
EXHIBIT 1

GENERAL CONDITIONS OF CONTRACT

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Article 1
General

1.1 Mutual Obligations

1.1.1 Department and Design-Builder commit at all times to cooperate fully with each other and proceed on the basis of trust and good faith, in order to permit each party to realize the benefits afforded under the Contract Documents.

1.2 Basic Definitions

1.2.1 For the purposes of the Contract Documents, the following words and terms shall have the meanings specified below (other words and abbreviations that have well-known technical or trade meanings are used in the Contract Documents in accordance with such recognized meanings); *provided, however*, that capitalized terms defined in other Contract Documents, including but not limited to the Agreement, shall have the meanings specified in such document.

Act is defined in the first (1st) recital to the Agreement.

Additional Right-of-Way is defined in Section 2.1.6 of the General Conditions of Contract.

Affiliate means, when used to indicate a relationship with a specified Person, a Person that: (i) directly or indirectly, through one or more intermediaries, has a ten percent (10%) or more voting or economic interest in such specified Person or (ii) controls, is controlled by or is under common control with such specified Person, and a Person is deemed to be controlled by another Person, if controlled in any manner whatsoever that results in control in fact by that other Person (or that other Person and any Person or Persons with whom that other Person is acting jointly or in concert), whether directly or indirectly and whether through share ownership, a trust, a contract or otherwise.

Agreement refers to the executed Comprehensive Agreement between Department and Design-Builder.

Agreement Date is the date that the Agreement is executed by both parties.

Aggregate Liability Cap is defined in Section 11.3.2 of the Agreement.

Anticipated JPA Approval Date is defined in Section 5.1.1.4 of the Agreement.

Application for Early Work Payment means the application requesting payment for Early Work performed, submitted by Design-Builder to Department in accordance with Section 3 (*Payments to Design-Builder for Early Work Tasks*) of **Exhibit 5** to the Agreement.

Application for Payment means the application requesting payment for Work performed, submitted by Design-Builder to Department in accordance with Article 6 of the General Conditions of Contract.

As-Built Drawings means the final design documents submitted and updated by Design-Builder, revised to incorporate all changes made in the specifications and working drawings during construction, showing the dimensions, geometry, and location and features of the Project.

ATC(s) mean those Alternative Technical Concepts identified in **Exhibit 4** to the Agreement.

Baseline Schedule is defined in Section 2.3 of the Technical Requirements.

Bridge Repair Work is defined in Section 9.9.1 of the General Conditions of Contract.

Business Day(s), whether capitalized or not, means any day(s) other than a Saturday, Sunday, Commonwealth of Virginia holiday, or a day when the New York Stock Exchange or banks are authorized or required to close in New York, New York or Richmond, Virginia.

Casualty Cost means the estimated cost of repairs, alterations, restorations, replacement and rebuilding of all or any part of the Project damaged or destroyed prior to Final Completion by fire or other casualty of any kind or nature.

Compensation Event is defined in Section 9.2.1 of the General Conditions of Contract.

Conditions to Assistance is defined in Section 2.14.2.1 of the General Conditions of Contract.

Construction Cost Index means the Construction Cost Index for the 20-city average as published by Engineering News-Record, for which the base year is 1913 United States Department of Labor, Bureau of Labor Statistics, for which the base year is 1913 = 100, or if such publication ceases to be in existence, a comparable index selected by Department and approved by Design-Builder, acting reasonably. For example, the Construction Cost Index for February 2019 was 11213.07.

Construction Manager means the individual identified with such title and role in **Exhibit 20** to the Agreement.

Contract Change Directive or *CCD* is defined in Section 9.3.1 of the General Conditions of Contract.

Contract Documents refer to those documents identified in Article 2 of the Agreement.

Contractor shall mean Design-Builder.

Contract Price is defined in Section 6.1 of the Agreement.

Contract Times means, collectively, (i) the Substantial Completion Deadline, (ii) the Final Completion Deadline, and (iii) the Long Stop Deadline. The Contract Times do not include the deadlines for the calculation and payment of the No Excuses Incentive Payment.

Corrective Work means any repair, correction, replacement or rectification of any Non-Conforming Work.

CTB means the Commonwealth Transportation Board.

Day or *Days*, whether capitalized or not, shall mean calendar days unless otherwise specifically noted in the Contract Documents.

DBE Performance Improvement Plan is the plan submitted by Design-Builder and approved by Department pursuant to Section 1.5.2 of **Exhibit 23** to the Agreement.

DBE/SWaM Contract Value means an amount equal to the Contract Price minus the costs of the exclusions described in Attachment 1 (*Exclusions to DBE/SWaM Contract Value*) of **Exhibit 23** to the Agreement. The DBE and SWaM participation goals are not based upon the Contract Price, but upon contractable items that include design and construction work that may be self-performed by Design-Builder. The final DBE/SWaM Contract Value will be determined following selection of the Successful Offeror.

DBE/SWaM Plan means the plan developed by Design-Builder that defines Design-Builder's approach for meeting the DBE and SWaM participation goals for the Project, as described in more detail in the Technical Requirements.

Delay Event is defined in Section 8.2.1 of the General Conditions of Contract.

Demobilization Costs means the amount necessary to reimburse the reasonable out-of-pocket and documented costs and expenses incurred by Design-Builder to demobilize and terminate Subcontracts, excluding Design-Builder's non-contractual liabilities and indemnity liabilities (contractual or non-contractual) to Subcontractors or third parties.

Department means the Virginia Department of Transportation.

Department-Caused Delay means any of the following events, to the extent they result in a material delay or interruption in performance of any obligation under the Contract Documents; *provided* such events are beyond Design-Builder's control and are not due to any act, omission, negligence, recklessness, willful misconduct, breach of contract or Legal Requirements on the part of Design-Builder; and *provided further* that such events (or the effects of such events) could not have been avoided by the exercise of caution, due diligence, or reasonable efforts by Design-Builder:

- (a) any breach of a material obligation under the Agreement by Department;
- (b) any violation of Legal Requirements by Department;
- (c) failure by Department to issue LNTP1, LNTP2, or LNTP3 within three (3) Business Days after Design-Builder has fulfilled the relevant conditions precedent to the issuance of LNTP1, LNTP2, or LNTP3, as applicable, set forth in Section 5.1.1 of the Agreement;

(d) failure by Department to issue NTP within three (3) Business Days after Design-Builder has fulfilled the conditions precedent to the issuance of NTP set forth in Section 5.1.2 of the Agreement;

(e) failure by Department to provide Design-Builder with access to the Department Right-of-Way as of the Agreement Date;

(f) failure by Department to respond to proposed schedules, plans, and other submittals and matters submitted to Department after the Agreement Date for which a response is required under the Contract Documents as an express prerequisite to Design-Builder's right to proceed or act, within the time periods (if any) indicated in the Contract Documents, or if no time period is indicated, within a reasonable time, taking into consideration the nature, importance and complexity of the submittal or matter, following delivery of notice from Design-Builder requesting such action in accordance with the terms and requirements of the Contract Documents;

(g) any delay or interference with the Work or physical damage to the Work directly attributable to (i) any Separate Contractors working in the Project Right-of-Way or (ii) the Toll System Contractor;

(h) any stoppage or suspension of Work by Design-Builder due to Department's issuance of a stop work order pursuant to Section 11.1.1 of the General Conditions of Contract; or

(i) any stoppage or suspension of Work by Design-Builder due to Department's failure to make any undisputed payment properly due to Design-Builder under Design-Builder's Application for Early Work Payment or Application for Payment pursuant to Sections 6.5.1 and 11.3.1 of the General Conditions of Contract.

Department's Representative is defined in Section 9.1.2 of the Agreement.

Department Right-of-Way means the real property (which term is inclusive of all estates and interests in real property, including easements) within the right-of-way limits shown on the RFP Concept Plans; *provided* the Department Right-of-Way does not include (i) the Willoughby Bay Bridge Right-of-Way, (ii) the Willoughby Spit Staging Area or (iii) any other Additional Right-of-Way.

Department's Senior Representative is defined in Section 9.1.1 of the Agreement.

Depository means a savings bank, a savings and loan association, or a commercial bank or trust company designated by Design-Builder and approved by Department to serve as a depository pursuant to Section 5.6 of the General Conditions of Contract.

Design-Builder means Hampton Roads Connector Partners, an unincorporated joint venture comprised of Dragados USA, Inc., Vinci Construction Grands Projets, Flatiron Constructors, Inc., and Dodin Campenon Bernard.

Design-Builder Members means each of (i) Dragados USA, Inc., (ii) Vinci Construction Grands Projets, (iii) Flatiron Constructors, Inc., and (iv) Dodin Campenon Bernard.

Design-Builder's Representative is defined in Section 9.2.2 of the Agreement.

Design-Builder's Senior Representative is defined in Section 9.2.1 of the Agreement.

Design Consultant is a qualified, licensed design professional, eligible to provide professional engineering and/or land surveying services in the State, who is not an employee of Design-Builder, but is retained by Design-Builder, or employed or retained by anyone under contract with Design-Builder or a Subcontractor, to furnish the design services required under the Contract Documents.

Design Manager means the individual identified with such title and role in **Exhibit 20** to the Agreement.

Design Work means all Work undertaken by or at the direction of any Design Consultant related to the design or engineering for the Project.

Disadvantaged Business Enterprise or *DBE* means a business certified as a Disadvantaged Business Enterprise in accordance with 49 CFR Part 26 and Department's DBE program.

Differing Roadway and Bridge Improvements Site Conditions means, with respect to any site on which the Roadway and Bridge Improvements are being constructed:

(a) actual subsurface or latent physical conditions at such site that differ materially from those indicated in the Contract Documents; or

(b) unknown physical conditions at such site, of an unusual nature, that differ materially from those ordinarily encountered and generally recognized as inherent in work of the character required pursuant to the Agreement,

that in either case, as of the Setting Date, was not:

(i) known to Design-Builder;

(ii) reasonably capable of being identified through a reasonable investigation of the site performed in accordance with Section 4.2 and/or the exercise of Good Industry Practice; or

(iii) attributable to conditions (excluding man-made conditions) that come into existence on or after the Setting Date.

Differing Tunnel Improvements Site Conditions means, with respect to any site on which the Tunnel Improvements are being constructed:

(a) actual subsurface or latent physical conditions at such site that differ materially from the conditions described in either the Geotechnical Baseline Report or Geotechnical Data Report; or

(b) unknown physical conditions at such site, of an unusual nature, that differ materially from those ordinarily encountered and generally recognized as inherent in work of the character required pursuant to the Agreement,

that in either case, as of the Setting Date, was not:

(i) known to Design-Builder;

(ii) subject to the Pre-Bid Site Access Limitations, reasonably capable of being identified by an appropriately qualified and experienced contractor or engineer exercising due care and skill and Good Industry Practice, including through review and analysis of the Geotechnical Baseline Report and Geotechnical Data Report; or

(iii) attributable to conditions (excluding man-made conditions) that come into existence on or after the Setting Date.

Disclosed Information means both the Reference Information and the Supplemental Information listed in **Exhibit 25** to the Agreement.

Division I Amendments means the Division I Amendments set out in **Exhibit 3** to the Agreement.

Early Work means the Work described in **Exhibit 5** to the Agreement.

Early Work Schedule of Values means the schedule developed by Design-Builder pursuant to Section 3 (*Payments to Design-Builder for Early Work Tasks*) of **Exhibit 5** to the Agreement.

Eastern Terminus means the eastern terminus of the Project located at the I-564 interchange with I-64.

Engineer shall mean the Department's Chief Engineer, who acts directly or through his duly authorized representative.

Entrusted Engineer In Charge means the individual identified with such title and role in **Exhibit 20** to the Agreement.

Escrow Agreement means the Escrow Agreement among Design-Builder, Department and SunTrust Bank, which shall be executed and delivered in accordance with Section 12.9.1 of the General Conditions of Contract.

Escrow Proposal Documents is defined in Section 12.9.1 of the General Conditions of Contract.

ETTM System means the electronic toll and traffic management system, including its components, systems, and subsystems used to collect tolls and otherwise manage traffic on the Express Lanes, including the civil infrastructure necessary to house and support such systems.

ETTM Work means the design, construction, installation, start-up, and commissioning of the ETTM System.

Express Lanes means the high occupancy toll lanes and associated entry and exit ramps and lanes within the Project Right-of-Way that are separated from the adjacent general purpose lanes.

Extended NTP Delay Date is defined in Section 5.1.3.2 of the Agreement.

Extended NTP Delay Termination Notice is defined in Section 5.1.3.3 of the Agreement.

Federal Requirements means the requirements set forth in **Exhibit 26** to the Agreement.

Final As-Built Schedule is defined in Section 2.3 of the Technical Requirements.

Finding of Public Interest is defined in in the ninth (9th) recital to the Agreement.

Final Completion means that (i) all Work has been completed in accordance with the Contract Documents, including but not limited to completion of all Punch List items and (ii) Design-Builder has received written notice from Department under Section 6.8 of the General Conditions of Contract confirming Design-Builder's completion of, and Department's acceptance of, all Work.

Final Completion Date is defined in Section 5.2.2 of the Agreement.

Final Completion Deadline is defined in Section 5.2.2 of the Agreement.

FHWA means the Federal Highway Administration.

Force Majeure Event means the occurrence of any of the following events after the Agreement Date that directly causes either Department or Design-Builder to be unable to comply with all or a material part of its obligations under the Agreement:

(a) war (including civil war and revolution), invasion, armed conflict, violent act of foreign enemy, military or armed blockade, or military or armed takeover of the Project, in each case occurring within the Commonwealth;

(b) any act of terrorism or sabotage that causes direct physical damage to or otherwise directly causes interruption to construction of the Project;

(c) nuclear explosion or contamination, in each case causing direct physical damage to the Project or radioactive contamination of the Project Right-of-Way;

(d) riot and civil commotion on or in the immediate vicinity of the Project Right-of-Way;

(e) flood (in excess of the base flood as described in the Technical Requirements), earthquake that causes ground acceleration in excess of AASHTO bridge design standards for the Project Right-of-Way, tornado, and named windstorm, in each case that causes direct physical damage to the Project or otherwise directly causes interruption to construction of the Project;

(f) fire or explosion not attributable to a Design-Builder or a Subcontractor that directly impacts a material element of the physical improvements to the Project or that materially impacts performance of the Work; or

(g) any protest against the Project that blocks access to the Project Right-of-Way or otherwise directly causes interruption to construction of the Project.

Force Majeure Termination Notice is defined in Section 11.6.1 of the General Conditions of Contract.

GAAP means Generally Accepted Accounting Principles in the United States as in effect from time to time.

General Conditions of Contract (or General Conditions) means these General Conditions of Contract set out in **Exhibit 1** to the Agreement.

General Notice is defined in Section 2.2.3 of the General Conditions of Contract.

Geotechnical Baseline Report means the report listed in **Exhibit 21** to the Agreement.

Geotechnical Data Report means the report listed in **Exhibit 22** to the Agreement.

Geotechnical Manager means the individual identified with such title and role in **Exhibit 20** to the Agreement.

Good Faith Efforts means the adequate demonstrated effort required by Design-Builder to achieve the DBE participation goal and SWaM participation goal for the Project.

Good Industry Practice means the degree of skill and judgment prevailing on the Agreement Date that is expected to be exercised by prudent, skilled and experienced contractors on similar projects in State (or, with respect to the Tunnel Improvements, similar projects on a national basis), taking into consideration safety, operational requirements, level of service and lifecycle costs. As applied to design professionals, Good Industry Practice refers to the duty of such professionals to exercise the degree of care and skill of those ordinarily skilled in the

business providing similar services in the same or a similar location, at the same time, and under similar circumstances.

Governmental Approval means any authorization, consent, approval, license, lease, ruling, permit, certification, exemption, or registration by or with any Governmental Unit.

Governmental Unit means any national, state or local government, any political subdivision thereof, or any governmental, quasi-governmental, judicial, public or statutory instrumentality, administrative agency, authority, body or other entity having jurisdiction over the performance of the Work, the Project or the parties; *provided, however*, that the term “Governmental Unit” shall not include Department.

Guarantee is defined in Section 10.3 of the Agreement.

Guarantors means (i) Dragados, S.A., a corporation (*sociedad anónima*) organized under the laws of Spain, (ii) Vinci Construction, a corporation (*Société par actions simplifiée*) organized under the laws of France, and (iii) HOCHTIEF USA, Inc., a corporation organized under the laws of the State of Delaware.

Hazardous Environmental Condition means the presence at the Project Right-of-Way of Hazardous Materials in such quantities or circumstances that may present a substantial danger to Persons or property exposed thereto in connection with the Work.

Hazardous Materials are any materials, wastes, substances and chemicals deemed to be hazardous under applicable Legal Requirements, or the handling, storage, remediation, or disposal of which are regulated by applicable Legal Requirements, including Hazardous Waste.

Hazardous Waste means a waste that is: (i) listed as a hazardous waste in 40 CFR Section 261.31 to 261.33 or (ii) exhibits one of the following characteristics: ignitability; corrosivity; reactivity; or toxicity, or is otherwise defined as a hazardous waste by the Legal Requirements.

HRTAC means the Hampton Roads Transportation Accountability Commission.

HRTAC Parties means, collectively, (i) HRTAC and its members, officers, employees, and agents and (ii) the trustee with respect to any bonds issued by HRTAC to fund the Project.

I-564 Direct Connections means the optional scope of work included in the Proposal to provide direct connections (eastbound and westbound) from the new Express Lanes to I-564.

Instructions for Offerors means Part 1 of the RFP.

Joint Permit means, collectively, the permits issued in response to the Joint Permit Application.

Joint Permit Application means the application used to apply for permits from the United States Army Corps of Engineers for work in the waters of the United States (including wetlands),

and corresponding permits from the Virginia Marine Resources Commission, the Virginia Department of Environmental Quality, and local wetlands boards.

Key Personnel is defined in Section 2.1.5 of the General Conditions of Contract.

Known Pre-Existing Hazardous Materials means Hazardous Materials identified in the Technical Requirements or otherwise disclosed to Design-Builder by Department on or before the Setting Date.

Lane Closure means, in respect of any traffic lane, that all or part of any traffic lane is closed or blocked, or the use thereof is otherwise precluded for any reason.

Lane Closure Liquidated Damages is defined in Section 11.2.3 of the Agreement.

Lead Mechanical Engineer means the individual identified with such title and role in **Exhibit 20** to the Agreement.

Lead Tunnel Engineer means the individual identified with such title and role in **Exhibit 20** to the Agreement.

Legal Requirements are all applicable federal, state and local laws, codes, ordinances, rules, regulations, orders and decrees of any Governmental Unit, including, for the avoidance of doubt, the Federal Requirements.

LNTP1 is defined in Section 5.1.1.1 of the Agreement.

LNTP1 Cap is defined in Section 5.1.1.1 of the Agreement.

LNTP1 Completion Milestone means Design-Builder's receipt of a written determination from the United States Army Corps of Engineers that the Joint Permit Application is ready for public notice.

LNTP2 is defined in Section 5.1.1.2 of the Agreement.

LNTP3 is defined in Section 5.1.1.3 of the Agreement.

LNTPs means, collectively, LNTP1, LNTP2, and LNTP3.

Liquidated Damages Liability Cap is defined in Section 11.3.1 of the Agreement.

Long Stop Deadline means the date that is three hundred sixty-five (365) days following the Final Completion Deadline, as such date may be adjusted in accordance with the Agreement.

Maximum Cumulative Compensation Amount is an ascending series of cumulative compensation caps established by Department in **Exhibit 6**, which is based on Design-Builder's monthly payment schedule submitted with the Proposal. There is a discrete Maximum

Cumulative Compensation Amount, which may be adjusted from time to time in accordance with Article 9 of the General Conditions of Contract, for each month during the life of the Project.

NEPA Document means, collectively, (i) the Record of Decision for the Project dated June 12, 2017, and (ii) the Finding of No Significant Impact dated October 23, 2018, together with any amendments, supplements, or reevaluations thereto.

No Excuses Incentive Payment is defined in Section 5.3.1 of the Agreement.

Non-Conforming Work means any Work that is not in conformance with the Contract Documents, relevant Governmental Approvals, or the Legal Requirements.

Non-Permitted Lane Closure means a Lane Closure that occurs outside the time period(s) when Lane Closures are permitted in accordance with the Technical Requirements.

Non-Permitted Interstate Closure means a full closure of either the eastbound direction or the westbound direction of Interstate 64 that occurs outside any time period(s) when such a closure is permitted in accordance with the Technical Requirements.

North Island means the manmade island on the Hampton-side of the existing Hampton Roads Bridge-Tunnel on which the tunnel portal and other support structures are situated.

Notice of Termination means either (i) a Termination for Convenience Notice or (ii) an Extended NTP Delay Termination Notice.

Notice to Proceed or NTP is defined in Section 5.1.2 of the Agreement.

NTP Delay Date is defined in Section 5.1.3.1 of the Agreement.

NTP Mobilization Amount is defined in Section 6.1.4 of the General Conditions of Contract.

Payment Bond is defined in Section 10.2.2.2 of the Agreement.

Performance Bond is defined in Section 10.2.2.1 of the Agreement.

Performance Security means, collectively, the Performance Bond, the Payment Bond, and the Guarantees.

Person means any individual (including the heirs, beneficiaries, executors, legal representatives or administrators thereof), corporation, partnership, joint venture, trust, limited liability company, limited partnership, joint stock company, unincorporated association or other entity or a Governmental Unit.

PPTA Steering Committee is defined in the second (2nd) recital to the Agreement.

Pre-Bid Site Access Limitations means the Department-established prohibitions on Offeror access to the Department Right-of-Way and private property adjacent to the Department Right-of-Way to perform any activities other than to observe the conditions of the Department Right-of-Way prior to the submission of its Proposal.

