

**THE AMTRAK STATION IMPROVEMENT PROJECT
KEYSTONE CORRIDOR – MIDDLETOWN STATION**

Public-Private Transportation Partnership Agreement

[●], 2018

Between

**THE PENNSYLVANIA DEPARTMENT OF TRANSPORTATION
as the Department**

and

**[●]
as the Development Entity**

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**THE AMTRAK STATION IMPROVEMENT PROJECT
KEYSTONE CORRIDOR – MIDDLETOWN STATION**

THIS PUBLIC-PRIVATE TRANSPORTATION PARTNERSHIP AGREEMENT dated as of [●], 2018 (this **PPA**) is entered into by and

BETWEEN:

- (1) **THE PENNSYLVANIA DEPARTMENT OF TRANSPORTATION** (the **Department**), an executive agency of the Commonwealth of Pennsylvania (the **Commonwealth**); and
- (2) [●], a [*describe corporate form and jurisdiction of formation*] (the **Development Entity**).

The Department and the Development Entity are hereinafter sometimes referred to individually as a **Party** and collectively as the **Parties**.

BACKGROUND:

- (A) The Department, in connection with the National Passenger Rail Corporation (**Amtrak**), wishes to upgrade and improve the station facilities at the Station through a public-private partnership project, as contemplated herein. This project will consist of (i) developing, designing, constructing, financing, operating and maintaining parking facilities (the **Parking Facility**) that provide a minimum of 400 parking spaces specific for transportation use, including the administration, collection, and accounting for all parking fees; (ii) designing, constructing and financing an extension of Emaus Street and the sidewalk along Emaus Street as set forth in the Technical Provisions (the **Emaus Street Extension**); (iii) designing, constructing and financing a pedestrian bridge over PA 230 (the **Pedestrian Bridge**); (iv) providing Maintenance Work with respect to the Station and the Project Sites; (v) ensuring public safety and security at the Project; (vi) responsibility for all Project Site development including all utilities necessary to support the Project, hardscape/landscape, parking facilities, street improvements, and construction Project Site security; (vii) obtaining permitting and licensing requirements, demand studies, drainage, and other requirements needed and all associated activities related to each of the foregoing, including all associated fees; and (viii) retail, lodging or other services and/or facilities developed and managed by the Development Entity on the Project Sites, all as more fully described herein (collectively, the **Project**).
- (B) On September 12, 2016, the Department issued a Request for Qualifications (the **RFQ**) regarding a proposed future solicitation for the Project.
- (C) On January 27, 2017, pursuant to the process outlined in the RFQ, the Department selected a proposer that would be eligible to submit a proposal in response to the Request for Proposal issued by the Department based on its financial and technical qualifications as detailed in its response to the RFQ.

- (D) On July 27, 2018, the Department issued to such proposer the Request for Proposal (including a form of this PPA) [and thereafter issued a series of addenda thereto (collectively, the **RFP**).]
- (E) On [●], the Department received the response of [●] (the **Proposer**) on behalf of the Development Entity.
- (F) On [●], pursuant to the evaluation process outlined in the RFP, the Department accepted the Proposer's Proposal. The Department's decision was based on its overall evaluation of the Proposal and the Department's conclusion that the Proposal sufficiently satisfied all criteria required by the RFP and offered the best value.
- (G) On [●], the Commonwealth's Public Private Transportation Partnerships Board authorized the Department, amongst other things, to advance the implementation and delivery of the Project as a public-private partnership project and enter into this PPA.

NOW, THEREFORE, in consideration of the sums to be paid by the Department to the Development Entity, the Project Services to be financed and performed by the Development Entity and the covenants and agreements set out herein, the Parties hereby agree as follows:

1. Definitions; Project Documents

1.1 Definitions; Construction and Interpretation of Agreement

- (a) Definitions for all capitalized terms used in this PPA are contained in Schedule 1 (Definitions) hereto. If any such terms are used in any other Project Document, unless expressly provided otherwise, they shall have the same respective meanings therein as defined herein.
- (b) The language in all parts of this PPA shall in all cases be construed simply, as a whole and in accordance with its fair meaning and not strictly for or against any Party. The Parties hereto acknowledge and agree that this PPA has been prepared jointly by the Parties and has been the subject of arm's length and careful negotiation over a considerable period of time, that each Party has been given the opportunity to independently review this PPA with legal counsel, and that each Party has the requisite experience and sophistication to understand, interpret and agree to the particular language of the provisions hereof. Accordingly, in the event of an ambiguity in or Dispute regarding the interpretation of this PPA, this PPA shall not be interpreted or construed against the Party preparing it, and instead the other applicable rules of interpretation and construction set out herein shall be utilized.
- (c) Any references to any covenant, condition, obligation and/or undertaking **herein, hereunder** or **pursuant hereto** (or language of like import) mean, refer to and include the covenants, conditions, obligations and undertakings existing in this PPA and any Exhibits, Schedules, Forms, Appendices, addenda, attachments or other documents affixed to or expressly incorporated by reference in this PPA. The words **herein, hereof** and **hereunder** and any other words of similar import

shall be construed to refer to this PPA in its entirety and not to any particular provision of this PPA. All terms defined in this PPA shall be deemed to have the same meanings in all Exhibits, Schedules, Forms, Appendices, addenda, attachments or other documents affixed to or expressly incorporated by reference in this PPA, unless the context thereof clearly requires the contrary. All references to this PPA or any other agreement shall include all Exhibits, Schedules, Forms, Appendices, addenda, attachments or other documents affixed to or expressly incorporated herein or therein by reference. Unless expressly provided otherwise, all references to Articles, Sections, subsections, clauses, Exhibits, Schedules, Forms and Appendices refer to the Articles, Sections, subsections, clauses, Exhibits, Schedules, Forms and Appendices set out in or attached to this PPA, as applicable. Unless otherwise stated in this PPA or the other Project Documents, words which have well-known technical or construction industry meanings are used in this PPA or the other Project Documents in accordance with such recognized meanings. All references to a subsection or clause **above** or **below** refer to the denoted subsection or clause within the Section in which the reference appears. Wherever the word **including**, **includes** or **include** is used in the Project Documents, it shall be deemed to be followed by the words **without limitation**. In the computation of periods of time from a specified date to a later specified date, the word **from** means **from and including** and the words **to** and **until** mean **to and including**.

- (d) As used in this PPA and as the context may require, (i) the singular includes the plural and vice versa, and the masculine gender includes the feminine and vice versa; (ii) any definition of or reference to any agreement, instrument or other document shall be construed as referring to such agreement, instrument or other document as amended, supplemented or otherwise modified from time to time (subject to any restrictions on such amendments, supplements or modifications set out herein or therein); and (iii) any reference to a Person shall be construed to include such Person's permitted successors and assigns.
- (e) Portions of the Project Documents are written in active voice, imperative mood. In sentences using the imperative mood, unless otherwise specifically stated, the subject **Development Entity** is implied, and it is understood the Development Entity shall perform such work, comply with the requirements of, furnish such material, or take such action. The word **shall** is also implied, and when implied or stated, is to be considered mandatory and, unless otherwise specifically stated, to pertain to requirements or actions of the Development Entity.
- (f) Unless indicated to the contrary, all determinations, consents or approvals of the Department shall not be unreasonably withheld, conditioned or delayed.

1.2 Project Documents; Order of Precedence

- (a) In the event of any conflict, ambiguity or inconsistency between any terms or provisions of this PPA, the order of precedence, from highest to lowest, shall,

except as provided otherwise in this Section 1.2 (Project Documents; Order of Precedence) be as follows:

- (i) any amendments to this PPA;
- (ii) any provision establishing a higher standard of safety, reliability, durability, performance or service shall take precedence over a provision establishing a lower standard of safety, reliability, durability, performance or service;
- (iii) the main body of this PPA;
- (iv) the Schedules to this PPA;
- (v) the Appendices to this PPA other than the Development Entity's Proposal Commitments; and
- (vi) the Development Entity's Proposal Commitments,

in each case as amended or supplemented from time to time in accordance with the terms of this PPA.

- (b) In the event of any conflict, ambiguity or inconsistency between or among any of the provisions in this PPA, or between two or more Project Documents having the same order of precedence, the more stringent standard will prevail.
- (c) If any ambiguity, conflict or inconsistency is not readily resolved by the foregoing provisions of this Section 1.2, then the Development Entity, upon discovery of same, shall immediately give written notice to the Department. The Department shall, within 10 Business Days after such notice, make a determination of which provision governs and give notice of such determination, in writing, to the Development Entity.
- (d) If the Development Entity's Proposal Commitments include statements, terms, concepts or designs that can reasonably be interpreted as offering to provide higher quality items than otherwise required by the other Project Documents or to perform services or meet standards in addition to or better than those otherwise required, then the Development Entity's obligations hereunder shall include compliance with all such statements, terms, concepts and designs as set out in the Development Entity's Proposal Commitments.
- (e) Additional or supplemental details or requirements in a lower priority Project Document shall be given effect except to the extent they irreconcilably conflict with requirements, provisions and practices contained in the higher priority Project Document.

1.3 Responsibility for Related Parties

Subject to the provisions of this PPA, in respect of the Development Entity's performance or non-performance of the Project Documents, the Development Entity shall be responsible for the acts and omissions of the Development Entity-Related Entities as if they were the acts and omissions of the Development Entity. Accordingly, the fact that the Development Entity did not select any Contractor will be no defense by the Development Entity in the event that it fails to perform its obligations or incurs any liability under this PPA.

2. Effectiveness, Conditions Precedent to Closing

2.1 Term and Effectiveness

- (a) The term of this PPA shall commence on the date of this PPA and shall end on the earlier of (i) the 30th anniversary of the Station Completion Date, and (ii) the Early Termination Date (the **Term**).
- (b) All the provisions of this PPA shall come into effect on the Commercial Closing Date.

2.2 Conditions Precedent to the Commercial Closing Date

The occurrence of the Commercial Closing Date is subject to the fulfillment (or waiver by the non-obligated Party) of the following conditions:

(a) Corporate Documents

The Development Entity shall have delivered to the Department such documents and certificates as the Department may reasonably request evidencing the organization, existence and good standing of the Development Entity and the authorization of the entry by the Development Entity into the Project Documents and any Key Contracts to which it is a party.

(b) Development Entity Opinions

The Development Entity shall have provided to the Department customary legal opinions, addressed to and in form and substance satisfactory to the Department, from external legal, or in respect of the opinion contemplated in Section 2.2(b)(iv) below, internal counsel as to:

- (i) organization and existence of the Development Entity;
- (ii) due authorization and execution of the Project Documents;
- (iii) enforceability of, and no violation of law or the Development Entity's organizational documents with respect to, each Project Document; and

(iv) the absence of material litigation.

(c) Representations and Warranties of the Development Entity

The representations and warranties of the Development Entity set out in Section 21.1 (Development Entity Representations and Warranties) of this PPA shall be true and correct in all material respects as at the date of this PPA.

(d) Representations and Warranties of the Department

The representations and warranties of the Department set out in Section 21.2 (Department Representations and Warranties) of this PPA shall be true and correct in all material respects as at the date of this PPA.

(e) Qualification to Do Business

The Development Entity shall have provided to the Department evidence reasonably satisfactory to the Department that

- (i) the D&C Contractor and the Maintenance Contractor, or to the extent that the D&C Contractor or the Maintenance Contractor is a consortium, partnership, or other form of joint venture, each member of the D&C Contractor performing Construction Work and each member of the Maintenance Contractor performing Maintenance Work as applicable, is prequalified under 67 Pa. Code Ch. 457;
- (ii) to the extent that the D&C Contractor is a consortium, partnership or other form of joint venture, each member of the D&C Contractor is capable of performing at least 50% of the original contract price relating to the member's responsibilities under the D&C Contract as provided in 67 Pa. Code § 457.15(c); and
- (iii) the Development Entity and each Development Entity-Related Entity with which contracts have been entered into prior to the Commercial Closing Date shall be a Registered Business Partner of the Commonwealth.

(f) Project Documents

Each of the following shall have been executed by the relevant parties thereto and be in form and substance approved by the Department (such approval not to be unreasonably withheld or delayed and it being acknowledged by the Department that to the extent that a term or provision of a document is materially consistent with the form of the same document (or heads of terms relating thereto) that was submitted with the Proposal, it would be unreasonable for the Department to withhold or delay its approval of such term or provision) and a copy of each such document, certified by the Development Entity as being true, complete and accurate, shall have been delivered to the Department:

- (i) the D&C Contract;
- (ii) the D&C Direct Agreement;
- (iii) the Maintenance Contract; and
- (iv) the Construction Security (if any).

(g) **Attorney General Ratification**

The PPA has been approved as to form and legality by the Attorney General of the Commonwealth pursuant to the act of October 15, 1980 (P.L. 950, No. 164), as amended, known as the Commonwealth Attorneys Act.

(h) **Environmental Liability Acknowledgement**

The Development Entity shall have executed and delivered an acknowledgment of its responsibilities in respect of Hazardous Materials, as set forth in Article 6 (such confirmation, an **Environmental Liability Acknowledgement**), substantially in the form attached as Schedule 4 (Form of Environmental Liability Acknowledgement).

(i) **[Guarantee]**

[If the Proposal specifies a Guarantor, the Development Entity shall have provided to the Department an executed guaranty substantially in the form attached as Schedule 22 (Form of Guarantee).]

3. Grant of Right

3.1 Grant of Right

- (a) Subject to the terms and conditions of the Project Documents, the Department hereby grants to the Development Entity the exclusive right, and the Development Entity accepts such right and acknowledges its obligation, to (i) develop, design, construct, upgrade, implement and finance certain elements of the Project, (ii) maintain the Maintained Facilities in accordance with the terms of the Project Documents; (iii) operate the Parking Facility; and (iv) subject to the terms of the Ground Lease, cause the Commercialization Entity to conduct Commercialization Activities in accordance with the Project Documents.
- (b) Without limiting the Development Entity's rights under this PPA, it is the express intent and agreement of the Parties that this PPA shall in no way be deemed to constitute a lease to the Development Entity (whether an operating lease or a financing lease) or, except as expressly provided herein or in the Ground Lease, a grant (regardless of the characterization of such grant, including by way of easement, purchase option, conveyance, lien or mortgage), in each case, of any right, title, interest or estate in the Project, a Project Site, or of any assets

incorporated into, appurtenant to, or in any way connected with the Project. It is the express agreement and intent of the Parties that the Development Entity shall not be treated as or deemed to be the legal or equitable owner of any Project Site for any purpose. The Development Entity's rights hereunder are derived solely from its status as a Development Entity and independent contractor as described in this PPA, and as the lessee pursuant to the Ground Lease, and not as an owner of any other interest in real property. The payments to be received by the Development Entity under this PPA are not payments in the nature of rent, fees with respect to real property or purchase price of real property.

3.2 Access to Project Sites

- (a) For the purposes of performing its obligations under the Project Documents only (and exercising of its rights hereunder), the Development Entity shall, subject to the terms and conditions of the Project Documents, have the right to enter onto (and engage in the activities contemplated herein) each Project Site.
- (b) The Department shall arrange for the Development Entity's Access to each Project Site in accordance with the provisions of Schedule 3 (Site Access Restrictions).
- (c) The Department shall not to in any way materially or unduly interfere with the Development Entity in the performance of its obligations (and exercising of its rights hereunder) under the Project Documents in accordance with the terms of the Project Documents (having regard always to the use of any of the Project Facilities and any other operations or activities carried out by the Department on any Project Site in order to perform its functions).
- (d) The Development Entity shall, in the performance of the Project Services at each Project Site, coordinate with any third parties that may from time to time have access rights to such Project Site, including the Borough, Amtrak and Norfolk Southern.

3.3 Collaborative Nature of the Project

Each Party agrees to cooperate, at its own expense, with the other Party in the fulfillment of the purposes and intent of this PPA. Neither Party shall be under any obligation to perform any of the other Party's obligations under the Project Documents.

3.4 Disclosed Information

- (a) The Department does not give any warranty or undertaking as to the relevance, completeness, accuracy or fitness for any purpose of any of the Disclosed Information. The Disclosed Information is for information purposes only, and is not mandatory or binding on the Development Entity. Subject to the terms of the Project Documents, the Development Entity is not entitled to rely on the Disclosed Information as accurately describing existing conditions, presenting design, engineering or maintenance solutions or directions, or defining means or

methods for complying with the requirements of the Project Documents, Governmental Approvals or Applicable Law.

- (b) Subject to the terms of the Project Documents, neither the Department nor any of its respective agents, officers or employees shall have any liability to the Development Entity in respect of any:
 - (i) inaccuracy, omission, unfitness for any purpose or inadequacy of any kind whatsoever in the Disclosed Information;
 - (ii) failure to make available to the Development Entity any materials, documents, drawings, plans or other information relating to the Project; or
 - (iii) causes of action, claims or Losses whatsoever suffered by any Development Entity-Related Entity by reason of any use of information contained in, or any action or forbearance in reliance on, the Disclosed Information.

- (c) The Development Entity shall, subject to the terms of the Project Documents, be deemed to have:
 - (i) satisfied itself as to the assets to which it will receive rights (including each Project Site and, where applicable, any existing structures, Utilities or work on, over or under such Project Site) and the nature and extent of the risks assumed by it under the Project Documents;
 - (ii) satisfied itself as to the nature of the general conditions of each Project Site, the nature of the ground and subsoil, the form and nature of each Project Site, the risk of injury or damage to property near to or affecting each Project Site and to occupiers of such property, the nature of the materials (whether natural or otherwise) to be excavated, and the nature of the design, work, materials, plant, machinery or equipment necessary for the purpose of carrying out its obligations under the Project Documents; and
 - (iii) satisfied itself as to:
 - A. the Access to and through each Project Site and the adequacy of the Access in respect thereof for the purpose of carrying out its obligations under the Project Documents;
 - B. the precautions and times and methods of working necessary to prevent or (if it is not possible to prevent) to mitigate or reduce, any nuisance or interference, whether public or private, being caused to any third parties; and
 - C. the scope of the Disclosed Information.

