

**COMPREHENSIVE AGREEMENT  
TO DEVELOP, DESIGN AND  
CONSTRUCT  
ROUTE 58 CORRIDOR FROM  
HILLSVILLE TO STUART**

**DATED AS OF DECEMBER 15, 2003  
AND AMENDED AS OF OCTOBER 2, 2007 AND  
DECEMBER 6, 2011**

**BY AND BETWEEN**

**VIRGINIA DEPARTMENT OF TRANSPORTATION,  
AN AGENCY OF THE COMMONWEALTH OF VIRGINIA**

**AND**

**BRANCH HIGHWAYS INC.**

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## **COMPREHENSIVE AGREEMENT TO DEVELOP, DESIGN AND CONSTRUCT ROUTE 58 CORRIDOR FROM HILLSVILLE TO STUART**

This Comprehensive Agreement to Develop, Design and Construct Route 58 Corridor from Hillsville to Stuart (the “Agreement”), is made and entered into as of December 15, 2003 by and between the Virginia Department of Transportation (the “Department”), an agency of the Commonwealth of Virginia (the “State”), the address of which Department is 1401 East Broad Street, Richmond, Virginia 23219, and Branch Highways Inc., (the “Developer”), the address of which is 442 Rutherford Avenue, Roanoke, Virginia 24016, and is amended by the parties as of October 2, 2007 and as of December 6, 2011.

### **ARTICLE 1**

#### **RECITALS**

- 1.1. On March 25, 1995, the Governor of the State signed into law, effective July 1, 1995, the Public-Private Transportation Act (as amended, the “PPTA”).
- 1.2 In enacting the PPTA, the General Assembly found and declared, among other things, that:
  - 1.2.1 there is a public need for timely acquisition or construction of and improvements to transportation facilities within the State that are compatible with State and local transportation plans;
  - 1.2.2 such public need may not be wholly satisfied by existing ways in which transportation facilities are acquired, constructed or improved; and
  - 1.2.3 authorizing private entities to acquire, construct, improve, maintain and/or operate one or more transportation facilities may result in the availability of such transportation facilities to the public in a more timely or less costly fashion, thereby serving the public safety and welfare.
- 1.3 The PPTA grants the Department the authority to allow private entities to acquire, construct, improve, and/or operate qualifying transportation facilities if the Department determines there is a need for the facilities and private involvement would provide the facilities to the public in a more timely and cost-effective fashion.
- 1.4 The PPTA allows for both solicited and unsolicited project proposals.

- 1.5 On July 1, 1995, the Department adopted implementation guidelines (the “Implementation Guidelines”) developed by the Commonwealth Transportation Commissioner (the “Commissioner”) for the selection of solicited and unsolicited proposals for negotiation under the PPTA. On April 1, 2001, the Department adopted revised implementation guidelines.
- 1.6 Pursuant to the PPTA, in May 2001, the Developer submitted an unsolicited conceptual proposal (the “Conceptual Proposal”) to the Department for the development, finance, design and construction of certain transportation facilities, which collectively the Department refers to as the Route 58 Corridor from Hillsville to Stuart (the “Project”).
  - 1.6.1 the initial proposal was submitted by Blue Ridge Corridor Developers, of which Branch Highways Inc. was the primary participant.
  - 1.6.2 Branch Highways Inc. is the Developer.
  - 1.6.3 this Agreement will be between the Department and the Developer.
  - 1.6.4 legislation pertinent to the PPTA, enacted by the State in April 2002, does not apply to this proposal, which was submitted before the 2002 Law.
- 1.7 The proposed Project has been the subject of environmental planning and design by the Department.
- 1.8 The proposed Project is described on Exhibit B attached hereto.
- 1.9 In accordance with the Implementation Guidelines, the Department duly posted and published notice of the Conceptual Proposal and referred it to the Initial Review Committee for preliminary review. No other competing proposal was received in response to the posted and published notice (no “Competing Proposal”).
- 1.10 Following a determination by the Initial Review Committee that the Conceptual Proposal merited further review, in November 2001, the Commonwealth Transportation Board (the “Board”), adopted a resolution approving the Conceptual Proposal for further evaluation. The Deputy Secretary of Transportation invited a detailed proposal for consideration by the Public-Private Transportation Advisory Panel (the “Panel”) in accordance with the Implementation Guidelines.
- 1.11 On January 22, 2002, the Developer submitted its detailed proposal (the “Detailed Proposal”) to the Panel for consideration; the Developer submitted supplements to the Detailed Proposal on May 2, 2002 and August 31, 2002. The Developer submitted a revised supplement on February 28, 2003, which replaced the August 31, 2002 supplement.

- 1.12 The Panel evaluated the Detailed Proposal using the “Proposal Evaluation and Selection Criteria” set forth in the Implementation Guidelines. Based on such evaluation, on July 23, 2003, the Panel recommended to the Commissioner that the Detailed Proposal for the Project be further developed pursuant to the PPTA, subject to the following conditions:
- 1.12.1 the successful and timely negotiation, execution and delivery of a comprehensive agreement.
  - 1.12.2 the total cost of the Phase 1 improvements (Blue Ridge Parkway Crossing at Meadows of Dan) must not exceed \$22.483 million, and all Phase 1 improvements must be completed within twenty-four months of notice to proceed.
  - 1.12.3 for the entire Hillsville to Stuart corridor, the Department should exercise the fiber optic conduit option proposed by Branch Highways, which is not part of Phases 1, 2 or 3.
  - 1.12.4 for the entire Hillsville to Stuart corridor, the Department and Branch Highways must quantify and clearly allocate risks – including changed conditions, weather, cost overruns, etc. The final comprehensive agreement should fairly allocate those risks between the Department and Branch Highways.
- 1.13 Thereafter, negotiations with the Developer for a comprehensive agreement, consisting of this Agreement and attached Exhibits, commenced at the direction of the Commissioner.
- 1.14 Section 1.14 intentionally left blank
- 1.15 Because financing for the entire Project has not been obtained as of the date of execution of this Agreement, the Project will be constructed in several Phases, with Notice to Proceed for each Phase contingent upon securing financing for such Phase and satisfaction of other conditions precedent as described in Article 4 below.

NOW, THEREFORE, in consideration of the covenants contained herein and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Department and the Developer agree as follows:

## **ARTICLE 2**

### **DEFINITIONS**

All capitalized terms used in this Agreement but not expressly defined in this Agreement have the respective meanings set forth on Exhibit A attached hereto.

## ARTICLE 3

### ESTABLISHMENT OF PUBLIC-PRIVATE TRANSACTION

#### 3.1 Basic Agreement

- 3.1.1 The Department and the Developer agree that the Project as described on Exhibit B attached hereto, and as more particularly identified in the Project scope document attached to the Design/Build Contract as Appendix 6, shall be developed, designed, permitted, financed, acquired, constructed, equipped and insured in a transaction involving, together, a series of agreements setting forth distinct roles and responsibilities of the Department and the Developer. As described on Exhibit B, the Project consists of several parts that comprise the entire corridor from Hillsville to Stuart. The entire corridor is approximately 36 miles in length, and Phase 1 will be the Blue Ridge Parkway Crossing at Meadows of Dan. Phase 1 consists of work to be performed by the Developer and financed by the Department, the Developer, and the Counties pursuant to the provisions of the Department's Revenue Sharing Program. The Scope of Work for subsequent Phases will be negotiated when financing for each Phase is identified.
- 3.1.2 This Article 3 identifies and establishes the basic roles and responsibilities of such participants. This Article 3 is not intended, and shall not be construed, to impose any obligations on any party, or provide any party with any rights, that are in addition to any rights or obligations set forth elsewhere in this Agreement and the other Project Agreements in connection with the subject matter hereof.