Pre-Existing Hazardous Materials means Known Pre-Existing Hazardous Materials and Unknown Pre-Existing Hazardous Materials.

Preliminary Design Plans means the plans described in Section 1.7 (*Plan Submittals*) of the Technical Requirements.

Preliminary Schedule is defined in Section 2.3 of the Technical Requirements.

Price Proposal Form means the completed Price Proposal Form submitted by Design-Builder as part of its Proposal.

Project means the design and construction of the improvements described in Article 1 of the Agreement.

Project Executive means the individual identified with such title and role in **Exhibit 20** to the Agreement.

Project Manager means the individual identified with such title and role in **Exhibit 20** to the Agreement.

Project Right-of-Way means, collectively, (i) the Department Right-of-Way and (ii) the Additional Right-of-Way that is acquired for the Project after the Agreement Date in accordance with Section 2.1.6 of the General Conditions of Contract.

Proposal or *Design-Builder's Proposal* means the proposal submitted by Design-Builder pursuant to the RFP and set out in **Exhibit 4** to the Agreement.

Punch List means an itemized list of Work that remains to be completed with respect to the Project after Substantial Completion has been achieved and before Final Completion, the existence, correction, and completion of which will have no material or adverse effect on the normal, uninterrupted, and safe use and operation of the Project.

QA Manager or *QAM* is Design-Builder's designee who shall be from an independent firm that has no involvement in construction operations for the Project, and shall be responsible for the quality assurance inspection and testing of all materials used and Work performed on the Project, to include monitoring of the Design-Builder's quality control program. The QAM will ensure that all work and materials, testing, and sampling are performed in conformance with the Contract Documents and the Released for Construction Plans. This individual shall be a registered, licensed Professional Engineer in the State.

QA/QC Plan is a plan that details how Design-Builder will provide quality assurance and

quality control for both the design and construction elements of the Project, obtain samples for Design-Builder quality control testing, perform tests for Design-Builder quality control, provide inspection, and exercise management control (e.g. quality assurance testing) to ensure the Work conforms to the Contract Documents.

Reference Information means all written information provided to Design-Builder by Department prior to the Agreement Date that is categorized as “Reference” in **Exhibit 25** to the Agreement.

Released for Construction Plans means the plans described in Section 1.7 (*Plan Submittals*) of the Technical Requirements.

Remedial Action Plan means the plan developed by Design-Builder with respect to Hazardous Materials encountered by Design-Builder.

Remedial Actions is defined in Section 4.1.1.2 of the General Conditions of Contract.

Request for Proposals or *RFP* is defined in the eleventh (11th) recital to the Agreement.

Request for Qualifications or *RFQ* is defined in the ninth (9th) recital to the Agreement.

Restoration Funds is defined in Section 5.6.1.3 of the General Conditions of Contract.

Revised Baseline Schedule is defined in Section 2.3 of the Technical Requirements.

RFP Concept Plans means the conceptual plans provided by Department as part of the Reference Information which illustrate Department’s conceptual design for the landside elements of the Project.

RFP Documents refer to those documents identified in the Instructions for Offerors.

Right of Way Plans means the plans described in Section 1.7 (*Plan Submittals*) of the Technical Requirements.

Roadway and Bridge Improvements means all Work needed to complete the improvements from the Western Terminus of the Project to the North Island and from the South Island to the Eastern Terminus of the Project, but excluding (i) the expansion of the North Island and the South Island, (ii) the design and construction of the tunnel approach structures, (iii) the design and construction of the tunnel, and (iv) the design and construction of any other improvements across the water between the North Island and the South Island.

Roadway and Bridge Improvements Scope Issues is defined in Section 2.2.1 of the General Conditions of Contract.

Safety Manager means the individual identified with such title and role in **Exhibit 20** to the Agreement.

Schedule Impact Analysis or *SIA* means the analysis prepared by Design-Builder in accordance with Section 2.3.8 of the Technical Requirements which demonstrates Design-Builder's entitlement to an extension of the Contract Times due to the occurrence of a Delay Event.

Schedule of Operations is defined in Section 2.15.3.2 of the General Conditions of Contract.

Schedule of Values means the schedule developed by Design-Builder pursuant to Section 6.2.1 of the General Conditions of Contract.

Schedule Update is defined in Section 2.3 of the Technical Requirements.

Scope Validation Period is defined in Section 2.2.1 of the General Conditions of Contract.

Separate Contractor means a contractor retained by Department other than Design-Builder to perform work (other than the Work) on, near, or within the same geographic area of the Work. The Toll System Contractor is not a Separate Contractor.

Setting Date means the deadline for the issuance of Addenda to the Final RFP, as set forth in the Instructions for Offerors.

Small, Women-Owned, and Minority Business or *SWaM* means the State program to support small, women-owned and minority groups in doing business with the State.

South Island means the manmade island on the Norfolk-side of the existing Hampton Roads Bridge-Tunnel on which the tunnel portal and other support structures are situated.

South Island Trestle Bridge Replacement Work means (i) the construction of new marine approach bridges to carry westbound I-64 across the water between Norfolk and the South Island and (ii) the demolition of the existing marine approach bridges between Norfolk and the South Island.

Standard Drawings are the applicable drawings in the Virginia Department of Transportation *Road and Bridge Standards* in effect as of the Agreement Date.

Standard Specifications are the Virginia Department of Transportation *Road and Bridge Specifications* in effect as of the Agreement Date.

State means the Commonwealth of Virginia.

State Highway means any highway designated a State Highway pursuant to Title 33.2 of the Code of Virginia.

State Indemnatee means and includes Department, the Commissioner, the Commonwealth Transportation Board, the HRTAC Parties, the State and all elected representatives, appointed officials, commissioners, officers, members, employees, authorized agents and authorized

representatives of any of them.

Steering Committee means the executive-level committee established by Department and Design-Builder to provide executive-level business guidance on disputes or disagreements in accordance with Section 10.2 of the General Conditions of Contract.

Subcontract means any and all agreements between Design-Builder and its Design Consultants, Subcontractors and other agreements between Design Consultants or Subcontractors and their respective Sub-Subcontractors (and/or any other lower tier subcontractors), it being the intent that all this term encompasses all agreements deriving directly or indirectly from Design-Builder, in connection with the performance of the Work.

Subcontractor means any Person or entity retained by Design-Builder as an independent contractor to perform a portion of the Work and shall include materialmen, suppliers, and Sub-Subcontractors of any tier, but shall not be deemed to include Design Consultants.

Sub-Subcontractor means any Person or entity retained by a Subcontractor as an independent contractor to perform any portion of a Subcontractor's Work and shall include materialmen and suppliers, but shall not be deemed to include Design Consultants.

Substantial Completion means the opening of the Project for normal and continuous operations and use by the traveling public at full capacity, after satisfaction of all Substantial Completion Conditions and issuance and delivery by Department of the Substantial Completion Certificate.

Substantial Completion Certificate is defined in Section 6.7.4.2(a) of the General Conditions of Contract.

Substantial Completion Conditions is defined in Section 6.7.7 of the General Conditions of Contract.

Substantial Completion Date is defined in Section 5.2.1 of the Agreement.

Substantial Completion Deadline is defined in Section 5.2.1 of the Agreement.

Successful Offeror is defined in the twelfth (12th) recital to the Agreement.

Supplemental Information means all written information provided to Design-Builder by Department prior to the Agreement Date that is categorized as "Supplemental" in **Exhibit 25** to the Agreement.

SWaM Performance Improvement Plan is the plan submitted by Design-Builder and approved by Department pursuant to Section 2.3.2 of **Exhibit 23** to the Agreement.

Technical Requirements means the Technical Requirements set out in **Exhibit 2** to the Agreement.

Termination for Convenience Notice is defined in Section 8.1 of the Agreement.

Third-Party Claim means any claim asserted against a State Indemnitee or Design-Builder by any Person who is not a party to the Agreement, a State Indemnitee or an Affiliate of such party.

Third-Party Hazardous Materials means any Hazardous Materials introduced or brought onto the Project Right-of-Way by a Person (including, without limitation, Department) other than Design-Builder or any Subcontractor.

Tidal Wetlands means wetlands, as defined pursuant to § 28.2-1300 of the Code of Virginia, generally located seaward of mean low water, over which the Virginia Marine Resources Commission has regulatory and permitting authority pursuant to the Legal Requirements.

Tidal Wetlands Mitigation Baseline Cost means six million dollars (\$6,000,000).

Toll System Contractor means the contractor retained by Department to design, install, and commission the electronic toll collection system along Interstate 64, including the portion of Interstate 64 that encompasses the Project.

Tunnel Construction Manager means the individual identified with such title and role in **Exhibit 20** to the Agreement.

Tunnel Improvements means all Work needed to complete the improvements across the water between the North Island and the South Island, including expansion of the North Island and the South Island, the design and construction of the tunnel approach structures, and the design and construction of the tunnel.

Unknown Pre-Existing Hazardous Materials means any Hazardous Materials present on the Project Right-of-Way prior to the Setting Date which are not Known Pre-Existing Hazardous Materials.

Western Terminus means the western terminus of the Project located at the Settlers Landing interchange with I-64.

Willoughby Bay Bridge Right-of-Way means the real property (which term is inclusive of all estates and interests in real property, including easements), if any, required to accommodate the reconstruction and widening of the existing structures that carry I-64 across the Willoughby Bay in the City of Norfolk, Virginia.

Willoughby Spit Staging Area means the undeveloped parcel, approximately fourteen (14) acres in size, located at the end of the Willoughby Spit peninsula in the City of Norfolk, Virginia, that Department has previously considered for use as a construction staging area for the Project.

Work is comprised of all Design-Builder's design, construction and other services required by the Contract Documents, including procuring and furnishing all materials, equipment, services and labor reasonably inferable from the Contract Documents.

Work Order is defined in Section 9.1.1 of the General Conditions of Contract.

Work Product is defined in Section 4.1 of the Agreement.

Article 2 **Design-Builder's Services and Responsibilities**

2.1 General

2.1.1 Design-Builder's Representative shall be reasonably available to Department and shall have the necessary expertise and experience required to supervise the Work. Design-Builder's Representative shall communicate regularly with Department and shall be vested with the authority to act on behalf of Design-Builder.

2.1.2 Design-Builder will attend a kick-off meeting with Department to discuss issues affecting the administration of the Work and to implement the necessary procedures, including those relating to submittals and payment, to facilitate the ability of the parties to perform their obligations under the Contract Documents. Department will notify Design-Builder of the time and location of the kick-off meeting. All Design-Builder's Key Personnel shall participate in this kick-off meeting.

2.1.3 Design-Builder shall provide Department with the Preliminary Schedule, Baseline Schedule, Revised Baseline Schedule, Schedule Updates, Schedule Revisions, monthly reports and Final As-Built Schedule in accordance with Section 11.1 of the Agreement.

2.1.4 Department shall, at its sole cost and expense, obtain and provide the Design-Builder with access to the Department Right-of-Way until the Final Completion Date (and thereafter, as may be necessary for Design-Builder to comply with its warranty obligations). Except as otherwise provided in Section 2.1.6 of the General Conditions of Contract, Design-Builder will not be responsible for the right-of-way acquisition cost. The term "right-of-way acquisition cost" means the actual purchase price to a landowner for right of way, including fees, any and all easements, and miscellaneous fees associated with closing as part of the Project.

2.1.5 Design-Builder shall provide management for the Work in accordance with the organization chart set forth in the Proposal. Design-Builder acknowledges the importance of its "Key Personnel". "Key Personnel" shall include Design-Builder's Representative, Project Executive, Project Manager, Construction Manager, Quality Assurance Manager, Safety Manager, Environmental Manager, Entrusted Engineer in Charge, Design Manager, Geotechnical Manager, Tunnel Construction Manager, Lead Tunnel Engineer, Lead Mechanical Engineer and any other positions specifically identified in the RFQ, RFP and/or the Proposal as "Key Personnel" (collectively, "**Key Personnel**"). Job duties and responsibilities of Key Personnel shall not be delegated to others for the duration of the Contract. Design-Builder shall

not change or substitute any Key Personnel except due to voluntary or involuntary termination of employment, retirement, death, disability, or incapacity. None of the Key Personnel may be withdrawn from the Project without prior written approval of Department, with it being understood and agreed that Design-Builder will provide Department with at least thirty (30) days written notice of any request to withdraw any Key Personnel. Department will have the right to review the qualifications of each individual to be appointed to a Key Personnel position and to approve or disapprove use of such individual in such position prior to the commencement of any Work by such individual. Design-Builder shall remove or replace, or have removed or replaced, any personnel performing the Work if Department has a reasonable objection to such Person.

2.1.6 If Design-Builder wishes to acquire (i) the Willoughby Bay Bridge Right-of-Way, (ii) the Willoughby Spit Staging Area, or (iii) any other real property (which term is inclusive of all estates and interests in real property, including permanent and temporary easements) outside the limits of the Department Right-of-Way (collectively, the “**Additional Right-of-Way**”), the acquisition of any Additional Right-of-Way will be subject to Department’s prior written approval. It will be the responsibility of Design-Builder to coordinate directly with the affected property owners to acquire any Additional Right-of-Way. Design-Builder shall be responsible for assuming all risks associated with the acquisition of any Additional Right-of-Way, including the cost of such Additional Right-of-Way, any public hearings, and any re-evaluation of the NEPA Document that may be required. Design-Builder acknowledges and agrees that Department will not approve modifications to the Contract Price or Contract Times arising from or relating to the acquisition of any Additional Right-of-Way.

2.1.7 Design-Builder shall submit its QA/QC Plan to VDOT for review and approval at the kick-off meeting referenced in Section 2.1.2 above. At the kick-off meeting, Design-Builder’s Design Manager and QA Manager shall provide a presentation of the QA/QC Plan (which shall comply with the Technical Requirements) for design and construction, using project-related scenarios

2.1.8 Design-Builder shall coordinate and lead all monthly progress meetings. During such meetings, progress during the prior month shall be reviewed. Design-Builder shall collect information from Design Consultants and any key Subcontractors responsible for Work completed during the specified duration and Work scheduled during the upcoming reporting duration. The monthly meetings shall be attended by all Key Personnel involved with the matters to be discussed at any such monthly meetings, as well as any other individuals that Department may require. Meetings will occur monthly beginning the month after Design-Builder’s receipt of LNTP1. Design-Builder shall be responsible for preparing, maintaining and distributing minutes of the meetings to all attendees for review. The meeting minutes shall be provided to Department within two (2) days of the monthly progress meeting.

2.1.9 Design-Builder shall perform the Work in accordance with: (i) the Contract Documents; (ii) applicable Legal Requirements and Governmental Approvals; and (iii) Good Industry Practice. Notwithstanding the foregoing, if any of (i), (ii) or (iii) in the preceding sentence conflict, Design-Builder shall be obligated to perform the Work in accordance with the more stringent standard.

2.1.10 If the Contract Documents incorporate any approved ATCs and Design-Builder, for whatever reason: (i) does not comply with one or more Department conditions of pre-approval for the ATC; (ii) fails or is unable to implement the approved ATC for any reason, including but not limited to the determination during the design approval process that the ATC fails to comply with the Contract Documents; (iii) does not obtain any required third-party approval (including any required re-evaluation of a previously secured third-party approval) for the ATC; or (iv) elects, for any reason, not to implement the approved ATC, then Design-Builder shall (1) provide written notice thereof to Department and (2) be solely responsible for complying with the requirements in the Contract Documents that would have applied in the absence of such ATC. Such compliance shall be without any increase in the Contract Price or extension to the Contract Times. For the avoidance of doubt, Design-Builder shall not be entitled to any increase in the Contract Price or extension of the Contract Times as a result of any delay, inability, or cost associated with the acquisition of any property or additional utility relocation work that may be required to implement any ATC.

2.1.11 The third-party costs associated with implementing the partnering protocols set forth in the Technical Requirements shall be agreed by Department and Design-Builder. Department and Design-Builder shall share such third-party costs equally; *provided* that Design-Builder shall not be entitled to any adjustment to the Contract Price to reflect its share of such third-party costs. Department shall provide regular invoices to Design-Builder for Design-Builder's share of such third-party costs and Design-Builder shall pay to Department the amount shown on each such invoice within thirty (30) days of Design-Builder's receipt of the relevant invoice.

2.1.12 With respect to Work occurring in the vicinity of property operated and maintained by the U.S. Navy, as described in **Exhibit 8**, Design-Builder shall at all times comply with the requirements set forth in **Exhibit 8**.

2.2 Scope Validation and Identification of Roadway and Bridge Improvement Scope Issues

2.2.1 Scope Validation Period. The term "**Scope Validation Period**" is the period of time that begins on date of Design-Builder's receipt of LNTP1 and extends for a period of one hundred eighty (180) days from such date of receipt. During the Scope Validation Period, Design-Builder shall thoroughly (i) review and compare all of the RFP Documents and the Contract Documents, including without limitation the Reference Information and the Proposal, and (ii) investigate the actual conditions at the Project Right-of-Way and any other areas necessary for the completion of the Work. Design-Builder shall undertake the activities described in clauses (i) and (ii) to verify and validate Design-Builder's proposed design concept for the Roadway and Bridge Improvements and identify any defects, errors, or inconsistencies in the RFP Documents and the Reference Information that affect Design-Builder's ability to complete its proposed design concept for the Roadway and Bridge Improvements within the Contract Price and/or Contract Times (collectively referred to as "**Roadway and Bridge Improvements Scope Issues**"). The term "Roadway and Bridge Improvements Scope Issues" shall not be deemed to include items that Design-Builder should have reasonably discovered prior to the Setting Date. Notwithstanding the foregoing, Design-Builder shall not be entitled to rely on the Supplemental Information for any purpose, and any defects, errors, or inconsistencies

in such Supplemental Information shall not entitle Design-Builder to relief for any Roadway and Bridge Improvements Scope Issues.

2.2.2 Scope Validation Period for Non-Accessible Areas of the Project Right-of-Way. The parties recognize that Design-Builder may be unable to conduct the additional investigations contemplated by Section 4.2.2 below because Design-Builder will not have access to certain areas within the Scope Validation Period. Design-Builder shall notify Department at the meeting described in Section 2.1.2 of the General Conditions of Contract of all such non-accessible areas and the dates upon which such areas are expected to become accessible. If Department agrees (acting reasonably) that such areas are non-accessible, then, for the limited purpose of determining Roadway and Bridge Improvements Scope Issues that directly arise from geotechnical evaluations for such areas, the term “**Scope Validation Period**” shall be deemed to be the ninety (90) day period after the date on which the specified area becomes accessible for purposes of conducting the geotechnical evaluation. If Department does not agree that such areas are non-accessible, then the Scope Validation Period shall not be extended.

2.2.3 Submission Requirements for Scope Issues. If Design-Builder intends to seek relief for a Roadway and Bridge Improvements Scope Issue, it shall promptly, but in no event later than the expiration of the Scope Validation Period, provide Department in writing with a notice (“**General Notice**”) of the existence of such Roadway and Bridge Improvements Scope Issue, which General Notice shall generally explain the basis for such Roadway and Bridge Improvements Scope Issue. Within twenty-one (21) days of the General Notice, Design-Builder shall provide Department with documentation that specifically explains its support for the Roadway and Bridge Improvements Scope Issue (“**Supporting Documentation**”). The Supporting Documentation shall include, among other things: (i) the assumptions that Design-Builder made during the preparation of its Proposal that form the basis for its allegation, along with documentation verifying that it made such assumptions in developing its Proposal; (ii) an explanation of the defect, error or inconsistency in the RFP Documents that Design-Builder could not have reasonably identified prior to the Setting Date; and (iii) the specific impact that the alleged Roadway and Bridge Improvements Scope Issue has had on Design-Builder’s price and time to perform the Work. For the avoidance of doubt Design-Builder shall not (1) be entitled to raise in its Supporting Documentation any Roadway and Bridge Improvements Scope Issues that were not previously addressed in a General Notice and (2) have the right to seek any relief for any Roadway and Bridge Improvements Scope Issues that have not been specifically identified in a General Notice provided to Department during the Scope Validation Period.

2.2.4 Resolution of Scope Issues. Within a reasonable time after Department’s receipt of the Supporting Documentation described in Section 2.2.3 above, the parties shall meet and confer to discuss the resolution of such Roadway and Bridge Improvements Scope Issues. If Department agrees that Design-Builder has identified a valid Roadway and Bridge Improvements Scope Issue that materially impacts Design-Builder’s price or time to perform the Work, Department shall issue a Work Order in accordance with Article 9 of the General Conditions of Contract. If Department disagrees that Design-Builder has identified a valid Roadway and Bridge Improvements Scope Issue that materially impacts Design-Builder’s price or time to perform the Work, then Design-Builder’s recourse shall be as set forth in Article 10 of the General Conditions of Contract. Notwithstanding anything to the contrary in the Contract Documents or

as a matter of law, Design-Builder shall have the burden of proving that the alleged Roadway and Bridge Improvements Scope Issue could not have been reasonably identified prior to the Setting Date and that such Roadway and Bridge Improvements Scope Issue materially impacts its price or time to perform the Work.

