Volume II

Phase Public-Private Partnership Agreement for the I-495 and I-270 P3 Program

AMONG:

MARYLAND TRANSPORTATION AUTHORITY

AND

MARYLAND DEPARTMENT OF TRANSPORTATION

AND

ACCELERATE MARYLAND PARTNERS LLC

DATED August 18, 2021

MDOT and MDTA   i   Phase P3 Agreement
Execution Version
Phase 1 of the I-495 & I-270 P3 Program

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PHASE P3 AGREEMENT

This Phase P3 Agreement (this **"Agreement"**) is entered into as of August 18, 2021, by the State of Maryland (the **"State"**) acting by and through the Maryland Transportation Authority, an agency of the State (**"MDTA"**) and the Maryland Department of Transportation, a principal department of the State including the State Highway Administration (**"MDOT"**), and Accelerate Maryland Partners LLC (the **"Phase Developer"**) (each a **"Party"** and together, the **"Parties"**).

RECITALS:

(A)   In 2017, Governor Larry Hogan announced Maryland's Traffic Relief Plan (the **"Plan"**). The largest component of the Plan is the I-495 & I-270 Public-Private Partnership Program which will include improvements to over 70 miles of interstate in Maryland including:

(1)   I-495 from the vicinity of the George Washington Memorial Parkway in Virginia, across and including the American Legion Bridge to the Woodrow Wilson Memorial Bridge; and

(2)   I-270 from its interchange with I-495 to its interchange with I-70,

(together, the **"P3 Program"**).

(B)   Under Title 10A of the State Finance and Procurement Article of the Annotated Code of Maryland (the **"Act"**), MDOT and MDTA are authorized to undertake the solicitation, program management, and delivery of the P3 Program.

(C)   Under §4-204 of the Transportation Article of the Annotated Code of Maryland, MDTA is authorized to finance, construct, operate, maintain, and repair "transportation facilities projects" as defined in §4-101 of the Transportation Article of the Annotated Code of Maryland, and to perform any and all actions necessary or convenient to carry out the powers granted by the Transportation Article, including issuing revenue bonds.

(D)   Under §4-312 of the Transportation Article of the Annotated Code of Maryland, MDTA is the only State entity with the authority to set and fix tolls for State transportation facilities.

(E)   MDTA and MDOT have determined that the design, construction, financing, operation, and maintenance of the P3 Program is an authorized undertaking by the Parties under State law.

(F)   The Maryland Department of Transportation State Highway Administration (**"MDOT SHA"**) has agreed to serve as agent for MDTA during the solicitation, program management, and delivery of the P3 Program under an Interagency Agreement between MDOT, MDOT SHA and MDTA dated April 25, 2019 (the **"Interagency Agreement"**).

(G)   MDOT SHA owns and maintains highways in Maryland upon which the P3 Program will be developed, including: (i) I-495 (Capital Beltway) from the American Legion Bridge over the Potomac River the Woodrow Wilson Bridge and (ii) I-270 (Dwight D. Eisenhower Memorial Highway) from I-495 to I-70, including the I-270 East Spur and I-270 West Spur (the **"Premises"**) and MDOT SHA will transfer the Premises to MDTA in accordance with the lease agreements entered into under Article 3 of the Interagency Agreement, as approved by the BPW.

(H)   MDOT will deliver the P3 Program in two or more phases. The first phase of the P3 Program includes improvements to I-495 from the vicinity of the George Washington Memorial Parkway

in Virginia, across and including the American Legion Bridge, to its interchange with I-270 and I-270 from its interchange with I-495 to its interchange with I- 70 (the **"Phase"**).

(I)   The southern part of the Phase (**"Phase South"**) is to be developed and delivered subject to the FHWA Record of Decision for the I-495 and I-270 Managed Lane Study. Phase South includes:

   (1)   I-495 from the vicinity of the George Washington Memorial Parkway to I-270 (**"Phase South A"**); and

   (2)   I-270 from I-495 to I-370 (**"Phase South B"**).

(J)   The balance of the Phase along I-270 from I-370 to I-70 (**"Phase North"**) will be developed and delivered subject to the outcome of an independent NEPA study.

(K)   Phase South and Phase North will each be developed and delivered in one or more Sections. Each Section will be developed and delivered by a Section Developer (a subsidiary of the Phase Developer that is to be formed by the Phase Developer) who will be responsible for the design, construction, financing, operation, and maintenance of the applicable Section.

(L)   On February 7, 2020, MDOT and MDTA issued a Request for Qualifications for the Phase (the **"RFQ"**) and received statements of qualification on or before the due date of May 20, 2020 and shortlisted four proposers.

(M)   On December 18, 2020, MDOT and MDTA issued a Request for Proposals for the Phase (the **"RFP"**) to complete Predevelopment Work for the Phase through this Agreement.

(N)   Following receipt and evaluation of the RFP proposals, MDOT selected the Phase Developer as the Selected Proposer to enter into this Agreement in accordance with the terms of the RFP.

(O)   On June 8, 2021, the MDTA Board approved this Agreement in accordance with the Act and implementing regulations.

(P)   On August 11, 2021, the Board of Public Works approved this Agreement in accordance with the Act and implementing regulations.

(Q)   The Parties desire to set forth the terms to perform the Predevelopment Work.

The PARTIES agree as follows:

1.   **DEFINITIONS, INTERPRETATION, AND PRECEDENCE**

1.1   **Definitions**

Unless the context otherwise requires, capitalized terms and acronyms used in this Agreement have the meanings given in Exhibit 1 (*Definitions*) or the Appendix *(Abbreviations and Definitions)* of Exhibit 6 *(Predevelopment Work Requirements)*.

1.2   **Interpretation**

   (a)   In this Agreement, unless otherwise stated:

      (i)   headings are for convenience only and do not affect interpretation;

(ii) a reference to any agreement, instrument, or other document is to such agreement, instrument, or other document as amended or supplemented;

(iii) a reference to this Agreement or any other agreement includes all exhibits, schedules, forms, appendices, addenda, attachments, or other documents attached to or otherwise expressly incorporated in this Agreement or such other agreement;

(iv) subject to Section 1.2(a)(v), a reference to an Article, Section number, Exhibit, schedule, form, or appendix is to the Article, Section number, Exhibit, schedule, form, or appendix contained in or attached to this Agreement;

(v) a reference in the main body of this Agreement or Exhibit, to an Article or Section number is to the Article or Section number of this Agreement or that Exhibit (as applicable);

(vi) a reference to a Person includes the Person's permitted successors and assigns;

(vii) the words "including", "includes", and "include" mean "including, without limitation", "includes, without limitation", and "include, without limitation", respectively; and

(viii) an obligation to do something "promptly" means an obligation to do so as soon as the circumstances permit, avoiding any delay.

(b) This Agreement is not to be interpreted or construed against the interests of a Party merely because that Party proposed this Agreement or some provision of it, or because that Party relies on a provision of this Agreement to protect itself.

(c) The Parties acknowledge and agree that each Party has been given the opportunity to independently review this Agreement with legal counsel, and that each Party has the requisite experience and sophistication to understand, interpret, and agree to the particular language of the provisions of this Agreement. Accordingly, in the event of an ambiguity in, or Dispute regarding, the interpretation of this Agreement, this Agreement will not be interpreted or construed against the Party preparing it simply as a consequence of that Party preparing this Agreement or the relevant provision.

1.3 **Order of Precedence**

(a) Except as otherwise expressly provided in this Section 1.3, if there is any conflict, ambiguity, or inconsistency between the provisions of this Agreement (including all Exhibits), the order of precedence will be as follows, from highest to lowest:

(i) the main body of this Agreement;

(ii) the Exhibits to this Agreement, other than Exhibit 6 (*Predevelopment Work Requirements*) and Exhibit 9 (*Phase Developer Proposal*);

(iii) Exhibit 6 (*Predevelopment Work Requirements*); and

(iv) Exhibit 9 (*Phase Developer Proposal*),

in each case, as amended or supplemented in accordance with this Agreement.

(b)   If there is any conflict, ambiguity, or inconsistency between any of the provisions in this Agreement (including all Exhibits), the provision establishing a higher standard of safety, reliability, durability, performance, or service will prevail.

(c)   If the Phase Developer's Proposal includes statements, provisions, concepts, or designs that can reasonably be interpreted as offering to:

(i)   provide higher (but not lower) quality items than otherwise required by the main body of this Agreement or the other Exhibits to this Agreement; or

(ii)   perform services or meet standards in addition to or better than those otherwise required,

the Phase Developer's obligations under this Agreement include compliance with all such statements, provisions, concepts, and designs in its Proposal.

(d)   Additional or supplemental details or requirements in a provision of this Agreement with lower priority will be given effect, except to the extent that they irreconcilably conflict with any provision of this Agreement with higher priority.

(e)   An amendment to this Agreement or a change order under Article 22 *(Change Orders)* shall take precedence over the terms it amends.

1.4   **Resolving any Conflict or Ambiguity**

(a)   If any Party becomes aware of any conflict, ambiguity, or inconsistency between the provisions of this Agreement, it must promptly notify the other Parties in writing of the conflict, ambiguity, or inconsistency and its assessment of which provision should prevail in light of the application of the rules in Section 1.3 (*Order of Precedence*).

(b)   If:

(i)   any conflict, ambiguity, or inconsistency between the provisions of this Agreement cannot be reconciled; or

(ii)   the Parties disagree with respect to any conflict, ambiguity, or inconsistency between the provisions of this Agreement,

MDOT will promptly issue a written determination to the other Parties, resolving the conflict, ambiguity, or inconsistency.

(c)   Any determination by MDOT under Section 1.4(b) will not constitute a Relief Event, or a change order under Article 22 (*Change Orders*), or otherwise entitle the Phase Developer to any extension of time, relief from obligations, or compensation.

2.   **REFERENCE INFORMATION DOCUMENTS**

2.1   **Reference Information Documents**

(a)   MDOT has provided and disclosed to the Phase Developer the Reference Information Documents.

(b)   The Reference Information Documents were provided for reference purposes only.

(c)   Except to the extent expressly provided under this Agreement or a Section P3 Agreement, none of the Phase Developer, Section Developers, nor any other Phase Developer-Related Entity is entitled to rely on the Reference Information Documents as accurately describing existing conditions, presenting design, engineering, operating or maintenance solutions, or other directions, means or methods for complying with the requirements of this Agreement, the Section P3 Agreements, Governmental Approvals, or Applicable Law.

2.2   **No Representations, Warranties, or Liability**

The Phase Developer acknowledges that, except to the extent expressly provided in this Agreement or a Section P3 Agreement:

(a)   each of MDOT and MDTA makes no representation or warranty with respect to the completeness, accuracy, or fitness for any purpose of any of the information contained in the Reference Information Documents or that such information conforms with the requirements of this Agreement, any Section P3 Agreement, Governmental Approvals, or Applicable Law; and

(b)   neither MDOT, MDTA nor any of their respective agents, officers, or employees will have any liability to the Phase Developer, any Section Developer, or any other Phase Developer-Related Entity, and neither the Phase Developer nor any Section Developer will be entitled to any extension of time, relief from obligations, or compensation with respect to:

(i)   any inaccuracy, omission, lack of fitness for any purpose, or inadequacy of any kind whatsoever in the Reference Information Documents;

(ii)   any failure to make available to the Phase Developer, any Section Developer, or any other Phase Developer-Related Entity any materials, documents, drawings, plans, or other information relating to the Phase as part of the Reference Information Documents; or

(iii)   any causes of action, claims, or Losses whatsoever suffered by the Phase Developer, any Section Developer, or any other Phase Developer-Related Entity by reason of any use of information contained in, or any action or forbearance in reliance on, the Reference Information Documents.

2.3   **No Reliance**

The Phase Developer acknowledges and confirms that it has not entered into this Agreement on the basis of, and has not relied upon, any statement or representation (whether negligent, innocent, or otherwise), warranty, or other provision (whether oral, written, express, or implied) made or agreed to by MDOT, MDTA, or any of their respective agents or employees, except those expressly repeated or referred to in this Agreement, and the only remedy or remedies available with respect to any misrepresentation or untrue statement made to it will be the remedy or remedies available under this Agreement.

2.4   **No Claims or Relief from Obligations**

(a)   Subject to any express rights that the Phase Developer has under this Agreement, the Phase Developer will not in any way be relieved from any obligation under this Agreement, nor will it be entitled to any claim against MDOT or MDTA on grounds that any Reference Information Documents or other information made available by MDOT or

MDTA, whether obtained from MDOT, MDTA, or otherwise, is incorrect or insufficient and the Phase Developer shall make its own inquiries as to the accuracy and adequacy of the Reference Information Documents or other such information.

(b)   The Phase Developer shall conduct any and all studies, analyses, and investigations as it deems advisable to verify and supplement information in the Reference Information Documents. Subject to any express rights that the Phase Developer has under this Agreement, any use of information in the Reference Information Documents in performing the Predevelopment Work, without verification or supplement, is entirely at the Phase Developer's own risk. If the Phase Developer or anyone on the Phase Developer's behalf uses any of the information in the Reference Information Documents in any way, such use is made on the basis that the Phase Developer, not MDOT or MDTA, has approved and is responsible for that information.

3.   **EFFECTIVE DATE AND TERM**

This Agreement will commence on the Effective Date, and will end on the earlier of:

(a)   the date Financial Close is achieved for the last Section of the Phase that is subject to this Agreement;

(b)   the date that is 10 years from the Effective Date (unless extended with MDOT and MDTA's written consent, and the BPW approval); or

(c)   the date this Agreement is terminated under Article 26 (*Termination*).

4.   **EXCLUSIVE RIGHTS AND OBLIGATIONS**

(a)   Subject to Section 4(b):

   (i)   MDOT and MDTA grant the Phase Developer an exclusive right to develop and implement the Phase in accordance with the terms of this Agreement; and

   (ii)   MDOT and MDTA shall not entertain proposals from, or negotiate with, any third party regarding the development of the Phase.

(b)   MDOT and MDTA reserve the right to negotiate with any third party with respect to the development of any portion of the Phase that is not subject to a signed Section P3 Agreement at the end of the Term or that is removed from the scope of this Agreement under Article 27 (*Reduction in Scope of the Agreement*).

5.   **CONDITIONS PRECEDENT TO MDOT AND MDTA SIGNING THIS AGREEMENT**

5.1   **Conditions Precedent to MDOT and MDTA Signing this Agreement**

This Agreement shall not be signed by MDOT or MDTA until the following conditions have been satisfied (or waived in writing by MDOT):

(a)   **Phase Developer has Signed this Agreement**

The Phase Developer has signed this Agreement and delivered it to MDOT.

(b)   **Performance Security**

The Phase Developer has delivered the Performance Security to MDOT.

(c) **Development Rights Fee Security**

The Phase Developer has delivered the Development Rights Fee Security to MDOT.

(d) **MDTA Board Approval**

The MDTA Board has approved this Agreement in accordance with the Act and COMAR §11.07.06.09.

(e) **BPW Approval**

The BPW has approved this Agreement in accordance with the Act.

(f) **Corporate Documents**

The Phase Developer has delivered to MDOT any documents and certificates that MDOT may have reasonably requested with respect to:

(i) the due organization, valid existence, and good standing of the Phase Developer; and

(ii) the authorization of the Phase Developer to enter into this Agreement.

(g) **Qualification to do Business**

The Phase Developer has provided MDOT with acceptable evidence that the Phase Developer, Lead Contractor, and Designer:

(i) are qualified to do business in the State of Maryland and the Commonwealth of Virginia;

(ii) are registered with the State Department of Assessments and Taxation;

(iii) are in good standing with the State of Maryland and the Commonwealth of Virginia; and

(iv) if required by Applicable Law, possess:

(A) a Maryland business license obtained from the clerks of the Circuit Court in the county where the business is located; and

(B) such licenses as may be required to conduct business in the Commonwealth of Virginia.

(h) **Licensing Requirements**

The Phase Developer has provided MDOT with acceptable evidence that the Phase Developer, Lead Contractor, or Designer is properly licensed to carry out the design, surveying, and layout proposed as part of the Predevelopment Work in compliance with:

(i) Titles 14 and 15 of the Business Occupations and Professions Article of the Annotated Code of Maryland;

(ii) Chapters 4 and 11 of the Professions and Occupations Article of the Code of Virginia; and

(iii) all other Applicable Law.

(i) **Phase Developer Opinions**

The Phase Developer has provided MDOT with acceptable legal opinions customary for a transaction of this nature addressed to MDOT and MDTA, from legal counsel, as to, among other things:

(i) the organization and existence of the Phase Developer;

(ii) the due authorization and signing of this Agreement;

(iii) the enforceability of this Agreement against the Phase Developer; and

(iv) confirmation that this Agreement does not violate any Applicable Law or any of the Phase Developer's organizational documents.

(j) **Certification Regarding Use of Contract Funds for Lobbying**

The Phase Developer has delivered to MDOT a signed certification in the form attached in Part F of Exhibit 16 (*Federal and State Requirements*) from:

(i) the Phase Developer;

(ii) each Key Participant; and

(iii) each PD Equity Member.

(k) **Certification Regarding Debarment**

The Phase Developer has delivered to MDOT a signed certification in the form attached in Part G of Exhibit 16 *(Federal and State Requirements)* from the Phase Developer and each Key Participant.

(l) **Contract Affidavit**

The Phase Developer has delivered to MDOT a signed "Contract Affidavit" from the Phase Developer and each PD Equity Member in the form of Exhibit 12 (*Contract Affidavit*).

(m) **Insurance Policies**

The Phase Developer has obtained and delivered to MDOT certificates of insurance that satisfy Section 24.2(d) *(Verification of Coverage)* evidencing that all insurances required under this Agreement are in place as of the Effective Date. The Phase Developer shall provide actual Insurance Policies and all endorsements to MDOT within 45 days after the Effective Date.

(n) **DBE Documents**

The Phase Developer has provided MDOT with the following in accordance with Section 19.9 *(Disadvantaged Business Enterprise)*:

(i) a DBE Participation Plan in accordance with Exhibit 17 *(Predevelopment DBE Participation Plan)*;

(ii) a list of all Contracts (with Dollar value), for the Predevelopment Work that are anticipated to begin within the first 180 days after the Effective Date; and

(iii) the DBE Participation Forms (as directed by MDOT) for each Contract awarded as of the Effective Date.

6. **REPRESENTATIONS AND WARRANTIES**

6.1 **Phase Developer Representations and Warranties**

The Phase Developer represents and warrants to MDOT and MDTA that as of the Effective Date:

(a) **Existence and Good Standing**

The Phase Developer is a limited liability company duly organized, validly existing, and in good standing under the laws of Delaware.

(b) **Good Standing and Qualification**

The Phase Developer is in good standing and qualified to do business in the State of Maryland and in the Commonwealth of Virginia.

(c) **Power and Authority**

The Phase Developer has the power and authority to sign this Agreement, and to perform its obligations under this Agreement.

(d) **Authorization**

(i) The signing of this Agreement by the Phase Developer, and the performance of the Phase Developer's obligations under this Agreement, have been duly authorized by all necessary limited liability company action of the Phase Developer.

(ii) Each Person signing this Agreement on behalf of the Phase Developer, has been duly authorized to sign this Agreement on behalf of the Phase Developer.

(e) **Signing**

This Agreement has been duly signed by the Phase Developer.

(f) **Enforceability**

This Agreement constitutes a legal, valid, and binding obligation on the Phase Developer, enforceable against the Phase Developer in accordance with its terms, subject to applicable bankruptcy, insolvency, and similar laws affecting the enforceability of the rights of creditors generally and the general principles of equity.

(g) **No Contravention**

The signing of this Agreement by the Phase Developer, and the performance by the Phase Developer of its obligations under this Agreement, does not conflict with, or result in a default or a violation of:

(i)   the Phase Developer's organizational documents;

(ii)   any other material agreement or instrument to which the Phase Developer is a party or which is binding on the Phase Developer or any of the Phase Developer's assets;

(iii)   any Applicable Law; or

(iv)   any judicial decree.

(h)   **No Prohibited Person**

The Phase Developer, each Affiliate of the Phase Developer, and each of their respective directors, officers, and employees, is not a Prohibited Person.

(i)   **No Litigation**

There is no action, suit, proceeding, investigation, or litigation pending or, to the knowledge of the Phase Developer or any PD Equity Member, threatened, that:

(i)   could reasonably be expected to have a material adverse effect on the ability of the Phase Developer to perform its obligations under this Agreement;

(ii)   challenges or could adversely impact, the Phase Developer's power and authority to sign this Agreement or to perform its obligations under this Agreement;

(iii)   challenges the validity or enforceability of this Agreement; or

(iv)   challenges the authority of the Phase Developer's representative signing this Agreement.

(j)   **Licenses, Skills, and Expertise**

The Phase Developer and the Key Participants have (or will have by the time required), the required authority, qualifications, rights, franchises, license status, privileges, professional ability, skills, and capacity to perform the Predevelopment Work.

(k)   **Governmental Approvals**

The Phase Developer and the Key Participants have all Governmental Approvals that are required, as of the Effective Date, to begin the Predevelopment Work, other than MDOT-Provided Approvals. The Phase Developer has no reason to believe that any Governmental Approval required to be obtained by the Phase Developer will not be granted in due course and thereafter remain in effect so as to enable the Predevelopment Work to proceed in accordance with this Agreement.

(l)   **Phase Site and Reference Information Documents**

The Phase Developer has, in accordance with Good Industry Practice:

(i)   investigated and reviewed the Reference Information Documents and available public records; and

(ii)   familiarized itself with the Phase Site and the surrounding locations, based on the Reference Information Documents, available public records, and an inspection of the Phase Site to the extent it was permitted access to the Phase Site under the ITP.

(m) **Applicable Law**

The Phase Developer has familiarized itself with the requirements of all Applicable Law and the conditions of any required Governmental Approvals.

(n) **Ownership**

Exhibit 2 (*Phase Developer Ownership*) accurately describes the legal, beneficial, and equitable ownership of the Phase Developer, and no arrangements are in place that will result in, or are reasonably likely to result in, a Change in Ownership that would require the Phase Developer to provide notice to MDOT under Article 32 (*Change in Ownership of Phase Developer*).

(o) **No Improper Acts**

The Phase Developer has not employed or retained, and shall not employ or retain, any Person other than employees, agents, attorneys, consultants, and advisors of the Phase Developer or a Phase Developer-Related Entity, to solicit or secure this Agreement, and the Phase Developer has not paid or agreed to pay any Person any fee or any other consideration contingent on the making of this Agreement which would be in violation of Section 19.11 (*Sanctions Upon Improper Acts*).

(p) **Conflicts of Interest**

As of the Predevelopment Work Proposal Due Date, the Phase Developer disclosed to MDOT in writing all Organizational Conflicts of Interest of the Phase Developer and the Phase Developer-Related Entities that were listed in its Proposal of which the Phase Developer was actually aware. Between the Predevelopment Work Proposal Due Date and the Effective Date:

(i)   the Phase Developer has not obtained knowledge of any additional Organizational Conflicts of Interest of the Phase Developer or the Phase Developer-Related Entities that was not disclosed in its Proposal; and

(ii)   there have been no organizational changes to the Phase Developer or the Phase Developer-Related Entities that were listed in its Proposal, which have not been approved in writing by MDOT.

6.2 **MDOT and MDTA Representations and Warranties**

MDOT and MDTA represent and warrant to the Phase Developer that as of the Effective Date:

(a) **Existence**

(i)   MDTA is an agency of the State, is validly existing in Maryland, and has the requisite authority to carry on its present activities and those proposed under this Agreement.

(ii)   MDOT is a principal department of the State, is validly existing in Maryland, and has the requisite authority to carry on its present activities and those proposed under this Agreement.

(b)   **Power and Authority**

Each of MDOT and MDTA has the power and authority to sign this Agreement, and to perform its obligations under this Agreement.

(c)   **Authorization**

(i)   The signing of this Agreement by MDOT and MDTA, and the performance of their obligations under this Agreement, have been duly authorized by all necessary action of MDOT and MDTA.

(ii)   Each Person signing this Agreement on behalf of MDOT or MDTA has been duly authorized to sign this Agreement on behalf of MDOT and MDTA, respectively.

(d)   **Execution**

This Agreement has been duly signed by MDOT and MDTA.

(e)   **Enforceability**

This Agreement constitutes a legal, valid, and binding obligation of MDOT and MDTA, enforceable against each of them in accordance with its terms, subject to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and the general principles of equity.

(f)   **No Litigation**

There is no action, suit, proceeding, investigation, or litigation pending or, to MDOT's or MDTA's knowledge threatened, that has reasonable prospects of success, that as of the Effective Date:

(i)   could reasonably be expected to have a material adverse effect on the ability of MDOT or MDTA to perform their material obligations under this Agreement;

(ii)   challenges or could adversely impact, MDOT's or MDTA's power and authority to sign this Agreement or to perform their obligations under this Agreement;

(iii) challenges the validity or enforceability of this Agreement; or

(iv)   challenges the authority of the MDOT official or the MDTA official signing this Agreement.

(g)   **No Contravention**

The signing of this Agreement by MDOT and MDTA, and the performance by MDOT and MDTA of their respective obligations under this Agreement, does not conflict with, or result in a default or a violation of:

(i)   any Applicable Law;

(ii)   any material agreement or instrument to which MDOT or MDTA is a party or which is binding on MDOT or MDTA; or

(iii)   any judicial decree.

7.   REPRESENTATIVES AND MDOT AS MDTA'S AGENT

7.1   Representatives

(a)   MDOT and the Phase Developer shall each designate an individual or individuals who will be authorized to make decisions and bind MDOT and the Phase Developer on matters relating to this Agreement (the **"Contract Manager"** and **"Phase Developer Representative"**, respectively).

(b)   Exhibit 3 (*Initial Designation of Authorized Representatives*) provides initial designations, which may be changed by a subsequent notice in writing delivered to the other Parties in accordance with Section 36.9 (*Notices and Communications*).

7.2   MDOT SHA as MDTA's Agent

(a)   Under the Interagency Agreement, MDTA has appointed MDOT SHA as its agent for the purposes of carrying out the P3 Program and exercising or performing all of MDTA's rights and obligations under this Agreement (other than the setting and collection of tolls on users and those which, by law, may only be exercised by the MDTA Board or the MDTA Executive Director).

(b)   All rights and obligations of MDTA under this Agreement (other than the setting and collection of tolls on users and those which, by law, may only be exercised by the MDTA Board or the MDTA Executive Director) will be exercised or performed exclusively by MDOT SHA, and any exercise or performance by MDOT SHA will bind MDTA as against the Phase Developer, upon which the Phase Developer will have the right to rely.

8.   STEERING COMMITTEE

(a)   MDOT and the Phase Developer shall establish a Steering Committee to:

(i)   ensure that the Predevelopment Work is progressed in accordance with this Agreement;

(ii)   develop and issue recommendations to MDOT and the Phase Developer regarding issues critical to the success of the Phase; and

(iii)   assist in resolving Disputes if requested under Section 33.1 *(Consultation and Initial Decision of Contract Manager)*.

(b)   The Steering Committee will be comprised of representatives of the Phase Developer, MDOT, and MDTA. MDOT may invite representatives of other agencies to attend and participate in any Steering Committee meeting.

(c)   The Steering Committee will meet monthly throughout the Term, or such other frequency agreed between MDOT and the Phase Developer.

(d)   The Phase Developer shall document all Steering Committee meetings and distribute meeting minutes, including a list of all attendees, to MDOT following each Steering Committee meeting.

9.   PHASE SITE ACCESS AND INVESTIGATIONS

9.1   Access to the Phase Site

(a)   The Phase Developer may access the Phase Site only in accordance with this Article 9.

(b)   The Phase Developer may access the Phase Site to:

(i)   conduct site investigations as part of the Predevelopment Work in accordance with Section 9.2 (*Site Investigations*);

(ii)   perform Remedial Action in accordance with Section 9.4 *(Hazardous Materials)*; and

(iii)   conduct data studies and investigations for the purposes of obtaining additional traffic and revenue information that the Phase Developer deems necessary, provided the Phase Developer obtains any necessary Governmental Approvals and does not:

(A)   interrupt or impede traffic flow without proper approvals and implementing safe traffic control measures;

(B)   stop traffic at cross-streets, intersections, or otherwise to solicit information; or

(C)   request any vehicle/owner data or information from MDOT prohibited by Applicable Law.

9.2   Site Investigations

(a)   The Phase Developer shall seek access to the Phase Site to conduct site investigations as part of the Predevelopment Work (**"Site Investigations"**) in accordance with this Section 9.2. The scope of the Site Investigations will be limited to:

(i)   field exploration and observation;

(ii)   soil boring and sampling;

(iii)   surveys;

(iv)   traffic data collection; and

(v)   any additional data collection mutually agreed to by MDOT and the Phase Developer.

(b)   The Phase Developer shall not commence or conduct Site Investigations unless:

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it has requested and received approval from MDOT (for proposed Site Investigations within Maryland) or from both MDOT and VDOT (for proposed Site Investigations within the Commonwealth of Virginia), to access the relevant part of the Phase Site for the purpose of conducting those Site Investigations; and

it has obtained any Governmental Approvals that are required to perform those Site Investigations.

(c)   If the Phase Developer requires access to the Phase Site to conduct any Site Investigations, the Phase Developer shall provide written notice to MDOT requesting access to conduct those Site Investigations, no later than two weeks prior to the date on which the Phase Developer wishes to perform the Site Investigations. The notice must specify:

<ol type="i" start="1">
the parts of the Phase Site the Phase Developer proposes to access;

the scope of the Site Investigations the Phase Developer proposes to undertake, in accordance with Exhibit 6 (*Predevelopment Work Requirements*); and

the dates on which the Phase Developer proposes to perform the Site Investigations.

(d)   If the Phase Developer provides proper notice under Section 9.2(c):

<ol type="i" start="1">
with respect to any MDOT Controlled Parcels, MDOT shall, within 10 Business Days of receiving the Phase Developer's notice under Section 9.2(c), grant the Phase Developer access to conduct the Site Investigations or give reasons why access cannot be granted and an estimate of when it may be available; and

with respect to any Third Party Parcels MDOT shall use Reasonable Efforts to obtain access for the Phase Developer to conduct the Site Investigations and shall notify the Phase Developer in writing whether or not MDOT has obtained such access and rights to conduct Site Investigations. The Phase Developer acknowledges that:

<ol type="A" start="1">
MDOT will not provide access unless MDOT has obtained a right of access from the third party or parties that control access to the applicable Third Party Parcels; and

without limiting Section 9.2(d)(ii)(A), in the case of proposed Site Investigations in the Commonwealth of Virginia, any access and Site Investigations will be subject to approval by VDOT.

(e)   The Phase Developer shall obtain and comply with all Governmental Approvals required for performing the Site Investigations.

(f)   The Phase Developer may, by written notice to MDOT, request MDOT's assistance in obtaining any Governmental Approvals required for performing Site Investigations. If requested in accordance with this Section 9.2(f), MDOT will exercise Reasonable Efforts to assist the Phase Developer in obtaining such Governmental Approvals.

9.3   **Protection of Property**

(a)   The Phase Developer shall preserve and protect all structures, improvements, equipment, and vegetation, on or adjacent to areas where it conducts Site Investigations or conducts any other Predevelopment Work while utilizing and occupying the Phase Site.

(b)   The Phase Developer shall replace or repair, at no cost to MDOT, any damage to structures, improvements, equipment, or vegetation, including those that are the property of a third party, resulting from the failure to comply with the requirements of this Agreement in performing the Predevelopment Work. If the Phase Developer fails or refuses to repair the damage promptly, MDOT may have the necessary services performed at the Phase Developer's sole cost.

(c)   The Phase Developer shall promptly (and in any event within one Business Day of any encounter) notify MDOT of all things of historical, archaeological, paleontological, or scientific interest encountered by the Phase Developer during the performance of the Predevelopment Work. The Phase Developer shall promptly stop any Site Investigation or other Predevelopment Work within the vicinity of the discovery in order to preserve and protect the discovery until its significance can be determined by MDOT. MDOT shall issue instructions to the Phase Developer with respect to the disposition of the discovery and shall reimburse the Phase Developer for its reasonable and proper costs (that would not otherwise have been incurred in performing Predevelopment Work) in complying with such instructions.

9.4   **Hazardous Materials**

(a)   If the Phase Developer encounters any Pre-Existing Hazardous Materials, or if there is a Hazardous Materials Release, the Phase Developer shall promptly (and in any event within one Business Day) notify MDOT of the Pre-Existing Hazardous Materials or Hazardous Materials Release and its location and, subject to Section 9.4(d), provide MDOT with a reasonable opportunity to inspect the affected areas and locations before taking any Remedial Action.