- (d) The Development Entity acknowledges and confirms that it has not entered into this PPA on the basis of, and has not relied upon, any statement or representation (whether negligent, innocent or otherwise) or warranty or other provision (in each case whether oral, written, express or implied) made or agreed to by the Department or any of its respective agents or employees, except those expressly repeated or referred to in the Project Documents and the only remedy or remedies available in respect of any misrepresentation or untrue statement made to it shall be any remedy available under this PPA.
- (e) Subject to any rights that the Development Entity has pursuant to the terms of the Project Documents, the Development Entity shall not in any way be relieved from any obligation under the Project Documents nor shall it be entitled to claim against the Department on grounds that any information, whether obtained from the Department or otherwise (including information made available by the Department), is incorrect or insufficient and shall make its own inquiries as to the accuracy and adequacy of that information.
- (f) Notwithstanding the other terms of this Section 3.4 (Disclosed Information), nothing in this Section 3.4 (Collaborative Nature of the Project

Each Party agrees to cooperate, at its own expense, with the other Party in the fulfillment of the purposes and intent of this PPA. Neither Party shall be under any obligation to perform any of the other Party's obligations under the Project Documents.

Disclosed Information) shall:

- (i) prejudice or qualify the Development Entity's express rights and remedies under or pursuant to the Project Documents; or
- (ii) exclude any liability which the Department or any of its respective agents or employees would otherwise have to the Development Entity in respect of any statements made fraudulently or in bad faith or constituting willful misconduct.

4. Review of Submittals

4.1 General

The terms and procedures set out in this Article 4 (Review of Submittals) shall govern all Submittals to the Department pursuant to the Project Documents.

4.2 No D&C Work Prior to Review

The Development Entity shall not commence or permit the commencement of any D&C Work that is the subject of, governed by or dependent upon a Reviewable Submittal until it has submitted the relevant Reviewable Submittal to the Department and:

- (a) in respect of a Discretionary Submittal, the Department has provided its approval or consent to the relevant Discretionary Submittal;
- (b) in respect of a Non-Discretionary Submittal:
 - (i) within seven (7) days of receiving written notice from the Development Entity that the Department failed to respond to the Non-Discretionary Submittal within the initial period required under the Project Documents, the Department fails to respond to such Submittal;
 - (ii) the Department approves or consents to such Non-Discretionary Submittal in accordance with this Article 4 (Review of Submittals); or
 - (iii) if the Department comments, objects or rejects the relevant Submittal in the manner contemplated in this Article 4 (Review of Submittals), the Department approves or consents to any re-submission of that Non-Discretionary Submittal in accordance with this Article 4 (Review of Submittals) or otherwise fails to respond in respect to the same within the time period required under Section 4.5(a); or
- (c) in respect of an R&C Submittal, the time period during which the Department is entitled to raise comments has expired, whether or not the Department made comments, save that in the event that the Department made comments that are disregarded by the Development Entity and it is subsequently determined that the Department's comments were permitted under Section 4.3(a), the Development Entity shall forthwith undo, modify or remove from the Project Sites and replace (in a manner complying with this PPA) the relevant parts of the Project Services to reflect the Department's comments.

4.3 Grounds for Objection and/or Comment

- (a) In respect of any Submittal that is not a Discretionary Submittal, the Department may comment on or withhold its approval or consent to that Submittal, but only to the extent that:
 - (i) the portion of the Project Services that is the subject of the Submittal fails to comply with any applicable covenant, condition, requirement, term or provision of the Project Documents;
 - (ii) the portion of the Project Services that is the subject of the relevant Submittal is not to a standard equal to or exceeding Good Industry Practice; or
 - (iii) the Development Entity has not provided all content or information required in respect of the Submittal; **provided**, that the Development Entity shall have an opportunity to re-submit the Submittal with the required content or information.

- (b) The Development Entity shall respond to all of the Department's comments and objections to a Submittal provided in accordance with the terms hereof and, except as provided below, make modifications to the Submittal as necessary to fully reflect and resolve all such comments and objections, in accordance with the review processes set out in this Section 4.3 (Grounds for Objection and/or Comment). The Development Entity acknowledges that the Department may provide comments and objections, which reflect concerns regarding interpretation or its preferences or which otherwise do not directly relate to grounds set out in Section 4.3(a). The Development Entity agrees to use its Reasonable Efforts to accommodate or otherwise resolve any such comments or objections through the review processes described in this Article 4 (Review of Submittals). If the Development Entity does not accommodate or otherwise resolve any comment or objection, the Development Entity shall deliver to the Department within thirty (30) days after receipt of the Department's comments or objections, a written explanation as to why modifications based on such comment or objection are not required or why the relevant comment or objection in relation to the Submittal does not relate (directly or indirectly) to any of the grounds set out in Section 4.3(a) (as applicable). The explanation shall include the facts, analyses and reasons that support the conclusion.
- (c) If the Development Entity fails to notify the Department within such time period, then such failure shall constitute the Development Entity's agreement to make all changes necessary to accommodate and resolve the comment or objection and full acceptance of all responsibility for such changes at the Development Entity's risk.
- (d) If the Department disagrees with the Development Entity's explanation as to why the modifications are not required or why the relevant comment or objection in relation to the Submittal does not relate (directly or indirectly) to any of the grounds set out in Section 4.3(a) (as applicable) as provided in Section 4.3(b), the Parties shall attempt in good faith to resolve the Dispute. If they are unable to resolve the Dispute, the Dispute shall be resolved according to Article 30 (Dispute Resolution Procedures), **provided**, that the Development Entity shall not be required to implement the resolution of any comments or objections that do not relate (directly or indirectly) to any of the grounds set out in Section 4.3(a).

4.4 Limitations on the Development Entity's Right to Rely

Nothing in this Article 4 (Review of Submittals) (including any act or omission of the Department pursuant to this Article 4 (Review of Submittals)) shall:

- (a) relieve the Development Entity from the performance of its obligations under the Project Documents;
- (b) constitute acceptance by the Department that the Project Services satisfy the requirements of the Project Documents; or

- (c) prevent the Department from subsequently raising an objection or comment on a Submittal in accordance with this Article 4 (Review of Submittals) if the same objection and/or comment was not made by the Department on a previous Submittal.

4.5 Time Periods

- (a) Except as otherwise provided in this Section 4.5 (Time Periods), whenever the Department is entitled to review and comment on, or to affirmatively approve, a Submittal, the Department shall, as soon as practicable within a period of up to fourteen (14) days after the date the Department receives an accurate and complete Submittal in conformance with the Project Documents, review, comment upon, or approve, as the case may be, the Submittal. The Department's review period in respect of any re-submission of any Submittal shall, unless provided otherwise in the Project Documents, be seven (7) days and shall be limited to a review of those matters that necessitated the re-submission; **provided**, that this reduced period of seven (7) days for Department review of a re-submission shall not apply if the reason for the re-submission was due to a rejection in accordance with the terms hereof of a prior Submittal because it was incomplete.
- (b) If any provision of the Project Documents expressly provides a longer or shorter period for the Department to act, such period shall take precedence over the time period set out in Section 4.5(a).
- (c) The Development Entity shall schedule, prioritize and coordinate all Submittals to allow an efficient and orderly Submittal review process. To the extent that the Development Entity exceeds any of the limits on Submittals set out in the Technical Provisions, the Parties shall (taking into account the number and nature of any other Submittals that the Department may concurrently be in the process of reviewing) agree in good faith to a reasonable time period for the review by the Department of the Submittals that exceed such limit.
- (d) The applicable period for the Department to act on any Submittals received during a period of any Service Failure shall automatically be extended by ten (10) days.

4.6 Substantially Similar Submittals

To the extent that a Submittal relating to a Project Facility is substantially similar to a Submittal previously issued by the Development Entity in respect of such Project Facility and the context and circumstances are substantially similar (such a Submittal being a **Substantially Similar Submittal**), the Department shall not raise a comment on such Submittal that is inconsistent with its previous comments in respect of the Substantially Similar Submittal unless any circumstances related to such Project Facility have changed or any new issues have arisen with respect to such Project Facility.

5. Governmental Approvals; Utilities; Federal Requirements

5.1 Governmental Approvals

(a) Responsibility

- (i) The Department shall be solely responsible for securing and obtaining all Governmental Approvals (including any revision, modification, amendment, supplement, renewal or extension thereof), required in connection with its performance of this PPA.
 - (ii) The Department shall obtain or cause to be obtained for the Development Entity the benefit of each of the Governmental Approvals so as to ensure that the Development Entity shall have the use and benefit of the Governmental Approvals no later than the date set forth in respect thereof in the Technical Provisions.
 - (iii) Notwithstanding Section 5.1(a)(i), the Development Entity shall be responsible for obtaining amendments or modifications to any Governmental Approval necessary to reflect the Development Entity's Final Design and/or means and methods should the Final Design in respect of any Project Facility and/or means and methods deviate from the basis upon which the Governmental Approval was initially granted by the Governmental Entity (or, if not then granted, the basis upon which the Department sought to obtain such Governmental Approval). In the event that any modifications are not permitted by the Governmental Entity, the Development Entity shall be responsible, at its own risk of delay and cost, for revising its Final Design in respect of the relevant Project Facility and/or means and methods as necessary to satisfy the requirements and conditions of the relevant Governmental Entity.
 - (iv) The Development Entity shall at all times perform its obligations under this PPA in compliance with all Governmental Approvals.
 - (v) The Development Entity shall promptly deliver to the Department true and complete copies of all new or amended Governmental Approvals obtained by it.
 - (vi) The Department shall be responsible for obtaining all land use permits and zoning approvals (if any) required by Applicable Law for the construction, operation and maintenance of the Project Facilities in accordance with the Technical Provisions.
- (b) The Development Entity shall cooperate with the Department in respect of the application by the Department for any Governmental Approvals (including any renewals, amendments or supplements thereto), at the times and in the manner reasonably requested by the Department, including providing supporting drawings, data and technical information and the filing by the Development Entity

of appropriate applications for the relevant Governmental Approvals with the relevant Governmental Entity.

5.2 Utilities

- (a) The Development Entity shall cause, in accordance with the Technical Provisions, all Utility Relocations necessary to accommodate construction, operation, maintenance and/or use of the Project Facilities. All Utility Relocation Work performed by the Development Entity shall comply with the Project Documents. To the extent consistent with the Technical Provisions, the Development Entity shall coordinate, monitor and otherwise undertake the necessary efforts to cause Utility Owners performing Utility Relocation Work to perform such work in a timely manner, in coordination with the Project Services, and in compliance with the standards of design and construction and other applicable requirements specified in the Project Documents. However, regardless of the arrangements made by the Development Entity with the Utility Owners, to the extent consistent with the Technical Provisions, the Development Entity shall continue to be the responsible party to the Department for timely performance of all Utility Relocation Work so that upon completion of the D&C Work, all Utilities that might impact the Project Facilities (whether located within or outside the relevant Project Site) are compatible with the Project Facilities.
- (b) For the avoidance of doubt, the Development Entity shall be solely responsible for all costs of any Utility Relocation Work (including any compensation payable to any Utility Owner in connection with Utility Relocation Work) and the Department shall have no obligation to pay the costs of any Utility Relocation Work.
- (c) The Development Entity shall pay when due all charges (including all applicable Taxes and fees) for gas, electricity, light, heat, power, telephone, water, and other utilities and services used in the Parking Facility or supplied to the Parking Facility during the Term. Upon request of the Department, the Development Entity shall forward to the Department, within fifteen (15) days following the respective due dates, official receipts, photocopies thereof, or other evidence satisfactory to the Department, acting reasonably, of the payment required to be made by the Development Entity in accordance with this Section 5.2(c).

6. Hazardous Materials

6.1 General Obligations

- (a) Subject to the terms of the Project Documents, the Development Entity will be responsible for the management, treatment, handling, storage, monitoring, remediation, removal, transport, and disposal of any Hazardous Materials in, under or on each Project Site that are encountered during the carrying out of any Construction Work in respect of a Project Facility, in each case to the extent

required by any Applicable Law, Governmental Entity, Governmental Approvals or the Project Documents.

- (b) The Department will be responsible for the management, treatment, handling, storage, monitoring, remediation, removal, transport, and disposal of any Hazardous Materials in, under or on each Project Site that are not the responsibility of the Development Entity under Section 6.1(a).
- (c) Before any Remedial Action (other than with respect to a Development Entity Release of Hazardous Materials) is taken for which the Development Entity has responsibility that would inhibit the Department's ability to ascertain the nature and extent of the relevant Hazardous Environmental Condition, the Development Entity will afford the Department the reasonable opportunity to inspect areas and locations that require Remedial Action within a reasonable time period; **provided**, that in the case of a sudden Hazardous Materials Release, the Development Entity may take the minimum action necessary to stabilize and contain the relevant Hazardous Materials Release without prior notice or inspection, but will promptly notify the Department of the sudden Hazardous Materials Release and its location; **provided, further**, that nothing herein shall prevent the Development Entity from complying with Applicable Law or the requirements of any Governmental Entity.
- (d) Subject to the terms of the Project Documents, the Development Entity will (without accepting or assuming responsibility under any Applicable Law) be responsible for obtaining and maintaining all Governmental Approvals relating to any Remedial Action and will be solely responsible for compliance with all Governmental Approvals and Applicable Laws concerning or relating to Hazardous Materials in respect thereof. In carrying out any Remedial Action, the Development Entity will take such steps and actions as the Department may reasonably require in order to protect and preserve the Department's potential claims of contribution and indemnity, statutory or otherwise, against potentially responsible parties, **provided**, that any such steps and actions are not inconsistent with all Applicable Laws and the requirements of the Project Documents and any relevant Governmental Entities or Governmental Approvals.

6.2 Third Party Claims

- (a) To the extent permitted by Applicable Law, the Development Entity shall indemnify, save, protect and defend the Indemnified Parties from any claims, causes of action and Losses initiated, prosecuted, incurred or suffered by any Indemnified Party as a result of or arising out of any Hazardous Materials for which the Development Entity is deemed to be the generator or arranger pursuant to this Article 6 (Hazardous Materials).
- (b) To the extent that the Department is deemed to be the generator or arranger for Hazardous Materials pursuant to this Article 6 (Hazardous Materials), the Development Entity shall be entitled to seek contribution (in an amount net of any

Insurance Proceeds received pursuant to the Insurance Policies or any amounts which the Development Entity is deemed to have self-insured in accordance with Schedule 9 (Insurance Coverage Requirements) of this PPA) from the Department for any Losses arising from or in connection with or in respect of any Third-Party Claims initiated against the Development Entity or any Development Entity-Related Entity in connection with such Hazardous Materials; **provided** that:

- (i) the Development Entity shall promptly notify the Department of Incidents, of any potential claims and matters which may give rise to any such Third-Party Claim;
- (ii) the Department may give written notice to the Development Entity to tender defense of any such Third-Party Claim to the Department at any time, in which case the Development Entity shall promptly tender defense of such claim and cooperate with the Department as necessary or reasonably requested by the Department to defend such claim; **provided**, that the Department shall have agreed in writing to pay or reimburse Development Entity's reasonable and documented costs incurred in tendering such defense;
- (iii) unless and until the Department assumes defense of any such Third-Party Claim, the Development Entity shall keep the Department reasonably informed at all times regarding such claim; and
- (iv) the Development Entity shall not enter into any agreement or settlement with respect to any such claim without the prior written approval of the Department.

6.3 Generator Status

- (a) As between the Department and the Development Entity, the Development Entity will be deemed the sole generator and arranger under 40 CFR Part 262 in respect of any Development Entity Release of Hazardous Materials. The Development Entity agrees that it shall be identified as the sole generator and arranger of such Hazardous Materials on waste manifests and any other documentation submitted to transporters, disposal facilities and any Governmental Entity.
- (b) As between the Department and the Development Entity, the Department will be deemed the sole generator and arranger under 40 CFR Part 262 in respect of any Hazardous Materials for which the Development Entity is not identified as the generator and arranger in accordance with Section 6.3(a). The Department will be identified as the sole generator and arranger of such Hazardous Materials on waste manifests and any other documentation submitted to transporters, disposal facilities and any Governmental Entity. For the avoidance of doubt, the Department's sole generator and arranger status under 40 CFR Part 262 does not alter the Development Entity's responsibilities and duties in accordance with Section 6.1.

7. Design and Construction

7.1 Obligations of the Development Entity

(a) General Duties

In addition to performing all other requirements of the Project Documents, the Development Entity shall:

- (i) furnish all design and other services, provide all materials, equipment and labor and undertake all efforts necessary or appropriate (excluding only those materials, services and efforts which the Project Documents expressly specify will be undertaken by the Department or other Persons) to construct the Project and to achieve Project Facility Completion in respect of all Project Facilities by the Long Stop Deadline;
- (ii) ensure all Construction Work is performed in accordance with Released For Construction Documents;
- (iii) ensure that a suitably qualified foreman is present at each Project Site at all times during the performance of any Construction Work on that Project Site;
- (iv) comply with and require that all Contractors and other Persons performing any of the Project Services comply with, all requirements of all Applicable Laws;
- (v) cooperate with the Department and Governmental Entities with jurisdiction in all matters relating to the D&C Work, including their review, inspection and oversight of the design and construction of the Project as required by Applicable Law or required herein;
- (vi) exercise Reasonable Efforts to mitigate any delay and any damages due to delay regardless of the cause of the delay, including by re-sequencing, reallocating, or redeploying the Development Entity's and its Contractors' employees to other work, as appropriate;
- (vii) remove silt, debris and any other deposits and objectionable material, and clean and remove surplus and discarded material, equipment, and temporary structures, from each Project Site and any other areas used or disturbed by the Construction Work, including waste and borrow areas, and remove paint marks or spills, stains, rust marks, oil, or any other unsuitable marks caused by the Construction Work, as directed by the Department; and
- (viii) remove and dispose of all existing structures and material which are not to remain in place or to be used in the Construction Work off the Project Sites, unless otherwise directed by the Department.

