 6           (a) Description of the Noncompliance Event, including its item number  
7 set forth in the first column of the Noncompliance Event Table;
- 8           (b) Date and time the Noncompliance Event commenced;
- 9           (c) Location of the Noncompliance Event (if applicable);
- 10          (d) Applicable cure period;
- 11          (e) If applicable, determination whether the Noncompliance Event was  
12 cured during the applicable cure period;
- 13          (f) Date and time of cure (if any);
- 14          (g) ADOT’s opinion of the current status of the Noncompliance Event;  
15 and
- 16          (h) The number of Noncompliance Points (if any) to be assessed.

17           **16.2.3 Cure Periods**

18                   **16.2.3.1** Developer shall cure Noncompliance Events by the end of the  
19 applicable cure periods set forth in the Noncompliance Event Table.

20                   **16.2.3.2** For each Noncompliance Event identified by the assessment  
21 category “A” in the Noncompliance Event Table, Developer’s cure period with respect to  
22 the Noncompliance Event shall be deemed to start on the date Developer first obtained  
23 knowledge or had reason to know of the Noncompliance Event. For this purpose, if the  
24 notice of the Noncompliance Event is initiated by ADOT, Developer shall be deemed to  
25 first obtain knowledge of the Noncompliance Event not later than the date of delivery of  
26 the notice to Developer.

27                   **16.2.3.3** For each Noncompliance Event identified by the assessment  
28 category “B” in the Noncompliance Event Table, Developer’s cure period shall be deemed  
29 to start on the date the Noncompliance Event occurred, regardless of whether ADOT has  
30 delivered a notice to Developer.

31                   **16.2.3.4** For purposes of the assessment of Noncompliance Points  
32 and Noncompliance Charges, each of the cure periods set forth in the Noncompliance  
33 Event Table shall be the only cure period available to Developer for the corresponding



1 Noncompliance Event, and shall control if it differs from any cure period that is set forth  
2 in Section 18.1.2 or might otherwise apply to the Noncompliance Event.

### 3 **16.2.4 Notification of Cure**

4 **16.2.4.1** When Developer determines it has cured any  
5 Noncompliance Event, Developer shall enter in the electronic database, as well as in the  
6 next monthly report, notice identifying the Noncompliance Event, stating that Developer  
7 has completed cure, and briefly describing the cure, including any modifications to the  
8 Project Management Plan to protect against future, similar Noncompliance Events.  
9 Thereafter, ADOT will have the right, but not the obligation, to inspect and verify  
10 completion of the cure.

11 **16.2.4.2** ADOT may reject any Developer notice of cure if ADOT  
12 determines that Developer has not fully cured the Noncompliance Event. Upon making  
13 this determination, ADOT will deliver a written notice of rejection to Developer either in a  
14 separate writing or via electronic mail. Any dispute regarding rejection of cure may be  
15 resolved according to the Dispute Resolution Procedures.

### 16 **16.3 Assessment of Noncompliance Points**

17 Upon notification of a Noncompliance Event, whether initiated by Developer under  
18 Section 16.2.1 or ADOT under Section 16.2.2, ADOT may assess Noncompliance Points  
19 in accordance with Exhibit 14, and subject to the terms and conditions set forth in Sections  
20 16.3.1 through 16.3.9.

21 **16.3.1** For each Noncompliance Event identified by the assessment category “A”  
22 in the Noncompliance Event Table, if it is cured by the end of the first cure period, no  
23 Noncompliance Points shall be assessed; but if it is not cured by the end of the first cure  
24 period, the Noncompliance Points shall be assessed at the end of the first cure period,  
25 and shall be assessed again at the end of each subsequent cure period, as described in  
26 Section 16.3.3(a), unless cured by the end of the subsequent cure period.

27 **16.3.2** For each Noncompliance Event identified by the assessment category “B”  
28 in the Noncompliance Event Table, the Noncompliance Points shall first be assessed on  
29 the date the Noncompliance Event occurred (the start of the first cure period). Provided  
30 that the Noncompliance Event is not then cured, Noncompliance Points shall be assessed  
31 again at the end of the first and each subsequent cure period, as described in Section  
32 16.3.3(b).

33 **16.3.3** Continuation of any Noncompliance Event identified by the assessment  
34 category “A” or “B” in the Noncompliance Event Table beyond the initial cure period into  
35 subsequent cure periods shall be treated as a separate Noncompliance Event.  
36 Accordingly:

37 (a) With respect to a Noncompliance Event in assessment category “A”,  
38 a new cure period equal to the prior cure period shall commence upon expiration of the  
39 prior cure period, without necessity for further notice; and

1 (b) With respect to a Noncompliance Event in assessment category “B”,  
2 successive new cure periods shall arise and each shall equal the initial cure period but  
3 shall be measured starting upon the later of (i) the expiration of the initial cure period or  
4 (ii) the date that Developer first obtained knowledge or had reason to know of the  
5 Noncompliance Event. For this purpose, if the notice of the Noncompliance Event is  
6 initiated by ADOT, Developer shall be deemed to first obtain knowledge of the  
7 Noncompliance Event not later than the date of delivery of the notice to Developer. (For  
8 example, if the initial cure period is ten days and Developer first obtains knowledge of the  
9 Noncompliance Event 30 days after it occurs, then the initial cure period shall expire at  
10 ten days after the occurrence of the Noncompliance Event, the next separate  
11 Noncompliance Event shall take effect day 30 and initiate a new ten-day cure period  
12 ending day 40, and each successive Noncompliance Event and cure period shall take  
13 effect every ten days thereafter until cure.)

14 **16.3.4** Subject to Section 16.3.5, ADOT will not assess Noncompliance Points  
15 under more than one assessment category for any particular Noncompliance Event.

16 **16.3.5** Developer’s failure to enter into the electronic database a Noncompliance  
17 Event as and when required under Section 16.2.1 or to report to ADOT a Noncompliance  
18 Event as and when required under Section 16.2.1.3 (Noncompliance Event 14-05), on  
19 the one hand; and the subject Noncompliance Event, on the other hand, constitute  
20 separate Noncompliance Events for the purpose of assessing Noncompliance Points. For  
21 purposes of Section 16.3.4, ADOT may therefore assess Noncompliance Points under  
22 both assessment categories for each of the Noncompliance Event itself and the separate  
23 Noncompliance Event (Noncompliance Event 14-05) of failing to comply with Section  
24 16.2.1.

25 **16.3.6** The number of points listed in the Noncompliance Event Table for any  
26 particular Noncompliance Event, as such number of points may be adjusted pursuant to  
27 Section 16.1.2, is the maximum number of Noncompliance Points that may be assessed  
28 for each occurrence or circumstance that constitutes a Noncompliance Event. ADOT  
29 may, but is not obligated to, assess fewer than the maximum number of points.

30 **16.3.7** Noncompliance Charges shall be assessed against and payable by  
31 Developer in accordance with Section 19.3.

32 **16.3.8** Regardless of the continuing assessment of Noncompliance Points under  
33 this Section 16.3, ADOT will be entitled to exercise its step-in rights in accordance with  
34 Section 18.5 and, if applicable, its work suspension rights in accordance with Article 17,  
35 after expiration of the initial cure period available to Developer.

36 **16.3.9** Upon either Party’s request at any time after ADOT has assessed  
37 Noncompliance Points three or more successive times for failure to cure the same  
38 occurrence or circumstance that constitutes a Noncompliance Event, the Parties will meet  
39 and confer to discuss the occurrence or circumstance and measures to mitigate  
40 continuation of such assessments and to effect a cure. This provision shall not be

1 construed to imply that ADOT is obligated to waive the Noncompliance Event or  
2 Developer's obligation to cure.

### 3 **16.4 Trigger Points for Persistent Developer Default**

4 **16.4.1** A "Persistent Developer Default", entitling ADOT to require submittal of  
5 Developer's remedial plan under Section 18.2.2, shall exist on any date when:

6 (a) 150 Noncompliance Points have been assessed in any consecutive  
7 365-day period; or

8 (b) 225 Noncompliance Points have been assessed in any consecutive  
9 720-day period.

10 **16.4.2** The number of Noncompliance Points that would otherwise be counted  
11 under Section 16.4.1 is subject to reduction in accordance with Section 18.2.2.2.

### 12 **16.5 Special Provisions for Certain Noncompliance Events**

13 **16.5.1** This Section 16.5 applies only to a Noncompliance Event that is directly  
14 attributable to:

15 (a) A Relief Event;

16 (b) A traffic accident on the Project ROW not caused by the negligence,  
17 willful misconduct, breach of contract, or violation of Law or Governmental Approval by  
18 any Developer-Related Entity; or

19 (c) Unexpected loss, disruption, break, explosion, leak or other damage  
20 of a Utility serving or in the vicinity of the Project but not within the responsibility of  
21 Developer.

22 **16.5.2** If a Noncompliance Event set forth in Section 16.5.1 occurs, then:

23 (a) The applicable cure period shall be extended if the Noncompliance  
24 Event is not reasonably capable of being cured within the applicable cure period due  
25 solely to an occurrence set forth in Section 16.5.1, and for a Noncompliance Event with  
26 an assessment category of "B", the assessment of Noncompliance Points and the start  
27 of successive cure periods shall not commence and shall be extended. An extension  
28 under this Section 16.5.2(a) shall be for a reasonable period of time under the  
29 circumstances, taking into account the scope of the efforts necessary to cure, the effect  
30 of such occurrence on Developer's ability to cure, availability of temporary remedial  
31 measures, and need for rapid action due to impact of the Noncompliance Event on safety  
32 or traffic movement;

33 (b) The Noncompliance Event shall not be counted toward a Persistent  
34 Developer Default for purposes of Section 16.4, provided the Noncompliance Event is

1 cured within the applicable cure period, as it may be extended pursuant to Section  
2 16.5.2(a);

3 (c) Regardless of which Party initiates notification of the Noncompliance  
4 Event, no Noncompliance Points shall be assessed if Developer cures such  
5 Noncompliance Event within the applicable cure period, as it may be extended pursuant  
6 to Section 16.5.2(a); and

7 (d) The Noncompliance Event shall not result in Noncompliance  
8 Charges under Section 19.3 if the Noncompliance Event is cured within the applicable  
9 cure period, as it may be extended pursuant to Section 16.5.2(a).

## 10 **16.6 Special Provisions for ADOT Step-in**

11 **16.6.1** If ADOT exercises a suspension right under Article 17 or a step-in right  
12 under Section 18.5, with respect to any portion of the Project (the “affected Project  
13 portion”), then:

14 (a) During the period that ADOT is in control of the Work for the affected  
15 Project portion (the “step-in or suspension period”), neither the condition of the affected  
16 Project portion nor the performance of or failure to perform Work respecting the affected  
17 Project portion shall result in a new Noncompliance Event, assessment of new  
18 Noncompliance Points or new Noncompliance Charges under Section 19.3;

19 (b) All cure periods that are available for Noncompliance Events  
20 respecting the affected Project portion and that arose prior to and are pending as of the  
21 date the step-in or suspension period commences shall be deemed forfeited by  
22 Developer;

23 (c) During the step-in or suspension period for the affected Project  
24 portion, Section 16.3.3 shall not be applied to Noncompliance Events that arose prior to  
25 the date such step-in or suspension period commences; and

26 (d) The step-in or suspension period for the affected Project portion shall  
27 be disregarded for purposes of determining a Persistent Developer Default under Section  
28 16.4. For avoidance of doubt, this means that (i) such step-in or suspension period shall  
29 not be included in counting the consecutive time periods set forth in Section 16.4 and (ii)  
30 such consecutive time periods shall be treated as consecutive notwithstanding the  
31 intervening step-in or suspension period.

## 32 **16.7 Provisions Regarding Dispute Resolution**

33 **16.7.1** Developer may object to the assessment of Noncompliance Points or the  
34 starting point for or duration of the cure period respecting any Noncompliance Event by  
35 delivering to ADOT written notice of such objection no later than five days after ADOT  
36 delivers its corresponding notice of determination.

1           **16.7.2** Developer may object to ADOT’s rejection of any notification of completion  
2 of a cure given pursuant to Section 16.2.4.2 by delivering to ADOT written notice of such  
3 objection no later than 15 days after ADOT delivers its notice of rejection.

4           **16.7.3** If for any reason Developer fails to deliver its notice of objection within the  
5 applicable time periods set forth in Sections 16.7.1 and 16.7.2, Developer shall be  
6 conclusively deemed to have accepted the matters set forth in the applicable notice from  
7 ADOT, and shall be forever barred from challenging them.

8           **16.7.4** If Developer gives timely written notice of objection, either Party may refer  
9 the matter for resolution according to the Dispute Resolution Procedures.

10           **16.7.5** In the case of any dispute as to the number of Noncompliance Points to  
11 assign for Noncompliance Events added to the Noncompliance Event Table, either Party  
12 may refer the matter for resolution according to the Dispute Resolution Procedures, and  
13 the sole issue for resolution shall be how many Noncompliance Points should be  
14 assigned.

15           **16.7.6** Pending the resolution of any Dispute arising under this Section 16.7, the  
16 provisions of this Article 16 shall take effect as if the matter were not in Dispute. If the  
17 final decision regarding the Dispute is that (a) the Noncompliance Points should not have  
18 been assessed, (b) the number of Noncompliance Points must be adjusted, (c) the  
19 starting point or duration of the cure period must be adjusted, or (d) a Noncompliance  
20 Event has been cured, then the number of Noncompliance Points assigned or assessed,  
21 the Noncompliance Points balance, and the related liabilities of Developer shall be  
22 adjusted to reflect such decision.

23           **16.7.7** For the purpose of determining whether ADOT may declare an Event of  
24 Default under clause (r) of Section 18.1.1 for failure to timely submit or comply with the  
25 remedial plan, the number of Noncompliance Points in Dispute:

26                   (a) Shall not be counted pending resolution of the Dispute by the Dispute  
27 Resolution Procedures if Developer delivers written notice of objection within the  
28 applicable time limit set forth in Section 16.7.1 or 16.7.2; and

29                   (b) Shall be counted if Developer for any reason does not deliver written  
30 notice of objection within the applicable time limit set forth in Section 16.7.1 or 16.7.2, or  
31 does not diligently pursue Dispute Resolution Procedures to conclusion (and in any such  
32 case Developer shall be deemed to have irrevocably waived the Dispute).

1 **ARTICLE 17.**  
2 **SUSPENSION**

3 **17.1 Suspensions for Convenience**

4 **17.1.1** ADOT may, at any time and for any reason, order Developer to suspend all  
5 or any part of the Work required under the Contract Documents for the period of time that  
6 ADOT deems appropriate for the convenience of ADOT. Developer shall promptly comply  
7 with any such suspension order. Developer shall promptly recommence the Work upon  
8 receipt of notice from ADOT directing Developer to resume work.

9 **17.1.2** Any such suspension for convenience shall be considered an ADOT-  
10 Directed Change or an ADOT-Caused Delay.

11 **17.2 Suspensions for Cause**

12 **17.2.1** Upon ADOT's delivery of notice of a Developer Default for any of the  
13 following, ADOT will have the right and authority to suspend for cause all of the Work or  
14 any affected portion of the Work, regardless of whether an Event of Default has been  
15 declared or any cure period (other than any cure period provided below in paragraphs  
16 (d), (e), (f), (h), and (j) of this Section 17.2.1) has not yet lapsed:

17 (a) The existence of conditions unsafe for workers, other Project  
18 personnel or the general public, including failure to comply with any provision of the Safety  
19 Management Plan;

20 (b) Failure to comply with any Law or Governmental Approval;

21 (c) Performance of Construction Work sooner than permitted under  
22 Section 7.6;

23 (d) Discovery of Nonconforming Work or of any activity that is  
24 proceeding or about to proceed that would constitute or cause Nonconforming Work,  
25 where the Nonconforming Work or activity is not substantially cured within 15 days after  
26 ADOT delivers written notice thereof to Developer, unless Developer demonstrates to  
27 ADOT's satisfaction that Developer has completed a full and complete cure of the  
28 Nonconforming Work and that verification by ADOT of such cure remains practicable if  
29 Work continues without suspension;

30 (e) Failure to carry out and comply with Directive Letters, where such  
31 failure is not cured within 15 days after ADOT delivers written notice thereof to Developer;

32 (f) Failure to replace or remove personnel as set forth in Sections 8.6  
33 and 8.8.3, as applicable, where such failure is not cured within 30 days after ADOT  
34 delivers written notice thereof to Developer;

1 (g) Failure to provide proof of required insurance coverage as set forth  
2 in Section 10.1.5 (which suspension is also available in the case of such failure following  
3 a written request rather than notice of a Developer Default, as set forth in Section 10.1.5);

4 (h) Except for Noncompliance Events where no Persistent Developer  
5 Default exists, other failure to perform the Work in compliance with, or other breach of,  
6 the Contract Documents, where such failure is not cured within 15 days after ADOT  
7 delivers notice thereof to Developer;

8 (i) Failure to deliver or maintain the Payment Bond, Performance Bond,  
9 or any other bonds or other security required hereunder;

10 (j) Failure to comply with any provision of the Quality Management Plan,  
11 where such failure is not cured within 15 days after ADOT delivers written notice thereof  
12 to Developer;

13 (k) If at any time ADOT gives Developer notice of ADOT's determination  
14 that Developer is in violation of any of its DBE or OJT commitments and obligations, that  
15 Developer's DBE or OJT utilization and Good Faith Efforts to meet the DBE Goals or OJT  
16 Goals are inconsistent with Developer's DBE or OJT commitments and obligations, or  
17 that Developer is failing to undertake Good Faith Efforts with respect to either the DBE  
18 Goals or OJT Goals, and the matter is not cured or the determination is not reversed upon  
19 any administrative reconsideration pursuant to Section 18.6.1(c);

20 (l) If at any time during the Construction Work Developer does not have  
21 at least one ADOT-approved IQF under Subcontract; or

22 (m) Failure of the ECC to comply with the requirements of Section  
23 104.09.07 of the Technical Provisions.

24 **17.2.2** Developer shall promptly comply with any such suspension order, even if  
25 Developer disputes the grounds for suspension. ADOT will lift the suspension order  
26 promptly after Developer fully cures and corrects the applicable breach or failure to  
27 perform or all other reasons for the suspension order cease to apply. Developer shall  
28 promptly recommence the Work upon receipt of notice from ADOT directing Developer to  
29 resume work. ADOT will have no liability to Developer, and Developer shall have no right  
30 to an increase in the Contract Price, a Completion Deadline adjustment or any other Claim  
31 in connection with any suspension of Work properly founded on any of the grounds set  
32 forth in Section 17.2.1. If Developer contends that ADOT's suspension order was not  
33 properly founded on any of the grounds set forth in Section 17.2.1, Developer may initiate  
34 the Dispute Resolution Procedures to determine whether ADOT properly issued the  
35 suspension order. If ADOT orders suspension of Work on one of the foregoing grounds  
36 but it is finally determined under the Dispute Resolution Procedures that such grounds  
37 did not exist, the suspension shall be treated as a suspension for ADOT's convenience  
38 under Section 17.1; and the amount of any compensation or Completion Deadline  
39 adjustment may be determined by the Dispute Resolution Procedures. Developer may  
40 request that the same initiation of the Dispute Resolution Procedures be used to

1 determine both whether ADOT properly issued the suspension order and the amount, if  
2 any, of compensation and/or Completion Deadline adjustment.

3 **17.3 Responsibilities of Developer during Suspension Periods**

4 During periods in which Work is suspended, Developer shall make passable, place  
5 in a maintainable condition, and shall open to traffic such portions of the Project and  
6 temporary roadways as may be agreed upon between ADOT and Developer for temporary  
7 accommodation of traffic during the anticipated period of suspension. Additionally, if ADOT  
8 does not suspend the Work in its entirety, Developer shall continue other Work that has  
9 been or can be performed at the Site or off the Site during the period that Work is  
10 suspended.