#### 3.2 Parties to the Transaction; Roles and Responsibilities

- 3.2.1 The parties to the transaction and certain Project Agreements are the Department, the Developer and The Branch Group, Inc. ("Guarantor").
- 3.2.2 This section intentionally left blank.
- 3.2.3 The Department:
- 3.2.3.1 shall establish, pursuant to the Project Agreements, the terms and conditions under which the Project shall be implemented;
- 3.2.3.2 hereby grants to the Developer the right to develop the Project on the terms and conditions set forth in this Agreement and the other Project Agreements;
- 3.2.3.3 This section intentionally left blank

3.2.3.4 shall provide funds to the Project as specified in this Agreement, the Project Financing Agreements (hereinafter defined) and the Design-Build Contract;

3.2.3.5 shall acquire title to, and as necessary and appropriate, condemn, all rights of way for the Project, as provided in the Design-Build Contract;

3.2.3.6 shall provide review services as provided in the Design-Build Contract;

3.2.3.7 shall take acceptance of the Work upon completion thereof, as provided in the Design-Build Contract; and

3.2.3.8 shall operate and maintain the Project following completion.

3.2.4 The Developer:

3.2.4.1 shall have the right and obligation to design, obtain Regulatory Approvals for, perform Project Right of Way acquisition and Utility Relocations, design, construct and perform all Work respecting the Project in accordance with the terms and conditions of the Design-Build Contract;

3.2.4.2 shall provide funds to the Project as specified in this Agreement, the Project Financing Agreements (hereinafter defined) and the Design-Build Contract;

3.2.4.3 shall cause the Work to be insured, as and when provided in the Design-Build Contract;

3.2.4.4 shall provide payment, performance, and maintenance bonds, as and when provided in the Design-Build Contract;

3.2.4.5 shall cause the Guarantor to execute and deliver the Completion Guaranty;

3.2.4.6 shall guarantee pricing of portions of the work to the extent such work is the subject of Notice(s) to Proceed issued within certain time frames as provided in the Design-Build Contract;

3.2.4.7 shall cause Guarantor to guarantee performance and completion of all the Developer's obligations under the Agreement, the Design-Build Contract, and the other Project Agreements (including, but not limited to any Developer warranty and indemnification obligations) in accordance with the provisions of the Completion Guaranty.

- 3.2.5 The Guarantor shall guarantee to the Department the performance and completion of all the Developer's obligations under this Agreement, the Design-Build Contract and the Project Financing Agreements (including, but not limited to, the Developer's warranty and indemnification obligations), in accordance with the provisions of the Completion Guaranty.
- 3.3 Project Agreements.  
The Project Agreements consist of (a) this Agreement; (b) the Design-Build Contract; (c) the Local Government participation in VDOT's Revenue Sharing Program; (d) any project financing plan or agreement entered into in connection with Phase 1 and subsequent phases, (collectively referred to as the "Project Financing Agreements") and (e) the Completion Guaranty. The Project Agreements are to be read and construed together, and together constitute the comprehensive agreement under the PPTA (notwithstanding the fact that this Agreement is entitled "Comprehensive Agreement").
- 3.4 The Developer shall not have the right or the obligation to commence work on Phase 1 or subsequent phases, or subpart thereof, of the Project until the conditions precedent to the Notice to Proceed for each such Phase, or subpart thereof, as set forth in Article 4, are satisfied or waived in writing.

## **ARTICLE 4**

### **FINANCING OF PROJECT AND CONDITIONS PRECEDENT**

- 4.1 It is anticipated that local counties will contribute local tax revenues to the Project, as described below.
- 4.1.1 It is anticipated that the Counties will participate in the Revenue Sharing Program described in Section 33.1-75.1 of the Code of Virginia ("Revenue Sharing Program") in order to provide a minimum of \$200,000 in Counties funding for the Project.

For Phase 1, it is anticipated that Patrick County, Virginia will provide a minimum of \$50,000 in calendar years 2004 and 2005. Upon receipt by the Department from Patrick County of notification that Patrick County intends to participate in the Revenue Sharing Program for Phase 1 for any of calendar years 2004 or 2005, the Department agrees that it will recommend to the Commonwealth Transportation Board ("CTB") that the CTB match the amount of the Patrick County funds contributed to Phase 1 each such calendar year pursuant to the Revenue Sharing Program.

For Phase 2, Carroll County, Virginia submitted an application for \$100,000 for the Revenue Sharing Program for Fiscal Years 2007 and 2008. The CTB approved the allocation of matching funds on July 19, 2007.

For subsequent phases, it is anticipated that the Counties will provide \$100,000 for the Project by participating in the Revenue Sharing Program. Upon receipt by the Department from the Counties of notification that the Counties intend to participate in the Revenue Sharing Program for subsequent phases, the Department agrees that it will recommend to the CTB that the CTB match the amount of Counties funds contributed to subsequent phases pursuant to the Revenue Sharing Program.

4.1.2 The parties acknowledge that:

4.1.2.1 As of the Agreement Date, the Virginia General Assembly had only appropriated, and the CTB had only allocated, funding for Phase 1 of the Project.

4.1.2.2 As of the date of the October 2, 2007 amendment to the Agreement, the Virginia General Assembly had only appropriated, and the CTB had only allocated, funding for Phases 1 and 2 of the Project.

4.1.2.3 As of the date of the December 6, 2011 amendment to the Agreement, the Virginia General Assembly had only appropriated, and the CTB had only allocated, funding for Phases 1, 2 and 3 of the Project.

4.1.2.4 Funding for future Phases of the Project shall be subject to appropriations by the Virginia General Assembly and allocations by the CTB.

4.1.3 The parties acknowledge that Patrick County has retained local county funds contributed in excess of \$100,000 for Phase 1 for application to future phases of the Project. If Patrick County elects to contribute such excess funds to future Phases of the Project, upon receipt by the Department from Patrick County of notification that Patrick County intends to participate in the Revenue Sharing Program, the Department agrees that it will recommend to the CTB that the CTB match the local county funds contributed to subsequent Phases pursuant to the Revenue Sharing Program.

4.2 Plans of Finance for subsequent Phases.

4.2.1 The Department and the Developer recognize that as of the Agreement Date, sources of funding for subsequent Phases have not been identified

except as set forth in Section 4.1, and as a result the rights and obligations of the Developer to construct such Phases are contingent on, among other things, the development and acceptance by Department of a plan of finance for each Phase that provides reasonable assurance that such funding will be available to pay the costs of each such Phase in a timely manner. After the Agreement Date, the parties will work together to secure additional funding for the Project from state and local governmental sources and private contributions, including additional funds pursuant to the Revenue Sharing Program, and to develop a definitive Project Financing Agreement for the remainder of the Project. The definitive Project Financing Agreement for each Phase must provide sufficient funds that will be available at the times expected to be needed to pay the Contract Price (as it may be escalated) in accordance with the terms of the Design-Build Contract for such Phase and all expenses to be incurred by the Department, or the Developer, including right of way acquisition costs and contingencies for risks retained by the Department under the Design-Build Contract. Upon acceptance, approval, and execution by the Department of a Project Financing Agreement for a Phase, which shall be in the Department's sole discretion, the Project Financing Agreement will be attached as an appendix to the Notice to Proceed for that Phase, or sub-part thereof.

- 4.2.2 This section intentionally left blank
- 4.2.3 The Department, the Developer and the Guarantor shall not have any liability to make an investment in or advance funds to the Project in the event that funds are not made available for the Project, except as provided in the Project Agreements executed by such party.
- 4.2.4 This section intentionally left blank
- 4.3 This section intentionally left blank
- 4.4 Conditions Precedent to Notices to Proceed for Phase Work
  - 4.4.1 Subject to the provisions of Section 4.4.2, the Department shall not issue a Notice to Proceed for any Phase of Work and the Developer shall have no obligation to proceed with any Phase of Work unless and until the following conditions have been satisfied or waived by the Department in writing.
    - 4.4.1.1 this section intentionally left blank
    - 4.4.1.2 this section intentionally left blank
    - 4.4.1.3 the Department shall have determined, in its sole discretion, that sufficient funding is available or reasonably expected to be available, subject to appropriation and allocation, as and when needed to pay the cost of the

Phase 1 Work, subsequent Phases of the Work, as applicable, including all costs and expenses to be incurred by the Department, and a Project Financing Agreement with respect to subsequent Phases has been duly authorized and executed by the Department and the Developer.