(b)   If the Phase Developer notifies MDOT of any Pre-Existing Hazardous Materials that it encounters while performing the Predevelopment Work, or a Hazardous Materials Release MDOT shall:

    (i)   notify the Phase Developer of any Remedial Action that MDOT requires the Phase Developer to perform with respect to the Hazardous Materials; and

    (ii)   if MDOT requires the Phase Developer to perform Remedial Action, or the Phase Developer is required by Applicable Law to perform Remedial Action, MDOT shall reimburse the Phase Developer for its reasonable and proper costs (that would not otherwise have been incurred in performing Predevelopment Work) in performing the Remedial Action, except in the case of a Phase Developer Hazardous Materials Release, in which case the Phase Developer will bear all costs and expenses and Section 23.1(d) (*Indemnity*) will apply.

(c)   The Phase Developer shall:

    (i)   comply with any notice issued by MDOT under Section 9.4(b) to perform Remedial Action;

(ii)   obtain all Governmental Approvals required for any Remedial Action that it is required to perform;

(iii)   perform the Remedial Action in accordance with all Applicable Laws and Governmental Approvals; and

(iv)   in performing the Remedial Action, take such steps and actions as MDOT may require to protect and preserve MDOT's potential claims of contribution and indemnity, statutory or otherwise, against potentially responsible parties.

(d)   If there is a sudden Hazardous Materials Release, the Phase Developer may take the minimum action necessary to stabilize and contain the relevant Hazardous Materials Release without providing MDOT with prior notice under Section 9.4(a) or the opportunity to inspect the relevant areas and locations. If there is a sudden Phase Developer Hazardous Materials Release, the Phase Developer will not be required to provide MDOT with prior notice under Section 9.4(a) or the opportunity to inspect the relevant areas and locations before commencing Remedial Action.

(e)   Nothing in this Section 9.4, prevents or excuses the Phase Developer from complying with Applicable Law, Governmental Approvals, or the requirements of any Governmental Entity, including complying with any requirements to notify a Governmental Entity or other Person upon discovery of Hazardous Materials.

9.5   **Generator Status**

(a)   As among MDTA, MDOT, and the Phase Developer, the Phase Developer will be deemed the generator under 40 CFR, Part 262 with respect to any Phase Developer Hazardous Materials Release. The Phase Developer will be identified as the generator of the relevant Hazardous Materials on waste manifests and any other documentation submitted to transporters, disposal facilities, or any Governmental Entity.

(b)   With respect to Pre-existing Hazardous Materials or any Hazardous Materials Release other than a Phase Developer Hazardous Materials Release:

(i)   as among MDTA, MDOT, and the Phase Developer, the Phase Developer will not be deemed the generator under 40 CFR, Part 262;

(ii)   the Phase Developer will not be designated as the generator on the waste manifest or any other documentation submitted to transporters, disposal facilities, or any Governmental Entity.

(iii)   if MDOT requires the Phase Developer to take Remedial Action under Section 9.4 (*Hazardous Materials*), the Phase Developer shall:

(A)   prepare waste manifests for review and approval by MDOT (prior to the time that the Hazardous Materials are loaded on the transport truck on the Phase Site)

(B)   provide all related forms and approvals required for transportation and disposal of the Hazardous Materials;

(C)   provide copies of the waste manifests and related forms to MDOT on the date of transport; and

<table>
<tr><td>(D)</td><td>provide the final signed manifests and receipt(s) from the receiving/disposal facility to MDOT upon receipt of such documents.</td></tr>
</table>

(c) If MDOT requires the Phase Developer to take Remedial Action under Section 9.4 (*Hazardous Materials*) with respect to Pre-existing Hazardous Materials or any Hazardous Materials Release other than a Phase Developer Hazardous Materials Release:

    (i) the Phase Developer shall not transport the relevant Hazardous Materials unless MDOT has received, reviewed, approved, and signed (as required) any waste documentation, and reviewed and signed the manifests; and

    (ii) the Phase Developer shall give MDOT at least 48 hours' prior notice before transporting the relevant Hazardous Materials.

10. PREDEVELOPMENT WORK

10.1 General Requirements

(a) The Phase Developer shall perform the Predevelopment Work in accordance with:

    (i) Exhibit 6 *(Predevelopment Work Requirements)*;

    (ii) the Phase Developer's Proposal;

    (iii) Good Industry Practice;

    (iv) all Applicable Law;

    (v) the requirements of all Governmental Approvals; and

    (vi) all other requirements of this Agreement.

(b) The Phase Developer shall obtain and maintain all Governmental Approvals (other than MDOT-Provided Approvals) that are required to perform the Predevelopment Work.

10.2 Environmental Process and NEPA Assistance

(a) For the purposes of NEPA, the identification of a preferred alternative for each of Phase South and Phase North is exclusively within the control and decision making authority of MDOT, in conjunction with FHWA as the lead federal agency for NEPA.

(b) Nothing in this Agreement will limit the discretion that MDOT will exercise in conducting its environmental review and preparing environmental documents for Phase South and Phase North, including the discretion of MDOT and FHWA (as the lead federal agency for NEPA) to choose a no-build alternative.

(c) Subject to Section 10.2(d), as part of the Predevelopment Work, the Phase Developer shall, in accordance with 23 CFR §636.109(b), support MDOT during the environmental process for Phase North, by:

    (i) preparing preliminary designs (as defined in 23 CFR §636.103);

    (ii) to the extent required by MDOT, performing design and engineering activities for the purposes of:

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(A)   defining the Phase North alternatives and completing the NEPA alternative analysis and review process;

(B)   complying with other related environmental laws and regulations;

(C)   supporting MDOT coordination, public involvement, permit applications, or the development of mitigation plans; or

(D)   developing the design of the preferred alternative to a higher level of detail if the lead agencies agree that it is warranted under 23 U.S.C. §139(f)(4)(D); and

(iii)   providing feedback on cost and revenue assumptions used by MDOT for the NEPA alternative analysis and review process.

(d)   MDOT and FHWA shall retain control and responsibility for the NEPA process for Phase South and Phase North. The Phase Developer shall not perform services (and, if requested by MDOT, may refuse to provide services) that would violate conflict of interest rules under NEPA regarding the preparation, review, revision, and decisions on the scope and content of draft and final environmental review documents.

10.3   Phase South NTP Contingent Upon NEPA Approval

(a)   MDOT shall issue a notice to proceed with respect to the Predevelopment Work for Phase South to the Phase Developer promptly after all required NEPA approvals have been issued with respect to Phase South (**"Phase South NTP"**).

(b)   Despite Section 10.3(a), the Phase Developer may commence Predevelopment Work for Phase South prior to the issue of the Phase South NTP, subject to complying with Section 10.2(d) *(Environmental Process and NEPA Assistance)*.

(c)   If the NEPA approvals for Phase South do not permit Priced Managed Lanes then:

(i)   MDOT will not issue the Phase South NTP;

(ii)   MDOT shall issue a notice under Section 26.1 *(Termination for Convenience)* terminating this Agreement for convenience;

(iii)   the Phase Developer will not be entitled to any Allowed Costs for work performed on Phase North; and

(iv)   MDOT shall pay the Phase Developer an amount equal to the Phase Developer's Allowed Costs that are directly attributable to Phase South and that have not previously been reimbursed, up to the Phase South Termination Cap.

10.4   Phase North NTP Contingent Upon NEPA Approval

(a)   MDOT shall issue a notice to proceed with respect to the Predevelopment Work for Phase North to the Phase Developer promptly after all required NEPA approvals have been issued with respect to Phase North (**"Phase North NTP"**).

(b)   Despite Section 10.4(a), the Phase Developer may provide MDOT with any of the support referred to in Section 10.2(c) *(Environmental Process and NEPA Assistance)*, provided that the scope, cost, and timing of payment for any such support is pre-agreed in writing

by MDOT. Any costs paid to the Phase Developer in accordance with this Section 10.4(b) will not be subject to the Predevelopment Cost Cap for Phase North or the Phase North Termination Cap.

(c) If the NEPA approvals for Phase North do not permit Priced Managed Lanes then:

(i) MDOT will not issue the Phase North NTP;

(ii) unless otherwise agreed by the Phase Developer and MDOT, Phase North will be removed from the scope of this Agreement in accordance with Section 27.1 (*NEPA Does Not Permit Priced Managed Lanes For Phase North*);

(iii) the Phase Developer will not be entitled to any compensation for work performed on Phase North, except for work performed in support of NEPA for Phase North in accordance with Section 10.4(b); and

(iv) MDOT shall reimburse the Phase Developer for any support provided to MDOT in accordance with Section 10.4(b).

10.5 Interface Obligations and Risks

The Phase Developer shall assume and manage, or cause the Section Developers to assume and manage, all interface arrangements and risks between the Section Developers of the Phase.

10.6 Reporting of Allowed Costs of Predevelopment Work

(a) No later than 10 Business Days after the end of each month, the Phase Developer shall provide MDOT with a report detailing:

(i) the Allowed Costs that were incurred by the Phase Developer during that month, together with line-item documentation for each discrete cost to support the Allowed Costs incurred;

(ii) the aggregate cumulative Allowed Costs that were incurred by the Phase Developer from the Effective Date until the end of that month; and

(iii) the Allowed Costs that the Phase Developer anticipates incurring in the following month.

(b) The first report submitted under Section 10.6(a) after the Effective Date may include Allowed Costs for Predevelopment Work performed prior to the Effective Date.

(c) The Phase Developer shall, within five Business Days of a request, provide MDOT with any further information or documents that MDOT may reasonably require to substantiate the Allowed Costs contained in the report.

(d) MDOT may review the reports provided by the Phase Developer under Section 10.6(a) and notify the Phase Developer of any comments or objections to the report. The Phase Developer shall promptly, and in any event within 10 Business Days, update the report to address MDOT's comments or objections.

(e) Any failure by MDOT to review or comment on a report provided by the Phase Developer under Section 10.6(a) will not limit MDOT's right to object to any claim for Allowed Costs

by the Phase Developer at the time those Allowed Costs are payable under this Agreement.

(f)   The Phase Developer will not be entitled to be paid any Allowed Costs that have not been correctly reported under this Section 10.6.

10.7   **Limitation on Right to Rely**

(a)   Except to the extent expressly provided under this Agreement or a Section P3 Agreement, no action or omission by MDOT or MDTA or their respective agents, employees, successors and assigns, with respect to any submittal from the Phase Developer in connection with the Predevelopment Work will:

(i)   relieve the Phase Developer from the performance of its obligations under this Agreement or a Section Developer from the performance of its obligations under a Section P3 Agreement;

(ii)   constitute acceptance by MDOT that any Predevelopment Work satisfies the requirements of this Agreement or a Section P3 Agreement; or

(iii)   prevent MDOT from subsequently raising an objection or comment on a submittal under this Agreement, if the same objection or comment was not made by MDOT on a previous submittal.

(b)   Without limiting the generality of Section 10.7(a), the Phase Developer acknowledges and agrees that:

(i)   neither MDOT nor MDTA will be responsible for the relevance, completeness, accuracy, adequacy or fitness for any purpose of any design documents developed by the Phase Developer under this Agreement or by a Section Developer under a Section P3 Agreement; and

(ii)   the Phase Developer and the Section Developers will be solely responsible for their design work, including the adoption or use of any design documents developed by the Phase Developer, the Section Developer, or any other Person. The adoption and use of such design documents will be at the sole risk of the Phase Developer and the Section Developers and neither MDOT nor MDTA will have any liability to the Phase Developer, any Section Developer, or any other Phase Developer-Related Entity with respect to the use of such design documents by the Phase Developer, any Section Developer, or any other Phase Developer-Related Entity,

notwithstanding, any review, comment, exception, objection, rejection, approval, disapproval, acceptance, concurrence, certification of the design documents, or failure to conduct any such activity by MDOT or MDTA under this Agreement, a Section P3 Agreement, or otherwise.

(c)   Any review, comment, exception, objection, rejection, approval, disapproval, acceptance, concurrence, or certification, of any design documents or failure to conduct any such activity by MDOT or MDTA under this Agreement, a Section P3 Agreement, or otherwise:

(i)   will not be deemed or construed as any kind of warranty, express or implied, by MDOT or MDTA;

(ii)   will not create or impose upon MDOT or MDTA any duty or obligation toward the Phase Developer, any Section Developer, or any other Phase Developer-Related Entity;

(iii)   will not relieve the Phase Developer or any Section Developer from liability for, and responsibility to replace nonconforming work and to cure defaults under a Section P3 Agreement;

(iv)   will not be deemed or construed as any assumption of risk by MDOT or MDTA as to design, construction, equipping, supply, operations, maintenance, performance, or quality of a Section or performance of the Predevelopment Work or work under a Section P3 Agreement; and

(v)   may not be asserted by the Phase Developer or any Section Developer against MDOT or MDTA as a defense (legal or equitable) to, or as a waiver of, or relief from, obligations of the Phase Developer or any Section Developer to fulfill the requirements of this Agreement or any Section P3 Agreement.

10.8   **IDP Submittals**

(a)   The Phase Developer will have full responsibility for the implementation of each IDP Submittal included within the Phase Developer's Proposal, including the satisfaction of all conditions (if any) attached to MDOT's acceptance of an IDP Submittal and obtaining the approval or consent of any relevant Governmental Entity or third party (including any necessary modifications to the MDOT-Provided Approvals).

(b)   If, with respect to any IDP Submittal included within the Phase Developer's Proposal, the Phase Developer fails to satisfy any of the conditions attached to MDOT's acceptance of that IDP Submittal or obtain the approval or consent of any relevant Governmental Entity or third party (including any necessary modifications to the MDOT-Provided Approvals):

(i)   the Phase Developer shall perform the Predevelopment Work and submit Committed Section Proposals as if such IDP Submittal had not been included in the Phase Developer's Proposal; and

(ii)   the Phase Developer will not be entitled to any additional time, relief, or compensation, under this Agreement, including any relief from its obligations to deliver a Committed Section Proposal that is Financially Viable for Phase South, or any adjustment to the Development Rights Fee that is payable under this Agreement.

11.   **SECTION P3 AGREEMENTS AND COMMITTED SECTION PROPOSALS**

11.1   **Development of Section P3 Agreement and Section Technical Provisions**

(a)   Within 90 days of the Effective Date, MDOT shall deliver to the Phase Developer a draft form of Section P3 Agreement (including the Section Technical Provisions).

(b)   To the extent that MDOT delivers a draft form Section P3 Agreement (including Section Technical Provision) under Section 11.1(a), the Phase Developer and MDOT shall, subject to Section 11.13 *(Good Faith),* negotiate in Good Faith to agree the form of the Section P3 Agreement and Section Technical Provisions for each Section.

(c)   In preparing the draft form of Section P3 Agreement referred to in Section 11.1(a):

   (i)   MDOT shall include the terms included in the Section P3 Agreement Term Sheet. Amendments to the terms of the Section P3 Agreement Term Sheet will be made only to the extent that it is agreed between MDOT and the Phase Developer (each acting reasonably) that such amendments are consistent with matters agreed between MDOT and the Phase Developer during the Phase Developer's performance of the Predevelopment Work; and

   (ii)   with respect to the Section Technical Provisions, MDOT shall include terms that are consistent with Articles 2 to 27 of Exhibit 6 *(Predevelopment Work Requirements)*.

(d)   If, despite both MDOT and the Phase Developer complying with their obligations under Section 11.1(b), MDOT and the Phase Developer are unable to agree the form of the Section P3 Agreement (including Section Technical Provisions) for a Section in accordance with this Section 11.1 by the date falling 60 days prior to the relevant Predevelopment Milestone Deadline for delivering the Committed Section Proposal for that Section, either MDOT or the Phase Developer may terminate this Agreement in accordance with Section 26.4 (*Termination for Failure to Agree Form of Agreements*).

11.2   Permitted Payments to Phase Developer and Section Developer on Financial Close

(a)   For each Section, the Section P3 Agreement and the Initial Base Case Financial Model may permit the Section Developer for that Section to make the following payments (and only the following payments) in connection with achieving Financial Close of that Section:

   (i)   if the Section is in Phase South A, an amount to reimburse, fund, or otherwise pay on behalf of the Phase Developer, the Development Rights Fee (if any) payable by the Phase Developer for that Section under Article 17 (*Development Rights Fees*) of this Agreement;

   (ii)   subject to Section 11.2(c), an amount to reimburse the Phase Developer and the Section Developer for the Allowed Costs incurred by the Phase Developer or the Section Developer, that are directly attributable to that Section or any other Section that has previously achieved Financial Close, and that have not previously been reimbursed;

   (iii)   cash closing fees payable to Phase Developer-Related Entities in connection with achieving Financial Close of that Section, in aggregate amount not to exceed the Developer Closing Fee Percentage of ▇▇▇▇▇▇ multiplied by the total amount of project financing (including debt and equity) for that Section; and

   (iv)   underwriter fees, Rating Agency fees, upfront fees payable to USDOT for TIFIA loans, upfront fees payable to placement agents, upfront fees payable to banks, and other comparable upfront, arranging, or origination fees payable to Lenders, in each case, in relation to the debt, equity bridge loans, or letters of credit to secure committed equity, for that Section (provided such fees are payable on an arm's-length basis).

(b)   None of the Phase Developer, the Section Developer, or any other Phase Developer-Related Entity will be entitled to receive any arranging, closing, or similar fees (however described), or reimbursement for costs incurred in connection with the Predevelopment

Work or Section Work in connection with achieving Financial Close of a Section, other than as provided in Section 11.2(a).

(c)   The maximum aggregate amount of Allowed Costs that may be reimbursed to the Phase Developer and the Section Developer under Section 11.2(a)(ii) shall not exceed the Predevelopment Cost Cap.

11.3   **Committed Section Proposal**

(a)   For each Section the Phase Developer shall submit a Committed Section Proposal that complies with Exhibit 7 (*Committed Section Proposal*) to MDOT for approval by MDOT and the MDTA Board. All material parts of the Committed Section Proposal must have been approved by MDOT prior to the formal submission of the Committed Section Proposal, and unless otherwise agreed with MDOT, be consistent with the Phase Developer's Proposal.

(b)   Without limiting the requirements of Exhibit 7 (*Committed Section Proposal*):

(i)   each Committed Section Proposal must include the proposed Section P3 Agreement (including the Section Technical Provisions) and the Initial Base Case Financial Model which have been approved by MDOT;

(ii)   subject to Section 11.3(b)(v), each Committed Section Proposal must be Financially Viable (unless agreed by MDOT in writing);

(iii)   subject to Section 11.3(b)(v), each Committed Section Proposal for Phase South A must be delivered with evidence satisfactory to MDOT that all Sections of Phase South A will be Financially Viable (unless agreed by MDOT in writing); and

(iv)   each Committed Section Proposal must be valid for a period of 240 days from the date of its submission to MDOT.

(v)   If the Phase Developer is unable to submit a Committed Section Proposal for a Section of Phase South (other than the First Section) without assuming Maryland Funding, the Phase Developer may assume in its Committed Section Proposal that the amount of any Upfront Payment or Development Rights Fee paid to MDOT in connection with Financial Close of any previous Section of Phase South is (to the extent that it has not already been used to fund a previous Section) an available source of funding for the relevant Section.

11.4   **Regional Transit**

(a)   The Parties acknowledge that:

(i)   MDOT intends to enter into memorandums of understanding with Frederick County and Montgomery County (each a **"Transit MOU"**) with respect to the delivery of transit service improvements in conjunction with the P3 Program (**"Transit Service Improvements"**);

(ii)   under Section 1.17 *(Transit Service Improvements)* of Exhibit 6 *(Predevelopment Work Requirements)* of this Agreement, the Phase Developer is required to work with MDOT to develop the Transit Service Improvements and ensure they are

delivered under the Section P3 Agreements and in accordance with each Transit MOU; and

(iii)   at the time of submitting its Proposal, the form, scope, and cost of the Transit Service Improvements were unknown and accordingly the Proposal did not take into account the cost of the Transit Service Improvements.

(b)   MDOT shall ensure that the cost and scope of the Transit Service Improvements that are to be delivered under a Section P3 Agreement are not of an amount that prevents the Section from being Financially Viable.

(c)   The Committed Section Proposal for a Section will include any Transit Service Improvements that MDOT requires the Phase Developer to include in that Section.

11.5   **MDOT and MDTA Board Acceptance and Approval of Committed Section Proposal**

(a)   MDOT shall notify the Phase Developer whether MDOT accepts the Committed Section Proposal (including the draft Section P3 Agreement).

(b)   The Phase Developer acknowledges that any Committed Section Proposal that has been accepted by MDOT remains subject to:

(i)   approval by the MDTA Board; and

(ii)   the review and approval process in the Act.

(c)   MDOT shall notify the Phase Developer whether the MDTA Board approves the Committed Section Proposal (including the Section P3 Agreement).

(d)   If MDOT and the MDTA Board accept and approve the Committed Section Proposal (including the Section P3 Agreement), MDOT and MDTA shall commence the Section P3 Agreement review and approval process in accordance with the Act.

11.6   **MDTA Board Fail to Approve A Committed Section Proposal**

(a)   If MDOT notifies the Phase Developer in accordance with Section 11.5(c) *(MDOT and MDTA Board Acceptance and Approval of Committed Section Proposal)* that the MDTA Board does not approve a Committed Section Proposal (including the draft Section P3 Agreement) for the First Section that has been accepted by MDOT within 180 days from submission of the Committed Section Proposal to MDOT (or such longer period as the Parties may agree), MDOT shall issue a notice to terminate this Agreement in accordance with Section 26.1 *(Termination for Convenience)*, unless otherwise agreed by MDOT and the Phase Developer.

(b)   Subject to Section 11.6(c), if the MDTA Board rejects or otherwise does not approve a Committed Section Proposal (including the draft Section P3 Agreement) for any Section (other than the First Section) that has been accepted by MDOT within 180 days from submission of the Committed Section Proposal to MDOT (or such longer period as the Parties may agree), the Section and all other Sections that have not been submitted to MDOT under a Committed Section Proposal will be removed from the scope of this Agreement in accordance with Section 27.4 *(MDTA Board Does Not Approve A Committed Section Proposal)*, unless otherwise agreed by MDOT and the Phase Developer.

(c)   If:

(i)   the MDTA Board rejects or indicates that it will not approve a Committed Section Proposal that has been accepted by MDOT; and

(ii)   the Parties agree that changes may be made to the Committed Section Proposal to address any concerns or objections by the MDTA Board,

then the Parties may agree to submit a revised Committed Section Proposal to the MDTA Board under Section 11.6(b).

11.7   BPW Fails to Approve Section P3 Agreement

(a)   Each Section P3 Agreement will be subject to the approval of the BPW.

(b)   If requested by MDOT, the Phase Developer shall cause the Section Developer to sign the Section P3 Agreement before the BPW approves the agreement and shall provide any other information or documents that MDOT may reasonably require to obtain BPW approval.

(c)   Subject to Section 11.7(e), if the BPW rejects or otherwise does not approve a Section P3 Agreement for the First Section that has been accepted by MDOT and the MDTA Board under Section 11.5 (*MDOT and MDTA Board Acceptance and Approval of Committed Section Proposal*) within 180 days from submission of the Committed Section Proposal to MDOT (or such longer period as the Parties may agree), MDOT shall issue a notice to terminate this Agreement in accordance with Section 26.1 (*Termination for Convenience*), unless otherwise agreed by MDOT and the Phase Developer.

(d)   Subject to Section 11.7(e), if the BPW rejects or otherwise does not approve a Section P3 Agreement for any Section (other than the First Section) that has been accepted by MDOT and the MDTA Board under Section 11.5 (*MDOT and MDTA Board Acceptance and Approval of Committed Section Proposal*) within 180 days from submission of the Committed Section Proposal to MDOT (or such longer period as the Parties may agree), the Section and all other Sections that have not been submitted to MDOT under a Committed Section Proposal will be removed from the scope of this Agreement in accordance with Section 27.5 (*BPW Does Not Approve An Approved Section P3 Agreement*), unless otherwise agreed by MDOT and the Phase Developer.

(e)   If:

(i)   the BPW rejects or indicates that it will not approve a Section P3 Agreement that has been accepted by MDOT and the MDTA Board under Section 11.5 (*MDOT and MDTA Board Acceptance and Approval of Committed Section Proposal*); and

(ii)   the Parties agree that changes may be made to the Section P3 Agreement to address any concerns or objections from the BPW,

then the Parties may agree to submit a revised Section P3 Agreement to the BPW for approval under Section 11.7(d).

11.8   **Entry into a Section P3 Agreement**

If the BPW approves a Section P3 Agreement, the Phase Developer shall, within 90 days of that approval cause the Section Developer to:

(a)   sign the Section P3 Agreement (unless already signed by the Section Developer in accordance with Section 11.7(b) *(BPW Fails to Approve Section P3 Agreement)*); and

(b)   deliver the signed Section P3 Agreement to MDOT for signing by MDOT and MDTA.

11.9   **Failure to Achieve Financial Close under Section P3 Agreement Due to MDOT or MDTA**

If:

(a)   MDOT or MDTA fail to sign a Section P3 Agreement that has been approved by the BPW and signed and delivered by the Section Developer under Section 11.8 (*Entry into a Section P3 Agreement*) within 30 days of satisfaction of all conditions precedent to MDOT and MDTA signing the Section P3 Agreement; or

(b)   a Section Developer validly terminates a Section P3 Agreement on the basis that it was unable to achieve Financial Close of that Section P3 Agreement, solely due to MDOT or MDTA failing to satisfy the conditions precedent to Financial Close for which MDOT and MDTA are responsible under the Section P3 Agreement,

then unless otherwise agreed by MDOT and the Phase Developer (i) the Section and all other Sections that have not been submitted to MDOT under a Committed Section Proposal will be removed from the scope of this Agreement in accordance with Section 27.6 (*Failure to Achieve Financial Close Under a Section P3 Agreement Due to MDOT or MDTA*) and (ii) the Phase Developer will be released from its obligation to pay any Development Rights Fees with respect to such Sections.

11.10   **Equity Interests in Section Developer**

At Commercial Close of each Section, the Phase Developer shall hold at least 51% of the equity interest in the Section Developer of that Section.

11.11   **Development of Tolling Services Agreement**

(a)   Within 90 days of the Effective Date, MDOT and MDTA shall deliver to the Phase Developer a draft form of Tolling Services Agreement.

(b)   To the extent that MDOT and MDTA deliver a draft form Tolling Services Agreement under Section 11.11(a), the Phase Developer, MDOT, and MDTA shall, subject to Section 11.13 *(Good Faith)* negotiate in Good Faith to agree the form of the Tolling Services Agreement for each Section.

(c)   In preparing the draft form of Tolling Services Agreement referred to in Section 11.11(a), MDOT shall include the terms included in the Tolling Services Agreement Term Sheet. Amendments to the terms of the Tolling Services Agreement Term Sheet will be made only to the extent that it is agreed between MDOT, MDTA, and the Phase Developer (each acting reasonably) that such amendments are consistent with matters agreed between MDOT, MDTA, and the Phase Developer during the Phase Developer's performance of the Predevelopment Work.

(d)   If, despite MDOT, MDTA, and the Phase Developer complying with their obligations under Section 11.11(b), the Parties are unable to agree to the form of the Tolling Services Agreement for a Section in accordance with this Section 11.11 by the same time that MDOT and the Phase Developer are required to have agreed to the form of the Section P3 Agreement and Section Technical Provisions for the Section under Section 11.1(d) *(Development of Section P3 Agreement and Section Technical Provisions)*, then either MDOT or the Phase Developer may terminate this Agreement in accordance with Section 26.4 *(Termination for Failure to Agree Form of Agreements)*.

11.12   **Development of MDTA Financing Documents**

(a)   Within 90 days of the Effective Date, MDOT and MDTA shall deliver to the Phase Developer a draft form of the MDTA Financing Documents.

(b)   To the extent that MDOT and MDTA deliver the draft MDTA Financing Documents under Section 11.12(a), the Phase Developer, MDOT, and MDTA shall, subject to Section 11.13 *(Good Faith),* negotiate in Good Faith to agree the form of the MDTA Financing Documents to which the Section Developer will be a party.

(c)   In preparing the draft form of the MDTA Financing Documents referred to in Section 11.12(a), MDOT and MDTA shall include the terms included in the MDTA Notes Term Sheet. Amendments to the terms of the MDTA Notes Term Sheet will be made only to the extent that it is agreed between MDOT, MDTA, and the Phase Developer (each acting reasonably) that such amendments are consistent with matters agreed between MDOT, MDTA and the Phase Developer during the Phase Developer's performance of the Predevelopment Work.

(d)   If, despite MDOT, MDTA, and the Phase Developer complying with their obligations under Section 11.12(b), the Parties are unable to agree to the form of the MDTA Financing Documents to which the Section Developer will be a party in accordance with this Section 11.12 by the same time that MDOT and the Phase Developer are required to have agreed to the form of the Section P3 Agreement and Section Technical Provisions for the Section under Section 11.1(d) *(Development of Section P3 Agreement and Section Technical Provisions)*, then either MDOT or the Phase Developer may terminate this Agreement in accordance with Section 26.4 *(Termination for Failure to Agree Form of Agreements)*.

11.13   **Good Faith**

For the purposes of Section 11.1 *(Development of Section P3 Agreement and Section Technical Provisions)*, Section 11.11 *(Development of Tolling Services Agreement)*, and Section 11.12 *(Development of MDTA Financing Documents)*, a party will not be acting in Good Faith if:

(a)   it insists on including provisions in the Section P3 Agreement, the Section Technical Provisions, the Tolling Services Agreement, or the MDTA Financing Documents that, unless otherwise agreed by MDOT and the Phase Developer in accordance with Section 11.1(c) *(Development of Section P3 Agreement and Section Technical Provisions),* Section 11.11(c) *(Development of Tolling Services Agreement),* or Section 11.12(c) *(Development of MDTA Financing Documents)*:

        (i)   are inconsistent with the terms or commercial intent of the Section P3 Agreement Term Sheet, the Tolling Services Agreement Term Sheet, the MDTA Notes Term Sheet, or Exhibit 6 *(Predevelopment Work Requirements)*;

(ii)   preclude the delivery of an accepted IDP Submittal; or

(iii)   are otherwise materially inconsistent with the terms generally accepted on comparable managed lane P3 projects in the United States unless proposed to address unique aspects of the P3 Program; or

(b)   in the case of the Phase Developer only, it refuses to accept, or seeks to negotiate changes to, proposed terms of the Section P3 Agreement, the Section Technical Provisions, the Tolling Services Agreement, or the MDTA Financing Documents on the basis that those terms are inconsistent with assumptions (other than the Key Assumptions) that it made when either:

(i)   sizing the Development Rights Fee included in its Proposal; or

(ii)   determining that the relevant Section was Financially Viable.

12.   PHASE SOUTH A KEY ASSUMPTIONS

12.1   Phase Developer Proposal

MDOT acknowledges that as part of the RFP it required the Phase Developer to use the Key Assumptions to prepare those elements of its Proposal relating to Phase South A.

12.2   Key Assumptions for Phase South A Prove To Be Incorrect

(a)   If a Key Assumption for Phase South A proves to be incorrect, MDOT and the Phase Developer shall work together in Good Faith in accordance with the terms of this Section 12.2, to determine the impact of the Key Assumption not being correct under this Agreement.

(b)   If the Phase Developer or MDOT become aware that a Key Assumption is incorrect, it shall promptly notify the other party that the Key Assumption is not correct and identify how the Key Assumption is incorrect. If the other party does not agree that the Key Assumption is incorrect, then the matter will be referred to the Dispute Resolution Procedures under Article 33 *(Dispute Resolution)*.

(c)   If it is agreed or determined that a Key Assumption is incorrect under Section 12.2(b), the Phase Developer shall provide MDOT with details of the impact that it projects, if any, that the Key Assumption not being correct will have, on its own (and without taking into account any other changes to information available to the Phase Developer), on:

(i)   the ability of the Phase Developer to submit a compliant Committed Section Proposal for each Section of Phase South A that is Financially Viable; and

(ii)   the Available Funds,

together with all supporting information that MDOT may reasonably request (including an update to the most recent draft of the Financing Plan and financial model submitted under Section 1.22 (*Financing Workstream*) of Exhibit 6 (*Predevelopment Work Requirements*).

(d)   Following receipt of the information provided by the Phase Developer under Section 12.2(c), MDOT and the Phase Developer shall negotiate in Good Faith to agree on whether or not the Key Assumption being incorrect arose as a result of any act or

omission of the Phase Developer and the impact that the Key Assumption not being correct will have on:

(i)   the ability of the Phase Developer to submit a compliant Committed Section Proposal for the relevant Section in Phase South A that is Financially Viable; and

(ii)   the Available Funds for the relevant Section of Phase South A.

(e)   If MDOT and the Phase Developer are unable to agree on whether or not the cause of the Key Assumption being incorrect arose as a result of any act or omission of the Phase Developer, or the impact that a Key Assumption not being correct will have on the Available Funds for the relevant Section, then the dispute will be referred to the Dispute Resolution Procedures.