**ARTICLE 18.**  
**DEFAULT; REMEDIES**

**18.1 Default of Developer**

**18.1.1 Events and Conditions Constituting Default**

Developer shall be in breach under this Agreement upon the occurrence of any one or more of the following events or conditions (each a “Developer Default”):

(a) Developer (i) fails to begin Work authorized by NTP 1 or NTP 2 within 30 days following issuance of NTP 1 or NTP 2, respectively, (ii) fails to satisfy all conditions to commencement of the Construction Work, or (iii) fails to commence and prosecute the Construction Work with diligence and continuity;

(b) Subject to Section 18.3, Developer fails to achieve Substantial Completion or Final Acceptance by the applicable Completion Deadline, as either may be extended pursuant to this Agreement;

(c) Developer fails to perform the Work in accordance with the Contract Documents, including conforming to applicable standards set forth therein in the design and construction of the Project, or refuses to correct, remove, and replace Nonconforming Work;

(d) Developer suspends, ceases, stops or abandons the Work or fails to continuously and diligently prosecute the Work (exclusive of work stoppage (i) due to termination by ADOT, (ii) due to and during the continuance of a Force Majeure Event that prevents prosecution of the Work, (iii) due to and during suspension by ADOT, or (iv) due to and during the continuance of any work stoppage under Section 18.7);

(e) Developer fails to comply with applicable Governmental Approvals and Laws, including the Federal Requirements;

(f) Developer fails to obtain, provide, and maintain any insurance, bonds, guarantees or other performance or payment security as and when required under this Agreement for the benefit of relevant parties, or fails to comply with any requirement of this Agreement pertaining to the amount, terms or coverage of the same;

(g) Developer makes or attempts to make or suffers a voluntary or involuntary assignment or transfer of all or any portion of this Agreement in violation of Section 24.4;

(h) Developer fails, absent a valid dispute, to make payment when due for labor, equipment, materials or property in accordance with its agreements with Subcontractors, Suppliers, and Utility Companies and in accordance with applicable Laws, or fails to make payment to ADOT of any amounts owing to ADOT under this Agreement when such payment is due;

1 (i) Developer fails to timely observe or perform or cause to be observed  
2 or performed any other covenant, agreement, obligation, term or condition required to be  
3 observed or performed by Developer under the Contract Documents;

4 (j) Any representation or warranty in the Contract Documents made by  
5 Developer or any Guarantor, or any certificate, schedule, report, instrument or other  
6 document delivered by or on behalf of Developer to ADOT pursuant to the Contract  
7 Documents is false or materially misleading or inaccurate when made or omits material  
8 information when made;

9 (k) Developer commences a voluntary case seeking liquidation,  
10 reorganization or other relief with respect to itself or its debts under any U.S. or foreign  
11 bankruptcy, insolvency or other similar Law now or hereafter in effect, seeks the  
12 appointment of a trustee, receiver, liquidator, custodian or other similar official of it or any  
13 substantial part of its assets; becomes insolvent, or generally does not pay its debts as  
14 they become due; admits in writing its inability to pay its debts; makes an assignment for  
15 the benefit of creditors; or takes any action to authorize any of the foregoing;

16 (l) An involuntary case is commenced against Developer: seeking (i)  
17 liquidation, reorganization, dissolution, winding up, a composition or arrangement with  
18 creditors, a readjustment of debts or other relief with respect to Developer or Developer's  
19 debts under any U.S. or foreign bankruptcy, insolvency or other similar Law now or  
20 hereafter in effect, (ii) the appointment of a trustee, receiver, liquidator, custodian or other  
21 similar official of Developer or any substantial part of Developer's assets, (iii) the issuance  
22 of a writ of attachment, execution, or similar process, or (iv) like relief; and such  
23 involuntary case is not dismissed or stayed within 60 days of commencement;

24 (m) In any voluntary or involuntary case seeking liquidation,  
25 reorganization or other relief with respect to Developer or its debts under any U.S. or  
26 foreign bankruptcy, insolvency or other similar Law now or hereafter in effect, this  
27 Agreement or any of the other Contract Documents is rejected, including a rejection  
28 pursuant to 11 USC § 365 or any successor statute;

29 (n) Any Guarantor revokes or attempts to revoke its obligations under its  
30 guarantee or otherwise takes the position that such instrument is no longer in full force  
31 and effect;

32 (o) Whether in connection with this Project or any other, any final  
33 judgment is issued holding Developer or any Guarantor liable for an amount in excess of  
34 \$100,000 based on a finding of intentional or reckless misconduct or violation of a state  
35 or federal false claims act;

36 (p) Developer fails to resume performance that had been suspended or  
37 stopped within the time specified by ADOT to resume or (if applicable) after cessation of  
38 the event preventing performance;

39 (q) After exhaustion of all rights of appeal, there occurs any  
40 disqualification, suspension or debarment (distinguished from ineligibility due to lack of

1 financial qualifications), or there goes into effect an agreement for voluntary exclusion,  
2 from bidding, proposing or contracting with any federal or state department or agency of  
3 (i) Developer, (ii) any affiliate of Developer (as “affiliate” is defined in 29 CFR § 3.2 or  
4 successor regulation of similar import), or (iii) any Equity Member;

5 (r) There occurs any Persistent Developer Default, ADOT delivers to  
6 Developer notice of the Persistent Developer Default, and either: (i) Developer fails to  
7 deliver to ADOT, within 15 days after such notice is delivered, a remedial plan meeting  
8 the requirements for approval set forth in Section 18.2.2; or (ii) Developer fails to fully  
9 comply with the schedule or specific elements of, or actions required under, the approved  
10 remedial plan;

11 (s) There occurs any Closure of the roadway within the Project ROW or  
12 any portion thereof, or any Lane Closure, except as expressly permitted otherwise or  
13 expressly excused under this Agreement, the Technical Provisions, and the ADOT-  
14 approved Transportation Management Plan;

15 (t) Developer fails to comply with ADOT’s written suspension of Work  
16 order issued in accordance with Section 17.2.1 within the time stated in such order;

17 (u) There occurs any use of the Project or Airspace or any portion  
18 thereof in violation of this Agreement, the Technical Provisions, Governmental Approvals  
19 or Laws (except violations of Law by Persons other than Developer-Related Entities); or

20 (v) There occurs a change in any Key Personnel that is not otherwise  
21 permitted under Section 8.6.3.1.

22 **18.1.2 Notice and Opportunity to Cure**

23 For Developer breaches or failures listed in the Noncompliance Event Table, the  
24 cure periods set forth therein shall exclusively govern for the sole purpose of assessing  
25 Noncompliance Points and Noncompliance Charges. For the purpose of ADOT’s exercise  
26 of other remedies, and subject to remedies that this Article 18 expressly states may be  
27 exercised before lapse of a cure period, Developer shall have the following cure periods  
28 with respect to the following Developer Defaults:

29 (a) As to a Developer Default under clauses (s) and (t) of Section 18.1.1,  
30 a period of five days after ADOT delivers to Developer written notice of the Developer  
31 Default;

32 (b) As to a Developer Default under clauses (a), (d), (f), (g), (h), and (p)  
33 of Section 18.1.1, a period of 15 days after ADOT delivers to Developer notice of the  
34 Developer Default; provided, however, that with respect to a Developer Default under  
35 clause (f) of Section 18.1.1, ADOT will have the right, but not the obligation, to effect cure,  
36 at Developer’s expense, if such Developer Default under clause (f) of Section 18.1.1  
37 continues beyond five days after such notice is delivered;

1 (c) As to a Developer Default under clauses (c), (e), (i), (j), (q), (u), and  
2 (v) of Section 18.1.1, a period of 30 days after ADOT delivers to Developer notice of the  
3 Developer Default; provided, however, that: (i) if the Developer Default is of such a nature  
4 that the cure cannot with diligence be completed within such time period and Developer  
5 has commenced meaningful steps to cure immediately after receiving the default notice,  
6 Developer shall have such additional period of time, up to a maximum cure period of 60  
7 days, as is reasonably necessary to diligently effect cure; and (ii) as to clause (i) of Section  
8 18.1.1, cure will be regarded as complete when the adverse effects of the breach are  
9 cured;

10 (d) As to a Developer Default under clauses (b), (k), (l), (m), (n), and (o)  
11 of Section 18.1.1, there shall be no cure period, and there shall be no right to notice of a  
12 Developer Default under clauses (b), (k), (l), (m), (n), and (o) of Section 18.1.1; and

13 (e) As to a Developer Default under clause (r) of Section 18.1.1, the cure  
14 period shall be as specified in Section 18.2.2.

### 15 **18.1.3 Declaration of Event of Default**

16 If any event or condition described in Section 18.1.1 is either not subject to cure or  
17 is not cured within the period (if any) specified in Section 18.1.2, ADOT may declare that  
18 an “Event of Default” has occurred. The declaration of an Event of Default shall be in  
19 writing and provided to Developer and, at ADOT’s election, provided to the Surety(ies).

## 20 **18.2 ADOT Remedies for Developer Default**

### 21 **18.2.1 Termination for Default**

22 **18.2.1.1** Subject to Section 18.3, in the event of any Developer Default  
23 that is or becomes an Event of Default, ADOT may terminate this Agreement or a portion  
24 thereof, including Developer’s rights of entry upon and control of the Project. Such  
25 termination shall be effective upon delivering notice of termination or any other date  
26 specified in such notice, which notice may be included in the declaration of the Event of  
27 Default. If this Agreement or a portion thereof is so terminated for an Event of Default,  
28 ADOT will have the following rights without further notice and without waiving or releasing  
29 Developer from any obligations and Developer shall have the following obligations (as  
30 applicable).

31 (a) ADOT may deduct any amounts owed by Developer to ADOT  
32 (including interest thereon as permitted under this Agreement) from any amounts payable  
33 by ADOT to Developer. The amounts that ADOT may deduct include reimbursements  
34 owing; Liquidated Damages and Noncompliance Charges; amounts ADOT deems  
35 advisable to cover any existing or threatened claims and stop notices of Subcontractors,  
36 laborers or other Persons; amounts of any Losses that have accrued, subject to any  
37 limitations on the recovery thereon in the Contract Documents; the cost to complete or  
38 remediate uncompleted Work or Nonconforming Work; interest owing ADOT under this  
39 Agreement; or other damages or amounts that ADOT has determined are or may be  
40 payable to ADOT under the Contract Documents.

1 (b) ADOT will have the right, but not the obligation, to pay any  
2 amount or perform any act as may then be required from Developer under the Contract  
3 Documents or Subcontracts.

4 (c) ADOT may appropriate any or all materials, supplies, and  
5 equipment on the Site and may direct the Surety to complete this Agreement or may enter  
6 into an agreement for the completion of this Agreement according to the terms and  
7 provisions hereof with another contractor or the Surety, or use such other methods as  
8 may be required for the completion of the Work and the requirements of the Contract  
9 Documents, including completion of the Work by ADOT.

10 (d) If ADOT exercises any right to perform any obligations of  
11 Developer, ADOT may, but is not obligated to, among other things:

12 i. Perform or attempt to perform, or cause to be performed, such  
13 Work;

14 ii. Spend such sums as ADOT deems necessary to employ such  
15 architects, engineers, consultants, and contractors and obtain materials and equipment  
16 as may be required for the purpose of completing such Work;

17 iii. Execute all applications, certificates, and other documents as  
18 may be required for completing the Work;

19 iv. Modify or terminate any contractual arrangements;

20 v. Take any and all other actions that it may in its good faith  
21 discretion consider necessary to complete the Work; and

22 vi. Prosecute and defend any action or proceeding incident to the  
23 Work.

24 **18.2.1.2** Developer and each Guarantor shall be jointly and severally  
25 liable to ADOT for all costs reasonably incurred by ADOT or any Person acting on ADOT's  
26 behalf in completing the Work or having the Work completed by another Person (including  
27 any re-procurement costs, throw away costs for unused portions of the completed Work,  
28 and increased financing costs). ADOT will be entitled to withhold all or any portion of  
29 further payments to Developer until such time as ADOT is able to determine (a) how  
30 much, if any, remains payable to Developer and (b) the amount payable by Developer to  
31 ADOT in connection with ADOT's damages and Claims against Developer-Related  
32 Entities or as otherwise required by the Contract Documents. ADOT will determine the  
33 total cost of all completed Work and will notify Developer and each Guarantor of the  
34 amount, if any, that Developer and each Guarantor shall pay ADOT or ADOT will pay  
35 Developer or its Surety with respect thereto. ADOT's Recoverable Costs will be deducted  
36 from any moneys due or which may become due to Developer or its Surety. If ADOT's  
37 Recoverable Costs exceed the sum then payable to Developer under this Agreement,  
38 then Developer and each Guarantor shall be jointly and severally liable therefor and shall  
39 pay to ADOT the amount of such excess.

1           **18.2.1.3**       In lieu of the provisions of this Section 18.2.1 for terminating  
2 this Agreement for default and completing the Work, ADOT may, in its sole discretion,  
3 pay Developer for the parts already done according to the provisions of the Contract  
4 Documents and ADOT may treat the parts remaining undone as if they had never been  
5 included or contemplated by this Agreement. No Claim or other request for relief in any  
6 form under this Section 18.2.1.3 will be allowed for prospective profits on, or any other  
7 compensation relating to, Work uncompleted by Developer.

8           **18.2.1.4**       If ADOT determines under Section 18.2.1.2 that ADOT owes  
9 any amounts to Developer or its Surety related to the Work or ADOT elects to pay  
10 Developer the amount owed for Work completed in accordance with Section 18.2.1.3,  
11 such amounts shall be payable by ADOT subject to the terms and conditions of the  
12 Contract Documents.

13           **18.2.1.5**       If this Agreement is terminated for grounds that are later  
14 determined not to justify a termination for default, such termination shall be deemed to  
15 constitute a Termination for Convenience pursuant to Article 23.

16           **18.2.2 Remedial Plan Delivery and Implementation Upon Persistent**  
17 **Developer Default**

18           **18.2.2.1**       Upon the occurrence of a Persistent Developer Default (refer  
19 to the trigger points in Section 16.4), Developer shall, within 15 days after notice of the  
20 Persistent Developer Default, prepare and submit a remedial plan for ADOT's approval  
21 in its good faith discretion. The remedial plan shall set forth a schedule and specific  
22 actions to be taken by Developer to improve its performance, reduce the number,  
23 frequency, and severity of Noncompliance Events, and reduce the assessment of  
24 Noncompliance Points under Section 16.4 to the point that such Persistent Developer  
25 Default will not continue. ADOT may require that such actions include improving  
26 Developer's quality management practices, plans and procedures, revising and restating  
27 the Project Management Plan, as applicable, changing organizational and management  
28 structure, increasing monitoring and inspections, changing Key Personnel and other  
29 important personnel, replacing Subcontractors, and delivering security to ADOT.

30           **18.2.2.2**       If (a) Developer complies in all material respects with the  
31 schedule and specific elements of, and actions required under, the approved remedial  
32 plan; (b) as a result thereof Developer reduces the assessment of Noncompliance Points  
33 under Section 16.4 to the point that such Persistent Developer Default is no longer  
34 ongoing; and (c) as of the date it achieves such requirements there exist no other uncured  
35 Developer Defaults for which ADOT provided notice, then ADOT will reduce the number  
36 of Noncompliance Points that would otherwise then be counted toward Persistent  
37 Developer Default by 25%. Such reduction shall be taken from the earliest assessed  
38 Noncompliance Points that would otherwise then be counted toward Persistent Developer  
39 Default.

40           **18.2.2.3**       Developer's failure to deliver to ADOT the required remedial  
41 plan within the 15-day period set forth in Section 18.2.2.1 shall constitute a Developer

1 Default that may result in issuance of a notice thereof by ADOT triggering a five-day cure  
2 period.

3 **18.2.2.4** Developer's failure to comply in any material respect with the  
4 schedule or specific elements of, or actions required under, a remedial plan shall  
5 constitute a Developer Default that may result in issuance of a notice thereof by ADOT  
6 triggering a 30-day cure period.

7 **18.2.2.5** If either of the events described in Sections 18.2.2.3 or  
8 18.2.2.4 remains uncured following expiration of the 5-day or 30-day cure period  
9 specified, respectively, then ADOT may declare that an Event of Default has occurred in  
10 accordance with Section 18.1.3.

### 11 **18.2.3 Developer Defaults Related to Safety**

12 **18.2.3.1** Notwithstanding anything to the contrary in this Agreement, if  
13 in the good faith judgment of ADOT a Developer Default results in an Emergency or  
14 danger to persons or property, and if Developer is not then diligently taking all necessary  
15 steps to rectify such Emergency or danger, ADOT may, without notice and without  
16 awaiting lapse of the period to cure any breach, and in addition and without prejudice to  
17 its other remedies, (but is not obligated to):

18 (a) Immediately take such action as may be reasonably  
19 necessary to rectify the Emergency or danger, in which event Developer shall pay to  
20 ADOT on demand the cost of such action, including ADOT's Recoverable Costs; or

21 (b) Suspend the Work or close or cause to be closed any and all  
22 portions of the Project affected by the Emergency or danger.

23 **18.2.3.2** So long as ADOT undertakes such action in good faith, even  
24 if under a mistaken belief in the occurrence of such failure or existence of an Emergency  
25 or danger as a result thereof, such action shall not be deemed unlawful or a breach of  
26 this Agreement, shall not expose ADOT to any liability to Developer and shall not entitle  
27 Developer to an increase in the Contract Price, Completion Deadline adjustment or any  
28 other Claim, it being acknowledged that ADOT has a high priority, paramount public  
29 interest in protecting public and worker safety at the Project and adjacent and connecting  
30 areas.

31 **18.2.3.3** ADOT's good faith determination of the existence of such a  
32 failure, Emergency or danger shall be deemed conclusive in the absence of clear and  
33 convincing evidence to the contrary.

34 **18.2.3.4** Immediately following rectification of such Emergency or  
35 danger, as determined by ADOT, ADOT will allow the Work to continue or such portions  
36 of the Project to reopen, as the case may be.

37

1           **18.2.4 Damages; Offset**

2           **18.2.4.1**     Subject to Article 19, ADOT will be entitled to recover any and  
3 all damages available at Law for any and all causes of action ADOT may have against  
4 Developer, including, but not limited to, for damages caused by a Developer Default.  
5 Developer shall owe any such damages that accrue after the occurrence of the Developer  
6 Default (provided that ADOT delivers notice thereof, if any, required by this Agreement)  
7 regardless of whether the Developer Default is subsequently cured or ripens into an Event  
8 of Default.

9           **18.2.4.2**     Subject to Section 19.1.2, Developer, Sureties, and  
10 Guarantors shall not be relieved of liability for continuing Liquidated Damages or  
11 Noncompliance Charges due to a Developer Default nor by ADOT's declaration of an  
12 Event of Default, or actions taken by ADOT under this Section 18.2.

13           **18.2.4.3**     ADOT's remedies with respect to Nonconforming Work shall  
14 include the right to accept such Work and receive payment as provided in Section 6.7  
15 in lieu of the remedies specified in this Section 18.2.

16           **18.2.4.4**     Where this Agreement is not terminated, damages include:

- 17                           (a)    Costs ADOT incurs to complete the Work;
- 18                           (b)    Compensation and reimbursements due but unpaid to ADOT  
19 under the Contract Documents;
- 20                           (c)    Costs to remedy any defective part of the Work;
- 21                           (d)    Costs to rectify any breach or failure to perform by Developer  
22 or to bring the condition of the Project to that required by the Contract Documents; and
- 23                           (e)    Any other damages available at law or in equity.

24           **18.2.4.5**     If the amount of damages owing ADOT is not liquidated or  
25 known with certainty at the time a payment is due from ADOT to Developer, ADOT may  
26 deduct and offset up to 105% of the amount it reasonably estimates will be due, subject  
27 to ADOT's obligation to adjust such deduction or offset when the amount of damages  
28 owing ADOT is liquidated or becomes known with certainty.

29           **18.2.5 Performance Security**

30           Upon the occurrence of an Event of Default and without waiving or releasing  
31 Developer from any obligations, ADOT will be entitled to make demand upon and enforce  
32 any bond, and make demand upon, draw on and enforce and collect any letter of credit,  
33 guaranty or other performance security available to ADOT under this Agreement with  
34 respect to the Event of Default in question. Where access to a bond is to satisfy damages  
35 owing, ADOT will be entitled to make demand and enforce, regardless of whether the  
36 Event of Default is subsequently cured. Where access to a letter of credit or other



1 performance security is to satisfy damages owing, ADOT will be entitled to make demand,  
2 draw, enforce, and collect, regardless of whether the Event of Default is subsequently  
3 cured. ADOT will apply the proceeds of any such action to the satisfaction of Developer's  
4 obligations under this Agreement, including payment of amounts due ADOT. The  
5 foregoing does not limit or affect ADOT's right to give notice to or make demand upon and  
6 enforce any bond, and make demand upon, draw on and enforce, and collect any letter of  
7 credit, guaranty or other performance security, immediately after ADOT is entitled to do so  
8 under the bond, letter of credit, guaranty or other performance security.

9 **18.2.6 Other Rights and Remedies; Cumulative Remedies**

10 Subject to Section 19.8:

11 (a) ADOT may exercise any other rights and remedies available under  
12 this Agreement, or available at law or in equity;

13 (b) Each right and remedy of ADOT hereunder shall be cumulative and  
14 shall be in addition to every other right or remedy provided herein or now or hereafter  
15 existing at law or in equity or by statute or otherwise; and

16 (c) The exercise or beginning of the exercise by ADOT of any one or  
17 more of any of such rights or remedies shall not preclude the simultaneous or later  
18 exercise by ADOT of any or all other such rights or remedies.

19 **18.3 Event of Default Due Solely to Developer's Failure to Achieve Completion**  
20 **Deadlines**

21 **18.3.1** If an Event of Default consists solely of Developer's failure to achieve  
22 Substantial Completion or Final Acceptance by the applicable Completion Deadline, then  
23 ADOT agrees not to terminate or seek damages respecting the delay except its right to  
24 Liquidated Damages so long as (a) the ADOT-approved Project Schedule (incorporating  
25 any ADOT-approved Recovery Schedule) demonstrates that Developer is capable of  
26 meeting such Completion Deadline within 180 days of the Substantial Completion  
27 Deadline or 45 days of the Final Acceptance Deadline, as applicable, and (b) Developer  
28 diligently performs the Work in accordance with such schedule. Nothing in this Section  
29 18.3 shall prejudice any other rights or remedies that ADOT may have due to any other  
30 Event of Default during such 180-day period or 45-day period, as applicable.

31 **18.3.2** If Substantial Completion or Final Acceptance of the Project has not  
32 occurred within 180 days or 45 days, respectively, of the applicable Completion Deadline,  
33 ADOT will have the right to exercise any other right or remedy under this Agreement, at  
34 law or in equity, including termination of this Agreement.

35 **18.4 Immediate ADOT Entry to Cure Wrongful Use or Closure**

36 **18.4.1** Without prior notice and without awaiting lapse of the period to cure, if any  
37 Developer Default occurs under clause (s) or (u) of Section 18.1.1, ADOT may enter and  
38 take control of the relevant portion of the Project to reopen and continue traffic operations

1 for the benefit of the public and restore the permitted uses, until such time as such  
2 Developer Default is cured or ADOT terminates this Agreement.

3 **18.4.2** Developer shall pay to ADOT on demand ADOT's Recoverable Costs in  
4 connection with ADOT's exercise of its rights under Section 18.4.1.