2.2.5 Design-Builder's Assumption of Risk of Roadway and Bridge Improvements Scope Issues. The parties acknowledge that the purpose of the Scope Validation Period is to enable Design-Builder to identify those Roadway and Bridge Improvements Scope Issues that could not reasonably be identified prior to the Setting Date. By executing the Agreement, Design-Builder acknowledges that the Scope Validation Period is a reasonable time to enable Design-Builder to identify Roadway and Bridge Improvements Scope Issues that will materially impact Design-Builder's price or time to perform the Roadway and Bridge Improvements. After the expiration of the Scope Validation Period, with the sole exception of those Roadway and Bridge Improvements Scope Issues made the subject of a General Notice during the Scope Validation Period (and subject to valid requests for Work Orders in accordance with Section 2.2.4 above), the parties agree as follows:

.1 without limiting its rights and remedies expressly granted under the Agreement, including but not limited to the right to compensation, an extension of time, and relief from obligations (as applicable) resulting from a Compensation Event or Delay Event, Design-Builder shall assume and accept all risks, costs, and responsibilities of any Roadway and Bridge Improvements Scope Issue arising from or relating to the Contract Documents, including but not limited to conflicts within or between the RFP Documents and the Proposal;

.2 Design-Builder shall be deemed to have expressly warranted that the Contract Documents existing as of the end of the Scope Validation Period are sufficient to enable Design-Builder to complete the design and construction of the Roadway and Bridge Improvements without any increase in the Contract Price or extension of the Contract Times;

.3 Department expressly disclaims any responsibility for, and Design-Builder expressly waives its right to seek any increase in the Contract Price or extension of the Contract Times for, any Roadway and Bridge Improvements Scope Issue associated with any of the Contract Documents, including but not limited to the RFP Documents; and

.4 the purpose of the Scope Validation Period is limited to providing Design-Builder with an opportunity to identify Roadway and Bridge Improvements Scope Issues that will materially impact Design-Builder's price or time to perform the Roadway and Bridge Improvements. The Scope Validation Period does not apply to the Tunnel Improvements.

2.2.6 Waiver of Rights. The failure of Design-Builder to meet the submission requirements required under Section 2.2.3 above for a Roadway and Bridge Improvements Scope Issue, including but not limited to the times for providing notice and documentation of the Roadway and Bridge Improvements Scope Issue, shall conclusively constitute a waiver of Design-Builder's rights to seek relief for such issues.

2.2.7 Failure of Proposal to Meet Requirements of the Contract Documents.

Notwithstanding anything to the contrary in this Section 2.2 or elsewhere in the Contract Documents, Department shall have no responsibility in the event Design-Builder's Proposal fails to meet the requirements of the Contract Documents, regardless of whether: (i) Department modified the RFP Documents to permit Design-Builder to implement a technical approach; (ii) Department accepted Design-Builder's Proposal; or (iii) any other action or inaction of Department is alleged by Design-Builder.

2.3 Design Professional Services

2.3.1 Design-Builder shall, consistent with applicable state licensing laws and Good Industry Practice, provide through qualified, licensed design professionals employed by Design-Builder, or procured from qualified, independent licensed Design Consultants, the necessary design services, including architectural, engineering, surveying, and other design professional services, for the preparation of the required drawings, specifications and other design submittals to permit Design-Builder to complete the Work consistent with the Contract Documents. All design professional services shall be performed by or under the supervision of professionals properly licensed in the State and who are well-versed in Department's design standards and practices.

2.3.2 No Design Consultant is intended to be, nor shall any Design Consultant be deemed to be, a third-party beneficiary of the Agreement. Department is intended to be, and shall be deemed, a third-party beneficiary of all contracts between Design-Builder and any Design Consultant. In the event that the Agreement is terminated, Design-Builder shall, upon the written demand of Department, assign such contracts to Department without any additional compensation to be paid by Department to Design-Builder for such assignment.

2.3.3 Design-Builder shall incorporate all obligations and understandings of the Contract Documents applicable to design services in its respective contracts with any Design Consultant, and require that such obligations be flowed down to lower-tiered Design Consultants, including the obligations relative to ownership of the Work Product set forth in Article 4 of the Agreement.

2.4 Design Development Services

2.4.1 Design-Builder shall be responsible for the professional quality, technical accuracy, timely completion and coordination of all drawings, specifications and other design submissions required to be developed by Design-Builder under the Contract Documents and shall, without additional compensation, correct or revise any errors, omissions or other deficiencies in such design submissions.

2.4.2 Design-Builder shall, consistent with any applicable provision of the Contract Documents, provide Department with electronic and paper copies of the following interim design submissions, in accordance with the Technical Requirements. The submissions should generally correspond to Department's concurrent engineering process, including but not limited to: (i) Preliminary Design Plans; (ii) Right of Way Plans; (iii) Released for Construction Plans; (iv) bridge plan submissions; and (v) tunnel plan submissions as required in Section 1.7 (*Plan Submittals*) of the Technical Requirements. On or about the time of the scheduled submissions,

Design-Builder and Department shall meet and confer about the submissions, with Design-Builder identifying during such meetings, among other things, the evolution of the design and any significant changes or deviations from the Contract Documents, or, if applicable, previous design submissions. Minutes of the meetings will be maintained by Design-Builder and provided to all attendees for review. Following the design review meeting, Department shall review and provide comments on the interim design submissions. Design-Builder shall promptly revise and modify all such submittals so as to fully reflect all comments and shall deliver to Department revised submittals for review and comment (and approval as the case may be).

2.4.3 Design-Builder shall submit to Department the Released for Construction Plans setting forth in detail drawings and specifications describing the requirements for construction and quality assurance/quality control activities associated with such Work, in full compliance with the Contract Documents, the Legal Requirements, and all Governmental Approvals. The Released for Construction Plans shall be consistent with the latest set of interim design submissions, as such submissions may have been modified in a design review meeting (as agreed upon in writing) and shall be submitted after Design-Builder has obtained all requisite Governmental Approvals (except for the Governmental Approvals identified in Department's Governmental Approvals List, set forth in **Exhibit 19** to the Agreement, which shall be Department's responsibility to obtain) associated with the Work contained in such documents. The parties shall have a design review meeting to discuss, and Department shall review and approve, the Released for Construction Plans in accordance with the procedures set forth Section 2.4.1 above. Design-Builder shall proceed with construction in accordance with the approved Released for Construction Plans and shall submit the approved Released for Construction Plans to Department prior to commencement of Work in accordance with the Technical Requirements.

2.4.4 Department's review, comment and/or approval of interim design submissions, ATCs and the Released for Construction Plans are for the purpose of evaluating Design-Builder's compliance with the requirements of the Contract Documents and mutually establishing a conformed set of Contract Documents compatible with the requirements of the Work. Department's review, comment and/or approval of any interim or final design submission (including but not limited to ATCs and the Released for Construction Plans) shall not be deemed to transfer any liability from Design-Builder to Department.

2.4.5 To the extent not prohibited by the Contract Documents or the Legal Requirements, Design-Builder may, with the prior approval of Department, prepare design submittals and Released for Construction Plans for a portion of the Work to permit procurement and construction to proceed on that portion of the Work prior to completion of the Released for Construction Plans for the entire Work.

2.5 Legal Requirements

2.5.1 Design-Builder shall keep fully informed of and perform the Work in accordance with all Legal Requirements. Design-Builder shall provide all notices, and execute and file the documents, statements and/or affidavits applicable to the Work as required by the Legal Requirements. Design-Builder shall permit Department's examination of any records made subject to such examination by any applicable Legal Requirements.

2.5.2 Design-Builder may request, by submission of a Work Order request, that the Contract Price and/or Contract Times shall be adjusted to compensate Design-Builder for the effects of any changes in the Legal Requirements enacted after the Setting Date, affecting the performance of the Work. Such effects may include, without limitation, revisions Design-Builder is required to make to the Released for Construction Plans because of changes in Legal Requirements. Notwithstanding anything to the contrary, the relief afforded by this Section 2.5 shall not apply to changes in any tax laws, with Design-Builder bearing the risk of such changes.

2.6 Governmental Approvals

2.6.1 Except as identified in Department's Governmental Approvals List, set forth in **Exhibit 19** to the Agreement, Design-Builder shall obtain and pay for all necessary Governmental Approvals required for the prosecution of the Work by any Governmental Unit. If any such Governmental Approval is required to be formally issued in the name of Department, Design-Builder shall undertake all efforts to obtain such Governmental Approvals, subject to Department's reasonable cooperation with Design-Builder, including execution and delivery of appropriate applications and other documentation in forms approved by Department. Design-Builder shall deliver to Department promptly after Design-Builder's receipt, a copy of each such Governmental Approval, along with a listing of the status of all such Governmental Approvals included in the monthly reports required by Section 11.1 of the Agreement.

2.6.2 Design-Builder shall provide reasonable assistance to Department in obtaining those Governmental Approvals that are Department's responsibility, and no construction activity will commence until: (i) all Governmental Approvals required for the relevant construction activity (including any activity that may disturb the Project Right-of-Way) have been obtained; (ii) Department has been notified that such Governmental Approvals have been obtained; and (iii) Department has, after reviewing the validity and scope of the Governmental Approval, authorized Design-Builder to proceed.

2.6.3 Design-Builder shall ensure that the Work conforms to the requirements and stipulations of all Governmental Approvals. Any violations of or noncompliance with any Governmental Approval, including but not limited to suspensions caused by Design-Builder violating or not being in compliance with a Governmental Approval, shall be at the sole risk of Design-Builder, and shall not be a basis for adjusting the Contract Price and/or Contract Times.

2.7 Design-Builder's Construction Phase Services

2.7.1 Unless otherwise specified in the Contract Documents to be the responsibility of Department or a Separate Contractor, Design-Builder shall provide through itself or Subcontractors the necessary supervision, labor, inspection, testing, start-up, material, equipment, machinery, temporary utilities and other temporary facilities to permit Design-Builder to complete construction of the Project in accordance with the Contract Documents.

2.7.2 Design-Builder shall perform all construction activities efficiently and with the requisite expertise, skill and competence to satisfy the requirements of the Contract Documents, and shall maintain or cause to be maintained all licenses required of Design-Builder or its employees in connection with the Work. Design-Builder shall at all times exercise complete and exclusive control over the means, methods, sequences and techniques of construction.

2.7.3 Design-Builder shall employ only Subcontractors who are duly licensed and qualified to perform the Work lawfully in the State and consistent with the Contract Documents. Design-Builder shall not use any Subcontractor to whom Department has a reasonable objection, and shall obtain Department's written consent before making any substitutions or additions to Subcontractors previously identified to Department as being members of Design-Builder's Project team, including those who may have been identified in the Proposal.

2.7.4 Design-Builder assumes responsibility to Department for the proper performance of the Work of Subcontractors and any acts and omissions in connection with such performance. Nothing in the Contract Documents is intended or deemed to create any legal or contractual relationship between Department and any Subcontractor or Sub-Subcontractor, including but not limited to any third-party beneficiary rights.

2.7.5 Design-Builder shall coordinate the activities of all Subcontractors. If Department performs other work on the Project or on the Project Right-of-Way with Separate Contractors under Department's control, Design-Builder agrees to reasonably cooperate and coordinate its activities with those of such Separate Contractors so that the Project can be completed in an orderly and coordinated manner without unreasonable disruption.

2.7.6 Design-Builder shall keep the Project Right-of-Way reasonably free from debris, trash and construction wastes to permit Design-Builder to perform its construction services efficiently, safely and without interfering with the use of adjacent land areas. Upon Final Completion, Design-Builder shall remove all debris, trash, construction wastes, materials, equipment, machinery and tools arising from the Work or applicable portions thereof to permit Department to occupy the Project for its intended use.

2.7.7 Design-Builder shall be responsible for the security of the Project Right-of-Way until Final Completion.

2.7.8 Design-Builder acknowledges and agrees that maintenance of existing facilities during construction of the Project is an essential component of the Work to be performed by Design-

Builder pursuant to the Contract Documents and Design-Builder shall provide such maintenance services in accordance with Section 12 of the Technical Requirements.

2.8 Design-Builder's Responsibility for Project Safety

2.8.1 Design-Builder recognizes the importance of performing the Work in a safe manner so as to prevent damage, injury or loss to: (i) all individuals on the Project Right-of-Way, whether working or visiting; (ii) the Work, including materials and equipment incorporated into the Work, wherever stored; and (iii) all other property on the Project Right-of-Way or adjacent thereto. Design-Builder shall implement and monitor all safety precautions and programs related to the performance of the Work. Design-Builder shall, prior to commencing construction, designate a Safety Manager with the necessary qualifications and experience to supervise the implementation and monitoring of all safety precautions and programs related to the Work. Unless otherwise required by the Contract Documents, the Safety Manager shall be an individual stationed at an area where Work is being performed who may have responsibilities on the Project in addition to safety. The Safety Manager shall make routine daily inspections of the Project Right-of-Way and shall hold weekly safety meetings with Design-Builder's personnel, Subcontractors and others as applicable. Design-Builder shall provide minutes of each safety meeting to Department within five (5) days of such meeting.

2.8.2 Design-Builder shall provide, for Department's review, comment and acceptance, a Health, Safety and Welfare ("**HS&W**") plan on or before the earlier of fifteen (15) days of Design-Builder's receipt of the Notice to Proceed, or twenty-one (21) days before Design-Builder intends to commence any construction-related activities on Project Right-of-Way. Design-Builder shall not perform any construction-related activity (including any activity that disturbs the Project Right-of-Way) until an acceptable HS&W plan is in place.

2.8.3 Design-Builder and Subcontractors shall comply with: (i) all Legal Requirements relating to safety; (ii) Design-Builder's HS&W plan; and (iii) any Department-specific safety requirements set forth in the Contract Documents; *provided* that such Department-specific requirements do not violate any applicable Legal Requirement. Design-Builder will immediately report in writing any safety-related injury, loss, damage or accident arising from the Work to Department's Representative and, to the extent mandated by Legal Requirements, to all Governmental Units having jurisdiction over safety-related matters involving the Project or the Work.

2.8.4 Department shall have the right to immediately suspend any or all Work if Design-Builder fails to comply with its obligations hereunder.

2.8.5 Design-Builder's responsibility for safety under this Section 2.8 is not intended in any way to relieve Subcontractors and Sub-Subcontractors of their own contractual and legal obligations and responsibility for: (i) complying with all Legal Requirements, including those related to health and safety matters and (ii) taking all necessary measures to implement and monitor all safety precautions and programs to guard against injury, losses, damages or accidents resulting from their performance of the Work.

2.9 Design-Builder's Warranty

2.9.1 Design-Builder hereby warrants to Department that the construction, including all materials and equipment furnished as part of the construction, shall be new unless otherwise specified in the Contract Documents, of good quality, in conformance with the Contract Documents and free of defects in materials and workmanship. Design-Builder's warranty obligation excludes defects caused by abuse, damage, alterations, or failure to maintain the Work by persons other than Design-Builder or anyone for whose acts Design-Builder may be liable. Nothing in this warranty is intended to limit any manufacturer's warranty that provides Department with greater warranty rights than those set forth in this Section 2.9 or the Contract Documents. Design-Builder will provide Department with all manufacturers' warranties upon Final Completion.

2.9.2 If and to the extent Design-Builder obtains general or limited warranties from any Subcontractor with respect to design, materials, workmanship, construction, equipment, tools, supplies, software, or services, Design-Builder also shall cause such warranty to be expressly extended to Department; *provided* that the foregoing requirement shall not apply to standard, pre-specified manufacturer warranties of mass-marketed materials, products (including software products), equipment or supplies where the warranty cannot be extended to Department using commercially reasonable efforts. To the extent that any Subcontractor warranty would be voided by reason of Design-Builder's negligence in incorporating materials or equipment in the construction work, Design-Builder shall be responsible for correcting such omission.

2.9.3 Design-Builder's warranties are in addition to all rights and remedies available under the Agreement or Legal Requirements and shall not limit Design-Builder's responsibilities imposed by the Agreement, the Contract Documents or Legal Requirements with respect to the Work, including liability for Non-Conforming Work, strict liability, breach, negligence, willful misconduct or fraud.

2.10 Correction of Non-Conforming Work

2.10.1 Subject to Section 2.9.2 of the General Conditions of Contract, Design-Builder agrees to correct any Non-Conforming Work, including that part of the Work subject to Section 2.9.1 hereof, within a period of twenty-four (24) months following the Final Completion Date; *provided* such obligation to correct Non-Conforming Work shall survive for twenty-four (24) months following the early termination of the Agreement for Work that was in place prior to any termination.

2.10.2 If any Non-Conforming Work is discovered, including in any materials and equipment furnished as part of the Work, Department shall be entitled, in addition to any other remedies:

.1 to demand that Design-Builder undertake Corrective Work to correct, repair or replace such Non-Conforming Work at Design-Builder's sole cost and expense;

.2 to suspend any affected portion of the Work by delivery of a written order to Design-Builder, which order Department shall lift after Design-Builder fully cures or corrects such Non-Conforming Work;

.3 to correct such Non-Conforming Work itself and to obtain payment of Department's costs incurred (plus twenty-five percent (25%) for supervisory and administrative personnel costs) from Design-Builder or draw on the Performance Security; *provided* that Department shall not undertake Corrective Work itself or draw on the Performance Security unless Department has requested, and Design-Builder has failed to undertake, such Corrective Work in accordance with Section 2.12; and/or

.4 to seek performance or payment pursuant to the Guarantees; *provided* that Department shall not seek performance or payment pursuant to the Guarantees unless Department has requested, and Design-Builder has failed to undertake, such Corrective Work in accordance with Section 2.12.

2.10.2 The issuance of a suspension order pursuant to Section 2.10.1.2 shall not affect Design-Builder's rights to cure or correct any Non-Conforming Work giving rise to the issuance of the suspension order.

2.10.3 The warranty with respect to any Work that is repaired or replaced shall be extended for an additional twelve (12) months from the date of such repair or replacement.

2.11 Root Cause Analysis. Department may, based on good cause, direct Design-Builder to perform a "root cause" analysis of any alleged Non-Conforming Work. If Design-Builder fails to perform such analysis as directed by Department, or if Department concludes that the "root cause" analysis is flawed, Department may elect to conduct an independent analysis of the alleged Non-Conforming Work, whereupon Design-Builder shall cooperate with Department and provide such information, test and product data, samples, and other data relevant to the alleged Non-Conforming Work as Department may request. If the "root cause" or independent analysis reveals a non-conformance in any part of the Work, Design-Builder shall be responsible for the costs and expenses of correcting the non-conformance, including paying the costs of the "root cause" or independent analysis. If the "root cause" or independent analysis demonstrates that there is no non-conformance, then Department shall bear the reasonable costs and expenses of such analyses. All remedial measures related to Non-Conforming Work revealed by any "root cause" or independent analysis must be approved by Department prior to implementation by Design-Builder.

2.12 Department's Right to Perform

2.12.1 If Design-Builder refuses or fails to commence any Corrective Work to correct any Non-Conforming Work within fourteen (14) days after receipt of written notice from Department to commence and continue such Corrective Work with diligence and promptness, without prejudice to any other remedy Department may have, Department may, itself or through one or more third-party contractors, undertake such Corrective Work on behalf of Design-Builder.

2.12.2 Any such Corrective Work undertaken by Department (or its designee) shall not in any way diminish the Design-Builder's obligations or liabilities under the Agreement with respect to work undertaken by the Department.

2.12.3 In the event Department exercises its rights under this Section 2.12, Department shall (at its election) deduct all of its costs incurred in connection with any such Corrective Work from any payments then or thereafter due to Design-Builder under the Agreement or by drawing on the Performance Security. If the payments then or thereafter due to Design-Builder are not sufficient to cover such amount, Design-Builder shall pay the difference to Department within thirty (30) days after Department issues an invoice for such amount together with supporting documentation.

2.13 DBE and SWaM Matters

2.13.1 Design-Builder shall comply with the requirements set forth in Exhibit 23 of the Agreement relating to DBE and SWaM participation.

2.14 Failure of Utility Owners to Cooperate

2.14.1 Design-Builder shall use diligent efforts to obtain the cooperation of each utility owner as necessary for the utility adjustments to be performed in connection with the Work. Design-Builder shall notify Department promptly if Design-Builder reasonably believes that:

- .1** any utility owner would not undertake or permit a utility adjustment in a manner consistent with the timely completion of the Work, or in accordance with the Legal Requirements, any Governmental Approval, or this Agreement;
- .2** any utility owner is not cooperating in a timely manner to provide agreed-upon work or approvals; or
- .3** any other dispute will arise between Design-Builder and a utility owner with respect to the Project, despite Design-Builder's diligent efforts to obtain such utility owner's cooperation or otherwise resolve such dispute (including a dispute relating to a betterment).

The notice described in this Section 2.14.1 may include a request that Department assist in resolving the dispute or in otherwise obtaining the utility owner's timely cooperation. Design-Builder shall provide Department with such information as Department requests regarding the utility owner's failure to cooperate and the effect on any resulting delay on the Baseline Schedule. After delivering to Department any notice or request for assistance, Design-Builder shall continue to use diligent efforts to pursue the utility owner's cooperation.

2.14.2 If Design-Builder requests Department's assistance pursuant to Section 2.14.1, the following provisions shall apply:

- .1** Design-Builder shall provide evidence reasonably satisfactory to Department that:

- (a) the subject utility adjustment is necessary;
- (b) the time for completion of the utility adjustment in the Baseline Schedule was, at its inception, a reasonable amount of time for completion of such work;
- (c) Design-Builder has made diligent efforts to obtain the utility owner's cooperation; and
- (d) the utility owner is not cooperating

(the foregoing clauses (a) through (d), the “**Conditions to Assistance**”);

.2 following Department's receipt of satisfactory evidence regarding the Conditions to Assistance, Department shall take such reasonable steps as Design-Builder may request to obtain the cooperation of the utility owner to resolve the dispute; *provided, however,* that Department shall have no obligation to prosecute eminent domain or other legal proceedings, or to exercise any other remedy available to it under the Legal Requirements or any existing contract, unless Department elects to do so in its sole discretion; and

.3 any assistance Department provides shall not relieve Design-Builder of its sole responsibility for satisfactory compliance with its obligations and timely completion of utility adjustments, except as otherwise expressly set out in this Agreement.