(f)   MDOT and the Phase Developer shall endeavor to reach an agreement or determination with respect to whether a Key Assumption is incorrect, its impact, and whether the cause of the Key Assumption not being correct arose as a result of any act or omission of the Phase Developer no later than 3 months after MDOT or the Phase Developer notifies the other that a Key Assumption is incorrect under Section 12.2(b).

(g)   If it is agreed or determined that:

(i)   a Key Assumption is incorrect under Section 12.2(b) (whether or not it is due to MDOT), and the Key Assumption being incorrect, on its own causes the following with respect to a Section in Phase South A:

(A)   for a Section in Phase South A with a Development Rights Fee greater than zero, a decrease to the Available Funds for that Section such that the Available Funds for that Section are less than the Development Rights Fee for that Section; and

(B)   for all Sections in Phase South A, the Phase Developer to be unable to submit a compliant Financially Viable Committed Section Proposal for that Section; and

(ii)   the cause of the Key Assumption being incorrect did not arise as a result of any act or omission of the Phase Developer,

then:

(iii) a Phase Developer Default under Section 25.1(b) (*Phase Developer Default)* will not have occurred; and

(iv)   either MDOT or the Phase Developer may terminate this Agreement under Section 26.5 *(Termination for Loss of Financial Viability Caused by A Key Assumption That Is Incorrect)*.

(h)   If the Development Rights Fee for a Section in Phase South A is greater than zero, then to the extent that it is agreed or determined that:

(i)   a Key Assumption is incorrect under Section 12.2(b) (whether or not it is due to MDOT), and the Key Assumption being incorrect directly results, on its own, in a decrease to the Available Funds for that Section; and

(ii)   the relevant Key Assumption being incorrect did not arise as a result of any act or omission of the Phase Developer,

then the Development Rights Fee for that Section will be reduced by the same amount as the reduction in the Available Funds.

13.   **UPFRONT PAYMENT ACCOUNT**

13.1   **Establishment of Upfront Payment Account**

An account will be established and held by the Trustee under the terms of the MDTA Master Trust Agreement into which the:

(a)   Development Rights Fees that are payable under this Agreement; and

(b)   any Upfront Payments that may be payable under the Section P3 Agreements,

will be paid (the **"Upfront Payment Account"**).

13.2   **Payments into Upfront Payment Account**

Following the execution of the MDTA Master Trust Agreement:

(a)   MDTA shall instruct the Trustee to deposit all Development Rights Fees that it receives from or on behalf of the Phase Developer (including where those payments are received by drawing on the Development Rights Fee Security) into the Upfront Payment Account.

(b)   MDTA shall instruct the Trustee to deposit all Upfront Payments that are paid by Section Developers on Financial Close of a Section into the Upfront Payment Account.

14.   **SECTION VIABILITY**

(a)   The requirements in this Article 14 apply to all Sections in Phase North, (together, the **"Uncommitted Sections"**).

(b)   For each Uncommitted Section the Phase Developer shall provide to MDOT:

(i)   a detailed description of the scope of work that the Phase Developer will perform to determine the Financial Viability of that Uncommitted Section;

(ii)   a schedule to complete the Financial Viability scope of work for the Uncommitted Section within the time required under Section 14(d)(i); and

(iii)   a breakdown of costs that will be incurred by the Phase Developer in performing the work described in Section 14(b)(i).

(c)   For each Uncommitted Section, the Phase Developer shall provide MDOT with the information described in Section 14(b) no later than:

(i)   with respect to the first Section of Phase North, 30 days from the Phase North NTP; or

(ii)   with respect to all other Uncommitted Sections, 30 days from the previous Section achieving Financial Close.

(d)   Within 5 Business Days of MDOT receiving the information under Section 14(b), MDOT and the Phase Developer shall commence meeting in Good Faith to agree:

(i)   the scope of work that the Phase Developer will perform to determine the Financial Viability of the Uncommitted Section and the schedule for completing the work (which shall be no longer than three months from the date that the Phase Developer and MDOT agree to the scope of work under this Section 14(d)(i), or such longer time period as agreed between MDOT and the Phase Developer); and

(ii)   the cap on Allowed Costs that the Phase Developer will be entitled to receive for performing the work described in Section 14(d)(i) in the event that the Section is not Financially Viable (**"Viability Cost Cap"**); and

(iii)   for Phase North:

(A)   a Predevelopment Cost Cap for all of Phase North;

(B)   a Phase North Termination Cap for all of Phase North; and

(C)   the deadlines for submitting complete and compliant Committed Section Proposals for the Sections in Phase North (these deadlines will be added to Exhibit 5 *(Predevelopment Milestones and Deadlines)* and will become Predevelopment Milestone Deadlines).

(e)   If the Phase Developer and MDOT are unable to agree to the matters in Section 14(d) within 45 Business Days, then unless MDOT and the Phase Developer otherwise agree, that Section and all other Uncommitted Sections will be removed from the scope of this Agreement in accordance with Section 27.3 *(Financial Viability of an Uncommitted Section).*

(f)   The Phase Developer shall complete all of the work described in Section 14(d)(i) and provide MDOT with its findings within the time periods agreed under Section 14(d)(i). If the Phase Developer performs all of the required work and determines that the Section is not Financially Viable, the Phase Developer shall provide MDOT with all ancillary and supporting documents used to support this determination.

(g)   If the Phase Developer fails to comply with the requirements of this Article 14, then MDOT may declare a Phase Developer Default under Section 25.1(u) *(Phase Developer Default)* and MDOT may:

(i)   terminate this Agreement for a Phase Developer Default in accordance with Section 26.2 *(Termination for Phase Developer Default)*; and

(ii)   draw on the Performance Security in accordance with Section 18.3 *(Rights to Draw on the Performance Security)*.

(h)   If the Phase Developer performs all of the work in accordance with Section 14(d)(i) and the Phase Developer's findings demonstrate that the Section will not be Financially Viable, then:

(i)   MDOT shall pay the Phase Developer its Allowed Costs for performing the work in Section 14(d)(i), up to the applicable Viability Cost Cap; and

(ii)   unless otherwise agreed, that Section and all other Uncommitted Sections will be removed from the scope of this Agreement in accordance with Section 27.3 *(Financial Viability of an Uncommitted Section)*.

15.   **SCHEDULE OF PERFORMANCE**

(a)   The Phase Developer shall perform the Predevelopment Work:

(i)   in accordance with the Predevelopment Work Schedule; and

(ii)   so as to achieve each Predevelopment Milestone by the applicable Predevelopment Milestone Deadline.

(b)   If a Financial Close Deadline is extended under a Section P3 Agreement, then the corresponding Predevelopment Milestone Deadline to which the achievement of Financial Close relates, will be extended by the same number of days as granted by MDOT under the Section P3 Agreement.

16.   **RELIEF EVENTS**

16.1   **Entitlement to Claim**

(a)   If a Relief Event directly causes or is reasonably likely to directly cause the Phase Developer to fail to achieve a Predevelopment Milestone by the applicable Predevelopment Milestone Deadline or to fail to comply with any of its other obligations under this Agreement, the Phase Developer may claim one or more of the following in accordance with this Article 16:

(i)   an extension to the Predevelopment Milestone Deadline;

(ii)   relief from compliance with its obligations under this Agreement; or

(iii)   an increase to a Predevelopment Cost Cap.

(b)   The Phase Developer will not be entitled to claim an extension of time or increase to any Predevelopment Cost Caps under this Article 16 in respect of any period of time that there is a concurrent delay. Delays will be considered concurrent where there is a delay caused by a Relief Event, but for the same period of delay, the Phase Developer or any Phase Developer-Related Entity has caused or otherwise suffered a delay in the performance of the Predevelopment Work and such delay does not itself arise from a Relief Event.

(c)   The Phase Developer will not be entitled to claim a Relief Event under this Agreement for an extension to a Predevelopment Milestone Deadline regarding the achievement of Financial Close, once the Section has achieved Commercial Close under the applicable Section P3 Agreement.

16.2   **Notices and Information to be Provided**

(a)   The Phase Developer shall comply with the procedures in this Section 16.2 to claim an extension to a Predevelopment Milestone Deadline, relief from its obligations, or an increase to any Predevelopment Cost Caps with respect to a Relief Event.

(b) The Phase Developer shall submit a notice that complies with Section 16.2(c) (**"Relief Event Notice"**) no later than 10 Business Days after the date that the Phase Developer first became aware that the relevant Relief Event had occurred and would have the effect that is the subject of the Phase Developer's claim.

(c) A Relief Event Notice must include:

(i) a statement that it is a Relief Event Notice issued under this Section 16.2;

(ii) full details of the relevant Relief Event (as available to the Phase Developer having made due inquiry), including its date and time of occurrence or inception;

(iii) full details of any extension of time, relief from any of its obligations, or increase to any Predevelopment Cost Cap claimed under this Article 16 (including details of any immediate relief required while the Relief Event is continuing);

(iv) with respect to a claim for an extension to a Predevelopment Milestone Deadline under Section 16.1(a)(i) (*Entitlement to Claim*), the Phase Developer's Good Faith analysis of how the relevant Relief Event was the direct cause or is reasonably likely to be the direct cause of a delay in achieving a Predevelopment Milestone by the applicable Predevelopment Milestone Deadline;

(v) with respect to a claim for relief from its obligations under Section 16.1(a)(ii) (*Entitlement to Claim*), the Phase Developer's Good Faith analysis of the adverse impact of the Relief Event on the Phase Developer's ability to perform its obligations under this Agreement;

(vi) with respect to a claim for an increase to a Predevelopment Cost Cap, the Phase Developer's Good Faith analysis of the additional Allowed Costs that it will incur as a result of the Relief Event and that would not be incurred had the Relief Event not occurred; and

(vii) the actions that the Phase Developer has taken and will take to mitigate the effect of the Relief Event in accordance with Section 16.3 *(Mitigation)*.

(d) If the Relief Event (or its effects) are continuing, the Phase Developer shall:

(i) submit an updated Relief Event Notice every 20 Business Days until the Relief Event has ended; and

(ii) within 10 Business Days of the Relief Event ending, submit a final Relief Event Notice.

(e) Within 10 Business Days of receiving a request from MDOT, the Phase Developer shall provide MDOT with any clarifying or additional information requested by MDOT with respect to its Relief Event Notice.

16.3 **Mitigation**

(a) The Phase Developer shall use Reasonable Efforts to mitigate the delay and any other consequences of any Relief Event that is the subject of a Relief Event Notice.

(b) If the Phase Developer fails to comply with its obligations under Section 16.3(a), the Phase Developer will not be entitled to an extension of time or relief from its obligations.

16.4 Failure to Provide Required Notice or Information

If any notice or information is not provided to MDOT in accordance with Section 16.2 (*Notices and Information to be Provided*), the Phase Developer will not be entitled to any extension of time or relief from its obligations and will have irrevocably waived and released any claim with respect to the alleged Relief Event.

16.5 Burden of Proof

The Phase Developer bears the burden of proving both the occurrence of a Relief Event and the resulting direct and adverse impacts of the Relief Event on the Phase Developer.

16.6 Grant of relief for Relief Events

(a) Within 30 Business Days (or such longer period as MDOT reasonably requires and notifies to the Phase Developer, having regard to the complexity of the claim) after receipt of a Relief Event Notice together with any other information provided under Section 16.2(e) (*Notices and Information to be Provided*), MDOT will notify the Phase Developer of MDOT's determination as to the Phase Developer's entitlement to any extension of time, increase to a Predevelopment Cost Cap, or other relief under this Article 16. If MDOT does not issue a determination within such time period, the claim will be deemed rejected.

(b) Within 10 Business Days of:

   (i) the Phase Developer receiving a notice of MDOT's determination under Section 16.6(a); or

   (ii) a deemed rejection under Section 16.6(a),

   the Phase Developer shall notify MDOT in writing of whether it accepts or disputes the determination made by MDOT. If the Phase Developer does not dispute MDOT's determination within 10 Business Days, the Phase Developer will be deemed to have accepted the determination.

(c) If the Phase Developer disputes MDOT's determination or deemed rejection under Section 16.6(b), then the matter will be resolved in accordance with the Dispute Resolution Procedures under Article 33 *(Dispute Resolution).*

(d) If the Phase Developer accepts or is deemed to have accepted MDOT's determination or deemed rejection under Section 16.6(b), the Phase Developer will have irrevocably waived and released any claim with respect to the alleged Relief Event.

16.7 Sole Remedy

Without prejudice to the Phase Developer's right to bring a claim for damages for a breach of contract by MDOT constituting a Relief Event under paragraph (c) of the definition of Relief Event, the Phase Developer's sole remedy in relation to any Relief Event will be the operation of this Article 16.

17. **DEVELOPMENT RIGHTS FEES**

17.1 **Development Rights Fees**

(a) The Phase Developer shall pay the Development Rights Fees to the Trustee in accordance with this Article 17 for the exclusive right to develop and implement the Phase under Article 4 (*Exclusive Rights and Obligations*). MDTA shall instruct the Trustee to deposit the Development Rights Fees into the Upfront Payment Account. If the Development Rights Fee is payable at any time prior to the execution of the MDTA Master Trust Agreement, the Development Rights Fee shall be payable to MDOT or MDOT's designee.

(b) The Development Rights Fees for Phase South A is $145,000,000.

17.2 **Payment of the Development Rights Fees**

Subject to Section 17.3 (*Payment of the Development Rights Fee Upon Failure to Achieve Financial Close of the First Section*) and Section 17.6 (*Development Rights Fee Security*), the Phase Developer shall pay the Development Rights Fee for Phase South A to the Trustee (or, if applicable, MDOT or MDOT's designee) on or before Financial Close for Phase South.

17.3 **Payment of the Development Rights Fee Upon Failure to Achieve Financial Close of the First Section**

If Financial Close for the First Section does not occur by the applicable Predevelopment Milestone Deadline in Exhibit 5 (*Predevelopment Milestones and Deadlines*), the Phase Developer shall pay to the Trustee (or, if applicable, MDOT or MDOT's designee) the Development Rights Fee for the First Section to the Trustee as if Financial Close had been achieved under Section 17.2 (*Payment of the Development Rights Fees*). The Phase Developer shall pay that Development Rights Fee no later than two Business Days after the applicable Predevelopment Milestone Deadline in Exhibit 5 (*Predevelopment Milestones and Deadlines*).

17.4 **Payment of the Development Rights Fees by Predevelopment Milestone Deadline for Phase South**

If Financial Close for all Sections of Phase South A does not occur by the applicable Predevelopment Milestone Deadline in Exhibit 5 (*Predevelopment Milestones and Deadlines*), the Phase Developer shall pay to the Trustee (or, if applicable, MDOT or MDOT's designee) the Development Rights Fees that have not already been paid under this Article 17 *(Development Rights Fees)*. The Phase Developer shall pay such Development Rights Fees no later than two Business Days after the applicable Predevelopment Milestone Deadline in Exhibit 5 (*Predevelopment Milestones and Deadlines*).

17.5 **Payment of the Development Rights Fee on Termination**

If MDOT terminates this Agreement for a Phase Developer Default under Section 26.2 (*Termination for Phase Developer Default*), the Phase Developer shall pay to the Trustee (or, if applicable, MDOT or MDOT's designee) the Development Rights Fees that have not already been paid under this Article 17 *Development Rights Fees)*. This amount shall be due and payable to the Trustee (or, if applicable, MDOT or MDOT's designee) on the date the Phase Developer receives an MDOT Termination Notice.

17.6   **Development Rights Fee Security**

(a)   On or before the Effective Date, the Phase Developer shall deliver to MDOT one or more letters of credit that comply with Section 17.6(b) as security for its obligation to pay the Development Rights Fees (collectively, the **"Development Rights Fee Security"**).

(b)   The Development Rights Fee Security must satisfy all of the following requirements:

(i)   be an irrevocable standby letter of credit in the form of Exhibit 14 (*Form of Development Rights Fee Security*) or such other form acceptable to MDOT in its sole discretion;

(ii)   be in an amount equal to the aggregate of the Development Rights Fees payable under this Agreement;

(iii)   be issued by an Eligible Security Issuer;

(iv)   be payable immediately on demand, conditioned only on written presentation from the Trustee or MDOT to the issuer of the Development Rights Fee Security;

(v)   if it has an expiration date, it must provide for automatic renewal unless the issuer provides notice to MDOT to the contrary no later than 30 days prior to the expiration date;

(vi)   allow for multiple draws; and

(vii)   name the Trustee and MDOT as the beneficiaries.

(c)   After payment of any Development Rights Fee to the Trustee (or, if applicable, MDOT or MDOT's designee) in accordance with this Article 17, or any reduction of the Development Rights Fee in accordance with Section 12.2 *(Key Assumptions for Phase South A Prove to be Incorrect)*, the Phase Developer may deliver a substitute Development Rights Fee Security to MDOT that complies with the requirements of this Article 17 in an amount equal to the aggregate of the balance of the Development Rights Fees payable under this Agreement.

17.7   **Obligation to Issue a Substitute Development Rights Fee Security**

(a)   If the financial institution issuing the Development Rights Fee Security ceases to be an Eligible Security Issuer, the Phase Developer shall deliver a substitute Development Rights Fee Security that complies with Section 17.6(b) (*Development Rights Fee Security*) issued by another financial institution that is an Eligible Security Issuer no later than 15 Business Days after the date that the prior financial institution ceased to be an Eligible Security Issuer.

(b)   If the Development Rights Fee Security has an expiration date (beyond which the Development Rights Fee Security may not be renewed), the Phase Developer shall deliver to MDOT a substitute Development Rights Fee Security that complies with Section 17.6(b) (*Development Rights Fee Security*) no later than 30 days prior to the expiration date of the then current Development Rights Fee Security.

17.8 Rights to Draw on the Development Rights Fee Security

MDOT may draw on the Development Rights Fee Security (directly or by issuing appropriate instructions to the Trustee) without prior notice to the Phase Developer in each of the following circumstances:

(a)   if the Phase Developer fails to pay a Development Rights Fee when due; or

(b)   if Section 17.7(a) or Section 17.7(b) (*Obligation to Issue a Substitute Development Rights Fee Security*) applies, the Phase Developer fails to deliver a substitute Development Rights Fee Security that complies with Section 17.6(b) (*Development Rights Fee Security*) within the period required under Section 17.7 (*Obligation to Issue a Substitute Development Rights Fee Security*).

17.9 Return of Development Rights Fee Security

MDOT shall return the Development Rights Fee Security to the Phase Developer within 15 days of the earlier of:

(a)   expiration of this Agreement under Section 3(a) *(Effective Date and Term)* or Section 3(b) *(Effective Date and Term)*;

(b)   termination of this Agreement under Section 26.1 *(Termination for Convenience),* Section 26.3 *(Termination by Court Ruling),* Section 26.4 *(Termination for Failure to Agree Form of Agreements)* (subject to Section 26.4(c) *(Termination for Failure to Agree Form of Agreements)*), or Section 26.5 *(Termination for Loss of Financial Viability Caused by A Key Assumption That Is Incorrect)*; or

(c)   the payment of the Development Rights Fee for the final Section of Phase South A.

18. PERFORMANCE SECURITY

18.1 Provision and Form of Performance Security

(a)   On or before the Effective Date, the Phase Developer shall provide MDOT with one or more letters of credit that comply with Section 18.1(b) as security for its payment obligation under Section 26.2(c) *(Termination for Phase Developer Default)* (collectively, the **"Performance Security"**).

(b)   The Performance Security must satisfy all of the following requirements:

   (i)   be an irrevocable standby letter of credit in the form of Exhibit 13 (*Form of Performance Security for Predevelopment Work*) or such other form acceptable to MDOT in its sole discretion;

   (ii)   be in an aggregate amount equal to $10 million;

   (iii)   be issued by an Eligible Security Issuer;

   (iv)   be payable immediately on demand, conditioned only on written presentation from MDOT to the issuer of the Performance Security;

(v)   if it has an expiration date, it must provide for automatic renewal unless the issuer provides notice to MDOT to the contrary no later than 30 days prior to the expiration date;

(vi)   allow for multiple draws; and

(vii)   name MDOT as the sole beneficiary.

18.2 Obligation to Issue a Substitute Performance Security

(a)   If the financial institution issuing the Performance Security ceases to be an Eligible Security Issuer, the Phase Developer shall deliver a substitute Performance Security that complies with Section 18.1(b) (*Provision and Form of Performance Security*) issued by another financial institution that is an Eligible Security Issuer no later than 15 Business Days after the date that the prior financial institution ceased to be an Eligible Security Issuer.

(b)   If the Performance Security has an expiration date (beyond which the Performance Security may not be renewed), the Phase Developer shall deliver to MDOT a substitute Performance Security that complies with Section 18.1(b) (*Provision and Form of Performance Security*) no later than 30 days prior to the expiration date of the then current Performance Security.

18.3 Rights to Draw on the Performance Security

MDOT may draw on the Performance Security in its entirety without prior notice to the Phase Developer in each of the following circumstances:

(a)   the Phase Developer fails to pay MDOT $10 million in liquidated damages upon termination of this Agreement for a Phase Developer Default in accordance with Section 26.2(c) *(Termination for Phase Developer Default)*; or

(b)   if Section 18.2(a) or Section 18.2(b)(*Obligation to Issue a Substitute Performance Security*) applies, the Phase Developer fails to deliver to MDOT a substitute Performance Security that complies with Section 18.1(b) (*Provision and Form of Performance Security*) within the period required by Section 18.2 (*Obligation to Issue a Substitute Performance Security*).

18.4 Return of Performance Security

MDOT shall return the Performance Security to the Phase Developer within 15 days of the earlier of:

(a)   expiration of this Agreement under Section 3(a) *(Effective Date and Term)* or Section 3(b) *(Effective Date and Term)*; or

(b)   termination of this Agreement under Section 26.1 *(Termination for Convenience),* Section 26.3 *(Termination by Court Ruling)*, Section 26.4 *(Termination for Failure to Agree Form of Agreements)* (subject to Section 26.4(c) *(Termination for Failure to Agree Form of Agreements)*), or Section 26.5 *(Termination for Loss of Financial Viability Caused by A Key Assumption That Is Incorrect)*.

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19. **KEY PERSONNEL AND CONTRACTING**

19.1 **Key Personnel**

(a) The Phase Developer shall retain, employ, and utilize the individuals listed in Exhibit 11 (*Key Personnel for Predevelopment Work*) to hold the following Key Personnel positions:

(i) Phase Developer Project Manager;

(ii) Construction Project Manager;

(iii) Design Project Manager; and

(iv) Lead Finance Manager.

(b) The Phase Developer shall not change or substitute any Key Personnel except:

(i) due to retirement, death, disability, incapacity, or voluntary or involuntary termination of employment;

(ii) if MDOT directs the Phase Developer to remove the Key Personnel in accordance with Section 19.1(f) or Section 19.2 (*Removal or Replacement of Phase Developer-Related Entity Personnel*); or

(iii) with MDOT's prior approval in writing under Section 19.1(c).

(c) The Phase Developer shall ensure that no individual carries out Predevelopment Work as a Key Personnel unless the individual has been approved in writing by MDOT in accordance with this Section 19.1.

(d) If the Phase Developer proposes to change, or is required to change, an individual in a Key Personnel position in accordance with Section 19.1(c), the Phase Developer shall provide MDOT with any information that MDOT may require to demonstrate that the Phase Developer's proposed individual has qualifications, capability, and experience that are equal to or better than those of the individual being replaced.

(e) MDOT will have the right to:

(i) review the qualifications, capability, and experience of each individual proposed by the Phase Developer to hold a Key Personnel position; and

(ii) approve or reject the appointment of each individual to each Key Personnel position prior to the individual commencing any Predevelopment Work in the Key Personnel capacity (such approval not to be unreasonably withheld, delayed or conditioned). It will be reasonable for MDOT to reject a proposed substitute if that individual does not possess the qualifications, capability, and experience that are equal to or better than those of the individual being replaced.

(f) If MDOT approves the appointment of an individual under Section 19.1(e)(ii), MDOT may require that the individual is appointed for a trial period of up to 60 days. At any time during that trial period, MDOT may require the Phase Developer to remove the individual from that position, in which case the Phase Developer shall repeat the process in Section 19.1(c).

(g)   If MDOT rejects a proposed substitute Key Personnel, the Phase Developer shall repeat the process in Section 19.1(c) until MDOT has approved the proposed substitute Key Personnel.

(h)   The Phase Developer shall cause each Key Personnel to dedicate the full amount of time necessary for the proper prosecution and performance of the Predevelopment Work.

(i)   The Phase Developer shall provide MDOT with office addresses, cell phone numbers, and email addresses for each Key Personnel. MDOT may contact any Key Personnel 24 hours per day, seven days a week.

(j)   The Phase Developer shall ensure that the Phase Developer Project Manager supervises, directs, and has overall responsibility for, the Predevelopment Work in accordance with this Agreement.

19.2   **Removal or Replacement of Phase Developer-Related Entity Personnel**

(a)   MDOT may by notice in writing require the removal or replacement of any personnel (at any level) of a Phase Developer-Related Entity assigned to the performance of the Predevelopment Work, if MDOT reasonably considers that the removal or replacement is necessary and in the best interests of the Phase.

(b)   If MDOT requires the removal or replacement of any personnel of a Phase Developer-Related Entity under Section 19.2(a), the Phase Developer shall ensure that the personnel to be removed or replaced immediately ceases the performance of Predevelopment Work at no cost or expense to MDOT.

(c)   The Phase Developer shall ensure that any personnel who is removed or replaced under this Section 19.2 is not re-employed again for the Phase.

19.3   **Key Participants**

(a)   The Phase Developer shall retain, employ, and utilize the Key Participants.

(b)   The Phase Developer shall not:

(i)   substitute a Key Participant; or

(ii)   add an additional Key Participant,

without MDOT's prior written consent (which shall not be unreasonably withheld or delayed).

(c)   Without limiting the matters that MDOT may consider when deciding whether to provide consent under Section 19.3(b), it will be reasonable for MDOT to withhold its consent to a substitute Key Participant if:

(i)   the Phase Developer fails to demonstrate that the proposed substitute has qualifications, capabilities, and experience that are equal to or better than those of the Key Participant that is being replaced; or

(ii)   MDOT determines that the substitute would adversely affect the capacity of the Phase Developer to perform fully the requirements of this Agreement.

19.4   **Subcontracting**

(a)   Nothing contained in this Agreement will create any contractual relationship between MDOT or MDTA, and any Contractor.

(b)   No Contract entered into by any Phase Developer-Related Entity will impose any obligation or liability upon MDOT, MDTA, or any other MDOT-Related Entity to any Contractor or any of its employees.

(c)   The retention of Contractors by the Phase Developer will not relieve the Phase Developer of its obligations under this Agreement, and the Phase Developer will at all times be fully responsible under this Agreement for the acts and omissions of all Contractors performing the Predevelopment Work in relation to the Phase as if they were the acts and omissions of the Phase Developer.

(d)   The Phase Developer shall retain, or shall cause to be retained, only Contractors that are qualified, experienced, and capable of performing the portion of the Predevelopment Work assigned to them. The Phase Developer shall require that each Contractor obtains and maintains at all times during the performance of the assigned Predevelopment Work, all licenses, certifications, registrations, permits, approvals and insurances required by Applicable Law and all Governmental Approvals in respect of the work being performed by such Contractor.

19.5   **Prompt Payment**

(a)   Subject to Section 19.5(c), the Phase Developer shall:

(i)   make prompt payment of undisputed amounts to Contractors with whom it has privity of contract; and

(ii)   require all Contractors to make prompt payment of undisputed amounts to lower-tier Contractors with whom they have privity of contract.

(b)   The Phase Developer shall insert in all Contracts to which the Phase Developer is a party a requirement for the Contractor to:

(i)   pay all undisputed amounts to lower-tier Contractors (with whom they have privity of contract) within 10 days of receiving payment for work that is satisfactorily performed by such lower-tier Contractors; and

(ii)   require lower-tier Contractors to insert the same provision in each subcontract at all tiers.

(c)   The Phase Developer acknowledges that any lower-tier Contractor that does not receive prompt payment may have the right to request a remedy in accordance with COMAR §21.10.08.

(d)   Within 10 days of the Phase Developer receiving payment of any Allowed Costs or any other payment from MDOT allocable to work performed by a Contractor with whom it has privity of contract, the Phase Developer shall make the corresponding payment to such Contractor (to the extent not previously paid).

(e)   The Phase Developer shall not withhold retainage from Contractors with whom it has privity of contract (and shall require that Contractors do not withhold retainage from lower-tier Contractors).

19.6   **Labor Standards**

(a)   In performing the Predevelopment Work, the Phase Developer shall comply, and shall require all Contractors to comply with all Applicable Laws regarding labor, occupational safety, and health.

(b)   To the extent any Predevelopment Work is carried out in the Commonwealth of Virginia, the Phase Developer shall comply, and shall require all applicable Contractors to comply, with the Commonwealth of Virginia's labor and occupational safety and health laws.

(c)   All individuals performing the Predevelopment Work must be qualified, experienced, competent, and skilled in performing the Predevelopment Work assigned to them under this Agreement.

(d)   If an individual employed by the Phase Developer or any Contractor:

(i)   lacks the qualifications, skill, competence, experience, licensing, certification, registration, permit, approval, bond, or insurance, for performing the relevant aspect of the Predevelopment Work; or

(ii)   is not performing the relevant aspect of the Predevelopment Work in a proper, safe, and skillful manner,

the Phase Developer shall, or shall cause the relevant Contractor to, remove that individual from performing the Predevelopment Work.

(e)   An individual removed from performing the Predevelopment Work under Section 19.6(d), may not be re-employed to perform any portion of the Predevelopment Work. The Phase Developer will not be entitled to make any claim as a result of such removal.

(f)   If, after notice and reasonable opportunity to cure, the Phase Developer:

(i)   fails take action as required by Section 19.6(d); or

(ii)   fails to ensure that qualified, skilled, competent, experienced, licensed, certified, registered, permitted, and approved personnel are furnished for the proper performance of the Predevelopment Work,

then, MDOT may suspend the affected portion of the Predevelopment Work by delivering to the Phase Developer notice of such suspension.

(g)   Any suspension under Section 19.6(f) will in no way relieve the Phase Developer of any obligation contained in this Agreement, or entitle the Phase Developer to make any claim under this Agreement.

19.7   **Ethical Standards**

(a)   Within 90 days after the Effective Date, the Phase Developer shall adopt written policies establishing ethical standards of conduct for all Phase Developer-Related Entities, including the Phase Developer's supervisory and management personnel, in dealing with

MDOT and in employment relations. The Phase Developer shall deliver the policies to MDOT upon MDOT's request.

(b) The Phase Developer shall ensure that the policies provided under Section 19.7(a), include standards of ethical conduct concerning:

(i) compliance with restrictions applicable to federal grantees, Maryland State agencies, public contracts, public officials and employees, and former public officials and employees, in accordance with the Maryland Public Ethics Law, Title 5 of the General Provisions Article of the Annotated Code of Maryland, and Title 14 of the Election Law Article of the Annotated Code of Maryland with respect to prohibitions on political contributions by the Phase Developer;

(ii) the protection of employees of the Phase Developer-Related Entities from unethical practices in the selection, use, hiring, compensation, or other terms of employment, or in firing, promotion, and termination of employees;

(iii) the protection of employees of the Phase Developer-Related Entities from retaliatory actions (including discharge, demotion, suspension, threat, harassment, pay reduction, or other discrimination in the terms of employment) in response to reporting of illegal (including the making of a false claim), unethical, or unsafe actions or failures to act by any Phase Developer-Related Entity;

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

(v) restrictions on use of office or job position for a purpose that is, or would to a reasonable person appear to be, primarily for the private benefit of a director, member, officer, or supervisory or management person, rather than primarily for the benefit of the Phase Developer or the Phase, or primarily to achieve a private gain or an exemption from duty or responsibility for a director, member, officer, or supervisory or management person; and

(vi) restrictions on directors, members, officers, or employees of any Phase Developer-Related Entity performing any of the Predevelopment Work if the performance of such Predevelopment Work would be prohibited under MDOT's conflict of interest rules and policies.

(c) The Phase Developer shall cause its directors, members, officers, supervisory and management personnel, and require those of all other Phase Developer-Related Entities, to adhere to and enforce the adopted policies on ethical standards of conduct. The Phase Developer shall establish reasonable systems and procedures to promote and monitor compliance with these policies.

(d) No official or employee of the State of Maryland or any unit of the State of Maryland whose duties as such official or employee include matters relating to or affecting the subject matter of this Agreement may, while holding such position or so employed, be

or become an employee of any Phase Developer-Related Entity or have a financial interest in any Phase Developer-Related Entity.