4.4.1.4 This section intentionally left blank

4.4.1.5 Funding for Phase 1 Work, and any subsequent Phase of Work, as applicable, shall have been allocated to the Project in the Six-Year Improvement Program approved by the Board and such Plan shall be in full force and effect, including such funding and funding available from other sources, when the Department issues such Notice to Proceed for Phase 1 Work, or subsequent Phases of Work, as applicable.

4.4.1.6 This section intentionally left blank

4.4.2 Notwithstanding the provisions of Section 4.4.1, subject to satisfaction of the conditions set forth in Section 4.4.1.5, the Department, in its sole discretion, may issue a limited Notice to Proceed solely applicable to certain interchanges or other portions of the Work, the aggregate cost of which does not exceed the amount allocated to the Project in the current Six-Year Improvement Program or available from other sources prior to issuance of a general Notice to Proceed for all Phase 1 Work, or subsequent Phases of the Work, as applicable, pursuant to Section 4.4.1.

4.4.3 The Department shall not issue a Notice to Proceed for any Phase of the Work unless and until the following conditions have been satisfied or waived by the Department in writing:

4.4.3.1 The Department and the Developer shall have agreed to the Contract Price for Work for such Phase, a CPM/Payment Schedule, a Substantial Completion Date and a Final Completion Date, which shall have been incorporated in a Change Order to the Design-Build Contract for such Phase subsequent to Phase 1, and a Completion Guaranty with respect to the Work for such Phase substantially in the form of Exhibit E hereto has been executed and delivered by the Guarantor.

4.4.3.2 This section intentionally left blank

4.4.3.3 The Developer shall have acquired all Regulatory Approvals required to commence construction of such Phase.

4.4.3.4 All other conditions precedent set forth in Article 4 of the Design-Build Contract and any amendment or Change Order with respect thereto applicable to such Phase shall have been satisfied or waived by the Department in writing.

## **ARTICLE 5**

### **DESIGN, ACQUISITION AND CONSTRUCTION OBLIGATIONS; DEPARTMENT OVERSIGHT**

#### **5.1 The Developer Obligations to Design, Acquire and Construct**

5.1.1 The Developer shall design, construct, insure, permit, acquire properties and relocate utilities, all in accordance with the terms and conditions of the Design-Build Contract.

5.1.2 The Developer shall not commence work on any Phase, or any subpart thereof, until the conditions precedent as set forth in the Design-Build Contract and this Agreement have been satisfied or waived in writing and the Department has issued a Notice to Proceed with respect to such Phase or subpart thereof.

#### **5.2 The Developer Draws**

5.2.1 The Developer shall have the right to submit draw requests to the Department for payment of actual costs incurred, as set forth in the Design-Build Contract.

5.2.2 No draws for amounts payable pursuant to the Design-Build Contract shall be permitted or valid unless and until the Department has issued its written approval and authorization of the draw request by signing a requisition in the form attached as Appendix 3 to the Design-Build Contract, appropriately completed. The Department shall review and approve such requisition within the time periods required by the Design-Build Contract.

#### **5.3 Department Right to Oversee Work**

The Department shall have the right at all times during the Term to oversee the performance of the Developer under the Design-Build Contract, provided that the Department's exercise of such right does not unreasonably interfere with Developer's performance and does not constitute a Department Caused Delay.

## **ARTICLE 6**

### **CONTRACTING PRACTICES**

#### **6.1 Contracting Practices**

Except for (a) this Agreement; (b) the other Project Agreements; and (c) the contracts, subcontracts and agreements expressly permitted under this Agreement or the other Project Agreements (including, but not limited to, subcontracts the Developer enters into to carry out the Work under the Design-Build Contract) or authorized or directed by the

Department, the Developer shall have no right or authority to enter into, deliver or perform any contracts or agreements pertaining to the Project which purport to bind the State or the Department or which are contrary to the terms and conditions of the Project Agreements, without the express prior written consent of the Department, which consent may be granted or withheld in the sole and absolute discretion of the Department.

## 6.2 Obligation to Refrain from Discrimination

6.2.1 The Developer covenants and agrees that it shall not discriminate, and it shall require all of its subcontractors not to discriminate, against any person, or group of persons, on account of age, sex, marital status, race, creed, color, national origin, religion or the presence of any sensory, mental or physical handicap, in connection with the Project, nor shall the Developer establish or permit any such practice or practices of discrimination or segregation with reference to the selection, use, hiring, firing, promotion or termination of employees, contractors, subcontractors and vendors; provided, however, that the prohibition against discrimination on the basis of sensory, mental or physical handicap shall not apply if the particular disability prevents the proper performance of the particular person involved.

6.2.2 The Developer shall conduct its activities in connection with the Project in compliance with all other requirements imposed pursuant to (a) Title 2.2, Chapter 42 Sections 4200 et seq., Code of Virginia; (b) Titles VI and VII of the Civil Rights Act of 1964, as amended; (c) Section 504 of the Rehabilitation Act of 1973, as amended; (d) the Americans with Disabilities Act of 1990; (e) the minority business enterprise provisions of the Design-Build Contract; and (f) applicable rules and regulations.

## ARTICLE 7

### INDEMNIFICATION AND INSURANCE

#### 7.1 Indemnities

The Developer shall indemnify, protect, defend, hold harmless and release each State Indemnatee to the extent provided in the Design-Build Contract. Such indemnity shall survive the expiration or earlier termination of this Agreement or the other Project Agreements.

7.1.1 This section intentionally left blank.

7.1.1.1 This section intentionally left blank.

7.1.2 This section intentionally left blank.

7.1.3 This section intentionally left blank.

7.1.4 This section intentionally left blank.

7.2 Limited Contractor Indemnity With Respect to Revenue Sharing Funds

- (a) If Patrick County does not participate in the Revenue Sharing Program for any of calendar years 2004 and 2005 in an amount equal to at least \$50,000 for each such calendar year, then the Developer shall indemnify the Department in an amount equal to the difference between \$50,000 and the amount, if any, actually contributed to the Project by Patrick County for such calendar year (the “Indemnity Amount”) by either (i) paying the Indemnity Amount to Patrick County for application by the county to participation in the Revenue Sharing Program with respect to Phase 1 of the Project or (ii) in the event the county declines to participate in the Revenue Sharing Program with respect to Phase 1 of the Project, paying the Indemnity Amount to the Department for application by the Department to the cost of Work on Phase 1 of the Project.
- (b) If Carroll County does not participate in the Revenue Sharing Program for any future Fiscal Years for subsequent phases constructed in Carroll County in a cumulative amount equal to at least \$100,000, then the Developer shall indemnify the Department in an amount equal to the difference between \$100,000 and the cumulative amount, if any, actually contributed to the Project by Carroll County for such future Fiscal Years (the “Indemnity Amount”) by either (i) paying the Indemnity Amount to Carroll County for application by the county to participation in the Revenue Sharing Program with respect to subsequent phases of the Project or (ii) in the event the county declines to participate in the Revenue Sharing Program with respect to subsequent phases of the Project, paying the Indemnity Amount to the Department for application by the Department to the cost of Work on subsequent phases of the Project.
- (c) If the Indemnity Amount is paid to the Department in accordance with clauses (a)(ii) and (b)(ii) above, then the Department shall use its best efforts to identify an alternative funding source for the Project in lieu of the matching funds the Department would have otherwise had access to through the Revenue Sharing Program. If such a source is identified, the Department agrees to recommend to the CTB that such funds be allocated and applied to the Project. If, however, no additional source of funds is identified, then the Contract Price for the Work shall be reduced in an amount equal to the Indemnity Amount.
- (d) Each of the Developer and the Department agree that (i) the indemnity obligations set forth in this Section 7.2 for each of Phase 1 and Phase 2 provided a benefit to the Project for each of Phase 1 and Phase 2 and (ii) the condition precedent to triggering the indemnity obligations set forth in this

Section 7.2 for each of Phase 1 and Phase 2 have not and will not occur; therefore, such indemnification obligations shall be deleted from this Agreement and neither the Developer nor the Department shall have any future obligations arising out of such indemnity obligations.