5 **18.4.3** So long as ADOT undertakes such action in good faith, even if under a  
6 mistaken belief in the occurrence of such a Developer Default, ADOT's action shall not  
7 be deemed unlawful or a breach of this Agreement, shall not subject ADOT to any liability  
8 to Developer, and shall not entitle Developer to an increase in the Contract Price,  
9 Completion Deadline adjustment or any other Claim, unless ADOT's action constitutes  
10 recklessness or willful misconduct. Developer acknowledges that ADOT has a high  
11 priority, paramount public interest in maintaining continuous public access to the Project  
12 and maintaining the authorized uses of the Project. ADOT's good faith determination that  
13 such action is needed shall be deemed conclusive in the absence of clear and convincing  
14 evidence to the contrary.

15 **18.4.4** Immediately following rectification of such Developer Default, as  
16 determined by ADOT, ADOT will relinquish control of the relevant portion of the Project  
17 back to Developer.

18 **18.4.5** Notwithstanding the foregoing, ADOT will rely solely on Liquidated  
19 Damages under Section 19.2 for a Lane Closure that is not a Permitted Closure occurring  
20 and lasting not more than one hour after the expiration of the time period for an approved  
21 Lane Closure under Sections 700.06.04.05.01, 700.06.04.05.06, and 700.06.04.05.08 of  
22 the Technical Provisions. ADOT may exercise any other rights and remedies hereunder  
23 for any Lane Closure that occurs and lasts more than one hour after the expiration of the  
24 time period approved for such Lane Closure.

## 25 **18.5 ADOT Step-in Rights**

26 **18.5.1** Without having declared an Event of Default, ADOT may exercise its step-  
27 in rights on the terms and conditions set forth in this Section 18.5:

28 (a) If a Developer Default has occurred; and

29 (b) If the cure period, if any, available to Developer under Section 18.1.2,  
30 or any shorter period specified in Section 18.1.2, has expired without full and complete  
31 cure by Developer.

32 **18.5.2** ADOT will have the right, but not the obligation, to pay and perform  
33 (including by entering an agreement with another Person to perform) all or any portion of  
34 Developer's obligations and the Work that are the subject of a Developer Default, as well  
35 as any other then-existing Developer Defaults or failures to perform for which Developer  
36 received prior written notice from ADOT but has not commenced or does not continue  
37 diligent efforts to cure. Exercise of such rights shall not waive or release Developer from  
38 any obligations.

1           **18.5.3** ADOT may, to the extent reasonably required for or incident to curing the  
2 Developer Default or such other Developer Defaults or failures to perform:

3           (a)     Perform or attempt to perform, or caused to be performed, such  
4 Work;

5           (b)     Employ security guards and other safeguards to protect the Project;

6           (c)     Spend such sums as ADOT deems reasonably necessary to employ  
7 and pay such architects, engineers, consultants, and contractors and obtain materials  
8 and equipment as may be required to perform such Work, without obligation or liability to  
9 Developer or any Subcontractors for loss of opportunity to perform the same Work or  
10 supply the same materials and equipment;

11           (d)     In accordance with Section 18.2.5, draw on and use proceeds from  
12 the Payment Bond and Performance Bond and any other available security to the extent  
13 such instruments provide recourse to pay such sums;

14           (e)     Execute all applications, certificates, and other documents as may  
15 be required;

16           (f)     Make decisions respecting, assume control over, and continue Work  
17 as may be reasonably required;

18           (g)     Modify or terminate any contractual arrangements in ADOT's good  
19 faith discretion, without liability for termination fees, costs or other charges;

20           (h)     Meet with, coordinate with, direct and instruct contractors and  
21 suppliers, process invoices and applications for payment from contractors and suppliers,  
22 pay contractors and suppliers, and resolve claims of contractors, subcontractors and  
23 suppliers, and for this purpose Developer irrevocably appoints ADOT as its attorney-in-  
24 fact with full power and authority to act for and bind Developer in its place and stead;

25           (i)     Take any and all other actions it may in its good faith discretion  
26 consider necessary to effect cure and perform the Work; and

27           (j)     Prosecute and defend any action or proceeding incident to the Work.

28           **18.5.4** Developer shall reimburse ADOT, within 30 days of receiving an invoice, for  
29 ADOT's Recoverable Costs in connection with the performance of any act or Work  
30 authorized by this Section 18.5. In lieu of reimbursement, ADOT may elect, in its sole  
31 discretion, to deduct such amounts from any amounts payable to Developer under this  
32 Agreement. Developer acknowledges that amounts owing from Developer to ADOT as  
33 Noncompliance Charges are not intended to liquidate or satisfy ADOT's Recoverable  
34 Costs.

35           **18.5.5** Neither ADOT nor any of its Authorized Representatives, contractors,  
36 subcontractors, vendors, and employees shall be liable to Developer in any manner for

1 any inconvenience or disturbance arising out of ADOT's entry onto the Project, Project  
2 ROW or Developer's Temporary Work Areas to perform under this Section 18.5, unless  
3 caused by the recklessness, intentional misconduct or bad faith of such Person. If any  
4 Person exercises any right to pay or perform under this Section 18.5, it nevertheless shall  
5 have no liability to Developer for the sufficiency or adequacy of any such payment or  
6 performance, or for the manner or quality of design, construction, operation or  
7 maintenance, unless caused by the recklessness, intentional misconduct or bad faith of  
8 such Person.

9 **18.5.6** ADOT's rights under this Section 18.5 are subject to the right of any Surety  
10 under payment and performance bonds to assume performance and completion of all  
11 bonded work.

12 **18.5.7** In the event ADOT takes action described in this Section 18.5 and it is later  
13 finally determined that ADOT lacked the right to do so because there did not occur a  
14 Developer Default and expiration, without full and complete cure, of the cure period, if  
15 any, available to Developer, and expiration of such cure period is a precondition to  
16 ADOT's action, then ADOT's action shall be treated as a Directive Letter for an ADOT-  
17 Directed Change. Developer shall comply with the Relief Event Claims process under  
18 Article 13 if Developer seeks an increase in the Contract Price, a Completion Deadline  
19 adjustment or to assert any other Claim arising therefrom.

## 20 **18.6 DBE and OJT Special Remedies**

21 **18.6.1** Notwithstanding any contrary provision in any other Section of this Article  
22 18, if ADOT determines at any time that Developer is in violation of any of its DBE or OJT  
23 commitments and obligations, that Developer's DBE or OJT utilization and Good Faith  
24 Efforts to meet the DBE Goals or OJT Goals are inconsistent with Developer's DBE or  
25 OJT commitments and obligations, or that Developer is failing to undertake Good Faith  
26 Efforts with respect to either the DBE Goals or OJT Goals, then:

27 (a) ADOT may require Developer to submit, in writing, proposed  
28 corrective actions for ADOT's approval, which ADOT may require to include a revised  
29 plan for achieving the DBE Goals or OJT Goals if the violation jeopardizes Developer's  
30 achievement of these goals, and Developer shall diligently undertake the approved  
31 corrective action;

32 (b) If Developer does not submit such plan of corrective action within ten  
33 Business Days of ADOT's request, if the proposed corrective action is disapproved as  
34 inadequate, or if Developer fails to diligently carry out the approved corrective action, then  
35 ADOT will have the right to withhold (i) in the case of DBE, 1% of progress payments until  
36 cure, and (ii) in the case of OJT, \$10,000 for each of the first two progress payments  
37 thereafter, and \$50,000 for each subsequent progress payment thereafter, until cure.  
38 Developer may include such withheld amounts in the next month's Draw Request after  
39 Developer effects cure;

1 (c) Except as provided in Sections 18.6.2, 18.6.3, 18.6.4 and 19.5,  
2 before exercising other remedies, ADOT will provide Developer an opportunity for  
3 administrative reconsideration by an official who did not take part in the original  
4 determination that Developer is in violation of its DBE Goals or OJT Goals. Developer  
5 shall have the right to provide written documentation to such official to support its case  
6 no later than ten Business Days after ADOT gives written notice of such determination  
7 and, upon request, to meet in person with such official and ADOT at a date and time the  
8 official sets. ADOT will then consider the findings and opinions of such official and issue  
9 a written decision on reconsideration to Developer within 30 days after receiving  
10 Developer's written documentation and conclusion of any meeting with such official.  
11 ADOT's decision is not administratively appealable to the USDOT; and

12 (d) If, as a result of such administrative process, ADOT does not reverse  
13 its determination, then ADOT may issue a notice of Developer Default, withhold (or  
14 continue to withhold) progress payments, issue an order to suspend Work and, if  
15 Developer's failure continues without cure within the applicable cure period, terminate this  
16 Agreement for an Event of Default. In addition, if ADOT does not reverse its  
17 determination, and deems the Event of Default egregious, then ADOT may elect to pursue  
18 proceedings to disqualify or debar Developer from future bidding as non-responsible, as  
19 well as any Subcontractor or Supplier that has violated or participated in violation of DBE  
20 or OJT requirements.

21 **18.6.2** If Developer fails to (a) timely deliver to ADOT in complete form any DBE  
22 Monthly Utilization Progress Report required under Section 18.02.2 of the DBE Special  
23 Provisions (Exhibit 7), (b) enter the same information by the 15th day of each month into  
24 ADOT's web-based DBE System, or (c) correctly complete and submit any other required  
25 reports, forms, and documentation required by the DBE Special Provisions (Exhibit 7)  
26 within the applicable time specified therein, and Developer does not cure such failure  
27 within ten Business Days after ADOT delivers to Developer notice of such failure, then  
28 ADOT will have the right to withhold 1% of progress payments thereafter until cure.  
29 Developer may include such withheld amounts in the next month's Draw Request after  
30 Developer effects cure.

31 **18.6.3** If Developer fails to (a) timely deliver to ADOT in complete form the monthly  
32 hours for each OJT Trainee as required by Section 923-6(A) of the OJT Special  
33 Provisions (Exhibit 8), or (b) correctly complete and submit any other required reports,  
34 forms, and documentation required by the OJT Special Provisions (Exhibit 8) within the  
35 applicable time specified therein, and Developer does not cure such failure within ten  
36 Business Days after ADOT delivers to Developer notice of such failure, then ADOT will  
37 have the right to withhold \$10,000 for each of the first two progress payments thereafter,  
38 and \$50,000 for each subsequent progress payment thereafter, until cure. Developer may  
39 include such withheld amounts in the next month's Draw Request after Developer effects  
40 cure.

41 **18.6.4** If at any time during the Construction Work the use of OJT Trainees is not  
42 in conformance with the schedule or supplemental schedule as submitted and approved  
43 pursuant to the OJT Special Provisions (Exhibit 8), then ADOT will have the right to

1 withhold \$10,000 for each of the first two progress payments thereafter, and \$50,000 for  
2 each subsequent progress payment thereafter until Developer conforms to the schedule  
3 or supplemental schedule. Conformance with the schedule or supplemental schedule will  
4 be considered acceptable when the OJT Trainee utilization to date is at least 90% of that  
5 shown on the schedule or supplemental schedule, for the Construction Work performed  
6 to date.

7 **18.7 Right to Stop Work for Failure by ADOT to Make Undisputed Payment**

8 Subject to Section 12.3.1, Developer shall have the right to stop Work if ADOT fails  
9 to make an undisputed payment due hereunder (including failure due to non-  
10 appropriation); provided, however, that Developer may only stop Work if ADOT does not  
11 make such undisputed payment due hereunder within 15 Business Days after ADOT's  
12 receipt of notice from Developer that payment has not been received and that Developer  
13 will stop Work. Any such work stoppage shall be considered a suspension for convenience  
14 under Section 17.1 and shall be considered an ADOT-Directed Change. Developer shall  
15 not have the right to terminate this Agreement for default as the result of any failure by  
16 ADOT to make an undisputed payment due hereunder; provided, however, that if ADOT's  
17 nonpayment continues for more than 90 days after ADOT's receipt of notice of  
18 nonpayment from Developer, upon notice from Developer to ADOT, the nonpayment may  
19 be deemed a Termination for Convenience pursuant to Article 23. Upon such termination,  
20 the Parties' rights and obligations shall be as set forth in Article 23.

**ARTICLE 19.**  
**LIQUIDATED DAMAGES, NONCOMPLIANCE CHARGES,**  
**AND LIMITATION OF LIABILITY**

**19.1 Liquidated Damages Respecting Delays**

**19.1.1** Developer shall be liable for and pay to ADOT Liquidated Damages with respect to any failure to achieve Substantial Completion or Final Acceptance of the Project by the applicable Completion Deadline, as the same may be extended pursuant to this Agreement. The amounts of such Liquidated Damages are as follows:

(a) \$70,000 for each day that Substantial Completion is delayed beyond the Substantial Completion Deadline; and

(b) \$25,000 for each day that Final Acceptance is delayed beyond the Final Acceptance Deadline.

**19.1.2** The Liquidated Damages described in this Section 19.1 shall commence on the day of the applicable Completion Deadline, as the same may be extended pursuant to this Agreement, and shall continue to accrue until the date of the applicable Substantial Completion or Final Acceptance, measured as of the date on which ADOT issues the Certificate of Substantial Completion or Final Acceptance, respectively, or until termination of this Agreement. Subject to Section 18.3, such Liquidated Damages shall constitute ADOT's sole right to damages against Developer for such delay.

**19.1.3** Developer agrees and acknowledges that:

(a) If Developer fails to achieve Substantial Completion or Final Acceptance of the Project by the applicable Completion Deadline, ADOT will incur substantial damages;

(b) As of the Effective Date, the amounts of Liquidated Damages under this Section 19.1 represent good faith estimates and evaluations by the Parties as to the actual potential damages that ADOT would incur as a result of late Substantial Completion or late Final Acceptance of the Project, as applicable, and do not constitute a penalty;

(c) Actual potential damages include loss of use, enjoyment, and benefit of the Project and connecting ADOT transportation facilities by the general public, injury to the credibility and reputation of ADOT's transportation improvement program with policy makers and with the general public who depend on and expect availability of service of the Project by the Substantial Completion Deadline, and additional costs of administering this Agreement (including engineering, legal, accounting, overhead, and other administrative costs);

(d) The Parties have agreed to Liquidated Damages under this Section 19.1 to fix and limit Developer's costs and to avoid later disputes over what amounts of damages are properly chargeable to Developer;

1 (e) Such sums are reasonable in light of the anticipated or actual harm  
2 caused by delayed Substantial Completion or delayed Final Acceptance of the Project,  
3 the difficulties of the proof of loss, and the inconvenience or infeasibility of otherwise  
4 obtaining an adequate remedy;

5 (f) Such Liquidated Damages are not intended to, and do not, liquidate  
6 Developer's liability under the indemnification provisions of Section 20.1, even though  
7 third party claims against Indemnified Parties may arise out of the same event, breach or  
8 failure that gives rise to the Liquidated Damages; and

9 (g) Such Liquidated Damages are not intended to, and do not, liquidate  
10 damages for cost to complete the Project or any other damages except damages due to  
11 delay in Substantial Completion or Final Acceptance.

## 12 **19.2 Liquidated Damages for Lane Closures**

### 13 **19.2.1** Subject to Sections 19.2.3 and 19.2.4:

14 (a) for any full or partial Lane Closure that occurs within the Project ROW outside  
15 the time approved by ADOT under Section 700.06.04.05.01 of the Technical Provisions,  
16 Developer shall be liable for and pay to ADOT Liquidated Damages in the following  
17 amounts for every 15-minute interval; or portion thereof, that such Lane Closure continues  
18 or exists outside approved time periods, as applicable:



<b>Liquidated Damages Per 15-Minute Period Mainline</b>				
	<b>I-10 Inbound US 60 to I-17</b>	<b>I-10 Outbound US 60 to I-17</b>	<b>I-10 Inbound US 60 to 202 Santan</b>	<b>I-10 Outbound US 60 to 202 Santan</b>
<b>Full Closure</b>	\$200,200	\$129,500	\$31,600	\$42,200
<b>1-Lane Closure</b>	\$5,900	\$3,600	\$1,700	\$2,200
<b>2-Lane Closure</b>	\$8,700	\$5,200	\$2,900	\$3,800
<b>3-Lane Closure</b>	\$14,400	\$8,600	N/A	N/A
	<b>US 60 Inbound</b>	<b>US 60 Outbound</b>	<b>SR 143 Inbound</b>	<b>SR 143 Outbound</b>
<b>Full Closure</b>	\$18,000	\$1,700	\$1,400	\$1,100
<b>1-Lane Closure</b>	\$100	\$60	\$100	\$100
<b>2-Lane Closure</b>	\$300	\$100	\$200	\$900
Inbound = I-10 WB; US 60 WB; SR 143 NB; open by <b>4 a.m.</b> Outbound = I-10 EB; US 60 EB; SR 143 SB; open by <b>4 a.m.</b>				

<b>Liquidated Damages Per 15-Minute Period Ramps / Crossroad</b>			
	<b>System Ramp</b>	<b>Service Ramp</b>	<b>Crossroad</b>
Full Closure	\$300	\$200	\$700
1-Lane Closure	\$20	\$10	\$50
2-Lane Closure	\$60	N/A	\$100

1  
2 (b) for any full or partial ramp closure or Lane Closure that occurs on the ramps  
3 specified in Sections 700.06.04.05.06 and 700.06.04.05.08 of the Technical Provisions,  
4 and subject to the conditions in Sections 700.06.04.05.06 and 700.06.04.05.08 of the  
5 Technical Provisions, Developer shall be liable for and pay to ADOT Liquidated Damages  
6 in the following amounts for every day or portion thereof that such ramp closure or Lane  
7 Closure continues or exists in excess of the maximum allotted number of days specified,  
8 except as provided in Section 700.06.04.05.08(F) of the Technical Provisions:  
9

Liquidated Damages Per Day Temporary Long-term Closure		
Location	Duration	
40th Street EB Off-ramp	45	\$6,900
32nd Street EB Off-ramp	45	\$40,500
40th Street EB On-ramp	45	\$4,400
32nd Street EB On-ramp	45	\$39,800
Broadway Road EB Off-ramp	60	\$10,200
Baseline Road EB Off-ramp	60	\$10,500
40th Street WB Off-ramp	60	\$12,100
32nd Street WB Off-ramp	45	\$12,000
32nd Street WB On-ramp	45	\$41,900
40th Street WB On-ramp	45	\$11,300
SR 143 SB to I-10 EB loop ramp	90	\$10,800

1           **19.2.2** Developer acknowledges and agrees that the Liquidated Damages  
2 described in this Section 19.2 are reasonable to compensate ADOT for damages ADOT  
3 will incur by reason of the matters that result in Liquidated Damages for Lane Closures.  
4 Such damages include loss of use, enjoyment and benefit of the Project, and connection  
5 to ADOT transportation facilities by the general public, injury to the credibility and  
6 reputation of ADOT’s transportation improvement program with policy makers and with  
7 the general public who depend on and expect availability of service, and additional costs  
8 of administering this Agreement (including engineering, legal, accounting, overhead, and  
9 other administrative costs). Developer further acknowledges that these damages are  
10 incapable of accurate measurement because of, among other things, the unique nature  
11 of the Project and the unavailability of a substitute for it. The Parties have agreed to  
12 Liquidated Damages under this Section 19.2 to fix and limit Developer’s costs and to  
13 avoid later disputes over what amounts of damages are properly chargeable to  
14 Developer.

15           **19.2.3** Liquidated Damages for Lane Closures shall not be assessed for Lane  
16 Closures that are necessary because of damage or destruction to a traffic lane, ramp,  
17 structure, cross road, shoulder or sidewalk directly attributable to a Relief Event; provided  
18 that such waiver of Liquidated Damages will continue only for so long as necessary, taking  
19 into account Developer’s duty to mitigate under Section 13.8 to repair or replace the  
20 damage or destruction and reopen the affected traffic lane, ramp, structure, cross road,  
21 shoulder or sidewalk.

22           **19.2.4** Liquidated Damages for any full or partial Lane Closure shall not be  
23 assessed to the extent it persists beyond the end of the approved time period as a result  
24 of any of the following, provided that (1) such waiver of Liquidated Damages shall only  
25 apply to the minimum extra time period that would be required to end the Lane Closure  
26 through use of diligent efforts, and (2) Developer shall immediately notify ADOT if any  
27 such event occurs that Developer believes will delay ending the Lane Closure on time:

1 (a) A Relief Event that occurs during the Lane Closure and directly  
2 adversely impacts the ability to end the Lane Closure on time;

3 (b) An Incident or Emergency that occurs during the Lane Closure and  
4 directly adversely impacts the ability to end the Lane Closure on time, provided that the  
5 Incident or Emergency is not caused by the negligence, willful misconduct, breach of  
6 contract, or violation of Law or Governmental Approval by any Developer-Related Entity;

7 (c) Unexpected loss, disruption, break, explosion, leak or other damage  
8 of a Utility that occurs during the Lane Closure and directly adversely impacts the ability  
9 to end the Lane Closure on time, provided that the same is not caused by the negligence,  
10 willful misconduct, breach of contract, or violation of Law or Governmental Approval by  
11 any Developer-Related Entity; or

12 (d) ADOT's unjustified and direct delay of, or unjustified and direct  
13 interference with, Developer's efforts to end the Lane Closure on time.

14 **19.2.5** Assessment of Liquidated Damages for Lane Closures shall not preclude  
15 ADOT's exercise of its right to remove a Lane Closure that is not a Permitted Closure at  
16 Developer's expense under Section 18.4.

17 **19.2.6** In addition to Liquidated Damages for Lane Closures that are not Permitted  
18 Closures, ADOT may assess Noncompliance Points due to a Lane Closure that is not a  
19 Permitted Closure in the amount shown in the Noncompliance Event Table. However,  
20 any Noncompliance Points assessed for a Lane Closure that is not a Permitted Closure  
21 (Item 14-33 of the Noncompliance Event Table) shall only accrue for the purpose of  
22 measuring a Persistent Developer Default, and shall not be subject to the assessment of  
23 Noncompliance Charges in accordance with Section 19.4.

24 **19.2.7** Liquidated Damages for Lane Closures shall separately apply to each Lane  
25 Closure that is not a Permitted Closure and shall be cumulative. When a Lane Closure  
26 that is not a Permitted Closure affects multiple junctions or lanes, Liquidated Damages  
27 shall separately accrue for each affected portion, regardless of whether the junctures or  
28 lanes overlap.