(b) Performance, Design and Construction Standards

The Development Entity shall perform the D&C Work in accordance with (i) Good Industry Practice, (ii) the requirements, terms and conditions set out in the Project Documents and the Station Documents, (iii) all Applicable Laws and (iv) the requirements, terms and conditions set out in all Governmental Approvals.

7.2 Nonconforming and Defective D&C Work

- (a) The Development Entity shall be responsible for the rectification of all Nonconforming D&C Work and Defects, including, to the extent necessary, through removal and/or replacement, whether discovered by the Development Entity, the Department, the Borough or any other Governmental Entity that has jurisdiction. For the avoidance of doubt, performance of any Required Actions in accordance with Section 25.3 (Action by Department) shall not in any respect diminish or derogate from the Development Entity's obligations under this Section 7.2 (Nonconforming and Defective D&C Work).
- (b) Subject to Section 31.2 (Consequential Losses), nothing contained in the Project Documents shall in any way limit the right of the Department, the Borough or any other Governmental Entity that has jurisdiction to assert claims for damages resulting from Defects in the D&C Work for the period of limitations prescribed by Applicable Law, and the foregoing shall be in addition to any other rights or remedies the Department may have hereunder or under Applicable Law.

7.3 Safety Compliance

(a) Safety Compliance Orders

- (i) The Department shall use good faith efforts to inform the Development Entity at the earliest practicable time of any circumstance or information relating to the Project which in the Department's reasonable judgment is likely to result in a Safety Compliance Order. Except in the case of an Emergency or an Incident, the Department shall consult with the Development Entity prior to issuing a Safety Compliance Order concerning the risk to public or worker safety, alternative compliance measures, and cost impacts.
- (ii) Subject to conducting such prior consultation, the Department may issue Safety Compliance Orders to the Development Entity at any time from and after the Commercial Closing Date.

(b) Duty to Comply

- (i) Subject to Section 7.3(a) (Safety Compliance Orders), the Development Entity shall implement all Safety Compliance as expeditiously as reasonably possible following issuance of the Safety Compliance Order.

The Development Entity shall diligently perform the work necessary to achieve such Safety Compliance until completion.

- (ii) The Development Entity shall perform all work required to implement Safety Compliance.
- (iii) The Development Entity shall undertake Reasonable Efforts to overcome any inability to comply with any Safety Compliance Order caused by a Relief Event.

7.4 Conditions Precedent to NTP1

No later than ten (10) days following satisfaction of the conditions set out in Part 1 (Conditions Precedent to NTP1) of Schedule 20 (Conditions Precedent to Notices to Proceed), the Department shall issue a notice (**NTP1**) to the Development Entity authorizing commencement of the Preliminary Work.

7.5 Conditions Precedent to NTP2

No later than ten (10) days following satisfaction of the conditions set out in Part 2 (Conditions Precedent to NTP2) of Schedule 20 (Conditions Precedent to Notices to Proceed), the Department shall issue a notice (**NTP2**) to the Development Entity authorizing commencement of the Remaining Work.

7.6 Project Facility Completion

- (a) The Department will promptly issue a written certificate (the **Certificate of Project Facility Completion**) that the Development Entity has achieved Project Facility Completion of the Project Facilities upon satisfaction of all of the Project Facility Completion Conditions upon satisfaction of all of the conditions set out in Schedule 21 (Conditions Precedent to Project Facility Completion).
- (b) Approximately twenty (20) days prior to the date on which the Development Entity expects to achieve all of the Project Facility Completion Conditions, the Development Entity shall provide written notice to the Department so as to allow the Department to commence its review of those Project Facility Completion Conditions amenable to being reviewed at the time of such notice. Notification shall include a list of all requirements that will be achieved to allow the Department's issuance of the relevant Certificate of Project Facility Completion.
- (c) Fifteen (15) days prior to satisfying all Project Facility Completion Conditions, the Development Entity shall meet and confer with the Department to confirm that the list of requirements provided for in Section 7.6(b) is in accordance with the Project Documents. Subsequent to this initial meeting, the Development Entity and the Department will meet, confer and exchange information on a regular basis with the goal being the Department's orderly, timely inspection of the Project Facilities, review of the Final Design Documents and final

Construction Documents and determination of whether the Development Entity has satisfied all of the Project Facility Completion Conditions.

- (d) The Development Entity shall thereafter provide written notification of the date it has satisfied all requirements for the Department's issuance of a Certificate of Project Facility Completion. Within five (5) days of receipt of the Development Entity's written notification and all required conditions and submittals per the Project Documents, the Department shall conduct an inspection of the Project Site and the Project Facilities, a review of the Final Design Documents, Construction Documents, the As-Built Drawings and other Submittals and such other investigation as may be necessary to evaluate whether Project Facility Completion has been achieved.
- (e) Within the period referred to in Section 7.6(d), the Department shall either:
 - (i) issue the Certificate of Project Facility Completion, effective as of the date that all of the Project Facility Completion Conditions were actually satisfied; or
 - (ii) notify the Development Entity in writing of the reasons why Project Facility Completion has not been achieved; **provided**, that in the event that any Project Facility Completion Condition has not been satisfied, the Development Entity shall be entitled to resubmit the notification provided pursuant to Section 7.6(d) once the relevant Project Facility Completion Condition has been satisfied, whereupon the Department shall promptly issue a Certificate of Project Facility Completion in accordance with this Section 7.6(e). If the Department and the Development Entity cannot agree as to the date of Project Facility Completion, such Dispute shall be resolved according to the Dispute Resolution Procedures; **provided**, that with respect to any such Dispute, the Parties may proceed directly to the Disputes Review Board.
- (f) The Development Entity may reach Project Facility Completion for the Parking Facility prior to the Station Completion Date.

7.7 Unavailability Payments

- (a) If the Development Entity does not reach Project Facility Completion for a Project Facility by the applicable Project Facility Completion Deadline, and such failure causes damage to the Department, the Department will give written notice to the Development Entity (an **Unavailability Payment Notice**), which will set forth (i) the amount claimed as an unavailability payment and (ii) details of the calculation thereof (the **Unavailability Payment**).
- (b) Within 60 days of the receipt of an Unavailability Payment Notice, the Development Entity shall reimburse the Department for all Unavailability Payments described in clause (a) above.
- (c) The Parties acknowledge and agree 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 the Department as a result of the

Development Entity's failure to reach Project Facility Completion. It is understood and agreed by the Parties that the Department shall be damaged by the failure of the Development Entity to meet such obligations and that:

- (i) it would be impracticable or extremely difficult to fix the actual damages resulting therefrom;
- (ii) any Unavailability Payments that are payable under this Section 7.7 are not a penalty, and are fair and reasonable;
- (iii) such payments represent a genuine and reasonable estimate of the losses to the Department that may reasonably be anticipated from such failure;
- (iv) the payment of any Unavailability Payments shall not be considered consequential loss or damage for the purposes of this PPA, and the Development Entity shall not be entitled to avoid payment of any Unavailability Payments by asserting that any such amounts are consequential loss or damage or are attributable to consequential loss or damage.

7.8 Suspension of Construction Work

- (a) The Department, the Borough or any Governmental Entity having jurisdiction over the Project shall at any time have the right and authority to suspend, in whole or in part, the Construction Work by written order to the Development Entity. Any such written order will be supported by the Department's, the Borough's or such Governmental Entity's reasons for the required suspension of the Construction Work.
- (b) Except where any suspension of the Construction Work by the Department pursuant to this Section 7.8 (Suspension of Construction Work) is made in response to:
 - (i) any failure by the Development Entity to comply with any Applicable Law or Governmental Approval (including failure to handle, preserve and protect archaeological, paleontological or historic resources, or failure to handle Hazardous Materials, in accordance with Applicable Laws and Governmental Approvals); or
 - (ii) the existence of conditions unsafe for workers, other Project personnel or the general public, including failures to comply with Safety Standards or perform Safety Compliance, but only to the extent that such condition does not arise as a direct result of a Relief Event,

any such suspension order shall constitute a Relief Event and any suspension order made in response to matters referred to in Sections 7.8(b)(i) or 7.8(b)(ii) shall cease to apply as soon as the relevant matter has been rectified or remedied to the reasonable satisfaction of the Department.

7.9 Late Completion Costs

- (a) To the extent the Development Entity fails to achieve Project Facility Completion on or before the Project Facility Completion Deadline, the Department may provide alternate parking for users of the Station until the Development Entity has achieved Project Facility Completion.
- (b) The Development Entity shall reimburse the Department for all costs incurred in connection with the provision of the services described in clause (a) above; provided, that the Development Entity may, at its option, provide alternate parking for users of the Station at its sole cost and expense.
- (c) The Department shall deliver to the Development Entity an invoice in respect of all costs incurred by the Department pursuant to clause (a) above as soon as practicable following the end of each month, and the Development Entity shall pay such amount to the Department within 15 calendar days.
- (d) Notwithstanding any other provision in this PPA to the contrary, the Development Entity shall not be required to pay costs incurred by the Department pursuant to this Section 7.9 (Late Completion Costs) in respect of any period of delay in the achievement of Project Facility Completion that arises as a direct result of a Compensation Event or Relief Event.

7.10 Passage of Title

Title to all equipment furnished by the Development Entity under the Project Documents for incorporation into the Project Sites or that are required for operation or maintenance of the Project shall pass to the Department, free and clear of all liens or other charges of any kind or nature, upon the incorporation thereof into the applicable Project Site or, for items that will not be incorporated into any Project Site, delivery to the applicable Project Site.

7.11 Warranties

- (a) The Development Entity will require the D&C Contractor to warrant that (A) the D&C Work is complete and conforms to Good Industry Practice; and (B) the D&C Work including all materials and equipment furnished as part of the D&C Work is new unless otherwise specified in the Technical Provisions or elsewhere in this PPA, of good quality, free of defects in materials and workmanship.
- (b) The warranties in this section are exclusive and are in lieu of all other warranties by contract. No implied or statutory warranties will apply. The foregoing warranties for D&C Work will be effective for a period of 24 months beginning on the date on which Project Facility Completion is achieved. Such warranties will survive termination of this PPA for D&C Work that was in place prior to termination.

8. Maintenance Work and Handback Requirements

8.1 Obligation to Perform Maintenance Work

- (a) The Development Entity shall carry out Maintenance Work on (i) the Parking Facility from the Project Facility Completion Date until the Termination Date and (ii) the Station from the Station Completion Date until the Termination Date.
- (b) If at any point the Development Entity fails to carry out the Maintenance Work as set forth in subsection (a) above (an **O&M Breach**), the Department shall, upon the delivery of notice to the Development Entity thereof, be entitled to step in and perform such Maintenance Work. Upon an O&M Breach, the Development Entity will cause the Commercialization Entity to pay to the Department the greater of:
 - (i) the fair market value rent for the Commercialization Activities calculated at the time of such O&M Breach; and
 - (ii) the actual cost to the Department to self-perform such Maintenance Work.

8.2 Maintenance Work Standards and Requirements

- (a) The Development Entity shall carry out the Maintenance Work in accordance with:
 - (i) Good Industry Practice, as it evolves from time to time;
 - (ii) the requirements, terms and conditions set out in the Project Documents and the Station Documents;
 - (iii) the Technical Provisions;
 - (iv) all Applicable Laws; and
 - (v) the requirements, terms and conditions set out in all Governmental Approvals.
- (b) The Development Entity shall at all times undertake sufficient Maintenance Work to ensure ongoing compliance with the Maintenance Performance Requirements.

8.3 Maintenance Management Plan

At the Department's request, the Development Entity and its Maintenance Contractor(s) shall promptly meet and confer with the Department to review and discuss any Maintenance Management Plan submitted to the Department pursuant to the Technical Provisions.

8.4 Handback Requirements

- (a) The Development Entity shall perform the Work so that as of the Termination Date, the Parking Facility meets all of the requirements set out in the Technical Provisions (collectively, the **Handback Requirements**).
- (b) In the event of Early Termination, the Development Entity shall only be required to comply with the requirements of this Section 8.4 (Handback Requirements) to the extent that any Renewal Work under the Handback Requirements was scheduled to have been performed prior to the Early Termination Date.

8.5 Handback Reserve Account

(a) Establishment and Security

- (i) No later than the first Business Day of the Handback Period, the Development Entity shall establish a reserve account (the **Handback Reserve Account**) to be held and controlled by a third party (the **Escrow Agent**) to be agreed between the Parties. Within three (3) Business Days of establishing the Handback Reserve Account, the Development Entity shall provide to the Department the details regarding the Handback Reserve Account, including the name, address and contact information for the depository institution and the account number.
- (ii) The Parties agree that:
 - A. withdrawals from the Handback Reserve Account will be controlled by the operation of an account control agreement to be agreed between and entered into by the Parties no later than the first Business Day of the Handback Period; and
 - B. any withdrawal from the Handback Reserve Account will require the prior written approval of the Department, such approval to be provided in accordance with this Section 8.5 (Handback Reserve Account).
- (iii) The Development Entity shall not grant any security interest to any third party in relation to the Handback Reserve Account or any amounts standing to the credit of it.

(b) Funding

- (i) No later than sixty (60) days prior to the commencement of the Handback Period and each 12-month anniversary thereof (each a **Handback Year**), the Development Entity shall deliver to the Department a report setting out its calculations of the Handback Reserve Amount in accordance with Schedule 5 (Calculation of Handback Amounts). Within thirty (30) days of any such report being delivered to the Department, the Parties shall

seek to agree upon the Handback Reserve Amount, and in the absence of agreement, the Handback Reserve Amount shall be finally determined pursuant to the Dispute Resolution Procedures.

- (ii) To the extent that the aggregate of the balance standing to the credit of the Handback Reserve Account and the undrawn value of any letter of credit delivered pursuant to Section 8.5(d) (Handback Letters of Credit), on any date of agreement or determination of the Handback Reserve Amount, exceeds the Handback Reserve Amount, such excess shall (at the request of the Development Entity) be paid by the Escrow Agent to the Development Entity in accordance with the account control agreement entered into pursuant to Section 8.5(a)(ii) above.

(c) **Withdrawal from Handback Reserve Account**

- (i) Subject to Section 8.5(c)(ii), the Development Entity shall be entitled to withdraw funds from the Handback Reserve Account in such amounts and at such times as needed only to pay for Renewal Work that was taken into account in the calculation of the Handback Reserve Amount.
- (ii) Prior to drawing funds from the Handback Reserve Account, the Development Entity shall give written notice to the Department of the amount to be drawn and the purpose for which funds will be used, together with such other supporting information as the Department may reasonably require. Within ten (10) Business Days from the date of the receipt of such notice, the Department shall either approve or withhold its approval to the Development Entity's proposed withdrawal. The Department may only withhold its approval to any proposed withdrawal from the Handback Reserve Account to the extent that:
 - A. the Development Entity is unable to demonstrate to the reasonable satisfaction of the Department that the proposed withdrawal amount will be used to meet costs incurred by the Development Entity in undertaking any Renewal Work that was taken into account in the calculation of the Handback Reserve Amount; or
 - B. the aggregate of (1) the balance standing to the credit of the Handback Reserve Account, (2) the undrawn value of any letter of credit delivered pursuant to Section 8.5(d) (Handback Letters of Credit), and (3) the aggregate amount of all withdrawals made from the Handback Reserve Account since the Handback Amount was most recently agreed is less than the Handback Amount,

provided, that if the Department fails to respond within such ten (10) Business Day period, the Department will be deemed to have given its approval to such withdrawal request.

- (iii) On the Termination Date, the Escrow Agent shall pay any amounts standing to the credit of the Handback Reserve Account to the Parties in the following order of priority:
 - A. first, an amount equal to that required to undertake any Renewal Work that is required to be undertaken in order to for the Parking Facility to meet the Handback Requirements as at the Termination Date, shall be paid by the Escrow Agent to the Department; and
 - B. second, the remaining balance standing to the credit of the Handback Reserve Account shall be paid by the Escrow Agent to the Development Entity.

(d) **Handback Letters of Credit**

In lieu of the establishment or ongoing funding of the Handback Reserve Account, the Development Entity may deliver to the Department one or more letters of credit (each in a form and from an issuer reasonably acceptable to the Department and on the basis that the Department shall be the sole beneficiary) with aggregate value equal to the ongoing Handback Reserve Amount, whereupon (to the extent that the Handback Reserve Account has already been established) the Escrow Agent shall pay all amounts standing to the credit of the Handback Reserve Account to the Development Entity.

8.6 Poor Maintenance Performance

To the extent that any Unavailability Event or Service Failure occurs at any time, the Department may request the Development Entity to take such actions as may reasonably be required in order to ensure that the reasons for such Unavailability Event or Service Failure are adequately mitigated with a view to ensuring that in the reasonably foreseeable future, there is no reasonable prospect of such Unavailability Event or Service Failure occurring for the same reasons.