- 7.3 Responsibilities Regarding Insurance. The Developer shall carry or cause to be carried the insurance policies and satisfy or cause to be satisfied the insurance covenants set forth in the Design-Build Contract.

## **ARTICLE 8**

### **REPRESENTATIONS, WARRANTIES AND FINDINGS**

- 8.1 Department Representations and Warranties.

The Department hereby represents and warrants to the Developer as follows:

- 8.1.1 The Department is a department of the executive branch of the State and has full power, right and authority to execute, deliver and perform its obligations under, in accordance with and subject to the terms and conditions of this Agreement and the other Project Agreements to which the Department is a party.
- 8.1.2 Each person executing this Agreement or any other Project Agreement, or any other agreement, instrument or document on behalf of the Department to which the Department is a party has been or at such time of execution will be duly authorized to execute each such document on behalf of the Department.
- 8.1.3 Neither the execution and delivery by the Department of this Agreement and the other Project Agreements executed by Department concurrently herewith, nor the consummation of the transactions contemplated hereby or thereby, is in conflict with or will result in a default under or violation of any other agreements or instruments to which it is a party or by which it is bound.
- 8.1.4 There is no action, suit, proceeding, investigation or litigation pending and served on the Department which challenges the Department's authority to execute, deliver or perform, or the validity or enforceability of, this Agreement and the other Project Agreements to which the Department is a party, or which challenges the authority of the Department official executing this Agreement or the other Project Agreements to which the Department is a party, and the Department has disclosed to the Developer any pending and unserved or threatened action, suit, proceeding,

investigation or litigation with respect to such matters of which the Department is aware.

8.1.5 This section intentionally left blank

## 8.2 Developer Representations and Warranties

The Developer hereby represents and warrants to the Department as follows:

- 8.2.1 The Developer is a duly organized corporation created under the laws of the Commonwealth and has the requisite power and all required licenses (or will have all required licenses prior to the time activities which require licenses are undertaken) to carry on its present and proposed activities, and has full power, right and authority to execute, deliver and perform its obligations under, in accordance with and subject to the terms and conditions of this Agreement and the other Project Agreements to which the Developer is a party.
- 8.2.2 The Developer has taken or caused to be taken all requisite action to authorize the execution and delivery of, and the performance of its obligations under, this Agreement and the other Project Agreements to which the Developer is a party.
- 8.2.3 Each person executing this Agreement or any other Project Agreement on behalf of the Developer to which the Developer is a party has been or at such time of execution will be duly authorized to execute each such document on behalf of the Developer.
- 8.2.4 Neither the execution and delivery by the Developer of this Agreement and the other Project Agreements executed by the Developer concurrently herewith, nor the consummation of the transactions contemplated hereby or thereby, is in conflict with or will result in a default under or violation of any other agreements or instruments to which it is a party or by which it is bound.
- 8.2.5 There is no action, suit, proceeding, investigation, indictment or litigation pending and served on the Developer which challenges the Developer's authority to execute, deliver or perform, or the validity or enforceability of, this Agreement and the other Project Agreements to which the Developer is a party, or which challenges the authority of the Developer official executing this Agreement or the other Project Agreements to which the Developer is a party, and the Developer has disclosed to the Department any pending and unserved or threatened action, suit, proceeding, investigation, indictment or litigation with respect to such matters of which the Developer is aware.

- 8.2.6 The Developer is in material compliance with all Laws, Regulations and Ordinances applicable to the Developer or its activities in connection with this Agreement and the other Project Agreements to which the Developer is a party.

8.3 This section intentionally left blank

#### 8.4 Survival of Representations and Warranties

The representations and warranties of the Department and the Developer contained herein shall survive for ten (10) years from the later of (i) the completion of Work on the entire Project, or (ii) expiration or earlier termination of this Agreement and the other Project Agreements.

#### 8.5 Department Findings Under PPTA

Department, as the Responsible Public Entity with respect to the Project, makes the following findings:

- 8.5.1 the actions taken by Department pursuant to the PPTA facilitate the timely design, acquisition, permitting and construction of the Project;
- 8.5.2 there is a public need for a transportation facility of the type of the Project;
- 8.5.3 the Project is reasonable and compatible with the State transportation plan and with local comprehensive plans;
- 8.5.4 the estimated cost of the Project as reflected in the Design-Build Contract is reasonable in relation to similar facilities;
- 8.5.5 the Developer's plans will result in the timely completion of each of the Phases of the Project;
- 8.5.6 the date that the initial Notice to Proceed with construction of Phase 1 is given under the Design-Build Contract shall be the date established as the beginning of construction of the Project as a Qualifying Transportation Facility;
- 8.5.7 the design, construction and warranting of the Project as provided by the Project Agreements serve the public purpose of the PPTA;
- 8.5.8 the terms and conditions of this Agreement serve the public purpose of the PPTA;

- 8.5.9 the Contract Price, adjusted pursuant to the Design-Build Contract, reflects a reasonable maximum rate of return on investment for the Developer for the purpose of the PPTA; and
- 8.5.10 no user fees are being provided with respect to the Project by the Project Agreements.

## **ARTICLE 9**

### **TERMINATION**

- 9.1 Termination Upon Expiration of Term.
  - 9.1.1 Unless earlier terminated in accordance with the terms of this Article 9 or the other Project Agreements, all the rights and obligations of the Developer hereunder and thereunder shall cease and terminate without notice or demand from the Department or the Developer on December 31, 2017.
- 9.2 Termination for Public Convenience.
  - 9.2.1 If the initial issuance of Notice to Proceed for Phase 1 has not occurred on or before six months after execution of this Agreement, if Phase 1 is not completed within 24 months of Notice to Proceed for Phase 1, or if funds to build a subsequent phase after Phase 1 are not appropriated and allocated on or before June 30, 2011, or if the Department determines in its sole discretion that such action is in the best interests of the State, the Department may terminate all of the Developer's rights and obligations under this Agreement and the Design-Build Contract.
  - 9.2.2 If the Department exercises its right of termination under Section 9.2.1 above, the following shall apply:
    - 9.2.2.1 Department shall deliver to the Developer a Notice of Termination and thereafter the Department and the Developer shall comply with the termination for convenience provisions of the Design-Build Contract;
  - 9.2.3 This section intentionally left blank
  - 9.2.4 This section intentionally left blank
  - 9.2.5 Department may not terminate this Agreement for public convenience prior to the issuance of Notice to Proceed for Phase 1 other than as set forth in Section 9.2.1 above; thereafter, the Department's termination rights shall be in accordance with the termination for convenience

provisions of the Design-Build Contract. Such prohibition does not in any manner limit or affect any other termination rights of Department.

### 9.3. Other Unilateral Rights to Terminate.

9.3.1 The Department shall have the right to terminate the Design-Build Contract due to an Event of Default by the Developer thereunder as set forth in the Design-Build Contract. Upon any such termination, the Developer's rights under this Agreement shall automatically terminate. Department's remedies against the Developer and the limitations thereon following any such termination are fully set forth in the Design-Build Contract.

9.3.2 This section intentionally left blank

9.3.3 The Department shall have the right to terminate this Agreement and the Project Agreements, or any of them, if for any reason any condition precedent set forth in Article 4 is not satisfied.

9.3.4 This section intentionally left blank

9.3.5 This section intentionally left blank

9.3.6 If the Department exercises its right of termination under Section 9.3.1 above, then:

9.3.6.1 Department shall deliver to the Developer the termination notice set forth in the Design-Build Contract and thereafter Department and the Developer shall comply with the termination provisions of the Design-Build Contract.

### 9.4. Developer Actions Upon Termination.

9.4.1. On the effective date of termination of this Agreement or the Developer's rights under this Agreement, the Developer shall, deliver to the Department:

9.4.1.1 All reports, books, records and work product of Developer relating to the Project and other intellectual property of Developer developed specifically for the Project, provided however, that Developer shall retain rights to duplicate, distribute and display works derived from the reports, books, records, work product and intellectual property referenced above solely for Developer's marketing purposes, as approved by Department in advance in writing; and

9.4.1.2 Possession and control of the Project and Project Right of Way.

## 9.5. Liability After Termination.

- 9.5.1 In the event this Agreement or any other Project Agreement is terminated by reason of a material default, such termination shall not excuse the defaulting party from any liability arising out of such default as provided in the Project Agreements.
- 9.5.2 In the event this Agreement or any other Project Agreement is terminated by reason other than a default, no party shall have any further obligation or liability except for performance of their respective obligations which are either expressly stated in a Project Agreement to survive termination or by their sense and context are intended to survive termination.

