

CONSTRUCTION CONTRACT
RELATING TO
THE 395 EXPRESS LANES SEMINARY ROAD RAMP PROJECT
BY AND BETWEEN
95 EXPRESS LANES LLC,
a Delaware limited liability company
AND
CES CONSULTING, LLC,
a Virginia limited liability company

Dated as of August ___, 2022

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LIST OF EXHIBITS

- Exhibit A – Definitions
- Exhibit B – Contract Documents
 - B-1 – Technical Requirements
 - B-2 – Design Plans
- Exhibit C – Federal Requirements and Civil Rights Requirements
- Exhibit D – Special Provisions
- Exhibit E – Safety Requirements
- Exhibit F – Form of Lien Waiver
- Exhibit G – Insurance Requirements
- Exhibit H – Forms of Performance and Payment Bonds
- Exhibit I – Minor Change Request Form
- Exhibit J – Task Order
- Exhibit K – Pricing Details

CONSTRUCTION CONTRACT

This CONSTRUCTION CONTRACT RELATING TO THE 395 EXPRESS LANES SEMINARY ROAD RAMP PROJECT (this “Contract”) is made and entered into as of August ____, 2022 (the “Contract Date”), by and between 95 EXPRESS LANES LLC (“Concessionaire”) and CES CONSULTING, LLC (“Contractor”) for the purposes of providing construction services. Concessionaire and Contractor may be singularly identified as “Party” and collectively as “Parties”. The Exhibits listed above are attached hereto and fully incorporated herein.

WITNESSETH:

WHEREAS, Concessionaire desires to secure services from Contractor to install signage and pavement markings to convert the existing Seminary Road ramp on Interstate 395 from a High Occupancy Vehicle (HOV) ramp to a High Occupancy Toll (HOT) ramp.

WHEREAS, Contractor has represented that it is experienced and capable of performing and willing to perform such services for Concessionaire.

NOW, THEREFORE, in consideration of the covenants hereinafter set forth, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

Section 1 Definitions, Interpretation, and Precedence

- 1.1 Unless the context otherwise requires, capitalized terms and acronyms used in this Contract have the meanings given in **Exhibit A**. Where a term is defined in both the Comprehensive Agreement and this Contract, the definition in this Contract shall govern.
- 1.2 *Order of Precedence*
 - (a) Without limiting the other provisions within this Section 1, if there is any conflict, ambiguity, or inconsistency between the provisions of this Contract (including all Exhibits), the order of precedence will be as follows, from highest to lowest:
 - (i) the main body of this Contract;
 - (ii) **Exhibit C** to this Contract (Federal Requirements and Civil Rights Requirements) and Exhibit E (Safety Requirements);
 - (iii) **Exhibit B-1** to this Contract (Technical Requirements);
 - (iv) Special Provisions – Copied Notes in **Exhibit D** to this Contract;
 - (v) Special Provisions in **Exhibit D** to this Contract;
 - (vi) VDOT Road and Bridge Supplemental Specifications (Divisions II-VII only) contained in **Exhibit D** to this Contract;

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- (vii) VDOT Road and Bridge Supplemental Specifications (Divisions II-VII only) published in the annual supplemental volume;
- (viii) VDOT Road and Bridge Specifications 2020 (Divisions II-VII only);
- (ix) **Exhibit B-2** to this Contract (Design Plans), excluding the specifications listed in clauses (vii) through (ix);
- (x) VDOT Road and Bridge Standard Drawings (including all revisions issued through the date of submission of Contractor's proposal); and
- (xi) all other Exhibits to this Contract;

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

- (b) If there is any conflict, ambiguity, or inconsistency between two or more provisions in this Contract (including all Exhibits) regarding safety, reliability, durability, performance, or service, the provision establishing a higher standard will prevail.
- (c) Good Industry Practice shall be utilized hereunder, among other things, to implement and in no event to displace or lessen the stringency of the standards set forth in this Contract and the Contract Documents.
- (d) Additional or supplemental details or requirements in a provision of this Contract with lower priority will be given effect, except to the extent that they irreconcilably conflict with any provision of this Contract with higher priority.
- (e) An amendment to this Contract or a Work Order shall take precedence over the terms it amends.

Section 2 General

- 2.1 Contractor will fully perform and timely complete, as an independent contractor, all work ("Work") in accordance with this Contract and as described in the documents identified on **Exhibit B**, the Federal Requirements and Civil Rights Requirements described on **Exhibit C**, the Special Provisions described in **Exhibit D** and the Safety Requirements described on **Exhibit E** (this Contract and the documents identified on such **Exhibits B, C, D and E** are collectively, the "Contract Documents") for the Contract Price as shown on this Contract and as detailed on **Exhibit K**. Contractor shall accept the Contract Price as full payment for the following: (i) all Materials, Equipment, tools, incidentals, bonds, labor, sales and use taxes, supervision, insurance, overhead and profit required to perform the Work, (ii) all loss or damage arising from the nature of the Work or from action of the elements or any unforeseen difficulties that may be encountered during prosecution of the Work and until its final acceptance, except as otherwise

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expressly provided in this Contract, (iii) any license, use, or infringement of a patent, trademark, or copyright, and (iv) the completion of the Work in accordance with the Contract Documents. Time is of the essence in performing all Contract obligations.

2.2 Prior to executing this Contract, Contractor has carefully determined to its satisfaction all requirements of this Contract and the extent and the costs of all aspects of the Work, and has:

- (a) ascertained the conditions and requirements of its Work, including: (a) the location, accessibility and character of the Site and adjacent areas; (b) surface conditions and reasonably ascertainable subsurface conditions (including potential water, Materials, Utilities or obstacles); (c) any errors, omissions or conflicts in the documents set forth in **Exhibit B** that could reasonably be discovered by a Contractor experienced in the Work in the area of the Project; (d) existing facilities at or near the Site; (e) transportation, disposal, handling and storage of Materials or Equipment; (f) labor availability; (g) location and availability of Utilities; (h) needed Equipment and facilities; (i) foreseeable weather conditions; and (j) all laws, treaties, ordinances, judgments, Federal Requirements, decrees, injunctions, writs and orders of any Governmental Authority, and all rules, regulations, orders, formal interpretations and permits of any Governmental Authority having jurisdiction over construction of the Project on the Project Right of Way, performance of the Work, or operation of the Project, or the health, safety or environmental condition of the Project or the Project Right of Way, as the same may be in effect from time to time, including the Code of Virginia and the Uniform Act applicable to any aspect of performance of the Work or to Contractor (“**Law**”); and
- (b) reviewed all information made available by Concessionaire or others, satisfying itself with the correctness and accuracy of the Contract Price in light of all information and required investigations.

2.3 **Safety Requirements.** Contractor acknowledges the critical importance to the Project and to all Project personnel of Concessionaire’s safety requirements. Contractor will comply with the safety requirements in **Exhibit E**, as may be amended, all Laws relating to safety in executing the Work and disposing or handling Materials (including any Hazardous Substances), and all rules of Concessionaire and VDOT regarding the performance of Work and the Site, including compliance with the current Site logistics plan. Contractor at all times maintains primary control of and responsibility for safety for its Work and will meet or exceed all safety requirements of this Contract. Contractor will at no time start, continue, or resume any Work which Contractor or any representative of Concessionaire identifies as unsafe, until Contractor has taken corrective measures satisfactory to Concessionaire. Failure of Concessionaire or others to stop an unsafe practice will not relieve Contractor of its responsibilities. If Contractor or any person for whom Contractor is responsible fails to adhere to or enforce

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Concessionaire's safety requirements or any safety-related Laws, Concessionaire may, in addition to other remedies, bar such party from the Site.

- 2.4 With respect to its Work and this Contract, and in addition to the other duties specified in this Contract, Contractor owes to Concessionaire the duties timely and fully to: (i) comply with all applicable Laws; (ii) provide within 3 Business Days any requested written assurances of complete and timely performance, including assurances prompted by any actual or potential insolvency, bankruptcy or failure to continue as a going concern; (iii) notwithstanding any provisions in this Contract which give Concessionaire the right to direct Contractor as to details of the Work (including safety) or to exercise a measure of control over the Work, Contractor will remain fully responsible for performance of the Work and be solely responsible for the acts or omissions of its laborers, and those of its Subcontractors and suppliers at all tiers (collectively, "Lower Tiers"); (iv) ensure that all obligations of this Contract and the Contract Documents are included in all agreements involving Lower Tiers as respects their performance of any Work; (v) comply with this Contract and the Contract Documents; (vi) promptly provide all financial and performance information required by Concessionaire as part of Concessionaire's program for qualifying subcontractors to work on a Project with Concessionaire; and (vii) allow no bankruptcy or receivership filing to delay or otherwise adversely impact the Work, and consent upon request to any request by Concessionaire to expedite hearings or other actions by the bankruptcy court to minimize impacts on the Work or the Project.

Section 3 Payments to Contractor

3.1 *Completion.*

- (a) Upon obtaining Final Completion, Contractor will provide Concessionaire with an application for payment ("Application for Payment") in accordance with Section 3.6 below. Concessionaire shall make the payment to Contractor (the "Completion Payment") within thirty (30) days after Concessionaire's receipt of a properly submitted and accurate Application for Payment. At the time of submission of its Application for Payment, Contractor shall provide the following information:
- (i) a final lien waiver, in the form of **Exhibit F**, of all liens that Contractor may have against Concessionaire, the Project and the Project Right of Way, and an affidavit that there are no claims, or obligations or liens outstanding or unsatisfied for labor, services, Material, Equipment, taxes or other items performed, furnished or incurred for or in connection with the Work which will in any way affect Concessionaire's interests;
 - (ii) a general release executed by Contractor waiving, upon receipt of the Completion Payment by Contractor, all claims, except those claims previously made in writing to Concessionaire and remaining

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- unsettled at the time of the Completion Payment, which claims shall be specifically listed in an attachment to the general release;
- (iii) consent of Contractor's surety to the Completion Payment;
 - (iv) all operating manuals, warranties and other deliverables required by the Contract Documents, including all project records; and
 - (v) certificates of insurance confirming that required coverages will remain in effect consistent with the requirements of the Contract Documents.
- (b) Upon making the Completion Payment, Concessionaire waives all claims against Contractor except claims relating to: (i) Contractor's failure to satisfy its payment obligations; (ii) Contractor's failure to complete the Work consistent with the Contract Documents, including defects appearing after the date of the Completion Payment; and (iii) warranties and indemnifications as set forth in the Contract Documents. Upon acceptance by Contractor of the Completion Payment, Contractor waives all claims under the Contract Documents, including all Subcontractor claims, for anything done or furnished or relating to the work under the Contract Documents or for any act or neglect of Concessionaire relating to or connected with the Contract Documents. Contractor is warned that the execution by it of a release, in connection with the acceptance of the Completion Payment, containing language purporting to reserve claims other than those herein specifically excepted from the operation of this Section 3.1(b) or those for amounts deducted from the final requisition or from the Completion Payment approved by Concessionaire, shall not be effective to reserve such claims, anything stated to Contractor orally or in writing by any official, agent or employee of Concessionaire to the contrary notwithstanding.
- (c) Contractor agrees that, within seven (7) days following receipt of monies from Concessionaire for work performed by any Subcontractor, Contractor shall either: (a) pay the Subcontractor for the proportionate share of the total payment received from Concessionaire attributable to the work performed by the Subcontractor; or (b) notify Concessionaire and Subcontractor, in writing, of Contractor's intention to withhold all or a part of the Subcontractor's payment, specifying the reason for the non-payment. Contractor also agrees that it shall include in all of its subcontracts a provision that: (a) obligates Contractor to pay interest to Subcontractors on all amounts owed by Contractor that remain unpaid after seven (7) days following receipt of monies from Concessionaire for work performed by any Subcontractor, except for amounts withheld as allowed in the preceding sentence; (b) states, "Unless otherwise provided under the terms of this Contract, interest shall accrue at the rate of one percent per month."; and (c) obligates each Subcontractor to include or otherwise be subject to the same

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payment and interest requirements as specified in this Section (c) with respect to each lower-tier sub-subcontractor.

- (d) Other than damage caused by Concessionaire or other parties not under the Contractor's direction performing maintenance or other work, including snow plowing, Contractor shall have charge and care thereof and shall take every precaution consistent with Good Industry Practice against damage to any part of the Work thereof by action of the elements or from any other cause. Contractor shall rebuild, repair, restore, and make good on damage to any portion of the Work occasioned by any of the foregoing causes and shall bear the expense thereof. Contractor's obligations under this Section 3.1(d) shall cease as of the date Concessionaire has provided a signed certificate of Final Completion to Contractor.
- (e) Contractor agrees to provide Concessionaire, within five (5) days of the date of this Contract, its federal employer identification number.

3.2 *[Reserved]*

- 3.3 ***Interest.*** Payments due and unpaid by Concessionaire to Contractor shall bear interest commencing ten (10) days after payment is due at an interest at a variable rate per annum equal to the reference rate announced by Bank of America, N.A., from time-to-time, plus one percent (1%).

- 3.4 ***Record Maintenance and Retention of Records.*** Contractor shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management, using accounting and control systems in accordance with generally accepted accounting principles and as may be provided in the Contract Documents. During the performance of the Work and for a period of five (5) years after the Completion Payment, Concessionaire and Concessionaire's accountants shall be afforded access from time-to-time, upon reasonable notice, to Contractor's records, books, correspondence, receipts, subcontracts, purchase orders, vouchers, memoranda and other data, including but not limited to electronic schedules and other electronic data (all collectively referred to as "Books and Records") relating to: (a) changes in the Work performed on a cost basis; or (b) any request by Contractor for an adjustment in the Contract Price or Contract Time. Contractor shall preserve all of its Books and Records for a period of five (5) years after the Completion Payment. Contractor shall permit Concessionaire to audit, examine, and copy all documents, computerized records, electronic mail, or other records of Contractor during the life of this Contract and for a period for not less than five years after the earliest of: (i) the date of the Completion Payment, (ii) the date Contractor is declared in default of Contract, and (iii) the date of termination of this Contract; provided that the exercise of Concessionaire's right to so audit, examine and copy documents, records, mail and other records of Contractor shall be limited to no more than one time per year (but such limitation shall not apply at any time a Contractor Default has occurred and is continuing or such exercise is in connection with (x) compliance by Concessionaire with applicable Law or any order or

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decision issued by a court or regulatory or other governmental body, or (y) compliance by Concessionaire with any request or requirement by VDOT, or (z) the adjudication or resolution of any dispute under this Contract).

3.5 *Not Used.*

3.6 *Application for Payment.*

- (a) No less than seven (7) days after Final Completion, Contractor shall submit a draft Application for Payment for Concessionaire's concurrence for all Work performed. The final Application for Payment details shall then be submitted formally upon mutual agreement of the parties. The Application for Payment shall be in a form approved by Concessionaire and shall be accompanied by all supporting documentation required by the Contract Documents.
- (b) Contractor shall furnish to Concessionaire such detailed information as Concessionaire may request to assist Concessionaire in the approval of the Application for Payment.
- (c) The Application for Payment shall constitute Contractor's representation that the Work has been performed consistent with the Contract Documents.