8.7 Suspension of Maintenance Work

- (a) The Department shall at any time have the right and authority to suspend, in whole or in part, the Maintenance Work by written order to the Development Entity. Any such written order will be supported by the Department's reasons for the required suspension of the Maintenance Work.
- (b) Except where any suspension of the Maintenance Work by the Department pursuant to this Section 8.7 (Suspension of Maintenance Work) is made in response to:
 - (i) any failure by the Development Entity to comply with any Applicable Law or Governmental Approval (including failure to handle Hazardous Materials in accordance with Applicable Laws and Governmental Approvals); or

- (ii) the existence of conditions unsafe for workers, other Project personnel or the general public, including failures to comply with Safety Standards or perform Safety Compliance, but only to the extent that such condition does not arise as a direct result of a Relief Event,

any such suspension order shall constitute a Relief Event and any suspension order made in response to matters referred to in Sections 8.7(b)(i) or 8.7(b)(ii) shall cease to apply as soon as the relevant matter has been rectified or remedied to the reasonable satisfaction of the Department.

9. Contractors and Key Personnel

9.1 Relationship with Contractors

- (a) Nothing in this PPA will create any contractual relationship between the Department and any Contractor. No Contract entered into by or under the Development Entity shall impose any obligation or liability upon the Department to any Contractor or any of its employees.
- (b) The retention of Contractors by the Development Entity will not relieve the Development Entity of its obligations under the Project Documents and the Development Entity will at all times be held fully responsible under the Project Documents for the acts and omissions of all Contractors performing Work, in relation to the Project and the obligations of the Development Entity hereunder, as if they were the acts and omissions of the Development Entity.

9.2 Key Personnel

- (a) The Development Entity shall (or shall procure that the relevant Key Contractor shall) retain, employ and utilize the individuals specifically listed as Key Personnel in Appendix 1 (Development Entity's Proposal Commitments) or in the Project Management Plan to fill the corresponding positions until such time as all relevant activities have been completed. The Development Entity shall not change or substitute any such individuals, except due to retirement, death, disability, incapacity, or voluntary or involuntary termination of employment or with the prior consent of the Department (such consent not to be unreasonably withheld, delayed or conditioned if the proposed substitute individual possesses equal or greater experience, skill, knowledge and professional expertise in the relevant fields than the individual being replaced).
- (b) The Development Entity shall notify the Department in writing of any proposed replacement for any Key Personnel position within seven (7) days of becoming aware of a change per Section 9.2(a). The Department shall have the right to review the qualifications and character of each individual to be appointed to a Key Personnel position (including personnel employed by Contractors to fill any such position) as set out in the Technical Provisions and to approve or disapprove (acting reasonably) use of such individual in such position prior to the

commencement of any Project Services by such individual in accordance with Section 9.2(a) above.

- (c) The Development Entity shall cause each individual filling a Key Personnel position to dedicate the full amount of time necessary for the proper prosecution and performance of the Project Services.
- (d) The Development Entity shall provide the Department with phone and cell phone numbers as well as e-mail addresses for all Key Personnel. The Development Entity shall provide to the Department two (2) personnel and a minimum of four (4) Key Personnel (one (1) from the D&C Contractor, one (1) from the Construction Manager or Maintenance Manager, as applicable and one (1) from the Maintenance Contractor) who the Department can contact twenty-four (24) hours per Day, seven (7) days per week as required, and who will be able to, in turn, contact the other Key Personnel promptly thereafter.

9.3 Certain Public Policy Requirements

- (a) The Development Entity shall comply with the requirements set out in Schedule 14 (Certain Public Policy Requirements).
- (b) The Development Entity shall ensure that the audit clause set out in Schedule 23 (Audit Clause) is included in all Subcontracts receiving funds from the FTA.

9.4 Separations Act Compliance

- (a) The Development Entity acknowledges and agrees that the Separations Act, 71 P.S. §1618, is applicable to certain Project Facilities and, accordingly, the Department may reject any design Submittal submitted by the Development that is not in compliance therewith.
- (b) When the design for the HVAC, plumbing, and/or electrical work has progressed to the point where the Department has reviewed the final design, the Development Entity must solicit prices for the separate scopes of work from all interested parties. The Development Entity shall submit its HVAC, plumbing and electrical work bid process to the Department for its review and approval within ten (10) days of final design approval. The Development Entity acknowledges and agrees that no HVAC, plumbing or electrical subcontractors have been pre-qualified.
- (c) The Development Entity must award at least one separate contract for each of the three aforementioned divisions of work, if applicable. The awards shall be made to the bidders who submitted the lowest responsible and responsive bid for each division of work. All required subcontractor provisions in the Development Entity's proposals must be included in these subcontracts.
- (d) At a minimum, the Development Entity's bidding process must include the following for each HVAC, plumbing, and electrical package:

- (i) The work shall be publicly bid and shall have a public announcement. The public announcement shall be included in/on, but is not limited to newspaper and web page advertisement. In addition to any and all other announcements by the Development Entity, this public announcement shall also be publicly displayed on the Department's web page for the Project.
 - (ii) The Development Entity shall hold a public pre-bid meeting where all interested parties are invited.
 - (iii) There shall be a questions/answers and request for information process whereby the Development Entity accepts questions from the bidding community and then formally answers said questions. The Development Entity's answers shall be in the form of a written bulletin or other official procedure, which shall be issued to all interested parties and all HVAC, plumbing and electrical bidders.
 - (iv) There shall be a public bid opening where sealed HVAC, plumbing and electrical work bids are opened. The Department or its agent will attend this public bid opening. A tab with the bid information (bid tab) shall later be made available for the Department.
 - (v) The Development Entity will be required to award its HVAC, plumbing and electrical work subcontracts to the lowest responsive and responsible bidders. No price negotiation with low bidders shall be allowed.
 - (vi) The Development Entity shall have a written bid protest procedure in place before issuing any HVAC, plumbing, and electrical packages. The Development Entity's documents will set forth the bid protest procedure. The Development Entity shall ensure that the protest procedure provides disappointed bidders with a meaningful and viable process to protest the bid award.
- (e) Multiple awards may be made in each of the selected major divisions of the Work as the Development Entity determines is in the best interest of the Project. Once the separate divisions of work are bid, the Development Entity shall certify to the Department that the Development Entity awarded the HVAC, plumbing and/or electrical construction work to the lowest responsible and responsive bidders for the work. The Development Entity's bidding process and selected subcontractors are subject to the Department's review in order to validate the process, the award(s) and/or that the selected subcontractors are responsible.
- (f) After the Final Design is completed (or partially completed if the Development Entity elects to have multiple separate awards for portions of the Work) and the Work has been bid, the Development Entity will be required to submit a notarized affidavit (in a form approved by the Department) for each award that names the successful bidder, states that the award has been made to the lowest responsible

and responsive bidder and that the successful bidder named will perform that scope of work. Each affidavit shall also include a bid tabulation identifying the other bidders and their prices.

- (g) For purposes of this process, “responsible” shall be defined as (i) acceptable to the Department based upon clearance through the Commonwealth’s Contractor Responsibility Program; and (ii) acceptable to the Development Entity based upon acceptance by the Development Entity’s general liability insurance carrier.
- (h) For purposes of this process, “responsive” shall be defined as a bid which conforms in all material respects to the requirements and criteria in the Development Entity’s solicitation for bids.
- (i) The Department reserves the right to reject the Development Entity’s selected HVAC, plumbing and electrical subcontractors if the Department reasonably believes that the Development Entity violates the above procurement process.

10. Department and Development Entity Changes

10.1 Department Changes

- (a) The Department has the right to propose Department Changes in accordance with this Article 10 (Department and Development Entity Changes).
- (b) In order to request a Department Change, the Department shall deliver to the Development Entity a document setting forth (each, a **Department Change Request**):
 - (i) the Department’s requirements for a change in the Project Services or a change to the terms and conditions of the Technical Provisions (including a change in the standards applicable to the Project Services), in sufficient detail to enable the Development Entity to calculate and provide the Development Entity’s Estimate in accordance with Section 10.3 (Development Entity’s Estimate of Department Change Requests); and
 - (ii) the method of compensation for the change.
- (c) The Development Entity shall be entitled to refuse a Department Change Request which:
 - (i) requires the Project Services to be performed in a way that infringes Applicable Law or is inconsistent with Good Industry Practice;
 - (ii) would, if implemented, materially and adversely change the nature of the Development Entity’s obligations or rights under this PPA; or
 - (iii) would, if implemented, cause any Governmental Approval then in full force and effect to be revoked.

10.2 Directive Letter

Subject to Section 10.1(c) and for so long as a Department Change Request has not been finally agreed between the parties, the Department may in its sole discretion deliver to the Development Entity a Directive Letter, directing the Development Entity to proceed with the performance of the Extra Work envisioned in a Department Change Request (each a **Directive Letter**). The Directive Letter shall also set out the kind, character, and limits of the work. Upon receipt of the Directive Letter, the Development Entity shall implement and perform the work in question as directed by the Department and in accordance with any relevant procedures set out in Schedule 19 (Extra Work Costs).

10.3 Development Entity's Estimate of Department Change Requests

- (a) As soon as practicable and in any event within fifteen (15) Business Days after having received a Department Change Request, the Development Entity shall deliver to the Department an estimate of costs and expenses and other matters with respect to such Department Change Request (a **Development Entity's Estimate**), or confirmation as to when a Development Entity's Estimate is to be provided to the Department (**provided**, that the Development Entity shall use all Reasonable Efforts to prepare its Development Entity's Estimate within thirty (30) Business Days after having received the Department Change Request, unless further extended by the Department acting reasonably). A Development Entity's Estimate shall include the following:
- (i) whether relief from compliance with its obligations under this PPA is required during the implementation or as a result of the Department Change;
 - (ii) any impact on the provision of the Project Services, including any potential cost impact on future Maintenance Work and whether the proposed change is in contravention of Section 10.1 (Department Changes);
 - (iii) any amendment required to this PPA as a result of the Department Change;
 - (iv) any consents or permits which are required;
 - (v) the proposed method of certification of any construction aspects of the Extra Work required by the proposed Department Change if not covered by the procedures set out in this PPA;
 - (vi) a scope of work, which shall be described in sufficient detail and broken down into suitable components and activities to enable pricing. The work breakdown shall include all activities associated with the proposed modification, including a description of additions, deletions and modifications to the Technical Provisions;

- (vii) a cost estimate that will enable the Department to review and evaluate the reasonableness of the Development Entity's Estimate. The Development Entity's cost estimate shall identify a "base amount" representing the amount established based on estimated quantities and unit rates presented according to line or pay items typically included on construction project bid sheets by the Department and separated by labor, materials and equipment. The cost estimate shall include a pricing form identifying which items have been priced based on estimated quantities and unit rates and which items have been priced on another basis, with reasons;
 - (viii) to the extent that the Development Entity believes that the relevant Department Change would result in a delay to the Project Services, a Time Impact Analysis (based on the Project Working Schedule most recently agreed pursuant to the Technical Provisions) demonstrating that the proposed Department Change will result in an identifiable and measurable disruption to the Project Services;
 - (ix) acceleration costs, but only when the Department requires the Development Entity pricing to accommodate an acceleration in any D&C Work; and
 - (x) such other supporting documentation as may be reasonably required by the Department.
- (b) The Development Entity's Estimate shall be accompanied by a certification by the Development Entity stating that: (i) to the best of the Development Entity's knowledge, the amount of time and/or compensation requested is justified as to entitlement and amount, (ii) the amount of time and/or compensation requested includes all known and anticipated impacts or amount, direct, indirect and consequential, which may be incurred as a result of the event or matter giving rise to the proposed change, and (iii) the cost and pricing data is complete, accurate and current.
- (c) The Development Entity's requested compensation for the Department Change in a Development Entity's Estimate shall be subject to Audit review by the Department in accordance with Section 26.1(c) (The Development Entity shall retain records and documents in accordance with Section 3 of Schedule 15. Notwithstanding the foregoing, all records, which relate to Disputes being processed or actions brought under the Dispute Resolution Procedures shall be retained and made available until any later date that such Disputes and actions are finally resolved; **provided**, that the Development Entity reserves the right to assert exemptions from disclosure of information that would be exempt under Applicable Law from disclosure or introduction into evidence in legal actions.

At the request of the Department, the Development Entity shall, at the Development Entity's cost and expense and at any and all reasonable times during the Term: (i) make available or cause to be made available to the Department all

Information relating to the Project or this PPA as may be specified in such request and as shall be in the possession or control of the Development Entity and (ii) permit the Department, after having provided 10 Business Days' prior notice to the Development Entity to discuss the obligations of the Development Entity under this PPA with the Development Entity for the purpose of enabling the Department to determine whether the Development Entity is in compliance with this PPA and applicable Law.

- (c) Audits).

10.4 Review and Evaluation of the Development Entity's Estimate

- (a) As soon as practicable after the Department receives the Development Entity's Estimate, the Development Entity shall meet with the Department to review, discuss and agree on the Development Entity's Estimate. During such discussions, the Department may modify the Department Change Request, and may (to the extent practicable, given the nature of the Extra Work) require the Development Entity to seek and evaluate competitive tenders for the relevant capital works in connection with such Department Change, as applicable. In each case the Development Entity shall, within fifteen (15) Business Days or such longer period as may be mutually agreed to by the Parties, after receipt of such modification, notify the Department of any consequential changes to the Development Entity's Estimate.
- (b) Within twenty-one (21) days from the date of meetings, or the date additional information is received, pursuant to Section 10.4(a) above, the Department shall:
 - (i) confirm in writing to the Development Entity the Development Entity's Estimate (as may be modified); or
 - (ii) withdraw the Department Change Request.
- (c) If the Department confirms the Development Entity's Estimate (as may be modified), the implementation of the relevant Extra Work shall be commenced on the later of five (5) Business Days of the Department's written confirmation and the date set out in the Development Entity's Estimate. Within this period, the Parties shall consult and agree on the remaining details as soon as practicable and shall enter into an appropriate change order to give effect to the relevant Department Change Request.
- (d) In the event that a Department Change Request is withdrawn, the Department will reimburse the Development Entity for all reasonable and documented costs incurred by the Development Entity in connection with such Department Change Request.

10.5 Funding

Where a Department Change involves estimated Capital Expenditures or other costs agreed by the Parties or an adjustment in any payments, then:

- (a) the Department and the Development Entity shall agree upon a payment schedule in respect of the payment of such sums; and
- (b) the Department shall make a payment to the Development Entity within thirty (30) days of receipt by the Department of invoices presented to the Department (complete in all material respects) in accordance with the agreed payment schedule accompanied by the relevant evidence (where applicable) that the relevant part of the Department Change has been carried out.

10.6 Development Entity Changes

- (a) If the Development Entity wishes to introduce a change in the Project Services (a **Development Entity Change**), it must deliver written notice (the **Development Entity Change Request**) to the Department setting out the following:
 - (i) the proposed change to the Project Services in sufficient detail to enable the Department to evaluate it in full;
 - (ii) the Development Entity's reasons for proposing the change to the Project Services;
 - (iii) a request to the Department to consult with the Development Entity with a view to deciding whether to agree to the change to the Project Services and, if so, what consequential changes the Department requires due to the Development Entity Change;
 - (iv) any implications of the change to the Project Services;
 - (v) details regarding cost savings (if any) associated with the proposed change to the Project Services;
 - (vi) any dates by which a decision by the Department is critical; and
 - (vii) all of the information enumerated above in Section 10.3(a).
- (b) The Department shall evaluate the Development Entity Change Request in good faith, taking into account all relevant issues, including whether:
 - (i) the change affects the quality of the Project Services or the likelihood of successful delivery of the Project Services;
 - (ii) the change will adversely interfere with the relationship of the Department with third parties;

- (iii) the financial strength of the Development Entity is sufficient to perform the changed Project Services;
 - (iv) the residual value of the Project is reduced; or
 - (v) the change materially affects the risk or costs to which the Department is exposed.
- (c) As soon as practicable after receiving the Development Entity Change Request, the Parties shall meet and discuss the matters referred to in it. During their discussions the Department may propose modifications or, subject to Section 10.6(g), approve or reject the Development Entity Change Request. Upon receipt of a Development Entity Change Request, the Department shall issue a response to the Development Entity as soon as practicable and in no event later than fifteen (15) days.
- (d) If the Department approves the Development Entity Change Request (with or without modification), the implementation of the relevant change to the Project Services shall be commenced within five (5) Business Days of the Department's acceptance. Within this period, the Parties shall consult and agree on the remaining details and shall enter into an appropriate change order to give effect to the relevant Development Entity Change Request.
- (e) If the Department rejects the Development Entity Change Request, it shall not be obliged to give its reasons for such a rejection.
- (f) Unless the Department's acceptance specifically agrees to an increase in the payments to be made to the Development Entity pursuant to this PPA, there shall be no increase in any payment to the Development Entity pursuant to this PPA as a result of a change to the Project Services proposed by the Development Entity.
- (g) The Department shall not be entitled to reject a Development Entity Change Request that is required in order to conform to a Change in Law. The costs of introducing a change to the Project Services resulting from a Qualifying Change in Law shall be calculated and paid in accordance with Section 12.4 (Change in Law) and to the extent such costs are not compensable pursuant to Section 12.4 (Change in Law), they shall be borne by the Development Entity.

10.7 No Cost Change Order

Changes in the Project Services that have no net effect on the amount of compensation due to the Development Entity may be approved in writing by the Department and shall be processed as a no cost change order.

10.8 Commencement of Extra Work

Other than when the Development Entity is in receipt of a Directive Letter, the Development Entity shall not be entitled or required to commence any Extra Work

described in a Department Change Request prior to the Department confirming the Development Entity's Estimate in accordance with Section 10.4(b) and as set out therein.

10.9 Decreased Costs

- (a) If a Development Entity Change Request results in a decrease in the Development Entity's costs, then any payment due from the Department under this PPA may be adjusted downwards (or a credit may be owed in the future) to reflect the sharing in the decrease in costs 50:50 as to the Department and the Development Entity, respectively.
- (b) If a Department Change Request results in a decrease in the Development Entity's costs, then any payment due from the Department under this PPA may be adjusted downwards (or a credit may be owed in the future) to reflect such reduction in the Development Entity's costs.