## 9.6. Exclusive Termination Remedies.

- 9.6.1 This Article 9, together with the express provisions on termination set forth in the Design-Build Contract, set forth the entire and exclusive provisions and rights of the Department and the Developer regarding termination of the Project Agreements, and any and all other rights to terminate at law or in equity are hereby waived to the maximum extent permitted by law.
- 9.6.2 This section intentionally left blank

# ARTICLE 10

## DEFAULTS AND REMEDIES

### 10.1 Developer Defaults

Each of the following events shall constitute a Developer Default under this Agreement:

- 10.1.1 the Developer shall fail to timely observe or perform or cause to be observed or performed any covenant, agreement, obligation, term or condition required to be observed or performed by the Developer under this Agreement (provided that if the same is also required of the Developer under the Design-Build Contract, then Section 10.1.6 below shall apply in lieu of this Section 10.1.1);
- 10.1.2 any representation or warranty made by the Developer herein, or the Guarantor, or in any Project Agreement shall be inaccurate or misleading in any material respect on the date made or deemed made and a material adverse effect upon the Project or the Department's rights or obligations under the Project Agreements results therefrom;

10.1.3 the Developer shall fail to execute and deliver, or fail to cause Guarantor to execute and deliver, any Project Agreement to which it is a party thereto as and when required under this Agreement;

10.1.4 the Developer shall commence a voluntary case seeking liquidation, reorganization or other relief with respect to itself or its debts under any bankruptcy, insolvency or other similar law now or hereafter in effect; shall seek the appointment of a trustee, receiver, liquidator, custodian or other similar official of the Developer or any substantial part of the Developer's assets; shall file an answer admitting the material allegations of a petition filed against the Developer in any involuntary case commenced against the Developer; shall consent to any such relief or to the appointment of or taking possession by any such official in any voluntary case commenced against the Developer; shall make an assignment for the benefit of creditors; shall fail, be unable, or admit in writing the inability generally to pay the Developer's debts as they become due; or shall take any action to authorize any of the foregoing, or any of the foregoing acts or events shall occur with respect to the Guarantor (but not necessarily in the same proceeding or concurrently);

10.1.5 an involuntary case shall be commenced against the Developer seeking liquidation, reorganization, dissolution, winding up, a composition or arrangement with creditors, a readjustment of debts or other relief with respect to the Developer or the Developer's debts under any bankruptcy, insolvency or other similar law now or hereafter in effect; seeking the appointment of a trustee, receiver, liquidator, custodian or other similar official of the Developer or any substantial part of the Developer's 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 the Developer in good faith or shall remain undismissed and unstayed for a period of 90 Days, or any such involuntary case or cases shall be commenced against the Guarantor (but not necessarily in the same proceeding or concurrently) and such case or cases shall not be contested by the Guarantor in good faith or shall remain undismissed and unstayed for a period of 90 days; or

10.1.6 any Event of Default by the Developer under the Design-Build Contract.

## 10.2 Developer Cure Periods.

The Developer shall have the following cure periods with respect to the following Developer Defaults:

10.2.1 With respect to all Developer Defaults except those specified in Sections 10.1.4, 10.1.5 and 10.1.6, the Developer shall have a period of thirty (30) days from the date of the notice of default in which to cure the default. If

the default is of such nature that the cure cannot with diligence be completed within such time period and the Developer has commenced meaningful steps to cure, as agreed to by the Department, then the Developer shall have an additional period of time as necessary to cure the default up to a maximum of 180 days.

10.2.2 With respect to the Developer Defaults specified in Sections 10.1.4 and 10.1.5, there shall be no additional time for cure beyond any periods of time mentioned therein.

10.2.3 With respect to a Developer Default under Section 10.1.6, the cure period, if any, will be as set forth in the Design-Build Contract.

10.3. Department Remedies for Developer Default.

Upon the occurrence of a Developer Default and expiration, without full cure, of any applicable cure period, the Department may exercise any one or more of the following remedies as the Department in its sole and absolute discretion shall determine:

10.3.1 In the event of a Developer Default (other than a Developer Default under Section 10.1.6) any and all remedies available at law or in equity, including but not limited to recovery of damages to the extent provided by law; provided that in no event shall the Developer be liable for, and Department waives all Claims for indirect, incidental or consequential damages of any nature, whether in contract, tort (including negligence) or other legal theory, unless arising out of the fraud or intentional misrepresentation of the Developer or any of its members, managers, partners, directors, officers, employees or agents;

10.3.2 in the event of a Developer Default under Section 10.1.6, any applicable remedies set forth in the Design-Build Contract;

10.3.3 the Department may offset any sums the Department owes to the Developer by any sums owing to the Department from the Developer, including but not limited to Liquidated Damages or other undisputed or finally adjudicated monetary damages owing Department under the Design-Build Contract; and

10.3.4 the Department may satisfy any sums the Developer owes the Department, including but not limited to such Liquidated Damages and other undisputed or finally adjudicated monetary damages by offset against future Developer draw requests.

10.4 This section intentionally left blank

10.5 This section intentionally left blank

10.6 This section intentionally left blank

10.7. Department Defaults.

10.7.1 Each of the following events shall constitute a Department Default:

10.7.1.1 the Department shall fail to observe or perform any covenant, agreement, term or condition required to be observed or performed by the Department under this Agreement;

10.7.1.2 any representation or warranty made by the Department herein or in any other Project Agreement shall be inaccurate or misleading in any respect on the date made and a material adverse effect upon the Project or the Developer's rights or obligations under the Project Agreements results therefrom;

10.7.1.3 an event of default by the Department occurs under any other Project Agreement; or

10.7.1.4 the General Assembly shall enact legislation which (A) the State intends to impact, and does impact, only the Developer, this Agreement, the Project or the class of contracts, developers, agreements, or transportation facilities established pursuant to the PPTA; and (B) materially impairs the Developer's rights under this Agreement to plan, develop and construct the Project, all as provided for in this Agreement and the other Project Agreements.

10.7.1.5 failure by the Department to execute and deliver any Project Agreement, as and when required under this Agreement.

10.7.2 Except as set forth in Section 10.7.1.4 above, the Developer acknowledges that no act or omission of any federal, State, regional or local government or agency thereof, other than the Department, shall constitute a Department Default hereunder, unless as a result of material involvement in such act or omission on the part of Department.

10.8. Department Cure Periods.

The Department shall have the following cure periods with respect to the following Department Defaults:

10.8.1 respecting a Department Default under Sections 10.7.1.1, 10.7.1.2, and 10.7.1.5, a period of thirty (30) Days after the Department receives written notice of the Department Default, provided that if the Department Default

is of such a nature that the cure cannot with diligence be completed within such time period and the Department has commenced meaningful steps to cure immediately after receiving the default notice, the Department shall have such additional period of time as is reasonably necessary to diligently effect cure;

10.8.2 respecting a Department Default under Section 10.7.1.3, the cure period, if any, set forth in the relevant Project Agreement; and

10.8.3 respecting a Department Default under Section 10.7.1.4, a period of 180 Days after the date the subject legislation becomes law; provided that, if the effectiveness of such legislation is stayed by a court of law, the running of such 180-Day cure period shall be suspended for the duration of any such stay.

#### 10.9. Developer Remedies.

10.9.1 Except as otherwise provided herein, upon the occurrence of a Department Default and expiration, without full cure, of any cure period available respecting such Department Default, the Developer may exercise any rights and remedies available to the Developer under this Agreement or the other Project Agreements or as are otherwise available to the Developer at law; provided, however,

10.9.1.1 The Developer shall have no right to seek or obtain equitable relief against the Department arising out of a Department Default except (A) writ of mandamus to the extent available, (B) equitable remedies regarding monetary compensation (such as relief in quantum meruit) and (C) equitable remedies available in the case of a Department Default resulting from action by the Department which is outside the Department's legal authority; and

10.9.1.2 Department's obligations and liabilities are strictly limited to those set forth in the Project Agreements, and the Developer shall not have nor may it assert, and shall waive, any Claim against Department based on any supposed or alleged duties arising in tort.