### 29 **19.3 Payment; Satisfaction; Waiver; Non-Exclusive Remedy**

30 **19.3.1** Developer shall pay any Liquidated Damages and Noncompliance Charges  
31 owing under this Article 19 within 20 days after ADOT delivers to Developer ADOT's  
32 invoice or demand therefor.

33 **19.3.2** ADOT will have the right to deduct and offset Liquidated Damages and  
34 Noncompliance Charges from any amounts owing to Developer. ADOT also shall have  
35 the right to draw on any bond, certificate of deposit, letter of credit or other security  
36 provided by Developer pursuant to this Agreement to satisfy Noncompliance Charges and  
37 Liquidated Damages not paid when due.

1           **19.3.3** Permitting or requiring Developer to continue and finish the Work or any  
2 part thereof after a Completion Deadline, as applicable, shall not act as a waiver of  
3 ADOT’s right to receive Noncompliance Charges and Liquidated Damages hereunder or  
4 any rights or remedies otherwise available to ADOT.

5           **19.3.4** ADOT’s right to, and imposition of, Noncompliance Charges and Liquidated  
6 Damages are in addition, and without prejudice, to any other rights and remedies  
7 available to ADOT under this Agreement, at law or in equity respecting the breach, failure  
8 to perform or Developer Default that is the basis for the Noncompliance Charges or  
9 Liquidated Damages or any other breach, failure to perform or Developer Default, except  
10 for recovery of the monetary damages that the Noncompliance Charges or Liquidated  
11 Damages are intended to compensate.

12           **19.4 Noncompliance Charges for Noncompliance Points**

13           **19.4.1** Developer shall be liable for and pay to ADOT amounts to compensate  
14 ADOT for damages due to the occurrence of Noncompliance Events, as described in the  
15 Noncompliance Event Table. The amounts owing from Developer to ADOT as  
16 Noncompliance Charges do not liquidate the costs to ADOT to rectify the corresponding  
17 Noncompliance Event and do not preclude ADOT from pursuing additional remedies  
18 against Developer.

19           **19.4.2** Except as provided in Section 19.4.7, for each assessed Noncompliance  
20 Point, Developer shall be subject to Liquidated Damages in the amount of \$1,000 (the  
21 “Noncompliance Charges”).

22           **19.4.3** Developer shall pay ADOT the amount of the Noncompliance Charges  
23 accrued within 20 days after ADOT requests payment thereof. Alternatively, ADOT shall  
24 have the right to deduct the Noncompliance Charges from progress payments to  
25 Developer.

26           **19.4.4** Developer acknowledges that the Noncompliance Charges assessed in  
27 accordance with the Contract Documents are reasonable liquidated amounts to  
28 compensate ADOT for damages it will incur by reason of Developer’s failure to comply  
29 with the applicable provisions of the Contract Documents. The damages addressed by  
30 the Noncompliance Charges include:

31           (a) ADOT’s increased costs of administering this Agreement, including  
32 the increased costs of engineering, legal, accounting, monitoring, oversight, overhead,  
33 and increased costs of monitoring and enforcing Developer’s compliance with applicable  
34 Governmental Approvals;

35           (b) Potential harm and future costs to ADOT from reduction in the  
36 condition and useful life of the Elements;

37           (c) Potential harm to the credibility and reputation of ADOT with other  
38 Governmental Entities, with policy makers, and with the general public who depend on  
39 and expect timely and quality delivery and availability of service;

1 (d) Potential harm and detriment to those using the Project, which may  
2 include loss of use, enjoyment and benefit of the Project and of facilities connecting to the  
3 Project, additional wear and tear on vehicles, and increased costs of congestion, travel  
4 time, and accidents; and

5 (e) ADOT's increased costs of addressing potential harm to the  
6 environment, including increased harm to air quality caused by congestion, and harm to  
7 water quality, soils conditions, historic structures, and other environmental resources  
8 caused by Noncompliance Events.

9 **19.4.5** Developer further acknowledges that the damages described in Section  
10 19.4.4 would be difficult and impracticable to measure and prove, because, among other  
11 things:

12 (a) The Project is of a unique nature and no substitute for it is available;

13 (b) The costs of monitoring and oversight will be variable and extremely  
14 difficult to quantify;

15 (c) The nature and level of increased monitoring and oversight will be  
16 variable depending on the circumstances; and

17 (d) The variety of factors that influence use of and demand for the  
18 Project makes it difficult to sort out causation of the matters that will trigger these  
19 Liquidated Damages and to quantify actual damages.

20 **19.4.6** The Parties have agreed to Liquidated Damages under this Section 19.4 to  
21 fix and limit Developer's costs and to avoid later disputes over what amounts of damages  
22 are properly chargeable to Developer.

23 **19.4.7** Developer shall not be subject to the Noncompliance Charges under this  
24 Section 19.4 for the occurrence of Noncompliance Events 14-12 (failure to comply with  
25 Proposal Commitments relating to Public Information) or 14-33 (failure to remove a Lane  
26 Closure that is not a Permitted Closure). However, the assessment of Noncompliance  
27 Points for the occurrence of Noncompliance Events 14-12 or 14-33 shall accrue for the  
28 purpose of measuring a Persistent Developer Default, as provided in Section 16.4. This  
29 Section 19.4.7 shall not affect any other rights, obligations or application of any other  
30 provision hereunder concerning Noncompliance Events.

## 31 **19.5 Liquidated Damages Respecting DBEs and OJT**

### 32 **19.5.1 DBEs**

33 **19.5.1.1** If Developer replaces or substitutes, or allows or  
34 suffers replacement or substitution, for a Committed DBE in violation of Section 19.0 of  
35 the DBE Special Provisions (Exhibit 7), then Developer shall be liable for and pay to  
36 ADOT Liquidated Damages in an amount equal to 1.5 times the unpaid portion of the  
37 Subcontract amount under the Subcontract with the wrongfully replaced Committed DBE.

1                   **19.5.1.2**     If, following Substantial Completion, ADOT determines  
2 that Developer has not met the DBE Goals for Professional Services and Construction  
3 and did not exercise Good Faith Efforts to meet such DBE Goals, then Developer shall  
4 be liable for and pay to ADOT Liquidated Damages in an amount equal to the total  
5 contract value that would have had to be paid to DBEs performing Commercially Useful  
6 Functions to meet each of the DBE Goals, minus the total contract value of Work actually  
7 performed by DBEs and credited toward each of the DBE Goals.

8                   **19.5.1.3**     Developer acknowledges and agrees that the  
9 Liquidated Damages respecting DBEs described in this Section 19.5.1 are reasonable to  
10 compensate ADOT for damages ADOT will incur by reason of the violations or failures  
11 described in this Section 19.5.1. Such damages include jeopardizing the attainment of  
12 ADOT's overall DBE goals, injury to the credibility and reputation of ADOT's DBE  
13 program, potential loss of federal funding equal to or exceeding the value of Work denied  
14 to DBEs, imposition of other costly measures and requirements by the FHWA, and  
15 additional costs of administering this Agreement and enforcing Developer's compliance  
16 with its DBE obligations. Further, the severity of such damages is expected to vary with  
17 the portion of the Subcontract amount denied to the Committed DBE or the portion of the  
18 DBE Goal not attained. Developer further acknowledges that these damages are  
19 incapable of accurate measurement because of, among other things, their imprecise  
20 nature. The Parties have agreed to Liquidated Damages under this Section 19.5.1 to fix  
21 and limit Developer's costs and to avoid later disputes over what amounts of damages  
22 are properly chargeable to Developer.

## 23                   **19.5.2 OJT**

24                   **19.5.2.1**     If, following Substantial Completion, ADOT determines that  
25 Developer has not met the OJT Goals and did not exercise Good Faith Efforts to meet  
26 the OJT Goals, then Developer shall be liable for and pay to ADOT Liquidated Damages  
27 in the amount that ADOT is then holding pursuant to Section 18.6.4.

28                   **19.5.2.2**     Developer acknowledges and agrees that the Liquidated  
29 Damages respecting OJT described in this Section 19.5.2 are reasonable to compensate  
30 ADOT for damages it will incur by reason of the violations or failures described in this  
31 Section 19.5.2. Such damages include jeopardizing the attainment of ADOT's overall OJT  
32 goals, injury to the credibility and reputation of ADOT's OJT program, potential loss of  
33 federal funding equal to or exceeding the value of Work denied to OJT Trainees,  
34 imposition of other costly measures and requirements by the FHWA, and additional costs  
35 of administering this Agreement and enforcing Developer's compliance with its OJT  
36 obligations. Further, the severity of such damages is expected to vary with the portion of  
37 the employment work denied to OJT Trainees. Developer further acknowledges that  
38 these damages are incapable of accurate measurement because of, among other things,  
39 their imprecise nature. The Parties have agreed to Liquidated Damages under this  
40 Section 19.5.2 to fix and limit Developer's costs and to avoid later disputes over what  
41 amounts of damages are properly chargeable to Developer.

42

1 **19.6 Liquidated Damages for Unavailability of Key Personnel**

2 Developer shall be subject to Liquidated Damages for the failure and unavailability  
3 of Key Personnel to work on the Project, as set forth in Sections 8.6.1.3, 8.6.2, 8.6.3, and  
4 8.6.4.

5 **19.7 Liquidated Damages Respecting Subcontractor Payroll Reporting**

6 **19.7.1** Developer shall be subject to Liquidated Damages if Developer does not  
7 comply with certain requirements respecting Subcontractor payroll reporting, as set forth  
8 in Section 12.6.2(c).

9 **19.7.2** Developer acknowledges that ADOT requires timely receipt of the  
10 Subcontractor payrolls described in Section 12.6.2 for ADOT to comply with applicable  
11 federal and State labor laws. Developer further acknowledges that the Liquidated  
12 Damages described in Section 12.6.2(c) are reasonable to compensate ADOT for  
13 damage it will incur if ADOT fails to comply with these laws. Such damages include  
14 potential loss of federal funding, the imposition of other sanctions by the U.S. Department  
15 of Labor or FHWA, and additional costs of administering this Agreement and enforcing  
16 Developer’s compliance with applicable requirements herein. Developer further  
17 acknowledges that these damages are incapable of accurate measurement because of,  
18 among other things, their imprecise nature. The Parties have agreed to Liquidated  
19 Damages under this Section 19.7 to fix and limit Developer’s costs and to avoid later  
20 disputes over what amounts of damages are properly chargeable to Developer.

21 **19.8 Limitation on Damages**

22 **19.8.1** Notwithstanding any other provision of the Contract Documents and except  
23 as set forth in Section 19.8.2, to the extent permitted by applicable Law, neither Party  
24 shall be liable to the other for punitive damages or indirect or incidental consequential  
25 damages, whether arising out of breach of this Agreement, tort (including negligence) or  
26 any other theory of liability, and each Party hereby releases the other party from any such  
27 liability.

28 **19.8.2** The foregoing limitations on Developer’s liability for consequential damages  
29 shall not apply to or limit any right of recovery ADOT may have respecting the following:

30 (a) Losses (including defense costs) to the extent (i) covered by the  
31 proceeds of insurance required to be carried pursuant to Article 10, (ii) covered by the  
32 proceeds of insurance actually carried by or insuring any Developer-Related Entity under  
33 policies solely with respect to the Project and the Work, regardless of whether required  
34 to be carried pursuant to Article 10, or (iii) Developer is deemed to have self-insured the  
35 Loss pursuant to Section 10.2.4;

36 (b) Losses arising out of fraud, criminal conduct, intentional misconduct  
37 (which does not include any intentional Event of Default), recklessness or bad faith on the  
38 part of any Developer-Related Entity;

1 (c) Developer's indemnities set forth in Sections 5.4.2.7, 5.4.6, 6.8.9,  
2 and 20.1;

3 (d) Developer's obligation to pay Noncompliance Charges and  
4 Liquidated Damages in accordance with Sections 8.6 and 12.6.2(c) and this Article 19;

5 (e) Losses arising out of Developer Releases of Hazardous Materials;

6 (f) Costs reasonably incurred by ADOT, or any Person acting on  
7 ADOT's behalf, to complete or correct Nonconforming Work, or have Nonconforming  
8 Work completed or corrected by another Person, in excess of the sum otherwise payable  
9 to Developer under this Agreement for the Work; and

10 (g) Amounts Developer may owe or be obligated to reimburse to ADOT  
11 under the express provisions of the Contract Documents, including, subject to any agreed  
12 scope of work and budget, ADOT's Recoverable Costs.



**ARTICLE 20.**  
**INDEMNIFICATION**

**20.1 Indemnity by Developer**

**20.1.1** Subject to Section 20.1.2, Developer shall release, protect, defend, indemnify, and hold harmless the Indemnified Parties from and against any and all claims, causes of action, suits, judgments, investigations, legal or administrative proceedings, demands and Losses, in each case if asserted or incurred by or awarded to any third party, arising out of, relating to or resulting from:

(a) The breach or alleged breach of any of the Contract Documents by any Developer-Related Entity;

(b) The failure or alleged failure by any Developer-Related Entity to comply with the Governmental Approvals, any applicable Environmental Laws or other Laws (including laws regarding Hazardous Materials Management);

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

(d) The actual or alleged culpable act, error, omission, negligence, breach or misconduct of any Developer-Related Entity in or associated with performance of the Work;

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

(f) The failure or alleged failure by any Developer-Related Entity to pay sums due for the work or services of Subcontractors, laborers, or Suppliers, provided that ADOT has paid all undisputed amounts owing to Developer with respect to such work;

(g) Any actual or threatened Developer Release of Hazardous Materials;

(h) The claim or assertion by any other ADOT contractor or developer:  
(i) that any Developer-Related Entity failed to cooperate reasonably with such other ADOT contractor or developer, so as to cause disruption, delay or loss, except where the Developer-Related Entity was not in any manner engaged in performance of the Work or  
(ii) that any Developer-Related Entity interfered with or hindered the progress or completion of work being performed by such other ADOT contractor or developer, so as

1 to cause disruption, delay or loss, to the extent such claim arises out of the actual or  
2 alleged culpable act, error, omission, negligence, breach or misconduct of any Developer-  
3 Related Entity;

4 (i) Developer's performance of, or failure to perform, the obligations  
5 under any Utility Agreement, or any dispute between Developer and a Utility Company  
6 arising out of Utility Adjustments;

7 (j) (i) Any Developer-Related Entity's breach of or failure to perform an  
8 obligation that ADOT owes to a third person, including Governmental Entities, under Law  
9 or under any agreement between ADOT and a third person, where ADOT has delegated  
10 performance of the obligation to Developer under the Contract Documents or (ii) the acts  
11 or omissions of any Developer-Related Entity that render ADOT unable to perform or  
12 abide by an obligation that ADOT owes to a third person, including Governmental Entities,  
13 under any agreement between ADOT and a third person, where the agreement was  
14 disclosed or known to Developer;

15 (k) The fraud, bad faith, arbitrary or capricious acts, or violation of Law  
16 by any Developer-Related Entity in or associated with the performance of the Work;

17 (l) Inverse condemnation, trespass, nuisance or similar taking of or  
18 harm to real property by reason of: (i) the failure of any Developer-Related Entity to  
19 comply with Good Industry Practices, requirements of the Contract Documents, the  
20 Project Management Plan or Governmental Approvals respecting control and mitigation  
21 of construction activities and construction impacts, (ii) the negligence or intentional  
22 misconduct of any Developer-Related Entity, or (iii) the actual physical entry onto or  
23 encroachment upon another's property by any Developer-Related Entity;

24 (m) Errors, inconsistencies or other defects in the design, construction or  
25 maintenance of the Project or of Utility Adjustments included in the Work. For Design  
26 Work, this indemnity obligation shall only apply to the extent Developer did not perform  
27 such Design Work in accordance with Section 6.2.1;

28 (n) Damage to water or sewer lines caused by Developer's operations,  
29 as provided in Section 107.15.03.03 of the Technical Provisions; or

30 (o) Any other indemnity obligation of Developer in the Contract  
31 Documents.

32 **20.1.2** Subject to the releases and disclaimers herein, including all the provisions  
33 set forth in Section 3.1.8 of this Agreement, Developer's indemnity obligation shall not  
34 extend to any third party Loss to the extent caused by:

35 (a) The sole negligence, reckless or intentional misconduct, bad faith or  
36 fraud of such Indemnified Party;

37 (b) ADOT's material breach of any of its material obligations under the  
38 Contract Documents;

1 (c) An Indemnified Party's material violation of any Laws or  
2 Governmental Approvals; or

3 (d) An unsafe requirement inherent in prescriptive design or prescriptive  
4 construction specifications of the Technical Provisions, but only where, prior to  
5 occurrence of the third party Loss: (i) Developer complied with such specifications and  
6 did not actually know, or would not have known, while exercising reasonable diligence,  
7 that the requirement created a potentially unsafe condition or (ii) Developer knew of and  
8 reported to ADOT the potentially unsafe requirement.

9 **20.1.3** In claims by an employee of Developer, a Subcontractor, anyone directly or  
10 indirectly employed by them or anyone for whose acts they may be liable, the  
11 indemnification obligation under this Section 20.1 shall not be limited by a limitation on  
12 the amount or type of damages, compensation or benefits payable by or for Developer or  
13 a Subcontractor under workers' compensation, disability benefit or other employee  
14 benefits laws.

15 **20.1.4** For purposes of this Section 20.1, "third party" means any person or entity  
16 other than an Indemnified Party and Developer, except that a "third party" includes any  
17 Indemnified Party's employee, agent or contractor who asserts a claim against an  
18 Indemnified Party that is within the scope of the indemnities and that is not covered in full  
19 by the Indemnified Party's worker's compensation program.

20 **20.1.5** Developer hereby acknowledges and agrees that it is Developer's  
21 obligation to perform the Work in accordance with the Contract Documents and that the  
22 Indemnified Parties are fully entitled to rely on Developer's performance of such  
23 obligation. Developer further agrees that any certificate, review or approval by ADOT or  
24 others hereunder shall not relieve Developer of any of its obligations under the Contract  
25 Documents or in any way diminish its liability for performance of such obligations or its  
26 obligations under this Article 20.

27 **20.1.6** The indemnity set forth in Section 20.1.1(g) is intended to operate as an  
28 agreement pursuant to Section 107(e) of the Comprehensive Environmental Response,  
29 Compensation and Liability Act, 42 U.S.C. Section 9607(e) to insure, protect, hold  
30 harmless, and indemnify the Indemnified Parties.

31 **20.1.7** The obligations under this Article 20 shall not be construed to negate,  
32 abridge, or reduce other rights or obligations that would otherwise exist in favor of an  
33 Indemnified Party hereunder.

## 34 **20.2 Defense and Indemnification Procedures**

35 **20.2.1** If ADOT receives notice of a claim or otherwise has actual knowledge of a  
36 claim that it believes is within the scope of the indemnities under Section 20.1, and if  
37 ADOT gives notice thereof pursuant to Section 10.2, then ADOT will have the right to  
38 conduct its own defense unless either an insurer accepts defense of the claim within the  
39 time required by law or Developer accepts the tender of the claim in accordance with  
40 Section 20.2.3.

1           **20.2.2** Subject to Section 20.2.6, if the insurer under any applicable insurance  
2 policy accepts the tender of defense, ADOT and Developer shall cooperate in the defense  
3 as required by the insurance policy. If no insurer under potentially applicable insurance  
4 policies provides defense, then Section 20.2.3 shall apply.

5           **20.2.3** If the defense is tendered to Developer, then within 15 days after receipt of  
6 the tender, Developer shall notify the Indemnified Party whether Developer has tendered  
7 the matter to an insurer. If Developer does not tender the matter to an insurer, then within  
8 such 15 days, or if the insurer has rejected the tender, then within five days after such  
9 rejection, Developer shall deliver a notice to the Indemnified Party stating one of the  
10 following:

11                   (a) Developer accepts the tender of defense and confirms that the claim  
12 is subject to full indemnification without any “reservation of rights” to deny or disclaim full  
13 indemnification thereafter;

14                   (b) Developer accepts the tender of defense but with a “reservation of  
15 rights” to deny or disclaim indemnification thereafter, in whole or in part; or

16                   (c) Developer rejects the tender of defense based on a determination  
17 that it is not required to indemnify against the claim under the terms of this Agreement or  
18 any other agreement or obligation to provide indemnification.

19           **20.2.4** If Developer accepts the tender of defense under Section 20.2.3(a),  
20 Developer shall have the right to select legal counsel for the Indemnified Party, subject to  
21 reasonable approval by the Indemnified Party, and Developer shall otherwise control the  
22 defense of such claim, including settlement, and bear the fees and costs of defending  
23 and settling such claim. During such defense:

24                   (a) Developer shall fully and regularly inform the Indemnified Party of the  
25 progress of the defense and of any settlement discussions; and

26                   (b) The Indemnified Party shall fully cooperate in said defense, provide  
27 to Developer all materials and access to personnel it requests as necessary for defense,  
28 preparation, and trial and which or who are under the control of or reasonably available  
29 to the Indemnified Party, and maintain the confidentiality of all communications between  
30 it and Developer concerning such defense.

31           **20.2.5** If Developer responds to the tender of defense as specified in Section  
32 20.2.3(b) or 20.2.3(c), the Indemnified Party shall be entitled to select its own legal  
33 counsel and otherwise control the defense of such claim, including settlement.

34           **20.2.6** Notwithstanding Section 20.2.3(a) or 20.2.3(b), the Indemnified Party may  
35 assume its own defense by delivering to Developer notice of such election and the  
36 reasons therefor, if the Indemnified Party, at the time it gives notice of the claim or at any  
37 time thereafter, reasonably determines that:

1 (a) A conflict exists between it and Developer that prevents or potentially  
2 prevents Developer from presenting a full and effective defense;

3 (b) Developer is otherwise not providing an effective defense in  
4 connection with the claim; or

5 (c) Developer lacks the financial capacity to satisfy potential liability or  
6 to provide an effective defense.