19.8   **Non-discrimination and Equal Opportunity**

(a)   **Compliance with State Non-Discrimination Law and Regulations**

The Phase Developer, its assignees, and its successors in interest, agree as follows:

(i)   not to discriminate in any manner against any employee or applicant for employment because of race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, gender identity, or disability unrelated in nature and extent so as to reasonably preclude the performance of such employment;

(ii)   to include a provision similar to Section 19.8(a)(i) in each Contract, and require the provision to be included in all lower-tier Contracts (other than standard form contracts for commercial supplies or raw materials that are not subject to negotiation); and

(iii)   to post and to cause Contractors to post notices setting forth the substance of Section 19.8(a)(i) in conspicuous places that is available to employees and applicants for employment.

(b)   **Sanctions**

(i)   In the event of noncompliance with the nondiscrimination provisions under Section 19.8(a) (*Compliance with State Non-Discrimination Law and Regulations*), MDOT will impose such sanctions as it may determine to be appropriate including:

(A)   where applicable, withholding payment of Allowed Costs to the Phase Developer until the Phase Developer-Related Entity complies; or

(B)   declaring a Phase Developer Default under Section 25.1(q) (*Phase Developer Default*).

(ii)   MDOT will provide notice regarding any breach of Section 19.8(a) (*Compliance with State Non-Discrimination Law and Regulations*) and allow the Phase Developer five Business Days to cure the breach before taking any action under this Section 19.8(b).

(c)   **Nondiscrimination Clause**

(i)   As a condition of entering into this Agreement, the Phase Developer represents and warrants that it will comply with the State's Commercial Nondiscrimination Policy under Title 19 of the State Finance and Procurement Article of the Annotated Code of Maryland.

(ii)   In complying with Section 19.1(b)(i), the Phase Developer shall not discriminate on the basis of race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, or on the basis of disability or other unlawful forms of discrimination in the solicitation, selection, hiring, or commercial treatment of subcontractors, vendors, suppliers, or commercial customers, nor shall the Phase

Developer retaliate against any person for reporting instances of such discrimination.

(iii)   The Phase Developer shall provide equal opportunity for subcontractors, vendors, and suppliers to participate in all of its public sector and private sector subcontracting and supply opportunities, provided that nothing contained in this Section 19.8(c) shall prohibit or limit otherwise lawful efforts to remedy the effects of marketplace discrimination that have occurred or are occurring in the marketplace.

(iv)   The Phase Developer understands and agrees that a material violation of this Section 19.8(c) shall be considered a material breach of this Agreement and may result in termination of this Agreement, disqualification from participating in State contracts, and other sanctions.

(v)   This Section 19.8(c) is not enforceable by or for the benefit of, and creates no obligation to, any third party.

(d)   **Investigations**

(i)   As a condition of entering into this Agreement, upon the request of the Commission on Civil Rights, or any Federal agency, and only after the filing of a complaint against the Phase Developer under Title 19 of the State Finance and Procurement Article, as amended from time to time, the Phase Developer agrees to provide to the State within 60 days after the request, a truthful and complete list of the names of all subcontractors, vendors, and suppliers that the Phase Developer has used in the past four years on any of its contracts that were undertaken within the State of Maryland, including the total Dollar amount paid by the contractor on each subcontract or supply contract.

(ii)   The Phase Developer agrees to cooperate in any investigation conducted by the State in accordance with the State's Commercial Nondiscrimination Policy under Title 19 of the State Finance and Procurement Article of the Annotated Code of Maryland, to provide any documents relevant to any investigation that is requested by the State.

(iii)   The Phase Developer understands and agrees that a violation of this Section 19.8(d) shall be considered a material breach of this Agreement and may result in termination of this Agreement, disqualification from participating in State contracts, and other sanctions.

(e)   **Compliance with Federal Law**

(i)   The Phase Developer assures and represents to MDOT and MDTA that it is conforming to the provisions of the Civil Rights Act of 1964 and §202 of Executive Order 11246 of the President of the United States of America as amended by Executive Order 11375, as applicable.

(ii)   The Phase Developer shall comply with all applicable federal laws and regulations pertaining to nondiscrimination in employment, including the requirements specified in Exhibit 16 (*Federal and State Requirements*).

(f)   **Affirmative Action and Equal Employment Opportunity Requirements**

To the extent applicable to the Predevelopment Work, the Phase Developer shall comply with MDOT's affirmative action requirements and all applicable equal employment opportunity requirements, and shall require its Contractors to comply with such requirements. Such requirements shall apply to the entire Phase and all of the Predevelopment Work.

19.9   **Disadvantaged Business Enterprises**

(a)   **General Requirements**

(i)   The spirit and intent of the State of Maryland is to afford small, disadvantaged, minority, and women-owned businesses the opportunity to perform viable and meaningful services in a teaming effort. It is the desire of the State to maximize notice, and the opportunity to participate in the solicitation process, to a diverse and broad range of small, disadvantaged, minority, and women-owned businesses.

(ii)   The governing statutes, regulations, and program requirements are 49 CFR Part 26 and the MDOT DBE Program Manual.

(iii)   In accordance with 49 CFR §26.13, the Phase Developer, sub recipient, or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Agreement. The Phase Developer shall carry out the applicable requirements of 49 CFR, Part 26 in the award and administration of DOT-assisted contracts. Failure by the Phase Developer to carry out these requirements is a material breach of this Agreement, which may result in termination of this Agreement, or such other remedy as MDOT deems appropriate which may include disqualifying the Phase Developer from future bidding as non-responsible. The requirements of this Section 19.9(a)(iii) shall be included in all Contracts.

(iv)   The Phase Developer shall support and actively participate in various meetings, as directed by MDOT, including workgroups, advisory groups, USDOT Office of Small and Disadvantaged Business Utilization "Bonding Education Program" and local business leadership councils.

(v)   The DBE participation goal for the Predevelopment Work is 26%.

(vi)   The Phase Developer shall make Good Faith Efforts to achieve the DBE participation goal.

(vii)   The Phase Developer shall comply with the following:

(A)   only MDOT certified DBEs can be used to achieve the DBE participation goal;

(B)   on or before the Effective Date, the Phase Developer shall provide to MDOT the following:

(aa)   a DBE Participation Plan in accordance with Exhibit 17 *(Predevelopment DBE Participation Plan)*;

<blockquote>
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<blockquote>

(bb)   a list of all Contracts (with Dollar value), for the Predevelopment Work that are anticipated to begin within the first 180 days after the Effective Date; and

(cc)   the DBE Participation Forms (as directed by MDOT) for each Contract awarded as of the Effective Date;

</blockquote>

(C)   beginning 90 days after the Effective Date and on a quarterly basis thereafter, the Phase Developer shall submit:

<blockquote>

(aa)   an updated list of Contracts, including the Dollar value, for the Predevelopment Work that are anticipated to begin within the next 180 day period;

(bb)   DBE Participation Forms, as directed by MDOT, for the Contracts awarded since the last submission of the DBE Participation Forms;

(cc)   an updated DBE Participation Schedule for approval by MDOT;

(dd)   completed DBE forms as requested by MDOT for the DBE firms that are anticipated to commence Predevelopment Work within the next 180 day period; and

(ee)   any other forms or information MDOT requests related to the total Dollar value of the awarded Contracts and total commitments to DBE firms;

</blockquote>

(D)   where the Phase Developer is unable to meet the DBE goal established by MDOT (and the Phase Developer did not obtain a waiver from MDOT under Form H-7 of the RFP), the Phase Developer shall submit to MDOT documentation of the Phase Developer's Good Faith Efforts to meet the DBE goal. If MDOT is satisfied that the Phase Developer has exercised Good Faith Efforts, MDOT will work with the Phase Developer to establish an improvement plan as part of the DBE Participation Plan, or notify the Phase Developer under Section 19.9(d)(iv) *(Compliance)*.

</blockquote>

(viii)   If MDOT determines that the Phase Developer:

<blockquote>

(A)   failed to submit the documentation required by this Agreement;

(B)   failed to exercise Good Faith Efforts to meet the DBE goal; or

(C)   failed to adhere to the improvement plan established under Section 19.9(a)(vii)(D) (*General Requirements*),

</blockquote>

then MDOT, in consultation with MDOT OEO, and upon review by the Maryland Office of the Attorney General, may make a determination that the Phase Developer is non-compliant, and take appropriate action against the Phase Developer in accordance with Section 19.9(d)(iv) *(Compliance)*.

</blockquote>

(b)   **Third-Tier and Lower-Tier Contracting**

MDOT and MDTA   48   Phase P3 Agreement
Execution Version
Phase 1 of the I-495 & I-270 P3 Program

(i) The Phase Developer must obtain MDOT approval for all third-tier and lower-tier contracting arrangements before using the third-tier or lower-tier contracting arrangement to achieve the DBE participation goal.

(ii) The following conditions must be met before MDOT may approve a third-tier or lower-tier contracting arrangement for meeting the DBE goal:

(A) the Phase Developer has submitted an approval request to MDOT regarding the use of third-tier or lower-tier contracting arrangement; and

(B) before awarding the contract, MDOT must be reasonably satisfied, through the DBE Participation Schedule and the DBE Participation Plan, that the third-tier or lower-tier contract is a necessary component of achieving the DBE goal.

(ii) The Phase Developer shall provide all records of any approved third-tier or lower-tier Contract to MDOT upon request.

(c) **DBE Participation Report**

(i) As part of the Monthly Progress Report, the Phase Developer shall submit a DBE Participation Report which shall:

(A) include an updated list of all Contractors;

(B) identify the DBE firms, and if requested, the non-DBE firms performing the Predevelopment Work;

(C) identify the type of work being performed by each DBE firm;

(D) include the results of all procurements completed in the previous month, including those procured competitively and by other means;

(E) provide the total number of Contractors and the total Dollar value of all Contracts awarded to date;

(F) provide the total number of Contracts awarded to DBE firms and the total value of Contracts awarded to DBE firms to date;

(G) provide the percentage of completion of the Predevelopment Work as a whole and the percentage of completion for each DBE Contract; and

(H) for each Contract provide the following:

(aa) the original Contract amount;

(bb) the value of any modifications to date; and

(cc) payments made to date.

(ii) Suppliers do not need to be included in the DBE Participation Report unless they are a DBE firm, but the Phase Developer must retain records of all non-DBE Supplier contracts and subcontracts.

(iii)   The Phase Developer shall provide information to MDOT no later than March 1 and November 1 each year for the duration of the Term to assist MDOT with the submission of DBE Uniform Reports to FHWA.

(d)   **Compliance**

(i)   Upon request by MDOT, the Phase Developer shall report to MDOT regarding compliance with the DBE requirements for the purposes of MDOT's monitoring.

(ii)   The compliance process includes monitoring payments and performing onsite reviews to verify that the certified DBE firms listed in the DBE Participation Schedule are actually performing the work and receiving compensation in accordance with that schedule.

(iii)   The Phase Developer shall:

(A)   as part of the Monthly Progress Report, beginning the first month after the Effective Date, submit to MDOT a monthly DBE Payment Report in the form provided by MDOT, for each certified DBE firm. The report must include:

(aa)   a list of all invoices submitted by each certified DBE firm during the reporting period;

(bb)   all invoices paid by the Phase Developer to the certified DBE firms during the reporting period; and

(cc)   a list of unpaid invoices over 30 days old received from a certified DBE firm, and the reason the payment has not been made;

(B)   include in its agreements with its certified DBE firms a requirement that the certified DBE firms submit by 10 Business Days following the prior months end, to the MDOT OEO (or its designee) the monthly Subcontractor DBE Payment Report in the form provided by MDOT. The report must include:

(aa)   all invoices submitted to the Phase Developer during the reporting period;

(bb)   all payments received from the Phase Developer in the preceding 30 days; and

(cc)   a listing of unpaid Contractor invoices over 30 days old, and the reason payment has not been made;

(C)   provide right-of-entry at reasonable times as requested by MDOT to enable MDOT's representatives to verify compliance with DBE participation requirements, including inspecting any relevant matter, conducting periodic reviews, reviewing records, visiting jobsites, and interviewing Contractors and workers; and

(D)   maintain and retain all records concerning DBE participation and make them available for MDOT's inspection for five years following the end of the Term. Subcontract agreements documenting the Predevelopment Work

performed by all certified DBE firms must be retained by the Phase Developer and furnished to MDOT upon request.

(iv)   If MDOT determines that the Phase Developer has failed to comply with its DBE requirements under this Section 19.9, then MDOT:

    (A)   will notify the Phase Developer of its findings and specify what corrective actions are required; and

    (B)   the Phase Developer shall initiate the corrective actions within 10 Business Days of the Phase Developer's notice and complete the corrective action within the time specified by MDOT.

(v)   If MDOT determines that noncompliance with DBE program requirements exist and that the Phase Developer has failed or refused to take the corrective action required by MDOT under Section 19.9(d)(iv), then MDOT, in its capacity as a governmental body charged with enforcing the DBE program, may impose sanctions on the Phase Developer, including:

    (A)   suspending the Predevelopment Work until the noncompliance is remedied;

    (B)   terminating this Agreement for Phase Developer Default;

    (C)   referring the matter to the Maryland Office of the Attorney General for appropriate action; and

    (D)   using any other compliance mechanism available at law.

(e)   **Cancellation of DBE Contracts**

(i)   The Phase Developer shall not cancel or terminate any Contract with a DBE firm except with MDOT's prior written consent.

(ii)   The Phase Developer shall provide written notice of its request to cancel or terminate the DBE Contract and comply with the applicable requirements and provisions of 49 CFR §26.53 and the MDOT DBE Program Manual.

(iii)   MDOT will respond to the request from the Phase Developer to cancel or terminate the DBE within 10 Business Days.

(f)   **DBE Participation Plan**

The Phase Developer shall comply with the requirements of the DBE Participation Plan and shall not amend the plan without the prior written consent of MDOT.

(g)   **Contract Provisions**

The Phase Developer shall:

(i)   include provisions to implement the requirements of this Section 19.9 in every applicable Contract to which it is a party (including purchase orders and task orders for the Predevelopment Work); and

(ii)   ensure that the requirements of this Section 19.9 be included in all applicable Contracts at lower tiers (including purchase orders and task orders for Predevelopment Work), so that such provisions will be binding upon each applicable Contractor.

(h)   **Minority Business Enterprise**

In the event that no federal funds are used to finance the Predevelopment Work, MDOT reserves the right to establish Minority Business Enterprise goals under Title 14, subtitle 3 of the State Finance and Procurement Article of the Annotated Code of Maryland, to the extent it is practicable and legally permissible to do so.

19.10 **Prevailing Wages for Predevelopment Work**

(a)   To the extent applicable, the Phase Developer shall pay or cause to be paid to all applicable workers employed by it or its Contractors performing the Predevelopment Work no less than the prevailing rates of wages, as provided in the statutes and regulations applicable to public work contracts, including §17-201 et seq. of the State Finance and Procurement Article of the Annotated Code of Maryland, COMAR §21.11.11, and the Davis Bacon Act as provided in Exhibit 16 (*Federal and State Requirements*).

(b)   It is the Phase Developer's sole responsibility to determine the wage rates required to be paid. If rates of wages and benefits change while this Agreement is in effect, then the Phase Developer shall bear the cost of such changes and shall have no right to a claim against MDOT on account of such changes. Without limiting the foregoing, no claim will be allowed which is based upon the Phase Developer's lack of knowledge or a misunderstanding of any such requirements.

(c)   If it is found that any individual employed by the Phase Developer or a Contractor has been or is being paid a rate of wages less than the rate of wages required to be paid under this Agreement, MDOT may declare a Phase Developer Default under Section 25.1(q) (*Phase Developer Default*).

(d)   The Phase Developer confirms that, as of the date of this Agreement, it does not intend to perform any Predevelopment Work that would be subject to prevailing wages.

(e)   The Phase Developer shall notify MDOT if at any time it performs or intends to perform any Predevelopment Work that will be subject to prevailing wage requirements. If any federal prevailing wage rates are determined to be applicable to any part of the Predevelopment Work, the Parties shall amend Part C of Exhibit 16 *(Federal and State Requirements)* of this Agreement to include the applicable federal prevailing wage rates.

19.11 **Sanctions Upon Improper Acts**

(a)   MDOT may declare a Phase Developer Default under Section 25.1(q) (*Phase Developer Default*) if:

(i)   the Phase Developer, any Phase Developer-Related Entity, or any of their officers, partners, principals, or employees, is convicted of a crime arising out of, relating to, or resulting from, the procurement of work to be done or payment to be made under this Agreement;

(ii)   the Phase Developer:

(A)   is debarred under §16-202 or §16-203 of the State Finance and Procurement Article of the Annotated Code of Maryland; or

(B)   may be debarred because any of the circumstances under §16-202 or §16-203 of the State Finance and Procurement Article of the Annotated Code of Maryland have occurred;

(iii)   the Phase Developer is included on a list of persons suspended or debarred under COMAR §21.08.01;

(iv)   the Phase Developer is debarred under COMAR §21.08.03 or may be debarred because any of the circumstances under COMAR §21.08.03 have occurred; or

(v)   the Phase Developer, any Phase Developer-Related Entity, or any of their officers, partners, principals, or employees, violates §11-205 or §11-205.1 of the State Finance and Procurement Article of the Annotated Code of Maryland.

(b)   The Phase Developer shall deliver to MDOT, by January 31 of each year during the Term, updated affidavits in the form of Exhibit 12 (*Contract Affidavit*) from the Phase Developer and each PD Equity Member.

20.   TOLL SYSTEMS INTEGRATOR AND TOLL SYSTEMS OPERATOR

20.1   Toll Systems Integrator

(a)   The Phase Developer shall engage or shall cause the Section Developers to engage the same Toll Systems Integrator for each Section of the Phase.

(b)   The Phase Developer shall not engage and shall ensure that a Section Developer does not engage a Toll Systems Integrator unless it has been approved by MDOT and MDTA in writing under this Section 20.1.

(c)   Prior to submitting a Committed Section Proposal for the First Section, the Phase Developer shall submit to MDOT, for MDOT and MDTA approval, details of the proposed Toll Systems Integrator, together with supporting documents and information demonstrating that the proposed Toll Systems Integrator meets the applicable requirements of Exhibit 6 *(Predevelopment Work Requirements)* and any other information that may be required by MDOT or MDTA.

(d)   MDOT and MDTA place great importance on the customer's experience and service. When approving the Toll Systems Integrator, emphasis will be placed on ensuring the appropriate customer is charged an accurate toll rate for vehicle classification, the transaction is complete (trip construction), and the vehicle and transaction data is accurately transmitted to MDTA's back office integrator.

(e)   Within 30 days of receiving details of the Phase Developer's proposed Toll Systems Integrator and all supporting documents and information, MDOT and MDTA shall provide the Phase Developer with written notice:

(i)   approving the Toll Systems Integrator; or

(ii)   rejecting the proposed Toll Systems Integrator and providing comments as to why MDOT and MDTA's approval was not granted.

(f)   Once a Toll Systems Integrator has been approved by MDOT and MDTA in accordance with this Section 20.1, the Phase Developer shall not change or substitute, and shall ensure that the Section Developers do not change or substitute, the Toll Systems Integrator without the prior written consent of MDOT and MDTA.

20.2   Toll Systems Operator

(a)   The Phase Developer shall engage or shall cause the Section Developers to engage the same Toll Systems Operator for each Section of the Phase and shall ensure that at all times when there are two or more Section P3 Agreements in effect, the same Toll Systems Operator is engaged to provide the tolling operations for the Sections covered by those Section P3 Agreements. The Toll Systems Operator may be the same entity as the Toll Systems Integrator.

(b)   The Phase Developer shall ensure that a Toll Systems Operator is not engaged by the Phase Developer or a Section Developer unless it has been approved by MDOT and MDTA in writing under this Section 20.2.

(c)   Prior to submitting a Committed Section Proposal for the First Section, the Phase Developer shall submit to MDOT, for MDOT and MDTA approval, details of the proposed Toll Systems Operator together with supporting documents and information demonstrating that the proposed Toll Systems Operator meets the applicable requirements of Exhibit 6 (Predevelopment Work Requirements) and any other information that may be required by MDOT or MDTA.

(d)   MDOT and MDTA place great importance on the customer's experience and service. When approving the Toll Systems Operator, emphasis will be placed on ensuring the appropriate customer is charged an accurate toll rate for the vehicle classification, the transaction is complete (trip construction), and the vehicle and transaction data is accurately transmitted to MDTA's back office integrator.

(e)   Within 30 days of receiving details of the Phase Developer's proposed Toll Systems Operator and all supporting documents and information, MDOT and MDTA shall provide the Phase Developer with written notice:

(i)   approving the Toll Systems Operator; or

(ii)   rejecting the proposed Toll Systems Operator and providing comments as to why MDOT's approval was not granted.

(f)   Once a Toll Systems Operator has been approved by MDOT and MDTA in accordance with this Section 20.2, the Phase Developer shall not change or substitute, and shall ensure that the Section Developers do not change or substitute, the Toll Systems Operator without the prior written consent of MDOT and MDTA.

21.   APPLICABLE LAW AND FEDERAL REQUIREMENTS

21.1   General

The Phase Developer shall at all times in carrying out the Predevelopment Work comply, and require its Contractors to comply, with all Applicable Law and Governmental Approvals.

21.2 Federal Requirements

Without limiting Section 21.1 (*General*), the Phase Developer shall comply with, and require its Contractors to comply with, all federal requirements applicable to transportation projects that receive federal credit or funds, including the requirements stated in Exhibit 16 *(Federal and State Requirements)*.

21.3 Assistance with Reporting Requirements

The Phase Developer shall provide all assistance reasonably requested by MDOT in connection with any reporting requirements that MDOT or MDTA must comply with under any Applicable Law.

21.4 Conflicting Provisions

If there is any conflict between:

(a)   any applicable federal requirements or Applicable Law; and

(b)   the other requirements of this Agreement,

the federal requirements and Applicable Law will prevail and take precedence over any such conflicting provisions.

21.5 Certification Regarding Use of Contract Funds for Lobbying

The Phase Developer shall ensure that all Contracts (including lower-tier subcontracts) that exceed $100,000 include the language of the certification in Part F of Exhibit 16 *(Federal and State Requirements)*.

22. CHANGE ORDERS

(a)   MDOT may, at any time, propose a change to the Predevelopment Work by delivering a written notice (an **"MDOT Change Request"**) to the Phase Developer setting out MDOT's proposed change to the Predevelopment Work.

(b)   MDOT shall not deliver an MDOT Change Request that:

    (i)   requires the Predevelopment Work to be performed in a way that violates Applicable Law;

    (ii)   causes any Governmental Approval then in full force and effect to be revoked;

    (iii)   adversely effects the health and safety of any Person; or

    (iv)   materially and adversely changes the nature of the Phase or any Section as a whole.

(c)   Promptly, and in any event within five Business Days following receipt of an MDOT Change Request, MDOT and the Phase Developer shall meet to discuss and seek to agree to:

    (i)   any compensation payable to the Phase Developer for the change to the Predevelopment Work;

(ii)   any change to a Predevelopment Cost Cap, the Phase South Termination Cap or the Phase North Termination Cap; and

(iii)   any time relief necessary as a consequence of the change.

(d)   The Parties shall enter into an amendment to this Agreement to reflect the change to the Predevelopment Work and such other terms that are agreed to in accordance with Section 22(c).

(e)   The Phase Developer shall not suspend performance of the Predevelopment Work during the negotiation of any change order under this Article 22, unless expressly provided otherwise in accordance with the terms of this Agreement.

23. INDEMNITY

23.1 Indemnity

Subject to Section 23.2 *(Limitations on Indemnification Obligations)*, the Phase Developer shall indemnify, hold harmless, and subject to Section 23.6 *(Conduct of Third Party Claims)*, defend the Indemnified Parties from and against:

(1) all Losses in relation to loss of or damage to real or personal property owned by or in the possession of an Indemnified Party;

(2) all Losses in relation to personal injury or death of any officers, agents, representatives, or employees of any MDOT-Related Entity; and

(3) all Losses in relation to Third Party Claims,

in each case, arising out of, relating to, or resulting from:

(a)   any act, omission, negligence, or misconduct of any Phase Developer-Related Entity in the manner or method of performing the Predevelopment Work satisfactorily or failure to perform the Predevelopment Work, including any breach, alleged breach, or violation of the Phase Developer's obligations under this Agreement;

(b)   the failure or alleged failure by a Phase Developer-Related Entity to comply with any Governmental Approval or Applicable Law relating to the performance of the Predevelopment Work;

(c)   any alleged infringement or other allegedly improper appropriation or use of:

(i)   Intellectual Property (including State Intellectual Property) by a Phase Developer-Related Entity; or

(ii)   Intellectual Property (excluding State Intellectual Property) by an Indemnified Party,

in performing the Predevelopment Work, or arising out of, relating to, or resulting from any use in connection with the Phase of methods, processes, design, information, or other items furnished or communicated to an Indemnified Party under this Agreement. This indemnity shall not apply to any infringement resulting from an Indemnified Party's failure to comply with specific written instructions regarding the use of Intellectual Property provided to MDOT by the Phase Developer that are consistent with the Phase

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Developer's obligation to convey and license the Intellectual Property under the Agreement;

(d) any Phase Developer Hazardous Materials Release;

(e) any fines or penalties imposed on MDOT or MDTA by a Governmental Entity arising out of, relating to, or resulting from the Phase Developer's breach or failure to comply with applicable requirements of this Agreement;

(f) any claims by any Governmental Entity claiming taxes based on gross receipts, purchases or sales, the use of any property or income of any Phase Developer-Related Entity with respect to any payment for the Predevelopment Work made to or earned by the Phase Developer-Related Entity under this Agreement; and

(g) any inverse condemnation, trespass, nuisance, or similar taking of or harm to real property by reason of:

(i) the failure of any Phase Developer-Related Entity to comply with Good Industry Practice, requirements of this Agreement, or an approved plan under this Agreement in connection with the performance of the Predevelopment Work;

(ii) the willful misconduct or negligence of any Phase Developer-Related Entity in connection with the performance of the Predevelopment Work; or

(iii) the unauthorized physical entry onto or encroachment upon another's property by any Phase Developer-Related Entity in connection with the performance of the Predevelopment Work.

23.2 Limitations on Indemnification Obligations

(a) **Exclusions**

The Phase Developer shall not be responsible or be obligated to indemnify, hold harmless, or defend the Indemnified Parties with respect to any Losses under Section 23.1 *(Indemnity)* to the extent it arises as a direct result of:

(i) a Relief Event; or

(ii) a violation of Applicable Law or a Governmental Approval by an Indemnified Party.

(b) **Insured losses**

With respect to any loss or damage of the type covered by the insurance required to be provided under this Agreement or otherwise obtained by the Phase Developer for the Phase, the Phase Developer's indemnity obligations shall not extend to any loss, damage, or expense arising out of, relating to, or resulting from the sole negligence, or willful misconduct of, an Indemnified Party, or its agents, servants, or independent contractors who are directly responsible to such Indemnified Party.

(c) **Uninsured losses**

(i) With respect to any loss or damage which is not of the type covered by the insurance required to be provided under this Agreement, or is not otherwise obtained by the Phase Developer for the Phase, the Phase Developer's indemnity

obligation will not extend to any loss, damage, or cost to the extent that such loss, damage, or cost was caused by:

(A)   the breach by MDOT or MDTA of any of their obligations to the Phase Developer under this Agreement; or

(B)   the sole negligence, or willful misconduct of the relevant Indemnified Party or its agents, servants, or independent contractors who are directly responsible to such Indemnified Party.

(ii)   The Phase Developer's indemnity obligations shall not include the payment of punitive damages except to the extent that punitive damages are assessed as the result of culpable conduct by the Phase Developer.

(d)   **Claims by employees**

In claims by an employee of the Phase Developer or a Contractor, anyone directly or indirectly employed by the Phase Developer or a Contractor, or anyone for whose acts the Phase Developer or a Contractor may be liable, the indemnification obligation under this Article 23 shall not be limited on the amount, or type of damages, compensation, or benefits payable, by or for the Phase Developer or a Contractor under workmen's compensation, disability benefit, or other employee benefit laws; provided that this Section 23.2(d) will not be construed as a waiver in favor of any employee by the Phase Developer, or any Contractor of any limitation of liability afforded by such laws.

(e)   **Reliance on the Phase Developer's performance**

The Phase Developer acknowledges and agrees that it is the Phase Developer's obligation to cause the Predevelopment Work to be performed in accordance with this Agreement, and that the Indemnified Parties are fully entitled to rely on the Phase Developer's performance of this obligation.

23.3   **Indemnities by Contractors**

The Phase Developer shall ensure that each Contract includes indemnity provisions appropriate to the scope of the Predevelopment Work to be performed by the Contractor, naming the Indemnified Parties as indemnitees.

23.4   **Limitation on Indemnity**

The indemnities under this Article 23, shall not limit any other indemnity by the Phase Developer under this Agreement.

23.5   **Notice of claims by third parties**

The Phase Developer shall:

(a)   promptly notify MDOT in writing of any injury to persons, damage to property, or other occurrence covered by the indemnities in this Article 23; and

(b)   subject to legally recognized privilege, promptly provide MDOT copies of all factual reports and factual portions of any other reports given to the Phase Developer's insurance carrier or carriers.

23.6   **Conduct of Third Party Claims**

(a)   Where MDOT or MDTA is entitled to make a claim under this Agreement against the Phase Developer in relation to a Third Party Claim, MDOT or MDTA shall give notice of the relevant claim to the Phase Developer, setting out the full particulars of the claim and whether or not the defense is tendered to the Phase Developer.

(b)   The Phase Developer acknowledges that:

(i)   the Maryland Office of the Attorney General is required by law to represent and defend MDOT, MDTA and the State and may appoint counsel approved by the Maryland Office of the Attorney General to act in their stead; and

(ii)   certain other Indemnified Parties may have similar statutory representation obligations and rights.

As a result, MDOT and the Indemnified Parties may elect to conduct their own defense at any time but may also agree to allow defense to be conducted in whole, in part, in conjunction with, or from time to time, by counsel appointed by the Phase Developer or its insurer.

(c)   Subject to Section 23.6(b), if the insurer under any applicable Insurance Policy accepts the tender of defense, MDOT and the Phase Developer agree to cooperate in the defense proffered by the Insurance Policy. If no insurer under potentially applicable Insurance Policies provides defense, then Section 23.6(d) will apply.

(d)   Subject to Section 23.6(b), if the defense is tendered to the Phase Developer, then within 30 days after receipt of the tender, the Phase Developer shall notify each relevant Indemnified Party whether it has tendered the matter to an insurer, and, if not tendered to an insurer or if the insurer has rejected the tender, shall deliver a notice stating that the Phase Developer:

(i)   accepts the tender of defense and confirms that the claim is subject to full indemnification without any "reservation of rights" to deny or disclaim full indemnification;

(ii)   accepts the tender of defense but with a "reservation of rights" in whole or in part; or

(iii)   rejects the tender of defense based on a determination that it is not required to indemnify against the claim under the terms of this Agreement.

(e)   Subject to Section 23.6(b), if the Phase Developer accepts the tender of defense under Sections 23.6(d)(i) or 23.6(d)(ii), the Phase Developer shall have the right to select legal counsel for the Indemnified Party, subject to reasonable approval by the Indemnified Party, and the Phase Developer shall otherwise direct the defense of such claim, and bear the fees and costs of defending and settling such claim. MDOT shall be kept informed of the status of any claim covered by such insurance and the Phase Developer shall seek MDOT's consent to any settlement terms and conditions.

(f)   Subject to Section 23.6(b), if the Phase Developer responds to the tender of defense as specified in Section 23.6(d)(iii), the Indemnified Party may select its own legal counsel and otherwise control the defense of such claim, including settlement.

(g)   Despite Sections 23.6(d)(i) or 23.6(d)(ii), any Indemnified Party (regardless of whether it is entitled to conduct its own defense under Section 23.6(b)), may assume its own defense at any time by delivering to the Phase Developer notice of such election and the reasons therefor.

(h)   If an Indemnified Party elects to conduct its own defense of a claim for which it is entitled to indemnification under this Section 23.6, the Phase Developer shall reimburse on a current basis all reasonable costs and expenses the Indemnified Party incurs in investigating and defending such claim. If the Indemnified Party is entitled to and elects to conduct its own defense, then:

    (i)   in the case of a defense that otherwise would be conducted under Section 23.6(d)(i), the Indemnified Party may settle or compromise the claim with the Phase Developer and each of the Phase Developer's relevant insurer(s)' prior written consent, which, in each case, shall not be unreasonably withheld or delayed;

    (ii)   in the case of a defense that otherwise would be conducted under Section 23.6(d)(ii), the Indemnified Party and the Phase Developer shall consult with each other on a regular basis to determine whether settlement is appropriate and, subject to the rights of any insurer providing coverage for the claim under a policy required under this Agreement, the Indemnified Party may settle or compromise the claim with the Phase Developer's prior written consent without prejudice to the Indemnified Party's rights to be indemnified by the Phase Developer; and

    (iii)   in the case of a defense conducted under Section 23.6(d)(iii), the Indemnified Party may, subject to the rights of any insurer providing coverage for the claim under a policy required under this Agreement, settle or compromise the claim without the Phase Developer's prior written consent and without prejudice to its rights to be indemnified by the Phase Developer.