10.10 Performance

The Development Entity shall not suspend performance of the Project Services during the negotiation of any Department Change Request or Development Entity Change Request, except:

- (a) as may be otherwise directed by the Department in accordance with Section 7.8 (Suspension of Construction Work); or
- (b) to the extent that such suspensions are otherwise permitted under the terms of this PPA.

11. Unavailability Events and Service Failures

11.1 Unavailability Events and Service Failures

- (a) After the occurrence of each Unavailability Event, the Department will be entitled to claim an Unavailability Penalty, as applicable to the Unavailability Event in accordance with this Article 11 (Unavailability Events and Service Failures).
- (b) After the occurrence of a Service Failure, the Department will be entitled to claim a Service Failure Penalty, as applicable to the applicable level of Service Failure in accordance with this Article 11 (Unavailability Events and Service Failures).

11.2 Notification of Unavailability Events and Service Failures

(a) Notification Initiated by the Development Entity

The Development Entity shall notify the Department in writing of the date of the occurrence of any Unavailability Event or Service Failure as soon as reasonably practicable, and in any event within forty-eight (48) hours after the earlier of the time the Development Entity first obtains knowledge of or first should have reasonably known of

the occurrence of the Unavailability Event or Service Failure. The notice shall provide reasonable detail of the circumstances of the Unavailability Event or Service Failure.

(b) Notification Initiated by the Department

If the Department believes any Unavailability Event or Service Failure has occurred, or receives notice from any Patron that any Unavailability Event or Service Failure has occurred, for which the Department has not received notification from the Development Entity in accordance with Section 11.2(a), the Department may deliver to the Development Entity a written notice setting forth the Department's determination of the occurrence of such Unavailability Event or Service Failure and the applicable Unavailability Penalty or Service Failure Penalty.

12. Supervening Events; Change in Law

12.1 Delays

(a) Notice

If at any time the Development Entity becomes aware that there will be or is likely to be a delay in the Work such that the Project Facility Completion will not occur by the Project Facility Completion Deadline or (following the Project Facility Completion Deadline) the Development Entity is likely to suffer further delay in the achievement of Project Facility Completion, the Development Entity shall, as soon as reasonably practicable and in any event within ten (10) Business Days of becoming aware of the likely delay, give notice to the Department to that effect specifying:

- (i) the reason for the delay or likely delay; and
- (ii) an estimate of the likely effect on the most recent Project Working Schedule of the delay in achieving Project Facility Completion taking into account any measures that the Development Entity proposes to adopt to mitigate the consequences of the delay in accordance with Section 12.1(c) (Duty to Mitigate).

(b) Supply of Information

Following delivery of a notice by the Development Entity pursuant to Section 12.1(a) (Notice), the Development Entity shall promptly supply to the Department any further information relating to the delay which:

- (i) is received by the Development Entity; or
- (ii) is reasonably requested by the Department.

(c) Duty to Mitigate

The Development Entity shall use Reasonable Efforts to mitigate the delay and consequences of any delay that is the subject of a notice pursuant to Section 12.1(a) (Notice), including all reasonable steps requested by the Department.

12.2 Relief Events

- (a) If, as a direct result of the occurrence of a Relief Event, the Development Entity becomes aware that the Relief Event has caused or is likely to cause the Development Entity to fail to:
 - (i) achieve Project Facility Completion by the Project Facility Completion Deadline or (following the Project Facility Completion Deadline) suffer further delay in the achievement of Project Facility Completion;
 - (ii) comply with any of its obligations under this PPA; or
 - (iii) both (i) and (ii).

then the Development Entity is entitled to request an extension to the Project Facility Completion Deadline and/or the Long Stop Deadline and/or relief from any rights of the Department arising under Section 24.5 (Termination for Development Entity Default) and/or relief from any costs or expenses that accrue pursuant to Section 7.9 (Late Completion Costs) or any Unavailability Payments accrue pursuant to Section 7.7 (Unavailability Payments), in each case in accordance with this Article 12 (Supervening Events).

(b) Procedure for Relief

Subject to Section 12.2(d) (Late Provision of Notice or Information), any request for relief made by the Development Entity pursuant to Section 12.2(a) (Relief Events) must:

- (i) be submitted to the Department as soon as practicable, and in any event no later than twenty (20) Business Days of the Development Entity first becoming aware that the relevant Relief Event would have the effect that is the subject of the Development Entity's request for relief;
- (ii) no later than ten (10) Business Days following receipt by the Department of the request referred to in Section 12.2(b)(i), give full details of the relevant Relief Event (as available to it having made due inquiry), the extension of time and/or relief requested, including:
 - A. to the extent the Development Entity believes that the relevant Relief Event would result in a delay to the achievement of Project Facility Completion, a Time Impact Analysis (based on the Project Working Schedule most recently accepted pursuant to the Technical Provisions) demonstrating that the relevant Relief Event will result in an identifiable and measurable disruption to Project Facility Completion, which will impact a Critical Path activity

(i.e., would consume all available float and would extend the time required to achieve Project Facility Completion);

- B. evidence demonstrating that no other concurrent unrelated delay to a Critical Path activity that is the Development Entity's responsibility has occurred that has contributed to the delay for which relief is being sought; and
- C. evidence demonstrating that such event could not reasonably be avoided by the Development Entity without material cost or delay, including by re-sequencing, reallocating or redeploying its forces to other portions of the Project Services.

(iii) provide evidence to the Department demonstrating that:

- A. the Development Entity and its Key Contractors could not have avoided such occurrence or consequences by steps which they might reasonably be expected to have taken, without incurring material expenditure;
- B. the Relief Event was the direct cause of or is reasonably likely to be the direct cause of:
 - I. a delay in achieving Project Facility Completion by the Project Facility Completion Deadline or (following the Project Facility Completion Deadline) further delay in the achievement of Project Facility Completion; and/or
 - II. the Development Entity failing to comply with its obligations under this PPA;
- C. the extension of time and/or relief from the obligations under this PPA requested could not reasonably be expected to be mitigated or recovered by the Development Entity acting in accordance with Good Industry Practice; and
- D. the Development Entity is using Reasonable Efforts to perform its obligations under this PPA.

(c) Giving of Relief

In the event that the Development Entity has complied with its obligations under Section 12.2(b) (Procedure for Relief), then:

- (i) in the case of a delay demonstrated pursuant to Section 12.2(b) (Procedure for Relief), the Project Facility Completion Deadline or (following the Project Facility Completion Deadline) the Long Stop Deadline shall be extended by such time as shall be reasonable for such a Relief Event, but

only to the extent that the Development Entity demonstrates to the Department by way of a Time Impact Analysis (based on the Project Working Schedule most recently agreed pursuant to the Technical Provisions) that the relevant Relief Event will result in an identifiable and measurable disruption to Project Facility Completion, which will impact a Critical Path activity (i.e., would consume all available float and would extend the time required to achieve Project Facility Completion); and

- (ii) to the extent that any Development Entity Default or breach of any Project Document would, but for the occurrence of any Relief Event, have not occurred, such Development Entity Default or breach shall, for the purposes of this PPA, be deemed not to have occurred.

(d) Late Provision of Notice or Information

In the event that information is provided after the dates referred to in Section 12.2(b) (Procedure for Relief) then the Development Entity shall not be entitled to any extension of time or relief from termination with respect to the period between the date on which the relevant information is required to have been provided pursuant to the terms hereof and the date on which the relevant information is provided.

(e) Failure to Agree

If the Parties cannot agree on the extent of any delay incurred or relief from the Development Entity's obligations under this PPA, or the Department disagrees that a Relief Event has occurred (or as to its consequences), or that the Development Entity is entitled to relief under this Article 12 (Supervening Events), the Parties shall resolve the matter in accordance with the Dispute Resolution Procedures.

12.3 Compensation Events

- (a) If, as a direct result of the occurrence of a Compensation Event, the Development Entity becomes aware that the Compensation Event has caused or is likely to cause the Development Entity to fail to:
 - (i) achieve Project Facility Completion by the Project Facility Completion Deadline or (following the Project Facility Completion Deadline) suffer further delay in the achievement of Project Facility Completion;
 - (ii) comply with its obligations under this PPA; and/or
 - (iii) incur costs or lose revenue,

then the Development Entity is entitled to claim:

- A. an extension to the Project Facility Completion Deadline and/or the applicable Long Stop Deadline;

- B. relief from compliance with its obligations under this PPA; and/or
- C. compensation for any damages that the Development Entity will incur or suffer (as relevant) as a direct result of such Compensation Event.

in each case in accordance with this Article 12 (Supervening Events).

(b) Procedure for Relief and Compensation

Subject to Section 12.3(d) (Late Provision of Notice or Information), any claim made by the Development Entity pursuant to Section 12.3(a) must:

- (i) be submitted to the Department as soon as practicable, and in any event no later than twenty (20) Business Days of the Development Entity first becoming aware that the relevant Compensation Event would have the effect that is the subject of the Development Entity's claim;
- (ii) no later than ten (10) Business Days following receipt by the Department of the claim referred to in Section 12.3(b)(i), give full details of the relevant Compensation Event (as available to it having made due inquiry) and the extension of time and/or relief from its obligations under this PPA and/or any Change in Costs claimed or reasonably likely to be claimed, including:
 - A. to the extent the Development Entity believes that the relevant Compensation Event would result in a delay to the achievement of Project Facility Completion, a Time Impact Analysis (based on the Project Working Schedule most recently agreed pursuant to the Technical Provisions) demonstrating that the relevant Compensation Event will result in an identifiable and measurable disruption to Project Facility Completion, which will impact a Critical Path activity (i.e., would consume all available float and would extend the time required to achieve Project Facility Completion);
 - B. evidence demonstrating that no other concurrent unrelated delay to a Critical Path activity that is the Development Entity's responsibility has occurred that has contributed to the delay for which relief is being sought; and
 - C. evidence demonstrating that such event could not reasonably be avoided by the Development Entity without material cost or delay, including by re-sequencing, reallocating or redeploying its forces to other Project Services; and
- (iii) provide evidence to the Department demonstrating that:

- A. the Compensation Event was the direct cause or is reasonably likely to be the direct cause of:
 - I. Change in Costs;
 - II. a delay in achieving Project Facility Completion by the Project Facility Completion Deadline or (following the Project Facility Completion Deadline) further delay in the achievement of Project Facility Completion; and/or
 - III. the Development Entity failing to comply with its obligations under this PPA; and
- B. the Change in Costs, extension of time and/or relief from the obligations under this PPA claimed, could not reasonably be expected to be mitigated or recovered by the Development Entity acting in accordance with Good Industry Practice or resequencing, reallocation or redeploying its forces to other Project Sites.

(c) **Giving of Relief and Compensation**

In the event that the Development Entity has complied with its obligations under Section 12.3(b) (Procedure for Relief and Compensation), then:

- (i) in the case of a delay as demonstrated pursuant to Section 12.3(b) (Procedure for Relief and Compensation), the Project Facility Completion Deadline or (following the Project Facility Completion Deadline) the Long Stop Deadline shall be extended by such time as shall be reasonable for such a Compensation Event, but only to the extent that the Development Entity demonstrates to the Department by way of a Time Impact Analysis (based on the Project Working Schedule most recently agreed pursuant to the Technical Provisions) that the relevant Compensation Event will result in an identifiable and measurable disruption to Project Facility Completion, which will impact a Critical Path activity (i.e., would consume all available float and would extend the time required to achieve Project Facility Completion); and
- (ii) in the case of any Change in Costs that are not the subject of Section **Error! Reference source not found.**, the Department shall compensate the Development Entity in such other manner as the Parties may agree (acting reasonably, and on the basis that the Development Entity should be left in no better and no worse position than it would have been if the Compensation Event had not occurred);
- (iii) to the extent that any Development Entity Default or breach of any Project Document would, but for the occurrence of the Compensation Event, have not occurred, such Development Entity Default or breach shall, for the purposes of this PPA, be deemed to have not occurred; and

- (iv) the Department shall give the Development Entity such relief from its ongoing obligations under this PPA as is reasonable given the nature of both the Compensation Event and the Development Entity's ongoing obligations.

(d) Late Provision of Notice or Information

To the extent that information is not provided to the Department in accordance with the requirements of Section 12.3(b) (Procedure for Relief and Compensation), the Development Entity shall not be entitled to any extension of time, compensation or relief from its obligations under this PPA with respect to the relevant Compensation Event.

(e) Failure to Agree

If the Parties cannot agree on the extent of any compensation, delay incurred, relief from the Development Entity's obligations under this PPA, or the Department disagrees that a Compensation Event has occurred (or as to its consequences), or that the Development Entity is entitled to relief under this Article 12 (Supervening Events), the Parties shall resolve the matter in accordance with the Dispute Resolution Procedures.

(f) Sole Remedy

As between the Development Entity and the Department, the Development Entity's sole remedy in relation to any Compensation Event shall be the operation of this Section 12.3 (Compensation Events).

12.4 Change in Law

(a) Occurrence

The Development Entity shall take all steps necessary to ensure that the Project Services are performed in accordance with the terms of this PPA following any Change in Law.

(b) Notification

- (i) If a Change in Law (other than a Qualifying Change in Law) occurs or is shortly to occur, then either Party may notify the other to express an opinion on its likely effects, giving details of its opinion of:
- (ii) any necessary change to the Project Services; and
- (iii) whether any amendments are required to the terms of this PPA to deal with the Change in Law,

in each case giving in full detail the procedure for implementing the change in the Project Services.

- (c) As soon as practicable after receipt of any notice from either Party under subsection (a), the Parties shall discuss and agree on the issues referred to in subsection (a) and any ways in which the Development Entity can mitigate the effect of the relevant Change in Law.

13. Technical Provisions

13.1 Compliance with Technical Provisions

The Development Entity shall comply with and implement the Technical Provisions in all material respects at all times during the Term. The Development Entity shall have in place procedures that are reasonably designed to achieve compliance with the Technical Provisions. The Department and the Development Entity agree that the Technical Provisions shall be construed flexibly in light of their objectives. The Technical Provisions shall not be deemed to be violated by occasional or incidental acts or omissions, including any occasional or incidental failure to comply with specific requirements set forth therein. Without limiting the generality of the foregoing, any failure to meet specific time limits, durations or frequencies set forth in the Technical Provisions shall not constitute a violation; *provided* that any such failure is not inconsistent with procedures that are designed to achieve compliance with the requirements set forth in the Technical Provisions. Except as specifically set forth in this PPA (including the Technical Provisions), the Development Entity shall perform all work required to comply with and implement the Technical Provisions in all material respects at its sole cost and expense. To the extent that any term or provision of the Technical Provisions conflicts with any term or provision otherwise specified in this PPA, then such term or provision of this PPA shall govern and shall supersede any such conflicting term or provision in the Technical Provisions.

13.2 Proposed Technical Provisions

If the Development Entity, at its cost and expense, wishes to implement and use Technical Provisions other than the Technical Provisions, the Development Entity must provide notice of such proposed Technical Provisions to the Department for Approval. The Development Entity's proposed Technical Provisions must be accompanied by an explanation of the Development Entity's rationale for making its proposal and all relevant supporting information, certificates, reports, studies, investigations and other materials as are necessary to demonstrate that the Development Entity's proposed Technical Provisions are reasonably designed to achieve the objectives of the applicable Technical Provisions. The Department may request any additional supporting information, certificates, reports, studies, investigations and other materials as are reasonably required by the Department to determine if the Development Entity's proposed Technical Provisions are reasonably designed to achieve the objectives of the applicable Technical Provisions. Until the Department provides its approval for the implementation of the Development Entity's proposed Technical Provisions, the Development Entity shall not implement the proposed Technical Provisions and shall continue to implement and comply with the then existing Technical Provisions. The Development Entity's proposed Technical Provisions shall be deemed incorporated into the Technical Provisions upon

approval by the Department in accordance with the terms hereof. If the Department refuses to approve any proposed Technical Provisions and the Development Entity disagrees with such refusal, the Development Entity may submit the matter to dispute resolution pursuant to Schedule 10.

13.3 Modified Technical Provisions

The Department shall have the right, at any time during the Term, to modify or change the Technical Provisions upon notice to the Development Entity. In the event that the Department modifies or changes the Technical Provisions, the Development Entity, at its cost and expense, shall perform all work required to implement such modifications or changes and shall comply with all such modifications or changes and in no event shall the Development Entity be excused from compliance with any such modification or change. For the avoidance of doubt, the Development Entity will have the right to challenge any modified Technical Provisions pursuant to Schedule 10 on the basis that it does not meet the requirements set forth above.

14. Payments to the Development Entity

14.1 Earned Value Payments; Holdback Payment

- (a) Earned Value Payments shall be calculated and earned by the Development Entity according to the methodology set out in Schedule 13 (Earned Value Payment Mechanism). Within thirty (30) days of the end of each period set forth in Schedule 13 (Earned Value Payment Mechanism), the Department shall, subject to the receipt of a proper Invoice in accordance with Section 14.2 (Invoicing), pay to the Development Entity the applicable Earned Value Payment.
- (b) The Department shall retain the Holdback Payment until the Development Entity and/or the Commercialization Entity reaches 50% of the construction for the Commercial Facility. Within thirty (30) days after the Commercialization Entity reaches 50% of the construction for the Commercial Facility, the Department shall, subject to the receipt of a proper Invoice in accordance with Section 14.2 (Invoicing), pay to the Development Entity the Holdback Payment.