7 **20.2.7** If the Indemnified Party is entitled and elects to conduct its own defense of  
8 a claim for which it is entitled to indemnification, Developer shall reimburse on a current  
9 basis all reasonable costs and expenses the Indemnified Party incurs in investigating and  
10 defending, except to the extent the Indemnified Party conducts its own defense as a result  
11 of Developer's denial of such defense pursuant Section 20.2.3(c). In the event the  
12 Indemnified Party is entitled to and elects to conduct its own defense, then:

13 (a) In the case of a defense conducted under Section 20.2.3(a), it shall  
14 have the right to settle or compromise the claim with Developer's prior consent, which  
15 shall not be unreasonably withheld or delayed;

16 (b) In the case of a defense conducted under Section 20.2.3(b), it shall  
17 have the right to settle or compromise the claim with Developer's prior consent, which  
18 shall not be unreasonably withheld or delayed, or with approval of the court or arbitrator  
19 following reasonable notice to Developer and opportunity to be heard and without  
20 prejudice to the Indemnified Party's rights to be indemnified by Developer; and

21 (c) In the case of a defense conducted under Section 20.2.3(c), it shall  
22 have the right to settle or compromise the claim without Developer's prior consent and  
23 without prejudice to its rights to be indemnified by Developer. If it is determined that  
24 Developer wrongfully denied the defense of the Indemnified Party, the Indemnified Party  
25 shall be entitled to reimbursement of the costs of defense, including reimbursement of  
26 reasonable attorney's fees and other litigation and defense costs, and indemnification of  
27 costs to settle or compromise the claim, in addition to interest, calculated as the Prime  
28 Rate in effect from time to time plus 100 basis points, payable on such defense and  
29 settlement amounts from the date such costs and expenses are incurred by the  
30 Indemnified Party.

31 **20.2.8** The Parties acknowledge that while Section 20.1 contemplates that  
32 Developer will have responsibility for certain claims and liabilities arising out of its  
33 obligations to indemnify, circumstances may arise in which there may be shared liability  
34 of the Parties with respect to such claims and liabilities. In such case, where either Party  
35 believes a claim or liability may entail shared responsibility and that principles of  
36 comparative negligence and indemnity are applicable, it shall confer with the other Party  
37 on management of the claim or liability in question. If the Parties cannot agree on an  
38 approach to representation in the matter in question, each shall arrange to represent itself  
39 and to bear its own costs in connection therewith pending the outcome of such matter.  
40 Within 30 days subsequent to the final, non-appealable resolution of the matter in

1 question, whether by arbitration, judicial proceedings, or otherwise, the Parties shall  
2 adjust the costs of defense, including reimbursement of reasonable attorney's fees and  
3 other litigation and defense costs, in accordance with the indemnification arrangements  
4 of Section 20.2, and consistent with the outcome of such proceedings concerning the  
5 respective liabilities of the Parties on the third-party claim.

6 **20.2.9** In determining responsibilities and obligations for defending suits pursuant  
7 to this Section 20.2, and to the extent consistent with applicable Law, specific  
8 consideration shall be given to the following factors: (a) the party performing the activity  
9 in question; (b) the location of the activity and incident; (c) contractual arrangements then  
10 governing the performance of the activity; and (d) allegations of respective fault contained  
11 in the claim.

1 **ARTICLE 21.**  
2 **PARTNERING AND DISPUTE RESOLUTION PROCEDURES**

3 **21.1 Partnering**

4 **21.1.1 General Provisions**

5 **21.1.1.1** For the mutual benefit of the Parties, ADOT and Developer  
6 shall establish a partnering relationship to complete the Project effectively. The purpose  
7 of the partnering relationship is to establish and maintain effective communication  
8 between the Parties to cooperatively identify and resolve critical Project-related issues.  
9 Neither the partnering relationship itself, nor discussions between the Parties addressed  
10 at the initial partnering workshop, refresher partnering meetings or the construction  
11 closeout partnering meeting (collectively “Partnering Meetings”), shall modify the terms  
12 and conditions of this Agreement.

13 **21.1.1.2** In implementing and managing the partnering relationship  
14 required under this Section 21.1, ADOT and Developer shall:

- 15 (a) Use early and regular communication;
- 16 (b) Establish and maintain a relationship of shared trust, equity,  
17 and commitment;
- 18 (c) Identify, quantify, and support attainment of mutual goals;
- 19 (d) Develop strategies for using risk-management tools and  
20 concepts;
- 21 (e) Implement timely communication and decision making;
- 22 (f) Resolve potential problems at the lowest level of responsible  
23 management to avoid negative impacts and Disputes, including by developing a process  
24 for the escalation of field-level issues, such as by using the Issue Resolution Ladder  
25 informally as disputes arise to resolve them before they materialize into Claims and  
26 Disputes;
- 27 (g) Develop a plan for periodic joint evaluation based on mutually  
28 agreed goals;
- 29 (h) Hold Partnering Meetings, as set forth in Section 21.1.2, to  
30 preserve the partnering relationship and its benefits; and
- 31 (i) Establish periodic joint evaluations of the partnering process  
32 and attainment of mutual goals.

1                   **21.1.2 Partnering Meeting Schedule; Participants**

2                   **21.1.2.1**       ADOT shall designate a person of ADOT’s choice to facilitate  
3 Partnering Meetings.

4                   **21.1.2.2**       The Parties shall schedule and conduct Partnering Meetings  
5 as follows:

6                               (a) The initial partnering workshop prior to NTP 2;

7                               (b) Partnering meetings quarterly thereafter, or as mutually  
8 agreed by the Parties; and

9                               (c) The construction closeout meeting no later than 30 days after  
10 ADOT has issued the Certificate of Substantial Completion.

11                   **21.1.2.3**       The Parties shall conduct Partnering Meetings at ADOT’s  
12 offices or at such other locations as the Parties mutually agree.

13                   **21.1.2.4**       Key Personnel and executives from both Parties with  
14 knowledge relevant to the matters to be discussed must attend Partnering Meetings.

15                   **21.1.3 Partnering Team; Partnering Charter**

16                   **21.1.3.1**       ADOT and Developer shall establish a partnering team for the  
17 Project, which team shall consist of Project-level contributors and decision-makers from  
18 ADOT, Developer, and, if applicable, stakeholder organizations. Each Party shall identify  
19 its respective members of the partnering team prior to the initial partnering workshop and  
20 all members of the partnering team must attend the initial partnering workshop.

21                   **21.1.3.2**       The partnering team shall create during the initial partnering  
22 workshop a partnering charter that includes:

23                               (a) Mutual goals (e.g., core goals that may also include Project-  
24 specific goals and individual goals that are jointly supported by both Parties);

25                               (b) A partnering team commitment statement signed by every  
26 member of the partnering team;

27                               (c) A plan for both Parties to maintain the partnering relationship;  
28 and

29                               (d) A plan and schedule to conduct partnering evaluation surveys  
30 that measure the progress of mutual goals and key short-term issues as they arise in  
31 connection with the Project.

32                   **21.1.3.3**       The members of the partnering team shall:



1 (a) Identify the appropriate persons in each Party's organization  
2 who shall fill the roles of reviewers for the Issue Resolution Ladder described in Section  
3 21.2.1;

4 (b) Identify the documentation, in addition to that specifically  
5 required by this Agreement, that the Parties desire for review of a Dispute at each level  
6 of the Issue Resolution Ladder described in Section 21.2.1;

7 (c) Participate in a partnering evaluation survey in accordance  
8 with the schedule determined during the initial partnering meeting;

9 (d) jointly review the results of the partnering evaluation survey;  
10 and

11 (e) Document lessons learned regarding the Work.

12 **21.1.3.4** While the provisions of this Section 21.1 are not part of the  
13 Dispute Resolution Procedures contemplated under this Agreement, the Parties shall  
14 exhaust the use of the partnering relationship when addressing potential Disputes and  
15 prior to proceeding to the Dispute Resolution Procedures set forth in Section 21.2.

16 **21.1.4 Confidentiality**

17 Subject to the requirements of the Public Records Act or other applicable Law, any  
18 statements made or materials prepared during or relating to partnering meetings, including  
19 any statements made or documents prepared by the facilitator, shall be kept in confidence  
20 and used only for the purpose of facilitating resolution of potential Disputes via the  
21 partnering process, and shall not be utilized or revealed to others, except to officials and  
22 agents of the Parties who are authorized to act on the subject matter. However, the  
23 Parties understand that such documents may be subsequently discoverable and  
24 admissible in mediation, arbitration or court proceedings, subject to the rules of  
25 procedure therein.

26 **21.1.5 Cost Responsibility**

27 **21.1.5.1** The costs of the facilitator, the site, and food for Partnering  
28 Meetings shall be shared equally by ADOT and Developer. All other costs associated with  
29 the partnering process shall be borne separately by the Party that incurs the costs.

30 **21.1.5.2** ADOT will initially pay the full costs of the facilitator, the site,  
31 and food for Partnering Meetings, and thereafter deduct 50% of the qualifying costs from  
32 amounts owing to Developer under this Agreement.

33 **21.2 Dispute Resolution Procedures**

34 The Parties agree that:

1 (a) Any dispute that has fully complied with the notice and information  
2 requirements set forth elsewhere in this Agreement so as to constitute a Dispute and is  
3 explicitly made eligible for resolution hereunder, and which is not resolved by partnering,  
4 per Section 21.1, shall be resolved pursuant to the multi-step Dispute Resolution  
5 Procedures described in this Section 21.2;

6 (b) The Party bringing a Dispute shall bear the burden of proving the same,  
7 subject to any provisions of this Agreement expressly assigning the burden of proof;

8 (c) Resolutions of Disputes pursuant to this Section 21.2 shall be final, binding,  
9 conclusive, and enforceable as set forth in this Section 21.2; and

10 (d) The Issue Resolution Ladder and mediation processes are administrative  
11 procedures and remedies, and the failure of Developer to comply with either or both of  
12 such processes in all material respects as to any Dispute or Claim shall constitute a failure  
13 to diligently pursue and exhaust such administrative procedures and remedies, and shall  
14 operate as a bar against the Dispute or Claim.

15 **21.2.1 Issue Resolution Ladder**

16 As a condition to the right to bring a Dispute to mediation, arbitration or litigation,  
17 the Party bringing the Dispute shall first attempt to resolve the Dispute directly with other  
18 Party using the Issue Resolution Ladder. The Issue Resolution Ladder is the process for  
19 elevating Disputes from the Project's field level to various levels of review, up to the  
20 Parties' executive management if necessary, with defined time limits for each level of  
21 review. The goal of the Issue Resolution Ladder is to resolve each Dispute as close to the  
22 field level as possible while recognizing the requirement to elevate the Dispute to the next  
23 level of review before the Dispute impacts cost or schedule.

24 **21.2.1.1 Issue Resolution Ladder Process**

25 (a) The Issue Resolution Ladder shall consist of three levels of  
26 review and corresponding time periods to review, as follows:

Level of Review	Developer Reviewer	ADOT Reviewer	Time Limit
3	Executive Officer	Senior Deputy State Engineer	30 days, or any lesser period mutually approved
2	Project Manager	Design Manager, Construction Manager or Project Manager (as applicable)	14 days, or any lesser period mutually approved
1	Project Level	Technical Lead	7 days, or any lesser period mutually approved

27 (b) Except as provided in Section 116.03 of the Technical  
28 Provisions, to the extent not previously provided in a Relief Request, prior to commencing

1 the Issue Resolution Ladder, Developer shall provide all information required for a Relief  
2 Request, as specified in Section 13.1.3.

3 (c) Provided that the Party seeking to invoke the Issue Resolution  
4 Ladder has complied in full with all requisite notice and information requirements set forth  
5 in this Agreement before a dispute is eligible for consideration using the Issue Resolution  
6 Ladder, the Parties shall meet and commence the Issue Resolution Ladder within 20 days  
7 following the invoking Party's complete written request. The Parties may use the forms  
8 provided in Exhibit 17 to document the Issue Resolution Ladder process.

9 (d) The partnering team as set forth in Section 21.1.3 shall  
10 identify the individuals from ADOT's and Developer's respective organizations filling the  
11 roles of reviewers in the Issue Resolution Ladder.

12 (e) If reviewers at any level of the Issue Resolution Ladder cannot  
13 resolve a Dispute within the applicable time period set forth in this Section 21.2.1.1, then  
14 they may mutually elect to continue efforts to resolve the Dispute at their level, provided  
15 that either reviewer shall have the unilateral right after the applicable time period to  
16 elevate the Dispute to the next level of review in the Issue Resolution Ladder.

## 17 **21.2.2 Issue Resolution Ladder Outcome**

18 **21.2.2.1** If ADOT and Developer succeed in resolving a Dispute using  
19 the Issue Resolution Ladder, the Parties shall memorialize the resolution in writing,  
20 including execution of any Supplemental Agreement as appropriate, and perform their  
21 respective obligations in accordance therewith. A Dispute shall only be considered  
22 resolved when the Parties have executed a Supplemental Agreement memorializing the  
23 resolution. If the Parties agree to the essential terms of a resolution at any of the levels  
24 of the Issue Resolution Ladder, the Parties shall have an additional 60 days to execute a  
25 Supplemental Agreement. If the Parties are unable to execute a Supplemental Agreement  
26 within 60 days after the date of agreement to the essential terms thereof, the Dispute shall  
27 not be considered resolved and shall be eligible to proceed to the next level of the Issue  
28 Resolution Ladder, or to mediation and all subsequent procedures if all levels of the Issue  
29 Resolution Ladder have been completed.

30 **21.2.2.2** If the Parties do not resolve the Dispute using the Issue  
31 Resolution Ladder, then either Party shall have the right, after conclusion of the Issue  
32 Resolution Ladder, to bring the Dispute to mandatory mediation, as described in  
33 Section 21.2.3.

## 34 **21.2.3 Mandatory Mediation**

35 Only upon completion of the requirements of Sections 21.2.1 and 21.2.2 shall either  
36 Party have the right to initiate mandatory mediation proceedings for the unresolved  
37 Dispute. Mandatory mediation is a condition precedent to bringing the Dispute to  
38 arbitration or litigation.

39

1                           **21.2.3.1**      Mediation Process

2                           (a)    The Party bringing the Dispute to mediation shall do so by  
3 serving the other Party with a written notice to initiate mediation proceedings. Such notice  
4 must be delivered within 60 days following the conclusion, without resolution, of the Issue  
5 Resolution Ladder in accordance with the process described in Section 21.2.1. Failure to  
6 provide such notice to initiate mediation proceedings within this time period shall  
7 constitute a waiver of any further right to pursue the Dispute and all related issues  
8 thereunder, including any relief associated therewith. Either Party may, in its sole  
9 discretion, grant an extension of the 60-day period; provided, however, that no such  
10 extension may be in excess of 30 additional days beyond the original 60-day period.

11                          (b)    Within ten Business Days after providing the written notice  
12 specified in Section 21.2.3.1(a), the Parties shall mutually select a qualified individual to  
13 serve as mediator. The mediator shall have at least ten years of experience serving as a  
14 mediator, shall have at least five years of experience mediating design or construction  
15 disputes, as applicable based on the nature of the Dispute, and preferably shall be an  
16 attorney at law.

17                          (c)    If the Parties are unable to agree upon an individual to serve  
18 as mediator, then the Parties shall enlist the assistance of a nationally-recognized  
19 mediation service to select a mediator. All mediators must meet the foregoing  
20 qualifications.

21                          (d)    The Parties shall use diligent efforts to convene and conclude  
22 mediation proceedings within 30 days after the mediator is appointed, or at such other  
23 date and time as may be set by the mediator or agreed to by the Parties. Each Party shall  
24 have the right to present to the mediator such materials and documentation as it may  
25 deem relevant to the Dispute, and each Party shall provide to the mediator such further  
26 materials, documentation, and information as the mediator may reasonably request. The  
27 Parties shall meet within three days after appointment of the mediator and determine  
28 whether and to what extent the Parties will share the materials submitted to the mediator  
29 with each other. The Parties may enlist the mediator to assist in determining a process  
30 for the sharing, if any, of the materials submitted to the mediator.

31                          (e)    Each Party shall bring to the mediation a representative with  
32 authority to mediate and settle the Dispute, and such representative shall actively  
33 participate in the mediation process. Each Party may bring to the mediation such other  
34 persons as it chooses; provided, however, that neither Party shall be represented at the  
35 mediation by legal counsel unless both Parties consent thereto in advance of the  
36 mediation.

37                          (f)    Each Party shall make good faith efforts to resolve the Dispute  
38 through mediation.

1 (g) Developer and ADOT will share equally the expenses of the  
2 mediation. Each Party shall bear its own costs of preparing for and participating in the  
3 mediation.

4 **21.2.3.2 Mediation Outcome**

5 If the Parties do not resolve the Dispute during mediation or within 30 days  
6 following the conclusion of the mediation, the Dispute may proceed to either arbitration in  
7 accordance with Section 21.2.5 or litigation in accordance with Section 21.2.6, as  
8 applicable.

9 **21.2.4 Evidentiary Impact of Issue Resolution Ladder or Mediation**

10 **21.2.4.1** The Issue Resolution Ladder process and mediation process  
11 shall be considered settlement negotiations for the purpose of all state and federal rules  
12 that protect disclosures made during settlement negotiations from discovery or use in  
13 evidence; provided, however, that any settlement executed by the Parties shall not be  
14 considered confidential and may be disclosed.

15 **21.2.4.2** Evidence of anything said, or of any admission made, in the  
16 course of the Issue Resolution Ladder process or mediation is without prejudice and is  
17 not admissible in evidence for any purpose, including impeachment, and disclosure of  
18 such evidence shall not be compelled before an arbitrator or in any civil action.

19 **21.2.4.3** No document or copy thereof prepared for the purpose of, in  
20 the course of, or pursuant to the Issue Resolution Ladder process or mediation shall be  
21 admissible in evidence, and disclosure of such document or copy shall not be compelled  
22 in any arbitration or civil action.

23 **21.2.4.4** No stenographic or other record of the Issue Resolution  
24 Ladder process or mediation session(s) shall be made except to memorialize a settlement  
25 record.

26 **21.2.4.5** To the extent permitted by applicable law, all conduct,  
27 statements, promises, offers, views, and opinions, oral or written, made during the Issue  
28 Resolution Ladder process or mediation by any Party or agent are confidential and, where  
29 appropriate, are to be considered work product and privileged. Such conduct, statements,  
30 promises, offers, views, and opinions shall not be subject to discovery and shall not be  
31 admissible for any purpose, including impeachment, before an arbitrator or in any civil  
32 action involving the Parties to the extent permitted by law.

33 **21.2.4.6** The limitations of this Section 21.2.4 do not affect the  
34 discovery or admissibility of facts, opinions, statements, documents or other evidence  
35 existing or developed independent of the Issue Resolution Ladder process or mediation,  
36 and the discoverability or admissibility of such evidence is not changed or affected  
37 because of its use in the Issue Resolution Ladder process or mediation.

1                   **21.2.4.7**     The Parties may waive any of the confidentiality provisions of  
2 this Section 21.2.4 through a written waiver or consent to disclosure.

3                   **21.2.5 Binding Arbitration**

4                   Upon completion (and only upon such completion) of the requirements of Sections  
5 21.2.1 and 21.2.3, either Party shall have the right to initiate binding arbitration  
6 proceedings only for an unresolved Dispute, or related or similar unresolved Disputes that  
7 arise fairly contemporaneously out of the same set of acts, events or circumstances, that  
8 has or have (a) a cumulative amount in controversy not exceeding \$5,000,000, and (b) a  
9 cumulative Completion Deadline adjustment in controversy not exceeding 45 days. To  
10 clarify, all unresolved Disputes that arise fairly contemporaneously out of the same set of  
11 acts, events or circumstances, and that have each fully complied with the requirements of  
12 Sections 21.2.1 and 21.2.3, in addition to all underlying notice and information  
13 requirements predicate to a dispute becoming eligible for resolution using the Issue  
14 Resolution Ladder, shall be aggregated to determine whether the foregoing arbitration  
15 caps are met; and the arbitrator shall have no power whatsoever to make an aggregate  
16 arbitration award for all such unresolved Disputes in excess of such caps. Any such  
17 arbitration proceeding shall be *de novo*.

18                   **21.2.5.1**     Arbitration Process

19                   (a)     The Party electing to bring an unresolved Dispute to  
20 arbitration shall serve upon the other Party a written request for mandatory and binding  
21 arbitration.

22                   (b)     The Parties shall then seek to agree upon the arbitration  
23 process, and any other matter pertinent to arbitration not otherwise addressed in this  
24 Section 21.2.5.

25                   (c)     If the Parties cannot agree upon an arbitration process within  
26 30 days after service of the written request for mandatory and binding arbitration, then  
27 the Party seeking arbitration shall be entitled to compel arbitration by serving a demand  
28 for arbitration, in accordance with American Arbitration Association (“AAA”) Construction  
29 Industry Arbitration Rules. The scope and extent of discovery shall be as determined by  
30 the arbitrator in accordance with AAA rules set forth above.

31                   (d)     Notwithstanding Section 21.2.5.1(c), for insurance Disputes,  
32 the arbitrator shall be experienced in the industry of insurance underwriting.

33                   (e)     The arbitrator shall render a decision by applying the pertinent  
34 provision(s) of the Contract Documents and applicable Law to the relevant facts and  
35 circumstances of the dispute. The arbitrator shall set forth the decision and reasoning for  
36 the decision in writing.

37                   (f)     If any Party acts to unreasonably delay or prevent arbitration,  
38 the other Party shall be entitled to enforce the arbitration provisions of this Agreement by  
39 petition to the Superior Court located in Maricopa County, Arizona.