10.9.2 Notwithstanding anything herein to the contrary, the recovery of Claims against the State shall be subject to all Laws, Regulations and Ordinances, including without limitation, Title 8.01, Chapter 3, Article 18 (commencing at Section 8.01-192) and Article 18.1 (commencing at Section 8.01-195.1), Code of Virginia.

10.9.3 Except as otherwise provided in Section 10.9.4 below, the Department's payment of any monetary damages or other compensation or award under Section 10.9.1 above shall be conditioned upon express legislative

authorization and appropriation of the payment to the Developer of such damages, compensation or award.

10.9.4 Promptly after any final judgment is rendered by a court of competent jurisdiction awarding compensation or damages to the Developer and all appeal rights are exhausted, the Department shall institute payment procedures as set forth in Title 8.01, Section 195, Code of Virginia.

10.9.5 If the Developer has not received the full amount of any outstanding monetary damages or other compensation or award owing to the Developer under Section 10.9.1 above the Department shall (i) use reasonably diligent efforts to obtain as soon as practicable from the General Assembly an appropriation sufficient to make such payment, and (ii) include such payment amount in its annual budget request, for two legislative sessions, if necessary, and diligently seek an appropriation to make such payment.

#### 10.10 Waiver of Consequential Damages

Neither the Department nor the Developer shall be entitled, and each of them waives all right, to recover indirect, incidental or consequential damages, including but not limited to lost profits, whether such damages arise in contract, tort or other legal theory, and irrespective of fault, negligence or strict liability, except and only to the extent specifically provided otherwise herein or in any of the other Project Agreements.

#### 10.11. Dispute Resolution; No Declaratory Judgment Procedure

10.11.1 this section intentionally left blank

10.11.2 Any dispute that may arise between the Department and the Developer shall be mutually resolved through best efforts and good faith negotiations between the Authorized Department Representatives and Authorized Developer Representatives. In conducting such negotiations, the Department and the Developer recognize that in drafting this Agreement, it is impracticable to make provisions for every contingency that may arise during its term. Accordingly, in order to achieve the resolution of any dispute concerning matters for which the Agreement provides no clear guidance, the Department and the Developer concur in the principle that this Agreement is intended to operate between them in fairness. If, despite best efforts and good faith negotiations and the application of the principle of fairness in the claims set forth above, the dispute is not resolved to the mutual satisfaction of both parties within 30 Days after written notification by one party to the other of a problem or claim arising that remains in dispute, or such longer time as is mutually

agreed, then such dispute shall first be submitted administratively as set forth below.

- 10.11.2.1 The Developer shall submit to the Department a written claim, an original and three legible copies, which shall set forth the facts upon which the claim is based. The Developer shall include all pertinent data and correspondence that may substantiate the claim. Within 90 Days from the receipt of the claim, the Department will make an investigation and notify the Developer by registered mail of its decision. However, by mutual agreement, the Department and the Developer may extend the 90-Day period for another 30 Days.
- 10.11.2.2 If the Developer is dissatisfied with the decision, it shall notify the Department's Commissioner in writing, within 30 Days from the receipt of the Department's decision, that it desires to appear before him, whether in person or through counsel, and present additional facts and argument in support of this claim. The Commissioner, or his designee, will schedule and meet with the Developer within 30 Days after receiving the request. However, the Commissioner and the Developer, by mutual agreement, may schedule the meeting to be held after 30 Days but before the 60<sup>th</sup> day from the receipt of the Developer's written request. Within 45 Days from the date of the meeting, the Commissioner, or his designee, will investigate the claim, including the additional facts presented, and notify the Developer in writing of his decision. However, the Commissioner and the Developer, by mutual agreement, may extend the 45-day period for another 30 Days. If the Commissioner deems that all or any portion of a claim is valid, he shall have the authority to negotiate a settlement with the Developer subject to the provision of Section 2.2-514 of the Code of Virginia.
- 10.11.2.3 If the Developer is dissatisfied with the decision of the Commissioner, it may institute a civil action as to such portion of the claim as is denied by the Commissioner pursuant to Section 33.1-387 of the Code of Virginia.
- 10.11.3 All litigation between the parties arising out of or pertaining to this Agreement or its breach shall be filed, heard and decided in the Circuit Court for the City of Richmond, Virginia, Division I, which shall have exclusive jurisdiction and venue; provided that the foregoing does not affect any claims or matters which are governed by a different dispute resolution procedure set forth in any other Project Agreement.
- 10.11.4 Each party shall bear its own attorney's fees and costs in any dispute or litigation arising out of or pertaining to this Agreement or any other Project Agreement, and no party shall seek or accept an award of attorney's fees or costs.

- 10.11.5 As permitted by Section 56-568 of the PPTA, the parties agree that any requirement that the State Corporation Commission issue a declaratory judgment regarding a material default (as defined in Section 56-565 of the PPTA) pursuant to such Section 56-568, as a prerequisite to exercising any remedy set forth in this Agreement, any other Project Agreements or such Section 56-568, shall not apply to this Agreement or any other Project Agreement.

## **ARTICLE 11**

### **RECORDS, REPORTS, WORK PRODUCT AND INTELLECTUAL PROPERTY**

#### **11.1 Maintenance of Records.**

- 11.1.1 The Developer shall file and maintain books, records, documents and information as provided in the Design-Build Contract.

#### **11.2. Public Records.**

- 11.2.1 Any Work Product the Department owns pursuant to the Design-Build Contract or otherwise, and any document of which the Department obtains a copy, may be considered public records under the Virginia Public Records Act, Section 42.1-76 through 42.1-91, Code of Virginia or official records under the Virginia Freedom of Information Act, Sections 2.2-3700 through 2.2-3714 of the Code of Virginia, and as such may be subject to public disclosure. The Department recognizes that certain Work Product the Department owns pursuant to the Design-Build Contract and certain documents of which the Department obtains a copy may contain information exempt from disclosure under Section 2.2-3705, Code of Virginia, may constitute trade secrets as defined in Section 59.1-336, Code of Virginia, and may include confidential information which is otherwise subject to protection from misappropriation or disclosure. Should such records become the subject of a request for public disclosure, the Department shall respond as follows:

- 11.2.1.1 Department shall use reasonable efforts to immediately notify Developer of such request and the date by which it anticipates responding.

- 11.2.1.2 Developer must then assert in writing to the Department any claim that such records contain proprietary information that is exempt from disclosure under Section 2.2-3705, Code of Virginia, or is subject to protection pursuant to Section 59.1-339, Code of

Virginia, or other State law so that the Department may consider such assertion in responding to the requester.

- 11.2.1.3 If the Developer fails to make such assertion within three (3) Business Days after the date the Department notifies the Developer of its intended response, the Department shall have the right to make such disclosure.
- 11.2.1.4 If the Developer makes a timely assertion that the requested records contain proprietary information, trade secrets or confidential information and thus are exempt from disclosure or otherwise protected under state law, upon consultation with the Developer to agree upon a reasonable effort and legal cost, at the Developer's expense, Department and Developer shall seek judicial declaration of the rights of the parties. Until such declaration is made, Department will maintain the confidentiality of such records.
- 11.2.1.5 If the Department's denial of a request for disclosure of records is challenged in court, the Developer shall assist the Department in its defense and shall indemnify the Department for any and all damages assessed and costs (including the fees and costs of the Department's attorneys) the Department incurs in such defense, including any attorney's fees assessed against the Department or any State Indemnitee.
- 11.2.1.6 In no event shall the Department be liable to the Developer as a result of any disclosure of such records by the Department in compliance with the provisions of this Section 11.2.1.
- 11.2.2 If the Developer believes that any Work Product or any document subject to transmittal to or review by the Department under the terms of this Agreement or any other Project Agreement contains proprietary or confidential information or trade secrets that are exempt or protected from disclosure pursuant to State law, the Developer shall use its reasonable efforts to identify such information prior to such transmittal or review and it and the Department shall confer on appropriate means of ensuring compliance with applicable laws prior to transmittal or review. Upon the written request of either party, the Developer and the Department shall mutually develop a protocol for the transmittal, review and disclosure of Work Product or other documents produced or obtained by the Developer so as to avoid violations of any applicable law.