(i)   A refusal of, or failure to accept, a tender of defense, as well as any Dispute relating to assumption of control of defense by an Indemnified Party under Section 23.6(g), will be resolved according to the Dispute Resolution Procedures. The Phase Developer may contest an indemnification claim and pursue, through the Dispute Resolution Procedures, recovery of defense and indemnity payments it has made to or on behalf of the Indemnified Party.

24.   INSURANCE

24.1   Insurance Policies and Coverage

The Phase Developer shall obtain and maintain, or cause to be obtained or maintained, the Insurance Policies in accordance with this Article 24 and Exhibit 10 *(Required Insurance for Predevelopment Work)*.

24.2   General Insurance Requirements

(a)   **Insurers**

The Phase Developer shall cause all Insurance Policies to be obtained from insurers:

(i) that at the time coverage commences have a current financial strength and financial size category rating of not less than "A -" (excellent or above) according to A.M. Best's Financial Strength Rating and "VIII" or better according to A.M. Best's Financial Size Rating, except as approved in writing by MDOT in its discretion; and

(ii) that are authorized to do business in the State of Maryland and the Commonwealth of Virginia.

(b) **No Recourse for Premiums, Deductibles, and Self-Insured Retentions**

Except as otherwise expressly provided in this Agreement:

(i) the Phase Developer or its Contractors shall be responsible for paying all premiums, deductibles, and self-insurance retentions with respect to the Insurance Policies; and

(ii) neither MDOT, MDTA, nor any other Indemnified Party will have any liability for premiums, deductibles, self-insured retentions, or claim amounts in excess of the required coverage, or other amounts, with respect to the Insurance Policies.

(c) **Primary Coverage**

The Phase Developer shall ensure that:

(i) each Insurance Policy provides that the coverage is primary and non-contributory with respect to all named and additional insureds and loss payees as their interests may appear, except for coverage that by its nature cannot be written as primary; and

(ii) any insurance or self-insurance beyond that specified in this Agreement that is maintained by an insured or any such additional insured must be in excess of such insurance and must not contribute with it.

(d) **Verification of Coverage**

(i) Each time the Phase Developer is required to initially obtain or cause to be obtained an Insurance Policy, and not less than 10 Business Days before the expiration date of each Insurance Policy, the Phase Developer shall deliver to MDOT a written certificate(s) of insurance (which, in the case of an expiring Insurance Policy, provides evidence of renewal coverage after such expiration). Each certificate of insurance must:

(A) be on the most recent ACORD form consistent with the required coverage;

(B) state the identity of all insurers, named insureds, and additional insureds, and state the type and limits of coverage;

(C) where applicable, include as attachments all additional insured endorsements; and

(D) be signed by the agent or broker.

(ii)   Within 10 Business Days of receiving a request from MDOT, the Phase Developer must deliver to MDOT:

(A)   a true and complete copy of each Insurance Policy or modification, or renewal or replacement Insurance Policy and all endorsements accompanied by a letter from the agent or broker placing the insurance certifying that the same is a true and complete copy thereof; and

(B)   evidence, acceptable to MDOT (acting reasonably), that all premiums then due have been paid in full.

(iii)   If the Phase Developer:

(A)   fails or refuses to obtain or maintain in force the Insurance Policies; or

(B)   does not provide MDOT with proof of coverage within five Business Days after MDOT requests such proof;

MDOT may, upon five Business Days' written notice to the Phase Developer, without prejudice to any other available remedy and without further inquiry as to whether such insurance is actually in force, obtain such an Insurance Policy.

(iv)   The Phase Developer shall reimburse MDOT for the cost MDOT incurs in obtaining any Insurance Policy under Section 24.2(d)(iii) within 30 days of receiving an invoice from MDOT with respect to such costs.

(v)   MDOT may, without obligation or liability, suspend all or any portion of the Predevelopment Work during any time that any proofs of coverage required by this Article 24 have not been provided.

(e)   **Contractor Insurance Requirements**

(i)   The Phase Developer shall cause all Contractors to obtain (before commencing any Predevelopment Work) and maintain all insurance that is required by Section 2 of Exhibit 10 *(Required Insurance of Predevelopment Work)*, to the extent that such Contractor is not covered by the Phase Developer provided insurance.

(ii)   The Phase Developer shall cause the Contractors to include MDOT and the Indemnified Parties as additional insureds as required under Exhibit 10 *(Required Insurance of Predevelopment Work)*.

(f)   **Endorsements and Waivers**

(i)   The Phase Developer shall ensure that all Insurance Policies contain, or are endorsed to comply with, the following:

(A)   each policy must be endorsed to state that coverage cannot be canceled, voided, or materially reduced in coverage or in limits (except with respect to payments under the policy which by their nature erode or deplete the limits of such policy) by the insurer except after 30 days' prior written notice (or 10 Business Days' notice for non-payment of premium) by certified mail with a return receipt requested, or by email with a hard copy

to follow. Such endorsement must not include any limitation of liability of the insurer for failure to provide such notice; and

(B) unless specified otherwise in Exhibit 10 *(Required Insurance for Predevelopment Work)*, each policy must provide coverage on an "occurrence" basis and not a "claims made" basis.

(ii) The Phase Developer shall cause all Insurance Policies (other than workers' compensation and professional liability policies) contain, or are endorsed to comply with, the following:

(A) any failure on the part of a named insured to comply with reporting provisions or other conditions of the policies, any breach of warranty, any action or inaction of a named insured or others, or any change in ownership of all or any portion of the Phase Developer's Interest will not affect coverage provided to the other named insureds or additional insureds (and their respective members, directors, officers, employees, agents, and Phase consultants);

(B) the commercial general liability insurance and excess liability insurance must apply separately to each named insured and additional insured against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability;

(C) endorsements adding additional insured coverage for MDOT and each Indemnified Party shall, for commercial general liability insurance, be evidenced by the CG 20 10 04 13 and CG 20 37 04 13 forms, or equivalent (to ensure coverage for both operations and completed operations), and, with regard to all required insurance coverages, must contain no additional limitations, conditions, restrictions or exceptions to coverage beyond those that apply under such policy generally;

(D) each liability policy obtained by the Phase Developer must contain the following endorsement:

"The insurer(s) shall not, without obtaining the express advance written permission from the Maryland Transportation Authority (MDTA) and the Maryland Department of Transportation (MDOT), raise any defense involving in any way the jurisdiction of a tribunal over the person of MDTA or MDOT, the immunity of MDTA or MDOT, or any of their officers, agents or employees, the governmental nature of MDTA or MDOT, or the provisions of any statutes respecting suits against MDTA or MDOT.";

(E) the commercial general liability policy must cover liability arising out of the acts or omissions of the Phase Developer's employees and employees of Contractors engaged in the Predevelopment Work on the terms and to the extent the Phase Developer or relevant Contractor is provided coverage under such liability policy; and

(F) any automobile liability insurance policy must be endorsed as required to include Motor Carrier Act Endorsement-Hazardous Materials Clean-up

(MCS-90) for those Contractors who will at any time transport Hazardous Materials.

(g) **Policies with insureds in addition to the Phase Developer**

Except with respect to professional errors and omissions Insurance Policies, all Insurance Policies that are required to insure other entities in addition to the Phase Developer shall comply with the following provisions:

(i) each Insurance Policy must contain a separation of insureds provisions such that the Insurance Policy is written or endorsed so that:

    (A) no acts or omissions of an insured shall cancel or diminish coverage of any other insureds; and

    (B) insurance will apply separately to each named insured, except with respect to the erosion of the specified limits of the insurer's liability.

(ii) Without limiting Section 24.2(g)(i), all endorsements adding additional named insureds to required Insurance Policies must:

    (A) contain no limitations, conditions, restrictions, or exceptions to coverage other than those that apply to all other named insureds, including the first named insured, under the Insurance Policy; and

    (B) state that the interests and protections of each named insured will not be affected by any misrepresentation, act, or omission of another named insured or any breach by another named insured of any provision in the policy which would otherwise result in forfeiture, reduction, or limitation of coverage.

(h) **Waivers of Subrogation**

(i) Each Insurance Policy shall include a clause or endorsement denying the insurer any rights of subrogation or recovery against MDOT and MDTA to the extent such rights have been waived by the insured before the occurrence of injury or loss.

(ii) The Phase Developer waives any rights of subrogation or recovery against MDOT and MDTA for injury or loss due to hazards covered or which should be covered by the Insurance Policies, to the extent of the injury or loss covered or to have been covered, and further, any deductible or retention will be deemed to be insurance coverage.

(iii) The Phase Developer shall require all Contractors and their respective insurance carriers to provide similar waivers in writing in accordance with this Section 24.2(h).

(i) **Support of Indemnification**

The insurance coverage the Phase Developer is required to provide under this Agreement will support but is not intended to limit the Phase Developer's indemnification obligations under this Agreement.

24.3   **Notices**

(a)   The Phase Developer shall provide MDOT with written notice of any claim in excess of $100,000 made by the Phase Developer or any other party under any insurance obtained in connection with the Phase within 30 days of submitting the notice of claim to the insurer.

(b)   The Phase Developer shall provide MDOT with written notice of the cancellation of any Insurance Policy (due to non-payment of premium) at least 10 Business Days before cancellation, and include the date of such expiration.

(c)   The Phase Developer shall provide MDOT with written notice of the cancellation of any Insurance Policy (for any reason other than non-payment of premium) at least 30 days before cancellation, and include the date of such expiration.

(d)   Notices given under this Section 24.3, shall be by certified mail with return receipt requested, or by email with hard copy to follow.

25.   **PHASE DEVELOPER DEFAULT AND REMEDIES**

25.1   **Phase Developer Default**

The occurrence of any of the following will constitute a **"Phase Developer Default"**:

(a)   the Phase Developer fails to promptly commence performance of the Predevelopment Work within 30 days of Phase South NTP being granted under Section 10.3 *(Phase South NTP Contingent Upon NEPA Approval)*;

(b)   subject to Section 12.2(g) *(Key Assumptions for Phase South A Prove to be Incorrect)*, the Phase Developer fails to submit a compliant Committed Section Proposal for Phase South that is Financially Viable by the applicable Predevelopment Milestone Deadline (unless otherwise agreed by MDOT in writing under the terms of this Agreement);

(c)   the Phase Developer fails to achieve any other Predevelopment Milestone by the applicable Predevelopment Milestone Deadline, or, unless Section 11.9 *(Failure to Achieve Financial Close under Section P3 Agreement Due to MDOT or MDTA)* applies, any Section Developer fails to achieve Financial Close of its Section by the Financial Close Deadline for such Section;

(d)   the Phase Developer fails to pay an amount owing to a Contractor on the date due for such payment, except to the extent that the Phase Developer is disputing such payment in Good Faith;

(e)   a Prohibited Change in Ownership occurs;

(f)   the Phase Developer fails to comply with the restrictions regarding assignment and transfer under Article 31 *(Assignment and Transfer; Fundamental Changes)*;

(g)   an Insolvency Event arises with respect to the Phase Developer;

(h)   an Insolvency Event arises with respect to a Key Participant, unless that Key Participant is replaced in accordance with Section 19.3 *(Key Participants)* within 60 days of the Insolvency Event arising;

(i) any representation or warranty made by the Phase Developer in this Agreement or any certificate, schedule, report, instrument, or other document delivered to MDOT under this Agreement is false or materially misleading or inaccurate when made, or omits material information when made (except with respect to any projections made by the Phase Developer in any such certificate, report, instrument or other document);

(j) the Phase Developer fails to comply with any Governmental Approval or Applicable Law in any material respect;

(k) the Phase Developer fails to obtain, provide, and maintain the Insurance Policies or Performance Security;

(l) a Section Developer Default has occurred under a Section P3 Agreement and has not been cured within the applicable cure period (if any) under the Section P3 Agreement;

(m) the Abandonment of the Phase by the Phase Developer;

(n) after exhaustion of all rights of appeal:

(i) there occurs any suspension or debarment (distinguished from ineligibility due to lack of financial qualifications), or there goes into effect an agreement for voluntary exclusion, of the Phase Developer, a Key Participant, or any affiliate of the Phase Developer (as "affiliate" is defined in 2 CFR §180.905 or successor regulation of similar import) from bidding, proposing, or contracting with any Federal or State department or agency, unless the Person that is subject to the suspension, debarment, or agreement for voluntary exclusion is a Key Participant and such Person is replaced in accordance with Section 19.3 (*Key Participants)* of this Agreement within 60 days of the suspension, debarment, or agreement for voluntary exclusion; or

(ii) the Phase Developer, a Key Participant, or any of their respective officers, directors, or Administering Employees have been convicted of, or plead guilty or nolo contendere to, a violation of Applicable Law for fraud, conspiracy, collusion, bribery, perjury, or material misrepresentation, as a result in whole or in part of activities relating to any project in the United States, and such failure continues without cure for a period of 90 days following the date MDOT delivers to the Phase Developer written notice thereof.

With respect to Section 25.1(n)(ii), if the offending Person is a Key Participant or an officer, director, or Administering Employee of a Key Participant, cure may be effected by the Phase Developer replacing the Key Participant in accordance with Section 19.3 (*Key Participants)* of this Agreement within the 90 day cure period referred to in Section 25.1(n)(ii);

(o) the Phase Developer, its Key Personnel, or its Key Participants no longer hold any license or certificate that the Phase Developer, Key Personnel, or Key Participant is required to hold to perform the Predevelopment Work for which they were proposed to perform;

(p) the Phase Developer fails to obtain MDOT approval prior to a change to a Key Personnel or Key Participant under Article 19 *(Key Personnel and Contracting)*;

(q) the Phase Developer fails to comply with the requirements in Section 19.8(a) *(Compliance with State Non-Discrimination Law and Regulations)*, or Section 19.10

(Prevailing Wages for Predevelopment Work), or Section 19.11 *(Sanctions Upon Improper Acts)* applies;

(r)   the Phase Developer fails to comply with the DBE program requirements under Section 19.9(d)(v) *(Disadvantaged Business Enterprises)*;

(s)   the Phase Developer fails to comply with the requirements of Article 14 *(Section Viability)*;

(t)   the Phase Developer fails to negotiate in Good Faith in accordance with Section 11.1 *(Development of Section P3 Agreement and Section Technical Provisions)* to agree the form of the Section P3 Agreement (including the Section Technical Provisions), Section 11.11 *(Development of Tolling Services Agreement)* to agree the form of Tolling Services Agreement, or Section 11.12 *(Development of MDTA Financing Documents)* to agree the form of the MDTA Financing Documents; or

(u)   the Phase Developer breaches any other material obligation of the Agreement.

25.2   **Phase Developer Default Notice and Cure Periods**

(a)   MDOT may provide written notice (**"Phase Developer Default Notice"**) to the Phase Developer upon the occurrence of a Phase Developer Default.

(b)   Upon receipt of a Phase Developer Default Notice, the Phase Developer shall have the following cure periods:

   (i)   for a Phase Developer Default under Section 25.1(u) *(Material Breach)*:

      (A)   a period of 30 days after the Phase Developer receives the Phase Developer Default Notice; or

      (B)   if, despite the Phase Developer's commencement of meaningful steps to cure immediately after receiving the Phase Developer Default Notice, the Phase Developer Default cannot be cured within such 30 day period, the Phase Developer may request an additional period of time, up to a maximum cure period of 120 days, provided it has demonstrated to MDOT's reasonable satisfaction that such additional period is reasonably necessary to cure the Phase Developer Default under Section 25.1(u) *(Material Breach)*;

   (ii)   for a Phase Developer Default under Section 25.1(a) *(Commencement of Predevelopment Work)*, Section 25.1(i) *(Representations and Warranties)*, Section 25.1(j) *(Governmental Approvals)*, Section 25.1(m) *(Abandonment)*, and Section 25.1(r) *(DBE Compliance)* a period of 30 days after the Phase Developer receives the Phase Developer Default Notice;

   (iii)   for a Phase Developer Default under Section 25.1(o) *(Licenses and Certificates)*, 25.1(d) *(Payment Default)*, Section 25.1(q) *(Breach of Regulations)*, and Section 25.1(s) *(Section Viability)* a period of 15 days after the Phase Developer receives the Phase Developer Default Notice;

   (iv)   for a Phase Developer Default under Section 25.1(k) *(Insurance Policies)* and Section 25.1(p) *(Key Personnel and Key Participants)*, a period of five Business Days after the Phase Developer receives the Phase Developer Default Notice; and

(v)   for a Phase Developer Default under Section 25.1(b) (*Committed Section Proposal)*, Section 25.1(c) *(Predevelopment Milestones and Failure to Achieve Financial Close),* Section 25.1(e) *(Prohibited Change in Ownership)*, Section 25.1(f) *(Assignment)*, Section 25.1(g) *(Insolvency)*, Section 25.1(h) *(Key Participant Insolvency)*, 25.1(l) *(Default of Section P3 Agreement*), Section 25.1(n) *(Suspension and Debarment)*, and Section 25.1(t) *(Good Faith)* there is no cure period.

(c)   A Phase Developer Default under Section 25.1(i) *(Representations and Warranties)* will be regarded as cured when the adverse effects of such Phase Developer Default are cured.

25.3   Remedies for Phase Developer Default

Upon the occurrence of a Phase Developer Default, and expiration without cure of any applicable cure period under Section 25.2 *(Phase Developer Notice and Cure Periods)*, MDOT may exercise the following rights without further notice and without waiving or releasing the Phase Developer from any obligations:

(a)   MDOT may terminate this Agreement under Section 26.2 *(Termination for Phase Developer Default)* and draw on the Performance Security;

(b)   MDOT may exercise its rights under Section 25.4 *(MDOT Step-in Rights)*; and

(c)   MDOT may exercise all other rights and remedies provided by law or equity and such rights and remedies as are otherwise available under this Agreement.

25.4   MDOT Step-in Rights

(a)   If a Phase Developer Default (other than a Phase Developer Default under Section 25.1(l) *(Section Developer Default)* occurs, and the Phase Developer has not fully cured the Phase Developer Default by the expiration of the applicable cure period (if any), MDOT may perform all or any portion of the Phase Developer's obligations that are:

(i)   the subject of the Phase Developer Default; or

(ii)   the subject of any other existing breach for which the Phase Developer has received prior notice from MDOT, and that the Phase Developer is not using diligent efforts to cure.

(b)   The Phase Developer shall reimburse MDOT on demand for any costs that are incurred by MDOT in performing the Phase Developer's obligations under Section 25.4(a).

26.   TERMINATION

26.1   Termination for Convenience

(a)   MDOT may, in its sole discretion, terminate this Agreement without cause at any time before the last day of the Term in accordance with Section 26.1(c).

(b)   If MDOT terminates a Section P3 Agreement for convenience prior to Financial Close of that Section P3 Agreement, MDOT shall terminate this Agreement for convenience under this Section 26.1, and, unless otherwise agreed by MDOT and the Phase Developer,

MDOT shall terminate all other Section P3 Agreements that have not achieved Financial Close for convenience.

(c)   If MDOT wishes to terminate this Agreement under this Section 26.1, it shall deliver a Termination For Convenience Notice to the Phase Developer stating:

(i)   that MDOT is terminating this Agreement under this Section 26.1; and

(ii)   that this Agreement will terminate on the date specified in the Termination For Convenience Notice.

(d)   If this Agreement is terminated under this Section 26.1, then:

(i)   MDOT shall pay the Phase Developer an amount equal to:

(A)   subject to Section 26.1(e), the Allowed Costs incurred by the Phase Developer or any Section Developer that are directly attributable to any Section in Phase South and that have not previously been reimbursed and that are not recoverable under any Section P3 Agreement, up to the Predevelopment Cost Cap for Phase South; and

(B)   subject to Section 26.1(f), the Allowed Costs incurred by the Phase Developer or any Section Developer that are directly attributable to any Section in Phase North and that have not previously been reimbursed and that are not recoverable under any Section P3 Agreement, up to the Predevelopment Cost Cap for Phase North;

(ii)   the Phase Developer will be released from its obligation to pay any Development Rights Fees that are not already due and payable; and

(iii)   MDOT shall return to the Phase Developer the Development Rights Fee Security and Performance Security.

(e)   The maximum aggregate amount payable under Section 26.1(d)(i)(A) and under all Section P3 Agreements relating to Sections in Phase South that have not achieved Financial Close and that are also terminated for convenience will be the Phase South Termination Cap.

(f)   The maximum aggregate amount payable under Section 26.1(d)(i)(B) and under all Section P3 Agreements relating to Sections in Phase North that have not achieved Financial Close and that are also terminated for convenience will be the Phase North Termination Cap.

26.2   Termination for Phase Developer Default

(a)   If a Phase Developer Default occurs and the Phase Developer Default has no cure period or has not been cured within the relevant cure period under Section 25.2 *(Phase Developer Default Notice and Cure Periods)* MDOT may terminate this Agreement by delivering a termination notice to the Phase Developer (**"MDOT Termination Notice"**).

(b)   An MDOT Termination Notice:

(i)   shall specify the Phase Developer Default that has occurred entitling MDOT to terminate the Agreement; and

(ii) will terminate the Agreement on the date the Phase Developer receives the MDOT Termination Notice.

(c) If this Agreement is terminated in accordance with Section 26.2(a), the Phase Developer shall pay $10 million to MDOT and acknowledges and agrees that this amount is in the nature of liquidated damages (and not a penalty), represents a genuine and reasonable estimate of the loss that will be suffered by MDOT, and is fair and reasonable to compensate MDOT for losses it will suffer as a result of such termination, including:

(i) additional costs of administering or re-administering the solicitation of the Phase and the P3 Program;

(ii) the cost of foregoing alternative opportunities and loss of potential best value to the general public;

(iii) delay to the delivery of the Phase and P3 Program, including loss of use, enjoyment, and benefit of the Phase for MDOT, MDTA, and the general public; and

(iv) injury to the credibility and reputation of MDOT and MDTA among policy makers and the general public.

(d) If it is finally determined under the Dispute Resolution Procedures that MDOT was not entitled to terminate this Agreement under this Section 26.2, this Agreement will be deemed to have been terminated by MDOT for convenience under Section 26.1 *(Termination for Convenience)* and Sections 26.1(d) and 26.1(e) *(Termination for Convenience)* will apply.

26.3 Termination by Court Ruling

(a) This Agreement will automatically terminate upon the occurrence of either of the following:

(i) the issuance of a final, non-appealable order by a court of competent jurisdiction to the effect that this Agreement is void, unenforceable, or impossible to perform in its entirety; or

(ii) the issuance of a final, non-appealable order by a court of competent jurisdiction upholding the binding effect on the Phase Developer or MDOT of a change in law that causes impossibility of either performance of a fundamental obligation or exercise of a fundamental right by the Phase Developer or MDOT under this Agreement.

(b) If this Agreement is terminated under Section 26.3(a)(i), and the Agreement is void, unenforceable, or impossible to perform by reason of the Phase Developer's acts, omissions, negligence, willful misconduct, fraud, or breach of warranty or representation, then the Agreement will be deemed to be terminated due to a Phase Developer Default under Section 26.2 *(Termination for Phase Developer Default)*.

(c) If this Agreement is terminated under Section 26.3(a) and Section 26.3(b) does not apply then:

(i) MDOT shall pay the Phase Developer an amount equal to:

(A)   subject to Section 26.3(d), the Allowed Costs incurred by the Phase Developer or any Section Developer that are directly attributable to any Section in Phase South and that have not previously been reimbursed and that are not recoverable under any Section P3 Agreement, up to the Predevelopment Cost Cap for Phase South; and

(B)   subject to Section 26.3(e), the Allowed Costs incurred by the Phase Developer or any Section Developer that are directly attributable to any Section in Phase North and that have not previously been reimbursed and that are not recoverable under any Section P3 Agreement, up to the Predevelopment Cost Cap for Phase North;

(ii)   the Phase Developer will be released from its obligation to pay any Development Rights Fees that are not already due and payable; and

(iii)   MDOT shall return to the Phase Developer the Development Rights Fee Security and Performance Security.

(d)   The maximum aggregate amount payable under Section 26.3(c)(i)(A) and under all Section P3 Agreements relating to Sections in Phase South that have not achieved Financial Close and that are also terminated by court ruling will be the Phase South Termination Cap.

(e)   The maximum aggregate amount payable under Section 26.3(c)(i)(B) and under all Section P3 Agreements relating to Sections in Phase North that have not achieved Financial Close and that are also terminated by court ruling will be the Phase North Termination Cap.

26.4   **Termination for Failure to Agree Form of Agreements**

(a)   If despite MDOT and the Phase Developer negotiating in Good Faith, MDOT and the Phase Developer are unable to agree to:

(i)   the form of the Section P3 Agreement (including the Section Technical Provisions) in accordance with Section 11.1 *(Development of Section P3 Agreement and Section Technical Provisions)*;

(ii)   the form of the Tolling Services Agreement in accordance with Section 11.11 *(Development of Tolling Services Agreement)*; or

(iii)   the form of the MDTA Financing Documents to which the Section Developer will be a party in accordance with Section 11.12 *(Development of MDTA Financing Documents)*,

in each case by the time MDOT and the Phase Developer are required to have agreed to the form of the Section P3 Agreement (including Section Technical Provisions) for the Section under Section 11.1(d) *(Development of Section P3 Agreement and Section Technical Provisions)*, then either MDOT or the Phase Developer may, by delivering a written notice to the other, terminate this Agreement with immediate effect.

(b)   Subject to Section 26.4(c), if this Agreement is terminated in accordance with Section 26.4(a):

(i)   the Phase Developer will not be entitled to any Allowed Costs not previously reimbursed;

(ii)   the Phase Developer will be released from its obligation to pay any Development Rights Fees that are not already due and payable; and

(iii)   MDOT shall return to the Phase Developer the Development Rights Fee Security and Performance Security.

(c)   If the Phase Developer issues a notice to terminate this Agreement under Section 26.4(a) and MDOT believes that the Phase Developer failed to negotiate in Good Faith as required by Section 11.1 *(Development of Section P3 Agreement and Section Technical Provisions)*, Section 11.11 *(Development of Tolling Services Agreement)*, or Section 11.12 *(Development of MDTA Financing Documents)*, then MDOT may refer the matter to Dispute resolution under Article 33 *(Dispute Resolution)*. If it is finally determined that the Phase Developer negotiated in Good Faith and was entitled to terminate this Agreement under Section 26.4(a), then Section 26.4(b) will apply and MDOT shall return the Development Rights Fee Security and Performance Security to the Phase Developer within 15 days of that final determination. If it is determined that the Phase Developer was not entitled to terminate this Agreement under Section 26.4(a) because it failed to negotiate in Good Faith as required by Section 11.1 *(Development of Section P3 Agreement and Section Technical Provisions)*, Section 11.11 *(Development of Tolling Services Agreement)*, or Section 11.12 *(Development of MDTA Financing Documents)*, then Section 26.4(b) will not apply and this Agreement will be deemed to have been terminated for a Phase Developer Default under Section 25.1(t) *(Failure to Negotiate in Good Faith)*.

26.5   **Termination for Loss of Financial Viability Caused by A Key Assumption That Is Incorrect**

(a)   If Section 12.2(g) *(Key Assumptions for Phase South A Prove to be Incorrect)* applies, then either MDOT or the Phase Developer may, by delivering a written notice to the other, terminate this Agreement with immediate effect.

(b)   If this Agreement is terminated in accordance with Section 26.5(a):

(i)   MDOT shall pay the Phase Developer an amount equal to the Phase Developer's Allowed Costs not previously reimbursed, up to the Phase South Termination Cap;

(ii)   the Phase Developer will be released from its obligation to pay any Development Rights Fees that are not already due and payable; and

(iii)   MDOT shall return to the Phase Developer the Development Rights Fee Security and Performance Security.

26.6   **Exclusive Termination Rights**

This Article 26 contains the entire and exclusive rights of MDOT and the Phase Developer to terminate this Agreement, and any and all other rights to terminate under Applicable Law are waived to the maximum extent permitted by Applicable Law.

27. **REDUCTION IN SCOPE OF THE AGREEMENT**

27.1 **NEPA Does Not Permit Priced Managed Lanes For Phase North**

(a) MDOT shall, by notice to the Phase Developer, remove Phase North in its entirety from the scope of this Agreement if the NEPA approvals for Phase North do not permit Priced Managed Lanes in accordance with Section 10.4(c)(ii) *(Phase North NTP Contingent Upon NEPA Approval)*.

(b) If Phase North is removed from the scope of this Agreement under Section 27.1(a), MDOT shall pay the Phase Developer an amount in accordance with Section 10.4(c)(iv) *(Phase North NTP Contingent Upon NEPA Approval)*.

27.2 **MDOT Right to Remove Phase North At Any Time For Convenience**

(a) MDOT may, by notice to the Phase Developer, remove Phase North from the scope of this Agreement at any time for convenience prior to Commercial Close of the first Section of Phase North.

(b) If Phase North is removed from the scope of this Agreement under Section 27.2(a):

(i) MDOT shall pay the Phase Developer an amount in accordance with Section 10.4(c)(iv) *(Phase North NTP Contingent Upon NEPA Approval)*;

(ii) if applicable, MDOT shall pay the Phase Developer its Allowed Costs for performing work to determine the Financial Viability of a Section or Sections in Phase North, up to the applicable Viability Cost Cap in accordance with Article 14 *(Section Viability)*; and

(iii) if applicable, MDOT shall pay the Phase Developer its Allowed Costs not previously reimbursed, that are directly attributable to the Predevelopment Work performed for each Section of Phase North for which Financial Viability has been established, up to the Phase North Termination Cap.

27.3 **Financial Viability of an Uncommitted Section**

(a) If:

(i) Section 14(e) *(Section Viability)* applies; or

(ii) an Uncommitted Section is determined to be not Financially Viable under Section 14(h) *(Section Viability)*,

MDOT shall, by notice to the Phase Developer, remove that Uncommitted Section and all other Uncommitted Sections from the scope of this Agreement.

(b) If one or more Uncommitted Sections are removed from the scope of this Agreement under Section 27.3(a)(i) then MDOT shall pay the Phase Developer any costs under Section 10.2 *(Environmental Process and NEPA Assistance)*.

(c) If one or more Uncommitted Sections are removed from the scope of this Agreement under Section 27.3(a)(ii):

(i)   MDOT shall pay the Phase Developer its Allowed Costs for performing work to determine the Financial Viability of those Uncommitted Sections, up to the applicable Viability Cost Caps under Article 14 *(Section Viability)*; and

(ii)   MDOT shall pay the Phase Developer any costs under Section 10.2 *(Environmental Process and NEPA Assistance)*.

27.4   **MDTA Board Does Not Approve A Committed Section Proposal**

(a)   If the MDTA Board fails to approve a Committed Section Proposal for any Section (other than the First Section) that has been approved by MDOT within the time specified in Section 11.6 *(MDTA Board Fail to Approve a Committed Section Proposal)*, MDOT shall (unless otherwise agreed by MDOT and the Phase Developer under Section 11.6(b) *(MDTA Board Fail To Approve A Committed Section Proposal)*), by notice to the Phase Developer, remove that Section and all other Sections that have not been submitted to MDOT under a Committed Section Proposal from the scope of this Agreement.

(b)   If one or more Sections are removed from the scope of this Agreement in accordance with Section 27.4(a):

(i)   MDOT shall pay the Phase Developer an amount equal to:

(A)   subject to Section 27.4(c), the Allowed Costs incurred by the Phase Developer or any Section Developer that are directly attributable to any Section in Phase South and that have not previously been reimbursed and that are not recoverable under any Section P3 Agreement, up to the Predevelopment Cost Cap for Phase South; and

(B)   subject to Section 27.4(d), the Allowed Costs incurred by the Phase Developer or any Section Developer that are directly attributable to any Section in Phase North and that have not previously been reimbursed and that are not recoverable under any Section P3 Agreement, up to the Predevelopment Cost Cap for Phase North; and

(ii)   the Phase Developer will be released from its obligation to pay any Development Rights Fees that are not already due and payable and MDOT shall return the Development Rights Fee Security to the Phase Developer.

(c)   The maximum aggregate amount payable under Section 27.4(b)(i)(A) for Phase South will be the Phase South Termination Cap.

(d)   The maximum aggregate amount payable under Section 27.4(b)(i)(B) for Phase North will be the Phase North Termination Cap.

27.5   **BPW Does Not Approve An Approved Section P3 Agreement**

(a)   If the BPW fails to approve a Section P3 Agreement for any Section (other than the First Section) that has been approved by MDOT within the time specified in Section 11.7 (*BPW Fails to Approve Section P3 Agreement*), MDOT shall (unless otherwise agreed by MDOT and the Phase Developer under Section 11.7(c) *(BPW Fails to Approve Section P3 Agreement)*, by notice to the Phase Developer, remove that Section and all other Sections that have not been submitted to MDOT under a Committed Section Proposal from the scope of this Agreement.