1 (g) The arbitrator shall not have the power to award punitive  
2 damages, rescind this Agreement, reform the Contract Documents, or void any limitations  
3 on liability contained in this Agreement.

4 (h) The venue of any arbitration hearing shall be in Maricopa  
5 County, State of Arizona.

6 (i) Developer and ADOT will share equally the expenses of the  
7 arbitrator and the arbitration forum. Each Party shall bear its own costs of preparing for  
8 and participating in the arbitration.

#### 9 **21.2.5.2 Arbitration Outcome**

10 The decision of the arbitrator shall be binding, and judgment upon the award  
11 rendered by the arbitrator may be entered in the Superior Court located in Maricopa  
12 County, Arizona and thereafter in any such jurisdiction as may be necessary to enforce  
13 the judgment.

#### 14 **21.2.6 State Court Litigation; Jurisdiction and Venue**

15 **21.2.6.1** Either Party shall have the right to initiate litigation  
16 proceedings for an unresolved Dispute; provided that (a) the Parties have completed and  
17 exhausted the requirements of Sections 21.2.1 and 21.2.3, and (b) the unresolved  
18 Dispute is not eligible for arbitration. Any such litigation proceeding shall be *de novo*.

19 **21.2.6.2** All litigation between the parties concerning any Disputes  
20 shall be filed, heard, and decided in the Superior Court located in Maricopa County,  
21 Arizona, which shall have exclusive jurisdiction and venue.

#### 22 **21.2.7 Continuation of Work and Payments During Dispute**

23 **21.2.7.1** Failure by ADOT to pay any amount in dispute shall not  
24 alleviate, diminish or modify in any respect Developer's obligation to perform under the  
25 Contract Documents, including Developer's obligation to achieve the Completion  
26 Deadlines and perform all Work in accordance with the Contract Documents. At all times  
27 while any dispute is pending or during the Dispute Resolution Procedures, Developer and  
28 all Developer-Related Entities shall continue with the performance of the Work and their  
29 obligations, including any disputed Work or obligations, diligently and without delay or  
30 slow down, in accordance with the Contract Documents, except to the extent enjoined by  
31 order of a court or otherwise specified or directed by ADOT. Developer acknowledges  
32 that it shall be solely responsible for the results of any delaying actions or inactions that  
33 Developer or any Developer-Related Entity takes during the pendency of resolution of a  
34 dispute relating to the Work even if Developer's position in connection with the dispute  
35 ultimately prevails. In addition, during the pendency of resolution of a dispute relating to  
36 the Work, the Parties shall continue to comply with all provisions of the Contract  
37 Documents, the Project Management Plan, the Governmental Approvals, and applicable  
38 Law.

1                   **21.2.7.2**     During the course of any and all Dispute Resolution  
2 Procedures, ADOT will continue to pay to Developer when due all undisputed amounts  
3 owing under this Agreement.

4                   **21.2.7.3**     Any Dispute regarding disputed payment shall be resolved  
5 pursuant to this Article 21. Developer shall proceed as directed by ADOT pending  
6 resolution of the Dispute. Upon resolution of any such Dispute, each Party shall promptly  
7 pay to the other any amount owing, subject to the restrictions governing payment under  
8 the Contract Documents.

9                   **21.2.8 Attorney's Fees**

10                  Except as expressly provided otherwise in this Agreement, each Party shall bear  
11 its own attorney's fees and expenses incurred in connection with any Dispute Resolution  
12 Procedures, regardless of the outcome.



1 **ARTICLE 22.**  
2 **RECORDS AND AUDITS; OWNERSHIP OF DOCUMENTS AND INTELLECTUAL**  
3 **PROPERTY**

4 **22.1 Detailed Pricing Documents**

5 **22.1.1 Contents of DPDs**

6 The "Detailed Pricing Documents," or "DPDs," shall consist of all cost, unit pricing,  
7 price quote, and other documentary information used in preparation of the Contract Price.  
8 The DPDs shall, *inter alia*, clearly detail how each cost or price included in the Proposal  
9 has been determined and shall show cost or price elements in sufficient detail adequate  
10 to enable ADOT to understand how Developer calculated the Contract Price. The DPDs  
11 provided in connection with quotations and Supplemental Agreements shall, *inter alia*,  
12 clearly detail how the total cost or price and individual components of that cost or price  
13 were determined. The DPDs shall itemize the estimated costs or price of performing the  
14 Work separated into usual and customary items and cost or price categories to present a  
15 detailed estimate of costs and price, such as direct labor, repair labor, equipment  
16 ownership and operation, expendable materials, permanent materials, supplies,  
17 Subcontract costs, plant and equipment, insurance, bonds, letters of credit, indirect costs,  
18 contingencies, mark-up, overhead, and profit. The DPDs shall itemize the estimated  
19 annual costs of insurance premiums for each coverage required to be provided by  
20 Developer under Article 10. The DPDs shall include all assumptions made in determining  
21 the scope of the Work and calculating the Contract Price, detailed quantity takeoffs, price  
22 reductions and discounts, rates of production and progress calculations, and quotes from  
23 Subcontractors used by Developer to arrive at the Contract Price, and any adjustments to  
24 the Contract Price under this Agreement.

25 **22.1.2 Manner and Duration for Retaining Detailed Pricing Documents**

26 **22.1.2.1** Prior to execution of this Agreement, Developer delivered to  
27 ADOT one copy of all the DPDs. Upon execution of this Agreement, the DPDs shall be  
28 held in locked fireproof cabinet(s) supplied by Developer and located in ADOT's project  
29 office with the key to the fireproof cabinet(s) held only by Developer. Within 21 days after  
30 the Effective Date, Developer shall deliver a detailed index and catalogue of the DPDs.  
31 Upon completion and delivery of the index and catalogue of the DPDs, the index and  
32 catalogue shall be added to the locked fireproof cabinet(s). Further, concurrently with  
33 execution of each Subcontract or with approval of each Supplemental Agreement or  
34 amendment to any Contract Document, the Parties shall add to the cabinet one copy of  
35 all documentary information respecting the pricing by the Subcontractor or used in  
36 preparation of the Supplemental Agreement or amendment, and shall update the index  
37 and catalogue.

38 **22.1.2.2** The DPDs and index and catalogue pertaining to the Work  
39 shall be held in such cabinet or otherwise maintained until all of the following have  
40 occurred:

1 (a) 180 days have elapsed from the earlier of Final Acceptance or  
2 termination of this Agreement;

3 (b) All Claims or Disputes regarding the Work have been settled; and

4 (c) The Final Payment has been made and accepted.

5 **22.1.3 Availability for Review**

6 The DPDs shall be available during business hours for joint review by Developer  
7 and ADOT, or by Developer, ADOT, and any dispute resolver, in accordance with  
8 Article 21, in connection with approval of the Project Schedule, negotiation of  
9 Supplemental Agreements, resolution of Claims or disputes under the Contract  
10 Documents, and aiding in determining the value of terminated Work, and also as described  
11 in Section 22.1.7. ADOT will be entitled to review all or any part of the DPDs to satisfy  
12 itself regarding the applicability of the individual documents to the matter at issue, and  
13 Developer shall cooperate with ADOT's request for review of the DPDs upon 24 hours'  
14 notice.

15 **22.1.4 Proprietary Information**

16 The DPDs are, and shall always remain, the property of Developer and shall be  
17 considered to be in Developer's possession, subject to ADOT's right to review the DPDs  
18 as provided in this Section 22.1. Developer will have and control the keys to the cabinet  
19 containing the DPDs. ADOT acknowledges that Developer may consider that the DPDs  
20 constitute trade secrets or proprietary information. ADOT will have the right to copy the  
21 DPDs for the purposes set forth in this Section 22.1, provided that the Parties execute a  
22 mutually agreeable confidentiality agreement with respect to DPDs that constitute trade  
23 secrets or proprietary information, which confidentiality agreement shall explicitly  
24 acknowledge that it is subject to applicable Law (including the Arizona Public Records  
25 Act).

26 **22.1.5 Representation**

27 Developer represents and warrants that the DPDs constitute all documentary  
28 information used in the preparation of its Contract Price. Developer agrees that no other  
29 price proposal preparation information will be considered in resolving disputes or Claims.  
30 Developer further agrees that the DPDs are not part of the Contract Documents and that  
31 nothing in the DPDs shall change or modify any Contract Document.

32 **22.1.6 Form of DPDs**

33 Except as otherwise provided in the RFP, Developer shall submit the DPDs in such  
34 format as is used by Developer in connection with its Proposal. Developer represents and  
35 warrants that the DPDs provided with the Proposal were personally examined by an  
36 authorized officer of Developer prior to delivery, and that the DPDs meet the requirements  
37 of Section 22.1. Developer further represents and warrants that all additional DPDs to be

1 provided hereunder were or will be personally examined prior to delivery by an authorized  
2 officer of Developer, and that they shall meet the requirements of Section 22.1

### 3 **22.1.7 Review by ADOT to Confirm Completeness**

4 ADOT may at any time conduct a review of the DPDs to determine whether they  
5 are complete. If ADOT determines that any data is missing from a DPD, Developer shall  
6 provide such data within three Business Days after delivery of ADOT's request for such  
7 data. At the time of its submission to ADOT, such data will be date stamped, labeled to  
8 identify it as supplementary DPD information, and added to the DPDs. Developer shall  
9 have no right to add documents to the DPDs except upon ADOT's request. The DPDs  
10 associated with any Supplemental Agreement or Contract Price adjustment under this  
11 Agreement shall be reviewed, organized, and indexed in the same manner as the original  
12 DPDs.

## 13 **22.2 Financial Reporting Requirements**

14 **22.2.1** Developer shall deliver to ADOT financial and narrative reports, statements,  
15 certifications, budgets, and information as and when required under the Contract  
16 Documents.

17 **22.2.2** Developer shall furnish, or cause to be furnished, to ADOT such financial  
18 information and statements as ADOT may reasonably request from time to time for any  
19 purpose related to the Project, the Work or the Contract Documents.

20 **22.2.3** Developer shall cooperate and provide, and shall cause the Subcontractors  
21 to cooperate and provide, such information as determined necessary or desirable by  
22 ADOT in connection with any Project financing. Without limiting the generality of the  
23 foregoing, Developer shall provide such information deemed necessary or desirable by  
24 ADOT for inclusion in ADOT's securities disclosure documents and to comply with  
25 Securities and Exchange Commission Rule 15c2-12 regarding certain periodic  
26 information and notice of material events. Developer shall provide customary  
27 representations and warranties to ADOT and the capital markets as to the correctness,  
28 completeness, and accuracy of any information furnished.

29 **22.2.4** Developer shall cooperate and provide, and shall cause the Subcontractors  
30 to cooperate and provide, such information as is necessary or requested by ADOT to  
31 assist or facilitate the submission by ADOT of any documentation, reports or analysis  
32 required by the State, FHWA or any other Governmental Entity with jurisdiction over the  
33 Project.

34 **22.2.5** All reports and information delivered by Developer under Sections  
35 22.2.2, 22.2.3, and 22.2.4 shall also be delivered electronically, to the extent electronic  
36 files exist, and be suitable for posting on the web.

37

38

1 **22.3 Subcontract Pricing Documents**

2 **22.3.1** Each Subcontract shall include a provision requiring the Subcontractor to  
3 preserve all documentary information used in establishing its Subcontract price and to  
4 provide such documentation to Developer or ADOT in connection with any claim made  
5 by such Subcontractor or any Claim by Developer that involves work performed by such  
6 Subcontractor.

7 **22.4 Maintenance and Inspection of Books and Records**

8 **22.4.1** Except for DPDs (which shall be maintained as set forth in Section 22.1),  
9 Developer shall keep and maintain in a secure, fireproof location in Maricopa County,  
10 Arizona, or in another location ADOT approves in its sole discretion, accurate and  
11 complete Books and Records, including copies of all original documents delivered to  
12 ADOT. Developer shall keep and maintain such Books and Records in accordance with  
13 applicable provisions of the Contract Documents, the Project Management Plan, and in  
14 accordance with Good Industry Practice. Developer shall notify ADOT where the Books  
15 and Records are kept.

16 **22.4.2** Developer shall make all its Books and Records available for inspection by  
17 ADOT and ADOT's Representatives at Developer's principal offices in Arizona, or at  
18 ADOT's project office for DPDs, at all times during normal business hours, without charge.  
19 Developer shall provide copies thereof to ADOT, or make available for review to ADOT,  
20 as and when expressly required by the Contract Documents, or, for those not expressly  
21 required, upon request and at no expense to ADOT. ADOT may conduct any such  
22 inspection upon 24 hours' prior notice, or unannounced and without prior notice where  
23 ADOT has a good faith suspicion of fraud. The right of inspection includes the right to  
24 make extracts and take notes. The provisions of this Section 22.4.2 are subject to the  
25 following:

26 (a) They shall remain in full force and effect regardless of whether a  
27 Claim or dispute exists or whether either Party or both of the Parties have invoked the  
28 Dispute Resolution Procedures; and

29 (b) Developer reserves the right to assert exemptions from disclosure  
30 for information that would be exempt under applicable State Law from discovery in legal  
31 actions, including information protected by the attorney-client or other legal privilege  
32 based upon an opinion of counsel reasonably satisfactory to ADOT.

33 **22.4.3** Developer shall retain Books and Records for a minimum of five years after  
34 Final Acceptance or after the date generated, whichever is later; provided, however, that  
35 if the Contract Documents specify any longer time period for retention of particular  
36 records, such time period shall control. Any provision of the Contract Documents  
37 establishing a stated period for retention of Books and Records means the period of time,  
38 as stated, after the date the Book or Record is generated, unless specifically provided  
39 otherwise.

1           **22.4.4** In addition to the foregoing, Developer shall retain and make available all  
2 Books and Records that relate to Claims and disputes being processed or the subject of  
3 the Dispute Resolution Procedures for a period of not less than one year after the date  
4 the dispute is finally resolved (or for any longer period required under any other applicable  
5 provision of the Contract Documents).

6           **22.4.5** For any Work performed pursuant to an ADOT-Directed Change, or Work  
7 that Developer contends entitles it to Extra Work Costs or Delay Costs following a Relief  
8 Event, and throughout the course of any Work that is in dispute and the subject of the  
9 Dispute Resolution Procedures, Developer shall keep separate and complete Books and  
10 Records that provide a clear distinction between the incurred direct costs of disputed  
11 Work (or Work for which Developer seeks Extra Work Costs and Delay Costs) and that  
12 of undisputed Work, and shall permit ADOT access to these Books and Records on an  
13 Open Book Basis.

14           **22.4.6** Refer to Exhibit 4, Attachment 1 for federal requirements applicable to  
15 maintenance and inspection of Books and Records, with which Developer shall comply.

## 16 **22.5 Audits**

17           **22.5.1** ADOT shall have the right to review and audit Developer, its  
18 Subcontractors, and their respective Books and Records as and when ADOT deems  
19 necessary for purposes of verifying compliance with the Contract Documents and  
20 applicable Law. Without limiting the foregoing, ADOT shall have the right to audit  
21 Developer's Project Management Plan and compliance therewith, including the right to  
22 inspect Work or activities and to verify the accuracy and adequacy of the Project  
23 Management Plan and its component parts, plans, and other documentation. ADOT may  
24 conduct any such audit of Books and Records upon 24 hours' prior notice, or  
25 unannounced and without prior notice where ADOT has a good faith suspicion of fraud.

26           **22.5.2** All Claims or disputes are subject to audit at any time following Developer's  
27 delivery of notice of the Claim or dispute. The audit may be performed by employees of  
28 ADOT or by an auditor under contract with ADOT. No notice is required from ADOT before  
29 commencing any audit during the Work and up to (1) 60 days after Final Acceptance or  
30 (2) 60 days after termination of this Agreement. Thereafter, ADOT will provide 20 days'  
31 notice to Developer, any Subcontractors or their respective agents before commencing  
32 an audit. Developer, Subcontractors or their agents shall provide and cause Developer-  
33 Related Entities to provide adequate facilities, acceptable to ADOT, for the audit during  
34 normal business hours. Developer shall cooperate and cause Developer-Related Entities  
35 to cooperate with the auditors. At a minimum, the auditors shall have available to them  
36 the following documents:

- 37           (a) Daily time sheets and supervisor's daily reports;
- 38           (b) Union agreements;
- 39           (c) Insurance, welfare, and benefits records;

- 1 (d) Payroll registers;
- 2 (e) Earnings records;
- 3 (f) Payroll tax forms;
- 4 (g) Material invoices and requisitions;
- 5 (h) Material cost distribution work sheet;
- 6 (i) Equipment records (list of company equipment, rates, etc.);
- 7 (j) Subcontractors' and Suppliers' invoices;
- 8 (k) Subcontractors' and agents' payment certificates;
- 9 (l) Canceled checks (payroll, Subcontractors and Suppliers);
- 10 (m) Job cost report;
- 11 (n) Job payroll ledger;
- 12 (o) General ledger;
- 13 (p) Cash disbursements journal;
- 14 (q) Project Schedules;
- 15 (r) All documents that relate to each and every Claim or dispute,
- 16 together with all documents that support the amount of damages in each Claim or dispute;
- 17 and
- 18 (s) Work sheets used to prepare the Claim or dispute establishing the
- 19 cost components for items of the Claim or dispute, including labor, benefits and insurance,
- 20 materials, equipment, Subcontractors, all documents that establish the time periods,
- 21 individuals involved, the hours for the individuals, and the rates for the individuals.

22 **22.5.3** Failure of any Developer-Related Entity to maintain and retain sufficient  
23 records to allow the auditors to verify any portion of a Claim or dispute shall constitute a  
24 waiver, and bar any recovery or relief, regarding such portion of the Claim or dispute.  
25 Failure of any Developer-Related Entity to permit the auditor access to the Books and  
26 Records of any Developer-Related Entity, or to otherwise fully comply with the provisions  
27 of this Section 22.5 shall constitute a waiver of the Claim or dispute and shall bar any  
28 recovery or relief thereunder.

29 **22.5.4** Certain rights of the FHWA to review and audit Developer, its  
30 Subcontractors, and their respective Books and Records are set forth in Exhibit 4.

1           **22.5.5** Developer represents and warrants the completeness and accuracy of all  
2 information it or its agents provide in connection with ADOT audits, and shall cause all  
3 Subcontractors other than ADOT and Governmental Entities acting as Subcontractors to  
4 warrant the completeness and accuracy of all information such Subcontractors or their  
5 agents provide in connection with ADOT audits.

6           **22.5.6** ADOT’s rights of audit include the right to observe the business operations  
7 of Developer and its Subcontractors to confirm the accuracy of Books and Records.

8           **22.5.7** Developer’s internal and third party quality and compliance auditing  
9 responsibilities shall be set forth in the Project Management Plan, consistent with the  
10 audit requirements referred to in Sections 111.01, 113.02, 114, and 115 of the Technical  
11 Provisions.

12           **22.5.8** Nothing in the Contract Documents shall in any way limit the constitutional  
13 and statutory powers, duties, and rights of elected State officials, including the  
14 independent rights of the State Auditor General, in carrying out his or her legal authority.  
15 Developer understands and acknowledges that:

16                   (a) The State Auditor General may conduct an audit or investigation of  
17 any Person receiving funds from the State directly under this Agreement or indirectly  
18 through a Subcontract;

19                   (b) Acceptance of funds directly under this Agreement or indirectly  
20 through a Subcontract acts as acceptance of the authority of the State Auditor General,  
21 under the direction of the Joint Legislative Audit Committee, to conduct an audit or  
22 investigation in connection with those funds; and

23                   (c) A Person that is the subject of an audit or investigation must provide  
24 the State Auditor General with access to any information the State Auditor General  
25 considers relevant to the investigation or audit.

26   **22.6 Arizona Public Records Act**

27           **22.6.1** Developer acknowledges and agrees that all records, documents,  
28 drawings, Plans, specifications, and other materials in ADOT’s possession, including  
29 materials submitted by Developer, are subject to the provisions of the Arizona Public  
30 Records Act. To the extent that this Agreement involves the exchange or creation of  
31 “public information,” as such term is defined by the Arizona Public Records Act, that  
32 ADOT collects, assembles, or maintains or has a right of access to, and is not otherwise  
33 excepted from disclosure under the Arizona Public Records Act, Developer is required,  
34 at its sole cost and expense, to make any such information available in .pdf format, which  
35 is accessible by the public.

36           **22.6.2** If Developer believes information or materials submitted to ADOT constitute  
37 trade secrets, proprietary information or other information that is excepted from disclosure  
38 under the Arizona Public Records Act, Developer shall be solely responsible for  
39 specifically and conspicuously designating that information by placing “CONFIDENTIAL”

1 in the center header of each such page affected, as it determines to be appropriate;  
2 provided that no such designation is necessary for the DPDs, which Developer hereby  
3 deems to be confidential. Any specific proprietary information, trade secrets or  
4 confidential commercial and financial information shall be clearly identified as such, and  
5 shall be accompanied by a concise statement of reasons supporting the claim.

6 **22.6.3** If ADOT receives a request for public disclosure of materials marked  
7 “CONFIDENTIAL,” ADOT will use reasonable efforts to notify Developer of the request  
8 and afford Developer an opportunity to assert, in writing and at Developer’s sole expense,  
9 a claimed exception under the Arizona Public Records Act or other applicable Law within  
10 the time period specified in the notice issued by ADOT and allowed under the Arizona  
11 Public Records Act. Under no circumstances, however, will ADOT be responsible or liable  
12 to Developer or any other Person for the disclosure of any such labeled materials, whether  
13 the disclosure is required by Law, or court order, or occurs through inadvertence, mistake  
14 or negligence on the part of ADOT or its officers, employees, contractors or consultants.