2.14.3 If Department objects in writing to a request for assistance pursuant to Section 2.14.1 based on Design-Builder's failure to satisfy one or both of the Conditions to Assistance described in clauses (a) and (b) of Section 2.14.2.1, then Design-Builder shall take such action as is appropriate to satisfy the condition(s) and shall then have the right to submit another request for assistance on the same subject matter.

2.14.4 If Department objects in writing to a request for assistance pursuant to Section 2.14.1 based on Design-Builder's failure to satisfy one or both of the Conditions to Assistance described in clauses (c) and (d) of Section 2.14.2.1, then Design-Builder shall take such action as Design-Builder deems advisable during the next ten (10) days to obtain the utility owner's cooperation and shall then have the right to submit another request for assistance on the same subject matter.

2.14.5 Notwithstanding the foregoing, no resubmittal will be accepted unless all of the Department's objections have been addressed in accordance with Section 2.14.3 and 2.14.4. This process shall be followed until Design-Builder succeeds in obtaining the utility owner's cooperation or in otherwise resolving the dispute until Department determines, based on evidence the Design-Builder presents, that the Conditions to Assistance have been satisfied, at which time Department will take such reasonable steps as Design-Builder may request to obtain the cooperation of the utility owner to resolve the dispute. Design-Builder shall have the right to submit the question of the reasonableness of the Department's determination for resolution in accordance with the dispute resolution procedures set forth in Article 10 of the General Conditions of Contract.

2.15 Cooperation with Toll System Contractor

2.15.1 Design-Builder acknowledges that (i) while Department intends to operate one or more of the travel lanes to be provided as part of the Project as Express Lanes, the provision of the ETTM System is not included in the Work and (ii) Department intends to procure the provision of the ETTM System as a separate agreement. In order to help facilitate Department's procurement, design, and installation of the ETTM System, Design-Builder shall cooperate with Department and the Toll System Contractor in accordance with the terms of this Section 2.15.

2.15.2 In order to assist Department with Department's procurement of the ETTM System, Design-Builder shall provide Department with such information regarding Design-Builder's schedule for performance of the Work and sequencing of construction operations as Department may reasonably request, and Design-Builder further acknowledges and agrees that Department will share such information with prospective offerors as part of Department's procurement of the ETTM System. Department shall require the Toll System Contractor to take such information into account and otherwise ensure that its schedule for delivery of the ETTM System is consistent and compatible with the Revised Baseline Schedule and any relevant Schedule Updates.

2.15.3 Beginning at least eighteen (18) months prior to the anticipated Substantial Completion Date, or such earlier time as Department may reasonably require, Design-Builder will begin to meet and confer with Department and the Toll System Contractor to discuss issues affecting the administration of the ETTM Work and to develop and agree to the necessary procedures to facilitate Design-Builder's and the Toll System Contractor's performance of their obligations under their respective agreements with Department. Such procedures shall include, but are not limited to:

- .1** procedures relating to the Toll System Contractor's review of submittals prepared by Design-Builder that may impact the ETTM Work, including but limited to submittals relating to signage for the Project; and
- .2** a written joint schedule of operations (the "**Schedule of Operations**") that is consistent and compatible with the then-current Revised Baseline Schedule and describes, among other things, (i) the areas of the Project Right-of-Way to which the Toll System Contractor will require access in order to perform the ETTM Work and (ii) the timing for Design-Builder to make such areas available to the Toll System Contractor.

2.15.4 The Schedule of Operations shall be binding on each of Design-Builder and the Toll System Contractor. Any modification of the Schedule of Operations shall be in writing and mutually agreed to by Design-Builder and the Toll System Contractor.

2.15.5 The Schedule of Operations shall be agreed to no later than fifteen (15) months prior to the anticipated Substantial Completion Date, as shown in the Baseline Schedule. If Department, Design-Builder, and the Toll System Contractor fail to agree on the Schedule of Operations on or before such date, Design-Builder and the Toll System Contractor shall each submit a proposed schedule to Department's Representative, who will prepare the final Schedule of Operations,

which shall be binding on Design-Builder and Toll System Contractor.

2.15.6 Design-Builder shall indemnify Department for any and all losses Department incurs due to Design-Builder's failure to abide by the terms of the Schedule of Operations, including but not limited to any increase in the costs of the ETTM Work. Design-Builder acknowledges and agrees that its persistent failure to abide by the terms of the Schedule of Operations will be justification for Department to declare Design-Builder in default of the Agreement pursuant to Section 11.2.1.9 of the General Conditions of Contract.

2.15.7 Notwithstanding the requirements of Section 2.15.3, Design-Builder shall meet with Department at any time prior to Department's engagement of the Toll System Contractor, upon Department's reasonable request, in order for Department to obtain information relating to Design-Builder's design for the Project and plan for execution of the Work so that Department may consider such information as part of its procurement of the ETTM Work.

2.15.8 Department will not have any responsibility for acts, failures, or omissions of the Toll System Contractor that delay Design-Builder, except to the extent any act, failure, or omission of the Toll System Contractor constitutes a Department-Caused Delay.

2.16 Tidal Wetlands Mitigation

2.16.1 To the extent any Governmental Approval or Legal Requirement requires mitigation activities relating to Tidal Wetlands to be undertaken in respect of the Project, the provisions of this Section 2.16 shall apply.

2.16.2 In respect of required mitigation activities relating to Tidal Wetlands, Design-Builder will, at its own cost and expense, either (i) pay for and make available wetland credits or (ii) construct and maintain new wetlands, in each case in accordance with, and satisfying the requirements of, the Governmental Approvals and Legal Requirements applicable to such wetlands; *provided*, that if the Design-Builder's documented total cost of required mitigation activities relating to Tidal Wetlands exceeds the Tidal Wetlands Mitigation Baseline Cost, Design-Builder will be entitled to an increase to the Contract Price (as reflected in a Work Order) in an amount equal to Design-Builder's costs incurred in carrying out such mitigation activities in excess of the Tidal Wetlands Mitigation Baseline Cost.

Article 3

Department's Services and Responsibilities

3.1 Duty to Cooperate

3.1.1 Department shall, throughout the performance of the Work, cooperate with Design-Builder and perform its responsibilities, obligations and services in a timely manner to facilitate Design-Builder's timely and efficient performance of the Work and so as not to delay or interfere with Design-Builder's performance of its obligations under the Contract Documents.

3.1.2 Department shall provide timely reviews and (where required) approvals of submittals, interim design submissions and Released for Construction Plans consistent with the turnaround times set forth in Design-Builder's schedule; *provided, however* that, unless stated otherwise in the Contract Documents, Department shall have twenty-one (21) days after receipt of such submissions to act upon such submissions. This Section 3.1.2 shall not be construed to apply to the acquisition of Governmental Approvals by either Design-Builder or Department.

3.1.3 Department's Representative will participate in monthly progress meetings for the duration of the Project.

3.2 Furnishing of Services and Information

3.2.1 Department has provided the Reference Information for Design-Builder to consider in developing the Proposal and for executing the Work. Design-Builder shall thoroughly review and compare all such documents during the Scope Validation Period and, to the extent that any Roadway and Bridge Improvements Scope Issues arise, Department shall consider such issues in accordance with Section 2.2 of the General Conditions of Contract.

3.3 Not Used

3.4 Department's Representative

3.4.1 Department's Representative shall be responsible for providing Department-supplied information and approvals in a timely manner to permit Design-Builder to fulfill its obligations under the Contract Documents. Department's Representative shall also provide Design-Builder with prompt notice if it observes any failure on the part of Design-Builder to fulfill its contractual obligations, including any errors, omissions or defects in the performance of the Work.

3.5 Governmental Approvals

3.5.1 Department shall obtain and pay for all Governmental Approvals set forth in **Exhibit 19**.

3.5.2 Department shall provide reasonable assistance to Design-Builder in obtaining all other Governmental Approvals that are Design-Builder's responsibility.

3.6 Department's Separate Contractors

3.6.1 Department may at any time contract or approve concurrent contracts for performance of other work on, near, or within the same geographical area of the Work. Design-Builder shall not unreasonably impede or limit access to such work by others.

3.6.2 When separate contracts are awarded within the limits of one project, contractors shall not hinder the work being performed by other contractors. Design-Builder and Separate Contractor(s) working on the same project shall cooperate with each other. In case of dispute, Department's Representative will be the referee, and his decision will be binding on all parties.

3.6.3 When contracts are awarded to Separate Contractor(s) for known concurrent construction in a common area, Design-Builder and Separate Contractor(s), in conference with Department's Representative, shall establish a written joint schedule of operations. The schedule shall be based on the limitations of the individual contracts and the joining of the work of one contract with the others. The schedule shall set forth the approximate dates and sequences for the several items of work to be performed and shall ensure completion within the contract time limit. The schedule shall be submitted to Department's Representative for review and approval no later than twenty-one (21) days after the award date of the later contract. The schedule shall be agreeable to, signed by, and binding on each of Design-Builder and any Separate Contractor(s). Department's Representative may allow modifications of the schedule when benefit to Design-Builder and/or Separate Contractor(s) and Department will result.

3.6.4 Any modification of the schedule shall be in writing, mutually agreed to and signed by Design-Builder and Separate Contractor(s), and shall be binding on Design-Builder and Separate Contractor(s) in the same manner as the original agreement.

3.6.5 If Design-Builder and Separate Contractor(s) fail to agree on a joint schedule of operations, they shall submit their individual schedules to Department's Representative, who will prepare a schedule that will be binding on Design-Builder and Separate Contractor(s).

3.6.6 The joint schedule and any modification thereof shall become a part of each contract involved. The failure of Design-Builder and Separate Contractor(s) to abide by the terms of the joint schedule will be justification for declaring Design-Builder and/or Separate Contractor(s) in default of his contract.

3.6.7 Department will not assume any responsibility for acts, failures, or omissions of Design-Builder or Separate Contractor that delay the work of another, except to the extent any act, failure, or omission of any Separate Contractor constitutes a Department-Caused Delay.

Article 4

Hazardous Materials and Differing Site Conditions

4.1 Hazardous Materials

4.1.1 General Obligations

.1 Design-Builder will be responsible for the management, treatment, handling, storage, monitoring, remediation, removal, transport and/or disposal of any Hazardous Materials, the presence of which constitutes a Hazardous Environmental Condition, that are discovered on, in or under the Project Right-of-Way. For each such Hazardous Environmental Condition, Design-Builder will be responsible for waste document and manifest preparation, tracking, obtaining and providing the Department with terminated manifests and certificates of disposal, and other reporting requirements related to disposal required by the Legal Requirements.

.2 If Design-Builder encounters any Hazardous Environmental Condition that must be managed, treated, handled, stored, monitored, remediated, removed, transported or disposed of (collectively, “**Remedial Actions**”), then Design-Builder shall promptly notify Department of the Hazardous Environmental Condition and comply with any obligation to notify any Governmental Units under the Legal Requirements. In the case of Hazardous Environmental Conditions that are attributable to Unknown Pre-Existing Hazardous Materials, Design-Builder will promptly notify Department and, in consultation with Department, will develop a Remedial Action Plan setting out the scope of the Remedial Actions that Design-Builder proposes to take in relation to the relevant Hazardous Environmental Condition, such actions to include, but not be limited to: (i) conducting such further investigations as may be necessary or appropriate to determine the nature and extent of the Hazardous Materials and submitting copies of such data and reports to Department for its review and approval; (ii) taking reasonable steps, including in the case of excavation, construction, reconstruction or rehabilitation, modifications and/or construction techniques, to avoid or minimize excavation or dewatering in areas with Hazardous Materials; (iii) preparing and obtaining Governmental Approvals for Remedial Action Plans, including Department approval; (iv) carrying out the Remedial Action Plan, including, as necessary, disposal of the Hazardous Materials; and (v) timely informing Department of all such actions.

.3 Before any Remedial Actions for Unknown Pre-Existing Hazardous Materials are taken that would impair Department’s ability to ascertain the nature and extent of the Hazardous Environmental Condition, Design-Builder will afford Department the opportunity to inspect areas and locations that require Remedial Actions; *provided* that in the case of a sudden release of any Unknown Pre-Existing Hazardous Materials, Design-Builder may take all reasonable actions necessary to stabilize and contain the release without prior notice or inspection, but will promptly notify Department of the sudden release and its location.

.4 Design-Builder will obtain all Governmental Approvals relating to all Remedial Actions. Design-Builder will be solely responsible for compliance with such Governmental Approvals and applicable Legal Requirements concerning or relating to Hazardous Materials. In carrying out Remedial Actions that are compensable by Department pursuant to Section 4.1.2 below, Design-Builder will not take any steps or actions which impair Department’s potential claims for indemnity and contribution, statutory or otherwise.

.5 Unless directed otherwise by Department, Design-Builder will seek to recover costs from any available reimbursement program or from any third-party responsible for generating or otherwise creating or contributing to conditions that led to the need for Remedial Action. Without limiting the preceding sentence, Design-Builder will seek pre-approval and pursue reimbursement from the Virginia Petroleum Storage Tank Fund for qualifying expenses incurred during the course of investigation, containment, management, mitigation or remediation activities on petroleum storage tank releases. The parties will cooperate with and notify each other with respect to activities undertaken pursuant to this Section 4.1.1.5.

.6 Except as provided in Section 4.1.2 below, Design-Builder will bear all costs and expenses of preparing and complying with any Remedial Action Plan, of complying with Legal

Requirements and obtaining and complying with Governmental Approvals pertaining to Hazardous Materials, and otherwise of carrying out Remedial Actions.

4.1.2 Pre-Existing Hazardous Materials and Third-Party Hazardous Materials

.1 Department, to the extent permitted by the Legal Requirements, will pay Design-Builder for Design-Builder's costs for Remedial Actions with respect to any Unknown Pre-Existing Hazardous Materials and Third-Party Hazardous Materials, the presence of either of which constitutes a Hazardous Environmental Condition. To the extent Design-Builder recovers costs from any available reimbursement program or third parties with respect to Unknown Pre-Existing Hazardous Materials or Third-Party Hazardous Materials, Design-Builder will pay such amounts to Department, less the reasonable costs incurred by Design-Builder in seeking recovery in accordance with Section 4.1.1.5. Design-Builder will furnish to Department documentation supporting the amount recovered from any reimbursement program or third parties and the costs incurred by Design-Builder in pursuing such recovery.

.2 Department, to the extent permitted by the Legal Requirements, will assume responsibility for Third-Party Claims against Design-Builder for personal injury, damages or harm to property or business due to any Pre-Existing Hazardous Materials, the presence of which constitutes a Hazardous Environmental Condition, and all related penalties, fines and administrative or civil sanctions arising out of or relating to such Pre-Existing Hazardous Materials, except to the extent Design-Builder is obligated to indemnify a State Indemnitee pursuant to Section 4.1.3 below.

.3 Design-Builder will provide cost estimates with respect to such Remedial Actions which may be reimbursed by Department, for Department's review and approval prior to proceeding with any such Remedial Actions; *provided* that in the case of a sudden release of any Hazardous Materials, Design-Builder may take all reasonable actions necessary to stabilize and contain the release without prior submission of such cost estimates.

.4 Department reserves the right to perform Remedial Actions for Unknown Pre-Existing Hazardous Materials in lieu of, and as replacement for, Design-Builder's Remedial Action obligations subject to Section 4.1.1.2 above.

.5 Notwithstanding Section 4.1.2.1 above, Department will not pay or reimburse Design-Builder's costs for Remedial Actions with respect to Unknown Pre-Existing Hazardous Materials, which Unknown Pre-Existing Hazardous Materials are discovered due to Design-Builder's failure to prosecute the Work in accordance with the Released for Construction Plans or other Contract Documents.

4.1.3 Design-Builder's Indemnification Obligations Regarding Hazardous Materials

.1 Design-Builder will indemnify, protect, defend and hold harmless and release each State Indemnitee from and against any and all Third-Party Claims against State Indemnitees, including reasonable attorney's fees, expert witness fees and court costs, or other losses or damages suffered or incurred by such State Indemnitee, to the extent caused by:

(A) Hazardous Materials introduced to or brought onto the Project Right-of-Way by Design-Builder or a Subcontractor;

(B) failure of Design-Builder or any of its Subcontractors to comply with any requirement of the Contract Documents relating to Hazardous Materials (including any failure to perform any Remedial Action required in accordance with Section 4.1.1 above) or to otherwise comply with applicable Legal Requirements and Governmental Approvals; or

(C) the exacerbation, release, spreading, migration, or toxicity of Hazardous Materials due to the negligence, omission, recklessness, or willful misconduct of Design-Builder or a Subcontractor.

.2 Design-Builder shall defend such claims in accordance with Article 7 below.

.3 Design-Builder's obligations under this Section 4.1.3 will not apply to such claims to the extent caused by the negligence, recklessness, or willful misconduct of any State Indemnitee.

4.1.4 Identified Generator on Waste Manifests

.1 For Pre-Existing Hazardous Materials and Third-Party Hazardous Materials, the presence of either of which constitutes a Hazardous Environmental Condition, Department agrees to be identified as the generator of such Pre-Existing Hazardous Materials and Third-Party Hazardous Materials in waste manifests and any other documentation submitted to transporters, disposal facilities and any Governmental Unit.

.2 For (i) any Hazardous Materials introduced to the Project Right-of-Way by Design-Builder or a Subcontractor or (ii) any Unknown Pre-Existing Hazardous Materials, which Unknown Pre-Existing Hazardous Materials are discovered due to Design-Builder's failure to prosecute the Work in accordance with the Released for Construction Plans or other Contract Documents, then, in case of either (i) or (ii), the presence of which constitutes a Hazardous Environmental Condition within the Project Right-of-Way, Design-Builder agrees to be identified as the generator of such Hazardous Materials in waste manifests and any other documentation submitted to transporters, disposal facilities, and any Governmental Unit.

4.2 Inspection of Site Conditions

4.2.1 Design-Builder represents and warrants that it has, as of the Agreement Date and subject to the Pre-Bid Site Access Limitations, ascertained the nature and location of the Work, the character and accessibility of the Project Right-of-Way, the existence of obstacles to construction, the availability of facilities and utilities, the location and character of existing or adjacent work or structures, the surface and subsurface conditions, and other general and local conditions (including labor) which might affect its performance of the Work or the cost thereof.

4.2.2 Design-Builder will, after its receipt of LNTP1, undertake such testing, inspections and investigations as may be necessary to perform its obligations under the Contract Documents, including but not limited to additional geotechnical evaluations or Hazardous Materials studies. If Design-Builder intends to conduct additional geotechnical evaluations to supplement or corroborate the information contained in the RFP Documents and the Contract Documents, it shall do so during the Scope Validation Period. Any Roadway and Bridge Improvements Scope Issues that arise from such evaluations shall be treated in the manner set forth in Section 2.2 of the General Conditions of Contract. All reports or analyses generated by Design-Builder's testing, inspections and investigations, including but not limited to additional geotechnical testing, shall be furnished to Department promptly after such reports or analyses are generated.

4.3 Differing Site Conditions

4.3.1 Differing Roadway and Bridge Improvements Site Condition

.1 Subject to Section 4.3.1.3 below, if, during construction of the Roadway and Bridge Improvements, Design-Builder encounters a Differing Roadway and Bridge Improvements Site Condition, Design-Builder will be entitled to submit a request for a Work Order for an adjustment in the Contract Price and/or Contract Times to the extent Design-Builder's cost and/or time of performance are adversely impacted by the Differing Roadway and Bridge Improvements Site Condition as allowed for herein.

.2 Upon encountering an alleged Differing Roadway and Bridge Improvements Site Condition during construction of the Roadway and Bridge Improvements, Design-Builder shall provide prompt written notice to Department of such alleged condition, which notice shall not be later than fourteen (14) days after such condition has been encountered. Design-Builder shall, to the extent reasonably possible, provide such notice before the Differing Roadway and Bridge Improvements Site Condition has been substantially disturbed or altered.

.3 Design-Builder shall not be entitled to any adjustment in the Contract Price and/or Contract Times due to impacts of Differing Roadway and Bridge Improvements Site Conditions encountered during construction of the Roadway and Bridge Improvements not identified during the Scope Validation Period, unless Department, in its sole discretion, determines that the circumstances associated with such Differing Roadway and Bridge Improvements Site Condition justify making such adjustment.

4.3.2 Differing Tunnel Improvements Site Condition

.1 Subject to Section 4.3.2.3, if Design-Builder encounters a Differing Tunnel Improvements Site Condition, Design-Builder will be entitled to submit a request for a Work Order for an adjustment in the Contract Price and/or Contract Times to the extent Design-Builder's cost and/or time of performance are adversely impacted by the Differing Tunnel Improvements Site Condition as allowed for herein.

.2 Upon encountering an alleged Differing Tunnel Improvements Site Condition during construction of the Tunnel Improvements, Design-Builder shall provide prompt written

notice to Department of such alleged condition, which notice shall not be later than three (3) days after such condition has been encountered, including the ground conditions encountered and the measures taken to deal with the ground conditions. Design-Builder may continue tunnel excavations; *provided, however*, Design-Builder collects and preserves the following documents, information, and materials on a daily basis for inspection by Department:

- (a) photographs (paper and electronic copies) that detail the alleged Differing Tunnel Improvements Site Condition;
- (b) an electronic copy of all data generated by the tunnel boring machine during the previous twenty-four (24) hours;
- (c) samples of the excavated material in the alleged Differing Tunnel Improvements Site Condition area taken from the tunnel boring machine conveyor or spoil discharge point, in an amount equivalent to a full sandbag for each ring advanced while the alleged Differing Tunnel Improvements Site Condition exists;
- (d) Design-Builder's daily shift reports (cover a twenty-four (24) hour period of production) for each day that the alleged Differing Tunnel Improvements Site Conditions exists; and
- (e) records, face logs and detailed daily records describing the ground conditions and the impact ground conditions are having on the tunnel boring machine and Design-Builder's productivity.