3.7 *Not Used.*

3.8 *Withholding of Payments.*

- (a) On or before the date established in this Contract, Concessionaire shall pay Contractor all amounts properly due. If Concessionaire reasonably determines that Contractor is not entitled to all or part of the Application for Payment, it will notify Contractor in writing at least seven (7) days prior to the date payment is due. The notice shall indicate the specific amounts Concessionaire intends to withhold, the reasons and contractual basis for the withholding, and the specific measures Contractor must take to rectify Concessionaire's concerns. Contractor and Concessionaire will attempt to resolve Concessionaire's concerns prior to the date payment is due. If the parties cannot resolve such concerns, Contractor may pursue its rights under the Contract Documents.
- (b) In addition to express provisions elsewhere contained in this Contract, Concessionaire may withhold from any payment otherwise due Contractor such amount as determined necessary to protect Concessionaire's interest, or if it so elects, may withhold or retain all or a portion of any payment on account of:
 - (i) breach or reasonably expected breach of this Contract by Contractor;

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- (ii) to protect VDOT and/or Concessionaire against potential or actual indemnity claim against Concessionaire under this Contract;
 - (iii) unsatisfactory progress of the work not caused by conditions beyond Concessionaire's control;
 - (iv) defective work not corrected;
 - (v) Contractor's failure to carry out instructions or orders of Concessionaire or its representative;
 - (vi) a reasonable doubt that the Work can be completed for the balance then unpaid;
 - (vii) work or execution thereof not in accordance with the Contract Documents;
 - (viii) claim filed against Contractor or Concessionaire or reasonable evidence indicating probable filing of claims;
 - (ix) failure of Contractor to make payments to Subcontractor or for Materials or labor;
 - (x) damage to another contractor, unsafe working conditions allowed to persist by Contractor or failure of Contractor to provide work schedules as required by Concessionaire; or
 - (xi) use of Subcontractors without Concessionaire's approval.
- (c) To the fullest extent permitted by law, Contractor agrees to waive any rights it has under applicable laws, including but not limited to any bond, payment, or trust fund statutes, which would otherwise prevent Concessionaire from exercising these rights.
- (d) [Reserved]
- (e) [Reserved]
- (f) If Concessionaire does not withhold out of any payment (final or otherwise) a sum for any of the circumstances described in Section 3.8(b), even though the circumstance has occurred at the time of Concessionaire's payment to Contractor, Concessionaire will not forfeit its right to exercise such withholding from a future payment or any other rights or remedies it may be entitled to obtain such amount from Contractor.
- (g) Nothing under this Contract (including this Section 3.8) will create any obligation of Concessionaire of any kind to any Subcontractors, architects, mechanics, laborers, engineers, workmen or other third persons.

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- (h) The right of Contractor to any amount to be paid under this Contract (even where any amounts have already been approved or determined as due) will be subject to and subordinate to the rights of Concessionaire under this Section 3.8.
- (i) Without limiting any other provision of this Section 3.8 or any other rights of Concessionaire under this Contract, and subject to Section 3.8(j), if Contractor or any Subcontractor pays wages or supplements in an amount less than required by this Contract or the relevant subcontract, Concessionaire may:
 - (i) withhold out of any payment (final or otherwise and even though a payment has already been approved) due to Contractor under this Contract, an amount that Concessionaire deems sufficient to pay laborers, mechanics, architects, draftsmen, engineers and technical workers, and others employed to perform the Work, the difference between the sums those Persons should have received as wages or supplements from Contractor or Subcontractor and the amounts they actually received; and
 - (ii) pay those sums over to those Persons.

All amounts withheld and paid by Concessionaire under this Section 3.8(i) will be deemed to be payments made to Contractor under this Contract on account of the Contract Price.
- (j) Without limiting any other provision of this Section 3.8 or any other rights of Concessionaire under this Contract, if Concessionaire conducts an investigation and discovers that Contractor or any of its Subcontractors has failed to pay wages or supplements as required by this Contract or the relevant subcontract:
 - (i) Contractor must pay to Concessionaire an amount equal to Concessionaire's cost of conducting that investigation, within fourteen (14) days of receiving a demand from Concessionaire for such payment; and
 - (ii) if Contractor fails or refuses to pay for the cost of any investigation within that 14-day period, Concessionaire may withhold out of any payment (final or otherwise and even though a payment has already been approved) due to Contractor under this Contract, or under any other agreement between Contractor and Concessionaire, an amount equal to the cost of such investigations plus a 15% administrative charge.
- (k) Concessionaire may withhold out of any payment due to Contractor under this Contract, any amounts required or permitted under this Section 3.8. All amounts withheld by Concessionaire under this Section 3.8(k) will be

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deemed to be payments made to Contractor under this Contract on account of the Contract Price.

- 3.9 ***Contractor's Payment Obligations.*** Contractor will pay Subcontractors, in accordance with its contractual obligations to such parties, all the amounts Contractor has received from Concessionaire on account of their work. Contractor will impose similar requirements on Subcontractors to pay those parties with whom they have contracted. Contractor will indemnify and defend Concessionaire against any claims for payment and mechanic's liens as set forth in Section 7.1 hereof.

Section 4 Operations

- 4.1 Contractor will at all times be thoroughly familiar with all requirements regarding the Work, and promptly notify Concessionaire, in writing and before proceeding with affected Work, of any deficiencies, errors, discrepancies, unanticipated Site conditions, anticipated conflicts or unusual difficulties not specifically addressed in this Contract. Contractor's non-compliance with any notice and claim requirements in the Contract Documents or in this Contract will constitute a waiver of claim. Contractor will coordinate its Work with that of Concessionaire and all other Subcontractors. Concessionaire will upon reasonable request provide shop drawings by other Subcontractors to Contractor.
- 4.2 Each of Concessionaire and Contractor shall designate an individual authorized to make decisions and bind such Party on matters relating to the Contract documents (each individual, an "Authorized Representative"). The initial Authorized Representative for Concessionaire shall be **Samrat Valani, Vice President Operations**, and the initial Authorized Representative for Contractor shall be **Scott C. Hunter, Director of Construction**. Each Party may change its Authorized Representative by a notice delivered to the other Party. An Authorized Representative may, by notice delivered to the other Party, delegate its authority under this Section 4.2 or any other matter to be performed by the Authorized Representative under this Contract, to another individual or individuals to perform those functions, and make binding decisions with respect to those matters, specified in that notice. Contractor's Authorized Representative and Contractor's other pertinent representatives will attend all coordination meetings and project meetings. Contractor's Authorized Representative will represent Contractor and will have full authority to make decisions and commitments regarding Contractor's Work. All communications and notices given to Contractor's Authorized Representative will be binding as if given to Contractor, and Contractor's Authorized Representative is authorized to bind Contractor. Contractor represents that its crew will include one or more supervisor-level employees that qualifies as an expert in the Work and as a competent person as defined by the Occupational Safety and Health Administration, and is knowledgeable of all applicable Laws.
- 4.3 Contractor shall participate in meetings between Concessionaire and VDOT, upon VDOT's reasonable request, concerning matters pertaining to Contractor or its work; provided, that all direction to Contractor will be provided by Concessionaire;

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and provided further, that nothing in this Section 4.3 will limit the authority of VDOT to give such direction or take such action which in the opinion of VDOT is necessary to remove an immediate and present threat to the safety of life or property.

- 4.4 Concessionaire is not responsible for damage to Contractor's Work or stored Materials or Equipment unless directly damaged by Concessionaire's employees, subcontractors (other than Contractor and others under its direction), or others working under Concessionaire's direction, but will cooperate with Contractor to secure payment for such damage from the responsible party or applicable insurance.
- 4.5 Contractor will be responsible for and will use the highest degree of care in regard to all loading/unloading of Materials, tools, and Equipment.
- 4.6 Contractor will employ only laborers who will work in harmony with those employed by Concessionaire or other Subcontractors, or by VDOT in its operations. Subcontracts may be awarded, and labor employed by Contractor or its other Subcontractors without regard to union status. Contractor will not allow labor disputes to delay or hinder its Work, that of any other Subcontractor, or VDOT's operations. If Concessionaire's job site is picketed, and Concessionaire establishes a reserved gate for Contractor's use, Contractor will continue to properly perform the Work without interruption or delay. Contractor will bind and require all of its sub-subcontractors (of every tier) performing job site work to comply with this Section 4.6. Contractor agrees to include this entire Section 4.6 in all lower-tier subcontract and supply agreements.
- 4.7 Contractor will maintain a lien-free and claim-free Project and must immediately secure release of any Lower Tier lien or stop payment notice through payment or release bond. Contractor must timely and fully pay and/or ensure payment of: (i) wages and benefits due to laborers; (ii) taxes, contributions, fees, penalties, and the like in respect of the Work or this Contract; and (iii) all amounts due to all Lower Tiers and their laborers. Concessionaire may require satisfactory evidence as to the status of any payments or payment obligations in connection with this Contract. Notwithstanding the foregoing, Contractor will ensure that no liens or claims of Contractor or any of its subcontractors will attach at any time to any interest of VDOT in the Project or the Project Right of Way.
- 4.8 In performing its Work, and in addition to the other duties specified in this Contract, Contractor owes to Concessionaire the duties timely and fully to: (i) furnish and pay for all permits (except where such permits are provided by Concessionaire), Governmental Approvals, licenses, Equipment, labor, Materials, supervision, required safety measures and employee parking and transportation required for the proper and complete performance of the Work, and provide copies of all permits and permit modifications to the Concessionaire upon receipt; (ii) perform all Work with no unapproved deviations or substitutions; (iii) provide quality control to ensure that Work is performed in strict accordance with this Contract and the Contract Documents and as needed to ensure the required quality; (iv) uncover and

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correct/replace any Work identified as defective during construction; (v) comply with Concessionaire's written directives; (vi) submit proper notices, warranties, Work Order proposals, submittals, parts lists, O&M manuals and other documents or Materials required by the Contract Documents or by Concessionaire; (vii) correct defects in the Work which appear within the guaranty or Warranty Period established in the Contract Documents or by law (if no period is stipulated in the Contract Documents or by law, then the guarantee and/or warranty will be for twenty-four (24) months from date of completion and written acceptance of the Work by Concessionaire); (viii) perform all required lay-out accurately and completely from control lines or benchmarks provided by VDOT or Concessionaire; (ix) execute and deliver, and/or deliver from suppliers, any special guaranty or warranty required by the Contract Documents; (x) clean up daily from its operations as required by VDOT or Concessionaire, and/or if requested contribute reasonably to a composite clean-up crew at no additional cost; (xi) prevent any damage to or trespass on adjoining lands or facilities; (xii) reasonably inspect work of other contractors of Concessionaire to ensure that it has been performed properly to accommodate Contractor's Work, and advise Concessionaire in writing of any deficiencies that would prohibit or interfere with the proper performance of the Work; (xiii) pay all royalties and avoid any infringement of patents or copyrights; (xiv) provide daily reports, safety data sheets (or similar sheets as required), job hazard analyses (or similar documents reflecting safe planning for safety risks in the Work), copies of all subcontracts and purchase orders and other reasonable documentation requested by Concessionaire; (xv) remove any employee for reasonable cause upon written request of Concessionaire; (xvi) protect its Work and stored Materials from damage or destruction until Completion Payment, and avoid damage to the work or Materials of other trades; (xvii) release no Hazardous Substances, and properly document and dispose of any Hazardous Substances discovered or used so as not to violate any applicable Law; (xviii) provide and pay for power, gas, water, trailers, storage, temporary protection, guardrails, overhead protection and other temporary facilities needed for the Work; (xix) subordinate lien rights, to the extent required of Concessionaire by a project lender; (xx) obtain any required waivers or variances as required for the proper and complete performance of the Work from each applicable local government regarding local noise ordinances, adhere to such waivers and variances and pay all costs associated with any violation of such waivers and variances identified by such local government; (xxi) pay all costs associated with compliance with any ordinance or law or any violations of law attributable to the activities of Contractor hereunder; and (xxii) provide such other services, documentation and Materials needed to meet the VDOT's requirements for the Work.

- 4.9 ***Contractor's Warranty.*** Contractor warrants to Concessionaire and VDOT that (x) the Work when complete will conform to Good Industry Practice and (y) the Work, including all Materials and Equipment furnished as part of the construction, shall be new unless otherwise specified in the Contract Documents, of good quality, in conformance with the Contract Documents and free of defects in Materials and workmanship. Contractor's warranty obligation excludes defects caused by abuse,

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damage, alterations, or failure to maintain the Work by persons other than Contractor or anyone for whose acts Contractor may be liable. All warranties received by Contractor from Subcontractors shall be passed through to Concessionaire in full. Nothing in this warranty is intended to limit any manufacturer's warranty which provides Concessionaire with greater warranty rights than set forth in this Section 4.9 or the Contract Documents. Contractor will provide Concessionaire with all manufacturers' warranties prior to the date of Final Completion for all Work.

4.10 *Correction of Defective Work.*

- (a) Contractor agrees to promptly and completely correct, at its cost, any Work that is found not to be in conformance with the Contract Documents, including that part of the Work subject to Section 10, within a period of twenty-four (24) months from the date of Final Completion of the Work, as applicable, or within such longer period to the extent required by the Contract Documents or applicable Laws or Governmental Approvals (the "Warranty Period").
- (b) Contractor shall, within seven (7) days, or other time period as mutually agreed, of receipt of written notice from Concessionaire that the Work is not in conformance with the Contract Documents, take meaningful steps to commence correction of such nonconforming Work, including the correction, removal or replacement of the nonconforming Work and any damage caused to other parts of the Work affected by the nonconforming Work. If Contractor fails to commence the necessary steps within such time period, Concessionaire, in addition to any other remedies provided under the Contract Documents, may take any steps that it considers necessary to correct the nonconforming Work, including providing Contractor with written notice that Concessionaire will commence correction of such nonconforming Work with its own forces. If Concessionaire does perform such corrective Work, Contractor shall be responsible for all costs and expenses incurred by Concessionaire in performing such correction within fourteen (14) days of Contractor receiving demand from Concessionaire. If the nonconforming Work creates an emergency requiring an immediate response, the seven (7) day periods identified herein shall be deemed inapplicable.
- (c) If any item of Work is repaired or replaced, the Warranty Period for that last item of Work will be extended until the later of (x) an additional twelve (12) months from the date the repair or replacement is completed and (y) the end of the Warranty Period, and this Section 4.10 will continue to apply with respect to that Work for the extended Warranty Period.
- (d) The Warranty Period referenced in Section 4.10(a) above applies only to Contractor's obligation to correct nonconforming Work and is not intended to constitute a period of limitations for any other rights or remedies

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Concessionaire may have regarding Contractor's other obligations under the Contract Documents.