15 **22.6.4** In the event of any proceeding or litigation concerning the disclosure of any  
16 material submitted by Developer to ADOT, ADOT’s sole involvement will be as a  
17 stakeholder retaining the material until otherwise ordered by a court or such other  
18 authority having jurisdiction with respect thereto, and Developer shall be fully responsible  
19 for otherwise prosecuting or defending any action concerning the materials at its sole cost  
20 and risk; provided, however, that ADOT reserves the right, in its sole discretion, to  
21 intervene or participate in the litigation in such manner as it deems necessary or desirable.  
22 Except in the case of ADOT’s voluntary intervention or voluntary participation in litigation,  
23 Developer shall pay and reimburse ADOT within 30 days after receipt of demand and  
24 reasonable supporting documentation for all costs and fees, including attorney’s fees and  
25 costs, ADOT incurs in connection with any litigation, proceeding or request for disclosure.

26 **22.6.5** Nothing contained in this Section 22.6 shall modify or amend requirements  
27 and obligations imposed on ADOT by the Arizona Public Records Act or other applicable  
28 Law, and the provisions of the Arizona Public Records Act or other Laws shall control in  
29 the event of a conflict between the procedures described above and the applicable Law.

30 **22.7 Intellectual Property**

31 **22.7.1 Proprietary Intellectual Property**

32 **22.7.1.1** Developer acknowledges and agrees that all Proprietary  
33 Intellectual Property, in any medium, is specially ordered or commissioned by ADOT,  
34 including works made for hire in accordance with Section 101 of the Copyright Act of the  
35 United States. Developer hereby assigns to ADOT all rights, title, and interest in and to  
36 the Proprietary Intellectual Property including any and all software, work product, and  
37 designs.

38 **22.7.1.2** As a condition of Final Acceptance, Developer shall deliver to  
39 ADOT all work product, documents, results, and related materials created in the  
40 development of Proprietary Intellectual Property, as well as a complete, indexed collection



1 of such materials. Without limiting the generality of the foregoing, delivery of such  
2 materials shall include Design Documents and Construction Documents. Developer may  
3 retain a copy of such work product, documents, results, and related materials.

4 **22.7.1.3** ADOT hereby grants to Developer a non-exclusive,  
5 irrevocable, perpetual, fully paid up license to use, exploit, manufacture, distribute, copy,  
6 adapt, and display the Proprietary Intellectual Property, including in connection with (a)  
7 incorporation into the Project, (b) the Work for this Project, (c) all other services performed  
8 for or on behalf of ADOT to complete the Work, or comply with Developer's obligations  
9 under this Agreement, and (d) other projects and work of Developer. No Intellectual  
10 Property rights of ADOT are being licensed to Developer except as otherwise expressly  
11 provided in this Section. Developer's use or exploitation of the licensed Proprietary  
12 Intellectual Property shall be at Developer's sole discretion and risk, and in no way shall  
13 be deemed to confer liability or an indemnity obligation on ADOT. ADOT shall not be liable  
14 to Developer or any other person for any claim, loss, damage, cost, judgment, fee,  
15 penalty, charge or expense (including attorney's fees and costs) to the extent arising out  
16 of or resulting from use or exploitation of the licensed Proprietary Intellectual Property by  
17 Developer, any transferee of the license or any of their respective board members,  
18 officers, agents or employees. ADOT makes no warranty or representation, express or  
19 implied, regarding the licensed Proprietary Intellectual Property or its suitability for any  
20 intended purpose.

## 21 **22.7.2 Developer Intellectual Property**

22 **22.7.2.1** Subject to Section 22.7.5, Developer hereby grants to ADOT  
23 a non-exclusive, irrevocable, perpetual, fully paid-up right and license to use, exploit,  
24 manufacture, distribute, copy, adapt, and display the Developer Intellectual Property,  
25 including any enhancements thereof.

26 **22.7.2.2** Developer shall identify and disclose all Developer Intellectual  
27 Property contained or included in the Project Intellectual Property, including (when  
28 reasonably available) full and specific information detailing Intellectual Property claimed,  
29 date of authorship, creation or invention, date of application(s), application number(s) and  
30 registering entit(ies), date of registration(s), registration number(s), and registering  
31 entit(ies), if any, and owner including person or entity name and address.

32 **22.7.2.3** Developer shall deliver to ADOT all Developer Intellectual  
33 Property contained or included in the Project Intellectual Property promptly upon request.

## 34 **22.7.3 Third Party Intellectual Property**

35 **22.7.3.1** Whenever using any design, device, material, software or  
36 process protectable or protected as Third Party Intellectual Property, Developer shall  
37 obtain the right and license for such use. Without limiting the foregoing, and subject to  
38 Section 22.7.5, Developer shall secure nonexclusive, transferable, irrevocable,  
39 unconditional, royalty-free licenses in the name of ADOT to use, reproduce, modify,  
40 adapt, and disclose Third Party Intellectual Property and shall pay any and all royalties

1 and license fees required to be paid for any Intellectual Property incorporated into the  
2 Project Intellectual Property. All Third Party Intellectual Property licenses are subject to  
3 ADOT's review and approval. The foregoing requirement shall not apply, however, to  
4 mass-marketed software products (sometimes referred to as "shrink wrap software")  
5 owned by such a Person where such a license cannot be extended to ADOT using  
6 commercially reasonable efforts. In such case, Developer shall acquire the proper rights  
7 for ADOT to make use of such products as necessary for Developer to comply with the  
8 Contract Documents.

9           **22.7.3.2** Developer shall identify and disclose all Third Party  
10 Intellectual Property contained or included in the Project Intellectual Property, including  
11 (when reasonably available) full and specific information detailing Intellectual Property  
12 claimed, date of authorship, creation or invention, date of application(s), application  
13 number(s) and registering entit(ies), date of registration(s), registration number(s), and  
14 registering entit(ies), if any, and owner, including person or entity name and address.

15           **22.7.4 Inclusion in Contract Price**

16           Developer acknowledges and agrees that the Contract Price includes all royalties  
17 and costs arising from Project Intellectual Property or in any way involved in the Work.

18           **22.7.5 Licensing Limitations**

19 Licenses granted under Sections 22.7.2 and 22.7.3 shall be limited as follows:

20           **22.7.5.1** The right to transfer the license is limited to any Governmental  
21 Entity that succeeds to the power and authority of ADOT generally or with respect to the  
22 Project, and any Governmental Entity having power and authority over any municipality,  
23 city, state or county road where the Proprietary Intellectual Property of Developer is  
24 installed, deployed or operated.

25           **22.7.5.2** The right to sublicense is limited to State, regional, and local  
26 Governmental Entities that own or operate a State Highway or other road (tolled or not  
27 tolled) where the Proprietary Intellectual Property of Developer is installed, deployed or  
28 operated, and to the concessionaires, developers, contractors, subcontractors,  
29 employees, attorneys, consultants, and agents that are retained by or on behalf of ADOT  
30 or any such State, regional or local Governmental Entity in connection with the Project,  
31 another State Highway, or other road (tolled or untolled) where the Proprietary Intellectual  
32 Property of Developer is installed, deployed or operated.

33           **22.7.5.3** ADOT will:

34           (a) Not disclose any Developer Intellectual Property or Third  
35 Party Intellectual Property to any Person other than authorized transferees and  
36 sublicensees who agree to be bound by any confidentiality obligations of ADOT relating  
37 thereto;

1 (b) Enter into a commercially reasonable confidentiality  
2 agreement if requested by Developer with respect to the licensed Developer Intellectual  
3 Property or Third Party Intellectual Property; and

4 (c) Include, or where applicable require, such State, regional or  
5 local Governmental Entity to include, in the contract with the sublicensee its covenant to  
6 employ sound business practices no less diligent than those used for its own confidential  
7 information, and no less diligent than required by commercially reasonable standards of  
8 confidentiality, to protect all Developer Intellectual Property or Third Party Intellectual  
9 Property and other materials provided under the sublicense against disclosure to third  
10 parties not in receipt of a sublicense, and to use the sublicense only for the permitted  
11 purposes.

12 **22.7.6 Limitation on ADOT Liability**

13 Notwithstanding any contrary provision of this Agreement, in no event shall ADOT  
14 or any of its directors, officers, employees, consultants or agents be liable to Developer,  
15 any Affiliate, any Subcontractor or any Developer-Related Entity for any damages,  
16 including loss of profit, arising out of breach of the duty of confidentiality set forth in Section  
17 22.7.5 if such breach is not the result of recklessness or intentional misconduct. Developer  
18 hereby irrevocably waives all claims to any such damages.

**ARTICLE 23.**  
**EARLY TERMINATION OF AGREEMENT**

**23.1 Termination for Convenience**

**23.1.1** ADOT may, at any time, terminate this Agreement and the performance of the Work by Developer, in whole or in part, if ADOT determines, in its sole discretion, that a termination is in ADOT’s best interest (“Termination for Convenience”). ADOT will terminate by delivering to Developer a Notice of Termination for Convenience or Notice of Partial Termination for Convenience specifying the extent of termination and its effective date.

**23.1.2** If ADOT terminates this Agreement on grounds or in circumstances beyond ADOT’s termination rights specifically set forth in this Agreement, such termination shall be deemed a Termination for Convenience for the purpose of determining the amount of termination compensation due (but not for any other purpose).

**23.2 Termination for Convenience Compensation Amount**

**23.2.1** If ADOT exercises its right of Termination for Convenience, it shall owe compensation to Developer in an amount equal to the sum of the following:

(a) Payments due but not yet paid in accordance with Article 12 for all Work performed up to the date of termination, including work in progress since the last Draw Request; plus

(b) Developer’s actual reasonable out-of-pocket cost, without profit, and including equipment costs only to the extent permitted by Section 1.2.3 of Exhibit 13 for demobilization, and work done to secure the applicable portion of the Project for termination, including reasonable overhead; plus

(c) The cost of settling and paying claims arising out of the termination of Work under Subcontracts and Utility Agreements, exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the Subcontractor prior to the effective date of the Notice of Termination for Convenience or Notice of Partial Termination for Convenience of Work under this Agreement, which amounts shall be included in the cost for which payment is made under clause (a) above; plus

(d) The reasonable out-of-pocket cost incurred (including reasonable overhead) to preserve and protect property; plus

(e) The reasonable out-of-pocket cost incurred to prepare and carry out the transition plan under Section 23.7.1; plus

(f) Any other reasonable out-of-pocket cost (including overhead) incurred incidental to termination of Work under this Agreement, including the reasonable cost to Developer of handling material returned to a Supplier, delivered to ADOT or

1 otherwise disposed of as directed by ADOT, and including a reasonable allowance for  
2 Developer's administrative costs in determining the amount payable due to termination of  
3 this Agreement, but excluding any costs and expenses incurred in connection with any  
4 disputes or Claims; minus

5 (g) The cost of property, materials, supplies, equipment, and other  
6 things to be retained by Developer, or the agreed price for, or proceeds from, the sale of  
7 such items not otherwise delivered to ADOT, and other appropriate deductions allowed  
8 under this Agreement, including those deductions that would be permitted in connection  
9 with the Final Payment; minus

10 (h) All unliquidated advance or other payments made to or on behalf of  
11 Developer applicable to the terminated portion of the Work or Agreement; minus

12 (i) The cost of repairing any Nonconforming Work (or, in ADOT's sole  
13 discretion, the amount which ADOT is entitled to recover under Section 6.7.2); minus

14 (j) The amount of any other Claim that ADOT may have against any  
15 Developer-Related Entity in connection with this Agreement; minus

16 (k) Any other amounts due or payable by Developer to ADOT pursuant  
17 to this Agreement; minus

18 (l) Amounts that ADOT reasonably deems advisable to retain to cover  
19 any existing or threatened claims and stop notices relating to the Project, including claims  
20 by Utility Companies, provided that ADOT will promptly pay to Developer any such  
21 retained amounts remaining after the need for the retention ends.

22 **23.2.2** Developer acknowledges and agrees that it shall not be entitled to any  
23 compensation in excess of the value of the Work performed (determined as provided in  
24 Section 23.2.1) and that, except to the extent provided in Section 23.2.1(a), items such  
25 as lost or anticipated profits, unabsorbed overhead, and opportunity costs shall not be  
26 recoverable by it upon termination of this Agreement. If any refund is payable with respect  
27 to insurance or bond premiums, letter of credit fees, deposits or other items that were  
28 previously passed through to ADOT by Developer, Developer shall pay such refund to  
29 ADOT or such amount will otherwise be credited to ADOT. Except for normal spoilage,  
30 and except to the extent that ADOT will have otherwise expressly assumed the risk of  
31 loss, there will be excluded from the amounts payable to Developer under Section 23.2.1  
32 the fair value, as determined by ADOT, of equipment, machinery, materials, supplies, and  
33 property that is destroyed, lost, stolen, or damaged so as to become undeliverable to  
34 ADOT, or sold pursuant to Section 23.7.2.11. Information contained in the DPDs may be  
35 considered in determining the value of the Work terminated.

36 **23.2.3** Upon determination of the amount of the termination payment, the Parties  
37 shall amend this Agreement to reflect the agreed termination payment. ADOT will pay  
38 Developer any amount that may be due, and, in the case of a Partial Termination for  
39 Convenience, the Contract Price shall be reduced to reflect the reduced scope of Work  
40 using procedures comparable to those for ADOT reductive changes under Section 14.1.5.

1 **23.3 Subcontracts**

2 **23.3.1** Provisions shall be included in each Subcontract (at all tiers) regarding  
3 terminations for convenience, allowing such termination rights and obligations to be  
4 passed through to the Subcontractors and establishing terms and conditions relating  
5 thereto, including procedures for determining the amount payable to the Subcontractor  
6 upon a termination, consistent with this Article 23.

7 **23.3.2** Each Subcontract shall provide that, in the event of a termination for  
8 convenience by ADOT, the Subcontractor will not be entitled to any anticipatory or  
9 unearned profit on Work terminated or partly terminated, or to any payment which  
10 constitutes consequential damages or punitive damages due to the termination or partial  
11 termination.

12 **23.4 Termination Based on Delayed Issuance of NTP 1**

13 **23.4.1** If NTP 1 has not been issued within 120 days after the Effective Date and  
14 this delay is not caused in whole or in part by an act, omission, negligence, intentional  
15 misconduct, or breach of applicable Law, contract or Governmental Approval of any  
16 Developer-Related Entity, Developer shall have the right to terminate this Agreement,  
17 which right shall be exercised by delivery of notice of termination to ADOT. In such event,  
18 ADOT's sole liability to Developer is to pay Developer (a) the same payment for work  
19 product as provided to unsuccessful Proposers pursuant to Section 6.3 of the ITP,  
20 provided, however, that Developer has met all other conditions for such payment, plus (b)  
21 reasonable out-of-pocket costs (including overhead) incurred in performing any of the  
22 activities described or required in Sections 5.11, 5.12 and 6.1 of the ITP.

23 **23.5 Termination by Court Ruling**

24 **23.5.1** This Agreement and the other Contract Documents are subject to  
25 Termination by Court Ruling.

26 **23.5.2** Termination by Court Ruling becomes effective, and automatically  
27 terminates this Agreement, upon issuance of the final, non-appealable court order by a  
28 court of competent jurisdiction; provided, however, that where Section 24.16 applies,  
29 Termination by Court Ruling becomes effective only after the Parties determine they are  
30 unable to negotiate revisions to the Contract Documents to effect their original intent.

31 **23.5.3** If both Parties agree in writing, they may elect to terminate this Agreement  
32 in part due to such court order and to continue the remainder of this Agreement in effect,  
33 to the extent it is possible to do so without violating the court order.

34 **23.5.4** If Termination by Court Ruling occurs, then ADOT will owe termination  
35 compensation to Developer equal to that owing upon a Termination for Convenience or  
36 Partial Termination for Convenience, as applicable.

1 **23.6 Termination Based on Statutory Grounds**

2 **23.6.1** ADOT may terminate this Agreement, without penalty or further obligation,  
3 within three years after the Effective Date, if any person significantly involved in initiating,  
4 negotiating, securing, drafting or creating this Agreement for ADOT is or becomes, at any  
5 time during such three-year period, an employee or agent of Developer. See A.R.S., Title  
6 38, Chapter 3, Article 8, and, in particular, Section 38-511.

7 **23.6.2** ADOT may terminate this Agreement, without obligation or penalty, if  
8 Developer or any member of the Developer’s team violates A.R.S. § Section 41-2517.C,  
9 regarding unlawful offering of employment to a procurement officer or procurement  
10 employee.

11 **23.7 Responsibilities after Notice of Termination**

12 **23.7.1** Within three days after either Party delivers to the other Party a notice of  
13 termination of this Agreement, Developer and ADOT shall meet and confer for the  
14 purpose of developing an interim transition plan for the orderly transition of the terminated  
15 Work, demobilization, and transfer of the Project design and construction to ADOT. The  
16 Parties shall use diligent efforts to complete preparation of the interim transition plan  
17 within 15 days after the date of such notice of termination. The Parties shall use diligent  
18 efforts to complete a final transition plan within 30 days after such date. The transition  
19 plan shall be in form and substance acceptable to ADOT in its good faith discretion and  
20 shall include and be consistent with the provisions and procedures set forth in Section  
21 23.7.2.

22 **23.7.2** After either Party delivers to the other Party a notice of termination of this  
23 Agreement, and except as otherwise directed by ADOT, Developer shall timely comply  
24 with the following obligations independent of, and without regard to, the timing for  
25 preparing or implementing the transition plan or for determining, adjusting, settling, and  
26 paying any amounts due Developer under this Agreement:

27 **23.7.2.1** Developer shall stop the Work as specified in the notice;

28 **23.7.2.2** Developer shall notify all affected Subcontractors and  
29 Suppliers that this Agreement is being terminated and that their Subcontracts (including  
30 orders for materials, services or facilities) are not to be further performed unless otherwise  
31 authorized in writing by ADOT;

32 **23.7.2.3** Developer shall not enter into any further Subcontracts  
33 (including orders for materials, services or facilities), except as necessary to complete the  
34 continued portion of the Work;

35 **23.7.2.4** Unless instructed otherwise by ADOT, Developer shall  
36 terminate all Subcontracts and Utility Agreements to the extent they relate to the Work  
37 terminated;

1                   **23.7.2.5**       To the extent directed by ADOT, Developer shall execute and  
2 deliver to ADOT written assignments, in form and substance acceptable to ADOT, acting  
3 reasonably, of all of Developer's right, title, and interest in and to: (a) Subcontracts and  
4 Utility Agreements that relate to the terminated Work, provided ADOT assumes in writing  
5 all of Developer's obligations thereunder that arise after the effective date of assignment;  
6 and (b) all assignable warranties, claims, and causes of action held by Developer against  
7 Subcontractors and other Persons in connection with the terminated Work, to the extent  
8 such Work is adversely affected by any Subcontractor or other Person's breach of  
9 warranty, contract or other legal obligation; provided, however, that Developer may retain  
10 claims against Subcontractors for which ADOT has been fully compensated;

11                   **23.7.2.6**       Subject to the prior approval of ADOT, Developer shall settle  
12 all outstanding liabilities and claims arising from termination of Subcontracts and Utility  
13 Agreements that are required to be terminated hereunder;

14                   **23.7.2.7**       Within 30 days after notice of termination is delivered,  
15 Developer shall provide ADOT with a true and complete list of all materials, goods,  
16 machinery, equipment, parts, supplies, and other property in inventory or storage  
17 (whether held by Developer or any Person or entity on behalf of or for the account of  
18 Developer) for use in or respecting the terminated Work, or on order or previously  
19 completed but not yet delivered from Suppliers for use in or respecting such Work. In  
20 addition, if requested by ADOT, Developer shall promptly transfer title and deliver to  
21 ADOT or ADOT's Authorized Representative, through bills of sale or other documents of  
22 title, as directed by ADOT, all such materials, goods, machinery, equipment, parts,  
23 supplies, and other property, provided ADOT assumes in writing all of Developer's  
24 obligations under any contracts relating to the foregoing that arise after the effective date  
25 of transfer of title;

26                   **23.7.2.8**       On or about the effective date of termination, Developer shall  
27 execute and deliver to ADOT the following, together with an executed bill of sale or other  
28 written instrument, in form and substance acceptable to ADOT, acting reasonably,  
29 assigning and transferring to ADOT all of Developer's right, title, and interest in and to the  
30 following:

31                               (a) All completed or partially completed drawings (including  
32 Plans, elevations, sections, details, and diagrams), specifications, designs, Record  
33 Drawings, surveys, and other Design Documents and information pertaining to the design  
34 or construction of the terminated Work;

35                               (b) All samples, borings, boring logs, geotechnical data, and  
36 similar data, and information relating to the terminated Work;

37                               (c) All books, records, reports, test reports, studies, and other  
38 documents of a similar nature relating to the terminated Work; and

39                               (d) All other work product used or owned by Developer or any  
40 Affiliate relating to the terminated Work;



1                   **23.7.2.9**       In the case of a partial termination, Developer shall complete  
2 performance in accordance with the Contract Documents of all Work not terminated,  
3 except to the extent performance of the remaining Work is rendered impossible due to  
4 the scope of the partial termination;

5                   **23.7.2.10**     For the period of time specified by ADOT in the notice of  
6 termination or until ADOT takes over the Work, Developer shall take all action that may  
7 be necessary, or that ADOT may direct, for the safety, protection, and preservation of:

8                               (a) The public, including public and private vehicular movement;

9                               (b) The Work; and

10                              (c) Equipment, machinery, materials, and property related to the  
11 Project that is in the possession of Developer and in which ADOT has or may acquire an  
12 interest;

13                   **23.7.2.11**     As authorized by ADOT in writing, Developer shall use its best  
14 efforts to sell, at reasonable prices, any property of the types referred to in Section  
15 23.7.2.10 (c); provided, however, that Developer: (a) is not required to extend credit to  
16 any purchaser; and (b) may acquire the property under the conditions prescribed and at  
17 prices approved by ADOT. The proceeds of any transfer or disposition will be applied to  
18 reduce any payments to be made by ADOT under the Contract Documents or paid in any  
19 other manner directed by ADOT;

20                   **23.7.2.12**     Developer shall immediately safely demobilize and secure  
21 construction, staging, lay down, and storage areas for the Project and Utility Adjustments  
22 included in the Work, including Developer's Temporary Work Areas, in a manner  
23 satisfactory to ADOT, and remove all debris and waste materials, except as otherwise  
24 approved by ADOT in writing;

25                   **23.7.2.13**     Developer shall assist ADOT in such manner as ADOT may  
26 require prior to and for a reasonable period following the effective date of termination to  
27 ensure the orderly transition of the terminated Work and its management to ADOT, and  
28 shall, if appropriate and if requested by ADOT, take all steps as may be necessary to  
29 enforce the provisions of Subcontracts pertaining to the surrender of the terminated Work;

30                   **23.7.2.14**     Developer shall deliver to ADOT all Books and Records and  
31 the then-current Electronic Document Management System, except for information in  
32 Books and Records exempt under applicable State Law from discovery in legal actions,  
33 including information protected by the attorney-client or other legal privilege based upon  
34 an opinion of counsel reasonably satisfactory to ADOT;

35                   **23.7.2.15**     Developer shall carry out such other directions as ADOT may  
36 give for the termination of the Work; and

37                   **23.7.2.16**     Developer shall take such other actions as are necessary or  
38 appropriate to mitigate further cost.