.3 If Design-Builder establishes (i) that the actual ground conditions encountered qualifies as a Differing Tunnel Improvements Site Condition and (ii) that such Differing Tunnel Improvements Site Condition has adversely impacted Design-Builder's costs and/or time of performance, then Design-Builder shall be entitled to submit a request for a Work Order for an adjustment in the Contract Price and/or Contract Times.

Article 5 **Insurance**

5.1 Insurance Policies and Coverages

5.1.1 Design-Builder shall (i) procure and maintain, at its own cost and expense, the insurance coverages specified in Part 1 of **Exhibit 12** and (ii) otherwise comply with the applicable requirements set forth in the Division I Amendments.

5.1.2 Design-Builder shall cause each of its Subcontractors to (i) provide and maintain, at their own cost and expense when such Subcontractors are employed by Design-Builder, the insurance coverages specified in Part 2 of **Exhibit 12** and (ii) otherwise comply with the applicable requirements set forth in the Division I Amendments.

5.1.3 Except to the extent that the matter giving rise to a particular claim arises from a Compensation Event or a Delay Event, Design-Builder and its Subcontractors shall be solely responsible for any and all deductibles or self-insured retentions that shall apply under any required, or otherwise purchased, insurances and shall have no recourse against Department for any such costs.

5.2 General Insurance Requirements

5.2.1 The insurance policies that Design-Builder is required to maintain under this Article 5 of the General Conditions of Contract:

.1 shall delete any specific design-build or similar exclusions that could compromise coverages because of Design-Builder's use of the design-build delivery method;

.2 except for professional liability insurance, worker's compensation insurance, employer's liability insurance and railroad protective liability insurance, Department shall be included as an additional insured or loss payee as its interests may appear, as applicable, on a primary, non-contributory basis;

.3 shall not limit Design-Builder's liabilities and obligations pursuant to the Agreement, including Design-Builder's indemnification obligations;

.4 shall be maintained with insurers that are authorized to do business in the State and have a current policyholder's management and financial size category rating of not less than "A-: VIII" according to A.M. Best's Financial Strength Rating and Financial Size Category, except as otherwise approved by Department;

.5 shall be on terms specified in the Agreement or otherwise approved by Department (such approval not to be unreasonably withheld);

.6 shall contain coverage terms and conditions that reflect the industry standard that the commercial market will provide and support as of the date of such insurance procurement and any subsequent renewals;

.7 without inferring a right of cancellation that would not exist in the absence of these endorsements, shall contain a term which requires the insurer to give not less than thirty (30) days' prior notice to Department and any additional insured, including, as applicable, the U.S. Navy, whenever the insurer gives Design-Builder a notice of cancellation or non-renewal with respect to the policy (except in the case of any non-premium payment, not less than ten (10) days' prior notice, which the insurer shall be obligated to give to Department and any additional insured, including, as applicable, the U.S. Navy, simultaneously with providing such notice to Design-Builder);

.8 other than for professional liability insurance, worker's compensation insurance, employer's liability insurance, railroad protective liability insurance and property and business interruption insurance, shall include cross-liability clauses allowing one insured to bring a claim

against another insured party (with regard to pollution liability insurance, a cross-liability clause will be allowed as long as it does not impact Department's or the HRTAC Parties' ability to sue another insured party and collect under the policy);

.9 shall be endorsed so that the insurer agrees to waive, to the extent permitted by the Legal Requirements, all rights of subrogation or action that it may have or acquire against Department or any additional insured, including, as applicable, the U.S. Navy, and all or any of the Persons comprising the insured;

.10 other than for workers compensation and employer's liability insurance, automobile liability insurance, professional liability insurance, railroad protective liability insurance and contractor pollution liability insurance, shall contain a provision under which the insurer agrees that the failure of one insured to observe and fulfill the terms of the policy will not prejudice the coverage of the other insureds;

.11 shall, with regard to builder's risk and any other first-party property insurance, have each policy endorsed to contain a standard mortgagee clause to the effect that Department and other insureds will not be prejudiced by an unintended and/or inadvertent error, omission or mistaken description of the risk interest in property insured under the policies, incorrect declaration of values, failure to advise insurers of any change of risk interest or property insured, or failure to comply with a statutory requirement; and

.12 shall not include defense costs within the limits of coverage or permit erosion of coverage limits by defense costs, except that defense costs may be included within the limits of coverage of professional and contractor pollution liability policies.

5.3 Proof of Coverage

5.3.1 Design-Builder shall (i) deliver to Department true and correct specimen copies of policies, material forms, endorsements and premium quotes for each insurance policy certified by Design-Builder's insurance broker to be true and correct copies of such policies, forms, endorsements, and premium indications, as a condition to receiving the applicable notices to proceed set forth in the Agreement and (ii) annually thereafter at least ten (10) days prior to the expiration of any policy, provide an updated, compliant certificate of insurance evidencing renewal of the required insurance coverages.

5.3.2 In addition to the requirements of Section 5.3.1, Design-Builder also shall deliver to Department copies of each Project-specific insurance policy and endorsements for such policies certified by Design-Builder's insurance broker to be true and correct copies of the originals no later than thirty (30) days after receiving the applicable notices to proceed set forth in the Agreement and annually thereafter no later than thirty (30) days after policy renewal or replacement, and also whenever reasonably requested by Department.

5.4 Unavailability of Insurance

5.4.1 If any insurance required to be maintained pursuant to this Article 5 (including the limits,

deductibles or any other terms under policies for such insurance) ceases to be available on a commercially reasonable basis, Design-Builder shall provide written notice to Department accompanied by a letter from Design-Builder's insurance advisor stating that such insurance is unavailable anywhere in the global market on a commercially reasonable basis. Such notice will be given not later than thirty (30) days prior to the scheduled date for renewal of any such policy. Except to the extent such unavailability is attributable to Design-Builder, upon receipt of such notice by Department, Design-Builder and Department shall immediately enter into good faith negotiations regarding the matters set forth in Sections 5.4.3 and 5.4.4 below.

5.4.2 Design-Builder shall not be excused from satisfying the insurance requirements of this Article 5 merely because premiums for such insurance are higher than anticipated. To establish that the required coverages (or required terms of such coverages, including insurance policy limits) are not available on commercially reasonable terms, Design-Builder shall bear the burden of proving either that (i) the same is not available at all in the global insurance and reinsurance markets or (ii) the premiums for the same have so materially increased over those previously paid for the same coverage that a reasonable and prudent risk manager for a Person seeking to insure comparable risks would conclude that such increased premiums are not justified by the risk protection afforded. For the purpose of clause (ii) of the preceding sentence, the only increases in premiums that may be considered are those caused by changes in general market conditions in the insurance industry.

5.4.3 In the event that Design-Builder and Department cannot reach a resolution acceptable to both parties within ten (10) days, Design-Builder and Department shall make arrangements for the formation of an insurance panel consisting of Design-Builder's insurance advisor (or broker), Department or its insurance advisor (or broker), and an independent insurance expert from a nationally recognized insurance brokerage firm, chosen by Design-Builder and reasonably acceptable to Department. Such independent expert will conduct a separate review of the relevant insurance requirements of this Article 5 and the market for such insurance at the time, giving due consideration to the representations of each insurance advisor, and upon conclusion of such review will issue a written report stating whether such insurance is available or unavailable on a commercially reasonable basis. Design-Builder shall be responsible to pay the costs of such independent expert.

5.4.4 If the insurance panel concludes that such insurance is not available on a commercially reasonable basis, the insurance panel will provide a written recommendation (which will include the amount and type of insurance which is available upon a commercially reasonable basis) not less than fifteen (15) days before the date for renewal of such insurance. Design-Builder shall, prior to the expiration of the insurance then in effect, obtain the insurance required by this Article 5 as adjusted in accordance with such recommendation.

5.4.5 Department makes no representation that the limits of liability specified for any insurance policy to be carried pursuant to the Agreement are adequate to protect Design-Builder against its undertakings pursuant to the Agreement. No such limits of liability will preclude Department from taking any actions as are available to it under the Agreements or the Legal Requirements.

5.5 Failure to Obtain Insurance Coverage

5.5.1 If in any instance Design-Builder has not performed its obligations respecting insurance coverage set forth in the Agreement (as may be adjusted in accordance with Section 5.4 above) or is unable to enforce and collect any such insurance for failure to assert claims in accordance with the terms of the insurance policies, then for purposes of determining Design-Builder's liability and the limits thereon or determining reductions in compensation due from Department to Design-Builder on account of available insurance, Design-Builder shall be treated as if it has elected to self-insure up to the full amount of insurance coverage that would have been available had Design-Builder performed such obligations and not committed such failure.

5.6 Restoration; Insurance Proceeds

5.6.1 If all or any part of the Project is damaged or destroyed prior to Design-Builder's achievement of Final Completion by fire or other casualty of any kind or nature (including any casualty for which insurance was not obtained or obtainable), ordinary or extraordinary, foreseen or unforeseen, Design-Builder shall:

.1 give Department and the appropriate insurer written notice thereof promptly after Design-Builder receives actual notice of such casualty;

.2 proceed diligently to restore the Project to its pre-casualty condition; and

.3 account for all monies received as a result of any insurance claim and immediately provide to Department any such funds that are rightfully the property of Department due to there being an insurable interest, and, in the event the insurance proceeds exceed twenty million dollars (\$20,000,000), deposit all insurance proceeds received by Design-Builder in connection with any restoration with a Depository (such insurance proceeds, together with any interest earned thereon, the "**Restoration Funds**") and provide detailed accounting of how such funds are utilized.

5.6.2 If Design-Builder:

.1 fails or neglects to commence the diligent restoration of the Project or the portion thereof so damaged or destroyed;

.2 having so commenced such restoration, fails to diligently complete the same in accordance with the terms of the Agreement; or

.3 prior to the completion of any such restoration, the Agreement terminates in accordance with its terms,

Department may, but shall not be required to, complete such restoration at Design-Builder's expense and shall be entitled to be paid out of the Restoration Funds for the relevant restoration costs incurred by Department.

5.6.3 In any case where the Agreement terminates prior to completion of the restoration, Design-Builder shall:

.1 account to Department for all amounts spent in connection with any restoration that was undertaken;

.2 immediately pay over or cause the Depository to pay over to Department the remainder, if any, of the Restoration Funds received by Design-Builder prior to such termination or cancellation; and

.3 pay over or cause the Depository to pay over to Department, within five (5) Business Days after receipt thereof, any Restoration Funds received by Design-Builder or the Depository subsequent to such termination or cancellation.

Design-Builder's obligations under this Section 5.6.3 shall survive the expiration or termination of the Agreement.

5.6.4 Subject to the satisfaction by Design-Builder of all of the terms and conditions of this Section 5.6, Design-Builder shall cause the Depository, with prior written notice to Department, to pay to Design-Builder from time to time, any Restoration Funds, but not more than the amount actually collected by the Depository upon the loss, together with any interest earned thereon, to be utilized by Design-Builder solely for the restoration, such payments to be made as follows:

.1 prior to commencing any restoration, with regard to insurance proceeds in excess of twenty million dollars (\$20,000,000), Design-Builder shall furnish to Department for its approval the estimated cost, estimated schedule, and detailed plan for the completion of the restoration, each prepared by an architect or engineer;

.2 the Restoration Funds will be paid to Design-Builder in installments as the restoration progresses, subject to Section 5.6.4.3, based upon requisitions to be submitted by Design-Builder to the Depository, with a copy to Department, showing the cost of labor and materials purchased for incorporation in the restoration, or incorporated therein since the previous requisition, or the amounts payable or paid to the any Subcontractor, as the case may be, and due and payable or paid by the Design-Builder; *provided* that if any lien is filed against the Project or any part thereof in connection with the restoration, Design-Builder shall not be entitled to receive any further installment until such lien is satisfied or discharged (by bonding or otherwise); *provided further*, that notwithstanding the foregoing, but subject to the provisions of Section 5.6.4.3, the existence of any such lien shall not preclude Design-Builder from receiving any installment of Restoration Funds so long as such lien will be discharged with funds from such installment and at the time Design-Builder receives such installment Design-Builder delivers to the Department and the Depository a release of such lien executed by the holder of such lien and in recordable form;

.3 the amount of each installment to be paid to Design-Builder shall be the aggregate amount of Casualty Costs theretofore incurred by Design-Builder minus the aggregate amount of Restoration Funds theretofore paid to Design-Builder in connection therewith; *provided* that all

disbursements to Design-Builder shall be made based upon an architect's or engineer's certificate for payment in accordance with industry standards, and disbursements may be made for advance deposits for materials and Subcontractors to the extent that such disbursements are customary in the industry and that the unapplied portion of the funds held by the Depository, together with other funds available to Design-Builder for such Restoration, as certified by Design-Builder, are sufficient to complete the restoration; and

.4 except as provided in Section 5.6.2, upon completion of and payment for the restoration by Design-Builder, the Depository will pay the balance of the Restoration Funds, if any, to Design-Builder; *provided* that if the insurance proceeds are insufficient to pay for the restoration (or if there will be no insurance proceeds), Design-Builder shall nevertheless be required to make the restoration and provide any funds necessary to complete the restoration.

5.6.5 The requirements of this Section 5.6 are for the benefit only of Department, and no Subcontractor or other Person shall have or acquire any claim against Department as a result of any failure of Department actually to undertake or complete any restoration as provided in this Section 5.6 or to obtain the evidence, certifications and other documentation provided for herein.

5.6.6 Restoration Funds deposited with a Depository shall be invested and reinvested in direct obligations of, or obligations fully guaranteed by the United States of America or any agency or instrumentality of the United States of America, which obligations are backed by the full faith and credit of the United States of America, and all interest earned on such investments will be added to the Restoration Funds.

Article 6 **Payment and Completion**

6.1 Schedule of Payments

6.1.1 Design-Builder shall submit to Department an anticipated monthly earnings schedule in the monthly reports required by Section 11.1 of the Agreement.

6.1.2 Not Used.

6.1.3 The anticipated monthly earnings schedule described in Section 6.1.1 above shall not, when added to all previous payments under this Agreement, exceed the Maximum Cumulative Compensation Amount for the corresponding month, unless Department specifically approves this in writing.

6.1.4 Design-Builder shall be entitled to a payment for mobilization following Department's issuance of NTP in the amount of five percent (5%) of the Contract Price (the "**NTP Mobilization Amount**"). The payment of the NTP Mobilization Amount shall be distributed in two (2) equal installments. The first installment payment of fifty percent (50%) of the NTP Mobilization Amount may be scheduled for payment following partial mobilization and initiation of construction work. The second installment payment of the remaining fifty percent (50%) of the NTP Mobilization Amount may be scheduled for payment following completion of

substantial mobilization, including erection of Design-Builder's offices and buildings, if any. Preliminary engineering items, including, but not limited to, surveying, geotechnical investigations and utility coordination, shall not constitute construction work for the purpose of mobilization. Bonds and insurance premiums and field office expenses at Project start-up will not be considered part of mobilization activities. For the avoidance of doubt, this Section 6.1.4 shall prevail over any conflicting provision of Section 513 of the Road and Bridge Specifications.

6.2 Monthly Progress Payments

6.2.1 On the tenth (10th) day of each month, Design-Builder shall submit for Department's review and approval Design-Builder's Application for Payment requesting payment for all Work performed by Design-Builder during the prior month and coinciding with the progress reflected in the monthly Baseline Schedule update. The Application for Payment shall be accompanied by all supporting documentation required by the Contract Documents and/or established at the meeting required by Section 2.1.2 hereof. Payment shall be made in accordance with the Schedule of Values.

.1 The Price Proposal Form in Design-Builder's Proposal is the basis of the Schedule of Values. This form lists Design-Builder's values for individual "Payment Headings" (as shown on the Price Proposal Form), and the sum of these values is the Contract Price.

(a) To develop the Schedule of Values, Design-Builder shall subdivide the "Payment Headings" and values into further detail sufficient to serve as the basis for monthly progress payments, such that the total value of each "Payment Heading's" subsections sums to the corresponding "Payment Heading" value in the Price Proposal Form.

(b) Design-Builder shall provide a detailed Schedule of Values which is acceptable to Department as a condition precedent to the issuance of NTP under Section 5.1.2 of the Agreement.

(c) For all Work paid on a lump-sum basis, progress payments shall be determined as percentages of items on the Schedule of Values, comprising the Work completed since the Design-Builder's immediately prior Application for Payment. Design-Builder shall present a method for determining these percentages which is acceptable to Department.

(d) To reflect changes in Contract Price due to Work Orders, an additional "Payment Heading" may be added to the Schedule of Values, with subsections reflecting individual Work Orders.

.2 Quality assurance/quality control shall be an integral part of each activity. Design-Builder shall submit with each Application for Payment evidence of the quality assurance/quality control reviews, including any checklists, summary data, high-level/outline calculations or design checks, and evaluations of the work and the qualifications of the responsible personnel that completed the work, etc., that the relevant quality assurance or quality control reviewer

relied on to make its determination the Work is complete and conforms to the requirements of the Contract Documents. Furthermore, the QAM shall:

(a) verify that the design included in each activity has been completed in accordance with the Contract Documents;

(b) certify that the construction included in each activity has been completed in accordance with the Contract Documents; and

(c) certify that all required quality assurance/quality control tests, measurements, permits or other requirements have been completed and all non-conformance reports relative to the respective activity have been resolved. The QAM's certification for monthly Application of Payment for construction activities shall include the following statement: *As the QA Manager, I certify, to the best of my knowledge, information and belief based upon and to the extent of: (i) current on-site observations and field testing required to be performed; and (ii) material certifications and test reports, that the Work shown herein as complete has been completed in accordance with the Contract Documents, and that all required quality assurance/quality control tests, measurements, permits or other requirements have been completed and all non-conformance reports relative to such Work have been resolved except for the attached list of open issues.*

6.2.2 The Application for Payment may request payment for equipment and materials not yet incorporated into the Project; *provided* that: (i) Department, in its sole discretion, agrees that it is willing to allow payment for such equipment and materials; (ii) Department is satisfied that the equipment and materials are suitably stored on the Project Right-of-Way or another acceptable location; (iii) the equipment and materials are protected by suitable insurance; and (iv) upon payment, Department will receive the equipment and materials free and clear of all liens and encumbrances.

6.2.3 The Application for Payment shall constitute Design-Builder's representation that the Work has been performed consistent with the Contract Documents, has progressed to the point indicated in the Application for Payment, and that title to all Work will pass to Department free and clear of all claims, liens, encumbrances, and security interests upon the incorporation of the Work into the Project, or upon Design-Builder's receipt of payment, whichever occurs earlier.

6.2.4 Notwithstanding anything to the contrary in this Agreement, Department shall not be obligated to make any payment for Work to the extent that such payment, when added to all previous payments under this Agreement, exceeds the Maximum Cumulative Compensation Amount for the month covered by the Application for Payment. In its sole discretion, Department may make payments to Design-Builder in excess of the Maximum Cumulative Compensation Amount.

6.3 Payments Related to Tunnel Boring Machine

6.3.1 Design-Builder shall be entitled to payments with respect to the purchase and commissioning of the tunnel boring machine in accordance with the following schedule:

.1 Following the issuance of LNTP2:

(a) Design-Builder shall be entitled to request payment in an amount equal to twenty-five percent (25%) of the cost of the tunnel boring machine upon Department's receipt of documentation from Design-Builder demonstrating that Design-Builder has executed a purchase order or purchase agreement for the tunnel boring machine with the tunnel boring machine manufacturer.

(b) Design-Builder shall be entitled to request payment in an amount equal thirty-five percent (35%) of the cost of the tunnel boring machine on the date that is six (6) months following Department's receipt of documentation from Design-Builder demonstrating that Design-Builder has executed a purchase order or purchase agreement for the tunnel boring machine as described in Section 6.3.1(a); *provided* that Design-Builder has provided documentation or other materials (including photographic evidence) demonstrating (to the reasonable satisfaction of Department) that (i) development of the tunnel boring machine has advanced in accordance with the schedule for such work and (ii) the value of such work corresponds to the value of payments made by Department (including the thirty-five percent (35%) payment described herein).

(c) Design-Builder shall be entitled to request payment in an amount equal to twenty (20%) of the cost of the tunnel boring machine following the completion of factory acceptance testing (which such testing Department shall be entitled to witness) and the furnishing of related factory test reports to Department demonstrating that the tunnel boring machine meets the relevant specifications set forth in the Technical Requirements.

(d) Design-Builder shall be entitled to request payment in an amount equal to five percent (5%) of the cost of the tunnel boring machine following the delivery of the tunnel boring machine and all related equipment to the launch site.

.2 Following the issuance of LNTP3:

Design-Builder shall be entitled to request payment in an amount equal to five percent (5%) of the cost of the tunnel boring machine following assembly, set-up, and testing of the tunnel boring machine in the pre-launch position at the launch site, such testing to including:

(a) a demonstration that the tunnel boring machine is ready to perform the work for which it was designed;

(b) the complete erection of a precast concrete segment ring (excluding backfill grouting) using the methods to be employed by Design-Builder for all subsequent precast concrete segment erection work; and

(c) a demonstration that (x) the geotechnical instrumentation monitoring system and tunnel boring machine data monitoring system are fully functional and fully integrated with Department's monitoring system(s) and (y) Design-Builder has provided relevant Department personnel with training on the use of such monitoring system(s).

.3 Following the issuance of the NTP:

Design-Builder shall be entitled to request payment in an amount equal to ten percent (10%) of the cost of the tunnel boring machine following the completion of one thousand (1,000) lineal feet of excavation using the tunnel boring machine (measured from the starter shaft wall to the tunnel boring machine cutter head face) in accordance with the Technical Requirements and relevant design submittals.