14.2 Invoicing

Upon receipt by the Department of an invoice for an Earned Value Payment or the Holdback Payment (an **Invoice**), the Department shall pay the Development Entity such Earned Value Payment or Holdback Payment within thirty (30) days of the receipt of such Invoice. Notwithstanding the foregoing, the Department has no obligation to pay any Earned Value Payment or the Holdback Payment until the Development Entity submits a proper Invoice in respect of the relevant amount in accordance with the following provisions of this Section 14.2 (Invoicing):

- (a) The Development Entity shall submit an Invoice no later than (i) the fifteenth day of the month following the applicable period set forth in Schedule 13 (Earned Value Payment Mechanism) for an Earned Value Payment or (ii) the fifteenth day

of the month following the date on which the Commercialization Entity reaches 50% of the construction for the Commercial Facility; **provided**, that if the Development Entity submits the invoice after the fifteenth day in a particular month, such Invoice shall be processed by the Department as soon as is reasonably practicable, and in no event later than the fifteenth day of the month following that in which such Invoice is submitted.

- (b) The Invoice must set out the amount and calculation of any Earned Value Payment or Holdback Payment invoiced in the relevant Invoice. The Department shall return any Invoices that are incomplete and/or incorrect in any material respect to the Development Entity for correction and resubmission.

14.3 Disputed Amounts

- (a) Both the Development Entity and the Department shall have the right to dispute, in good faith, any amount specified in an Invoice submitted pursuant to Section 14.2. The Party disputing any such amount will pay the amount of the Invoice in question that is not in dispute and will be entitled to withhold the balance pending resolution of the Dispute.
- (b) Any amount determined to be due pursuant to the Dispute Resolution Procedures will be paid within thirty (30) days following resolution of the Dispute.

14.4 Set Off Right in Respect of Commonwealth Liability

The Development Entity agrees that the Commonwealth may set off the amount of any state tax liability or other obligation of the Development Entity or its subsidiaries to the Commonwealth against any payments due to the Development Entity under this PPA.

14.5 Appropriations and Source of Funds

(a) Appropriations

- (i) The Department hereby covenants and agrees to:
 - A. include in its budgetary request, which the Department shall submit to the Commonwealth's Office of the Budget no later than November 1 each Calendar Year during the Term, a request for appropriation (including executive authorization) of funds sufficient to pay the amounts due and owing or scheduled to become due and owing from the Department to the Development Entity during the succeeding fiscal year; and
 - B. use its best efforts to cause the General Assembly of the Commonwealth to appropriate (and the Governor of the Commonwealth to implement executive authorization of) amounts that will be sufficient to enable the Department to pay all such amounts to the Development Entity under this PPA, including

exhausting all available reviews and appeals and doing all other things lawfully within its power to do if such amounts are not appropriated.

- (ii) The obligation of the Department to pay all amounts due and owing or scheduled to become due and owing from the Department to the Development Entity hereunder is a contractual commitment of the Commonwealth and does not constitute a debt or pledge of the Commonwealth or any political subdivision thereof within the meaning or application of any constitutional provision or limitation. The Department has no taxing power. The Development Entity has no right to have taxes levied or compel appropriations by the General Assembly of the Commonwealth for any payment of any amounts due and owing or scheduled to become due and owing from the Department to the Development Entity hereunder.

(b) Source of Funds

- (i) Except with respect to funds from the FTA or those sources of funds, if any, that are available for payments required to be made by the Department hereunder that as a matter of law are not subject to appropriations, the Parties acknowledge that:
 - A. the source of funds for payment of all amounts due and owing or scheduled to become due and owing from the Department to the Development Entity hereunder is subject to the availability of funds appropriated to the Department by the General Assembly of the Commonwealth and approved by the Governor of the Commonwealth (including funds available pursuant to executive authorization in accordance with appropriations theretofore made by the General Assembly of the Commonwealth); and
 - B. the Department's obligations to provide funding under this PPA are subject to the appropriation of funds for such purposes by the General Assembly of the Commonwealth (including funds available pursuant to executive authorization in accordance with appropriations theretofore made by the General Assembly of the Commonwealth) and the certification of the availability of such funds by the Commonwealth's Office of the Budget pursuant to Section 327 of the Commonwealth Procurement Code, 62 Pa.C.S. §327.
- (ii) The Department shall notify the Development Entity in writing promptly upon becoming aware of any failure of (i) the Governor of the Commonwealth to approve such appropriation, or (ii) the Commonwealth's Office of the Budget to certify as to the availability of such funds.

- (iii) Notwithstanding anything to the contrary set out herein, the obligations of the Department under this PPA will survive any failure to appropriate sufficient amounts to pay the amounts due and owing or scheduled to become due and owing from the Department to the Development Entity under this PPA and any expiration or termination of this PPA and such obligations shall not be impaired, reduced or otherwise affected by any such failure.

15. Commercialization Activities

15.1 Commercialization Management Plan

From time to time, the Development Entity may submit to the Department for the Department's review and acceptance in its sole discretion an update to the then-current Commercialization Management Plan to reflect any proposed changes in the Commercialization Entity's management of the Commercialization Activities in accordance with the requirements set forth in the Technical Provisions (such updated Commercialization Management Plan, as approved, the **Updated Commercialization Management Plan**).

15.2 Commercialization Rights

The Commercialization Entity shall have the right, but not the obligation, to develop Commercial Facilities and collect Commercialization Revenues in accordance with this PPA and the Commercialization Management Plan in connection with those Commercialization Activities identified in the then-current Commercialization Management Plan. If the Commercialization Entity fails to develop a Commercial Facility on or before the date which is three (3) years after the proposed date for such Commercial Facility in the Commercialization Management Plan, the Commercialization Entity shall (i) have forfeited the Commercialization Entity's right to undertake Commercialization Activities at such Commercialization Site and the Department shall have the right, in its sole discretions, to authorize or approve other Persons to undertake Commercialization Activities at such Commercialization Site and (ii) have no right to compensation in respect of such forfeiture.

15.3 Ground Lease

On the Commercial Closing Date, the Department and the Commercialization Entity shall enter into the Ground Lease with respect to the Commercialization Sites indicated in the Initial Commercialization Management Plan. To the extent that an Updated Commercialization Management Plan requires additional Commercialization Sites for the Commercialization Activities, the Department and the Commercialization Entity shall enter into an amendment to the Ground Lease to reflect such additional Commercialization Sites.

15.4 Commercialization Taxes

The Development Entity and/or the Commercialization Entity will be responsible for paying any real property, ad valorem, transfer, sales, income or other tax, duty or charge by any Governmental Entity as a consequence of the conduct of Commercialization Activities by the Commercialization Entity from time to time (any such tax, duty or charge, **Commercialization Taxes**).

To the extent that the Department incurs or is assessed any Commercialization Taxes, the Department shall notify the Development Entity in writing thereof (including the amount of such Commercialization Taxes) and the Development Entity shall promptly, but in any event within 30 days after receipt of such written notice from the Department, pay to the Department the amount of such Commercialization Taxes.

16. Parking Facility Operations

16.1 Operation of the Parking Facility

During the O&M Period, the Development Entity shall or shall cause the Maintenance Contractor to operate the Parking Facility in the ordinary course in a manner consistent with other commercially-operated public parking facilities, which shall include using all reasonable efforts (i) to cause the Parking Facility to be operated in all material respects in accordance with this PPA, the Technical Provisions and Applicable Law; and (ii) to maintain good business relationships with customers, suppliers and the Borough. The Development Entity shall, at all times during the Term, cause the Parking Facility to be continuously open and operational for use by all members of the public, twenty-four (24) hours a day, every day, except that the Development Entity may close the Parking Facility or a portion or portions thereof (A) with respect to underutilized portions of the Parking Facility during periods of such underutilization, as reasonably determined by the Development Entity; provided that no such closure shall prevent users of the Parking Facility from retrieving their vehicles from any such closed portion, (B) as specifically permitted under this PPA, (C) as required by Applicable Law, (D) as necessary to comply with any other requirement of this PPA or (E) as necessary for temporary closures required to address Emergencies, Incidents, public safety, or temporary events.

16.2 Costs and Expenses

Except as otherwise specifically provided herein, the Development Entity shall, at all times during the Term, pay or cause to be paid all costs and expenses relating to the operations of the Parking Facility as and when the same are due and payable.

16.3 Quiet Enjoyment

The Department agrees that, subject to the Department's remedies upon a Development Entity Default, the Development Entity shall, at all times during the Term, be entitled to and shall have the quiet possession and enjoyment of the Parking Facility and the rights and privileges granted to the Development Entity hereunder, subject to the provisions contained in this PPA. The Department and the Development Entity acknowledge that

the Development Entity's rights to use the Parking Facility as a public parking garage and charge parking fees are subject to the right of the Department, in accordance with the terms of this PPA, to monitor compliance with this PPA to ensure that the Parking Facility is used and operated as required by this PPA. Unless expressly so stated in writing by the Department, any entry by the Department or any of its representatives onto the Parking Facility required or permitted under this PPA shall not constitute a reentry, trespass, or a breach of the covenant for quiet enjoyment contained in this PPA.

16.4 Parking Operator

- (a) The Parking Facility shall, at all times during the Term, be under the direction and supervision of an active operator with the expertise, qualifications, experience, competence, skills and know-how to operate the Parking Facility in accordance with this PPA and the Technical Provisions, who may be the Development Entity itself or the Maintenance Contractor.
- (b) The Maintenance Contractor shall at all times be subject to the direction, supervision, and control of the Development Entity, and any delegation to a Maintenance Contractor shall not relieve the Development Entity of any obligations, duties or liability hereunder. The Maintenance Contractor shall have no interest in or rights under this PPA or the Parking Facility unless the Maintenance Contractor is the Development Entity itself.

16.5 Qualifications

The Development Entity shall, at all times during the Term, maintain in full force and effect its existence and all qualifications necessary to carry on its business pertaining to the Parking Facility, including all rights, franchises, licenses, privileges, and qualifications required in connection with the Parking Facility.

16.6 No Encumbrances

- (a) The Development Entity shall not do any act or thing that will create any Encumbrance against the Parking Facility and shall promptly remove any Encumbrance against the Parking Facility.
- (b) The Department shall not do any act or thing that will create any Encumbrance against the Parking Facility and shall promptly remove any Encumbrance against the Parking Facility.
- (c) Each Party, if requested by the other Party and at such other Party's costs and expense, shall use its reasonable efforts to assist such other Party in attempting to remove any Encumbrance that has come into existence as a result of an act of or omission by such other Party.

16.7 Police, Fire, Emergency, and Public Safety Access Rights

Notwithstanding any other provision of this PPA, at all times during the Term and without notice or compensation to the Development Entity (i) any police, fire, and emergency services and any other security or emergency personnel retained by or on behalf of the Department, the Borough, or other local, state, and federal agencies shall have access, as required by such services or personnel, to the Project Sites; and (ii) any Governmental Entity with jurisdiction over the Project Sites shall have access to the Project Sites as necessary for emergency management and homeland security purposes, including the prevention of or response to a public safety emergency.

17. Parking Facility Revenues

17.1 Parking Facility Revenues

- (a) The Development Entity shall, at all times during the Term, (i) have the right to establish, collect, and enforce payment of Parking Fees, (ii) have the right, title, entitlement, and interest in all revenues charged by or on behalf of the Development Entity in respect of vehicles using the Parking Facility during the Term, and (iii) collect and enforce payment of fines with respect to parking of vehicles in the Parking Facility (the **Parking Facility Revenues**).
- (b) Subject to Section 17.2 below, the Development Entity may charge any types of rates as it determines are appropriate in its discretion, including variable rates, time-of-day rates, monthly rates, weekday, weekend, and special event rates and discounts to be determined by the Development Entity.

17.2 Rate Setting

(a) Amtrak Users

- (i) The Development Entity shall have the right to establish and collect Parking Fees for Amtrak Users, which shall be the lesser of (i) the Parking Fees established for the Non-Amtrak Users and (ii) the Parking Fees set forth in Schedule 8 (Parking Fee Schedule). The Development Entity may charge Parking Fees for Amtrak Users in the form of weekday rates, weekly rates or monthly rates all as set forth in Schedule 8 (Parking Fee Schedule).
- (ii) Every five (5) years, the Development Entity shall be entitled to submit a request to the Department to change the Parking Fees for Amtrak Users, at the Department's sole discretion. If the Department agrees to change the Parking Fees for Amtrak Users, the Department and the Development Entity shall revise Schedule 8 (Parking Fee Schedule) with such revised Parking Fee rates. At any time with 30 days' written notice to the Development Entity, the Department shall be entitled to change the Parking Fees for Amtrak Users in its sole discretion. If the Department changes the Parking Fees for Amtrak Users, the Department and the

Development Entity shall revise Schedule 8 (Parking Fee Schedule) with such revised Parking Fee rates.

(b) Non-Amtrak Users

The Development Entity shall have the right to establish and collect Parking Fees for Non-Amtrak Users as it determines are appropriate in its discretion. The Development Entity may charge any types of Parking Fees for Non-Amtrak Users as it determines are appropriate in its discretion, including variable rates, time-of-day rates, weekday rates, weekly rates, monthly rates, weekend rates, and special event rates and discounts to be determined by the Development Entity.

(c) Parking Fee Rate Notices

The Development Entity shall provide to the Department, no later than the end of each year, notice of the rates and rate types charged by the Development Entity for the parking of any vehicle in the Parking Facility. Such notice shall include the rates and rate types charged during the prior calendar year and expected to be charged during the next calendar year.

18. Principal Development Entity Documents

18.1 Key Contracts

The Development Entity shall perform its obligations under, and observe all of the provisions of, the Key Contracts and shall not, without the prior written consent of the Department:

- (a) terminate or agree to termination of all or any part of any Key Contract;
- (b) amend or vary any Key Contract;
- (c) in any material respect, depart from its obligations (or waive or allow to lapse any rights it may have in a material respect) or procure that others in any material respect depart from their obligations (or waive or allow to lapse any rights they may have in a material respect), under any Key Contract; or
- (d) enter into (or permit the entry into by any other person of) any agreement replacing all or part of (or otherwise materially and adversely affecting the interpretation of) any Key Contract,

if in each case the proposed course of action may reasonably be expected to have a material adverse effect on the ability of the Development Entity to perform its obligations under the Project Documents.

18.2 Delivery of Changed Principal Development Entity Documents

At any time an amendment is made to any Principal Development Entity Document or the Development Entity enters into a new Principal Development Entity Document (or any agreement, which affects the interpretation or application of any Principal Development Entity Document), the Development Entity shall deliver to the Department a conformed copy of each such amendment or agreement within ten (10) Business Days of the date of its execution or creation (as the case may be) certified as a true copy by an officer of the Development Entity.

18.3 No Increased Termination Liabilities

No amendment, waiver or exercise of a right under any Principal Development Entity Document shall have the effect of increasing the amount of the Department's liabilities on Early Termination, unless the Development Entity has obtained the prior written consent of the Department to such increased liability for the purposes of this Section 18.3 (No Increased Termination Liabilities). In the event of any conflict between the provisions of this Section 18.3 (No Increased Termination Liabilities) and any other provision of this PPA, the provisions of this Section 18.3 (No Increased Termination Liabilities) shall prevail.

18.4 Replacement of Key Contractors

- (a) Nothing in this PPA shall prohibit the Development Entity from providing or procuring the provision of the Work from any Key Contractor that the Development Entity demonstrates to the Department has the legal capacity, power and authority to become a party to and perform the obligations of the relevant Key Contract and employs persons having appropriate qualifications, experience, integrity and technical competence and has the resources available to it, which are sufficient to enable it to perform the obligations of the Key Contractor under the relevant Key Contract, and otherwise comply with the requirements of this PPA. By entering into this PPA, the Department approves each of the Key Contractors appointed by the Development Entity as at the date of this PPA.
- (b) The Development Entity shall not enter into any D&C Contract without first delivering to the Department a D&C Direct Agreement duly executed by the Development Entity and the relevant D&C Contractor.

19. Insurance

19.1 Compliance with Insurance Requirements

The Development Entity shall at all times comply with the requirements of Schedule 9 (Insurance Coverage Requirements).

20. Development Entity Indemnity

20.1 Indemnified Losses

Subject to Section 20.2 (Exclusions from Indemnity), to the fullest extent permitted by Applicable Law, the Development Entity shall release, defend, indemnify and hold harmless the Indemnified Parties on demand from and against any and all liability to third parties for Losses arising from:

- (a) death or personal injury;
- (b) loss of or damage to any Indemnified Party's property, including loss of use thereof;
- (c) third party actions, claims, fines, penalties and/or demands brought against any Indemnified Party;

which may arise out of, or in consequence of, the performance or non-performance by the Development Entity of its obligations under the Project Documents.

20.2 Exclusions from Indemnity

The Development Entity shall not be responsible or be obliged to indemnify an Indemnified Party in respect of any Losses under Section 20.1 (Indemnified Losses) to the extent that the same arise as a direct result of:

- (a) a Compensation Event or Relief Event;
- (b) any Third-Party Claim initiated against the Development Entity or any Development Entity-Related Entity in connection with the presence of Hazardous Materials on any Project Site that the Department is deemed to be the sole generator and arranger of pursuant to Section 6.3 (Generator Status), but only to the extent that the relevant Loss does not arise as a direct result of the negligence of the Development Entity or the Development Entity failing to comply with the terms of the Project Documents;
- (c) the fraud, negligence, recklessness, bad faith or willful misconduct of an Indemnified Party;
- (d) any performance or non-performance by an Indemnified Party of its obligations under the Project Documents; or
- (e) any Losses suffered by an Indemnified Party with respect to the use of the Project Data or any Intellectual Property related thereto other than specifically for the Project Facilities.

20.3 Limitation of Indemnity

An indemnity by the Development Entity under any provision of the Project Documents shall be without limitation to any indemnity by the Development Entity under any other provision of the Project Documents.