(b)   If one or more Sections are removed from the scope of this Agreement in accordance with Section 27.5(a):

    (i)   MDOT shall pay the Phase Developer an amount equal to:

        (A)   subject to Section 27.5(c), the Allowed Costs incurred by the Phase Developer or any Section Developer that are directly attributable to any Section in Phase South and that have not previously been reimbursed and that are not recoverable under any Section P3 Agreement, up to the Predevelopment Cost Cap for Phase South; and

        (B)   subject to Section 27.5(d), the Allowed Costs incurred by the Phase Developer or any Section Developer that are directly attributable to any Section in Phase North and that have not previously been reimbursed and that are not recoverable under any Section P3 Agreement, up to the Predevelopment Cost Cap for Phase North; and

    (ii)   the Phase Developer will be released from its obligation to pay any Development Rights Fees that are not already due and payable and MDOT shall return the Development Rights Fee Security to the Phase Developer.

(c)   The maximum aggregate amount payable under Section 27.5(b)(i)(A) for Phase South will be the Phase South Termination Cap.

(d)   The maximum aggregate amount payable under Section 27.5(b)(i)(B) for Phase North will be the Phase North Termination Cap.

27.6   Failure to Achieve Financial Close under a Section P3 Agreement Due to MDOT or MDTA

(a)   If Section 11.9 (*Failure to Achieve Financial Close under Section P3 Agreement Due to MDOT or MDTA*) applies, MDOT shall, by notice to the Phase Developer, remove that Section and all other Sections that have not been submitted to MDOT under a Committed Section Proposal from the scope of this Agreement.

(b)   If one or more Sections are removed from the scope of this Agreement in accordance with Section 27.6(a):

    (i)   MDOT shall pay the Phase Developer an amount equal to:

        (A)   subject to Section 27.6(c), the Allowed Costs incurred by the Phase Developer or any Section Developer that are directly attributable to any Section in Phase South and that have not previously been reimbursed and that are not recoverable under any Section P3 Agreement, up to the Predevelopment Cost Cap for Phase South; and

        (B)   subject to Section 27.6(d), the Allowed Costs incurred by the Phase Developer or any Section Developer that are directly attributable to any Section in Phase North and that have not previously been reimbursed and that are not recoverable under any Section P3 Agreement, up to the Predevelopment Cost Cap for Phase North; and

(ii)   the Phase Developer will be released from its obligation to pay any Development Rights Fees that are not already due and payable and MDOT shall return the Development Rights Fee Security to the Phase Developer.

(c)   The maximum aggregate amount payable under Section 27.6(b)(i)(A) and under all Section P3 Agreements relating to Sections in Phase South that are terminated for failure to achieve Financial Close will be the Phase South Termination Cap.

(d)   The maximum aggregate amount payable under Section 27.6(b)(i)(B) and under all Section P3 Agreements relating to Sections in Phase North that are terminated for failure to achieve Financial Close will be the Phase North Termination Cap.

28.   RECORDS AND AUDIT

28.1   Maintenance and Inspection of Records

(a)   The Phase Developer shall:

(i)   keep and maintain all its books, records, and documents relating to the Phase, the Phase Site or the Predevelopment Work, including copies of all original documents delivered to MDOT, in accordance with the applicable provisions of this Agreement and in accordance with Good Industry Practice; and

(ii)   notify MDOT where such books, records, and documents are kept.

(b)   The Phase Developer shall make all of its books, records, and documents available for inspection by MDOT at all times during normal business hours, without charge. MDOT may conduct any such inspection upon two Business Days' prior written notice, or unannounced and without prior notice where there is Good Faith suspicion of fraud or criminal activity. When conducting any inspection, MDOT may make extracts and take notes.

(c)   The Phase Developer shall provide copies of its books, records, and documents to MDOT as and when reasonably requested by MDOT.

(d)   The Phase Developer shall:

(i)   retain all of its books, records, and documents for five years following the end of the Term; and

(ii)   retain all of its books, records, and documents it produces or receives regarding the Phase for five years following the end of the Term.

If any provision of this Agreement or Applicable Law specifies any longer time period for retention of particular records, such time period will prevail.

(e)   Despite Section 28.1(d), all records that relate to Disputes being processed or actions brought under the Dispute procedures must be retained and made available until any later date that such Disputes and actions are finally resolved.

28.2   Audits

(a)   In addition to any other specific audit rights that MDOT may have under this Agreement, MDOT will have such rights to review and audit the Phase Developer, its Contractors,

and their respective Books and Records as MDOT deems necessary for the purposes of verifying compliance with this Agreement, Applicable Law, and Governmental Approvals.

(b)   The Phase Developer represents and warrants the completeness and accuracy in all material respects of all information it or its agents provides in connection with any audit by MDOT, and shall use Reasonable Efforts to cause all Contractors to warrant the completeness and accuracy in all material respects of all information such Contractors provide in connection with such audits.

(c)   The Phase Developer shall (and shall ensure that any Contractor will) include appropriate terms in each Contract in order to provide MDOT with access and audit rights in accordance with the terms of this Article 28.

(d)   Nothing in this Agreement shall in any way limit the constitutional and statutory powers, duties, and rights of elected State officials, including the independent rights of the Maryland Legislative Auditor, in carrying out his or her legal authority. The Phase Developer understands and acknowledges that:

(i)   the Maryland Legislative Auditor may conduct an audit or investigation of any entity receiving funds from the State directly under this Agreement or indirectly through a Contract;

(ii)   any acceptance of funds directly under this Agreement or indirectly through a Contract acts as acceptance of the authority of the Maryland Legislative Auditor, under the direction of the legislative audit committee, to conduct an audit or investigation in connection with those funds; and

(iii)   an entity that is the subject of an audit or investigation must provide the Maryland Legislative Auditor with access to any information such auditor considers relevant to the investigation or audit.

28.3   **Inquiries from the State Legislature**

The Phase Developer shall support MDOT in responding to any inquiries from the State legislature regarding the Phase, including by providing MDOT with any necessary information that MDOT requires to respond to those inquiries.

29.   **INTELLECTUAL PROPERTY**

29.1   **Ownership of Work Product**

(a)   All Work Product which is prepared or procured by or on behalf of MDOT or MDTA or its contractors (other than the Phase Developer), whether before or after the Effective Date, will be and will remain the exclusive property of MDOT or MDTA, notwithstanding any copies of the Work Product provided to the Phase Developer.

(b)   Subject to Section 29.2 (*Assignment of Work Product on Payment of Allowed Costs or Financial Close*) and Section 29.3 *(MDOT Option to Purchase Work Product)* all Work Product prepared by or on behalf of the Phase Developer will remain exclusively the property of the Phase Developer, notwithstanding any copies of the Work Product provided to MDOT.

29.2 **Assignment of Work Product on Payment of Allowed Costs or Financial Close**

(a)   If this Agreement is terminated under Section 26.1 (*Termination for Convenience*), Section 26.3 (*Termination by Court Ruling*), or Section 26.5 *(Termination for Loss of Financial Viability Caused by A Key Assumption That Is Incorrect),* then with effect from the payment of the Allowed Costs that are payable under Section 26.1 (*Termination for Convenience*), Section 26.3 (*Termination by Court Ruling*), or Section 26.5 *(Termination for Loss of Financial Viability Caused by A Key Assumption That Is Incorrect)*, with respect to such termination, the Phase Developer (on behalf of the Phase Developer and all Phase Developer-Related Entities) shall:

    (i)   irrevocably assign to MDOT all rights, title, and interest in and to all of the Phase Developer's Work Product other than:

        (A)   Proprietary Intellectual Property; and

        (B)   Work Product that has already been assigned to MDOT for a Section under the terms of this Agreement; and

    (ii)   deliver a copy of all of the Phase Developer's Work Product that is assigned to MDOT under Section 29.2(a)(i).

(b)   If a Section is removed from the scope of this Agreement under Article 27 (*Reduction In Scope of the Agreement*), then with effect from the payment of the Allowed Costs that are payable under Article 27 (*Reduction In Scope of the Agreement*) with respect to such removal, the Phase Developer (on behalf of the Phase Developer and all Phase Developer-Related Entities) shall:

    (i)   irrevocably assign to MDOT all rights, title, and interest in and to all of the Phase Developer's Work Product that relates to that Section (other than Proprietary Intellectual Property; and

    (ii)   deliver a copy of all of the Phase Developer's Work Product (other than Proprietary Intellectual Property) that relates to that Section.

(c)   Upon Financial Close of a Section, the Phase Developer (on behalf of the Phase Developer and all Phase Developer-Related Entities) shall:

    (i)   irrevocably assign to MDOT all rights, title, and interest in and to all of the Phase Developer's Work Product that relates to that Section (other than Proprietary Intellectual Property); and

    (ii)   deliver a copy of all the Phase Developer's Work Product (other than Proprietary Intellectual Property) that relates to that Section.

29.3 **MDOT Option to Purchase Work Product**

(a)   If this Agreement is terminated under Section 26.2 *(Termination for Phase Developer Default)*, or Section 26.4 *(Termination for Failure to Agree Form of Agreements)* the Phase Developer grants to MDOT an irrevocable option to purchase all of the Phase Developer's Work Product other than:

    (i)   Proprietary Intellectual Property; and

(ii) Work Product that has already been assigned to MDOT under the terms of this Agreement.

(b) MDOT may exercise the option under Section 29.3(a) by delivering written notice to the Phase Developer at the same time as, or within 30 days of, issuing the MDOT Termination Notice.

(c) If MDOT exercises its option under Section 29.3(a):

(i) MDOT shall pay to the Phase Developer an amount equal to the Phase Developer's Allowed Costs not previously reimbursed, up to a maximum amount of $500,000 (regardless of the value of the Work Product that is being transferred to MDOT); and

(ii) with effect from the payment under Section 29.3(a), the Phase Developer (on behalf of the Phase Developer and all Phase Developer-Related Entities) shall:

(A) irrevocably assign to MDOT all rights, title, and interest in and to all of the Phase Developer's Work Product (other than Proprietary Intellectual Property); and

(B) deliver a copy of all the Phase Developer's Work Product (other than Proprietary Intellectual Property).

29.4 Phase Developer Non-Proprietary Intellectual Property

(a) The Phase Developer (on behalf of itself and each Phase Developer-Related Entity) hereby grants to MDOT and MDTA a nonexclusive, sublicensable, transferrable (subject to Section 29.4(b)), royalty-free, irrevocable, worldwide, fully paid up license under the Intellectual Property of the Phase Developer and all Phase Developer-Related Entities (excluding Proprietary Intellectual Property) to use, reproduce, modify, adapt, disclose, and sublicense the same to other Persons engaged by or on behalf of MDOT and MDTA (directly or indirectly) solely in connection with the Phase during the Term.

(b) The right of MDOT and MDTA to transfer the license under Section 29.4(a) will be limited to any Governmental Entity that succeeds to the power and authority of MDOT or MDTA generally or with respect to the whole or part of the Phase.

29.5 Phase Developer Proprietary Intellectual Property

(a) All Proprietary Intellectual Property will remain exclusively the property of the Phase Developer or Phase Developer-Related Entity.

(b) The Phase Developer (on behalf of itself and each Phase Developer-Related Entity) hereby grants to MDOT and MDTA a nonexclusive, sublicensable, transferrable (subject to Section 29.5(c)), royalty-free, irrevocable, worldwide, fully paid up license under the Proprietary Intellectual Property to use, reproduce, modify, adapt, disclose, and sublicense the same to other Persons engaged by or on behalf of MDOT and MDTA (directly or in directly) solely:

(i) in connection with the Predevelopment Work during the Term; and

(ii) to the extent necessary for MDOT to use any Work Product assigned to MDOT under Section 29.2 (*Assignment of Work Product on Payment of Allowed Costs or Financial Close*), and Section 29.3 (*MDOT Option to Purchase Work Product*).

(c) The right of MDOT and MDTA to transfer the license under Section 29.5(b) will be limited to any Governmental Entity that succeeds to the power and authority of MDOT or MDTA generally or with respect to the whole or part of the Phase.

(d) MDOT and MDTA may not sell any Proprietary Intellectual Property or, subject to Section 29.5(b), use, reproduce, modify, adapt, or disclose, or allow any party to use, reproduce, modify, adapt, or disclose, any Proprietary Intellectual Property for any purpose other than as described in Section 29.5(b).

(e) The Phase Developer grants MDOT and MDTA the right, and will cause each Phase Developer-Related Entity to grant MDOT and MDTA the right, to purchase a perpetual, nonexclusive, sublicensable, transferable (subject to Section 29.5(c)), irrevocable, worldwide, fully paid up license to use the Proprietary Intellectual Property on other roads (tolled or un-tolled) owned and operated by MDOT, MDTA, or any other State agency on commercially reasonable terms.

29.6 **Further assurance**

The Phase Developer shall execute, and shall cause the Phase Developer-Related Entities to execute, such further documents and to do such further acts as may be necessary or reasonably required by MDOT to perfect, register, or enforce MDOT and MDTA's ownership or rights of any Work Product that is to be assigned or licensed to MDOT under this Article 29 *(Intellectual Property)*.

29.7 **State Intellectual Property**

(a) All State Intellectual Property will remain exclusively the property of MDOT or MDTA.

(b) MDOT hereby grants to the Phase Developer a revocable, non-exclusive, non-transferable, non-sub-licensable (without MDOT's prior written consent) license to use the State Intellectual Property, solely in connection with the performance of the Predevelopment Work during the Term. This license will automatically terminate upon the expiration or early termination of this Agreement.

(c) The Phase Developer may not sell any State Intellectual Property, or subject to Section 29.7(b), use, reproduce, modify, adapt, or disclose, or allow any party to use, reproduce, modify, adapt, or disclose, any State Intellectual Property for any purpose other than the performance of the Predevelopment Work for the Term.

(d) If the Phase Developer or any Phase Developer-Related Entity creates or develops any improvements, modifications, enhancements, or derivative works to or of the State Intellectual Property, the Phase Developer shall promptly notify MDOT in writing and provide to MDOT all data, sketches, charts, calculations, plans, drawings, layouts, depictions, specifications, manuals, electronic files, artwork, correspondence and other documents, information and other work product, and other related materials that disclose such State Intellectual Property related to such improvements, modifications, enhancements, or derivative works. Any and all such improvements, modifications, enhancements, or derivative works created or developed by the Phase Developer or any

Phase Developer-Related Entity are, and will be deemed, State Intellectual Property under this Agreement.

30. **PUBLIC INFORMATION AND RECORDS**

(a) The Phase Developer acknowledges and agrees that all submittals, records, documents, drawings, plans, specifications and other materials in MDOT's or MDTA's possession, including any Books and Records submitted by the Phase Developer to MDOT or MDTA, may be considered public records subject to inspection under the Maryland Public Information Act, Title 4 of the General Provisions Article of the Annotated Code of Maryland (**"PIA"**).

(b) The Phase Developer may designate conspicuously any documents that it believes contain trade secrets, confidential commercial information, confidential financial information or any other information that would be exempted from inspection in response to an application to inspect public records under the PIA by placing "CONFIDENTIAL" in the header or footer of such page or record affected. Any such designation shall be accompanied by a concise statement of reasons supporting the claim including the specific law that authorizes the exemption from inspection under the PIA.

(c) If an application is made under the PIA or other Applicable Law to inspect Books and Records that have been designated by the Phase Developer as "CONFIDENTIAL", MDOT or MDTA may notify the Phase Developer of the application. If so notified, the Phase Developer shall notify MDOT whether it consents to the disclosure or asserts a basis for non-disclosure and claimed exception under the PIA or other Applicable Law within the time period specified in the notice issued by MDOT or MDTA (if any) and before the deadlines for disclosure under the PIA and other Applicable Law.

(d) The Phase Developer acknowledges and agrees that:

(i) MDOT and MDTA will not be liable for any failure to notify the Phase Developer of an application to inspect Books and Records under Section 30(c);

(ii) MDOT and MDTA will have no responsibility or liability for any failure of the Phase Developer to respond or to respond timely to any notification by MDOT or MDTA under Section 30(c) and MDOT and MDTA will not be required to wait for a response before making a disclosure or otherwise taking action under the PIA or other Applicable Law;

(iii) MDOT and MDTA will not be obligated to adopt or support any assertion by the Phase Developer under Section 30(c) as to the basis for non-disclosure and claimed exception under the PIA or other Applicable Law; and

(iv) MDOT and MDTA will not be responsible and will have no liability to the Phase Developer or any other party as a result of disclosing any Books and Records, including Books and Records marked "CONFIDENTIAL", in response to an application for inspection under the PIA or other Applicable Law.

(e) Nothing contained in this Article 30 will be taken to modify or amend requirements and obligations imposed on MDOT or MDTA by the PIA or other Applicable Law. If there is any conflict between the provisions of the PIA or other Applicable Laws and this Agreement, the provisions of the PIA, or other Applicable Laws will control to the extent of that conflict.

(f) MDOT and MDTA will not advise the Phase Developer as to the nature or content of documents entitled to protection from disclosure under the PIA or other Applicable Law, or as to the interpretation of such laws. The Phase Developer shall contact its own legal counsel concerning the effect of Applicable Law to the Phase Developer's Books and Records and actions to be taken to preserve confidentiality.

(g) In any proceedings or litigation concerning the disclosure of any Books and Records to third parties, MDOT and MDTA's sole involvement will be as stakeholders retaining the material until otherwise ordered by a court or other authority having jurisdiction, unless MDOT or MDTA decides to intervene or participate in the litigation in such manner as it deems necessary or desirable. The Phase Developer will be responsible for prosecuting or defending any such proceedings or litigation, acting on its own behalf, at its sole expense and risk.

(h) The Phase Developer shall indemnify and hold harmless the Indemnified Parties from and against any and all claims, causes of action, suits, legal or administrative proceedings, damages, losses, liabilities, response costs, costs and expenses, including any injury to or death of persons or damage to or loss of property (including damage to utility facilities), and including attorneys' and expert witness fees and costs, arising out of, relating to, or resulting from MDOT or MDTA's refusal to disclose any material that the Phase Developer has designated as containing trade secrets, confidential commercial information, confidential financial information or any other information that would be exempted from inspection in response to an application to inspect public records under the PIA.

31. ASSIGNMENT AND TRANSFER; FUNDAMENTAL CHANGES

31.1 Assignment by the Phase Developer

The Phase Developer shall not assign, transfer, pledge, mortgage, or otherwise encumber any of its rights or obligations under this Agreement without the prior written consent of MDOT and MDTA. It is acknowledged that under certain circumstances the approval of BPW may also be required.

31.2 Assignment by MDOT or MDTA

MDOT or MDTA may, upon the prior written notice to the Phase Developer, but without the Phase Developer's consent, transfer and assign all or any portion of its rights, title and interests in and to this Agreement, the Phase, the Phase Site, the Development Rights Fee, and the Performance Security to any Governmental Entity that:

(a) succeeds to the governmental powers and authority of MDOT or MDTA; and

(b) if the assigning party is MDOT, has sources of funding to perform the payment obligations of MDOT under this Agreement that are at least as adequate and secure as MDOT's at the time of the assignment.

31.3 Change of Organization or Name

(a) The Phase Developer shall not change the legal form of its organization without providing prior written notice to MDOT.

(b)   If the Phase Developer changes its name, the Phase Developer shall promptly (and in any event within 10 Business Days of such change) provide MDOT and MDTA with written notice of such name change and appropriate supporting documentation.

32.   CHANGE IN OWNERSHIP OF PHASE DEVELOPER

32.1   Compliance with the Act

The Phase Developer shall provide all information and complete all actions required by MDOT or MDTA to enable MDOT and MDTA to comply with the Act in connection with any proposed Change in Ownership.

32.2   Pre-Approved Changes in Ownership

(a)   The Parties acknowledge that, without prejudice to the other provisions under this Article 32 regarding notices and approval from MDOT or MDTA, Changes in Ownership of the type specified in Section 32.2(b) have been pre-approved by the Board of Public Works for the purposes of §10A-202(e) of the State Finance and Procurement Article of the Annotated Code of Maryland.

(b)   **"Pre-Approved Change in Ownership"** means each of the following:

(i)   a bona fide upstream business reorganization, consolidation, or other transfer in equity of a parent entity with an interest in the Phase Developer where the transferor and transferee are under the same ultimate parent organization with ultimate power to direct or control or cause the direction or control of the management of the Phase Developer and so long as there occurs no change in such entity as part of such reorganization, consolidation, or other transfer in equity;

(ii)   a transfer of interests:

(A)   between managed funds that are under common ownership or control; or

(B)   between the general partner, manager, or the parent company of such general partner or manager, and any managed funds under common ownership or control with such general partner or manager (or parent company of such general partner or manager),

so long as there occurs no change in the entity or entities with ultimate power to direct or control, or cause the direction or control, of the management of the Phase Developer;

(iii)   a Change in Ownership due solely to bona fide open market transactions in securities effected on a recognized public stock exchange, including transactions involving an initial public offering; and

(iv)   the exercise of minority veto or minority voting rights that are exercised under Applicable Law, or that are exercised under the Phase Developer's organizational documents (or under related member, shareholder, or similar agreements (where MDOT has received copies of such agreements)).

32.3   **Restrictions on Change in Ownership**

(a)   Except for any Changes in Ownership described in <u>Section 32.2(b)(iii)</u> *(Pre-Approved Changes in Ownership)*, the Phase Developer shall not voluntarily or involuntarily effect or allow any Change in Ownership unless the requirements in <u>Section 32.3(a)(i)</u> or <u>Section 32.3(a)(ii)</u> below have been satisfied:

    (i)   if the Change in Ownership is subject to §10A-202 of the State Finance and Procurement Article of the Annotated Code of Maryland:

        (A)   the Change in Ownership has been approved in writing by MDOT (in its absolute discretion) in accordance with <u>Section 32.5</u> *(MDOT Approval)*, and complies with any conditions that may be imposed by MDOT in connection with that approval; and

        (B)   the requirements of <u>Section 32.6</u> *(Changes in Ownership that are Subject to the Act)* have been satisfied; or

    (ii)   if the Change in Ownership is not subject to §10A-202 of the State Finance and Procurement Article of the Annotated Code of Maryland, the Change in Ownership has been approved in writing by MDOT (in its absolute discretion), in accordance with <u>Section 32.5</u> *(MDOT Approval)*, and complies with any conditions that may be imposed by MDOT in connection with that approval.

(b)   Notwithstanding any other provision of this Agreement to the contrary, any Change in Ownership that does not change the percentage of the issued share capital or membership interests in the Phase Developer owned (directly or indirectly) by each PD Equity Member:

    (i)   will not constitute a change in the ownership composition of the Phase Developer for the purposes of §10A-202(e) of the State Finance and Procurement Article of the Annotated Code of Maryland; and

    (ii)   will not be subject to the approval by MDOT under <u>Section 32.5</u> *(MDOT Approval)*.

32.4   **Notifications of Proposed Changes in Ownership**

(a)   The Phase Developer shall provide MDOT with:

    (i)   at least 45 days' prior written notice of any proposed Change in Ownership that is not subject to §10A-202 of the State Finance and Procurement Article of the Annotated Code of Maryland; and

    (ii)   at least 90 days' prior written notice of any proposed Change in Ownership that is subject to §10A-202 of the State Finance and Procurement Article of the Annotated Code of Maryland.

(b)   Each Notice of Proposed Change in Ownership must:

    (i)   identify whether or not the Change in Ownership is subject to §10A-202 of the State Finance and Procurement Article of the Annotated Code of Maryland and attach all supporting information necessary to demonstrate whether or not the

Change in Ownership is subject to §10A-202 of the State Finance and Procurement Article of the Annotated Code of Maryland;

(ii)   identify whether the proposed Change in Ownership is a Pre-Approved Change in Ownership and, if applicable, attach all supporting information necessary to demonstrate that it is a Pre-Approved Change in Ownership; and

(iii)   provide any information that MDOT may reasonably require in connection with its approval under Section 32.5 *(MDOT Approval)*.

(c)   For any proposed Change in Ownership that is subject to §10A-202 of the State Finance and Procurement Article of the Annotated Code of Maryland and that is not a Pre-Approved Change in Ownership, the Phase Developer shall provide to MDOT, promptly upon request, all information and documentation as the Board of Public Works and MDOT may request in connection with the Board of Public Works determination of whether to approve such Change in Ownership.

(d)   Except for any Changes in Ownership described in Section 32.2(b)(iii) *(Pre-Approved Changes in Ownership)*, the Phase Developer shall notify MDOT in writing that a Change in Ownership has been completed no later than 10 Business Days after it has been completed.

32.5   **MDOT Approval**

(a)   Within 30 days of receiving a complete Notice of Proposed Change in Ownership, MDOT shall notify the Phase Developer whether or not MDOT approves of the proposed Change in Ownership including, where applicable, whether MDOT and MDTA have made a responsibility determination under the Act in accordance with Section 32.5(d).

(b)   MDOT may approve (and include any conditions to its approval) or withhold its approval to the proposed Change in Ownership under Section 32.5(a) in its absolute discretion.

(c)   The Phase Developer acknowledges that if the proposed Change in Ownership is subject to §10A-202 of the State Finance and Procurement Article of the Annotated Code of Maryland:

(i)   MDOT may approve the proposed Change in Ownership only if MDOT and MDTA have made a responsibility determination under §10A-202(e) of the State Finance and Procurement Article of the Annotated Code of Maryland; and

(ii)   MDOT's approval of the proposed Change in Ownership will be subject to Section 32.6 *(Changes in Ownership that are Subject to the Act)*.

(d)   In the case of any proposed Change in Ownership that is subject to §10A-202 of the State Finance and Procurement Article of the Annotated Code of Maryland, MDOT will not approve the proposed Change in Ownership unless MDOT and MDTA make a responsibility determination under §10A-202(e) of the State Finance and Procurement Article of the Annotated Code of Maryland.

32.6 **Changes in Ownership that are Subject to the Act**

(a) The Phase Developer acknowledges and agrees that for any proposed Change in Ownership that is subject to §10A-202 of the State Finance and Procurement Article of the Annotated Code of Maryland:

(i) MDOT and MDTA are required to provide 45 days' advance notice of the proposed Change in Ownership to the Senate Budget and Taxation Committee, the House Committee on Ways and Means and the House Appropriations Committee; and

(ii) such Change in Ownership may not be effected unless:

(A) MDOT and MDTA have made a responsibility determination under the State Finance and Procurement Article of the Annotated Code of Maryland;

(B) the 45-day notice period referred to in Section 32.6(a)(i) has expired; and

(C) the Board of Public Works has approved the Change in Ownership.

(b) If the Phase Developer delivers a complete Notice of Proposed Change in Ownership that is subject to §10A-202 of the State Finance and Procurement Article of the Annotated Code of Maryland the following will apply:

(i) if MDOT notifies the Phase Developer that it has not approved the proposed Change in Ownership under Section 32.5 *(MDOT Approval)*, the Phase Developer shall ensure that the Change in Ownership does not take effect and MDOT will not be required to notify the Senate Budget and Taxation Committee, the House Committee on Ways and Means, the House Appropriations Committee, or the Board of Public Works of the proposed Change in Ownership; or

(ii) if MDOT notifies the Phase Developer that MDOT and MDTA have made a responsibility determination and that MDOT has approved the proposed Change in Ownership under Section 32.5 *(MDOT Approval)*, MDOT will notify the Senate Budget and Taxation Committee, the House Committee on Ways and Means, and the House Appropriations Committee of the proposed Change in Ownership (in order to start the 45 day advance notice period under the Act) and, except in the case of a Pre-Approved Change in Ownership, will submit the proposed Change in Ownership to the Board of Public Works for approval; and

(iii) upon the Board of Public Works determining whether to approve or reject the proposed Change in Ownership, MDOT will notify the Phase Developer of that determination.

32.7 **Costs**

The Phase Developer shall reimburse MDOT and MDTA for all reasonable out-of-pocket expenses (including reasonable and proper fees of consultants and legal counsel) incurred by MDOT and MDTA in connection with their review of any proposed Change in Ownership within 30 days of receiving an invoice from MDOT or MDTA with respect to their respective costs.

33. **DISPUTE RESOLUTION**

33.1 **Consultation and Initial Decision of Contract Manager**

(a) Disputes shall follow the Dispute Resolution Procedures set forth in this Article 33 *(Dispute Resolution)*.

(b) The Contract Manager and the Phase Developer Representative shall first consult in Good Faith in an attempt to promptly resolve the Dispute.

(c) As part of their Good Faith consultation, the Contract Manager and the Phase Developer Representative may agree to confer with the Steering Committee to assist in resolving the Dispute.

(d) If after 30 days of a Dispute being referred to the Dispute Resolution Procedures the Dispute is not resolved by the Parties through the means set forth in Section 33.1(b) and Section 33.1(c), then, the Contract Manager shall issue a written decision to the Phase Developer regarding the Dispute (**"Initial Decision"**) within 15 days.

(e) The Initial Decision will be provided to the Phase Developer by email, with a hard copy delivered by certified mail, return receipt requested, or by any other method that provides evidence of receipt.

33.2 **Appeal of Initial Decision**

(a) The MDOT Secretary may delegate the responsibilities under this Section 33.2 to a designee.

(b) The Phase Developer may appeal an Initial Decision by submitting a written notice of appeal (**"Notice of Appeal"**) to the MDOT Secretary (or designee), with a copy to the Contract Manager, within 15 days of receiving notice of the Initial Decision.

(c) If the Phase Developer does not file a Notice of Appeal within 15 days of receiving the Initial Decision, the Phase Developer will be deemed to have accepted the Initial Decision and will have irrevocably waived and released any Claim with respect to the matter that is the subject of the Dispute and any Notice of Appeal filed after the 15 day period will be dismissed.

(d) A Notice of Appeal must include:

(i) an explanation of the Dispute, including relevant facts and reference to all relevant contract provisions;

(ii) all pertinent data and correspondence relating to the Dispute;

(iii) a copy of the Initial Decision; and

(iv) a simple, concise and direct statement of the basis of the appeal (including the amount of the Claim or relief requested and all supporting documentation).

(e) Within 30 days of receiving a Notice of Appeal, the MDOT Secretary (or designee) may request that the Phase Developer produce additional material, including documents, books, or other tangible records or information, in support of the Notice of Appeal. Within 15 days after receipt of such a request, the Phase Developer shall produce the additional

material and information requested or identify grounds for not producing the information or documents.

(f) The Phase Developer and the Contract Manager will be afforded an opportunity to be heard and to offer evidence in support of their respective positions regarding the Dispute. Within 45 days of receiving a Notice of Appeal, or if Section 33.2(e) applies, within 30 days of receiving all additional information requested under Section 33.2(e), the MDOT Secretary (or designee) will determine and notify the Phase Developer and Contract Manager of the procedural rules (and timings) for any hearing and for written submissions (the "**Procedural Rules**"). The Procedural Rules shall provide for the last day of any hearings and receipt of last written submissions to be no later than 6 months after the date of the Procedural Rules.

(g) The hearing before the MDOT Secretary (or designee) shall be recorded and transcribed.

(h) The MDOT Secretary (or designee) will make a record of all matters relating to the appeal, including:

(i) the nature of the Dispute;

(ii) the Initial Decision;

(iii) all documentary evidence received by the MDOT Secretary (or designee);

(iv) the written transcript, if any, of a hearing;

(v) the final decision of the MDOT Secretary (or designee); and

(vi) any other documentation in the custody of MDOT relevant to the appeal.

(i) The MDOT Secretary (or designee) will issue a written decision to the Phase Developer and Contract Manager within 60 days from the last date of the hearing, or receipt of the last written submission, whichever is later.

(j) The decision by the MDOT Secretary (or designee) will be deemed the final decision of MDOT and is a prerequisite to any petition for judicial review filed in court of any Dispute by the Phase Developer against MDOT or MDTA. Within 30 days after receipt of the final decision of the MDOT Secretary (or designee), the Phase Developer may seek judicial review in any court of competent jurisdiction in the State.

(k) To the extent provided by Applicable Law, a Party may seek specific performance of any obligation under this Agreement or injunctive relief.

34. LIABILITIES

34.1 Consequential Losses

(a) Except as otherwise expressly provided in this Agreement, no Party will have the right to claim damages, including punitive and incidental damages, against another Party for a breach of this Agreement, in tort, or on any other basis whatsoever, to the extent that any loss claimed by a Party is for Indirect Losses.

(b) The Parties agree that the limitation in Section 34.1(a) will not apply to or limit a Party's right to recover from another Party:

(i)   any Losses (excluding defense costs) to the extent that they are either covered by the proceeds of insurance carried by the relevant Party or are required to be insured against under Article 24 *(Insurance)*, or to the extent the Phase Developer is deemed to have self-insured the Loss under Article 24 *(Insurance)*;

(ii)   Losses arising out of fraud, criminal conduct, willful misconduct, gross negligence, or bad faith on the part of the relevant Party;

(iii)   amounts payable by the Phase Developer to MDOT or MDTA under an indemnity in this Agreement; or

(iv)   interest, late charges, fees, transaction fees and charges, penalties, and similar charges that this Agreement expressly states are due from the relevant Party.