4.11 ***Concessionaire's Rights to Direct Contractor.*** When any act, omission, or other action or inaction of Contractor occurs that violates the requirements, conditions, or terms of the Contract Documents or affects the health, safety, or welfare of the public or natural resources, Concessionaire will have the right, but not the obligation, to direct Contractor to take prompt action to repair, replace, or restore the damage or injury within a time frame established by Concessionaire. If Contractor fails to make such repair, replacement, or restoration within the established time frame, Concessionaire will have the damage or injury repaired, replaced, or restored and will deduct the cost of such repair, replacement, or restoration (plus 25% for supervisory and administrative personnel costs) from monies due Contractor.

4.12 ***Site Conditions.***

- (a) ***Inspection of Site Conditions.*** Contractor represents and warrants that it has, as of the Contract Date, using Good Industry Practice, ascertained the nature and location of the Work, the character and accessibility of the Site, the existence of obstacles to construction, the availability of facilities and Utilities, the location and character of existing or adjacent work or structures, the surface and subsurface conditions, and other general and local conditions (including labor) which might affect its performance of the Work or the cost thereof.
- (b) ***Further Investigations and Protection of Utilities.*** Prior to commencing any trenching or excavations, Contractor shall, taking into account the information in **Exhibit B** and in compliance with Good Industry Practice, conduct further Site investigations, including exploratory excavations and further borings, to confirm the location and type of underground structures that could be damaged as a result of the excavations. Such underground structures include all Utilities and other piping, and manholes, chambers, electrical conduits, wires, tunnels and other existing subsurface work located within or adjacent to the Site. As defined in **Exhibit B**, Contractor shall carefully sustain in their places and support or, if necessary, relocate all underground and surface structures and Utilities located within or adjacent to the Site. To the extent any of Contractor's work will or may impact the Utilities and businesses or residents in the area surrounding the Site, Contractor shall notify, at least seven (7) Business Days in advance of such work: (1) Concessionaire of any work that might impact Utilities and businesses or residents in the area surrounding the Site; and (2) such businesses or residents of such work. To the extent that seven (7) Business Days' advance notice is not feasible, Contractor shall provide as much advance notice as is reasonably possible under the circumstances to Concessionaire and to impacted businesses and residents of Contractor's work.

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4.13 *Hazardous Environmental Conditions.*

(a) *General Obligations*

- (i) Contractor will be responsible for the management, treatment, handling, storage, monitoring, remediation, removal, transport and/or disposal of any Hazardous Environmental Conditions that are encountered on, in or under the Site.
- (ii) If Contractor encounters any Unknown Pre-Existing Hazardous Substances the presence of which constitutes a Hazardous Environmental Condition, then Contractor will promptly notify Concessionaire and, in consultation with Concessionaire, will develop a Remedial Action Plan setting out the scope of the Remedial Actions that Contractor proposes to take in relation to the relevant Hazardous Environmental Condition, such actions to include, but not be limited to: (i) conducting such further investigations as may be necessary or appropriate to determine the nature and extent of the Hazardous Substances and submitting copies of such data and reports to Concessionaire for its review and approval, (ii) taking reasonable steps, including in the case of excavation, construction, reconstruction or rehabilitation, modifications and/or construction techniques, to avoid or minimize excavation or dewatering in areas with Hazardous Substances, (iii) preparing and obtaining Governmental Approvals for remedial action plans, including Concessionaire approval and (iv) carrying out the Remedial Action Plan, including, as necessary, disposal of the Hazardous Substances. Contractor shall keep Concessionaire regularly apprised of its progress in executing any Remedial Action Plan.
- (iii) Before any Remedial Actions for Unknown Pre-Existing Hazardous Substances are taken that would inhibit Concessionaire's ability to ascertain the nature and extent of the Hazardous Environmental Condition, Contractor will afford Concessionaire the opportunity to inspect areas and locations that require Remedial Actions; provided, that in the case of a sudden release of any Unknown Pre-Existing Hazardous Substances, Contractor may take all reasonable actions necessary to stabilize and contain the release without prior notice or inspection, but will promptly notify Concessionaire of the sudden release and its location.
- (iv) Contractor will obtain all Governmental Approvals relating to all Remedial Actions. Contractor will be solely responsible for compliance with such Governmental Approvals and applicable Law concerning or relating to Hazardous Substances.

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- (v) Unless directed otherwise by Concessionaire, Contractor will seek to recover costs from any available reimbursement program or from any third party responsible for generating or otherwise creating or contributing to conditions that led to the need for Remedial Action. Without limiting the preceding sentence, Contractor will seek pre-approval and pursue reimbursement from the Virginia Petroleum Storage Tank Fund for qualifying expenses incurred during the course of investigation, containment, management, mitigation or remediation activities on petroleum storage tank releases. The Parties will cooperate with and notify each other with respect to activities undertaken pursuant to this Section 4.13(a)(v).
 - (vi) Except as provided in Section 4.13(b) below, Contractor will bear all costs and expenses of preparing and complying with any Remedial Action Plan, of complying with applicable Law and obtaining and complying with Governmental Approvals pertaining to Hazardous Substances, and otherwise of carrying out Remedial Actions.
- (b) *Unknown Pre-Existing Hazardous Substances.*
- (i) Concessionaire will reimburse, to the extent permitted by applicable Law, Contractor for Contractor's costs for Remedial Actions with respect to any Unknown Pre-Existing Hazardous Substances, the presence of which constitutes a Hazardous Environmental Condition.
 - (ii) Concessionaire will assume, to the extent permitted by applicable Law, responsibility for third-party claims against Contractor for personal injury, damages or harm to property or business due to any Unknown Pre-Existing Hazardous Substances, the presence of which constitutes a Hazardous Environmental Condition, and all related penalties, fines and administrative or civil sanctions arising out of or related to such Unknown Pre-Existing Hazardous Substances; except to the extent Contractor is obliged to indemnify Concessionaire pursuant to Section 7 below.
 - (iii) Contractor will provide cost estimates with respect to such Remedial Actions which may be reimbursed by Concessionaire, for Concessionaire's review and approval prior to proceeding with any such Remedial Actions, subject to Section 4.13(a)(ii) above.
 - (iv) Concessionaire reserves the right to perform Remedial Actions for Unknown Pre-Existing Hazardous Substances in lieu of, and as replacement for, Contractor's Remedial Action obligations subject to Section 4.13(a)(ii) above.

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- (v) Contractor will be entitled to submit a request for a Work Order in accordance with this Contract, to an adjustment in its Contract Price and/or Contract Time to the extent Contractor's cost and/or time of performance meeting the conditions set forth in Section 10.6 have been adversely impacted by the presence, removal or remediation of Unknown Pre-Existing Hazardous Substances that constitute a Hazardous Environmental Condition.
- (c) *Contractor's Indemnification Obligations Regarding Hazardous Substances.*
 - (i) Contractor will indemnify, protect, defend and hold harmless and release each of Concessionaire and its Representatives from and against any and all claims against each of Concessionaire and its Representatives by a person not party to this Contract, including reasonable attorney's fees, expert witness fees and court costs suffered or incurred by Concessionaire or its Representative, as applicable, to the extent caused by:
 - (A) Hazardous Substances introduced to or brought onto the Site by Contractor or its Subcontractors;
 - (B) failure of Contractor or any of its Subcontractors to comply with any requirement of the Contract Documents relating to Hazardous Substances (including any failure to perform any Remedial Action required in accordance with Section 4.13(a) above) or to otherwise comply with applicable Law and Governmental Approvals; or
 - (C) the exacerbation, release, spreading, migration, or toxicity of Hazardous Substances due to the negligence, omission, recklessness, or willful misconduct of Contractor or any of its Subcontractors.
 - (ii) Contractor shall defend such claims in accordance with Section 7 below.
 - (iii) Contractor's indemnification under this Section 4.13(c) will not apply to claims to the extent caused by the negligence, recklessness, or willful misconduct of any of Concessionaire and its Representatives.

4.14 *TMS Contractor*

- (a) Contractor acknowledges that as part of the overall Seminary Road Ramp Project under the Comprehensive Agreement, Concessionaire will contract directly with a TMS Contractor to perform the traffic management system software revisions and systems integration scope of work. Contractor

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further acknowledges that the Project's success is dependent upon the ability of Contractor and the TMS Contractor to perform their respective obligations in a cooperative, collaborative and integrated manner. To help accomplish this, Concessionaire, Contractor and TMS Contractor agree to reasonably cooperate with each other to meet the mutual goals of successful and timely completion of their respective work and the Project as a whole, and Concessionaire may direct the timing of Contractor's work to coordinate with the timing of the deployment and testing of the TMS work.

- (b) For the avoidance of doubt, Contractor shall not have any liability for the acts or omissions of the TMS Contractor, nor shall the TMS Contractor have any liability for the acts or omissions of Contractor.

4.15 *Impacts to 395 Express Lanes Facilities and Operations.*

- (a) Contractor shall be responsible for any impact to the existing intelligent transportation system or electronic toll collection roadside equipment and infrastructure within the construction limits. Prompt response is required to any damage caused by Contractor and in the event the repair is not completed two (2) hours prior to the next traffic peak, Concessionaire may restore critical systems and bill Contractor for such restoration.
- (b) Contractor shall reimburse Concessionaire for the damages caused by Contractor, including but not limited to repair or replacement of the existing fiber and electrical network, but not with respect to lost revenue. The cost of the repair work performed will include the actual maintenance Contractor costs plus 25% for supervisory and administrative personnel.

4.16 *Inadequate Maintenance.* If Contractor fails to remedy unsatisfactory maintenance of the Work not complying with the Contract within a mutually agreed upon time after receipt of a written notice by Concessionaire, Concessionaire may proceed with adequate forces, Equipment, and Material to maintain the Project and the Work. Concessionaire will deduct the cost of proceeding with its own forces and Equipment (plus 25% for supervisory and administrative personnel costs) from monies due Contractor. Contractor shall have the right to dispute Concessionaire's determination that maintenance is unsatisfactory.

Section 5 **Time for Completion.**

5.1 *Notice to Proceed.* Contractor will not commence construction of the Project unless and until the following conditions have been satisfied (or Concessionaire, in its discretion, waives such conditions) and Concessionaire has delivered notice to that effect to Contractor (such notice being referred to as the "Construction Notice to Proceed" or "Construction NTP"):

- (a) Concessionaire has approved the following: (A) Construction Quality Management Plan; and (B) Health, Safety and Security Plan; and

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- (b) Contractor certifies to Concessionaire that all Insurance Policies required under Section 9.1 necessary for the Work, have been obtained and will be in full force and effect, and in the case of Project-specific policies, Contractor has delivered to Concessionaire duplicate originals or copies thereof certified by Contractor's insurance broker to be true and correct copies of the originals.

Concessionaire may waive any condition precedent set forth in this Section 5.1; *provided*, that no person or entity will be entitled to assume that Concessionaire will waive any condition precedent. Unless Concessionaire waives in writing (as distinguished from a deemed waiver) a condition precedent that requires action by Contractor to be satisfied, Contractor will remain bound to use diligent efforts to satisfy the condition precedent.

5.2 *Completion Dates.*

- (a) *Scheduled Final Completion Date.* The "Scheduled Final Completion Date" shall be the date that is thirty (30) days following the date of issuance of the Construction NTP, as may be extended solely in accordance with this Contract. Contractor shall achieve Final Completion by the Scheduled Final Completion Date.
- (b) Contractor will deliver to Concessionaire a notice of Final Completion ("Notice of Final Completion") after all the Work is complete. After receipt of Contractor's Notice of Final Completion, Concessionaire shall have ten (10) days to inspect the Project and all Work completed by Contractor and either: (a) deliver to Contractor a signed certificate of Final Completion; or (b) if reasonable cause exists for doing so, notify Contractor that Final Completion has not been achieved stating in reasonable detail the reasons therefor. Final Completion shall only be achieved hereunder if Concessionaire has provided a signed certificate of Final Completion to Contractor acknowledging that Contractor has satisfied all conditions of the Contract Documents. The foregoing process shall be repeated until Concessionaire is satisfied that all conditions set forth within Contract Documents have been satisfied.

5.3 *Adjustments.* The Scheduled Final Completion Date set forth in Section 5.2 (also referred to as the "Contract Time") shall be subject to adjustment in accordance with Section 10.

5.4 *Time is of the Essence.* Concessionaire and Contractor mutually agree that time is of the essence with respect to the Contract Time.

5.5 *Not Used.*

5.6 *Lane Closure Damages.*

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(a) If all lanes are not open to traffic during the times required in the approved request for a temporary lane closure, Contractor shall pay Concessionaire liquidated damages (“Lane Closure Damages”) in the amounts set forth below until all lanes are opened as determined by Concessionaire:

Lane Closure Damages (\$ per minute)			
Elapsed Time (min)	I-395, and all ramps which includes General Purpose Lanes, HOV and HOT Lanes	Major Arterials	All other roads
1-5, or any portion thereof	\$0	\$0	\$0
Every additional minute or any portion thereof after initial 5 minutes stated above	\$1,000 for the sixth minute plus \$1,000 per each additional minute	\$1,000 for the sixth minute plus \$500 per each additional minute	\$500 for the sixth minute plus \$500 per each additional minute

(b) If a lane closure outside the Technical Requirements that is not approved by the Concessionaire (a “Non-Permitted Closure”) occurs, Concessionaire will notify Contractor thereof and of the amount of associated Lane Closure Damages in writing within 48 hours of the Non-Permitted Closure. If there are no additional Non-Permitted Closures occurring within 90 days, Concessionaire shall refrain charging of the Lane Closure Damages for the prior Non-Permitted Closures. Otherwise, the Contractor shall pay all Lane Closure Damages to the Concessionaire within 30 days of the date on which last written notice of Lane Closure Damages is given to Contractor for violating having two (2) or more Non-Permitted Closure occurrences within 90 days. Once there is a clean period of 90 days without a Non-Permitted Closure occurrence, the new 90 days period will start for future Lane Closure Damages. All liquidated damage charges will be capped at \$5,000 per violated Non-Permitted Closure. For avoidance of doubt, Contractor shall pay all Lane Closure Damages to Concessionaire for Non-Permitted Closures that occur on all roadways except for the Non-Permitted Closures occurring within the 95 Express Lanes. If there are Non-Permitted Closures that occur on the 95 Express Lanes and another adjoining roadway, Contractor shall be responsible for 50% of the resulting Lane Closure Damages.

(c) In addition to the assessed Lane Closure Damages for failure to restore traffic lanes, Contractor will not be allowed further lane closures until the reason for the failure are evaluated and Contractor can provide assurance that the causes have been corrected. A formal submission as to the reasons for the failure to restore traffic lanes within the contract lane closure restrictions and the proposed corrective measures is to be provided to Concessionaire within two (2) days of the occurrence. Concessionaire will respond to the adequacy of the submission within two (2) working days of receipt. No modification of the Contract Price or Contract Time will be granted or considered for these days.