6.4 Withholding of Payments

6.4.1 On or before the date established in the Agreement, Department shall pay Design-Builder all amounts properly due. If Department determines that Design-Builder is not entitled to all or part of an Application for Early Work Payment or Application for Payment, it will notify Design-Builder in writing at least seven (7) days prior to the date payment is due. The notice shall indicate the specific amounts Department intends to withhold, the reasons and contractual basis for the withholding, and the specific measures Design-Builder must take to rectify Department's concerns. Design-Builder and Department will attempt to resolve Department's concerns prior to the date payment is due. If the parties cannot resolve such concerns, Design-Builder may pursue its rights under the Contract Documents, including those under Article 10 hereof. For the avoidance of doubt, Department may withhold payment if Work (including but not limited to maintenance required pursuant to Section 12 of the Technical Requirements) does not conform to the requirements of the Contract Documents.

6.4.2 Notwithstanding anything to the contrary in the Contract Documents, Department shall pay Design-Builder all undisputed amounts in an Application for Early Work Payment or Application for Payment, as applicable, within the times required by the Agreement.

6.5 Right to Stop Work and Interest

6.5.1 If Department fails to make any undisputed payment properly due under Design-Builder's Application for Early Work Payment or Application for Payment, Design-Builder, in addition to all other remedies provided in the Contract Documents, may stop Work pursuant to Section 11.3 hereof. All payments due and unpaid shall bear interest at the rate set forth in the Agreement.

6.6 Design-Builder's Payment Obligations

6.6.1 Design-Builder will pay Design Consultants and Subcontractors, in accordance with its contractual obligations to such parties, all the amounts Design-Builder has received from Department on account of their work. Design-Builder will impose similar requirements on Design Consultants and Subcontractors to pay those parties with whom they have contracted. Design-Builder will indemnify and defend Department against any claims for payment and mechanic's liens as set forth in Section 7.2.1 hereof.

6.7 Substantial Completion

6.7.1 Design-Builder shall provide written notice to Department of the anticipated date of completion of all Substantial Completion Conditions at least fifteen (15) Business Days prior to such anticipated date, so as to allow Department to commence its review of those Substantial Completion Conditions capable of being reviewed at the time of such notice. The notice must include a list of all requirements that will be achieved to allow Department's issuance of the Substantial Completion Certificate.

6.7.2 No later than ten (10) Business Days prior to Design-Builder's determination that it has satisfied all Substantial Completion Conditions, Design-Builder shall meet and confer with Department to confirm that the list of requirements provided pursuant to Section 6.7.1 is in accordance with the General Conditions of Contract. Following the initial meeting, Design-Builder and Department will meet, confer and exchange information on a regular basis to allow for Department's orderly, timely inspection of the Project and determination of whether Design-Builder has satisfied all of the Substantial Completion Conditions.

6.7.3 Design-Builder shall provide written notice to Department once Design-Builder has determined that it has satisfied all of the Substantial Completion Conditions.

6.7.4 Within fifteen (15) Business Days of receiving Design-Builder's notice under Section 6.7.3:

.1 Department shall inspect the Project and conduct such other investigation and review as may be necessary to evaluate whether all Substantial Completion Conditions have been satisfied; and

.2 Department shall:

(a) if all the Substantial Completion Conditions have been satisfied, issue a written certificate confirming that Design-Builder has achieved Substantial Completion (the "**Substantial Completion Certificate**"); or

(b) if any Substantial Completion Condition has not been satisfied, notify Design-Builder in writing of the reasons why such Substantial Completion Condition has not been satisfied.

6.7.5 If any Substantial Completion Condition has not been satisfied, Design-Builder may resubmit a notice pursuant to Section 6.7.3 once it has determined that the relevant Substantial Completion Condition has been satisfied and Section 6.7.4 will apply.

6.7.6 The issuance of the Substantial Completion Certificate shall be conclusive evidence that the Substantial Completion Date has occurred, and of the date it occurred, for the purpose of ascertaining that Design-Builder is eligible for the No Excuses Incentive Payment in accordance with Section 5.3 of the Agreement.

6.7.7 Substantial Completion will have been achieved when (i) each of the following conditions (the “**Substantial Completion Conditions**”) has been satisfied (or Department, in its sole discretion, waives any such condition) and (ii) Department has delivered the Substantial Completion Certificate confirming Design-Builder’s satisfaction of such conditions:

.1 all lanes of traffic (including bridges, tunnels, ramps, interchanges, overpasses, underpasses, and other crossings) set forth in the Technical Requirements are in their final configuration and available for normal and safe use and operation, subject only to the Punch List items;

.2 all major safety features are installed and functional in accordance with the Technical Requirements, including, as required, shoulders, guardrails, striping and delineations, concrete traffic barriers, bridge railings, cable safety systems, metal beam guard fences, safety end treatments, terminal anchor sections and crash attenuators;

.3 all required illumination for normal and safe use and operation is installed and functional in accordance with the Technical Requirements;

.4 all required signs and signals for normal and safe use and operation are installed and functional in accordance with the Technical Requirements;

.5 the need for temporary traffic controls or for lane closures at any time has ceased (except for temporary lane closures and single lane closures, and as otherwise permitted in accordance with the Technical Requirements and as permitted by a Department-approved traffic management plan, solely in order to complete the Punch List); and

.6 the testing and commissioning of the tunnel and building systems has been completed and all such systems are functional in accordance with the Technical Requirements, all operations and maintenance manuals (including emergency response plans) have been reviewed and accepted by Department, and all operations personnel have completed the required training;

.7 the Certificates of Occupancy for all new and modified buildings have been issued by the Virginia Department of General Services, Division of Engineering & Buildings in accordance with the Construction and Professional Services Manual;

.8 all Work on the North Island and the South Island is complete such that Department personnel have full and unrestricted use of the facilities located on both islands, with only Punch List items remaining to be completed; and

.9 Design-Builder has otherwise completed the Work in accordance with the Contract Documents, including the Technical Requirements, such that the Project is in a physical condition that it can be used for normal and safe vehicular travel in all lanes and at all points of entry and exit.

6.8 Final Completion

6.8.1 Until the completion and acceptance of all Work, including all Punch List items, has been confirmed in accordance with the requirements of this Section 6.8, Design-Builder shall have charge and care thereof and shall take every precaution against damage to any part thereof by action of the elements or from any other cause. Design-Builder shall rebuild, repair, restore, and make good on damage to any portion of the Work occasioned by any of the foregoing causes before Final Completion and shall bear the expense thereof.

6.8.2 Design-Builder shall notify Department when Design-Builder believes it has completed all of the Work, including all Punch List items. Within five (5) days of Department's receipt of Design-Builder's notice, along with a certification from the QA Manager, that all of the Work has been completed (including all Punch List Items), Department and Design-Builder will jointly inspect the Work to verify that the Work has been completed in accordance with the requirements of the Contract Documents. If Department concludes that all or a portion of the Work has not been completed in accordance with the requirements of the Contract Documents, it will, within five (5) Business Days of completion of such joint inspection, so advise Design-Builder in writing (setting forth in reasonable detail those matters which Department has concluded have not been completed in accordance with the Contract Documents), whereupon the preceding process will continue until Department agrees that all of the Work has been completed and Department accepts all of the Work. Once Department has determined that all of the Work has been completed in accordance with the Contract Documents, Department will notify Design-Builder in writing of such determination and Department's acceptance of the Work.

6.8.3 Upon notification of completion and acceptance of all of the Work pursuant to Section 6.8.2, Design-Builder will provide Department with a Final Application for Payment. Department shall make final payment by the time required in the Agreement. At the time of submission of its Final Application for Payment, Design-Builder shall provide the following information:

.1 an affidavit that there are no claims, obligations or liens outstanding or unsatisfied for labor, services, material, equipment, taxes or other items performed, furnished or incurred for or in connection with the Work which will in any way affect Department's interests;

.2 a general release executed by Design-Builder waiving, upon receipt of final payment by Design-Builder, all claims, except those claims previously made in writing to

Department and remaining unsettled at the time of final payment, which claims shall be specifically listed in an attachment to the general release;

.3 consent of Design-Builder's surety to final payment;

.4 all operating manuals, warranties and other deliverables required by the Contract Documents, including the project records required by Section 11.1.9 of the Agreement;

.5 the As-Built Drawings have been submitted to Department in accordance with the Technical Requirements; and

.6 certificates of insurance confirming that required coverages will remain in effect consistent with the requirements of the Contract Documents.

6.8.4 Upon making final payment, Department waives all claims against Design-Builder except claims relating to: (i) Design-Builder's failure to satisfy its payment obligations, if such failure affects Department's interests; (ii) Design-Builder's failure to complete the Work consistent with the Contract Documents, including Non-Conforming Work appearing after final payment; and (iii) the terms of any special warranties and indemnifications required by the Contract Documents.

6.8.5 Department, in its sole discretion, may agree that all of the Work has been completed and accept all of the Work even if minor deliverables required by the Contract Documents remain outstanding. If so, Department may retain a sufficient amount, as determined in Department's sole discretion, from the final payment to ensure any such outstanding deliverables are timely delivered to Department. Upon (i) Design-Builder's delivery of each and every such outstanding deliverable to Department and (ii) Department's determination that each and every such deliverable is complete in accordance with the terms of the Contract Documents, Department will pay to Design-Builder the retained balance of the final payment, as may be offset by any amounts owed by Design-Builder to Department.

Article 7 **Indemnification**

7.1 Patent and Copyright Infringement

7.1.1 Design-Builder shall defend any action or proceeding brought against any State Indemnitee based on any claim that the Work, or any part thereof, or the operation or use of the Work or any part thereof, constitutes infringement of any United States patent or copyright, now or hereafter issued. The State Indemnitee shall give prompt written notice to Design-Builder of any such action or proceeding and will reasonably provide authority, information and assistance in the defense of same. Design-Builder shall indemnify and hold harmless State Indemnitees from and against all damages and costs, including but not limited to attorneys' fees and expenses, awarded against State Indemnitees or Design-Builder in any such action or proceeding. Design-Builder agrees to keep the State Indemnitees informed of all developments in the defense of such actions.

7.1.2 If a State Indemnitee is enjoined from the operation or use of the Work, or any part thereof, as the result of any patent or copyright suit, claim, or proceeding, Design-Builder shall at its sole expense take reasonable steps to procure the right to operate or use the Work. If Design-Builder cannot so procure such right within a reasonable time, Design-Builder shall promptly, at Design-Builder's option and at Design-Builder's expense (i) modify the Work so as to avoid infringement of any such patent or copyright or (ii) replace said Work with Work that does not infringe or violate any such patent or copyright.

7.1.3 Sections 7.1.1 and 7.1.2 above shall not be applicable to any suit, claim or proceeding based on infringement or violation of a patent or copyright (i) relating solely to a particular process or product of a particular manufacturer specified by Department and not offered or recommended by Design-Builder to Department or (ii) arising from modifications to the Work by Department after acceptance of the Work by Department.

7.2 Payment Claim Indemnification

7.2.1 Provided that Department is not in breach of its contractual obligation to make payments to Design-Builder for the Work (or if Department has breached such contractual obligation, such breach has been abated), Design-Builder shall indemnify, defend and hold harmless State Indemnitees from any claims or mechanic's liens brought against any State Indemnitee or against the Project as a result of the failure of Design-Builder, Design Consultants, Subcontractors, anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable, to pay for any services, materials, labor, equipment, taxes or other items or obligations furnished or incurred for or in connection with the Work. Within three (3) days of receiving written notice from a State Indemnitee that such a claim or mechanic's lien has been made and/or filed, Design-Builder shall commence to take the steps necessary to resolve and/or discharge said claim or lien, including, if necessary, the furnishing of a mechanic's lien bond. If Design-Builder fails to do so, the State Indemnitee will have the right to resolve and/or discharge the claim or lien and hold Design-Builder liable for costs and expenses incurred, including attorneys' fees.

7.3 Design-Builder's General Indemnification

7.3.1 In addition to Design-Builder's indemnity obligations as set forth elsewhere in the Agreement, Design-Builder, to the fullest extent permitted by law, shall indemnify, hold harmless and defend State Indemnitees from and against claims, losses, damages, liabilities, including attorneys' fees and expenses, for:

.1 bodily injury, sickness or death, and property damage or destruction (other than to the Work itself) to the extent resulting from the negligent acts or omissions, recklessness, illegal acts, or willful misconduct of Design-Builder, Design Consultants, Subcontractors, anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable;

.2 any violation of Sections 2.5, 2.6, or 2.8 of the General Conditions of Contract by Design-Builder, Design Consultants, Subcontractors, anyone employed directly or indirectly by any of them, or anyone for whose acts any of them may be liable; and

.3 any actual or alleged inverse condemnation, trespass, nuisance or similar taking of or harm to real property arising from (i) the failure of Design-Builder or any Subcontractor to comply with Good Industry Practice, the requirements of the Contract Documents, or Governmental Approvals with respect to the control and mitigation of construction activities and construction impacts, (ii) the negligent acts or omissions, recklessness, illegal acts, or willful misconduct of Design-Builder or any Subcontractor, or (iii) the actual physical entry onto or encroachment upon another's property by Design-Builder or any Subcontractor.

7.3.2 If anyone employed directly or indirectly by Design-Builder, Design Consultants or Subcontractors, or anyone for whose acts any of them may be liable, has a claim against a State Indemnitee, Design-Builder's indemnity obligation set forth in Section 7.3.1 above shall not be limited by any limitation on the amount of damages, compensation or benefits payable by or for Design-Builder, Design Consultants, Subcontractors, or other entity under any employee benefit acts, including workers' compensation or disability acts.

7.4 Defense and Indemnification Procedures

7.4.1 If Department receives notice of or otherwise has actual knowledge of a claim which it believes is within the scope of Design-Builder's indemnification under the Contract Documents, it shall by writing as soon as practicable: (i) inform Design-Builder of such claim; (ii) send to Design-Builder a copy of all written materials Department has received asserting such claim and (iii) notify Design-Builder that either: (a) the defense of such claim is being tendered to Design-Builder or (b) Department has elected to conduct its own defense for a reason set forth below.

7.4.2 If the insurer under any applicable insurance policy accepts tender of defense, Design-Builder and Department shall cooperate in the defense as required by the insurance policy. If no defense is provided by insurers under potentially applicable insurance policies, then the following provisions shall apply.

7.4.3 If the defense is tendered to Design-Builder, it shall within forty-five (45) days of said tender deliver to Department a written notice stating that Design-Builder: (i) accepts the tender of defense and confirms that the claim is subject to full indemnification hereunder without any "reservation of rights" to deny or disclaim full indemnification thereafter; (ii) accepts the tender of defense but with a "reservation of rights" in whole or in part; or (iii) rejects the tender of defense if it reasonably determines it is not required to indemnify against the claim under the Contract Documents. If such notice is not delivered within such forty-five (45)-day period, the tender of defense shall be deemed rejected.

7.4.4 If Design-Builder accepts the tender of defense, Design-Builder shall have the right to select legal counsel for the State Indemnitees, subject to reasonable approval of the State Attorney General, and Design-Builder shall otherwise control the defense of such claim, including settlement, and bear the fees and costs of defending and settling such claim. During

such defense: (i) Design-Builder shall at Design-Builder's expense, fully and regularly inform Department of the progress of the defense and of any settlement discussions; and (ii) Department shall, at Design-Builder's expense for all of Department's reasonable out-of-pocket third-party expenses, fully cooperate in said defense, provide to Design-Builder all materials and access to personnel it requests as necessary for defense, preparation and trial and which or who are under the control of or reasonably available to Department and maintain the confidentiality of all communications between it and Design-Builder concerning such defense to the extent allowed by law.

7.4.5 Department shall be entitled to select its own legal counsel and otherwise control the defense of such claim if: (i) the defense is tendered to Design-Builder and it refuses the tender of defense, or fails to accept such tender within forty-five (45) days, or reserves any right to deny or disclaim such full indemnification thereafter; or (ii) Department, at the time it gives notice of the claim or at any time thereafter, reasonably determines that: (a) a conflict exists between it and Design-Builder which prevents or potentially prevents Design-Builder from presenting a full and effective defense; (b) Design-Builder is otherwise not providing an effective defense in connection with the claim and Design-Builder lacks the financial capability to satisfy potential liability or to provide an effective defense; or (c) Design-Builder's tendered defense is contrary to Legal Requirements. Department may assume its own defense pursuant to the above by delivering to Design-Builder written notice of such election and the reasons therefore.

7.4.6 If Department is entitled and elects to conduct its own defense pursuant hereto, all reasonable costs and expenses it incurs in investigating and defending and claim for which it is entitled to indemnification hereunder (and any settlements or judgments resulting therefrom) shall be reimbursed by Design-Builder after completion of the proceeding.

7.4.7 If Department is entitled to and elects to conduct its own defense, then it shall have the right to settle or compromise the claim with Design-Builder's prior written consent, which shall not be unreasonably withheld or delayed, or with approval of the court, and with the full benefit of Design-Builder's indemnity. Notwithstanding the foregoing, if Department elects to conduct its own defense and it is later determined that no indemnification obligation existed as to the particular claim, Department shall pay its own costs and expenses relating thereto. In addition, if Department elects to conduct its own defense because it perceives a conflict of interest, Department shall pay its own costs and expenses relating thereto.

Article 8 **Time**

8.1 Obligation to Achieve the Contract Times

8.1.1 Design-Builder agrees that it will commence performance of the Work and achieve the Contract Times in accordance with Article 5 of the Agreement.

8.2 Delays to the Work

8.2.1 Extensions to Contract Times. If Design-Builder is delayed in the performance of the Work due to any of the events or circumstances identified in this Section 8.2.1 (each such event,

a “**Delay Event**”), Design-Builder may submit a request to Department that the Contract Times for performance be reasonably extended by a Work Order:

- .1 a Force Majeure Event;
- .2 any delay in obtaining any Governmental Approvals (other than any Governmental Approval set forth in **Exhibit 19**);
- .3 any failure by the U.S. Navy to respond to proposed plans or other construction submittals for which a response from the U.S. Navy is required under the Contract Documents as an express prerequisite to Design-Builder’s right to proceed or act within the time period set forth in Section 4(E) of Part A of **Exhibit 8**; or
- .4 any Compensation Event (as defined in Section 9.2.1) that delays Design-Builder’s performance of the Work;

provided that the Delay Events do not include any delay that: (i) could have been reasonably avoided by Design-Builder or any Subcontractor; (ii) is caused by the negligent acts or omissions, recklessness, illegal acts, or willful misconduct of Design-Builder or any Subcontractor; (iii) is caused by any act or omission by Design-Builder in breach of the provisions of the Agreement; (iv) arises by reason of lack or insufficiency of funds or failure to make payment of monies or provide required security on the part of Design-Builder or any Subcontractor; (v) arises by reason of any strike, labor dispute or other labor protest involving any Person retained, employed or hired by Design-Builder or any Subcontractor or its representatives to supply materials or services for or in connection with the Project or any strike, labor dispute or labor protest caused by or attributable to any act (including any pricing or other price or method of operation) or omission of Design-Builder or a Subcontractor; or (vi) except to the extent the same constitutes a Force Majeure Event, arises by reason of any weather condition (including any flooding), whether or not such weather conditions or the severity of such weather conditions are not or have not ordinarily or customarily been encountered or experienced.

8.2.2 As a condition precedent to Design-Builder receiving an extension of the Contract Times, Design-Builder shall demonstrate that: (i) notice has been given by Design-Builder as provided in the General Conditions of Contract; (ii) the delay impacts the critical path (as reflected on the most recent monthly Baseline Schedule update) and is outside the reasonable control of Design-Builder; (iii) Design-Builder’s performance would not have been concurrently delayed or interrupted by any event other than the Delay Event giving rise to Design-Builder’s request for an extension of the Contract Times; (iv) Design-Builder, in view of all the circumstances, has exercised reasonable efforts to avoid the delay and did not cause the delay; and (v) Design-Builder has complied with the requirements of Section 8.3 below.

8.2.3 Notwithstanding the right of Design-Builder to receive an extension of the Contract Times pursuant to this Section 8.2, Design-Builder agrees that if it encounters a Delay Event, it will, if directed by Department, develop and implement a recovery schedule and plan to improve progress and take such measures to overcome such delay.

8.3 Schedule Impact Analysis for Proposed Time Extensions

8.3.1 If Design-Builder claims that any event, including but not limited to a change in the Work, justifies an extension to the Contract Times, Design-Builder shall submit to Department a written Schedule Impact Analysis. Upon approval by Department, the event shall be included in the next Baseline Schedule update.

8.3.2 Activity delays shall not automatically mean that an extension of the Contract Times is warranted or due Design-Builder. Design-Builder recognizes that certain events will not affect existing critical activities or cause non-critical activities to become critical, and that such events may result in only absorbing a part of the available total float that may exist within an activity chain of the network, thereby not causing any effect on the Contract Time.

8.3.3 Float is not for the exclusive use or benefit of either Department or Design-Builder, but rather shall be used for the benefit of the overall Project. Activity splitting or float suppression techniques will not be permitted. Extension of the Contract Times will be granted only to the extent the equitable time adjustments to the activity or activities affected by the event exceeds the total float of a critical activity or path and extends the Contract Times.

8.3.4 Two (2) copies of each Schedule Impact Analysis shall be submitted to Department in accordance with the following, as applicable, along with a written proposal for any requested time extension:

- .1** within twenty-eight (28) days after receipt of a written Work Order;
- .2** within twenty-eight (28) days from the beginning of any other event claimed to give rise to a delay; or
- .3** within the time period required for the filing of a written notice of claim pursuant to Article 10 of the General Conditions of Contract.