### 11.3. Reporting Requirements and Inspection and Audit Rights.

11.3.1 The Developer shall deliver to the Department financial and narrative reports, statements, certifications, budgets and information as and when required under the Design-Build Contract and the PPTA.

11.3.2 This section intentionally left blank

11.3.3 The Department shall have audit rights respecting the Developer as set forth in the Design-Build Contract.

11.3.4 This section intentionally left blank

11.3.5 Nothing contained in this Agreement or any other Project Agreement shall in any way limit the constitutional and statutory powers, duties and rights of elected state officials, including the independent rights of the State Auditor of Public Accounts, in carrying out his or her legal authority.

## **ARTICLE 12**

### **RESERVED RIGHTS**

#### **12.1. Exclusions from The Developer's Interests.**

The Developer's rights and interests in the Project and Project Right of Way shall be specifically limited only to such rights and interests which are necessary and required for Project Purposes. The Developer's rights and interests specifically exclude all Reserved Rights.

#### **12.2. Department Reservation of Rights.**

All rights to own, lease, sell, assign, transfer, utilize, develop or take advantage of the Reserved Rights are hereby reserved to the Department; and the Developer shall not engage in any activity infringing upon the Reserved Rights. The Department at any time may devote, use or take advantage of the Reserved Rights for any public purpose without any financial participation whatsoever by the Developer. The Department hereby reserves to itself all ownership, development, maintenance, repair, replacement, operation, use and enjoyment of, and access to, the Reserved Rights. No Department activity or improvement respecting Reserved Rights shall materially interfere with the construction of the Project.

#### **12.3. Disgorgement.**

If a Developer Default concerns a breach of the provisions of Sections 12.1 or 12.2, in addition to any other remedies under this Agreement, the Department shall be entitled to disgorgement of all profits from the prohibited activity and to sole title to and ownership of the prohibited assets and improvements.

#### **12.4. Alternate Treatment of Reserved Rights.**

Notwithstanding Sections 12.1, 12.2 and 12.3, Department may elect in its sole discretion to undertake the development of improvements respecting Reserved Rights.

## **ARTICLE 13**

### **MISCELLANEOUS**

#### **13.1 Assignment**

13.1.1 The Developer may not, without the prior written consent of the Department, voluntarily or involuntarily assign, convey, transfer, pledge, mortgage or otherwise encumber its rights or interests under this Agreement or the other Project Agreements.

13.1.2 This section intentionally left blank

13.1.3 Any transfer of the right or practical ability to control the policies and decisions of the Developer (except transfers occurring after the Final Completion Date), whether due to transfer of partnership or membership interests, shares, beneficial interests or otherwise, shall constitute an assignment prohibited under Section 13.1.1 above without the Department's prior written consent.

13.1.4 The Department may transfer and assign its interests in the Project, this Agreement and any other Project Agreements to any other public agency or public entity as permitted by law, provided that the successor or assignee has assumed all of the Department's obligations, duties and liabilities under this Agreement and the Project Agreements then in effect, and has provided the Developer with reasonable assurance of its legal and financial authority, ability and resources to honor and perform the same.

13.1.5 If either party changes its name, such party agrees to promptly furnish the other party with written notice of change of name and appropriate supporting documentation.

#### **13.2 No Gift or Dedication.**

Nothing contained in this Agreement shall be deemed to be a gift or dedication of any portion of the Project, Project Right of Way or Work Product to the Department or the general public or for any public use or purpose whatsoever, or be deemed to create any rights in the Project, Project Right of Way or Work Product except as expressly set forth herein.

#### **13.3 Notices**

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

If to the Department:

1401 E. Broad Street  
Richmond, VA 23219  
Attn: Chief Engineer  
Fax: (804) 786-2940

With copies to:

Department of Transportation  
731 Harrison Avenue  
Salem, VA 24153  
Attn: Salem District Administrator  
Fax: (540) 387-5312

Department of Transportation  
731 Harrison Avenue  
Salem, VA 24153  
Attn: Salem District Construction Engineer  
Fax: (540) 387-5312

Office of the Attorney General  
900 E. Main Street  
Richmond, VA 23219  
Attn: Transportation Section Chief  
Fax: (804) 786-9136

If to the Developer:

Branch Highways Inc.  
442 Rutherford Avenue  
Roanoke, VA 24016  
Attn: Michael P. Higgins, P.E.  
Fax: (540) 982-4216

With copies to:

Branch Highways Inc.  
442 Rutherford Avenue  
Roanoke, VA 24016  
Attn: J. William Karbach  
Fax: (540) 982-4216

Branch Highways Inc.  
442 Rutherford Avenue  
Roanoke, VA 24016  
Attn: Michael C. Tomlinson  
Fax: (540) 982-4216

The Branch Group, Inc.  
442 Rutherford Avenue  
Roanoke, VA 24016  
Attn: J. William Karbach  
Fax: (540) 982-4216

Williams Mullen  
200 South 10<sup>th</sup> Street, 16<sup>th</sup> Floor  
Richmond, VA 23219  
Attn: Charles E. Wall, Esq.  
Fax: (804) 420-6507

13.3.2 Any party may, from time to time, by notice in writing served upon the other party as aforesaid, designate an additional and/or a different mailing address or an additional and/or a different person to whom all such notices, requests, demands, reports and communications are thereafter to be addressed. Any notice, request, demand, report or other communication served personally shall be deemed delivered upon receipt, if served by mail or independent courier shall be deemed delivered on the date of receipt as shown by the addressee's registry or certification receipt or on the date receipt at the appropriate address is refused, as shown on the records or manifest of the U.S. Postal Service or independent courier, and if served by facsimile transmission shall be deemed delivered on the date of receipt as shown on the received facsimile (provided the original is thereafter delivered as aforesaid).

#### 13.4 Binding Effect

Subject to the limitations of Section 13.1, this Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective legal representatives, successors and permitted assigns, and wherever a reference in this Agreement is made to any of the parties hereto, such reference also shall be deemed to include, wherever applicable, a reference to the legal representatives, successors and permitted assigns of such party, as if in every case so expressed.

### 13.5 Relationship of Parties

13.5.1 The relationship of the Developer to the Department shall be one of an independent contractor, not an agent, partner, joint venturer or employee, and the Department shall have no rights to direct or control the activities of the Developer.

13.5.2 Officials, employees and agents of the Department shall in no event be considered employees, agents, partners or representatives of the Developer.

### 13.6 No Third Party Beneficiaries

Nothing contained in this Agreement is intended or shall be construed as creating or conferring any rights, benefits or remedies upon, or creating any obligations of the parties hereto toward, any person or entity not a party to this Agreement.

### 13.7 Waiver

13.7.1 No waiver by any party of any right or remedy under this Agreement or the other Project Agreements shall be deemed to be a waiver of any other or subsequent right or remedy under this Agreement or the other Project Agreements. The consent by one party to any act by the other party requiring such consent shall not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

13.7.2 No act, delay or omission done, suffered or permitted by one party or its agents shall be deemed to waive, exhaust or impair any right, remedy or power of such party under this Agreement or any other Project Agreement, or to relieve the other party from the full performance of its obligations under this Agreement and the other Project Agreements.

13.7.3 No waiver of any term, covenant or condition of this Agreement shall be valid unless in writing and signed by the obligee party.

13.7.4 The acceptance of any payment or reimbursement by a party shall not: (i) waive any preceding or then-existing breach or default by the other party of any term, covenant or condition of this Agreement, other than the other party's prior failure to pay the particular amount or part thereof so accepted, regardless of the paid party's knowledge of such preceding or then-existing breach or default at the time of acceptance of such payment or reimbursement; or (ii) continue, extend or affect (A) the service of any notice, any suit, arbitration or other legal proceeding or final judgment, (B) any time within which the other party is required to perform any obligation or (C) any other notice or demand.