34.2   **No Double Recovery**

Despite any other provisions of this Agreement to the contrary, no Party will be entitled to recover compensation or make a claim under this Agreement with respect to any Loss that it has incurred to the extent that it has already been compensated with respect to that Loss under this Agreement or otherwise.

35.   **GOVERNING LAW AND JURISDICTION**

35.1   **Governing Law**

This Agreement will be governed by and construed in accordance with the laws of the State of Maryland.

35.2   **Submission to Jurisdiction**

The Phase Developer consents to the jurisdiction of any court in the State of Maryland, waiving any claim or defense that such forum is not convenient or proper. The Phase Developer agrees that any such court shall have *in personam* jurisdiction over it, and consents to service of process in any manner authorized by Applicable Law.

35.3   **Waiver of Jury Trial**

The parties 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 this agreement, or arising out of, under, or in any connection with this 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 this agreement. This provision is a material inducement for all parties entering into this agreement. This provision applies only to suits between the parties arising out of or related to this agreement and does not apply to third party claims or suits by or on behalf of the parties for phase property. Each of the Parties (a) 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 this Agreement, seek to enforce the foregoing waiver and (b) acknowledge that it has been induced to enter into this Agreement by, among other things, the mutual waivers and certifications in this Section 35.3.

36.   **OTHER**

36.1   **Amendments**

This Agreement can only be amended or replaced by a written instrument duly executed by the Parties.

36.2   **Waiver**

(a)   No waiver of any obligation, term, condition, or other provision of this Agreement will be valid unless in writing and signed by the waiving Party.

(b)   No Party's waiver of any breach or failure to enforce any of the obligations, terms, conditions, or other provisions of this Agreement at any time will in any way limit or waive that Party's right to subsequently enforce, or compel strict compliance with every obligation, term, condition, or other provision of this Agreement, despite any course of dealing or custom of the trade (other than the waived breach or failure in accordance with the terms of such waiver).

(c)   If the Parties make and implement any interpretation of this Agreement without documenting such interpretation by an instrument in writing signed by all Parties, such interpretation and implementation will not be binding in the event of any future Disputes.

36.3   **Independent Contractor; No Agent, Joint Venture, or Partnership**

(a)   The Phase Developer is an independent contractor, and nothing contained in this Agreement will be construed as constituting any relationship with MDOT or MDTA other than that of developer of the Phase and independent contractor.

(b)   The Parties agree that:

(i)   nothing in this Agreement is intended or will be construed to create any partnership, joint venture, agency, landlord-tenant, lessor-lessee of real property, optionor-optionee, vendor-purchaser, mortgagor-mortgagee, or similar relationship between MDOT, MDTA, and the Phase Developer; and

(ii)   in no event will any Party take a position in any tax return, insurance application or questionnaire, financial statement, financial report, regulatory filing, securities filing, loan document, or other writing of any kind that any such relationship exists.

(c)   While the term "public-private partnership" may be used on occasion to refer to contractual relationships of the type created by this Agreement, the Parties do not express any intention to form or hold themselves out in law or in practice as a partnership, joint venture, or similar relationship, to share net profits or net losses, or to give MDOT or MDTA control or joint control over the Phase Developer's financial decisions or discretionary actions concerning the Phase and the Predevelopment Work.

(d)   In no event will the relationship between MDOT, MDTA, and the Phase Developer be construed as creating any relationship whatsoever between MDOT or MDTA and the Phase Developer's employees.

(e)   Neither the Phase Developer nor any of its employees is or shall be deemed to be an employee of MDOT or MDTA.

(f) Except as otherwise expressly provided in this Agreement, the Phase Developer has sole authority and responsibility to employ, discharge, and otherwise control its employees and has complete and sole responsibility as a principal for its agents, for all Contractors and for all other Persons that the Phase Developer or any Contractor hires to perform or assist in performing the Predevelopment Work.

36.4 No Personal Liability

No officer, agent, representative, or employee of MDOT or any MDOT-Related Entity will be personally liable under any provision of this Agreement, or because of the execution or attempted execution of this Agreement, or because of any breach of this Agreement.

36.5 Taxes

The Phase Developer is solely responsible for the payment of taxes accrued or arising out of the performance of its obligations under this Agreement.

36.6 Successors and Assigns

This Agreement is binding upon and will inure to the benefit of MDOT, MDTA, and the Phase Developer and their respective successors and permitted assigns.

36.7 Survival

All provisions which by their inherent character should survive expiration or early termination of this Agreement, will survive the expiration or early termination of this Agreement, including Article 6 *(Representations and Warranties)*; Article 23 *(Indemnity)* and any other indemnities in this Agreement; the express obligations of the Parties following the date of termination; any obligations to pay amounts under this Agreement; Article 28 *(Records and Audit)*; Article 29 *(Intellectual Property)*; Article 33 *(Dispute Resolution)*; and this Article 36.

36.8 Limitation on Third Party Beneficiaries

Nothing contained in this Agreement is intended or will be construed as creating or conferring any rights, benefits, or remedies upon, or creating any obligations of the Parties toward, any Person not a party to this Agreement, except rights expressly contained in this Agreement.

36.9 Notices and Communications

(a) Notices under this Agreement must be in writing and:

　(i) delivered personally;

　(ii) sent by certified mail, return receipt requested;

　(iii) sent by a recognized overnight mail or courier service, with delivery receipt requested; or

　(iv) sent by email communication followed by a hard copy.

(b) Notices under Section 36.9(a) shall be sent to the following addresses (or to such other address as may from time to time be specified in writing by such Person):

　(i) If to the Phase Developer:

Accelerate Maryland Partners LLC

Attn: Tim Steinhilber, PE

Address: 7900 Westpark Drive, Suite T500 Tysons, Virginia, 22102

Tel: 571-620-7363

Email: tsteinhilber@transurban.com

(ii)   If to MDOT:

Maryland Department of Transportation

Address: 707 North Calvert Street, P-601, Baltimore, Maryland 21202

Attn: Jeffrey Folden

Tel: 410-637-3321

Email: JFolden1@mdot.maryland.gov

In addition, copies of all notices regarding Disputes, suspension, termination, and default notices shall be delivered to the following:

Office of the Attorney General
State Highway Administration
Attn: Principal Counsel
Address: 707 North Calvert Street, 4th Floor, Baltimore, Maryland 21202
Tel: 410-545-0040
Email: kreynolds@mdot.maryland.gov

(c)   Any notice sent personally will be deemed delivered upon receipt, if sent by mail or courier service will be deemed delivered on the date of receipt or on the date receipt at the appropriate address is refused, as shown on the records of the US Postal Service, courier service, or other Person making the delivery, and if sent by email communication will be deemed delivered on the date of receipt as shown on the received email transmission (provided the hard copy is also delivered under Section 36.9(a)). All notices (including by email communication) delivered after **4:00 p.m. Baltimore time** will be deemed delivered on the first Business Day following delivery.

36.10   **Integration of this Agreement**

The Parties agree and expressly intend that this Agreement (including all Exhibits) constitute a single, integrated agreement whose terms are interdependent and non-divisible, such that, among other things, no part of this Agreement could be separated from any other part for the purposes of assumption or rejection under §365 of Title 11 of the United States Bankruptcy Code.

36.11   **Entire Agreement**

This Agreement contains the entire understanding of the Parties with respect to the subject matter of this Agreement and supersedes all prior agreements, understandings, statements, representations, and negotiations between the Parties with respect to their subject matter.

MDOT and MDTA   92   Phase P3 Agreement
Execution Version
Phase 1 of the I-495 & I-270 P3 Program

36.12 **Severability**

(a) If any section, provision, Article, or part of this Agreement is ruled invalid (including due to a change in law) by a court having proper jurisdiction, the Parties shall:

(i) promptly (and in any event within 10 Business Days) after such ruling, meet and negotiate a substitute for such section, provision, Article, or part, which will, to the greatest extent legally permissible, effect the original intent of the Parties, including any adjustment to MDOT's compensation to the Phase Developer's account for any change in the Predevelopment Work resulting from such invalidated portion; and

(ii) if necessary or desirable, apply to the court or other decision maker which declared such invalidity for an interpretation of the invalidated portion to guide the negotiations.

(b) The invalidity or unenforceability of any section, provision, Article, or part will not affect the validity or enforceability of the balance of this Agreement, which will be construed and enforced as if this Agreement did not contain such invalid or unenforceable section, provision, Article, or part.

36.13 **Counterparts**

(a) This Agreement may be signed in counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument.

(b) The Parties:

(i) agree that delivery of an executed counterpart of a signature page of this Agreement in electronic (e.g. "pdf" or "tif") format shall be effective as delivery of a manually executed counterpart of this Agreement; and

(ii) consent to the delivery of electronically executed counterparts under this Section 36.13.

36.14 **Electronic Execution of Agreement**

The words "execution", "signed", "signature", and such similar terms used in this Agreement shall be deemed to include electronic signatures and electronic records. An electronic signature or electronic record shall have the same legal effect, validity, or enforceability as:

(a) a manually executed signature; or

(b) the use of a written record keeping system,

as the case may be, to the extent permitted by Applicable Law, including the Federal Electronic Signatures in Global and National Commerce Act and Title 21 "The Maryland Uniform Electronic Transactions Act" of the Commercial Law Article of the Annotated Code of Maryland.
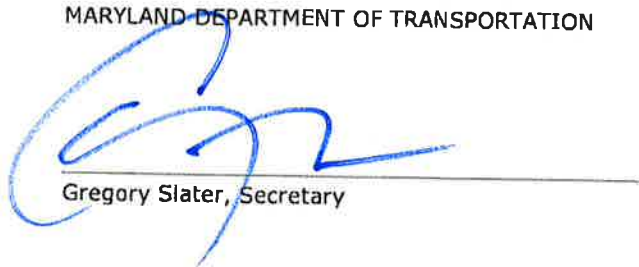
36.15 **Payments and Appropriations**

(a) Except as otherwise expressly provided in this Agreement, payments due to any Party will be due and payable by the Party responsible for payment no later than 30 days following receipt of an invoice and supporting documentation.

(b)   Each Party will be entitled to deduct, offset, or withhold from any amounts due from one Party to another Party any amounts then due and owing from such other Party.

(c)   Except as otherwise expressly provided in this Agreement, no Party is required to pay amounts due that are being contested in Good Faith in accordance with the Dispute Resolution Procedures in Article 33 *(Dispute Resolution)*.

(d)   The Phase Developer acknowledges and agrees that each of MDOT and MDTA have entered into the Interagency Agreement, under which MDOT has agreed with MDTA to be responsible to the Phase Developer for all financial liability arising from claims by the Phase Developer under the Agreement against MDTA and MDOT.

(e)   Without prejudice to any rights of MDOT against MDTA under the Interagency Agreement (which rights the Phase Developer expressly acknowledges and agrees it is not a third party beneficiary of):

   (i)   to the extent that the resolution of any Claim of the Phase Developer against MDTA or MDOT under this Agreement, including all Disputes, entitles the Phase Developer, whether as a result of an agreement among such Person(s) or through the Dispute Resolution Procedure or otherwise, to recover any sum of money from MDTA or MDOT, such recovery shall be expressly limited to such amounts as may be appropriated by the Maryland General Assembly to MDOT, as more particularly described in Section 36.15(c);

   (ii)   MDTA will have no liability to the Phase Developer in respect of any Claim under this Agreement, and any liability of MDOT to the Phase Developer in furtherance of this Section 36.15 will be expressly subject to Section 36.15(f) in all respects; and

   (iii)   no judgment obtained by the Phase Developer in respect of any Claim may be enforced by the Phase Developer against MDTA or any of MDTA's assets and by its execution of this Agreement, the Phase Developer consents to the dismissal with prejudice of any such action seeking enforcement.

(f)   All amounts payable by MDOT under this Agreement are subject to appropriations by the Maryland General Assembly in accordance with and to the extent required by Applicable Law. The obligation of MDOT to make payments under this Agreement, including the obligation of MDOT to make payments in respect of amounts owing as a result of the act or omission of MDTA under Section 36.15(d), does not constitute an indebtedness of the State within the meaning or application of any constitutional provision or limitation and does not constitute a pledge of the faith, credit, or taxing power of the State or any political subdivision thereof (including MDOT and MDTA) within the meaning or application of any constitutional provision or limitation. Furthermore, MDOT has no taxing power, and the Phase Developer has no right to have taxes levied or to compel appropriations by the Maryland General Assembly for any payment owing under this Agreement.

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

WITNESS: MARYLAND DEPARTMENT OF TRANSPORTATION

_____   _____
                                            Gregory Slater, Secretary

APPROVED AS TO FORM AND LEGAL SUFFICIENCY:

_____
Assistant Attorney General
Maryland Department of Transportation

WITNESS:

_____   _____
                                            Maryland Department of Transportation State
                                            Highway Administration Administrator

APPROVED AS TO FORM AND LEGAL SUFFICIENCY:
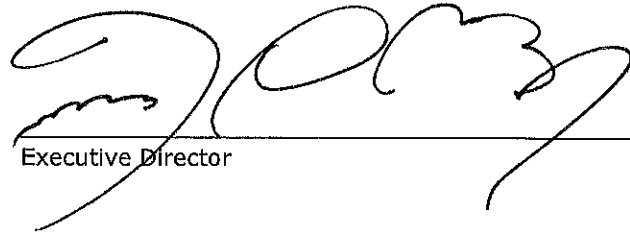
_____
Assistant Attorney General
Maryland Department of Transportation State Highway
Administration

WITNESS: MARYLAND TRANSPORTATION AUTHORITY

Natalie Jenson   _____
                                            Executive Director

APPROVED AS TO FORM AND LEGAL SUFFICIENCY:

Kimberly Millender
Assistant Attorney General
Maryland Transportation Authority

WITNESS

ACCELERATE MARYLAND PARTNERS LLC

Tim Stanhll

By:_____

Name: _Pierce R. Coffee_____

Title: __Manager_____

WITNESS

ACCELERATE MARYLAND PARTNERS LLC

_____

By:_____

Name: _____

Title: _____

WITNESS   **ACCELERATE MARYLAND PARTNERS LLC**

_____   By:_____

                                     Name: _____

                                     Title: _____

WITNESS   **ACCELERATE MARYLAND PARTNERS LLC**

_____   By:_____

                                     Name: Mark Bradshaw
                                           _____

                                     Title: Manager
                                            _____

EXHIBIT 1

DEFINITIONS

Capitalized terms and acronyms used in this Agreement have the meanings given in this Exhibit 1 *(Definitions)*.

"Abandonment" means to abandon all or a material part of the Phase, which abandonment will be deemed to have occurred if:

(a)   the Phase Developer demonstrates through statements, acts, or omissions an intent not to continue (for any reason other than a Relief Event that materially interferes with its ability to continue) to perform the Predevelopment Work; or

(b)   no significant Predevelopment Work on the Phase as shown on the Predevelopment Work Schedule (taking into account any Relief Event) is performed for a continuous period of more than 60 days.

"ACORD" means the Association for Cooperative Operations and Research Development.

"Act" means Title 10A of the State Finance and Procurement Article of the Annotated Code of Maryland.

"**Additional Properties**" means any property or property rights not provided for as MDOT-Provided Parcels, including those necessary to accommodate necessary permanent and temporary rights, as well as laydown, staging, temporary drainage, and other construction methods in connection with the construction or rehabilitation of the Phase.

"**Additional TCAs**" means Additional Properties that are not Permanent Additional Properties.

"Administering Employees" means employees of the Phase Developer whose work related to the Phase has not been completed and that are involved in the administration of federal or State funds.

"Affiliate" means, in relation to any Person, any entity which, directly or indirectly, through one or more intermediaries:

(a)   has a 10 percent or more voting or economic interest in such Person; or

(b)   Controls, is Controlled by, or is under common Control with such Person.

"Agreement" means this agreement (including all its Exhibits).

"Allowed Costs" means in respect of a Section, the Phase Developer's or Section Developer's documented reasonable internal direct costs and third party direct costs incurred in performing the Predevelopment Work or Section Work for that Section prior to Financial Close of that Section (including any fees incurred with respect to providing the Performance Security or the Development Rights Fee Security) that are permitted as Allowed Costs under Exhibit 15 *(Allowed Costs)*.

"Alternative Equity IRR" means the nominal pre-tax internal rate of return on Section Equity Investment (on a cash-on-cash basis) over the full term of a Section P3 Agreement, calculated using the Initial Base Case Financial Model and assuming that there are no Refinancings (including Exempt Refinancings), or Mandatory Equity Sales, as the discount rate that, when applied to the Distributions gives a net present value equal to the net present value of the Section Equity Investment. For the purposes of this definition, the phrase cash-on-cash basis means, with respect to the calculation of a

financial return, the calculation of such financial return on the basis of cash actually received in relation to cash actually invested (as opposed to cash committed).

"Applicable Law" means any statute, law code, regulation, ordinance, rule, common law, judgment, judicial or administrative order, decree, directive, or other requirement having the force of law or other governmental restriction (including those resulting from the initiative or referendum process) or any similar form of decision of or determination by, or any interpretation or administration of any of the foregoing by, any Governmental Entity which is applicable to the Phase, the Predevelopment Work, or any relevant Person whether taking effect before or after the date of this Agreement. Applicable Law excludes Governmental Approvals.

"Assumptions Book" means the data book provided by the Section Developer under Section 1.6(j) *(Initial Base Case Financial Model Assumptions Book)* of Exhibit 7 *(Committed Section Proposal)*.

"Available Funds" means the aggregate funds available at Financial Close of each Section of Phase South A to pay the Development Rights Fee and Upfront Payment for each Section.

"Bank Debt Financing" has the meaning given to that term in Section 1.2 *(Financial Institutions Providing Debt Financing)* of Exhibit 7 *(Committed Section Proposal)*.

"Benchmark Interest Rate" means the publicly-documented interest rates of each maturity included in the following indices:

(a)   the U.S. Spot Treasury Yield;

(b)   the Municipal Market Benchmark (supplied by Thomson Reuters);

(c)   the State and Local Government Series index provided by the U.S. Treasury; and

(d)   the Overnight Index Swap Yield.

The Benchmark Interest Rates do not include any additional credit spread, margin, or fee components.

"Board of Public Works" or **"BPW"** means the State of Maryland Board of Public Works.

"Bond Financing" has the meaning given to that term in Section 1.2 *(Financial Institutions Providing Debt Financing)* of Exhibit 7 *(Committed Section Proposal)*.

"Books and Records" means any and all documents, books, records, papers, or other information of any Phase Developer-Related Entity or Affiliate relating to the Phase, including:

(a)   all design and construction documents, and all operations and maintenance documents (including drawings, specifications, submittals, Contracts, subcontracts, invoices, schedules, meeting minutes, budgets, forecasts, and change orders);

(b)   all budgets, certificates, claims, correspondence, data (including test data), documents, expert analyses, facts, files, information, investigations, materials, notices, plans, projections, proposals, records, reports, requests, samples, schedules, settlements, statements, studies, surveys, tests, test results, vehicular traffic information analyzed, categorized, characterized, created, collected, generated, maintained, processed, produced, prepared, provided, recorded, stored, or used by the Phase Developer or its Contractors in connection with the Phase; and

(c)   with respect to all of the above, any information that is stored electronically or on computer-related media.

For the purposes of the requirements of this Agreement to maintain Books and Records, the term "Books and Records" includes documents or information that are subject to the attorney-client privilege, but for the purposes of the requirements under this Agreement to provide access to Books and Records, the term specifically excludes documents or information that are subject to the attorney-client privilege and other legally recognized privilege under Applicable Law that are identified in a privilege log.

"Business Day" means any day that is not a Saturday, a Sunday, a State of Maryland public holiday, or a federal public holiday.

"Capital Costs" means all costs related to design, construction, reimbursed Predevelopment Costs, Developer Closing Fees, right of way, MDTA Notes purchase, Upfront Payment, and Development Rights Fee for the Section.

"CFR" means the Code of Federal Regulations.

"Change in Ownership" means:

(a)   any sale, transfer, assignment, mortgage, encumbrance, conveyance, or disposal of any legal, beneficial, or equitable interest in any or all of the shares or membership interests in the Phase Developer;

(b)   any change in the direct or indirect control over:

(i)   the voting rights conferred on the shares or membership interests of the Phase Developer;

(ii)   the right to appoint or remove directors of the Phase Developer;

(iii)   the right to receive dividends or distributions of the Phase Developer;

(iv)   the direction or control of the management of the Phase Developer, or the Phase; or

(c)   any other arrangements that have or may have the same effect as paragraph (a) or paragraph (b) of this definition.

"Claim" means a written demand or assertion by the Phase Developer seeking, as a legal right, the payment of money, extension of time, or other relief, under or relating to this Agreement or a particular interpretation of the terms of this Agreement.

"COMAR" means the Code of Maryland Regulations.

"Commercial Close" means the date that the applicable Section P3 Agreement is signed by all of the parties.

"Committed Section Proposal" means the proposal described in Section 11.3 *(Committed Section Proposal)*.

"Contract" means any contract, subcontract, or other form of agreement to perform any part of the Predevelopment Work or provide any materials, equipment, or supplies for any part of the Predevelopment Work, or any such agreement, supplement, or amendment at a lower tier, between a Contractor and its lower-tier Contractor or a Supplier and its lower-tier Supplier, at all tiers.

"Contractor" means:

(a) any Person (other than MDOT and MDTA), with whom the Phase Developer has entered into a contract to perform any part of the Predevelopment Work or provide any materials, equipment, or supplies for the Predevelopment Work, on behalf of the Phase Developer; and

(b) any other Person with whom any contractor has further subcontracted any part of the Predevelopment Work, at all tiers.

"Contractor Markup Cost" is defined in Appendix A of Exhibit 6 *(Predevelopment Work Requirements).*

"Contractor Markup Percentage" is defined in Appendix A of Exhibit 6 *(Predevelopment Work Requirements)*.

"Contract Manager" has the meaning given to the term in Section 7.1(a) *(Representatives)*, and the initial Contract Manager is the individual identified as such in Exhibit 3 *(Initial Designation of Representatives)*.

"Control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract, or otherwise.

"CPI-U" means the All Items Consumer Price Index for All Urban Consumers (CPI-U) in Washington (BLS Series ID CUURS35ASA0) as published by the Bureau of Labor Statistics using a reference year of 1982-84 that equals 100.0 or, if such index in its present form becomes unavailable, such similar index as may be agreed by the Parties, acting reasonably. If such index is revised so that the base year differs from that set forth above, the Inflation Index shall be converted in accordance with the conversion factor published by the United States Department of Labor, Bureau of Labor Statistics. If the Bureau of Labor Statistics otherwise alters its method of calculating such index, the Parties shall mutually determine appropriate adjustments in the affected index.

"CSP Equity Member" means, for each Section, the parties that will contribute shareholder equity to the Section Developer as part of the financing plan for that Section, and will include the PD Equity Members.

"D&C Contract" has the meaning given to that term under the applicable Section P3 Agreement.

"D&C Contract Member" means, if the D&C Contractor is a limited liability company, partnership, or joint venture, each member or partner (as applicable) of the D&C Contractor.

"D&C Contractor" means the contractor identified as the "D&C Contractor" in a Committed Section Proposal.

"D&C General Conditions Cost Percentage" is defined in Appendix A of Exhibit 6 (*Predevelopment Work Requirements*).

"D&C General Conditions Costs" is defined in Appendix A of Exhibit 6 *(Predevelopment Work Requirements)*.

"Data Room" means the electronic data room created and operated by MDOT on the project control suite (PCS) to give Proposers access to the Reference Information Documents.

"Day" or **"day"** means a calendar day.

"DBE" means those firms identified with Disadvantaged Business Enterprise certification by MDOT's Office of Minority Business Enterprise.

"DBE Participation Form" means those forms provided by MDOT to the Phase Developer relating to compliance with Section 19.9 *(Disadvantaged Business Enterprises)*.

"DBE Participation Plan" means the plan provided under Section 5.1(n)(i) *(DBE Documents)* on or prior to the Effective Date that complies with Exhibit 17 *(Predevelopment DBE Participation Plan)*.

"DBE Participation Schedule" means the "DBE Participation Schedule" submitted as part of the Proposal and updated in accordance with the terms of this Agreement.

"DBE Payment Report" means the report described in Section 19.9(d)(iii)(A) *(Compliance)*.

"Debarment Regulations" means:

(a)   Federal Executive Order no. 12549 (February 18, 1986);

(b)   Federal Executive Order no. 12689 (August 16, 1989);

(c)   31 U.S.C. §6101 note (Section 2455, Pub. L. 103 -355, 108 Stat. 3327);

(d)   2 CFR Part 180 "OMB Guidelines to Agencies On Governmentwide Debarment and Suspension (Nonprocurement)";

(e)   §16-202 and §16-203 of the State Finance and Procurement Article of the Annotated Code of Maryland; and

(f)   COMAR §21.08.03.

"Deferred Section Equity Amounts" means any amount of unfunded equity that:

(a)   is committed to a Section Developer as of Financial Close (including commitments to provide a Section Equity Investment or Section Equity Member Debt); and

(b)   is shown in the Section's base case financial model to be utilized prior to final completion of the Section.

"Designer" means Dewberry Engineers Inc. and Stantec Consulting Services Inc.

"Developer Closing Fee(s)" means the cash closing fees payable to the Phase Developer-Related Entity for a Section under Section 11.2(a)(iii) *(Permitted Payments to Phase Developer and Section Developer on Financial Close)*.

"Developer Closing Fee Percentage" means ██████████.

"Development Rights Fee" means for each Section in Phase South A the amount specified in Section 17.1(b) *(Development Rights Fees),* as may be adjusted in accordance with Section 12.2 (*Key Assumptions for Phase South A Prove To Be Incorrect*).

"Development Rights Fee Security" has the meaning given to that term in Section 17.6 *(Development Rights Fee Security)*.

"Dispute" means any dispute between MDOT or MDTA and the Phase Developer concerning their respective rights and obligations under this Agreement, including with respect to any claim, alleged breach, or failure to perform, and any remedy.

"Dispute Resolution Procedures" means the procedures for resolving disputes in Article 33 *(Dispute Resolution)*.

"Distributions" means, whether in cash or in kind, any:

(a)   dividend or other distribution with respect to share capital;

(b)   reduction of capital, redemption, or purchase of shares or any other reorganization or variation to share capital;

(c)   payments made by the Section Developer under the Section Equity Member Funding Agreement (whether of principal, interest, breakage costs, or otherwise);

(d)   payment, loan, contractual arrangement, or transfer of assets or rights directly to the extent that, in each case, it was put in place after Financial Close and was neither in the ordinary course of business nor on reasonable commercial terms; or

(e)   receipt of any other benefit which is not received in the ordinary course of business and not on reasonable commercial terms.

"Dollars" means U.S. dollars.

"Effective Date" means the date that MDOT and MDTA sign this Agreement following the satisfaction or waiver of the conditions in Section 5.1 *(Conditions Precedent to MDOT and MDTA Signing this Agreement)*.

"Eligible Security Issuer" means:

(a)   with respect to a letter of credit, an approved bank, or financial institution by the Maryland State Treasurer's Office with a long-term, unsecured debt ratings of not less than "A/A2" from one of the major national rating agencies (Fitch Ratings, Moody's Investor Service and Standard & Poor's Ratings Group); and

(b)   with respect to a demand guarantee or any surety bond, an entity meeting the requirements of Applicable Law, licensed or authorized to do business in the State rated at least A by Standard and Poor's and "A" (excellent or above) according to A.M. Best's Financial Strength Rating and XII or better according to A.M. Best's Financial Size Rating,

that in each case is not an Affiliate of the Phase Developer.

"Environment" means air, soils, surface waters (including wetlands), groundwater, land, parkland, stream sediments, surface or subsurface strata, biological resources including endangered, threatened and sensitive species, natural systems including ecosystems, and cultural, historic, archaeological, and paleontological resources.

"Equity IRR" means the nominal pre-tax internal rate of return on Section Equity Investment (on a cash-on-cash basis) over the full term of the Section P3 Agreement, calculated using the Initial Base Case Financial Model, as the discount rate that, when applied to the Distributions gives a net present value equal to the net present value of the Section Equity Investment. For the purposes of this definition, the phrase cash-on-cash basis means, with respect to the calculation of a financial return, the calculation

of such financial return on the basis of cash actually received in relation to cash actually invested (as opposed to cash committed).

"Equity Member Letter" means the letter provided in accordance with Section 1.3 *(Details of Equity Source and Equity Member Letters)* of Exhibit 7 *(Committed Section Proposal)*.

"Exempt Refinancing" has the meaning given to that term in the Section P3 Agreement Term Sheet.

"FEIS" means Final Environmental Impact Statement for the I-495 and I-270 Managed Lane Study.

"FHWA" means the United States Department of Transportation Federal Highway Administration.

"Finance Documents" means the funding agreements and security documents in connection with a Section.

"Financial Close" means the date on which all of the conditions precedent to financial close under the Section P3 Agreement have been satisfied or otherwise waived in accordance with the Section P3 Agreement.

"Financial Close Deadline" means, for each Section, the deadline by which the Section Developer is obligated to achieve Financial Close for that Section under the applicable Section P3 Agreement.

"Financial Proposal" means the proposal submitted by the Phase Developer in accordance with Appendix 5 *(Financial Proposal Instructions)* of the Instructions to Proposers.

"Financially Viable" means with respect to a Section, that the Section may be designed, constructed, financed, operated, and maintained, assuming the following:

(a) no Maryland Funding is necessary to finance the Section, and no payments are necessary from the Upfront Payment Account (unless agreed in writing by MDOT (in its sole discretion) or as expressly permitted under Section 11.3(b)(v) *(Committed Section Proposal)*);

(b) the Section will deliver an Alternative Equity IRR that is not less than the Proposal Equity IRR (unless otherwise agreed by the Phase Developer);

(c) all Allowed Costs for the Section are reimbursed to the Phase Developer and the Section Developer at Financial Close of the Section to the maximum amount allowable under this Agreement;

(d) all cash closing fees in connection with achieving Financial Close of the Section are reimbursed to the Phase Developer in accordance with Section 11.2(a)(iii) *(Permitted Payments to Phase Developer and Section Developer on Financial Close)*;

(e) the Contractor Markup Costs for the Section are derived from the Contractor Markup Percentage in the Financial Proposal;

(f) the D&C General Conditions Costs for the Section are derived from the D&C General Conditions Cost Percentage in the Financial Proposal; and

(g) the Renewal Work General Conditions Costs for the Section are derived from the Renewal Work General Conditions Cost Percentage in the Financial Proposal.

"Financing Plan" means the plan described in Section 1.22.1 *(Financing Plan)* of Exhibit 6 *(Predevelopment Work Requirements)*.

"First Section" means the first section of Phase South that must be delivered in accordance with this Agreement and that must include the American Legion Bridge.

"Force Majeure Event" means the occurrence of any of the following events after the date of this Agreement that directly causes either Party (the **"Affected Party"**) to be unable to comply with all or a material part of its obligations under this Agreement:

(a)   war, civil war, invasion, violent act of foreign enemy, or armed conflict;

(b)   nuclear, chemical, or biological contamination unless the source or cause of the contamination is brought to or near the Phase Site by the Phase Developer or a Phase Developer-Related Entity, or is a result of any breach of the Phase Developer of the terms of this Agreement;

(c)   ionizing radiation unless the source or cause of the ionizing radiation is brought to or near the Phase Site by the Phase Developer or a Phase Developer-Related Entity, or is as a result of any breach by the Phase Developer of the terms of this Agreement; or

(d)   an act of Terrorism.

"GAAP" means the Generally Accepted Accounting Principles in the respective country in effect from time to time.

"Good Faith" means the observance of reasonable commercial standards of fair dealing in a given trade or business.

"Good Faith Efforts" has the meaning given to that term in 49 CFR Part 26 and 49 CFR Part 26 Appendix A.

"Good Industry Practice" means the exercise of the degree of skill, diligence, prudence, and foresight which would reasonably and ordinarily be expected from time to time from a skilled and experienced designer, engineer, consultant, constructor, maintenance contractor, or operator or Phase Developer seeking in Good Faith to comply with its contractual obligations, complying with all Applicable Law and Governmental Approvals, using accepted design and construction standards and criteria normally used on similar projects in Maryland, and engaged in the same type of undertaking in the United States under similar circumstances and conditions, including environmental conditions.

"Governmental Approval" means all approvals, permits (including lane closure permits), permissions, consents, licenses, certificates (including sales tax exemption certificates), and authorizations (whether statutory or otherwise) which are required from time to time in connection with the Phase (including MDOT-Provided Approvals) to be issued by any Governmental Entity.