8.3.5 In cases where Design-Builder does not submit a Schedule Impact Analysis within the time requirements stated above, it shall be considered a waiver of any request for an extension of the Contract Times.

8.3.6 Approval or rejection of each Schedule Impact Analysis by Department shall be made within ten (10) days after receipt of each Schedule Impact Analysis, unless subsequent meetings and negotiations are necessary. Upon approval, a copy of the Schedule Impact Analysis signed by Department shall be returned to Design-Builder and incorporated into the next Baseline Schedule update. If Department does not approve or reject an SIA within such ten (10)-day period, such SIA shall be deemed rejected.

8.3.7 The SIA related to a Work Order shall be incorporated into and attached to the applicable Work Order.

Article 9
Changes to the Contract Price and Time

9.1 Work Orders

9.1.1 A “**Work Order**” is a written instrument on Department’s Form C-10, issued after the Agreement Date signed by Department and Design-Builder, stating their agreement upon all of the following:

- .1 the scope of the change in the Work;
- .2 the amount of the adjustment to the Contract Price (including the relevant adjustments, if any, to the Maximum Cumulative Compensation Amount); and
- .3 the extent of the adjustment to the Contract Times.

9.1.2 All changes in the Work authorized by applicable Work Order shall be performed under the applicable conditions of the Contract Documents. Department and Design-Builder shall negotiate in good faith and as expeditiously as possible the appropriate adjustments for such changes.

9.1.3 If Department requests a proposal for a change in the Work from Design-Builder and subsequently elects not to proceed with the change, a Work Order shall be issued to reimburse Design-Builder for reasonable costs incurred for estimating services, design services and services involved in the preparation of proposed revisions to the Contract Documents.

9.2 Adjustment of the Contract Price.

9.2.1 If Design-Builder’s performance of the Work is impacted due to any of the events or circumstances identified in this Section 9.2.1 (each such event, a “**Compensation Event**”), Design-Builder may submit a request for a Work Order for any appropriate adjustment of the Contract Price:

- .1 any Department-Caused Delay;
- .2 any failure by Department to issue the NTP by the NTP Delay Date, *provided* that Design-Builder’s sole remedy for any such failure shall be as set forth in Section 5.1.3 of the Agreement;
- .3 any changes in Legal Requirements enacted after the Setting Date, but excluding changes in tax law as stated in Section 2.5.2 of the General Conditions of Contract;
- .4 any Differing Roadway and Bridge Improvements Site Condition; *provided* that Design-Builder’s sole remedy with respect to any Differing Roadway and Bridge Improvements Site Conditions shall be as set forth in Sections 2.2 and 4.3.1 of the General Conditions of Contract;

- .5** any Differing Tunnel Improvements Site Condition;
- .6** any material damage or interruption to, or interference with, the Work caused by any capital project carried out by any Governmental Unit or its contractors on or in the vicinity of the Project Right-of-Way;
- .7** any express, material amendment or variation to the terms and conditions of any Governmental Approval set forth in **Exhibit 19** after the Setting Date not previously understood (and that could not reasonably have been understood) by Design-Builder, as compared to those versions of such Governmental Approval provided to Design-Builder (including in draft form) as part of the Reference Information prior to the Setting Date, except to the extent such amendment or variation is caused by a difference between the RFP Concept Plans and Design-Builder's final design for the Project;
- .8** the discovery of any Unknown Pre-Existing Hazardous Materials or Third-Party Hazardous Materials, the presence of which constitutes a Hazardous Environmental Condition, as further described in Section 4.1.2.1;
- .9** any Third-Party Claim against Design-Builder for personal injury, damages or harm to property or business due to any Pre-Existing Hazardous Materials or Third-Party Hazardous Materials, the presence of which constitutes a Hazardous Environmental Condition, as further described in Section 4.1.2.2;
- .10** discovery within or immediately adjacent to the Project Right-of-Way of archeological, paleontological or cultural resources (including historic properties), excluding any such resources known to Design-Builder prior to the end of the Scope Validation Period or that would have become known to Design-Builder by undertaking reasonable investigation, subject to the Pre-Bid Site Access Limitations, during the Scope Validation Period;
- .11** in connection with a delay attributable to (i) a utility owner refusing to enter or delay in entering into a two-party agreement on terms customary for utility providers affected by projects of a similar size and scope to that of the Project or (ii) a utility owner failing to perform its obligations under a two-party agreement (as described in the Technical Requirements) in accordance with the terms of such agreement, where such delay (or delays resulting from such refusals or failures by multiple utility owners) causes one or more critical path activities to be adversely impacted for a period of one hundred eighty (180) days in the aggregate; *provided* that Design-Builder shall have continued to satisfy the Conditions to Assistance with such utility owner for the duration of such refusal or failure to cooperate by the utility owner; *provided further* that this Section 9.2.1.11 shall not apply to any delays relating to the coordination with utility owner(s) or any utility relocations or adjustments required in order to provide electrical power to the tunnel boring machine; or
- .12** the issuance by a court having jurisdiction over the Project of any injunction or other order enjoining or estopping Design-Builder from the performance of its rights or obligations pursuant to the Agreement, in any case for more than forty-five (45) days in the

aggregate, *provided* that each of the Compensation Events does not arise by reason of: (i) the negligent acts or omissions, recklessness, illegal acts, or willful misconduct of Design-Builder or a Subcontractor or (ii) any act or omission by Design-Builder in breach of the provisions of the Agreement.

9.3 Contract Change Directive

9.3.1 A **Contract Change Directive** (CCD) is a written order prepared and signed by Department, directing a change in the Work prior to agreement between Department and Design-Builder on any corresponding adjustments to the Contract Price and/or the Contract Times. Upon Design-Builder's receipt of a Contract Change Directive from Department, Design-Builder shall promptly proceed with performance of the Work as modified by such Contract Change Directive.

9.3.2 Department and Design-Builder shall negotiate in good faith and as expeditiously as possible the appropriate adjustments for any Contract Change Directive. Upon reaching an agreement, the parties shall prepare and execute an appropriate Work Order reflecting the terms of the agreement.

9.3.3 Department may issue a CCD by unilateral Work Order using Department's Form C-10, subject further to the terms of Section 9.5.1.3.

9.4 Minor Changes in the Work

9.4.1 Minor changes in the Work are changes that do not involve an adjustment in the Contract Price and/or Contract Times and do not materially and adversely affect the Work, including the design, quality, performance and workmanship required by the Contract Documents. Design-Builder may make minor changes in the Work consistent with the intent of the Contract Documents; *provided, however*, that Design-Builder shall promptly inform Department and the QAM, in writing, of any such changes and record such changes on the records maintained by Design-Builder.

9.4.2 All approved deviations from the Contract Documents shall be documented using Department's Change Order Form C-10. With respect to any deviation that does not involve an adjustment in the Contract Price or Contract Times or does not otherwise affect quantities or cost items, the Change Order Form C-10 relating to such deviation shall note that no such adjustment is being made as a result of the approval of such deviation. Design-Builder shall provide a report regarding proposed deviations requiring the completion of Change Order Form C-10 as part of the monthly progress meetings.

9.5 Contract Price Adjustments

9.5.1 The increase or decrease in the Contract Price resulting from a change in the Work shall be determined by one or more of the following methods to be determined by Department:

.1 unit prices set forth in the Agreement or as subsequently agreed to between the parties;

.2 a mutually accepted, lump sum, properly itemized and supported by sufficient substantiating data to permit evaluation by Department;

.3 costs, fees and any other markups set forth in accordance with Section 109.05 of the Division 1 Amendments; or

.4 if an increase or decrease cannot be agreed to as set forth in Sections 9.5.1.1 through 9.5.1.3 above and Department issues a Contract Change Directive and a corresponding unilateral Work Order, the cost of the change of the Work shall be determined by the reasonable expense and savings in the performance of the Work resulting from the change, including a reasonable overhead and profit, as may be set forth in the Agreement. If the net result of both additions and deletions to the Work is an increase in the Contract Price, overhead and profit shall be calculated on the basis of the net increase to the Contract Price. If the net result of both additions and deletions to the Work is a decrease in the Contract Price, there shall be no overhead or profit adjustment to the Contract Price. Design-Builder shall maintain a documented, itemized accounting evidencing the expenses and savings associated with such changes.

9.5.2 If unit prices are set forth in the Contract Documents or are subsequently agreed to by the parties, but application of such unit prices will cause substantial inequity to Department or Design-Builder because of differences in the character or quantity of such unit items as originally contemplated, such unit prices shall be equitably adjusted. Design-Builder shall bear the burden of proving that there is a substantial inequity in the unit rates.

9.6 Emergencies

9.6.1 In any emergency affecting the safety of Persons and/or property, Design-Builder shall act, at its discretion, to prevent threatened damage, injury or loss. Any change in the Contract Price and/or Contract Times on account of emergency work shall be determined as provided in this Article 9.

9.7 I-564 Direct Connections

9.7.1 Notwithstanding anything to the contrary in this Article 9 and subject to the terms of this Section 9.7, Design-Builder acknowledges and agrees that (i) Department shall have the right at any time to direct Design-Builder to undertake the design and construction of the I-564 Direct Connections and (ii) Design-Builder shall proceed with the design and construction of the I-564 Direct Connections if so directed by Department.

9.7.2 If, within one hundred eighty (180) days following the Agreement Date, Department directs Design-Builder to undertake the design and construction of the I-564 Direct Connections, the increase to the Contract Price with respect to such work (as reflected in a Work Order) shall be equal to one hundred twenty-one million three hundred twenty-three thousand seven hundred eighty-six dollars and forty-six cents (\$121,323,786.46).

9.7.3 If Department directs Design-Builder to undertake the design and construction of the I-564 Direct Connections pursuant to Section 9.7.1, Design-Builder shall have the period that is

the longer of (i) the portion of the Scope Validation Period remaining, if any, as of the date on which Department issues a Work Order with respect to the I-564 Direct Connections and (ii) ninety (90) days in order to identify Roadway and Bridge Improvements Scope Issues with respect to the I-564 Direct Connections in accordance with the procedures set forth in Section 2.2 of the General Conditions of Contract.

9.7.4 If Department directs Design-Builder to undertake the design and construction of the I-564 Direct Connections more than one hundred eighty (180) days following the Agreement Date, the increase to the Contract Price with respect to such work (as reflected in a Work Order) shall be determined in accordance with this Article 9.

9.8 South Island Trestle Bridge Replacement Work

9.8.1 Notwithstanding anything to the contrary in this Article 9 and subject to the terms of this Section 9.8, Design-Builder acknowledges and agrees that (i) Department shall have the right at any time within one hundred eighty (180) days following the Agreement Date to direct Design-Builder to remove the South Island Trestle Bridge Replacement Work from the scope of the Project and (ii) Design-Builder shall not proceed with the South Island Trestle Bridge Replacement Work if so directed by Department.

9.8.2 If Department directs Design-Builder to remove the South Island Trestle Bridge Replacement Work from the scope of the Project pursuant to Section 9.8.1, then:

.1 the Contract Price shall be decreased by an amount equal to (i) ninety-five million four hundred twenty-seven thousand nine hundred seventy-six dollars and five cents (\$95,427,976.05) plus (ii) the reasonable additional cost savings, if any, in the performance of the Work resulting from the removal of the South Island Trestle Bridge Replacement Work from the scope of the Project as Department and Design-Builder may reasonably agree; and

.2 the Contract Times shall be reduced as necessary to reflect the impacts to the critical path resulting from the removal of the South Island Trestle Bridge Replacement Work from the scope of the Project.

9.8.3 The decrease to the Contract Price and reductions to the Contract Times described in Section 9.8.2 shall be implemented via a Work Order.

9.9 Bridge Repair Work Option

9.9.1 Department and Design-Builder acknowledge and agree that the bridge repair work described in Sections 21.1.B.4 through 21.1.B.16 (*Scope*) and Section 21.3.5 (*Bridge Repair*) of the Technical Requirements (the “**Bridge Repair Work**”) is not included as part of the Work.

9.9.2 Notwithstanding anything to the contrary in this Article 9 and subject to the terms of this Section 9.9, Design-Builder further acknowledges and agrees that (i) Department shall have the right at any time to direct Design-Builder to undertake the Bridge Repair Work and (ii) Design-Builder shall proceed with the Bridge Repair Work if so directed by Department.

9.9.3 If, prior to the issuance of NTP, Department directs Design-Builder to undertake the Bridge Repair Work pursuant to Section 9.9.2, then:

.1 the increase to the Contract Price (as reflected in a Work Order) with respect to such work shall be calculated using (i) the total quantities authorized by the Department and actually completed by Design-Builder for each element of the Bridge Repair Work set forth in **Exhibit 18** and (ii) the corresponding unit price set forth in **Exhibit 18** for each such element; and

.2 there shall be no adjustment to the Contract Times.

9.9.4 If Department directs Design-Builder to undertake the Bridge Repair Work pursuant to Section 9.9.2, Design-Builder shall have the period that is the longer of (i) the portion of the Scope Validation Period remaining, if any, as of the date on which Department issues a Work Order with respect to the Bridge Repair Work and (ii) ninety (90) days in order to identify Roadway and Bridge Improvements Scope Issues with respect to the Bridge Repair Work in accordance with the procedures set forth in Section 2.2 of the General Conditions of Contract.

Article 10 **Contract Adjustments and Disputes**

10.1 Requests for Contract Adjustments and Relief

10.1.1 If Design-Builder believes that it is entitled to an adjustment to the Contract Price or Contract Times or other relief for any occurrence arising out of or related to the Work or Project, including the acts or omissions of Department, it shall submit a written request to Department stating the basis for such Contract Price or Contract Time adjustment or relief. Such request shall be submitted (i) prior to Design-Builder incurring any cost or expense, or performing any work on which the request is based and (ii) in accordance with any specific requirements set forth in applicable sections of the General Conditions of Contract or, absent any specific requirement, then within a reasonable time, not to exceed twenty-one (21) days, after the time of the occurrence giving rise to the request for Contract Price or Contract Time adjustment or relief or after Design-Builder reasonably should have recognized the occurrence giving rise to the request for Contract Price or Contract Time adjustment or relief, whichever is later. Such request shall include sufficient information to advise Department of the facts and circumstances giving rise to the request for Contract Price or Contract Time adjustment or relief, the specific contractual adjustment or relief requested and the basis for Design-Builder's entitlement to the adjustment or relief.

10.2 Dispute Avoidance and Resolution; Litigation

10.2.1 The parties are fully committed to working with each other throughout the Project and agree to communicate regularly with each other at all times so as to avoid or minimize disputes and disagreements. If disputes or disagreements do arise, Design-Builder and Department each commit to resolving such disputes or disagreements in an amicable, professional and expeditious manner so as to avoid unnecessary losses, delays and disruptions to the Work.

10.2.2 Design-Builder and Department will first attempt to resolve all disputes or disagreements at the field level, in accordance with the protocols set forth in Section 2.1 (*Collaboration*) of the Technical Requirements, through best efforts and good faith negotiations between Design-Builder's Representative and Department's Representative. If the dispute or disagreement cannot be resolved through Design-Builder's Representative and Department's Representative, Design-Builder's Senior Representative and Department's Senior Representative, upon the request of either party, shall meet as soon as possible, but in no case later than forty-five (45) days after such a request is made, to attempt to resolve such dispute or disagreement. Prior to any meetings between the Senior Representatives, the parties will exchange relevant information that will assist the parties in resolving the dispute or disagreement. If the Senior Representatives determine that the dispute or disagreement cannot be resolved to the mutual satisfaction of both parties within such forty-five (45) -day period, despite their best efforts, then the following provisions of this Section 10.2.2 shall apply. With respect to any dispute or disagreement relating to the design and construction of the Tunnel Improvements, Design-Builder may pursue the processes set forth in **Exhibit 17**. With respect to any dispute or disagreement that is not related to the Tunnel Improvements, either party shall have the right to submit the dispute or disagreement to the Steering Committee for resolution. The Steering Committee will meet within ten (10) days of written notification by either party of any unresolved dispute. The Steering Committee will have thirty (30) days following such meeting to resolve the dispute. Only in the absence of complete resolution by the Steering Committee within such thirty (30) -day period, may the party seeking relief file a legal action pursuant to, and subject to the limitations of, Section 10.2.3 and Section 10.2.4 below.

10.2.3 With respect to any dispute that remains unresolved following the Steering Committee's consideration of such dispute pursuant to Section 10.2.2, Design-Builder shall be entitled to file legal action prior to the Final Completion Date if and only to the extent the value of such dispute, or the aggregate value of all unresolved disputes, is at least fifty million dollars (\$50,000,000). With respect to any dispute (i) that remains unresolved following, as applicable, the Steering Committee's consideration of such dispute pursuant to Section 10.2.2 or Section 2.8(g)(ii) of **Exhibit 17** and (ii) for which legal action has not been filed prior to the Final Completion Date because the value of such dispute, or the aggregate value of all unresolved disputes, is less than fifty million dollars (\$50,000,000), the provisions of Section 10.2.4 shall apply.

10.2.4 Upon the occurrence of the Final Completion Date, Design-Builder may submit any unresolved dispute to the Steering Committee for resolution (including the re-submission of any dispute considered previously by the Steering Committee that remains unresolved as of the Final Completion Date); *provided* that Design-Builder submitted a written request for relief to Department corresponding to the condition or other facts upon which the dispute is based pursuant to and within the timeframe(s) required by Section 10.1.1 of the General Conditions of Contract. The Steering Committee will meet within ten (10) days of written notification by Design-Builder of any unresolved dispute. The Steering Committee will have thirty (30) days following such meeting to resolve the dispute. Only in the absence of complete resolution by the Steering Committee within such thirty (30) -day period, may Design-Builder file a legal action pursuant to Section 10.2.5 below. Design-Builder may seek relief pursuant to this Section 10.2.4 by filing a legal action no later than one (1) year following the Final Completion Date.

10.2.5 All litigation between the parties arising out of or pertaining to the Agreement or its breach shall be filed, heard, and decided in the Circuit Court for the City of Richmond, Virginia, Division I, which will have exclusive jurisdiction and venue. Satisfaction of the procedures set forth in this Section 10.2 shall be a condition precedent to instituting a legal action in court; *provided* that if Department determines, in its sole discretion, that a dispute involves an issue that poses an immediate and serious threat to the public health, safety, and welfare, Department shall be entitled to take whatever steps it deems appropriate and to initiate litigation of the matter in court without first submitting the dispute to the dispute resolution procures set forth in this Section 10.2.

10.2.6 As permitted by Section 33.2-1814 of the Code of Virginia, the parties agree that any requirement that the State Corporation Commission issue a declaratory judgment regarding a material default (as defined in Section 33.2-1813 of the Code of Virginia) pursuant to such Section 33.2-1814, as a prerequisite to exercising any remedy set forth in the Agreement or such Section 33.2-1814, will not apply to the Agreement.

10.2.7 Pending final resolution of any dispute (except a dispute regarding the cause for terminating the Agreement), the parties will continue to fulfill their respective obligations under the Agreement.

10.2.8 Neither party will seek or accept an award of attorneys' fees or costs incurred in connection with the resolution of a dispute pursuant to the provisions of this Section 10.2.

10.2.9 Within thirty (30) days of the Agreement Date, each party will identify the individuals who will serve as its representatives on the Steering Committee and provide such information to the other party. Either party may replace any of its representatives on the Steering Committee at any time during the term of the Agreement by giving notice to the other party in accordance with Section 12.8.1 of the General Conditions of Contract.

10.2.10 THE PARTIES HEREBY KNOWINGLY, IRREVOCABLY, VOLUNTARILY AND INTENTIONALLY WAIVE ANY RIGHTS THAT ANY MAY HAVE TO A TRIAL BY JURY WITH RESPECT TO ANY ACTION, PROCEEDING, COUNTERCLAIM OR DEFENSE BASED ON THE AGREEMENT, OR ARISING OUT OF, UNDER OR IN ANY CONNECTION WITH THE AGREEMENT, OR WITH RESPECT TO ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER ORAL OR WRITTEN) OR ACTIONS OF ANY PARTY HERETO RELATING TO THE AGREEMENT. THIS PROVISION IS A MATERIAL INDUCEMENT FOR ALL PARTIES ENTERING INTO THE AGREEMENT. THIS PROVISION APPLIES ONLY TO SUITS BETWEEN THE PARTIES ARISING OUT OF OR RELATED TO THE AGREEMENT AND DOES NOT APPLY TO THIRD-PARTY CLAIMS OR SUITS. Each of the parties (i) certifies that no representative, agent, attorney or any other Person has represented, expressly or otherwise, that such other Person would not, in the event of any suit, action or proceedings relating to the Agreement, seek to enforce the foregoing waiver and (ii) acknowledges that it has been induced to enter into the Agreement by, among other things, the mutual waivers and certifications in this Section 10.2.10.

10.3 Duty to Continue Performance

10.3.1 Unless provided to the contrary in the Contract Documents, Design-Builder shall continue to perform the Work and Department shall continue to satisfy its payment obligations to Design-Builder, pending the final resolution of any dispute or disagreement between Design-Builder and Department.

10.4 CONSEQUENTIAL DAMAGES

10.4.1 NOTWITHSTANDING ANYTHING HEREIN TO THE CONTRARY (EXCEPT AS SET FORTH IN SECTION 10.4.2 BELOW), NEITHER DESIGN-BUILDER NOR DEPARTMENT SHALL BE LIABLE TO THE OTHER FOR ANY LOSS OF USE, PROFITS, BUSINESS REPUTATION OR FINANCING (WHETHER DIRECT OR INDIRECT), OR ANY CONSEQUENTIAL LOSSES OR DAMAGES, WHETHER ARISING IN CONTRACT, WARRANTY, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE.