13.7.5 No custom or practice between the parties in the administration of the terms of this Agreement shall be construed to waive or lessen the right of a party to insist upon performance by the other party in strict compliance with the terms of this Agreement.

13.8 No Brokers

Each party represents and warrants that it has not dealt with any real estate or business opportunity broker or agent or any finder in connection with this Agreement. To the extent permitted by law, each party agrees to indemnify, protect, defend with counsel acceptable to the other party and hold harmless the other party against any claim for commission, finder's fee or like compensation asserted by any real estate or business opportunity broker, agent, finder or other person claiming to have dealt with the indemnifying party in connection with this Agreement.

13.9 Governing Law and Venue

This Agreement shall be governed and construed in accordance with the laws of the State applicable to contracts executed and to be performed within the State. Venue for any legal action arising out of this Agreement shall lie in the Circuit Court in the City of Richmond, Virginia, Division I.

13.10. Use of Police Power

Nothing in this Agreement limits the authority of the Department to exercise its regulatory and police powers granted by law, including but not limited to its powers of condemnation with respect to all or any part of the Project, the Project Right of Way and any of the Developer's rights hereunder. The parties waive any requirement by the State Corporation Commission to issue a declaratory judgment regarding condemnation pursuant to Title 56, Chapter 22, Section 56-568, Code of Virginia.

13.11 Survival.

All covenants, agreements, representations and warranties made in or pursuant to this Agreement shall be deemed continuing and made at and as of the date of this Agreement and at and as of all other applicable times during the Term. All covenants, agreements, representations and warranties made in or pursuant to this Agreement shall survive for ten (10) years beyond the later of (i) the expiration or earlier termination of this Agreement, or (ii) the completion of the last authorized Phase of Work, and shall not be waived by the execution and delivery of this Agreement, by completion of construction, by any investigation by the Department or by any other event except a specific written waiver by the party against whom waiver is asserted; provided, however, that the ten (10) year limitation on survival shall not apply (a) in the event of fraud or a material misrepresentation with respect to a particular covenant, agreement, representation

or warranty or (b) any claim arising from either a latent defect or any particular warranty items in the Design-Build Contract with a specified warranty period that exceeds ten (10) years.

#### 13.12 Subpoena

Except as provided for in Virginia Code Section 33.1-4, the Developer may subpoena any Department personnel provided that the Developer shall pay for such personnel's time at its fully burdened rate (including overhead and fringe benefits), together with all out-of-pocket expenses incurred, no later than 30 Days after the Developer's receipt of an invoice reasonably documenting the amount of such time provided.

#### 13.13 Construction and Interpretation of Agreement

13.13.1 The language in all parts of this Agreement shall in all cases be construed simply, as a whole and in accordance with its fair meaning and not strictly for or against any party. The parties hereto acknowledge and agree that this Agreement has been prepared jointly by the parties and has been the subject of arm's length and careful negotiation over a considerable period of time, 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 hereof. Accordingly, in the event of an ambiguity in or dispute regarding the interpretation of this Agreement, this Agreement shall not be interpreted or construed against the party preparing it, and instead other rules of interpretation and construction shall be utilized.

13.13.2 If any term or provision of this Agreement, the deletion of which would not adversely affect the receipt of any material benefit by either party hereunder, shall be held by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Agreement shall not be affected thereby and each other term and provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law. It is the intention of the parties to this Agreement, and the parties hereto agree, that in lieu of each clause or provision of this Agreement that is illegal, invalid or unenforceable, the parties in good faith shall supply as a part of this Agreement an enforceable clause or provision as similar in terms to such illegal, invalid or unenforceable clause or provision as may be possible.

13.13.3 The captions of the articles, sections and subsections herein are inserted solely for convenience and under no circumstances are they or any of them to be treated or construed as part of this instrument.

13.13.4 References in this instrument to this "Agreement" mean, refer to and include this instrument as well as any riders, exhibits, addenda and

attachments hereto (which are hereby incorporated herein by reference) or other documents expressly incorporated by reference in this instrument. Any references to any covenant, condition, obligation and/or undertaking “herein,” “hereunder” or “pursuant hereto” (or language of like import) mean, refer to and include the covenants, conditions, obligations and undertakings existing pursuant to this instrument and any riders, exhibits, addenda, attachments or other documents affixed to or expressly incorporated by reference in this instrument. All terms defined in this instrument shall be deemed to have the same meanings in all riders, exhibits, addenda, attachments or other documents affixed to or expressly incorporated by reference in this instrument unless the context thereof clearly requires the contrary. Unless expressly provided otherwise, all references to Articles and Sections refer to the Articles and Sections set forth in this Agreement. Unless otherwise stated in this Agreement or the Project Agreements, words which have well-known technical or construction industry meanings are used in this Agreement or the Project Agreements in accordance with such recognized meaning.

13.13.5 As used in this Agreement and as the context may require, the singular includes the plural and vice versa, and the masculine gender includes the feminine and vice versa.

13.13.6 This Agreement, its exhibits and the other Project Agreements are intended to be complementary and consistent with each other and shall, to the maximum extent possible, be construed according to such intent.

#### 13.14 Counterparts

This instrument may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

#### 13.15 Entire Agreement; Amendment

13.15.1 THIS AGREEMENT AND THE OTHER PROJECT AGREEMENTS (INCLUDING EXHIBITS HERETO AND THERETO) CONSTITUTE THE ENTIRE AND EXCLUSIVE AGREEMENT BETWEEN THE PARTIES RELATING TO THE SPECIFIC MATTERS COVERED HEREIN AND THEREIN. ALL PRIOR OR CONTEMPORANEOUS VERBAL OR WRITTEN AGREEMENTS, UNDERSTANDINGS, REPRESENTATIONS AND/OR PRACTICES RELATIVE TO THE FOREGOING ARE HEREBY SUPERSEDED, REVOKED AND RENDERED INEFFECTIVE FOR ANY PURPOSE. THIS AGREEMENT MAY BE ALTERED, AMENDED OR REVOKED ONLY BY AN INSTRUMENT IN WRITING SIGNED BY EACH PARTY HERETO, OR ITS PERMITTED SUCCESSOR OR ASSIGNEE. NO VERBAL AGREEMENT OR IMPLIED COVENANT SHALL BE

HELD TO VARY THE TERMS HEREOF, ANY STATUTE, LAW OR CUSTOM TO THE CONTRARY NOTWITHSTANDING.

- 13.15.2 This Agreement and the other Project Agreements attempt to set forth in full all requirements applicable under the PPTA as to the study, planning, design, acquisition, development, construction, management and financing of the Project and attempt to define in full the rights and responsibilities of each party in connection therewith. To the extent requirements and rights and responsibilities have not been addressed in this Agreement and the other Project Agreements, the parties agree to carry out their respective responsibilities in the spirit of cooperation contemplated by the PPTA, recognizing that they may not have defined in a sufficient detail or anticipated fully all activities necessary for the full implementation of the Project.
- 13.15.3 If any provisions of this Agreement are rendered obsolete or ineffective in serving their purpose by change in law, passage of time, financing requirements or other future events or circumstances, the parties agree to negotiate in good faith appropriate amendments to or replacements of such provisions in order to restore and carry out the original purposes thereof to the extent practicable; provided, however, that neither party is obligated to agree to any amendment or replacement which would reduce its rights or enlarge its responsibilities under this Agreement in any material respect.
- 13.16 Headings The Article and Section headings and the use of terms “Article” and “Section” in this Comprehensive Agreement and other Project Agreements are for convenience of reference only and shall not be deemed to alter or affect the meaning or interpretation of any provisions hereof. The terms “Article” and “Section” are used interchangeably throughout.

IN WITNESS WHEREOF, the parties, intending to be legally bound, have executed this Agreement on the date first written above.

Virginia Department of Transportation,  
a department of the Commonwealth of Virginia

By:

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Philip A. Shucet  
Commonwealth Transportation Commissioner

Branch Highways Inc.

By:

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Lawrence B. Dickenson,  
Vice President