20.4 Conduct of Third-Party Claims

- (a) Pursuant to the Commonwealth Attorneys Act (71 P.S. § 732-101, et. seq.), the Office of Attorney General shall have the sole authority to represent the Department in any Third-Party Claim brought against the Department. The Office of Attorney General may, in its sole discretion and under such terms as it deems appropriate, delegate its right of defense of any Third-Party Claim. If the Office of Attorney General delegates the defense of any Third-Party Claim, the Department shall cooperate with all reasonable requests of the Development Entity made in the defense of such Third-Party Claim.
- (b) The Development Entity shall, if it wishes to have conduct and control of any Third-Party Claim (at its own cost and expense), submit a request to the Department, and the Department shall notify the Office of Attorney General of such request. If the Office of Attorney General consents (in its sole discretion) to the Development Entity's conduct and control of any Third-Party Claim, the Department shall cooperate with all reasonable requests of the Development Entity made in respect of such Third-Party Claim.
- (c) Notwithstanding the foregoing, neither Party shall enter into any settlement in respect of a Third-Party Claim without the other Party's written consent.

21. Representations and Warranties

21.1 Development Entity Representations and Warranties

The Development Entity hereby represents and warrants to the Department that:

- (a) The Development Entity has all required authority, license status, professional ability, skills and capacity to perform the Project Services.
- (b) Without limiting its rights and remedies expressly granted hereunder, the Development Entity has evaluated the constraints affecting design, construction, operations and maintenance of the Project, including each of the Project Sites and each of the Project Facilities, as well as the conditions of the Governmental Approvals then in effect, and has reasonable grounds for believing, and does believe, that the Project can be designed and built within such constraints.
- (c) Without limiting its rights and remedies expressly granted hereunder as of the Setting Date, the Development Entity has, in accordance with Good Industry Practice, examined each Project Site and surrounding locations, investigated and reviewed the Disclosed Information, and other available public and private

records, and undertaken other activities sufficient to familiarize itself with each Project Site or surrounding locations; and as a result of such review, inspection, examination and other activities the Development Entity is familiar with and, subject to the provisions of this PPA, accepts the physical requirements of the Project Services; **provided**, that the same shall not diminish, reduce or otherwise affect any of the Development Entity's rights under this PPA, including, without limitation, its rights pursuant to Article 12 (Supervening Events).

- (d) To the extent given access on or prior to the date hereof, the Development Entity has familiarized itself with the requirements of any and all Applicable Laws, including those Applicable Laws applicable to the use of federal-aid funds, and the conditions of any required Governmental Approvals then in effect prior to entering into this PPA. Except as specifically permitted in this PPA, the Development Entity shall be responsible for complying with all Applicable Laws at its sole cost and without any increase in compensation or extension of any deadlines in the Project Working Schedule on account of such compliance, regardless of whether such compliance would require additional time for performance or additional labor, equipment and/or materials not expressly provided for in the Project Documents. The Development Entity has no reason to believe that any Governmental Approval required to be obtained by the Development Entity will not be granted in due course and, thereafter, remain in effect so as to enable the Project Services to proceed in accordance with the Project Documents.
- (e) All Project Services furnished by the Development Entity will be performed by or under the supervision of Persons who hold all necessary, valid licenses to practice in the Commonwealth, by personnel who are skilled, experienced and competent in their respective trades or professions, who are professionally qualified to perform the Project Services in accordance with the Project Documents.
- (f) The Development Entity is a [●] duly organized and validly existing under the laws of [●], 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 deliver this PPA and the Principal Development Entity Documents to which the Development Entity is a party and to perform each and all of the obligations of the Development Entity provided for herein. The Development Entity is duly qualified to do business, and is in good standing, in the Commonwealth.
- (g) The execution, delivery and performance of this PPA and the Principal Development Entity Documents to which the Development Entity is (or will be) a party have been duly authorized by all necessary [Board of Managers'] action of the Development Entity; each person executing this PPA and such Principal Development Entity Documents on the Development Entity's behalf has been duly authorized to execute and deliver the PPA on the Development Entity's behalf; and this PPA and such Principal Development Entity Documents has been duly executed and delivered by the Development Entity.

- (h) Neither the execution and delivery by the Development Entity of this PPA and the Principal Development Entity Documents to which the Development Entity is (or will be) a party, nor the consummation of the transactions contemplated hereby, is (or at the time of execution will be) in conflict with or has resulted or will result in a default under or a violation of the organizational documents of the Development Entity or any other material agreements or instruments to which it is a party or which are binding on the Development Entity or any of its property or assets or in a material default or violation of any Applicable Law.
- (i) Each of this PPA and the Principal Development Entity Documents to which the Development Entity is (or will be) a party constitutes (or at the time of execution and delivery will constitute) the legal, valid and binding obligation of the Development Entity, enforceable against the Development Entity and, if applicable, each member of the Development Entity, in accordance with its terms, subject to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and the general principles of equity.
- (j) There is no action, suit, proceeding, investigation or litigation pending or served on the Development Entity or, to the Development Entity's knowledge, threatened which (i) would reasonably be expected to have a material adverse effect on the ability of the Development Entity to perform its obligations under any Project Document or (ii) challenges the Development Entity's authority to execute, deliver or perform, or the validity or enforceability of, this PPA and the Principal Development Entity Documents to which the Development Entity is a party, or which challenges the authority of the Development Entity's representative executing this PPA or such Principal Development Entity Documents; and the Development Entity has disclosed to the Department any pending and un-served or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which the Development Entity is aware.
- (k) The audited consolidated financial statements of the Development Entity (and, if applicable, each Guarantor), the Equity Members, the D&C Contractor and the Maintenance Contractor (or the audited consolidated financial statements of the parent company of such Key Contractor, in the case of any such Key Contractor that is a special purpose vehicle) for the most recent reporting year prior to submission of the Proposal for which such audited statements are available have been prepared on a basis consistently applied and using GAAP or equivalent accounting principles utilized and generally accepted in the country of incorporation of such party, and audited by an independent certified public accountant (applying GAAP or equivalent auditing standards utilized and generally accepted in the country of incorporation of such party) and give a true and fair view of the consolidated financial condition of each such entity or group (as applicable) and are unqualified for the accounting period in question; **provided**, that in the case of the Development Entity, such financial statements shall be on a *pro forma* basis.

- (l) As of the date hereof, there has been no material adverse change in the financial condition of the Development Entity, the parent company of the Development Entity or, if applicable, any Guarantor, the Equity Members, the D&C Contractor, the Maintenance Contractor and a Key Contractor since the date of its most recent audited financial statements that would have a material adverse effect on the Development Entity's ability to perform its obligations under this PPA and the other Project Documents.
- (m) All written information and certifications furnished by or on behalf of the Development Entity to the Department, or any of its representatives or advisors, as part of or in connection with the Proposal and the negotiation of this PPA or the Project Documents or delivered by or on behalf of the Development Entity to the Department or any Person on its behalf pursuant to this PPA was true and accurate in all material respects when given and is true on the date on which this representation is made or repeated and taken as a whole and there are no other facts or matters the omission of which made any statement or information contained in the written information provided to the Department or to any of its representatives or advisors misleading in any material respect as of the relevant date of delivery thereof or the date on which this representation is made or repeated and all expressions of opinion contained therein were honestly made on reasonable grounds after due and careful inquiry.
- (n) The Financial Model (i) was prepared by or on behalf of the Development Entity in good faith and utilizes the same financial formulas that the Development Entity utilized and is utilizing in making its decision to enter into this PPA and in making disclosures to potential equity investors, (ii) represents the projections that the Development Entity believes in good faith are the most realistic and reasonable for the Project, (iii) was audited and verified by an independent recognized model auditor prior to the date of this PPA and such audit will be updated within forty-eight (48) hours after the Commercial Closing Date, and (iv) fully discloses all cost, revenue and other financial assumptions and projections that the Development Entity has used or is using in making its decision to enter into this PPA; **provided, however**, that such projections (A) are based upon a number of estimates and assumptions, (B) are subject to significant business, economic and competitive uncertainties and contingencies, and (C) accordingly are not a representation or warranty that any of the assumptions are correct, that such projections will be achieved or that the forward-looking statements expressed in such projections will correspond to actual results.

21.2 Department Representations and Warranties

The Department hereby represents and warrants to the Development Entity that:

- (a) The Department is an executive agency of the Commonwealth, and has the requisite power and all required licenses to carry on its present activities and those proposed under the Principal Department Documents.

- (b) The Department has the full power and authority to execute, deliver and perform each Principal Department Document and to carry out the transactions contemplated thereby. The execution, delivery and performance of each Principal Department Document, and the performance of the transactions contemplated thereby, have been duly and validly authorized by all necessary action of the Department. Each Principal Department Document has been duly and validly executed and delivered by the Department, and each constitutes a valid and binding obligation of the Department, enforceable against the Department in accordance with its terms, subject only to:
- (i) the effect of bankruptcy, insolvency, reorganization, moratorium, or other similar Laws now or hereafter in effect affecting, generally, the enforcement of creditor's rights and remedies;
 - (ii) the effect of Applicable Laws governing equitable remedies and defenses, and the discretion of any court of competent jurisdiction in awarding equitable remedies, including, without limitation, the doctrine of sovereign immunity;
 - (iii) the effect of Applicable Laws governing enforcement and collection of damages against the Department, including, without limitation, the doctrine of sovereign immunity; and
 - (iv) Applicable Laws concerning the review and approval of contracts, as to form and legality, by the Office of General Counsel of the Commonwealth and the Office of the Attorney General of the Commonwealth.
- (c) The execution, delivery and performance of each Principal Department Document by the Department do not:
- (i) violate any Applicable Law applicable to the Department or the Department's ability to fully perform its obligations thereunder;
 - (ii) require any consent, approval, or authorization of, notice to, or declaration, filing, or registration with any Person not obtained or accomplished as of the Commercial Closing Date; or
 - (iii) to the knowledge of the Department, conflict with, or result in a default under or a violation of, any other agreement or instruments to which the Department is a party or by which it is bound.
- (d) To the knowledge of the Department, there is no material action, suit, proceeding, investigation or litigation pending and served upon the Department that challenges either the Department's authority to execute, deliver, or perform any of the Principal Department Documents, the validity or enforceability of any of the Principal Department Documents, or the authority of the Department official executing any of the Principal Department Documents.

21.3 Repetition and Survival of Representations and Warranties

The representations and warranties of the Development Entity and the Department contained herein are made on the date of this PPA and repeated on the Commercial Closing Date.

22. Development Entity Default

22.1 Development Entity Default

The occurrence of any one or more of the following events or conditions shall constitute a **Development Entity Default**:

- (a) the Development Entity fails to comply with any Governmental Approvals or Applicable Law, in any material respect;
- (b) the Development Entity fails in any material respect to make a payment to the Department under this PPA when due, or fails to deposit funds in the Handback Reserve Account in the amount and within the time period required by this PPA, in either case provided that the relevant payment or deposit (as applicable) is not subject to a good faith Dispute;
- (c) the Development Entity fails to obtain, provide and maintain the Insurance Policies in accordance with the requirements of this PPA;
- (d) any failure by the Development Entity to comply with Article 28.1 (Compliance with Federal Requirements)

The Development Entity shall comply, and shall require its Contractors to comply, with federal Applicable Law, including, without limitation, the Federal Requirements.

Cooperation with FTA

The Development Entity shall cooperate with FTA in the reasonable exercise of FTA's duties and responsibilities in connection with the Project.

Conflicting Provisions

In the event of any conflict between any Federal Requirements and the other requirements of the Project Documents, the Federal Requirements shall prevail, take precedence and be in force over and against any such conflicting provisions.

Assignment and Transfer; Fundamental Changes);

- (b) any representation or warranty made by the Development Entity in the Project Documents or any certificate, schedule, report, instrument or other document delivered to the Department pursuant to the Project Documents is false in any

material respect or materially misleading or inaccurate in any material respect when made or omits material information when made;

- (c) an Insolvency Event arises with respect to:
 - (i) the Development Entity;
 - (ii) any Guarantor;
 - (iii) any D&C Contractor or D&C Guarantor (in each case only during the Construction Period) or Maintenance Contractor, unless:
 - A. the Development Entity either:
 - I. enters into a replacement D&C Contract, guarantee or Maintenance Contract (as relevant) with a reputable counterparty reasonably acceptable to the Department within ninety (90) days of the relevant Insolvency Event; or
 - II. in the absence of entering into a replacement Maintenance Contract, the Development Entity otherwise demonstrates to the satisfaction of the Department that the Development Entity possesses the technical and financial capacity to perform all remaining Maintenance Work in accordance with the Project Documents; or
 - B. with respect to any D&C Contractor or Maintenance Contractor that is part of a joint venture or Guarantor, the Development Entity demonstrates to the satisfaction of the Department that the D&C Contractor, Maintenance Contractor and the Guarantors in respect of which an Insolvency Event has not occurred possess the technical and financial capability to perform all remaining Work in accordance with the Project Documents in all respects;
- (d) the Development Entity fails to comply with any written suspension of Construction Work order issued by the Department pursuant to Section 7.8 (Suspension of Construction Work) as soon as is practicable, except to the extent that such failure arises as a direct result of a Relief Event;
- (e) the Development Entity fails to achieve Project Facility Completion by the Long Stop Deadline;
- (f) a Persistent Breach occurs;
- (g) any D&C Contract or Maintenance Contract is terminated (other than non-default termination on its scheduled termination date) and the Development Entity has not either:

- (i) entered into a replacement D&C Contract or Maintenance Contract (as relevant) with a reputable counterparty reasonably acceptable to the Department within ninety (90) days of the termination of the relevant D&C Contract or Maintenance Contract (as relevant); or
 - (ii) in the absence of entering into a replacement Maintenance Contract, the Development Entity otherwise demonstrates to the satisfaction of the Department that the Development Entity possesses the technical and financial capacity to perform all remaining Maintenance Work in accordance with the Project Documents; and
- (h) without limitation to clauses (a) to (i) (inclusive), any breach (other than (i) any breach for which liquidated damages are payable, or (ii) any breach that arises as a direct result of the occurrence of a Compensation Event or Relief Event) by the Development Entity of any other material obligation under this PPA or any written repudiation of this PPA by the Development Entity.

22.4 Termination for Persistent Breach by the Development Entity

(a) **Warning Notice**

If the Development Entity commits a breach of this PPA (other than any breach that arises as a direct result of the occurrence of a Compensation Event or Relief Event) that continues for more than thirty (30) consecutive days or occurs more than three (3) times in any six (6)-month period then the Department may serve a notice (an **Initial Warning Notice**) on the Development Entity:

- (i) specifying that it is an Initial Warning Notice;
- (ii) giving reasonable details of the relevant breach; and
- (iii) stating that the relevant breach is a breach which, if it recurs frequently or continues, may result in the assessment of liquidated damages.

(b) **Final Notice**

If the breach specified in an Initial Warning Notice continues beyond thirty (30) consecutive days or recurs in three (3) or more months within the six (6)-month period after the date of service of the Initial Warning Notice, then the Department may serve another notice (a **Final Warning Notice**) on the Development Entity:

- (i) specifying that it is a Final Warning Notice;
- (ii) stating that the breach specified has been the subject of an Initial Warning Notice served within the six (6)-month period prior to the date of service of the Final Warning Notice; and

- (iii) stating that if the breach continues for more than thirty (30) consecutive days or recurs in three (3) or more months within the six (6)-month period after the date of service of the Final Warning Notice, this PPA may be terminated for Persistent Breach.

(c) **Currency of Warning Notices**

An Initial Warning Notice may not be served in respect of any incident of breach which has previously been the subject of an Initial Warning Notice.

22.5 Initial Notice and Cure Periods

The Department shall provide written notice to the Development Entity of the occurrence of a Development Entity Default. Upon receipt of the Department's notice (if required), the Development Entity shall have the following cure periods:

- (a) For a Development Entity Default under Sections 22.1(b) through 22.1(d), a period of thirty (30) days after the Development Entity receives written notice from the Department of such Development Entity Default.
- (b) For a Development Entity Default under Sections 22.1(a), 22.3(b) or 22.3(h) a period of thirty (30) days after the Development Entity receives written notice from the Department of such Development Entity Default; **provided**, that:
 - (i) if such Development Entity Default cannot be cured within such time period, despite the Development Entity's commencement of meaningful steps to cure immediately after receiving the default notice, then the Development Entity shall have such additional period of time, up to a maximum cure period of one hundred twenty (120) days, as is reasonably necessary to effect cure; and
 - (ii) with respect to a Development Entity Default under Section 22.3(b), cure will be regarded as complete when the adverse effects of the breach are cured.
- (c) For any other Development Entity Default not referred to in Section 22.5(a) or Section 22.5(b), there is no cure period.

22.6 Department Remedies for Development Entity Default

(a) **Remedial Plan**

- (i) In the event that a Development Entity Default occurs and it has not been cured within any relevant cure period set out in Section 22.5 (Initial Notice and Cure Periods) the Department may, without prejudice to any other right or remedy available to it, require the Development Entity to prepare and submit, within twenty (20) Business Days of being notified of such requirement, a remedial plan that shall set out a schedule and specific

actions to be taken by the Development Entity to cure the relevant Development Entity Default and reduce the likelihood of such defaults occurring in the future. Such actions may, amongst other things, include improvements to the Development Entity's quality management practices, plans and procedures, revising and restating management plans, changes in organizational and management structure, increased monitoring and inspections, changes in Key Personnel and other important personnel, and replacement of Contractors.

- (ii) Within twenty (20) Business Days of receiving any remedial plan pursuant to Section 22.6(a)(i), the Department shall notify the Development Entity whether or not the relevant remedial plan is, in the Department's sole discretion, acceptable. If the Department notifies the Development Entity that the relevant remedial plan is acceptable, the Development Entity shall implement such remedial plan in accordance with its terms.