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- (d) Concessionaire may, at its sole discretion, choose not to assess damage recovery/user fees for failure to open traffic if such cause is not related to or caused by Contractor's operations.
- (e) Concessionaire reserves the right to monitor traffic conditions affected by the Work and to make additional restrictions as may be necessary, such as terminating a lane closure early.

5.7 ***Payment of Lane Closure Damages.*** Any Lane Closure Damages payable by Contractor shall be paid by Contractor or withheld by Concessionaire, as applicable, on the date of the Completion Payment.

5.8 ***Liquidated Damages Not Penalty.*** The parties acknowledge, recognize and agree on the following:

- (a) that because of the unique nature of the Project, it is difficult or impossible to determine with precision the amount of damages that would or might be incurred by Concessionaire as a result of Contractor's failure to complete the Work on or before the applicable Contract Time;
- (b) that any sums which would be payable under Section 5.6 are in the nature of liquidated damages, and not a penalty, and are fair and reasonable and such payment represents a reasonable estimate of fair compensation for the losses that may reasonably be anticipated from such failure; and
- (c) that any sums which would be payable under Section 5.6 shall be in lieu of all liability for any and all extra costs, losses, expenses, claims, penalties and any other damages, whether special or consequential, and of whatsoever nature incurred by Concessionaire which are occasioned by any non-permitted lane closures, as applicable. Notwithstanding the above, Lane Closure Damages are not intended to excuse Contractor from liability for any other breach of its obligations under the Contract Documents.

5.9 ***Obligation to Achieve the Contract Time.*** Contractor agrees that it will commence performance of the Work and achieve the Contract Time in accordance with this Section 5.

5.10 ***Not Used.***

Section 6 Electronic Documents

6.1 Contractor will utilize Concessionaire's electronic document management system if it is made available to Contractor for the Project. This system can accept electronic submission of submittals, Applications for Payment, proposed Work Orders and other items. By submitting documents electronically, Contractor is affirming that it has the appropriate license to use the documents, and it is not violating any copyright or other rights of owners of original documents.

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- 6.2 Contractor will utilize an electronic plan room to reference drawings if one is provided for its use.

Section 7 Indemnity

- 7.1 To the fullest extent permitted by law, Contractor will indemnify, protect and hold harmless Concessionaire and its surety (and any other parties as required by Contract Documents) and each of their respective officers, directors, members, managers, agents or employees, (individually, the “Indemnified Party” and collectively the “Indemnified Parties”) from any and all claims, losses, demands, judgments, suits, actions and proceedings, as well as all attorneys’ fees and costs, which may be asserted against any Indemnified Party, with respect to bodily injury, death or property damage to the extent arising out of or occurring in connection with: (i) any default, or failure to timely, properly, or fully perform the Work as required, by Contractor; (ii) any negligence, injury, loss, damage or death to any person or persons (including but not limited to any Indemnified Party) or any destruction of or damage to property; (iii) the use of unacceptable Materials in the Project; and/or (iv) any act or omission in violation of this Contract, or neglect or misconduct of Contractor. In no event may Contractor’s defense or indemnity obligations extend to the negligence of Concessionaire or other indemnitees.
- 7.2 To the fullest extent permitted by law, in addition to the express duties to indemnify, protect and hold harmless, there is a duty, separate from the duties in Section 7.1, to defend each Indemnified Party in connection with a claim, demand or suit described in Section 7.1 (collectively, the “Claims”). The duty to defend includes all costs of litigation, attorneys’ fees, expert and consultant fees, settlement costs and reasonable expenses in connection with the claim or litigation, regardless of whether the Claims are valid or groundless and regardless of whether the defense of an Indemnified Party is maintained by that party or assumed by Contractor, as long as the Claims asserted arise out of or relate to Contractor’s alleged or actual default described in Section 7.1(i), to an alleged or actual negligent act or omission or intentional wrongful act as described in Section 7.1(ii), to an alleged or actual use of unacceptable Materials as described in Section 7.1(iii) or to an act, omission, neglect or misconduct as described in Section 7.1(iv). An Indemnified Party, at its option, may defend any or all of the Claims (at Contractor’s expense) or tender to Contractor the defense of any or all of the Claims. Upon tender to Contractor, Contractor will promptly assume the defense of the Claims. If an Indemnified Party tenders the defense of a Claim to Contractor and Contractor fails to assume the defense, an Indemnified Party facing liability for the Claim may defend, compromise and/or settle any such suit or action, and Contractor will be bound and obligated to reimburse each Indemnified Party for the amount expended in settlement, and/or the amount expended in paying any judgment, together with all reasonable attorneys’ fees and costs of litigation, so long as the Indemnified Party demonstrates that the settlement or compromise was made in Good Faith and the Claim was one for which the duty of defense was owed.

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- 7.3 In addition to the foregoing obligations, where the Comprehensive Agreement requires Concessionaire to provide an indemnity or defense of VDOT or any other party, Contractor agrees that, in respect of its Work under this Contract, it will indemnify, defend and hold harmless: (i) VDOT and all applicable parties to the full extent required of Concessionaire under the Comprehensive Agreement to indemnify VDOT or any such parties; and (ii) Concessionaire, to the full extent that Concessionaire is required by the Comprehensive Agreement to indemnify, defend or hold harmless any such party with respect to Contractor's Work.
- 7.4 The obligations of this Section 7 are not limited by insurance limits in policies maintained by Contractor. Nothing in this Section 7 will be interpreted to require Contractor to indemnify, defend or hold harmless any party to the extent such an obligation is prohibited by law. To the extent that applicable law would invalidate any part of the indemnity and defense obligations of this Section 7, then this Section 7 will be interpreted and applied only to the extent legally permitted. To the extent that a claim is made by an employee of Contractor against an Indemnified Party, Contractor must defend, indemnify, and hold harmless the Indemnified Party to the same extent as if the claim was made by a non-employee of Contractor. Contractor waives any defense or immunity it may have under any applicable worker's compensation Laws or any other statute or judicial decision disallowing or limiting such defense and indemnification obligations.
- 7.5 Neither termination for any reason, nor the Completion Payment by Concessionaire, nor acceptance of the Work, will waive any obligations of Contractor under this Section 7.
- 7.6 The cause of action on a claim for indemnity under this Contract or any bond provided by Contractor will accrue on the later of: (i) the date of a written demand for indemnity to Contractor or its surety; or (ii) the date when Contractor or its surety makes the last payment with respect to which indemnity is sought.

Section 8 Limitations on Liability

- 8.1 *Not Used.*
- 8.2 ***Aggregate Liability Cap.*** Subject to Section 8.3, the total, maximum aggregate liability of Contractor to the Concessionaire arising out of this Contract, including, without limitation, for default, breach, negligence, indemnity obligations or otherwise in connection with this Contract claimed breach thereof, or the Work shall be limited to an amount equal to thirty percent (30%) of the Contract Price (the "**Aggregate Liability Cap**") herein, which liability arises under any theory of liability under applicable Law.
- 8.3 ***Exclusions from Liability Cap.*** The limitations of liability in Sections 8.1 and 8.2 do not apply to, nor will the calculation of such limitations include:
- (a) any liabilities or obligations to the extent that:

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- (i) the amount of such liabilities or obligations is paid from the proceeds of insurance maintained by VDOT or Concessionaire or required to be maintained by Contractor or Contractor Party under this Contract;
 - (ii) an amount is paid by Contractor but subsequently recovered by Contractor from proceeds of insurance referred to in Section 9.1, or from Concessionaire, VDOT or any third party (other than an entity providing insurance or a Contractor Party); or
 - (iii) the same would have been recovered by Contractor through such insurance if Contractor or any Contractor Party had maintained the coverage required to be maintained by it under this Contract, or if Contractor or such Contractor Party had otherwise complied with its obligations under, and the limitations of, such Insurance Policies and diligently pursued the relevant insurance claim;
- (b) liabilities that arise out of third-party claims (other than from VDOT) associated with the Work or the performance by Contractor or any Contractor Party of any obligations under this Contract (including any third-party claims for any damage or destruction of property, death or personal injury or third-party Intellectual Property);
 - (c) liabilities that arise out of the bad faith, willful misconduct, gross negligence or fraud of Contractor or any Contractor Party or any Contractor Default under Section 12.3(a)(i);
 - (d) any costs paid or incurred by Contractor in connection with its correction of any nonconforming Work or Defect;
 - (e) fines and penalties under any applicable Law or any costs that Contractor or any Contractor Party incurs or is liable for in complying with obligations that arise out of any failure by Contractor or any Contractor Party to comply with any applicable Laws (including workman's compensation, employment or health and safety laws or regulations); or
 - (f) fines and penalties under any applicable Law or any costs incurred by Contractor or any Contractor Party as a result of a failure by Contractor or any Contractor Party to comply with any applicable Laws (including workman's compensation, employment or health and safety laws or regulations).

8.4 ***Consequential Loss.*** To the maximum extent allowed by law, neither Party shall be liable to the other for any Indirect Losses suffered or incurred by such Party, provided that the following will not be deemed to be Indirect Losses:

- (i) any loss or reduction of the Contract Price received or receivable by Contractor under this Contract;

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- (ii) any compensation amount expressly required to be paid by either Party under Section 12;
- (iii) all damages, losses, liabilities and costs arising from any claim by a third party in respect of which Contractor or Concessionaire indemnifies the other Party under this Contract;
- (iv) losses that are covered liability for claims (including defense costs) to the extent (A) they are required to have been covered by insurance pursuant to this Contract and (B)(x) proceeds for which liability have actually been received, or (y) Contractor or Concessionaire, as applicable, failed to properly claim under and/or obtain or maintain such insurance in full force and effect as required in this Contract;
- (v) all losses arising out of the willful misconduct, gross negligence, fraud, criminal conduct, recklessness or bad faith on the part of any Contractor Party or Concessionaire;
- (vi) amounts that Concessionaire is substantially probable to owe or is obligated to pay or reimburse VDOT under the express provisions of the Comprehensive Agreement, or that VDOT sets-off or deducts from payments to Concessionaire, including any liquidated damages thereunder or any other damages owed to VDOT, in each case, of which Concessionaire actually pays to VDOT due to Contractor's performance or non-performance under this Contract; and
- (vii) interest, late charges, fees, transaction fees and charges, penalties and similar charges expressly provided under this Contract and the Contract Documents that arise out of the Work.

8.5 ***Statute of Limitations.*** Notwithstanding anything to the contrary in this Contract, neither Party may bring any action against the other Party in any way arising out of, or relating directly or indirectly to, this Contract, including any action in any way arising out of, or relating (directly or indirectly) to, any breach of contract or negligence in the performance of its obligations or of any indemnity obligation under this Contract, after the expiration of the relevant limitation period under the relevant statute of limitations. Neither Party will be obligated to exhaust its remedies against any insurer before being entitled to claim against the other Party.

Section 9 Insurance and Bonds

9.1 ***Insurance.*** Contractor shall procure and maintain insurance in accordance with the requirements set forth on **Exhibit G** (the “**Insurance Requirements**” and policies required thereunder, the “**Insurance Policies**”). Evidence of insurance shall be submitted on or before the date of this Contract.

9.2 ***Performance and Payment Bonds.***

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- (a) Contractor shall procure and maintain the Performance Bond and Payment Bond substantially in the form of **Exhibit H** executed by a surety that has a then-current policyholder's management and financial size category rating of not less than "A-: VIII" according to A.M. Best's Financial Strength Rating and Financial Size Category and meets any other standard or condition required by VDOT. Each of the Performance Bond and Payment Bond shall have a penal sum in the amount of one hundred percent (100%) of the Contract Price. Receipt of Performance and Payment Bond for the full Contract Price is a condition precedent to the execution and delivery of this Contract.
- (b) All bonds shall be executed by Contractor and a surety company or financial institution authorized to do business in Virginia in accordance with the laws of Virginia and the rules and regulations of the State Corporation Commission. To be considered properly executed, the Performance and Payment Bonds shall include authorized signatures and titles.
- (c) In lieu of Performance or Payment Bonds, the Contractor may furnish a certified check or cash escrow in the face amount required for each of the bonds, which will be held for the full statutory period as applicable for each bond.
- (d) If Contractor is structured as a limited liability company, partnership or joint venture, the bonding approach used will ensure that the members of such organizations will have joint and several liability for the performance of the Work required for the Project. A single 100% Performance Bond and a single 100% Payment Bond shall be provided regardless of any co-surety relationship.
- (e) Any increase in the Contract Price shall automatically result in a corresponding increase in the penal amount of the Performance Bond and Payment Bond without notice to or consent from the surety, such notice and consent being hereby waived. Decreases in the Contract Price shall not, however, reduce the penal amount of the Performance Bond and Payment Bond unless specifically provided in any Work Order decreasing the scope of the Work.

Section 10 Changes

10.1 Work Orders.

- (a) A "Work Order", is a written instrument, issued after the Contract Date signed by Concessionaire and Contractor, stating their agreement upon all of the following:
 - (i) The scope of the change in the Work;
 - (ii) The amount of the adjustment to the Contract Price; and

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- (iii) The extent of the adjustment to the Contract Time.
- (b) All changes in the Work authorized by applicable Work Order shall be performed under the applicable conditions of the Contract Documents. Concessionaire and Contractor shall negotiate in Good Faith and as expeditiously as possible the appropriate adjustments for such changes.
- (c) If Concessionaire requests a proposal for a change in the Work from Contractor and subsequently elects not to proceed with the change, a Work Order shall be issued to reimburse Contractor for reasonable costs incurred for estimating services and services involved in the preparation of proposed revisions to the Contract Documents.

10.2 *Contract Change Directive.*

- (a) A “Contract Change Directive” or “CCD” is a written order prepared and signed by Concessionaire, directing a change in the Work prior to agreement on an adjustment in the Contract Price and/or the Contract Time.
- (b) Concessionaire and Contractor shall negotiate in Good Faith and as expeditiously as possible the appropriate adjustments for the Contract Change Directive. Upon reaching an agreement, the parties shall prepare and execute an appropriate Work Order reflecting the terms of the agreement.
- (c) Concessionaire may issue a CCD by unilateral Work Order, subject further to the terms of Section 10.4(a)(iv).

10.3 *Minor Changes in the Work.* Minor changes in the Work do not involve an adjustment in the Contract Price and/or Contract Time and do not materially and adversely affect the Work, including the quality, performance and workmanship required by the Contract Documents (“Minor Changes”). Either party may make a written request to the other party to the Contract in the form attached as **Exhibit I** to make Minor Changes consistent with the intent of the Contract Documents. Any such Minor Change request may only be implemented by Contractor if such Minor Change request form attached as **Exhibit I** is signed in writing by Concessionaire. All Minor Change requests must certify that such Minor Change will not (i) impair or diminish any performance criteria or Work requirements, (ii) cause a delay to achieving the Contract Time and (iii) cause Contractor or Concessionaire to incur any additional cost or expense to complete the Project at the cost of Concessionaire. If either party disputes that such change is a Minor Change, the disputing party shall promptly notify the other party in writing. Upon request by Concessionaire, Contractor may be required to provide further evidence, at its sole cost and expense, to demonstrate that the proposed Minor Change is compliant and conformant with this Section 10.3. Any approved Minor Change requests must be catalogued and recorded as part of this Contract.