1           **23.7.3** Termination (or partial termination) of this Agreement under this Article 23  
2 shall not relieve Developer or any Surety or Guarantor of its obligation for any Claims.

3           **23.8 Payment**

4           **23.8.1** ADOT will pay amounts owing to Developer under this Article 23 as follows:

5                   (a) Undisputed amounts, by not later than the next Developer Cycle Key  
6 Date occurring after ADOT approves said amounts; and

7                   (b) Disputed amounts, by not later than the next Developer Cycle Key  
8 Date occurring after the corresponding dispute is resolved.

9           **23.8.2** ADOT may, but is not obligated to, make advance partial payments to  
10 Developer for costs Developer incurs in connection with a termination under this Article 23  
11 before Developer's termination compensation is finally determined. If the total of such  
12 advance partial payments exceeds the amount of the termination compensation finally  
13 determined to be owing to Developer under this Article 23, such excess shall be payable  
14 by Developer to ADOT upon demand.

15           **23.9 No Consequential Damages**

16           Under no circumstances shall Developer be entitled to anticipatory or unearned  
17 profits or consequential or other damages as a result of any termination under this Article  
18 23. The payment to Developer determined in accordance with this Article 23 constitutes  
19 Developer's exclusive remedy for a termination hereunder.

20           **23.10 No Waiver; Release**

21           **23.10.1** Notwithstanding anything contained in this Agreement to the contrary, a  
22 termination under this Article 23 shall not waive any right or claim to damages that ADOT  
23 may have. ADOT may pursue any cause of action that it may have at Law, in equity or  
24 under the Contract Documents.

25           **23.10.2** Subject to Section 23.11, ADOT's payment to Developer of the amounts  
26 required under this Article 23 shall constitute full and final satisfaction of, and upon  
27 payment ADOT will be forever released and discharged from, any and all Claims, causes  
28 of action, suits, demands, and Losses, known or unknown, suspected or unsuspected,  
29 that Developer may have against ADOT arising out of or relating to the terminated Work.  
30 Upon such payment, Developer shall execute and deliver to ADOT all such releases and  
31 discharges as ADOT may reasonably require to confirm the foregoing, but no such  
32 release and discharge shall be necessary to give effect to the foregoing satisfaction and  
33 release.

1    **23.11 Dispute Resolution**

2           The failure of the Parties to agree on amounts due under this Article 23 shall be a  
3 Dispute to be resolved in accordance with Article 21, which procedures shall apply  
4 notwithstanding the termination of this Agreement.

5    **23.12 Allowability of Costs**

6           All costs claimed by Developer under this Article 23 must be allowable, allocable,  
7 and reasonable in accordance with the cost principles and procedures of 48 CFR Part 31.

**ARTICLE 24.**  
**MISCELLANEOUS PROVISIONS**

**24.1 Amendments**

The Contract Documents may be amended only by a written instrument duly executed by the Parties or their respective successors or assigns, except to the extent expressly provided otherwise in this Agreement.

**24.2 Waiver**

**24.2.1** No waiver of any term, covenant or condition of the Contract Documents shall be valid unless in writing and signed by the obligee Party.

**24.2.2** The exercise by a Party of any right or remedy provided under the Contract Documents shall not waive or preclude any other or further exercise thereof or the exercise of any other right or remedy. No waiver by any Party of any right or remedy under the Contract Documents shall be deemed to be a waiver of any other or subsequent right or remedy under the Contract Documents. The consent by one Party to any act by the other Party requiring such consent shall not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

**24.2.3** Except as provided otherwise in the Contract Documents, no act, delay or omission done, suffered or permitted by one Party or its agents shall be deemed to waive, exhaust or impair any right, remedy or power of such Party hereunder, or to relieve the other Party from the full performance of its obligations under the Contract Documents.

**24.2.4** Either Party's waiver of any breach or failure to enforce any of the terms, covenants, conditions or other provisions of the Contract Documents at any time shall not in any way limit or waive that Party's right thereafter to enforce or compel strict compliance with every term, covenant, condition or other provision. Furthermore, if the Parties make and implement any interpretation of the Contract Documents without documenting such interpretation by an instrument signed by both Parties, such interpretation and implementation thereof will not be binding in the event of any subsequent Claims or disputes.

**24.3 Independent Contractor**

**24.3.1** Developer is an independent contractor, and nothing contained in the Contract Documents shall be construed as constituting any relationship with ADOT other than that of Project developer and independent contractor.

**24.3.2** Nothing in the Contract Documents is intended or shall be construed to create any partnership, joint venture or similar relationship between ADOT and Developer; and in no event shall either Party take a position in any tax return or other writing of any kind that a partnership, joint venture or similar relationship exists. While the term "public-private partnership" may be used on occasion to refer to contractual

1 relationships of the type hereby created, the Parties do not thereby express any intention  
2 to form or hold themselves out as a de jure or de facto partnership, joint venture or similar  
3 relationship, to share net profits or net losses, or to give ADOT control or joint control over  
4 Developer's financial decisions or discretionary actions concerning the Project and the  
5 Work.

6 **24.3.3** In no event shall the relationship between ADOT and Developer be  
7 construed as creating any relationship whatsoever between ADOT and Developer's  
8 employees. Neither Developer nor any of its employees is or shall be deemed to be an  
9 employee of ADOT. Except as otherwise specified in the Contract Documents, Developer  
10 has sole authority and responsibility to employ, discharge, and otherwise control its  
11 employees and has complete and sole responsibility as a principal for its agents, for all  
12 Subcontractors and for all other Persons that Developer or any Subcontractor hires to  
13 perform or assist in performing the Work.

#### 14 **24.4 Successors and Assigns; Change of Control**

15 **24.4.1** The Contract Documents shall be binding upon and inure to the benefit of  
16 ADOT and Developer and their permitted successors, assigns, and legal representatives.

17 **24.4.2** ADOT may transfer and assign all or any portion of its rights, title, and  
18 interests in and to the Contract Documents, including rights with respect to the Payment  
19 Bond, the Performance Bond, Guarantees, letters of credit, and other security for  
20 payment or performance:

21 (a) Without Developer's consent, to any other public agency or public  
22 entity as permitted by Law, provided that the successor or assignee has assumed all of  
23 ADOT's obligations, duties, and liabilities under the Contract Documents then in effect;

24 (b) Without Developer's consent, to any other Person that succeeds to  
25 the governmental powers and authority of ADOT; provided, however, that such  
26 successor(s) has assumed all of ADOT's obligations, duties, and liabilities under the  
27 Contract Documents then in effect; and

28 (c) To any other Person with the prior approval of Developer.

29 **24.4.3** All rights of ADOT under Article 11, as well as all other rights and claims of  
30 ADOT, insofar as they will be owned by Persons other than ADOT (such as Utility  
31 Companies and the Local Jurisdictions), shall be assignable to such Persons.

32 **24.4.4** In the event of ADOT's assignment of all of its rights, title, and interests in  
33 the Contract Documents as permitted hereunder, Developer shall have no further  
34 recourse to ADOT under the Contract Documents or otherwise except as specifically  
35 provided by other contractual agreement or by statute.

36 **24.4.5** Developer shall not voluntarily or involuntarily sell, assign, convey, transfer,  
37 pledge, mortgage or otherwise encumber Developer's interest in and to the Contract  
38 Documents or any portion thereof without ADOT's prior approval. Developer shall not

1 grant any right of entry, license or other special occupancy of the Project to any other  
2 Person that is not in the ordinary course of Developer performing the Work, without  
3 ADOT's prior approval. Any sale, assignment, conveyance, transfer, pledge, mortgage,  
4 encumbrance, grant of right of entry, license or other special occupancy in violation of this  
5 provision shall be null and void ab initio and ADOT, at its option, may declare any such  
6 attempted action to be a material Developer Default and Event of Default.

7 **24.4.6** Developer shall not voluntarily or involuntarily cause, permit or suffer any  
8 Change of Control without ADOT's prior approval. If there occurs any voluntary or  
9 involuntary Change of Control without ADOT's prior approval, ADOT, at its option, may  
10 declare it to be a material Developer Default and Event of Default.

11 **24.4.7** Where ADOT's prior approval is required for a proposed sale, assignment,  
12 conveyance, transfer, pledge, mortgage, encumbrance, sublease or grant of right of entry,  
13 license or other special occupancy, or for any proposed Change of Control, ADOT may  
14 withhold or condition its approval in its sole discretion. Any such decision of ADOT to  
15 withhold consent shall be final, binding, and not subject to the Dispute Resolution  
16 Procedures.

17 **24.4.8** Assignments and transfers of Developer's interest in or to the Contract  
18 Documents permitted under this Section 24.4 or otherwise approved by ADOT will be  
19 effective only upon ADOT's receipt of notice of the assignment or transfer and a written  
20 recordable instrument executed by the transferee, in form and substance acceptable to  
21 ADOT, in which the transferee, without condition or reservation, assumes all of  
22 Developer's obligations, duties, and liabilities under this Agreement and the other  
23 Contract Documents then in effect and agrees to perform and observe all provisions  
24 thereof applicable to Developer. Each transferee shall take Developer's interest in or to  
25 the Contract Documents subject to, and shall be bound by, the Project Management Plan,  
26 all Subcontracts, the Utility Agreements, the Governmental Approvals, and all  
27 agreements between the transferor and Governmental Entities with jurisdiction over the  
28 Project or the Work, except to the extent otherwise approved by ADOT in its good faith  
29 discretion.

30 **24.5 Change of Organization or Name**

31 **24.5.1** Developer shall not change its legal form of business organization without  
32 the prior approval of ADOT, which consent may be granted or withheld in ADOT's sole  
33 discretion.

34 **24.6 Designation of Representatives; Cooperation with Representatives**

35 **24.6.1** ADOT and Developer shall each designate an individual or individuals with  
36 the authority to make decisions and bind the Parties on matters relating to the Contract  
37 Documents (for each Party, its respective "Authorized Representative"). Exhibit 15 hereto  
38 provides the Parties' initial Authorized Representative designations. Either Party may  
39 change its initial Authorized Representative designation by a subsequent writing delivered  
40 to the other Party in accordance with Section 24.12.

1           **24.6.2** Developer’s Authorized Representative(s) shall have onsite field and office  
2 authority to represent and act on behalf of Developer. Such Authorized Representative(s)  
3 shall be present at the Site at all times while Work is in progress.

4           **24.6.3** The Parties may also designate technical representatives who shall be  
5 authorized to investigate and report on matters relating to the design and construction of  
6 the Project and negotiate on behalf of each of the Parties, but who do not have authority  
7 to bind ADOT or Developer.

8           **24.6.4** Developer shall cooperate with ADOT and all representatives of ADOT  
9 designated as described above.

10   **24.7 Survival**

11           Developer’s representations and warranties, including those under Articles 2 and  
12 11, the provisions regarding invoicing and payment under Article 12, the express rights  
13 and obligations of the Parties following termination of this Agreement under Articles 18  
14 and 23, the provisions of Sections 6.8.6 and 6.8.9, the indemnifications and releases  
15 contained in Article 20, the Dispute Resolution Procedures contained in Article 21, the  
16 provisions of Article 22, and all other provisions in the Contract Documents that  
17 contemplate actions or obligations after termination of this Agreement or completion of the  
18 Work or any other provisions that by their inherent character should survive termination of  
19 this Agreement or completion of the Work, shall survive the termination of this Agreement  
20 or completion of the Work. The provisions of Article 21 shall continue to apply after  
21 expiration or earlier termination of this Agreement to all Claims and Disputes between the  
22 Parties arising out of the Contract Documents.

23   **24.8 Limitation on Third Party Beneficiaries**

24           It is not intended by any of the provisions of the Contract Documents to create any  
25 third party beneficiary hereunder or to authorize anyone not a Party hereto to commence  
26 any legal proceeding of any nature whatsoever pursuant to the terms or provisions hereof,  
27 except to the extent that specific provisions (such as the indemnity provisions) identify third  
28 parties and state that they are entitled to benefits hereunder. Except as otherwise provided  
29 in this Section 24.8, the duties, obligations, and responsibilities of the Parties to the  
30 Contract Documents with respect to third parties shall remain as imposed by Law. The  
31 Contract Documents shall not be construed to create a contractual relationship of any kind  
32 between ADOT and a Subcontractor, Supplier or any Person other than Developer.

33   **24.9 No Personal Liability of ADOT Employees; Limitation on State’s Liability**

34           **24.9.1** ADOT’s Authorized Representatives, employees, and consultants are  
35 acting solely as agents and representatives of ADOT when carrying out the provisions of  
36 or exercising the power or authority granted to them. They shall not be liable to any  
37 Developer-Related Entity either personally or as employees of ADOT for actions in their  
38 ordinary course of employment.

1           **24.9.2** In no event shall ADOT be liable for any injury, damage or death caused by  
2 the actions, omissions, negligence, intentional misconduct, or breach of applicable Law  
3 or contract by any Developer-Related Entity.

4           **24.10 Governing Law and Venue**

5           The Contract Documents shall be governed by and construed in accordance with  
6 the Laws of the State for contracts made and to be performed in the State, and without  
7 regard to its principles concerning conflict of laws. The exclusive venue for any litigation,  
8 arbitration, mediation, administrative hearing or other legal proceeding or action arising  
9 out of or relating to the Contract Documents shall be in Maricopa County, State of Arizona.

10          **24.11 Arbitration within Litigation**

11          The Parties agree to utilize arbitration to the extent required by A.R.S. § 12-1518.

12          **24.12 Notices and Communications**

13           **24.12.1**       Notices under the Contract Documents shall be in writing and: (a)  
14 delivered personally; (b) sent by certified mail, return receipt requested; (c) sent by a  
15 recognized overnight mail or courier service, with delivery receipt requested; or (d) sent  
16 by email communication followed by a hard copy and with receipt confirmed by telephone,  
17 to the addresses set forth in Sections 24.12.2 and 24.12.3, as applicable (or to such other  
18 address as may from time to time be specified in writing).

19           **24.12.2**       All notices, correspondence, and other communications to  
20 Developer shall be delivered to the following address or as otherwise directed by  
21 Developer's Authorized Representative:

22  
23           Pulice-FNF-Flatiron Joint Venture  
24           8660 East Hartford Drive  
25           Suite 305  
26           Scottsdale, AZ 85255  
27           Attn: Steve Campbell  
28           Telephone: (602) 944-2241 x 1442  
29           E-mail: [campbell@pulice.com](mailto:campbell@pulice.com)

30           **24.12.3**       All notices, correspondence, and other communications to ADOT will  
31 be marked as regarding the Project and shall be delivered to the following address or as  
32 otherwise directed by ADOT's Authorized Representative:

33           Arizona Department of Transportation  
34           7130 West Fairview Street  
35           Chandler, AZ 85226  
36           Attn: Amy Ritz  
37           Telephone: (602) 708-0627  
38           E-mail: [aritz@azdot.gov](mailto:aritz@azdot.gov)



1 In addition, copies of all notices regarding disputes, suspension, termination, and  
2 default shall be delivered to the following:

3 Office of the Arizona Attorney General  
4 Transportation Section  
5 2005 North Central Avenue  
6 Phoenix, AZ 85004  
7 Telephone: (602) 542-1680  
8 E-mail: [transportation@azag.gov](mailto:transportation@azag.gov)

9 **24.12.4** Notices shall be deemed received when actually received in the  
10 office of the addressee (or by the addressee if personally delivered) or when delivery is  
11 refused, as shown on the receipt of the U.S. Postal Service, private carrier or other Person  
12 making the delivery. Notices delivered by email communication shall be deemed received  
13 when actual receipt at the email address of the addressee is confirmed. Notwithstanding  
14 the foregoing, notices sent or received after 5:00 p.m. (measured as of the prevailing time  
15 in Phoenix, Arizona) shall be deemed received on the first Business Day following  
16 delivery. Any technical or other communications pertaining to the Work shall be  
17 conducted by Developer's Authorized Representative and technical representatives  
18 designated by ADOT.

19 **24.13 Taxes**

20 Developer shall pay, prior to delinquency, all applicable taxes. Developer shall  
21 have no right to an adjustment to the Contract Price, a Completion Deadline or any other  
22 Claim due to its misinterpretation of Laws respecting taxes or incorrect assumptions  
23 regarding applicability of taxes.

24 **24.14 Interest on Amounts Due and Owing**

25 **24.14.1** Pursuant to A.R.S. § 44-1201(D), no prejudgment interest shall be  
26 due either Party for any unliquidated amount.

27 **24.14.2** Subject to Section 24.14.1, any amount owed to ADOT under this  
28 Agreement, including any overpayment to Developer as a result of an inaccuracy in a  
29 Draw Request, and not paid when due shall bear interest at a floating rate equal to the  
30 following:

31 (a) If not in good faith dispute, then at the Prime Rate in effect from time  
32 to time plus 100 basis points, commencing on the date of ADOT's payment of the Draw  
33 Request, or the date ADOT claims any other amount is due, and continuing until the date  
34 the overpayment or other amount due is paid to ADOT or ADOT deducts such amount  
35 from payment to Developer; and

36 (b) If the subject of a good faith dispute over whether it is due, then at  
37 the Prime Rate in effect from time to time, commencing on the date of ADOT's payment  
38 of the Draw Request, or the date ADOT claims any other amount is due, and continuing  
39 until the date the amount is finally determined to be due pursuant to settlement or the

1 Dispute Resolution Procedures, and thereafter at the Prime Rate in effect from time to  
2 time plus 100 basis points until paid.

3 **24.14.3** ADOT's right to receive interest is without prejudice to any other  
4 rights and remedies it may have under this Agreement.

5 **24.15 Integration of Contract Documents**

6 ADOT and Developer agree and expressly intend that, subject to Section 24.16,  
7 this Agreement and other Contract Documents constitute a single, non-severable,  
8 integrated agreement the terms of which are interdependent and non-divisible.

9 **24.16 Severability**

10 **24.16.1** If any clause, provision, section or part of the Contract Documents is  
11 ruled invalid by a court of competent jurisdiction, then the Parties shall:

12 (a) Promptly meet and negotiate a substitute for such clause, provision,  
13 section or part, which shall, to the greatest extent legally permissible, effect the original  
14 intent of the Parties, including an adjustment to the Contract Price, in accordance with the  
15 procedure for Supplemental Agreements that adjust the Contract Price, to account for  
16 any change in the Work resulting from such invalidated portion; and

17 (b) If necessary or desirable, apply to the court or other decision maker  
18 (as applicable) which declared such invalidity for an interpretation of the invalidated  
19 portion to guide the negotiations.

20 **24.16.2** The invalidity or unenforceability of any such clause, provision,  
21 section or part shall not affect the validity or enforceability of the balance of the Contract  
22 Documents, which shall be construed and enforced as if the Contract Documents did not  
23 contain such invalid or unenforceable clause, provision, section or part.

24 **24.17 Headings**

25 The captions of the articles, sections, and subsections herein are inserted solely  
26 for convenience and under no circumstances are they or any of them to be treated or  
27 construed as part of this Agreement.

28 **24.18 Entire Agreement**

29 The Contract Documents contain the entire understanding of the Parties with  
30 respect to the subject matter hereof and supersede all prior agreements, understandings,  
31 statements, representations, and negotiations between the Parties with respect to its  
32 subject matter.

33

34

1 **24.19 Counterparts**

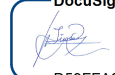
2 This instrument may be executed in two or more counterparts, each of which shall  
3 be deemed an original, but all of which together shall constitute one and the same  
4 instrument.

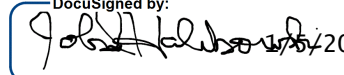
5 IN WITNESS WHEREOF, this Agreement has been executed as of the date  
6 first set forth above.  
7

DEVELOPER:

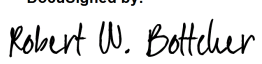
ARIZONA DEPARTMENT OF  
TRANSPORTATION

**Pulice Construction, Inc.**

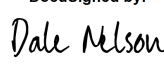
DocuSigned by:  
 1/5/2021  
By: \_\_\_\_\_  
Name: Victor Jimenez  
Title: Chief Operating Officer

DocuSigned by:  
 1/5/2021  
By: \_\_\_\_\_  
Name: John S. Halikowski  
Title: Director

**FNF Construction, Inc.**

DocuSigned by:  
 1/5/2021  
By: \_\_\_\_\_  
Name: Robert Bottcher  
Title: President

**Flatiron Constructors, Inc.**

DocuSigned by:  
 1/5/2021  
By: \_\_\_\_\_  
Name: Dale Nelson  
Title: Senior Vice President