10.4.2 The consequential damages limitation set forth in Section 10.4.1 above shall not apply to or limit any right of recovery Department may have with respect to the following:

- .1** any losses or obligations to the extent that:
 - (a) the amount thereof is paid from the proceeds of insurance policies required to be maintained by Design-Builder or any Subcontractor under this Agreement; or
 - (b) the same would have been recovered through insurance and (i) Design-Builder failed to maintain such insurance if required to be maintained by Design-Builder under this Agreement or (ii) Design-Builder failed to comply with its obligations under, and the limitations of, such insurance policies or did not diligently pursue a relevant insurance claim;
- .2** any third-party losses that arise from any indemnity obligations of Design-Builder under the Contract Documents;
- .3** any losses that arise from Design-Builder's gross negligence, willful misconduct, or fraud;
- .4** fines and penalties that arise out of any failure by Design-Builder to comply with any Legal Requirements, including workers' compensation, employment, or health and safety laws or regulations; or
- .5** any reasonable costs incurred by Department in the enforcement of any of the Performance Security, which is settled or finally resolved in favor of Department.

Article 11
Stop Work and Termination for Cause

11.1 Department's Right to Stop Work

11.1.1 Department may, without cause and for its convenience, order Design-Builder in writing to stop and suspend the Work. Such suspension(s) shall not exceed sixty (60) consecutive days or more than ninety (90) days in the aggregate during the duration of the Project.

11.1.2 Design-Builder is entitled to seek an adjustment of the Contract Price and/or Contract Times if its cost or time to perform the Work has been adversely impacted by any suspension or stoppage of work by Department, by requesting a Work Order.

11.1.3 In case of suspension of work, Department shall issue instructions and directions to Design-Builder as to the implementation of the suspension, which may include directing Design-Builder to develop a maintenance and transition plan. Unless specifically directed otherwise by Department, Design-Builder shall, during the suspension period, continue to have full responsibility for the Project, including but not limited to its obligations to take such precautions as may be necessary to prevent damage to the Work, comply with Governmental Approvals, and ensure public safety. Such obligations include, but are not limited to, erosion control and drainage and erection of any necessary temporary structures, signs, or other facilities.

11.2 Department's Right to Perform and Terminate for Cause

11.2.1 If:

.1 Design-Builder fails to begin Work within fourteen (14) days of Design-Builder's receipt of LNTP1, LNTP2, LNTP3 or NTP, as applicable;

.2 Design-Builder persistently fails to provide a sufficient number of skilled workers, equipment, or supply the materials required by the Contract Documents;

.3 Design-Builder persistently fails to comply with applicable Legal Requirements;

.4 Design-Builder persistently fails to timely pay, without cause, Design Consultants or Subcontractors;

.5 Design-Builder persistently fails prosecute the Work with promptness and diligence to ensure that the Work is completed by the Contract Times, as such times may be adjusted;

.6 Design-Builder fails to achieve Final Completion by the Long Stop Deadline;

.7 Design-Builder's aggregate liabilities due to Department under this Agreement (excluding those liabilities set forth in Section 11.3.2 of the Agreement) exceed the Aggregate Liability Cap, or Design-Builder so asserts in writing;

.8 Design-Builder's aggregate liability for liquidated damages assessed pursuant to Section 11.2 of the Agreement exceeds the Liquidated Damages Liability Cap;

.9 Design-Builder persistently fails to perform material obligations under the Contract Documents; *provided* that a debarment pursuant to Part 2 of **Exhibit 23** (relating to SWaM participation) will not entitle Department to terminate the Agreement for Design-Builder default pursuant to this Section 11.2;

.10 Design-Builder fails to comply with the obligations set forth in Section 11.5.1; or

.11 any Guarantor institutes or has instituted against it a case under the United States Bankruptcy Code, unless (i) Department determines, acting reasonably, that the remaining Guarantor(s) can sufficiently guarantee Design-Builder's obligations under the Agreement or (ii) Design-Builder provides a replacement Guarantee with a reputable counterparty reasonably acceptable to Department within ninety (90) days of the relevant Insolvency Event, or within such longer period as agreed with Department (acting reasonably) not to exceed one hundred fifty (150) days which is reasonably necessary to effect such replacement, so long as Design-Builder is pursuing such replacement, then, subsequent to the notice and cure period provisions of Section 11.2.2, Design-Builder may be declared in default and Department, in addition to any other rights and remedies provided in the Contract Documents or by law, shall have the rights set forth in Section 11.2.2 below.

11.2.2 If any of the conditions set forth in Section 11.2.1 above exists, Department will give written notice to Design-Builder and its surety of the condition. If, within ten (10) days after such notice, Design-Builder or its surety fails to cure, or reasonably commence to cure, such condition to the satisfaction of Department, then Department may then, or at any time thereafter, send a second written notice to Design-Builder declaring Design-Builder in default; *provided* that with respect to the conditions described in Sections 11.2.1.6, 11.2.1.7, 11.2.1.8, Design-Builder shall not be entitled to any additional cure period. Upon declaring Design-Builder in default, Department shall have the right, among other things, to terminate the Agreement for default.

11.2.3 Upon terminating the Agreement for default, Department will have the right to, in addition to any other right available at law, take possession, for the purpose of completing the Work, of all materials, equipment (including, for the avoidance of doubt, the tunnel boring machine), scaffolds, tools, appliances and other items thereon, which have been purchased or provided for the performance of the Work, all of which Design-Builder hereby transfers, assigns and sets over to Department for such purpose, and to employ any Person or Persons to complete the Work and provide all of the required labor, services, materials, equipment and other items. Design-Builder specifically agrees that it will assign all Subcontracts (including, for the avoidance of doubt, the agreement with the tunnel boring machine supplier for the supply of the tunnel boring machine) and any contracts with Design Consultants to Department, upon Department's written demand that it do so. In the event of such termination, Design-Builder shall not be entitled to receive any further payments under the Contract Documents until Final Completion. At such time, if the unpaid balance of the Contract Price exceeds the cost and expense incurred by Department in completing the Work, such excess shall be paid by Department to Design-Builder. If Department's cost and expense of completing the Work

exceeds the unpaid balance of the Contract Price, then Design-Builder shall be obligated to pay the difference to Department. Such costs and expense shall include not only the cost of completing the Work, but also losses, damages, costs and expense, including attorneys' fees and expenses, incurred by Department in connection with the re-procurement and defense of claims arising from Design-Builder's default, subject to the waiver of consequential damages set forth in Section 10.4 hereof.

11.2.4 If Department improperly terminates the Agreement for cause, the termination for cause will be converted to a termination for convenience in accordance with the provisions of Article 8 of the Agreement.

11.2.5 Department shall have the right, upon the occurrence of any of the conditions set forth in Section 11.2.1 above, and regardless of whether or not Design-Builder is declared in default and/or terminated, to communicate with Design-Builder's surety and compel such surety to cure such conditions.

11.3 Design-Builder's Right to Stop Work

11.3.1 Design-Builder may, in addition to any other rights afforded under the Contract Documents or at law, stop work for Department's failure to make any undisputed payment properly due under Design-Builder's Application for Early Work Payment or Application for Payment, as applicable.

11.3.2 Should the event set forth in Section 11.3.1 above occur, before exercising its rights under this section, Design-Builder shall provide Department with written notice that Design-Builder will stop work unless said event is cured within twenty-one (21) days from Department's receipt of Design-Builder's notice. If Department does not cure the problem within such twenty-one (21) day period, Design-Builder may stop work.

11.4 Design-Builder's Right to Terminate for Cause

11.4.1 Design-Builder, in addition to any other rights and remedies provided in the Contract Documents or by law, may terminate the Agreement for cause for the following reasons:

.1 the Work has been stopped for one hundred twenty (120) consecutive days, or more than one hundred eighty (180) days during the duration of the Project, because of court order, any Governmental Unit having jurisdiction over the Work, or orders by Department under Section 11.1.1 of the General Conditions of Contract; *provided* that such stoppages are not due to the acts or omissions of Design-Builder or anyone for whose acts Design-Builder may be responsible;

.2 Department's failure to provide Design-Builder with any information, permits or approvals that are Department's responsibility under the Contract Documents which result in the Work being stopped for one hundred twenty (120) consecutive days, or more than one hundred eighty (180) days during the duration of the Project, even though Department has not ordered

Design-Builder in writing to stop and suspend the Work pursuant to Section 11.1.1 of the General Conditions of Contract; or

.3 Department's failure to cure the problems set forth in Section 11.3.1 above within thirty (30) days after Design-Builder has stopped the Work.

11.4.2 Upon the occurrence of an event set forth in Section 11.4.1 above, Design-Builder may provide written notice to Department that it intends to terminate the Agreement unless the problem cited is cured, or commenced to be cured, within ten (10) days of Department's receipt of such notice. If Department fails to cure, or reasonably commence to cure, such problem, then Design-Builder may give a second written notice to Department of its intent to terminate within an additional ten (10) day period. If Department, within such second ten (10) day period, fails to cure, or reasonably commence to cure, such problem, then Design-Builder may declare the Agreement terminated for default by providing written notice to Department of such declaration. In such case, Design-Builder shall be entitled to recover in the same manner as if Department had terminated the Agreement for its convenience under Article 8 of the Agreement.

11.5 Bankruptcy of Design-Builder

11.5.1 If Design-Builder institutes or has instituted against it a case under the United States Bankruptcy Code, such event may impair or frustrate Department's ability to perform its obligations under the Contract Documents. Accordingly, should such event occur:

.1 Design-Builder, its trustee or other successor, shall furnish, upon request of Department, adequate assurance of the ability of Design-Builder to perform all future material obligations under the Contract Documents, which assurances shall be provided within ten (10) days after receiving notice of the request; and

.2 Design-Builder shall file an appropriate action within the bankruptcy court to seek assumption or rejection of the Agreement within sixty (60) days of the institution of the bankruptcy filing and shall diligently prosecute such action.

If Design-Builder fails to comply with its foregoing obligations, Department shall be entitled to request the bankruptcy court to reject the Agreement, declare the Agreement terminated and pursue any other recourse available to Department under this Article 11.

11.5.2 The rights and remedies under Section 11.5.1 above shall not be deemed to limit the ability of Department to seek any other rights and remedies provided by the Contract Documents or by law, including its ability to seek relief from any automatic stays under the United States Bankruptcy Code. It shall also not limit the ability of Department to seek recourse against Design-Builder's surety or any Guarantor, who shall be obligated to perform notwithstanding the bankruptcy proceedings against Design-Builder.

11.6 Extended Force Majeure Event

11.6.1 If (i) as a result of a Force Majeure Event, either party is unable to comply with any of its material obligations under the Agreement for a continuous period of more than one hundred eighty (180) days after the date such Force Majeure Event occurred and (ii) within such one hundred eighty day (180) -day period the parties are unable to agree on appropriate terms to mitigate the effects of the Force Majeure Event and facilitate the continued performance of the Agreement, either party may deliver notice to the other party that it wishes to terminate the Agreement (a **“Force Majeure Termination Notice”**). A Force Majeure Termination Notice must (x) provide a proposed date of termination and (y) be delivered to the other party at least fourteen (14) days before such proposed date of termination. If either party delivers a Force Majeure Termination Notice, the Agreement will terminate on the date stated in such Force Majeure Event Termination Notice.

11.6.2 If a Force Majeure Termination Notice takes effect prior to the issuance of NTP, the compensation payable to Design-Builder as a result of such termination shall be determined in accordance with Section 8.1.1 of the Agreement. If a Force Majeure Termination Notice takes effect following the issuance of NTP, the compensation payable to Design-Builder as a result of such termination shall be determined in accordance with Sections 8.2 through 8.8 of the Agreement.

Article 12 **Miscellaneous**

12.1 Assignment

12.1.1 Design-Builder shall not, without the prior written consent of Department (which consent may be withheld or denied for any reason), assign, transfer or sublet the Contract Documents or any portion or part of the Work or the obligations required by the Contract Documents.

12.2 Successorship

12.2.1 Design-Builder and Department intend that the provisions of the Contract Documents are binding upon the parties, their employees, agents, heirs, successors and assigns.

12.3 Governing Law

12.3.1 The Agreement and all Contract Documents shall be governed by the laws of the State, without giving effect to its conflict of law principles.

12.4 Severability

12.4.1 If any provision or any part of a provision of the Contract Documents shall be finally determined to be superseded, invalid, illegal, or otherwise unenforceable pursuant to any applicable Legal Requirements, such determination shall not impair or otherwise affect the validity, legality, or enforceability of the remaining provision or parts of the provision of the

Contract Documents, which shall remain in full force and effect as if the unenforceable provision or part were deleted.

12.5 No Waiver

12.5.1 The failure of either Design-Builder or Department to insist, in any one or more instances, on the performance of any of the obligations required by the other under the Contract Documents shall not be construed as a waiver or relinquishment of such obligation or right with respect to future performance.

12.6 No Third-Party Beneficiary Status

12.6.1 Nothing under the Contract Documents shall afford any third-party to the Agreement, including members of the public, third-party beneficiary status hereunder.

12.7 Headings

12.7.1 The headings used in these General Conditions of Contract, or any other Contract Document, are for ease of reference only and shall not in any way be construed to limit or alter the meaning of any provision.

12.8 Notice

12.8.1 Whenever the Contract Documents require that notice be provided to the other party, notice will be deemed to have been validly given: (i) if delivered in Person to the individual intended to receive such notice; (ii) four (4) days after being sent by registered or certified mail, postage prepaid to the address indicated in the Agreement; or (iii) if transmitted by e-mail, by the time stated by the intended recipient's e-mail software application; *provided, however*, that the transmittal is immediately followed by a hard copy delivered in accordance with (i) or (ii) above.

12.9 Escrow Proposal Documents

12.9.1 General. As a condition precedent to the effectiveness of the Agreement, Department, Design-Builder and Escrow Agent shall execute and deliver the Escrow Agreement, in the form attached to the Agreement as **Exhibit 24**, to implement the provisions of this Section 12.9 of the General Conditions of Contract, and Design-Builder shall submit to Department for Department's review and approval one copy of all documentary evidence generated with respect to the expected costs of the Work, including all assumptions made in determining such expected costs, available to Design-Builder (collectively, the "**Escrow Proposal Documents**"). For purposes of preparing the Escrow Proposal Documents, the Work shall be deemed to include the I-564 Direct Connections. Documentary evidence generated with respect to the cost of designing and constructing the I-564 Direct Connections shall be clearly organized and labeled so Department can easily determine which portions of the Escrow Proposal Documents relate to the I-564 Direct Connections and which portions of the Escrow Proposal Documents relate to the other components of the Work.

12.9.2 Format and Contents

.1 Design-Builder may submit Escrow Proposal Documents in their usual cost estimating format; *provided* that all information is presented clearly and is otherwise ascertainable and submitted in accordance with the requirements of this Section 12.9.2 of the General Conditions of Contract. It is not the intention of Section 12.9 of the General Conditions of Contract to cause Design-Builder extra work, but to ensure that Escrow Proposal Documents will be adequate to enable complete understanding and proper interpretation for their intended use.

.2 The Escrow Proposal Documents shall be submitted in English and clearly itemize the estimated costs of performing each item of the Project, including financing, administrative and related costs. Cost items shall be separated into sub-items as required to present a detailed cost estimate and allow a detailed cost review.

.3 The Escrow Proposal Documents will include: (i) estimates for costs of the design professionals and consultants itemized by discipline for development of the design; (ii) all quantity take-offs, crew size and shifts, equipment, calculations of rates of production and progress; (iii) copies of quotes from Subcontractors and suppliers; and (iv) memoranda, narratives, drawings and sketches showing site or work area layouts and equipment, add/deduct sheets, geotechnical reviews and consultant reports, and all other information used by Design-Builder to arrive at the estimated prices for the Project. Estimated costs shall be broken down into estimate categories for each bid items such as direct labor, repair labor, equipment ownership and operation, expendable materials, permanent materials and subcontract costs as appropriate. Plant and equipment, indirect costs, bond rates and calculations, insurance costs and financing should be detailed. Design-Builder's allocation of indirect costs, contingencies, and mark-up shall be identified.

.4 All costs shall be identified. For items amounting to less than ten thousand dollars (\$10,000), estimated unit costs are acceptable without a detailed cost estimate; *provided* that (i) labor, equipment, materials and Subcontracts, as applicable, are specified and (ii) indirect costs, contingencies, and mark-ups, as applicable, are allocated.

12.9.3 Submittal

.1 The Escrow Proposal Documents shall be submitted in a sealed container to Department, which containers shall be clearly marked on the outside with Design-Builder's name, reference to the Project, and the words "I-64 Hampton Roads Bridge Tunnel Project Escrow Proposal Documents."

.2 On or before the date that is fourteen (14) days after the Agreement Date, the Escrow Proposal Documents will be examined, organized and inventoried by representatives of Department, assisted by members of Design-Builder's staff who are knowledgeable in how the Escrow Proposal Documents were prepared. This examination will be to ensure that the Escrow Proposal Documents are legible and complete. It will not include a review, and will not constitute approval, of proposed construction methods, estimating assumptions, or interpretations

of any Contract Document. Such examination will not alter any condition or term of any Contract Document.

.3 Timely submission of complete Escrow Proposal Documents as of the date that is fourteen (14) days after the Agreement Date is an essential element of Design-Builder's responsibility.

.4 To the extent the Proposal is based upon contracting any part of the Work, Design-Builder shall cause each Subcontractor whose total Subcontract price exceeds fifty million dollars (\$50,000,000) to provide similar documentation to be included with those of Design-Builder. Such documents will be opened and examined in the same manner and at the same time as the examination described above for Design-Builder.

.5 Department retains the right to require Design-Builder to submit similar documentation from any Subcontractor with whom Design-Builder enters into a Subcontract after the date hereof before such Subcontract is approved.

12.9.4 Storage. Design-Builder shall bear the cost for storing the Escrow Documents. The Escrow Proposal Documents will be stored at the following address:

SunTrust Bank
919 East Main Street, 7th Floor
Richmond, Virginia 23219
Telephone: 804-782-7087
Attention: Charles Henderson

12.9.5 Examination

.1 Subject to the terms of the Escrow Agreement, the Escrow Proposal Documents may be examined by Department and Design-Builder at any time deemed necessary by Department.

.2 Department may delegate review of the Escrow Proposal Documents to members of Department's staff or to consultants. No other Person shall have access to the Escrow Proposal Documents.

.3 Notwithstanding the foregoing, the Escrow Proposal Documents, and information contained therein, may be used:

- (a) to assist in the negotiation of Work Orders to compensation due upon termination;
- (b) in the resolution of any claim or dispute before any entity selected to resolve disputes; and
- (c) in any dispute resolution procedure commenced under the Agreement.

.4 Access to the Escrow Proposal Documents will take place in the presence of duly designated representatives of both Department and Design-Builder, except that, if Design-Builder refuses to be present or to cooperate in any other way in the review of documents, Department may review such documents without Design-Builder being present.

12.9.6 Ownership

.1 The Escrow Proposal Documents are, and will always remain, the property of Design-Builder, subject to joint review by Department and Design-Builder, as provided herein.

.2 Department stipulates and expressly acknowledges that the Escrow Proposal Documents constitute trade secrets. This acknowledgment is based on Department's understanding that the information contained in the Escrow Proposal Documents is not known outside Design-Builder's business, is known only to a limited extent and only by a limited number of employees of Design-Builder, is safeguarded while in Design-Builder's possession, is extremely valuable to Design-Builder and could be extremely valuable to Design-Builder's competitors by virtue of its reflecting Design-Builder's contemplated techniques of design and construction. Department further acknowledges that Design-Builder expended substantial sums of money in developing the information included in the Escrow Proposal Documents and further acknowledges that it would be difficult for a competitor to replicate the information contained therein. Department further acknowledges that the Escrow Proposal Documents and the information contained therein are made available to Department only because such action is an express prerequisite to award of the Agreement. Department further acknowledges that the Escrow Proposal Documents include a compilation of the information used in Design-Builder's business, intended to give Design-Builder an opportunity to obtain an advantage over competitors who do not know of or use the contents of the documentation.

12.9.7 Final Disposition and Return of Escrow Proposal Documents. The Escrow Proposal Documents will be returned to Design-Builder upon the earlier to occur of (i) completion of the Work, including tender of final payment and resolution of all claims or disputes arising under the Agreement or (ii) termination of the Agreement and resolution of all claims or disputes arising pursuant to the Agreement.

12.10 Encumbrance of Tunnel Boring Machine. Except with respect to a lien or security interest in favor of the tunnel boring machine supplier securing payments due and payable to the tunnel boring machine supplier for supply of the tunnel boring machine, Design-Builder shall not create, incur, assume or permit to exist any lien on, or security interest in, or otherwise encumber in any manner, the tunnel boring machine.

12.11 Internal Control Systems. Design-Builder shall have internal control systems in place that meet federal requirements for accounting. Such systems shall comply with the requirements of 48 CFR 31, "Federal Acquisition Regulations, Contract Cost Principles and Procedures," and 23 CFR 172 "Administration of Engineering and Design Related Services Contracts."

12.12 Federal Immigration Reform and Control Act of 1986. Design-Builder shall at all times comply, and cause all Subcontractors to comply, with the Federal Immigration Reform and

Control Act of 1986, which prohibits employment of illegal aliens.

12.13 Civil Rights Act. Design-Builder and all Subcontractors with fifteen (15) or more employees shall, upon request from Department, submit a Title VI Evaluation Report (EEO-D2).

12.14 Amendments. The Contract Documents may not be changed, altered, or amended in any way except in writing signed by a duly authorized representative of each party.

END OF GENERAL CONDITIONS OF CONTRACT