10.4 *Contract Price Adjustments.*

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- (a) The increase or decrease in Contract Price resulting from a change in the Work shall be determined by one or more of the following methods:
- (i) Unit prices set forth in this Contract or as subsequently agreed to between the parties;
 - (ii) A mutually accepted, lump sum, properly itemized and supported by sufficient substantiating data to permit evaluation by Concessionaire;
 - (iii) Costs, fees and any other markups set forth in accordance with Section 109.05 of the Division 1 Amendments; and
 - (iv) If an increase or decrease cannot be agreed to as set forth in Section 10.4(a)(i) through 10.4(a)(iii) above and Concessionaire issues a Contract Change Directive, the cost of the change of the Work shall be determined by the reasonable expense and savings in the performance of the Work resulting from the change, including a reasonable overhead and profit, as may be set forth in this Contract. If the net result of both additions and deletions to the Work is an increase in the Contract Price, overhead and profit shall be calculated on the basis of the net increase to the Contract Price. If the net result of both additions and deletions to the Work is a decrease in the Contract Price, there shall be no overhead or profit adjustment to the Contract Price. Contractor shall maintain a documented, itemized accounting evidencing the expenses and savings associated with such changes.
- (b) If unit prices are set forth in the Contractor's proposal or are subsequently agreed to by the parties, but application of such unit prices will cause substantial inequity to Concessionaire or Contractor because of differences in the character or quantity of such unit items as originally contemplated, such unit prices shall be equitably adjusted. Contractor shall bear the burden of proving that there is a substantial inequity in the unit rates.

10.5 *Emergencies.*

In any emergency affecting the safety of persons and/or property, Contractor shall act, at its discretion, to prevent threatened damage, injury or loss. Any change in the Contract Price and/or Contract Time on account of emergency work shall be determined as provided in this Section 10. Contractor shall comply with all requirements with respect to Emergency management and response under the Technical Requirements.

10.6 *Requests for Contract Adjustments and Relief.*

- (a) If Contractor believes that it is entitled to an adjustment to the Contract Price or Contract Time or other relief for any occurrence arising out of or related

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to the Work or Project, including the acts or omissions of Concessionaire, it shall submit a written request to Concessionaire stating the basis for such Contract Price or Contract Time adjustment or relief.

- (b) Such request shall be submitted: (a) prior to Contractor incurring any cost or expense, or performing any work on which the request is based; and (b) in accordance with any specific requirements contained in applicable sections of this Contract or, absent any specific requirement, then within a reasonable time, not to exceed five (5) days, after the time of the occurrence giving rise to the request for Contract Price or Contract Time adjustment or relief or after Contractor reasonably should have recognized the occurrence giving rise to the request for Contract Price or Contract Time adjustment or relief, whichever is later.
- (c) Such request shall include sufficient information to advise Concessionaire of the facts and circumstances giving rise to the request for Contract Price or Contract Time adjustment or relief, the specific contractual adjustment or relief requested and the basis for Contractor's entitlement to the adjustment or relief.
- (d) If Contractor in Good Faith is unable to provide final price or schedule information at the time of its written request, Contractor shall provide final price and schedule information no later than fifteen (15) days, or other time period as mutually agreed, from the date of submitting its request for contractual adjustment or relief.
- (e) In cases where Contractor does not submit final price and schedule information within fifteen (15) days, or other time period as mutually agreed, of submitting its request, it shall be considered a waiver of any request for contract adjustment or relief for Contract Price or Contract Time, unless otherwise agreed in writing by Concessionaire.

Section 11 Contract Interpretation and Disputes

- 11.1 For any dispute involving an act or omission of the VDOT or those for whom the VDOT is responsible, Contractor must follow the disputes procedures and requirements in the Comprehensive Agreement, and Contractor agrees it may be joined into any court or arbitration proceedings required by the Contract Documents. Contractor is bound to Concessionaire to the same extent that Concessionaire is bound to the VDOT, by the terms of the Contract Documents, and by any and all preliminary and final decisions or determinations made thereunder by the party, board, arbitrator(s), or court authorized in the Contract Documents or by law, regardless of whether Contractor is a party to the proceedings. Contractor will, as a condition precedent to its right to prosecute any claim, comply with all notice, claim, and dispute resolution provisions of the Contract Documents, including allowing a reasonable time for Concessionaire to analyze and forward to the VDOT any required communications or documentation.

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Contract adjustments will be made only to the extent that Concessionaire is entitled to relief from VDOT. It is expressly understood and agreed in connection with the determination of such disputes pursuant to this Section 11.1 that Concessionaire will not be liable to Contractor to any greater extent than VDOT is liable to Concessionaire. Further, each Contract adjustment will be equal only to Contractor's allocable share of any adjustment in Concessionaire's contract with VDOT. Contractor's allocable share will be determined by Concessionaire, after allowance of Concessionaire's normal overhead and profit on any recovery and Concessionaire's expense of recovery (including without limitation attorneys' fees), by making a reasonable apportionment, if applicable, between Contractor, Concessionaire, and other Subcontractors or persons with interests in the adjustment. Concessionaire's determination of Contractor's allocable share is final and not subject to review unless the determination was made in bad faith. Contractor agrees that it is an express condition precedent to any payment to Contractor for such disputes that Concessionaire receives payment from VDOT. Contractor will timely furnish Concessionaire with any claim certification required by the Contract Documents or by Law, in a form satisfactory to Concessionaire, and agrees to indemnify, defend, and hold Concessionaire harmless from any losses, claims, damages or expenses Concessionaire may incur as a result of Contractor's prosecution of claim and/or failure or inability to support any part of the claim as required by the certification or by Law. Concessionaire is not required to certify a claim when it cannot do so in Good Faith, and may, in its discretion, provide a qualified certification when appropriate.

- 11.2 Disputes between Contractor and Concessionaire not covered by Section 11.1 will at Concessionaire's election, to the extent allowed by law, be arbitrated under the American Arbitration Association's Construction Industry Arbitration Rules (the "Rules") subject to the limitations contained in this Section 11. Arbitration will be in Fairfax County, Virginia and may include other necessary parties.
- 11.3 A written notice to the other Party is required if either Party wishes to initiate a dispute pursuant to Section 11.1 or 11.2. Any such notice shall be provided by Concessionaire to Contractor within 7 Business Days of the occurrence of the event giving rise to such dispute. Any such notice shall be provided by Contractor to Concessionaire within 7 Business Days of either: (a) Concessionaire's denial of a change in the scope of the Work or (b) the occurrence of another event giving rise to a dispute. Failure to provide timely notice shall be considered a waiver of the Contractor's request for dispute resolution, unless otherwise agreed in writing by Concessionaire.
- 11.4 If Concessionaire or its surety notifies Contractor in Good Faith that any arbitration or lawsuit brought under Section 11.2 involves a controversy within the scope of Section 11.1, then the disputes process under Section 11.2 must be stayed until the procedures under Section 11.2 are completed.
- 11.5 If Concessionaire elects not to invoke the arbitration procedures set forth in Section 11.2, then all claims, disputes and other matters in controversy between

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Concessionaire and Contractor arising out of or relating to this Contract and covered by Section 11.2 will be resolved through litigation in the state court in the County of the Project or in the federal court closest to the location of the Project. EACH PARTY WAIVES ITS RIGHT TO A TRIAL BY JURY IN ANY LITIGATION RELATED TO THIS CONTRACT, UNLESS THE MATTER ARISES UNDER SECTION 11.1 AND THE CONTRACT DOCUMENTS ALLOW THE OWNER A RIGHT TO TRIAL BY JURY.

- 11.6 Unless otherwise agreed in writing by the parties, Contractor will timely and fully perform the Work during any dispute and Concessionaire will make undisputed payments to Contractor. Contractor will make relevant books and records available for inspection and copying if it asserts a claim for additional compensation, or if Concessionaire reasonably contends that Contractor is in default under this Contract, or to the extent otherwise required under the Contract Documents.
- 11.7 This Contract is governed by the laws of the Commonwealth of Virginia, without regard to any contrary conflicts of laws rules of that state. Both parties waive all claims for their own special, indirect, or consequential damages in connection with any dispute or claim related to this Contract or the Project. This waiver does not preclude liability for liquidated damages or consequential damages assessed by VDOT or payable to third parties.

Section 12 Termination

12.1 *Termination for Convenience.*

- (a) Upon ten (10) days written notice to Contractor, Concessionaire may, for its convenience and without cause, elect to terminate all or part of the Work if Concessionaire, in its sole discretion, determines that such a termination is in Concessionaire's best interests. Concessionaire shall notify Contractor of the decision to terminate by delivering to Contractor a written notice of termination specifying the extent of termination and its effective date (a "Notice of Termination"). Pursuant to this Section 12.1(a), Concessionaire shall have the right to terminate this Contract immediately (and this Contract shall terminate automatically upon delivery of written notice by Concessionaire to Contractor) upon termination of the Comprehensive Agreement for whatever reason.
- (b) After receipt of a Notice of Termination, and except as directed by Concessionaire, Contractor shall immediately proceed as follows, regardless of any delay in determining or adjusting any amounts due under this Section 12.1:
- (i) Stop any Work as specified in the notice;
 - (ii) Enter into no further Subcontracts and place no further orders for Materials, services or facilities, except as necessary to complete the continued portion of the Work, if any, or for mitigation of damages;

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- (iii) Unless instructed otherwise by Concessionaire, terminate all Subcontracts to the extent they relate to the Work terminated and except to the extent that continuation of this Contract is necessary in order to mitigate damages;
- (iv) Assign to Concessionaire or its designee in the manner, at the times, and to the extent directed by Concessionaire, all of the right, title, and interest of Contractor under the Subcontracts so terminated, in which case Concessionaire will have the right, in its sole discretion, to accept performance, settle or pay any or all claims under or arising out of the termination of such Subcontracts;
- (v) Settle outstanding liabilities and claims arising out of such termination of Subcontracts, with the approval or ratification of Concessionaire, to the extent it may require, which approval or ratification shall be final;
- (vi) Transfer and deliver to Concessionaire or its designee, as directed by Concessionaire: (1) possession and control of the Project; and (2) all right, title and interest of Contractor in and to: (i) the Work in process, completed Work, supplies and other Materials produced or acquired for the Work terminated; (ii) the Contract Documents and all other completed or partially completed drawings (including plans, elevations, sections, details and diagrams), specifications, records, reports, books, samples, information and other Work Product that would have been required to be furnished to Concessionaire if the Work had been completed; and (iii) all intellectual property developed specifically for the Project;
- (vii) Complete performance in accordance with the Contract Documents of all Work not terminated;
- (viii) Take all action that may be necessary, or that Concessionaire may direct, for the protection and preservation of the property related to the Contract Documents that is in the possession of Contractor and in which Concessionaire has or may acquire an interest; and
- (ix) As authorized by Concessionaire, use its best efforts to sell at fair market value any property of the types referred to in Section 12.1(c) below; provided, however, that Contractor: (1) shall not take any such action with respect to any items for which title has previously transferred to Concessionaire; (2) is not required to extend credit to any purchaser; and (3) may acquire the property itself, under the conditions prescribed and at prices approved by Concessionaire. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by Concessionaire under the Contract Documents or paid in any other manner directed by Concessionaire.

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- (c) *Inventory.* Contractor shall submit to Concessionaire a list of termination inventory not previously disposed of and excluding items authorized for disposition by Concessionaire; and within thirty (30) days of receipt of the list, Contractor shall deliver such inventory to Concessionaire and Concessionaire shall accept title to such inventory as appropriate.
- (d) *Settlement Proposal.* After termination, Contractor shall submit a final termination settlement proposal to Concessionaire in the form and with the certification prescribed by Concessionaire. Contractor shall submit the proposal promptly, but no later than thirty (30) days from the effective date of termination unless Contractor has requested a time extension in writing within such 30-day period and Concessionaire has agreed to allow such an extension.
- (e) *Amount of Termination Settlement.*
 - (i) Subject to clause (e)(ii) below, Contractor and Concessionaire shall negotiate in Good Faith to reach agreement on the settlement amount to be paid to Contractor by reason of the termination of Work pursuant to this Section 12.1 and any such settlement shall be subject to the dispute resolution provisions of Section 11. Such negotiated settlement shall include a reasonable allowance for profit solely on Work that has been performed as of the termination date. Such amount or amounts payable for the terminated Work, exclusive of demobilization costs, breakage costs and other shut-down costs, shall be the lesser of (x) the total Contract Price as reduced by the Contract Price of Work not performed and (y) any amount or amounts agreed upon by the Parties. Upon determination of the settlement amount, this Contract will be amended accordingly, and Contractor will be paid the agreed amount as described in this Section 12.1(e). Concessionaire's execution and delivery of any settlement agreement shall not be deemed to affect any of its rights with respect to compliance of the Work or any components of the Work which has achieved Final Completion, with all applicable Contract requirements, or any of its rights under payment and performance bonds or any of its rights against Subcontractors.
 - (ii) Notwithstanding clause (e)(i) above, if this Contract is terminated in accordance with applicable provisions of the Comprehensive Agreement providing for termination upon a default by VDOT or other event not arising from a breach by Concessionaire under the Comprehensive Agreement and this Contract is terminated under Section 12.1(e)(i) above, the termination settlement amount payable to Contractor shall be paid by Concessionaire only with proceeds of a termination payment received by Concessionaire from VDOT, in each case subject to Pay-When-Paid Principles.