"Governmental Entity" means the government of the United States of America, the State, the Commonwealth of Virginia, the cities and counties within the State, the cities and counties within the Commonwealth of Virginia, and any other agency, or subdivision of any of the foregoing, including any federal, state, or municipal government, and any court, agency, special district, commission, or other authority exercising executive, legislative, judicial, regulatory, administrative, or taxing functions of, or pertaining to, the government of the United States of America, the State, the Commonwealth of Virginia, the cities or counties within the State, or the cities or countries within the Commonwealth of Virginia. "Governmental Entity" includes MDOT and MDTA acting in a regulatory or administrative capacity but does not include MDOT or MDTA acting in their capacity as Parties to this Agreement.

"Hazardous Materials" means any element, chemical, compound, mixture, material, or substance, whether solid, liquid, or gaseous, which at any time is defined, listed, classified, or otherwise regulated

in any way under any Applicable Law (including CERCLA), or any other such substances or conditions (including mold and other mycotoxins, fungi or fecal material) which may create any unsafe or hazardous condition or pose any threat or harm to the Environment or human health and safety.

"Hazardous Materials Release" means any spill, leak, emission, release, discharge, injection, escape, leaching, dumping, or disposal of Hazardous Materials into the soil, air, surface water, groundwater, or Environment, including any exacerbation of an existing release or condition of Hazardous Materials contamination.

"I-270 East Spur" has the meaning given to that term in Exhibit 6 *(Predevelopment Work Requirements)*.

"I-270 West Spur" has the meaning given to that term in Exhibit 6 *(Predevelopment Work Requirements)*.

"IDP Submittal" has the meaning given to that term in Section 2.7(e) of the Instructions to Proposers.

"IFRS" means the International Financial Reporting Standards.

"Indemnified Parties" means MDOT, the MDOT-Related Entities, and their respective officers, agents, representatives, and employees.

"Indirect Loss" means the loss of profits, loss of use, loss of production, loss of business, loss of business opportunity, or any claim for consequential loss or for indirect loss of any nature but excluding any of the same that relate to payments expressly provided for under this Agreement.

"Initial Base Case Financial Model" means the tool described in Section 1.6 *(Initial Base Case Financial Model)* of Exhibit 7 *(Committed Section Proposal)* that a Section Developer shall use to support the Committed Section Proposal.

"Initial Base Case Traffic Projections" means the equity case of the traffic and revenue forecast provided within the investment grade report in Section 1.8 *(Traffic and Revenue Report)* of Exhibit 7 *(Committed Section Proposal)*.

"Initial Baseline Schedule" means the schedule for the Section Work of a Section P3 Agreement developed in accordance with the Section Technical Provisions.

"Initial Decision" has the meaning given to that term in Section 33.1 *(Consultation and Initial Decision of Contract Manager)*.

"Initial Upfront Payment" has the meaning given to that term in Section 1.15 *(Initial Upfront Payment)* of Exhibit 7 *(Committed Section Proposal)*.

"Insolvency Event" means:

(a)   the Phase Developer commences a voluntary case seeking liquidation, reorganization, or other relief with respect to the Phase Developer or the Phase Developer's debts under any U.S. or foreign bankruptcy, insolvency, or other similar law; seeking the appointment of a trustee, receiver, liquidator, custodian, or other similar official of its, or any substantial part of its, assets; becomes insolvent, or generally does not pay its debts as they become due; provides notice of its inability to pay its debts; makes an assignment for the benefit of creditors; or takes any action to authorize any of the foregoing;

(b)   an involuntary case is commenced against the Phase Developer seeking liquidation, reorganization, dissolution, winding up, a composition or arrangement with creditors, a readjustment of debts or other relief with respect to such the Phase Developer or the Phase Developer's debts under any U.S. or foreign bankruptcy, insolvency, or other similar law; seeking the appointment of a trustee, receiver, liquidator, custodian, or other similar official of it or any substantial part of its assets; seeking the issuance of a writ of attachment, execution, or similar process; or seeking like relief, and such involuntary case shall not be contested by it in Good Faith or shall remain undismissed and unstayed for a period of 60 days;

(c)   in any voluntary or involuntary case seeking liquidation, reorganization, or other relief with respect to the Phase Developer or its debts under any U.S. or foreign bankruptcy, insolvency, or other similar law, this Agreement, is rejected, including a rejection under Title 11 U.S.C. §365 or any successor statute; or

(d)   any voluntary or involuntary case or other act or event described in paragraphs (a) or (b) occurs (and in the case of an involuntary case is not contested in Good Faith or remains undismissed and unstayed for a period of 60 days) with respect to:

   (i)   any PD Equity Member, partner, or joint venture member of the Phase Developer (unless said Person has fully met all financial obligations owing to the Phase Developer in the form of a committed investment and payments or transfers of money or property previously made to or for the benefit of the Phase Developer are not subject to §544, §547, §548, or §550 of the Bankruptcy Code, or any similar Applicable Law respecting the avoidance or recovery of preferences or fraudulent transfers, including any applicable enactment of the Uniform Fraudulent Transfer Act); or

   (ii)   any PD Equity Member, partner, or joint venture member of the Phase Developer for whom transfer of ownership or management authority would constitute a Change in Ownership.

"Insurance Policies" means the insurance policies the Phase Developer is required to carry or ensure are carried under Article 24 *(Insurance)* and Exhibit 10 *(Required Insurance for Predevelopment Work)*.

"Intellectual Property" means any and all patents, trademarks, service marks, copyright, data and database rights, moral rights, rights in a design, know-how, trade secrets, confidential information, and all or any other intellectual or industrial property rights whether or not registered or capable of registration and whether subsisting in the United States or any other part of the world together with all or any goodwill relating or attached thereto which is created, brought into existence, acquired, used, or intended to be used for the purposes of carrying out the Predevelopment Work, developing the Work Product, or otherwise for the purposes of this Agreement.

"Key Assumptions" means each of the key assumptions for Phase South A contained in Exhibit 18 *(Key Assumptions for Phase South A)*.

"Key Contractor" means the D&C Contractor, O&M Contractor, Toll Systems Integrator, and Toll Systems Operator under a Section P3 Agreement.

"Key Participants" means the Designer, Lead Contractor, and Lead Project Developer.

"Lead Contractor" means Macquarie Infrastructure Developments LLC and Transurban (USA) Operations Inc.

"Lead Project Developer" means Macquarie Infrastructure Developments LLC and Transurban (USA) Operations Inc.

"Lead Underwriter" means the underwriter for any bond financing for a Section.

"Lender" means any Person that:

(a)   provides Section Debt, together with their successors and assigns; or

(b)   is appointed by any Person referred to in paragraph (a) as its agents, or trustee in connection with the Section Debt.

"Limit of Disturbance" means a boundary established during the NEPA process representing the maximum extent of impact to be created by the Section Work.

"Loss" means any loss, damages, injury, liability, obligation, cost, response, expense, fee (including attorney and expert witness fees and expenses incurred in connection with the enforcement of this Agreement), charge, judgment, penalty, or fine. Losses include injury to or death of Persons, damage or loss of property, and harm or damage to natural resources.

"Mandatory Equity Sale" means the mandatory sale of equity in the Section Developer as described in Section 70 of the Section P3 Agreement Term Sheet.

"Maryland Funding" means any Maryland state or local funding, whether received directly, via federal aid, or otherwise. "Maryland Funding" does not include the use of TIFIA or PABs financing.

"MBE" means those firms identified with Minority Business Enterprise certification by MDOT's Office of Minority Business Enterprise.

"MDOT" means the Maryland Department of Transportation, including MDOT SHA.

"MDOT Change Request" has the meaning given to that term in Section 22(a) *(Change Orders)*.

"MDOT Controlled Parcels" means those parcels of the Phase Site that MDOT owns or has established a right of access to.

"MDOT Deliverables" means:

(a)   the issuance of all final NEPA approvals for Phase South A;

(b)   a copy of the agreement entered into between MDOT and VDOT relating to the construction of new facilities (and tolling of certain lanes) between the George Washington Memorial Parkway (VA) and River Road (MD);

(c)   a copy of each memorandum of understanding entered into between MDOT and Frederick County and Montgomery County, respectively, with respect to the delivery of transit service improvements in conjunction with the P3 Program;

(d)   conclusion by MDTA of the statutory toll rate setting process for Phase South and the conclusion of all other actions necessary to determine toll rates that may be applied to vehicles using the Priced Managed Lanes in Phase South; and

(e)   a copy of the fully executed MDTA Master Trust Agreement.

"MDOT OEO" means the MDOT SHA Office of Equal Opportunity.

"MDOT-Provided Approvals" means:

(a)   environmental decision documents approved under NEPA covering the limits of the Phase (such as any applicable FEIS and ROD);

(b)   USACE permit under §404 of the Clean Water Act and accompanying Section 401 Water Quality Certification; and

(c)   designation of the Phase (or the P3 Program) by the MDTA Board as a "transportation facilities project" for the purposes of Title 4 of the Transportation Article of the Annotated Code of Maryland.

"MDOT-Provided Parcel" has the meaning given to that term in the Section P3 Agreement Term Sheet.

"MDOT-Related Entity" means:

(a)   MDTA;

(b)   MDOT (including MDOT SHA); and

(c)   the State.

"MDOT SHA" means the Maryland Department of Transportation State Highway Administration.

"MDOT Termination Notice" has the meaning given to that term in Section 26.2 *(Termination for Phase Developer Default)*.

"MDTA" means the Maryland Transportation Authority.

"MDTA Board" means the Chairman and members of the Maryland Transportation Authority Board.

"MDTA Executive Director" means the individual appointed by the MDTA Board to serve as the chief executive officer to manage the day-to-day operations of the MDTA and exercise those powers not otherwise specifically reserved to the Board.

"MDTA Financing Documents" has the meaning given to this term in the Section P3 Agreement Term Sheet.

"MDTA Master Trust Agreement" means the trust agreement relating to the issuance by MDTA of notes relating to the P3 Program under which the Upfront Payment Account shall be established.

"MDTA Notes" has the meaning given to that term in the Section P3 Agreement Term Sheet.

"MDTA Notes Outstanding Principal Amount" has the meaning given to that term in the Section P3 Agreement Term Sheet.

"MDTA Notes Term Sheet" means the "MDTA Notes Term Sheet" attached as Exhibit 3 to the Section P3 Agreement Term Sheet at Exhibit 8 *(Section P3 Agreement Term Sheet)*.

"Member" has the meaning given to that term in Section 1.4 *(Financial Strength of Members)* of Exhibit 7 *(Committed Section Proposal)*.

"Monthly Progress Report" means the report submitted under Section 1.3.*7 (Reporting on Progress of Predevelopment Work)* of Exhibit 6 *(Predevelopment Work Requirements)*.

"NEPA" means the National Environmental Policy Act.

"Notice of Appeal" has the meaning given to that term in Section 33.2 *(Appeal of Initial Decision)*.

"Notice of Proposed Change in Ownership" means the notice provided to MDOT regarding a Change in Ownership in Section 32.4(a) *(Notification of Proposed Changes in Ownership)*.

"O&M Contractor" has the meaning given to that term in the Section P3 Agreement.

"Organizational Conflict of Interest" has the meaning given to that term in the RFP.

"P3 Program" has the meaning given to that term in Recital (A).

"Party" means MDOT, MDTA, or the Phase Developer, as the context may require, and **"Parties"** means MDOT, MDTA, or the Phase Developer, as the context may require, collectively.

"PD Equity Member" means each Person that was identified as an "Equity Member" or "Guarantor" in the SOQ.

"Performance Security" means the security provided in accordance with Article 18 *(Performance Security)*.

"Performing Subcontractor" has the meaning given to that term in Section 1.2(a)(iv) of Exhibit 15 *(Allowed Costs)*.

"**Permanent Additional Properties**" means Additional Properties that are permanently needed to construct or maintain the Phase.

"Permanent ROW" means the permanent right of way for the Phase provided as part of the MDOT-Provided Parcels together with the Permanent Additional Properties.

"Person" means an individual, a general or limited partnership, a joint venture, a corporation, a limited liability company, a trust, an unincorporated organization, or a governmental authority.

"Phase" is defined in paragraph (H) of the Recitals.

"Phase Developer Default" has the meaning given to that term in Section 25.1 *(Phase Developer Default)*.

"Phase Developer Default Notice" has the meaning given to that term in Section 25.2(a) *(Phase Developer Default Notice and Cure Periods)*.

"Phase Developer Hazardous Materials Release" means any Hazardous Materials Release:

(a)   involving any Hazardous Materials arranged to be brought onto the Phase Site or any other location by any Phase Developer-Related Entity, regardless of cause;

(b)   to the extent attributable to the breach of any Applicable Law, Governmental Approval, or this Agreement (including any acts or omissions that are not in accordance with Good Industry Practice), negligence, or willful misconduct by any Phase Developer-Related Entity; or

(c)   without prejudice to the generality of paragraph (b), to the extent attributable to the use, containment, storage, management, handling, transport, and disposal of any Hazardous Materials by any Phase Developer-Related Entity in breach of any Applicable Law, Governmental Approval, or this Agreement.

"Phase Developer-Related Entity" means:

(a)   the Phase Developer;

(b)   the PD Equity Members;

(c)   each Section Developer;

(d)   the Contractors;

(e)   any other Persons performing any of the Predevelopment Work for or on behalf of the Phase Developer;

(f)   any other Persons for whom the Phase Developer may be legally or contractually responsible; and

(g)   the employees, agents, officers, directors, representatives, consultants, successors, and assigns of any of the foregoing.

"Phase Developer's Interest" means all right, title, and interest of the Phase Developer in, to, or derived from this Agreement.

"Phase North" is defined in paragraph (J) of the Recitals.

"Phase North NTP" means the notice to proceed with respect to undertaking Predevelopment Work for Phase North issued by MDOT to the Phase Developer in accordance with Section 10.4(a) *(Phase North NTP Contingent Upon NEPA Approval)*.

"Phase North Termination Cap" means:

(a)   the amount agreed under Section 14(d)(iii) (*Section Viability*); or

(b)   before such amount is agreed, zero.

"Phase Site" means the geographical area reasonably expected to be a part of the "Site" (as that term is defined in the Section P3 Agreement Term Sheet) for each Section of the Phase.

"Phase South" is defined in paragraph (I) of the Recitals.

"Phase South A" is defined in paragraph (I) of the Recitals.

"Phase South B" is defined in paragraph (I) of the Recitals.

"Phase South NTP" has the meaning given to that term in Section 10.3(a) *(Phase South NTP Contingent Upon NEPA Approval)*

"Phase South Termination Cap" means $50,000,000.

"PIA" is defined in Section 30(a) *(Public Information and Records)*.

"Placement Agent" means a private placement agent for the Section.

"Pre-Approved Change in Ownership" has the meaning given to that term in Section 32.2(b) *(Pre-Approved Changes in Ownership)*.

"Pre-existing Hazardous Materials" means Hazardous Materials that exist in, on, or under the Phase Site (except each Additional TCA) prior to the date the Phase Developer gains access to the relevant portion of the Phase Site, including those that manifest themselves after that date.

"**Predevelopment Cost Cap"** means:

(a)   with respect to Phase South, the initial Predevelopment Cost Cap for Phase South being $54,300,000, less:

    (i)   any amounts reimbursed to the Phase Developer and Section Developers for Allowed Costs incurred by the Phase Developer or a Section Developer in connection with Financial Close of Sections in Phase South; less

    (ii)   any amounts that have previously been reimbursed to the Phase Developer or Section Developer by MDOT for Allowed Costs that are directly attributable to Phase South; and

(b)   with respect to Phase North, the initial Predevelopment Cost Cap for Phase North as determined in accordance with Section 14(d)(iii), less:

    (i)   any amounts reimbursed to the Phase Developer and Section Developers for Allowed Costs incurred by the Phase Developer or a Section Developer in connection with Financial Close of Sections in Phase North; less

    (ii)   any amounts that have previously been reimbursed to the Phase Developer or Section Developer by MDOT that are directly attributable to Phase North.

"Predevelopment Milestone" means the predevelopment milestones in Exhibit 5 *(Predevelopment Milestones and Deadlines)*.

"Predevelopment Milestone Deadline" means the predevelopment milestone deadlines in Exhibit 5 *(Predevelopment Milestones and Deadlines)*, as such deadline may be extended by MDOT in accordance with the terms of this Agreement.

"Predevelopment Work" means in respect of a Section, all Work required to be performed or provided by the Phase Developer prior to Commercial Close of that Section.

"Predevelopment Work Proposal Due Date" has the meaning given to that term in the Instructions to Proposers.

"Predevelopment Work Schedule" means the schedule for the Predevelopment Work described in Section 1.4.1 *(The Predevelopment Work Schedule)* of Exhibit 6 *(Predevelopment Work Requirements)*.

"Premises" is defined in paragraph (G) of the Recitals.

"Priced Managed Lanes" means the toll lanes and the associated entry and exit ramps within the Permanent ROW that are separated from the adjacent general purpose lanes.

"Prohibited Change in Ownership" means:

(a)   any Change in Ownership occurs in breach of Article 32 *(Change in Ownership of Phase Developer)*; or

(b)   any Change in Ownership occurs that involves the transfer of any shares or membership interests to a Prohibited Person.

"Prohibited Person" means any Person who is:

(a)   debarred, proposed for debarment with a final determination still pending, suspended, declared ineligible, or voluntarily excluded (as such terms are defined in any of the Debarment Regulations) from participating in procurement or non-procurement transactions with the federal or state government or any department, agency, or instrumentality of the federal or state government under any of the Debarment Regulations;

(b)   indicted, convicted, or had a civil or administrative judgment rendered against such Person for any of the offenses listed in any of the Debarment Regulations and no event has occurred and no condition exists that is likely to result in the debarment or suspension of such Person from contracting with the federal or State government or any department, agency, or instrumentality of the federal or State government;

(c)   listed on the "Lists of Parties Excluded from Federal Procurement and Non-procurement Programs" issued by the U.S. General Services Administration;

(d)   located within, or doing business or operating from, a country or other territory subject to a general embargo administered by the United States Office of Foreign Assets Contract ("**OFAC**");

(e)   designated on the OFAC list of "Specially Designated Nationals";

(f)   otherwise targeted under economic or financial sanctions administered by the United Nations, OFAC, or any other U.S. federal economic sanctions authority or any divestment or sanctions program of the State;

(g)   a banking institution chartered or licensed in a jurisdiction against which the United States Secretary of the Treasury has imposed special measures under §311 of the USA PATRIOT Act;

(h)   located within or is operation from a jurisdiction that has been designated as non-cooperative with international anti-money laundering principles by the Financial Action Task Force on Money Laundering;

(i)   a financial institution against which the United States Secretary of the Treasury has imposed special measures under §311 of the USA PATRIOT Act;

(j)   a senior foreign political figure or a prohibited foreign shell bank within the meaning of 31 CFR §1010.605; or

(k)   any Person with whom MDOT or MDTA is engaged in litigation relating to the performance of a contract or business practices, unless MDOT or MDTA has first waived (in MDOT or MDTA's absolute discretion) the prohibition on a transfer to such Person during the continuance of the relevant litigation, by written notice to the transferring equity holder, with a copy to the Phase Developer.

"Proposal" means the proposal and commitments made by the Phase Developer, that are contained in Exhibit 9 *(Phase Developer Proposal)*.

"Proposal Equity IRR" means ███████.

"Proposer" means each firm or team of firms that was shortlisted in accordance with the RFQ and invited to submit a proposal to MDOT in response to the RFQ, including any changes approved in writing by MDOT.

"Proprietary Intellectual Property" means:

(a)   Intellectual Property that is patented or copyrighted by any Phase Developer-Related Entity under Applicable Law, or

(b)   if not patented or copyrighted, Intellectual Property of a Phase Developer-Related Entity that is created, held, and managed as a trade secret and protected as a trade secret under Applicable Law, or confidential proprietary information of a Phase Developer-Related Entity,

but does not include Intellectual Property that is specifically created for the Phase.

"Rating Agency" means any credit rating agency registered with the Securities and Exchange Commission as a nationally recognized statistical rating organization.

"Reasonable Efforts" means all those steps (if any) in the power of the relevant Party that are capable of producing the desired result, being steps which a prudent, determined, and commercially reasonable Person desiring to achieve that result would take. Reasonable Efforts does not mean that, subject to its other express obligations under this Agreement, the relevant Party is required to expend funds, except for those necessary to meet the reasonable costs reasonably incidental or ancillary to the steps to be taken by the relevant Party (including its reasonable travel expenses, correspondence costs, and general overhead expenses).

"Reference Information Documents" means all written information that is published by MDOT or MDTA on their websites or that is provided to the Phase Developer or any Phase Developer-Related Entity by MDOT, MDTA, or any of any of their employees, agents, officers, directors, or representatives or consultants prior to the date of this Agreement, including:

(a)   the RFP;

(b)   all contents of the Data Room; and

(c)   information provided on the MDOT website.

"Refinancing" has the meaning given to that term in the Section P3 Agreement Term Sheet.

"Relief Event" means:

(a)   any Force Majeure Event;

(b)   the issuance of any preliminary or permanent injunction or temporary restraining order or other similar order, legal restraint, or prohibition by a Governmental Entity of competent jurisdiction under Applicable Law that prohibits the performance of a material part of the Predevelopment Work under this Agreement or materially and adversely affects a Party's performance under this Agreement;

(c)   MDOT's failure to perform or observe any of its obligations under this Agreement;

(d)   MDOT unreasonably withholds or delays its response or approval of any submission made to it by the Phase Developer during the performance of the Predevelopment Work;

(e)   MDOT's failure to:

        (i)   provide any of the MDOT Deliverables (other than the fully executed MDTA Master Trust Agreement) to the Phase Developer by October 31, 2021; or

        (ii)   provide the fully executed MDTA Master Trust Agreement to the Phase Developer within 30 days of the Effective Date;

(f)   any Section of the Phase is not designated by the MDTA Board as part of a "transportation facilities project" for the purpose of Title 4 of the Maryland Code before execution of the Section P3 Agreement by all relevant parties for that Section;

(g)   following the issuance of the NEPA approval covering any applicable part of the Phase, such approval is subject to legal challenge or litigation which prevents any Section from achieving Financial Close by the applicable Predevelopment Milestone Deadline;

(h)   the MDTA Board fails to approve a Committed Section Proposal within 90 days of the Phase Developer submitting a Committed Section Proposal to MDOT that is accepted by MDOT; or

(i)   the BPW fails to approve a Section P3 Agreement within 150 days of the Phase Developer submitting a Committed Section Proposal to MDOT, that is accepted by MDOT and approved by the MDTA Board,

except, in each case, to the extent attributable to any breach of this Agreement, Applicable Law, or any Governmental Approval by, or any negligent act or negligent omission of, a Phase Developer-Related Entity.

"Remedial Action" means remediation or removal of Hazardous Materials under Section 9.4 (Hazardous Materials).

"Renewal Work General Conditions Cost Percentage" is defined in Appendix A of Exhibit 6 (Predevelopment Work Requirements).

"Renewal Work General Conditions Costs" is defined in Appendix A of Exhibit 6 (Predevelopment Work Requirements).

"Request for Proposals" or **"RFP"** is defined in paragraph (M) of the Recitals.

"Request for Qualifications" or **"RFQ"** is defined in paragraph (L) of the Recitals.

"Responsibility Determination" has the meaning given to that term in §10A-101 of the State Finance and Procurement Article of the Annotated Code of Maryland.

"ROD" means the FHWA Record of Decision for the I-495 and I-270 Managed Lane Study and any other relevant FHWA Records of Decision that may be issued during the Term.

"Scheduled Substantial Completion Date" has the meaning given to that term in the Section P3 Agreement.

"Section" means each portion of the Phase as determined under Article 1 (Scope of Predevelopment Work) of Exhibit 6 (Predevelopment Work Requirements).

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"Section Construction Project Manager" means the "Construction Project Manager" as defined under the applicable Section P3 Agreement.

"Section D&C Work" means all work related to the design and construction of a Section under a Section P3 Agreement.

"Section Debt" means all of the outstanding obligations from time to time under the Finance Documents for a Section.

"Section Design Project Manager" means the "Design Project Manager" as defined under the applicable Section P3 Agreement.

"Section Developer" means the entity that enters into a Section P3 Agreement with MDOT and MDTA.

"Section Developer Default" means a default by a Section Developer under a Section P3 Agreement that:

(a)   occurs prior to Substantial Completion; and

(b)   gives MDOT a right to terminate the Section P3 Agreement if not remedied within an applicable cure period.

"Section Equity Investment" means:

(a)   any form of direct investment by Section Equity Members, including the purchase of newly issued equity shares or other equity interests in or the provision of Section Equity Member Debt to the Section Developer; and

(b)   any payment under, or draws on, any instrument guaranteeing the provision of Deferred Section Equity Amounts, including but not limited to any draws by or on behalf of the Section Developer of any letter(s) of credit issued by or for the account of a Section Equity Member with respect to such committed amounts.

The Developer Closing Fee(s) are separate and distinct from Section Equity Investment and are not netted off to derive Section Equity Investment.

"Section Equity Member" means each Person that directly holds or will directly hold an equity interest (legal or beneficial) in the applicable Section Developer.

"Section Equity Member Debt" means any obligations created, issued, or incurred by a Section Developer for borrowed money that:

(a)   is owned by a Section Equity Member, Section Related Entity, Section Qualified Investor, any Affiliate of a Section Equity Member, or an Affiliate of the Section Developer; and

(b)   is subordinated in priority of payment and security to all Section Debt held by Persons who are not Section Equity Members, other than any mezzanine debt that is provided by a party referred to in paragraph (a) on an arm's length basis.

"Section Equity Member Funding Agreement" means any loan agreement, credit agreement, or other similar finance agreement or subordination agreement providing for or evidencing Section Equity Member Debt.

"Section Key Personnel" means the "Key Personnel" as defined under the applicable Section P3 Agreement.

"Section O&M Work" means the "O&M Work" as that term is defined in the Section P3 Agreement Term Sheet.

"Section P3 Agreement" means the public-private partnership agreement that is used to deliver the design, construction, finance, operation, and maintenance works for a Section.

"Section P3 Agreement Term Sheet" means the term sheet for the Section P3 Agreement in Exhibit 8 *(Section P3 Agreement Term Sheet)*.

"Section Proposal Equity IRR" means the Alternative Equity IRR submitted in the applicable Committed Section Proposal.

"Section Qualified Investor" means, for each Section, each CSP Equity Member (and any guarantor thereof) approved under a Committed Section Proposal for that Section.

"Section Related Entity" means, for each Section, each entity in the ultimate ownership structure between the Section Developer and each Qualified Investor (not including the Section Developer or the Qualified Investors).

"Section Schedule" means a work record showing planned start and finish dates for all Section Work to be performed under a Section P3 Agreement, and showing the logic used in the sequence of construction.

"Section Technical Provisions" means the technical provisions attached as an exhibit to a Section P3 Agreement.

"Section Work" means, in respect of a Section, all Work, services and obligations to be performed or provided by a Section Developer under a Section P3 Agreement.

"Selected Proposer" means the Proposer selected by MDOT to enter into this Agreement.

"Service Line" means:

(a)   a Utility line, the function of which is to directly connect the improvements on an individual property to another Utility line located off such property, which other Utility line connects more than one individual line to a larger system; or

(b)   any cable or conduit that supplies an active feed from a Utility Owner's facilities to activate or energize MDOT's or a local agency's lighting and electrical systems, traffic control systems, communications systems, or irrigation systems.

"Site Investigations" has the meaning given to that term in Section 9.2(a) *(Site Investigations)*.

"State" means the State of Maryland.

"State Intellectual Property" means all Work Product that is the property of MDOT and MDTA.

"Steering Committee" means the committee established in accordance with Article 8 *(Steering Committee)*.

"Subcontractor DBE Payment Report" means the report described in Section 19.9(d)(iii)(B) *(Compliance)*.

"Substantial Completion" means the satisfaction of all conditions to substantial completion to be set out in each Section P3 Agreement.

"Substantial Completion Date" means the date Substantial Completion has been achieved for the applicable Section.

"Supplier" means any Person not performing work at or on the Phase Site which supplies machinery, equipment, materials, hardware, software, systems, or any other appurtenance to the Phase to the Phase Developer or to any Contractor in connection with the performance of the Predevelopment Work. Persons who merely transport, pick up, deliver, or carry materials, personnel, parts, or equipment or any other items or Persons to or from a Phase Site will not be deemed to be performing Predevelopment Work at the Phase Site, and will not be deemed to be a Supplier.

"Term" means the term of this Agreement as determined under Article 3 *(Effective Date and Term)*.

"Termination For Convenience Notice" means a notice of termination provided under Section 26.1 *(Termination for Convenience)*.

"Terrorism" means activities against Persons or property of any nature:

(a)   that involve the following or preparation for the following:

    (i)   use or threat of force or violence; or

    (ii)   commission or threat of an act that interferes with or disrupts an electronic, communication, information, or mechanical system; and

(b)   when one or both of the following applies:

    (i)   it appears that the intent is to intimidate or coerce MDOT, MDTA, or a Governmental Entity, or the civilian population or any segment of the civilian population, or to disrupt any segment of the economy;

    (ii)   it appears that the intent is to intimidate or coerce MDOT, MDTA, or a Governmental Entity, or to further political, ideological, religious, social, or economic objectives, or to express (or express opposition to) a philosophy or ideology; and

(c)   that are criminally defined as terrorism for purposes of Maryland, federal, or international Applicable Law.

"Third Party Claim" means any claim, dispute, disagreement, cause of action, demand, suit, action, investigation, or administrative proceeding brought by a Person that is not an Indemnified Party or the Phase Developer with respect to damages, injuries, liabilities, obligations, losses, costs, penalties, fines, or expenses (including attorney and expert witness fees and expenses) sustained or incurred by such Person.

"Third Party Parcels" means those parcels of the Phase Site that are owned by a third party and that MDOT does not have an established right of access to (including those that are owned or controlled by VDOT).

"TIFIA" means the Transportation Infrastructure Finance and Innovation Act of 1998, codified at 23 U.S.C. §§.601 et seq., as amended from time to time.

"Tolling Services Agreement Term Sheet" means the "Tolling Services Agreement Term Sheet" attached as Exhibit 2 to the Section P3 Agreement Term Sheet at Exhibit 8 *(Section P3 Agreement Term Sheet)*.

"Toll Systems Integrator" means the entity with primary responsibility for the design, construction, integration, and testing of the toll system for a Section.

"Toll Systems Operator" means the entity with primary responsibility for the operation of the toll system for the Phase.

"Transit MOU" has the meaning given to that term in Section 11.4(a)(i) *(Regional Transit)*.

"Transit Service Improvements" has the meaning given to that term in Section 11.4(a)(i) *(Regional Transit)*.

"Trustee" means the trustee appointed under the MDTA Master Trust Agreement.

"Uncommitted Section" has the meaning given to that term in Section 14(a) *(Section Viability)*.

"Upfront Payment" has the meaning given to that term in the Section P3 Agreement.

"Upfront Payment Account" means the account of that name described in Section 13.1 *(Establishment of Upfront Payment Account)*.

"U.S.C." means the Code of Laws of the United States of America.

"US GAAP" means the Generally Accepted Accounting Principles in the US as in effect from time to time.

"Utility" means a privately, publicly, or cooperatively owned line, facility, or system for transmitting or distributing communications, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, a combined stormwater and sanitary system, or other similar commodities, including wireless telecommunications, television transmission signals, and publicly owned fire and police signal systems, which directly or indirectly serve the public. The term Utility excludes:

(a)   streetlights and traffic signals; and

(b)   intelligent transportation systems and intelligent vehicle highway system facilities.

The necessary appurtenances to each Utility facility will be considered part of such Utility. Any Service Line connecting directly to a Utility will be considered an appurtenance to that Utility, regardless of the ownership of such Service Line.

"Utility Owner" means the owner or operator of any Utility (including both privately held and publicly held entities, cooperative Utilities, municipalities, and other governmental agencies).

"Viability Cost Cap" has the meaning given to that term in Section 14(d)(ii) *(Section Viability)*.

"VDOT" means the Virginia Department of Transportation, its agents, designees, successors, and assigns.

"WMATA" means the Washington Metropolitan Area Transit Authority.

"Work" means all predevelopment, design, construction, financing, traffic and revenue, maintenance, renewal, operations, and all other work, services, and obligations to be performed and provided in connection with the Phase under Exhibit 6 *(Predevelopment Work Requirements)*, the other requirements of this Agreement, and each Section P3 Agreement.

"Work Product" means all Intellectual Property, data, information, documentation, work product, and other related materials produced, prepared, or obtained for the Phase and the P3 Program, including all submittals and other materials (including design documents), data, sketches, charts, calculations, plans, drawings, layouts, depictions, specifications, manuals, electronic files, artwork, records, film, tape, articles, memoranda, correspondence, and other documents acquired or brought into existence or used in relation to the foregoing and arising in connection with the Predevelopment Work.