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- (f) *No Agreement as to Amount of Claim.* In the event of failure of Contractor and Concessionaire to agree upon the amount to be paid Contractor by reason of the termination of Work pursuant to this Section 12.1, the amount payable (exclusive of interest charges) shall be determined in accordance with the Dispute Resolution Procedures.
- (g) *Reduction in Amount of Claim.* The amount otherwise due Contractor under this Section 12.1 shall be reduced by: (a) the amount of any valid claim which Concessionaire may have against Contractor in connection with this Contract; and (b) the agreed price for, or the proceeds of sale of, Materials, supplies or other things previously paid for by Concessionaire and to be retained by Contractor or sold by Contractor (with the proceeds being retained by Contractor), pursuant to the provisions of this Section 12.1.
- (h) *Payment.* Concessionaire may, from time-to-time, under such terms and conditions as it may prescribe and in its sole discretion, make partial payments on account against costs incurred by Contractor in connection with the terminated portion of this Contract, whenever in the opinion of Concessionaire the aggregate of such payments shall be within the amount to which Contractor will be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this Section 12.1, such excess shall be payable by Contractor to Concessionaire upon demand together with interest at a variable rate per annum equal to the reference rate announced by Bank of America, N.A., from time-to-time, plus one percent (1%).
- (i) *Inclusion in Subcontracts.* Contractor shall insert in all Subcontracts that the Subcontractor shall stop Work on the date of, and to the extent specified in, a Notice of Termination from Concessionaire, and shall require that Subcontractors insert the same provision in each subcontract at all tiers. Contractor shall communicate, immediately upon receipt thereof, any Notice of Termination issued by Concessionaire to all affected Subcontractors.
- (j) *No Consequential Damages.* In the event of a termination for convenience under this Section 12.1, Contractor acknowledges and agrees that it shall not be entitled to any compensation in excess of the value of the Work performed plus its settlement and closeout costs. Under no circumstances shall Contractor or any Subcontractor be entitled to anticipatory or unearned profits, unabsorbed overhead, opportunity costs, or consequential or other damages as a result of a termination for convenience under this Section 12.1. The payment to Contractor determined in accordance with this Section 12.1 constitutes Contractor's exclusive remedy for a termination hereunder.

12.2 *Concessionaire's Right to Stop Work.*

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- (a) Concessionaire may, without cause and for its convenience, order Contractor in writing to stop and suspend the Work. Any stoppage or suspension pursuant to this Section 12.2 in excess of sixty (60) days (whether consecutive or in aggregate) shall entitle Contractor to terminate the Contract Documents pursuant to Section 12.1.
- (b) Contractor is entitled to seek an adjustment of the Contract Price and/or Contract Time if its cost or time to perform the Work has been adversely impacted by any suspension or stoppage of work by Concessionaire, by requesting a Work Order.
- (c) In case of suspension of work, Concessionaire shall issue instructions and directions to Contractor as to the implementation of the suspension, which may include directing Contractor to develop a maintenance and transition plan. Unless specifically directed otherwise by Concessionaire, Contractor shall, during the suspension period, continue to have full responsibility for the Project, including but not limited to its obligations to take such precautions as may be necessary to prevent damage to the Work, comply with Governmental Approvals, and ensure public safety. Such obligations include, but are not limited to, erosion control and drainage and erection of any necessary temporary structures, signs, or other facilities necessary or appropriate for the protection of the Work and the public. During the suspension of the Work, Contractor shall properly and continuously maintain in acceptable growing condition all living material in newly established plantings, seeding, and soddings furnished under the Contract and shall take adequate precautions to protect vegetation against damage.

12.3 *Contractor Default; Concessionaire's Right to Perform and Terminate for Cause.*

- (a) *Contractor Default.* The occurrence of any one or more of the following will constitute a "Contractor Default":
 - (i) Contractor Abandons the Project or makes any written repudiation of this Contract or any of its terms;
 - (ii) Contractor fails to commence the Work upon receipt of Concessionaire's NTP or as directed by Concessionaire;
 - (iii) Contractor fails to progress the Work diligently to ensure that Final Completion is likely to be achieved by the Scheduled Final Completion Date;
 - (iv) Contractor fails to complete the Work within seventy-five (75) days of Construction NTP;
 - (v) provide a sufficient number of skilled workers, Equipment, or supply the Materials required by the Contract Documents;

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- (vi) Contractor fails to comply with the third sentence of Section 16.8 (Assignment);
- (vii) an Insolvency Event arises with respect to Contractor or any Contractor Member, as applicable;
- (viii) Contractor fails to pay any amount due to Concessionaire under this Contract when due, except to the extent the payment is being reasonably disputed by Contractor, which failure continues for twenty (20) days after written notice of such non-payment;
- (ix) any representation or warranty made by Contractor in this Contract or any certificate, schedule, report, instrument or other document delivered to Concessionaire in accordance with this Contract is or was false, misleading or inaccurate when made, in each case in any material respect, or omits material information when made;
- (x) Contractor fails to comply with any Governmental Approval or applicable Law in any material respect;
- (xi) Contractor fails to promptly comply with any order to stop and suspend the Work issued by Concessionaire in accordance with Section 12.2;
- (xii) Contractor fails to allow VDOT or Concessionaire to inspect the Site, the Work and any Materials or documents where required under this Contract;
- (xiii) Contractor fails, for any reason other than failure of Concessionaire to make payments to Contractor when obligated in accordance with this Contract, to make prompt payments required to be made by Contractor to any Subcontractor that are not in dispute, which failure continues for ten (10) days after written notice of such non-payment (which notice requirement will be deemed waived if applicable Law prohibits the giving of such notice);
- (xiv) Contractor fails to obtain any Performance Bond or Payment Bond when required under this Contract or any such Performance Bond or Payment Bond is terminated, or is no longer maintained in full force and effect, as applicable;
- (xv) Contractor, at any time, fails to obtain, provide and maintain the insurance in accordance with Section 9.1; and
- (xvi) without limiting Section 12.3(a)(i) through (xv), Contractor materially breaches any other obligation under this Contract or any Contractor Party engages in fraud, criminal conduct, willful misconduct, recklessness or bad faith.

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- (b) If any of the conditions set forth in Section 12.3(a) above exists, Concessionaire will give written notice to Contractor and its surety of the condition (“Contractor Default Notice”).
- (c) Upon receipt of a Contractor Default Notice, the following cure periods will apply:
 - (i) for a Contractor Default under Section 12.3(a)(i) (*Abandonment*), 12.3(a)(i) (*Completion Date*), 12.3(a)(vi) (*Assignment*) and 12.3(a)(vii) (*Insolvency Event*), there is no cure period; or
 - (ii) for each other Contractor Default, unless otherwise noted in Section 12.3(a) for any specific Contractor Default a period of ten (10) days after Contractor receives the Contractor Default Notice.
- (d) If a Contractor Default occurs that has no cure period or if it is not cured within the applicable cure period, Concessionaire may, in its sole discretion:
 - (i) require Contractor to prepare and implement a Remedial Plan in accordance with Section 12.3(e); or
 - (ii) terminate this Contract in accordance with Section 12.3(f).
- (e) *Remedial Plan for Contractor Default.*
 - (i) Without prejudice to any other right or remedy available to Concessionaire, if a Contractor Default occurs (whether or not any cure period has expired), Concessionaire may require Contractor to prepare and submit to Concessionaire, within any period as Concessionaire determines, a plan to remedy or cure the relevant Contractor Default, as applicable (“Remedial Plan”).
 - (ii) Within ten (10) days of receiving a Remedial Plan, Concessionaire must notify Contractor as to whether Concessionaire accepts the Remedial Plan. If Concessionaire determines that the Remedial Plan is not acceptable, Concessionaire may for a Contractor Default terminate this Contract in accordance with Section 12.3(f) or notify Contractor of its deficiency and require correction of the deficiency within five (5) days of the notice.
 - (iii) If Concessionaire notifies Contractor that its Remedial Plan is acceptable, Contractor must diligently implement the Remedial Plan in accordance with its terms.

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(f) *Termination for Contractor Default.*

- (i) If a Contractor Default occurs and:
 - (A) there is no cure period for that Contractor Default under Section 12.3(c);
 - (B) Concessionaire determines that the Contractor Default has not been cured within the relevant cure period under Section 12.3(c); or
 - (C) if Concessionaire requires Contractor to deliver a Remedial Plan under Section 12.3(e), one of the following applies:
 - (1) Contractor fails to deliver the required Remedial Plan within the time required by Concessionaire or Concessionaire rejects any Remedial Plan that is delivered, in each case in accordance with Section 12.3(e); or
 - (2) where a Remedial Plan has been accepted by Concessionaire, Concessionaire determines that Contractor or its sureties have failed to comply with the Remedial Plan or cure the Contractor Default, in each case in accordance with the schedule provided in that Remedial Plan,

Concessionaire may by written notice to Contractor terminate this Contract ("Concessionaire Termination Notice"). A Concessionaire Termination Notice must specify the Contractor Default that has occurred and the date that this Contract will terminate.

(g) *Taking Over the Work*

- (i) If Concessionaire terminates this Contract in accordance with this Section 12.3:
 - (A) in addition to any other right available at law or in equity, Concessionaire may:
 - (1) take possession, for the purpose of completing the Work, of all Materials, completed Work, Subcontracts, Intellectual Property, Work Product, Insurance Policies, and other items that have been purchased or provided for the performance of the Work or that Contractor is able to assign or transfer to Concessionaire;

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- (2) employ any Person or Persons to complete the Work and provide all of the required labor, services, Materials, Equipment and other items; and

Contractor must at no cost to Concessionaire transfer and assign the items referred to in this Section 12.3(g) and comply with all requirements in Section 12.1(b), including assigning all Subcontracts to Concessionaire as may be requested by Concessionaire.

(h) *Payments on Termination for Contractor Default.*

- (i) If Concessionaire terminates this Contract in accordance with Section 12.3(f):

- (A) Contractor will not be entitled to receive any further payments under Contract; and

- (B) Contractor must pay Concessionaire, within thirty (30) days upon demand, an estimated amount equal to the aggregate of:

- (1) all Losses incurred or estimated to be incurred by Concessionaire associated with termination of this Contract and the Contractor Default (the "Concessionaire Estimated Damages"); and

- (2) any claims that have accrued up to, and remain unpaid as of, the date of termination of this Contract.

- (C) upon Final Completion, Concessionaire will calculate its actual Losses incurred due to such termination of this Contract (the "Concessionaire Actual Damages"), and based on such calculation:

- (1) if Concessionaire Actual Damages are less than the Concessionaire Estimated Damages, then Concessionaire will return any Concessionaire Estimated Damages received in excess of the Concessionaire Actual Damages; or

- (2) if Concessionaire Actual Damages are more than the Concessionaire Estimated Damages, Concessionaire may issue a demand to Contractor to pay Concessionaire, within thirty (30) days upon demand, a final amount equal to Concessionaire Actual Damages not otherwise previously received from Contractor.

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- (ii) Without limiting the generality of Section 12.3(h)(i)(B)(1), Concessionaire's Losses associated with termination of this Contract for a Contractor Default will include:
 - (A) Concessionaire's costs and expenses in completing the Work including:
 - (1) all costs and expenses that Concessionaire has incurred or will incur in completing all of the Work, less the remaining balance of the Contract Price;
 - (2) all Losses and expenses (including attorney and other advisor fees and expenses) incurred by Concessionaire in connection with any re-procurement of the Work; and
 - (3) all costs and expenses (including attorney and other advisor fees and expenses) incurred by Concessionaire defending claims arising from the Contractor's performance or non-performance (including any Claims by Concessionaire); and
 - (B) subject to Section 8, losses that have or will be incurred by Concessionaire for any reasonable delay or projected delay to the timely achievement of the Contract Time that remain outstanding on the date of termination of this Contract.
- (i) *Improper Termination for Contractor Default.* If it is finally determined, pursuant to Section 11, that Concessionaire incorrectly terminated this Contract for a Contractor Default:
 - (i) Concessionaire will be deemed to have terminated this Contract for convenience under Section 12.1; and
 - (ii) Contractor's sole relief for such improper termination will be the applicable termination compensation under and in accordance with Section 12.1(e).

Section 13 Not Used.

Section 14 Legal Responsibilities

Contractor shall keep fully informed of federal, state, and local laws, bylaws, ordinances, orders, decrees, and regulations of governing bodies, courts, and agencies having any jurisdiction or that affects those engaged or employed on the Work, the conduct of the Work, or the execution of any documents in connection with the Work. The Contractor shall comply with all Laws applicable to the Project, including the applicable Federal Requirements described on **Exhibit C**. Contractor shall execute and file the documents,

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statements, certifications, and affidavits required under any applicable federal or state law or regulation required by or affecting the Contract or prosecution of the Work thereunder. Contractor shall permit examination of any records made subject to such examination by any federal or state law or by regulations promulgated thereunder by any state or federal agency charged with enforcement of such law.

Section 15 Not Used.

Section 16 Miscellaneous

16.1 ***Representations and Warranties of Concessionaire.*** Concessionaire represents and warrants, as of the Contract Date, that:

- (a) *Existence and Powers.* Concessionaire is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Delaware, and has the authority to do business in the Commonwealth of Virginia and in any other state in which it conducts its activities, with the full legal right, power and authority to enter into and perform its obligations under this Contract.
- (b) *Due Authorization and Binding Obligation.* This Contract has been duly authorized, executed and delivered by Concessionaire, and constitutes a legal, valid and binding obligation of Concessionaire, enforceable against Concessionaire in accordance with its terms, except to the extent that its enforceability may be limited by bankruptcy, insolvency or other similar laws affecting creditors' rights from time to time in effect and equitable principles of general application.
- (c) *No Conflict.* To the best of its knowledge, neither the execution and delivery by Concessionaire of this Contract nor the performance by Concessionaire of its obligations in connection with the transactions contemplated hereby or the fulfillment by Concessionaire of the terms or conditions hereof:
 - (i) Conflicts with, violates or results in a breach of any constitution, law or governmental regulation, by-laws or certificates of incorporation applicable to Concessionaire; or
 - (ii) Conflicts with, violates or results in a material breach of any term or condition of any order, judgment or decree, or any contract, agreement or instrument, by which Concessionaire's properties or assets are bound, or constitutes a material default under any of the foregoing.
- (d) *No Approvals Required.* No additional approval, authorization, order or consent of, or declaration, registration or filing with, any Governmental Authority is required for the valid execution and delivery by Concessionaire of this Contract except otherwise as such have been duly obtained or made.

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- (e) *No Litigation Affecting Concessionaire.* Except as disclosed in writing to Contractor, to the best of its knowledge, there is no Legal Proceeding before or by any Governmental Authority pending or, to the best of Concessionaire's knowledge, overtly threatened or publicly announced against Concessionaire, in which an unfavorable decision, ruling or finding could reasonably be expected to have a material and adverse effect on the execution and delivery of this Contract by Concessionaire or the validity, legality or enforceability of this Contract against Concessionaire, or any other agreement or instrument entered into by Concessionaire in connection with the transactions contemplated hereby or on the ability of Concessionaire to perform its obligations hereunder or under any such other agreement or instrument.
- (f) *Intellectual Property.* Concessionaire owns or has express rights to use or can acquire on reasonable terms, all Intellectual Property necessary for the performance of its obligations without any known material conflict with the rights of others.
- (g) *Information Supplied by Concessionaire.* The information supplied and representations and warranties made by Concessionaire in this Contract are true, correct and complete in all material respects.

16.2 *Representations and Warranties of Contractor.*

Contractor, and each Contractor Member, solely with respect to itself and Contractor, represents and warrants, as of the date of this Contract, that:

- (a) *Existence and Powers.* Contractor is a limited liability company, validly existing and in good standing under the laws of the Commonwealth of Virginia, and has the authority to do business in Virginia and in any other state in which it conducts its activities, with the full legal right, power and authority to enter into and perform its obligations under the Contract Documents and has or will have when necessary, all required licenses to carry on its present and proposed activities. Contractor affirms that it is properly registered and owes no outstanding reports with the Virginia Secretary of State in accordance with applicable Law.
- (b) *Due Authorization and Binding Obligation.* This Contract has been duly authorized, executed and delivered by all necessary action of Contractor and each Contractor Member and constitutes a legal, valid and binding obligation of Contractor and each of its members, enforceable against Contractor and each Contractor Member in accordance with its terms, except to the extent that its enforceability may be limited by bankruptcy, insolvency or other similar laws affecting creditors' rights from time to time in effect and equitable principles of general application.

CONSTRUCTION CONTRACT TERMS AND CONDITIONS

- (c) *No Conflict.* To the best of Contractor's knowledge and each of its members' knowledge, neither the execution nor delivery by Contractor or each such Contractor Member of this Contract nor the performance by Contractor or each Contractor Member of its obligations in connection with the transactions contemplated hereby or the fulfillment by Contractor or Contractor Member of the terms or conditions hereof:
- (i) Conflicts with, violates or results in a breach of any constitution, law, governmental regulation, by-laws or certificates of incorporation applicable to Contractor or each Contractor Member; or
 - (ii) Conflicts with, violates or results in a material breach of any order, judgment or decree, or any contract, agreement or instrument to which Contractor, each Contractor Member or any of their Affiliates is a party or by which Contractor, each Contractor Member or any of their Affiliates or any of their properties or assets are bound, or constitutes a default under any of the foregoing.
- (d) *No Approvals Required.* No approval, authorization, order or consent of, or declaration, registration or filing with, any Governmental Authority is required for the valid execution and delivery of this Contract by Contractor or any Contractor Member except as such have been duly obtained or made.
- (e) *No Litigation Affecting Contractor.* Except as disclosed in writing to Concessionaire, to the best of their knowledge, there is no Legal Proceeding, at law or in equity, before or by any court or Governmental Authority pending or, to the best of Contractor's and each Contractor Member's knowledge, overtly threatened or publicly announced against the Contractor, each Contractor Member or any of their Affiliates, in which an unfavorable decision, ruling or finding could reasonably be expected to have a material and adverse effect on the execution and delivery of this Contract by Contractor and Contractor Member or the validity, legality or enforceability of this Contract against Contractor and each Contractor Member, or any other agreement or instrument entered into by Contractor or any Contractor Member in connection with the transactions contemplated hereby, or on the ability of Contractor or Contractor Member to perform their obligations hereunder or under any such other agreement or instrument.
- (f) *No Litigation Affecting the Subcontractors.* Except as disclosed in writing to Concessionaire, to the best of its knowledge, there is no Legal Proceeding, at law or in equity, before or by any court or Governmental Authority pending or, to the best of Contractor's knowledge, overtly threatened or publicly announced against Contractor or any Subcontractor, in which an unfavorable decision, ruling or finding could reasonably be expected to have a material and adverse effect on the execution and delivery

CONSTRUCTION CONTRACT TERMS AND CONDITIONS

of the Contractor or any Subcontractor by Contractor or respective Subcontractor or the validity, legality or enforceability of this Contract or any subcontract against the Subcontractor that is party to the subcontract, or on the ability of Contractor or any Subcontractor to perform its obligations under its respective subcontract.

- (g) *Intellectual Property.* Contractor owns, or has express rights to use or can acquire on reasonable terms, all Intellectual Property necessary for the performance of the Work without any known material conflict with the rights of others.
- (h) *Information Supplied by Contractor.* The information supplied and representations and warranties made by Contractor in all submittals made to Concessionaire or VDOT in connection with its proposal and in all post-proposal submittals with respect to Contractor (and to Contractor's knowledge, all information supplied in such submittals with respect to the Subcontractors) are true, correct and complete in all material respects.
- (i) *Contractor Reviews.* Contractor has carefully reviewed the whole of the Contract Documents and has taken all steps it considers reasonably necessary to satisfy itself that nothing contained herein inhibits or prevents Contractor from performing and completing the Work in accordance with the Contract Documents.
- (j) *Compliance with Applicable Law Generally.* Contractor and each Contractor Member are in compliance in all material respects with applicable Laws pertaining to Contractor's and each Contractor Member's business and services.
- (k) *Contractor Members.* The only "Contractor Members" are CES Consulting, LLC and each such member is duly formed under the laws under the state of its organization, is qualified to conduct business in the Commonwealth of Virginia, has the requisite power and all required licenses to carry on its present and proposed activities, and has full power, right and authority to execute and perform each and all of its obligations under this Contract.
- (l) *Ownership of the Site.* Contractor acknowledges VDOT's ownership interest in the Site as described in the Comprehensive Agreement.
- (m) *Environmental Stipulations.* The Contractor hereby stipulates that during the term of this Contract any facility used in the performance of the Contract is not listed on the EPA's List of Violating Facilities pursuant to 40 C.F.R. 1520.

16.3 ***Continuing Accuracy of Contractor Representations and Warranties.*** During the term of this Contract, Contractor and each Contractor Member, as applicable, shall not take any action, or omit to perform any act, that results in a representation and warranty made in Sections 16.2(a), 16.2(b), 16.2(c), 16.2(d), 16.2(g), 16.2(h),

CONSTRUCTION CONTRACT TERMS AND CONDITIONS

16.2(i), 16.2(j), 16.2(k), 16.2(l) and 16.2(m) becoming untrue. Contractor shall promptly notify Concessionaire if any such representation and warranty becomes untrue. From time to time, Contractor shall provide Concessionaire, upon Concessionaire's request, with information reasonably requested by Concessionaire to substantiate the continuing accuracy of these representations and warranties.

- 16.4 Contractor confirms its obligation to comply with all applicable clauses in the Contract Documents, and all applicable Laws. Contractor will ensure that all clauses and obligations of the Contract Documents are included in all Lower Tier subcontracts and purchase orders as required by the Contract Documents. Contractor will comply with the Federal Requirements and Civil Rights Requirements set forth on **Exhibit C** and in addition will comply with all such policies promulgated by any Governmental Authority.

16.5 *Administrative Requirements*

- (a) Foreign Professional Corporations and Foreign Professional Limited Liability Companies must possess a Commonwealth of Virginia Certificate of Authority from the State Corporation Commission to render professional services.
- (b) Any business entity other than a professional corporation, professional limited liability company or sole proprietorship must be registered in the Commonwealth of Virginia with the Department of Professional & Occupational Regulation, Virginia Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Decorators and Landscape Architects (http://www.dpor.virginia.gov/dporweb/ape_reg.pdf). Board regulations require that all professional corporations and business entities that have branch offices located in Virginia which offer or render any professional services relating to the professions regulated by the Board be registered with the Board. Registration involves completing the required application and submitting the required registration fee for each and every branch office location in the Commonwealth. All branch offices that offer or render any professional service must have at least one full-time resident professional in responsible charge that is licensed in the profession offered or rendered at each branch. All firms involved that are to provide professional services must meet this criteria prior to a contract being executed by Contractor.
- (c) Concessionaire will not consent to Contractor's subcontracting any portions of the Contract to any subconsultants in violation of the provisions of the Federal Immigration Reform and Control Act of 1986, which prohibits employment of illegal aliens.
- (d) Contractor must have internal control systems in place that meet federal requirements for accounting. These systems must comply with

CONSTRUCTION CONTRACT TERMS AND CONDITIONS

requirements of 48 CFR 31, "Federal Acquisition Regulations, Contract Cost Principles and Procedures," and 23 CFR 172, "Administration of Engineering and Design Related Service Contracts."

- (e) Contractor assures compliance with Title VI of the Civil Rights Act of 1964, as amended. The Contractor and all Subcontractors shall submit a Title VI Evaluation Report (EEO-D2) when requested by the Concessionaire. This requirement applies to all consulting firms with fifteen (15) or more employees.
 - (f) All subcontractors shall be prequalified by VDOT prior to performing any Work on the Contract.
 - (g) The required services may involve the handling of VDOT Critical Infrastructure Information/Sensitive Security Information (CII/SSI) material. Personnel handling CII/SSI material, visiting Critical Infrastructure (CI) facilities or performing bridge/tunnel inspections are required to sign CII/SSI Non-Disclosure Agreements and pass a fingerprint-based Criminal History Background Check (CHBC). Contractor will be allowed to replace those individuals who fail to successfully pass the fingerprint-based CHBC. VDOT reserves the right to conduct fingerprint-based CHBC on all employees of Contractor's team members, or on any proposed replacements during the term of the contract who will be involved in the Project. All costs associated with the fingerprint-based CHBC are the responsibility of Contractor. A VDOT issued photo-identification badge is required for each employee of the Contractor's team who will need access to VDOT's CI facilities or who will be performing bridge/tunnel inspections. Based upon the results of the fingerprint-based CHBC, VDOT reserves the right to deny access to CII/SSI material and issuance of a VDOT security clearance or a VDOT issued photo-identification badge.
- 16.6 All notices, consents, requests or other communications will be in writing, unless otherwise expressly provided to the contrary and will be deemed to have been made or given on the date sent when e-mailed (to the extent permitted by the Contract Documents), hand-delivered, or transmitted as electronic facsimile to the other party, at the address noted in this Contract. If notice is sent by first class mail or by overnight or similar services, it will be deemed made three (3) Business Days after mailing or upon receipt, whichever is first. Either party may designate a different address by written notice given to the other.
- 16.7 If any provision of this Contract is determined to be illegal, invalid or unenforceable under present or future laws, the parties intend the remainder to be unaffected and enforceable. In place of each clause or provision that may be determined to be illegal, invalid, or unenforceable, and to the full extent permitted by law, the court or arbitrator is authorized to add a legally permissible clause or provision as similar as possible to that found unenforceable.

CONSTRUCTION CONTRACT TERMS AND CONDITIONS

- 16.8 This Contract has been reviewed, negotiated, and accepted voluntarily and after due consideration, with advice from counsel as the parties deemed appropriate, and represents the entire agreement of the parties, except as specifically stated otherwise herein. This Contract may be amended only by Work Order signed by the parties. No part of this Contract may be assigned by Contractor without Concessionaire's written consent. Concessionaire may assign this Contract to VDOT or a non-profit special purpose entity established by the Commonwealth of Virginia to deliver the Project, or any or all of its rights under this Contract and the other Contract Documents without Contractor's consent. If VDOT (or an entity established by the Commonwealth of Virginia) succeeds to Concessionaire's rights under the Contract (by assignment or otherwise), then Contractor agrees that it will (A) maintain usual and customary books and records for the type and scope of operations of business in which it is engaged, (B) permit audit thereof by VDOT and (C) allow VDOT to assume the benefit of the Concessionaire's Contract rights and the work performed thereunder, with liability only for those remaining obligations accruing after the date of assumption, but excluding any monetary claims or obligations that Concessionaire may have against such Contractor that existed prior to VDOT's assumption of this Contract.
- 16.9 Except as required by law, Concessionaire's sureties have no greater or different obligation to pay Contractor than does Concessionaire, and further are entitled to enforce this Contract. Concessionaire's surety is an express third-party beneficiary of this Contract. VDOT is a third party beneficiary to the extent required by the Contract Documents. There are no other third-party beneficiaries.
- 16.10 The persons executing this Contract, and any Work Orders, claims, and lien or claim waivers or releases on behalf of Contractor, have actual authority to execute those documents.
- 16.11 Without limiting any other provision of this Contract, and notwithstanding any provision of this Contract to the contrary, this Contract shall be deemed to incorporate by reference, the contract provisions required under Sections 24.02(f), (g), (h), and (i), and 8.11 (to the extent applicable to the Contractor's Work under this Contract) of the Comprehensive Agreement (including imputation of any required representation or warranty upon Contractor). Contractor shall cause the foregoing provisions to be included in each Subcontract at every tier. VDOT shall be a third party beneficiary of this Section 16.11.
- 16.12 Attached hereto as **Exhibit J** is that certain Task Order No. 1, with a commencement date of April 25, 2022, to that certain Master Services Agreement between Contractor and Transurban (USA) Operations Inc., dated as of March 1, 2022 (the "Master Services Agreement"), and that certain Amendment No. 1 to Task Order No. 1, dated as of July 14, 2022 (such Task Order No. 1 and Amendment No. 1 to Task Order No. 1, collectively, the "Task Order"). The Parties hereby acknowledge and agree that: (i) notwithstanding Section 13.6 (*Entire Agreement*) of the Master Services Agreement, any "Services" (as defined in the Task Order) performed by Contractor under the Task Order shall be deemed to have

CONSTRUCTION CONTRACT TERMS AND CONDITIONS

been performed under this Contract and governed by the terms and conditions of Work performed hereunder, including but not limited to the terms and conditions set forth in Sections 4.9, 4.10 and 7; (ii) any undertakings, obligations, guarantees, warranties and liabilities of whatsoever nature of Contractor under the Master Services Agreement insofar as they are relevant to the performance of any Services by Contractor under the Task Order shall also be or be deemed to be the undertakings, obligations, guarantees, warranties and liabilities of whatsoever nature of Contractor under this Contract; (iii) the “Period of Performance” (as defined in the Task Order) shall have ended as of the date of this Contract in accordance with the terms of the Task Order; and (iv) any references to the “Company” under the Task Order shall be interpreted to mean either Concessionaire or Transurban (USA) Operations Inc.

[Signature Page Follows]

IN WITNESS WHEREOF, the Parties have caused this Contract to be executed by their duly authorized representatives on the day and year first above written.

95 EXPRESS LANES LLC

By: _____
Name: Pierce R. Coffee
Title: President

Address for Notices:

95 Express Lanes LLC
6440 General Green Way
Alexandria, VA 22312
Attention: Group General Manager
Facsimile: (571) 419-6101

with a copy to:

95 Express Lanes LLC
6440 General Green Way
Alexandria, VA 22312
Attention: Legal Counsel

CES CONSULTING, LLC

By: _____

Name: Scott C. Hunter

Title: Director of Construction

Address for Notices:

CES Consulting, LLC

23475 Rock Haven Way, Suite 255

Dulles, VA 20166

Exhibit A

Definitions

“Abandon” means to abandon all or a material part of the Work, which will be deemed to have occurred if:

(a) Contractor demonstrates through statements, acts or omissions an intent not to continue to perform all or a material part of the Work; or

(b) no significant Work on the Project or a material part of the Project is performed for a continuous period of more than 10 days.

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

“Aggregate Liability Cap” is defined in Section 8.2.

“Application for Payment” is defined in Section **Error! Reference source not found.**

“Authorized Representative” is defined in Section 4.2.

“Books and Records” is defined in Section 3.4.

“Business Day” means any day on which VDOT is officially open for business.

“Claim” is defined in Section 7.2.

“Completion Payment” is defined in Section 3.1(a).

“Comprehensive Agreement” means the “Third Amended and Restated Comprehensive Agreement Relating to the I-95/395 HOV/HOT Lanes Project”, dated as of August __, 2022, between VDOT and Concessionaire, as amended.

“Concessionaire” is defined in the preamble.

“Concessionaire Actual Damages” is defined in Section 12.3(h).

“Concessionaire Estimated Damages” is defined in Section 12.3(h).

“Concessionaire Termination Notice” is defined in Section 12.3(f).

“Construction Notice to Proceed” or **“Construction NTP”** is defined in Section 5.1.

“Construction Quality Management Plan” means the Construction Quality Management Plan developed by Contractor, as described in more detail in the Technical Requirements.

“Contract” is defined in the preamble.

“Contract Change Directive” or **“CCD”** is defined in Section 10.2(a).

“Contract Date” is defined in the preamble.

“Contract Documents” is defined in Section 2.1.

“Contract Price” is \$89,458.50.

“Contract Time” is defined in Section 5.3.

“Contractor” is defined in the preamble.

“Contractor Default” is defined in Section 12.3(a).

“Contractor Default Notice” is defined in Section 12.3(b).

“Contractor Member” is defined in Section 16.2(k).

“Contractor Party” means Contractor and any Affiliate and any agents, Representatives, officers, directors, employees, contractors, suppliers and materialmen of Contractor or any Affiliate.

“Day” or **“day”** means a calendar day.

“Defect” means a deterioration in the condition or performance of an asset, whether by construction, installation, damage or wear, affecting the condition, use, functionality or operation of any Project Asset, which would cause or have the potential to cause one or more of the following:

- (a) a hazard, nuisance or other risk to public or worker health or safety, including the health and safety of road users;
- (b) a structural deterioration of the affected Project Asset;
- (c) damage to a third party’s property or equipment;
- (d) damage to the Environment; or
- (e) failure of the affected Project Asset to meet a performance requirement.

“Definitions” means the definitions set forth on this **Exhibit A**.

“Direct Losses” means:

(a) any loss, damage, cost, expense, charge, fee, injury, liability, obligation, judgement, penalty or fine, in each case including attorneys', accountants' and expert witnesses' fees and expenses (including reasonable costs for demobilization and re-mobilization of Subcontractors where applicable),

(b) any increase in the cost to Concessionaire to perform its obligations under any Contract Document to the extent such increase is not caused by Concessionaire; and

(c) any reduction in amounts received or receivable by Concessionaire under the Comprehensive Agreement arising out of, related to or in connection with the Project, as may be updated from time to time in accordance with the Comprehensive Agreement, to the extent such reduction is not caused by Concessionaire.

“Dispute” means any Claim, dispute, disagreement or controversy between Concessionaire and the Contractor concerning their respective rights and obligations under the Contract Documents, including concerning any alleged breach or failure to perform and remedies.

“Dispute Resolution Procedures” means the dispute resolution procedures set forth in Section 11.

“Emergency” means any unplanned event within the Project Right of Way that:

(a) presents an immediate or imminent threat to the long term integrity of any part of the infrastructure of the Project, to the Environment, to property adjacent to the Project or to the safety of road users or the traveling public; or

(b) has jeopardized the safety of road users or the traveling public.

“Environment” means soil, surface waters, groundwaters, land, stream sediments, surface or subsurface strata and ambient air.

“Environmental Management Plan” means the plan developed by the Contractor that sets forth the Contractor's approach to environmental management, as described in more detail in the Technical Requirements.

“Equipment” means machinery, tools and other apparatuses, together with the necessary supplies for upkeep and maintenance thereof, that are necessary for the completion of the Work.

“Federal” means of or relating to the central government of the United States of America.

“Federal Requirements” means the provisions required to be part of federal-aid contracts relating to highway projects and applicable to the Project, including the provisions set forth in **Exhibit C**.

“Final Completion” means the “Final Completion” for the Project as set forth in Section 5.2(b).

“Good Faith” means the observance of reasonable commercial standards of fair dealing in a given trade or business.

“Good Industry Practice” means the industry practices and standards that would be exercised by a prudent and experienced concessionaire, engineer, contractor, operator or maintenance provider engaged in the same kinds of undertakings and under similar circumstances as those applying to the Work.

“Governmental Approvals” means all local, regional, state and Federal agreements, studies, findings, permits, approvals, authorizations, certifications, consents, decisions, exemptions, filings, leases, licenses, registrations, rulings and other governmental authorizations required to be obtained or completed under Law prior to undertaking any particular activity contemplated by this Contract, Contract Documents or a Work Order.

“Governmental Authority” means any court, Federal, state, or local government, department, commission, board, bureau, agency or other regulatory or governmental authority.

“Hazardous Environmental Condition” means the presence of any Hazardous Substances on, in, under or emanating from the Project Right of Way that is present at concentrations or in quantities that: (a) may present an imminent or substantial safety or health hazard for VDOT the Contractor or their respective employees, agents, representatives or independent contractors, the general public or the surrounding Environment or (b) are required to be removed or remediated as a matter of Law or in accordance with the requirements of any Governmental Authority.

“Hazardous Substances” means, but is not limited to, any solid, liquid, gas, odor, heat, sound, vibration, radiation or other substance or emission which is or could be considered a contaminant, pollutant, dangerous substance, toxic substance, Hazardous Waste, solid waste, or hazardous material which is or becomes regulated by Laws or which is classified as hazardous or toxic under Laws.

“Hazardous Waste” means a waste that is (a) listed as a hazardous waste in 40 CFR Section 261.31 to 261.33, and (b) exhibits one of the following characteristics: ignitability, corrosivity, reactivity or toxicity, or is otherwise defined as a hazardous waste by Law.

“Health, Safety and Security Plan” means the plan developed by the Contractor that defines the health, safety and security activities required during the construction of the Project, as described in more detail in **Exhibit E**.

“Indemnified Party” and **“Indemnified Parties”** is defined in Section 7.1.

“Indirect Losses” means punitive, exemplary, indirect or consequential losses or damages (including loss of profit, future revenue, increased cost of capital or loss of business opportunity), excluding Direct Losses.

“Insolvency Event” means:

(a) Contractor or Contractor Member commences a voluntary case seeking liquidation, reorganization, or other relief with respect to Contractor or Contractor'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 Contractor or Contractor Member seeking liquidation, reorganization, dissolution, winding up, a composition or arrangement with creditors, a readjustment of debts or other relief with respect to such Contractor or Contractor Member'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 50 days;

(c) in any voluntary or involuntary case seeking liquidation, reorganization or other relief with respect to Contractor or Contractor Member or their debts under any U.S. or foreign bankruptcy, insolvency or other similar law, this Contract 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 55 days) with respect to any member of Concessionaire.

It shall not be an "Insolvency Event" where a Person owing to Contractor or Contractor Member has fully met all financial obligations owing to Contractor or Contractor Member, as the case may be, in the form of a committed investment and payments or transfers of money or property previously made to or for the benefit of Contractor or Contractor Member are not subject to §544, §547, §548, or §550 of the Bankruptcy Code, or any similar Law respecting the avoidance or recovery of preferences or fraudulent transfers, including any applicable enactment of the Uniform Fraudulent Transfer Act.

"Insurance Policies" is defined in Section 9.1.

"Insurance Requirements" is defined in Section 9.1.

"Intellectual Property" means the electronic toll and traffic management books and records, copyrights (including moral rights), trademarks (registered and unregistered), designs (registered, including applications, and unregistered), patents (including applications), circuit layouts, source code and source code documentation, plant varieties, business and domain names, inventions, trade secrets, proposals, copyrightable works, customer and supplier lists and information, and other results of intellectual activity, copies and tangible embodiments of all of the foregoing (in whatever form or medium) and licenses granting any rights with respect to any of the foregoing (to the extent assignable), in each case, relating to the Project.

"Lane Closure Damages" is defined in Section 5.6.

“**Law**” is defined in Section 2.2(a).

“**Legal Proceeding**” means every action, suit, litigation, arbitration, administrative proceeding, and other legal or equitable proceeding having a bearing upon this Contract, and all appeals therefrom.

“**Losses**” means, with respect to any Person, any losses, liabilities, judgments, damages, fees, penalties, fines, sanctions, charges or out-of-pocket and documented costs or expenses actually suffered or incurred by such Person, including as a result of any injury to or death of persons or damage to or loss of property.

“**Lower Tiers**” is defined in Section 2.4.

“**Master Services Agreement**” is defined in Section 16.12.

“**Materials**” means any substance that is used in the Work specified in this Contract.

“**Minor Changes**” is defined in Section 10.3.

“**Non-Permitted Closures**” is defined in Section 5.6(b).

“**Notice of Final Completion**” is defined in Section 5.2(b).

“**Notice of Termination**” is defined in Section 12.1(a).

“**Party**” and “**Parties**” are defined in the preamble.

“**Pay-When-Paid Principles**” means that payment to Contractor is dependent upon Concessionaire’s receipt of a corresponding payment from VDOT, any such payment will only become due and payable under this Contract to Contractor within fifteen (15) Business Days or such other period of time set out in this Contract or otherwise agreed by the Parties following Concessionaire’s actual receipt of any such corresponding payment from VDOT.

“**Payment Bond**” means a payment bond required by the Contract Documents.

“**Performance Bond**” means a performance bond required by the Contract Documents.

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

“**Project**” means the development and construction, of the Project Assets, all as more particularly described in the Technical Requirements and in this Contract.

“**Project Assets**” means the Seminary Road Ramp HOT Lanes (as defined in the Comprehensive Agreement) and other assets constructed, maintained or held by Concessionaire as part of the Seminary Road Ramp Project (as defined and further described in the Comprehensive Agreement) (or any applicable portion of such assets).

“Project Right of Way” means the real property identified in Exhibit B-2 (Design Plans).

“Remedial Action” means any action to manage, treat, handle, store, monitor, remove, transport or dispose of Hazardous Substances.

“Remedial Action Plan” means the plan developed by Contractor with respect to Hazardous Substances encountered by Contractor within the Project Right of Way, as described in more detail in the Technical Requirements.

“Remedial Plan” is defined in Section 12.3(e)(i).

“Representative” means, with respect to any Person, any director, officer, employee, official, lender (or any agent or trustee acting on its behalf), partner, member, owner, agent, lawyer, accountant, auditor, professional advisor, consultant, engineer, contractor, other Person for whom such Person is, under Law, responsible or other representative of such Person and any professional advisor, consultant or engineer designated by such Person as its “Representative.”

“Rules” is defined in Section 11.2.

“Scheduled Final Completion Date” is defined in Section 5.2(a).

“Site” means the geographical area reasonably expected to be a part of the worksite for the Work.

“Software” means (a) computer instructions, including programs, routines and databases and applications supplied, procured or developed by Concessionaire, VDOT or Contractor in connection with the operation of the Project or in connection with Reserved Rights (as defined in the Comprehensive Agreement), including but not limited to that which monitors, controls or executes on electronic toll and traffic management equipment or Intelligent Transportation System equipment or hardware, and (b) all modifications, updates and revisions made to the matter described in clause (a) above, including those made to correct errors or to support new models of computer equipment and/or new releases of operating systems.

“Source Code and Source Code Documentation” mean Software written in programming languages, such as C and Fortran, including all comments and procedural code, such as job control language statements, in a form intelligible to trained programmers and capable of being translated into object or machine readable code for operation on computer equipment through assembly or compiling, and accompanied by documentation, including flow charts, schematics, statements of principles of operations, architectural standards, and commentary, explanations and instructions for compiling, describing the data flows, data structures, and control logic of the software in sufficient detail to enable a trained programmer through study of such documentation to maintain and/or modify the Software without undue experimentation. Source Code and Source Code Documentation also include all modifications, additions, substitutions, updates, upgrades and corrections made to the foregoing items.

“Subcontract” means any contract, subcontract or other form of agreement between Contractor, a Subcontractor and any other Person to perform any part of the Work or provide any Materials, Equipment or supplies for any part of the Work, at all tiers.

“Subcontractor” means any Person with whom Contractor has entered into any contract to perform any part of the Work or provide any Materials, Equipment or supplies for the Project, on behalf of Contractor, and any other Person with whom any Subcontractor has further subcontracted any part of the Work, at all tiers.

“Task Order” is defined in Section 16.12.

“Technical Requirements” means the Technical Requirements included as part of **Exhibit B** (including all Attachments thereto), and as the same may be revised and updated from time to time in accordance with this Contract.

“TMS Contractor” means Transurban (USA) Inc., a Delaware corporation.

“Uniform Act” means the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended.

“Unknown Pre-Existing Hazardous Substances” means any Hazardous Substances present on the Project Right of Way or portion thereof as of the date that Concessionaire assumes responsibility of such Project Right of Way or portion that was not known, or could not reasonably have been known using Good Industry Practices, to Contractor prior to such date.

“Utilities” means any and all utility installations whatsoever (including gas, water, sewer, electricity, telephone, chilled water and telecommunications), and all piping, wiring, conduit, and other fixtures of every kind whatsoever related thereto or used in connection therewith.

“VDOT” means the Virginia Department of Transportation, an agency of the Commonwealth of Virginia, and any other state agency succeeding to the powers, authorities and responsibilities of such department invoked by or pursuant to the Comprehensive Agreement.

“Warranty Period” is defined in Section 4.10(a).

“Work” is defined in Section 2.1.

“Work Order” is defined in Section 10.1(a).

“Work Product” means all the data, information, documentation and other work product produced, prepared, obtained or deliverable by or on behalf of Contractor for the Project or the Project Right of Way, including but not limited to drawings, plans and specifications, record and as-built plans and specifications, engineering documents, geotechnical soils and soil boring data, analyses, reports and records, property acquisition files, agreements and documents (including records of payment and related correspondence, title policies, parcel diaries and all construction documents relating to the Work), engineers’ and inspectors’ diaries and reports, s, right of way record maps and surveys, traffic and revenue studies, and other feasibility data, analyses, studies and reports, correspondence and memoranda relevant to construction decisions, contracting plans, air quality monitoring data, environmental reviews, studies and reports, mitigation studies and reports, data, assessments, studies and reports regarding Hazardous Substances investigations, testings, borings, monitoring and analyses, manifests regarding handling, storage or transportation of Hazardous Substances, correspondence and agreements relating to Governmental Approvals,

Work Orders, final quantities, pile driving records, records of accidents and traffic management, field test records and reports, concrete pour records, surfacing depth check records, grade and alignment books, cross-section notes, drainage notes, photographs, false work and form plans, records of construction materials, and any other documents which can be reasonably described as technical or engineering documents. Work Product expressly excludes, however, documents and information which the Contractor and VDOT mutually agree in writing, or which a court determines, to be exempted or protected from public disclosure under Section 18.02 of the Comprehensive Agreement and which is not conceived or first reduced to practice for the purposes of the Project, such as proprietary financial and pricing information of Contractor.