(b) Right of Termination

In the event that a Development Entity Default occurs and it has not been cured within any relevant cure period set out in Section 22.5 (Initial Notice and Cure Periods) or (if relevant) in accordance with any remedial plan accepted by the Department pursuant to Section 22.6(a) (Remedial Plan), the Department may terminate this PPA in accordance with, and subject to the terms of, Section 24.5 (Termination for Development Entity Default).

23. Department Default

23.1 Department Default

The occurrence of any one or more of the following events or conditions shall constitute a **Department Default**:

- (a) the Department fails to make any payment due to the Development Entity under this PPA when due; **provided**, that such payment is not subject to a good faith Dispute;
- (b) any representation or warranty made by the Department under Section 21.2 (Department Representations and Warranties) is false or materially misleading or inaccurate when made in each case in any material respect or omits material information when made;
- (c) the Department or any other Governmental Entity confiscates, sequesters, condemns or appropriates any of the Project Facilities, or the Development Entity's Interest or any material part thereof, excluding the exercise of any right set out in this PPA;
- (d) the Department has ceased to perform substantially all of its obligations under this PPA, which substantially frustrates or renders it substantially impossible for the

Development Entity to perform its obligations under this PPA for a continuous period of two (2) months; or

- (e) any failure by the Department to comply with Article 29 (Assignment and Transfer; Fundamental Changes).

23.2 Initial Notice and Cure Periods

The Development Entity shall provide written notice to the Department of the occurrence of a Department Default. Upon receipt of the Development Entity's notice, the Department shall have the following cure periods with respect to the following Department Defaults:

- (a) for a Department Default under Section 23.1(a), a period of thirty (30) days after the Development Entity delivers to the Department written notice of such a Department Default;
- (b) for a Department Default under Section 23.1(d), a period of sixty (60) days after the Development Entity delivers to the Department written notice of such a Department Default;
- (c) for a Department Default under Section 23.1(b) or Section 23.1(c), a period of thirty (30) days after the Development Entity delivers to the Department written notice of such a Department Default; **provided**, that if such Department Default cannot be cured within such time period, despite the Department's commencement of meaningful steps to cure immediately after receiving the default notice, then the Department shall have such additional period of time, up to a maximum cure period of one hundred twenty (120) days, as is reasonably necessary to effect cure; and
- (d) for any other Department Default not referred to in Sections 23.2(a), (b) and (c), there is no cure period.

23.3 Right of Termination

In the event that a Department Default occurs and it has not been cured within any relevant cure period set out in Section 23.2 (Initial Notice and Cure Periods), the Development Entity may terminate this PPA in accordance with Section 24.2 (Termination for Department Default).

23.4 Right of Suspension

For so long as a Department Default set out in Section 23.1(a) has occurred and remains uncured, the Development Entity may suspend performance of the Project Services.

24. Termination and Force Majeure

24.1 Termination for Convenience

- (a) Without prejudice to the other provisions of this Article 24 (Termination and Force Majeure), the Department may terminate this PPA at any time on or before the last day of the Term by complying with its obligations under Section 24.1(b).
- (b) If the Department wishes to terminate this PPA under this Section 24.1 (Termination for Convenience), it must give a Termination Notice to the Development Entity stating:
 - (i) that the Department is terminating this PPA under this Section 24.1 (Termination for Convenience); and
 - (ii) that this PPA will terminate on the date specified in the notice, which must be a minimum of twenty (20) Business Days after the date of receipt of the notice.
- (c) This PPA will terminate on the date specified in the Termination Notice referred to in Section 24.1 (Termination for Convenience).
- (d) If this PPA is terminated pursuant to this Section 24.1 (Termination for Convenience), the Department shall pay the Department Termination Sum to the Development Entity in accordance with Schedule 6 (Compensation on Termination).

24.2 Termination for Department Default

- (a) If a Department Default occurs and it has not been cured within any relevant cure period set out in Section 23.2 (Initial Notice and Cure Periods), the Development Entity may serve a Termination Notice (**Development Entity Termination Notice**) on the Department at any time during the continuance of that Department Default.
- (b) A Development Entity Termination Notice must specify the type of Department Default which has occurred entitling the Development Entity to terminate this PPA.
- (c) This PPA will terminate on the date falling twenty (20) Business Days after the date the Department receives the Development Entity Termination Notice.
- (d) If this PPA is terminated pursuant to this Section 24.2 (Termination for Department Default), the Department shall pay the Department Termination Sum to the Development Entity in accordance with Schedule 6 (Compensation on Termination).

24.3 Termination by Court Ruling

- (a) Termination by Court Ruling becomes effective and automatically terminates this PPA upon issuance of the final, non-appealable court order by a court of competent jurisdiction.
- (b) If this PPA is terminated pursuant to this Section 24.3 (Termination by Court Ruling), the Department shall pay the Department Termination Sum to the Development Entity in accordance with Schedule 6 (Compensation on Termination).

24.4 Force Majeure

(a) Effect of Force Majeure on Obligations

No Party shall be entitled to bring a claim for a breach of obligations under this PPA by the other Party or incur any liability to the other Party for any losses or damages incurred by that other Party to the extent that a Force Majeure Event occurs and the Affected Party is prevented from carrying out obligations by that Force Majeure Event (except as contemplated below). During the continuance of any Force Majeure Event, the Affected Party shall be excused from performing those of its obligations directly affected by such Force Majeure Event; **provided**, that the occurrence or continuance of any Force Majeure Event shall not excuse any Party from performing any payment obligations contemplated under this PPA or any other Project Document.

(b) Notification for Force Majeure

Upon the occurrence of a Force Majeure Event, the Affected Party shall notify the other Party as soon as practicable. The notification shall include details of the Force Majeure Event, including evidence of its effect on the obligations of the Affected Party and any action proposed to mitigate its effect.

(c) Consultation

As soon as practicable following such notification, the Parties shall consult with each other in good faith and use all Reasonable Efforts to agree to appropriate terms to mitigate the effects of the Force Majeure Event and facilitate the continued performance of this PPA.

(d) Mitigation

The Parties shall at all times following the occurrence of a Force Majeure Event use all Reasonable Efforts to prevent and mitigate the effects of any delay and the Development Entity shall at all times during which a Force Majeure Event is subsisting take all steps in accordance with Good Industry Practice to overcome or minimize the consequences of the Force Majeure Event.

(e) **Cessation of Force Majeure Event**

The Affected Party shall notify the other Party as soon as practicable after the Force Majeure Event ceases or no longer causes the Affected Party to be unable to comply with its obligations under this PPA. Following such notification this PPA shall continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event.

24.5 Termination for Development Entity Default

- (a) If a Development Entity Default occurs and it has not been cured within any relevant cure period set out in Section 22.5 (Initial Notice and Cure Periods) or (if relevant) in accordance with any remedial plan accepted by the Department pursuant to Section 22.6(a) (Remedial Plan), the Department may serve a Termination Notice (the **Department Termination Notice**) on the Development Entity at any time during the continuance of that Development Entity Default.
- (b) The Department Termination Notice must specify the type of Development Entity Default which has occurred and entitled the Department to serve the Department Termination Notice.
- (c) This PPA and the Project Documents will terminate on the date falling twenty (20) Business Days after the date the Development Entity receives the Department Termination Notice.
- (d) If this PPA is terminated pursuant to this Section 24.5 (Termination for Development Entity Default), the Department shall pay the Development Entity Termination Sum to the Development Entity in accordance with Schedule 6 (Compensation on Termination).

24.6 Reserved

24.7 Termination Procedures and Duties

Upon expiration of the Term or any Early Termination for any reason, the provisions of this Section 24.7 (Termination Procedures and Duties) shall apply. Except as expressly provided otherwise in this Section 24.7 (Termination Procedures and Duties), the Development Entity shall timely comply with such provisions independently of, and without regard to, the timing for determining, adjusting, settling and paying any amounts due the Development Entity or the Department on account of termination.

(a) **Transition Plan**

- (i) Within three (3) days after receipt by the relevant Party of a Termination Notice, the Parties shall meet and confer with each other for the purpose of developing an interim transition plan for the orderly transition of Project Services, demobilization and transfer of control of the Project and the Project Facilities to the Department. The Parties shall use diligent efforts

to complete preparation of the interim transition plan within fifteen (15) days after the date the relevant Party receives the Termination Notice.

- (ii) The Parties shall use diligent efforts to complete a final transition plan within thirty (30) days after receipt by the relevant Party of a Termination Notice. The final transition plan shall be in form and substance reasonably acceptable to the Department and shall include and be consistent with the other provisions and procedures set out in this Section 24.7 (Termination Procedures and Duties), all of which procedures the Development Entity shall promptly follow, regardless of any delay in preparation or acceptance of the interim or final transition plan. The final transition plan shall include an estimate of costs and expenses to be incurred by both Parties in connection with implementation of the transition plan.

(b) Handback of the Project

- (i) On the Termination Date, or as soon thereafter as is possible as provided in the final transition plan, the Development Entity shall relinquish and surrender full control of, and Access to, the Project Sites and the Project Facilities to the Department or the Department's Authorized Representative, and shall cause all Persons claiming under or through the Development Entity to do likewise, in at least the condition required by the Handback Requirements.
- (ii) On the later of the Termination Date or the date the Development Entity relinquishes control and Access as provided in the final transition plan, the Department shall assume responsibility, at its expense (subject to the right to recover damages under this PPA), for the Project and the Project Facilities.

24.8 Exclusive Termination Rights

This Article 24 (Termination and Force Majeure) and Schedule 6 (Compensation on Termination) contain the entire and exclusive provisions and rights of the Department and the Development Entity regarding termination of this PPA, and any and all other rights to terminate under Applicable Law are hereby waived to the maximum extent permitted by Applicable Law.

25. Department Step-In

25.1 Right to Step-in

If the Department reasonably believes that it needs to take action in connection with the Project Services because:

- (a) an Emergency has arisen;

- (b) a Development Entity Default or Persistent Breach has arisen and has not been cured within any relevant cure period set out in Article 22 (Development Entity Default); or
- (c) the Development Entity has failed to meet any Safety Standard or comply with any Safety Compliance Order within a reasonable period of time under the circumstances,

then, the Department shall be entitled to take action in accordance with Sections 25.2 (Notice to the Development Entity) through 25.2 (Step-In on Development Entity Breach).

25.2 Notice to the Development Entity

If Section 25.1 (Right to Step-in) applies and the Department wishes to take action, the Department shall notify the Development Entity in writing of the following:

- (a) the action it wishes to take;
- (b) the reason for such action;
- (c) the date it wishes to commence such action;
- (d) the time period which it believes will be necessary for such action; and
- (e) to the extent practicable, the effect on the Development Entity and its obligation to carry out the Project Services during the period such action is being taken;

provided, that in the case of an Emergency, the Department shall have the right to take any action it reasonably believes is necessary in order to mitigate or contain such Emergency without prior notice to the Development Entity.

25.3 Action by Department

- (a) Following service of such notice or the occurrence of an Emergency, the Department shall take any of the actions referred to in Section 25.2 (Notice to the Development Entity) and any consequential additional action as it reasonably believes is necessary (together, the **Required Action**) and the Development Entity shall use Reasonable Efforts to give all assistance to the Department while it is taking the Required Action. The Department shall provide the Development Entity with notice of completion of the Required Action and shall use Reasonable Efforts to provide such advance notice as is reasonably practicable of its anticipated completion.
- (b) The Department shall undertake all Required Actions in accordance with Good Industry Practice and, if applicable, the requirements of any manufacturer's warranty in respect of any equipment installed or used at any Project Site.

25.4 Step-in Without Development Entity Breach

If the Development Entity is not in breach of its obligations under this PPA, then for so long as and to the extent that the Required Action is taken, and to the extent the Required Action prevents the Development Entity from performing its obligations under this PPA:

- (a) the Development Entity shall be relieved from performing its relevant obligations under this PPA; and
- (b) in respect of the period in which the Department is taking the Required Action.

25.5 Step-in upon Development Entity Breach

If the Required Action is taken as a result of a breach of the obligations of the Development Entity under this PPA, then for so long as and to the extent that the Required Action is taken, and this prevents the Development Entity from carrying out any part of the Project Services:

- (a) the Development Entity shall be relieved of its obligations to carry out such part of the Project Services; and
- (b) in respect of the period in which the Department is taking the Required Action, an amount equal to all the Department's reasonable and proper costs in taking the Required Action shall be paid by the Development Entity to the Department.

26. Maintenance and Inspection of Records; Audits and Inspections

26.1 Maintenance and Inspection of Records

- (a) The Development Entity shall keep and maintain within the Commonwealth (or other location approved by the Department in writing in its sole discretion) all books, records and documents relating to the Project, Project Sites, the Project Facilities, or Project Services, including copies of all original documents delivered to the Department. The Development Entity shall keep and maintain such books, records and documents in accordance with applicable provisions of the Project Documents and in accordance with state law, federal law, and Good Industry Practice. The Development Entity shall notify the Department where such records and documents are kept.
- (b) The Development Entity shall make all its books, records and documents available for inspection by the Department and by the Commonwealth in connection with the Commonwealth audits under Section (c) (Audits), at the Development Entity's offices within the Commonwealth (or other location approved by the Department in writing in its sole discretion) at all times during normal business hours, without charge. The Development Entity shall provide to the Department copies thereof as and when reasonably requested by the Department. The Department may conduct any such inspection upon forty-eight (48) hours' prior written notice, or unannounced and without prior notice where

there is good faith suspicion of fraud or criminal activity. The right of inspection includes the right to make extracts and take notes.

- (c) The Development Entity shall retain records and documents in accordance with Section 3 of Schedule 15. Notwithstanding the foregoing, all records, which relate to Disputes being processed or actions brought under the Dispute Resolution Procedures shall be retained and made available until any later date that such Disputes and actions are finally resolved; **provided**, that the Development Entity reserves the right to assert exemptions from disclosure of information that would be exempt under Applicable Law from disclosure or introduction into evidence in legal actions.
- (d) At the request of the Department, the Development Entity shall, at the Development Entity's cost and expense and at any and all reasonable times during the Term: (i) make available or cause to be made available to the Department all Information relating to the Project or this PPA as may be specified in such request and as shall be in the possession or control of the Development Entity and (ii) permit the Department, after having provided 10 Business Days' prior notice to the Development Entity to discuss the obligations of the Development Entity under this PPA with the Development Entity for the purpose of enabling the Department to determine whether the Development Entity is in compliance with this PPA and applicable Law.

26.2 Audits and Inspections

- (a) In addition to any other specific audit rights that the Department may have under the Project Documents, the Commonwealth shall (at its own cost and expense, unless a Development Entity Default shall have occurred and be continuing) have such rights to review and Audit the Development Entity, its Contractors and their respective books and records as the Commonwealth deems necessary for purposes of verifying compliance with the Project Documents and Applicable Law. Without limiting the foregoing, the Commonwealth shall have the right (at its own cost and expense, unless a Development Entity Default shall have occurred and be continuing) to Audit the Development Entity's Project Management Plan and compliance therewith, including the right to inspect Project Services and/or activities and to verify the accuracy and adequacy of the Project Management Plan and other relevant Project Documents.
- (b) The Department may, at all reasonable times, upon 48 hours' prior notice carry out an Audit of the Information required to be maintained or delivered by the Development Entity under this PPA in connection with the performance of the Technical Provisions for the purpose of verifying the information contained therein and shall be entitled to make copies thereof and to take extracts therefrom, at the Department's expense. The Development Entity, at the cost and expense of the Development Entity, shall, at reasonable times, make available or cause to be made available to the Department such reasonable information and material as may reasonably be required by the Department for purposes of such Audit and

otherwise provide such cooperation as may be reasonably required by the Department in connection with the same.

- (c) The Department, with the prior consent of the Development Entity be entitled, at the sole cost and expense of the Commonwealth, and at any time and from time to time, to perform or cause to be performed any test, study or investigation in connection with the Project as the Department may determine to be reasonably necessary in the circumstances and the Development Entity, at the cost and expense of the Development Entity, shall furnish the Department with every reasonable assistance in connection with the carrying out of such tests, procedures, studies and investigations. In connection with the foregoing, the Department, with the prior consent of the Development Entity, be entitled to install machines, equipment, systems, monitors, counters and other devices in, on, under, over or adjacent to the Project to permit and facilitate any test, study, monitor, review or investigation of or relating to the Project to the extent that the same does not materially interfere with the Project.
- (d) The Commonwealth's Audit rights include the right to observe the business operations of the Development Entity and its Contractors to confirm the accuracy of books and records.
- (e) The Development Entity shall include in the Project Management Plan internal procedures to facilitate review and Audit by the Commonwealth and, if applicable, the federal government and any agency thereof.
- (f) The Development Entity represents and warrants the completeness and accuracy in all material respects of all Information it or its agents provides in connection with the Commonwealth Audits, and shall use Reasonable Efforts to cause all Contractors to warrant the completeness and accuracy in all material respects of all information such Contractors provide in connection with the Commonwealth Audits.
- (g) The Development Entity's internal and third-party quality and compliance auditing responsibilities shall be set out in the Project Management Plan.
- (h) The Department shall, at all times, have access to the Project and every part thereof and the Development Entity, at the reasonable cost and expense of the Development Entity, shall furnish the Department with every reasonable assistance for inspecting the Project for the purpose of Auditing the Information or ascertaining compliance with this PPA and applicable Law. The Development Entity shall (and shall ensure that any Contractor or subcontractor shall) include appropriate terms in each Contract in order to provide the Department and the Commonwealth with access and Audit rights (as applicable) in accordance with the terms of this Article 26 (Maintenance and Inspection of Records).
- (i) In the course of performing its inspections, reviews, tests and Audits under this PPA, the Department shall use reasonable efforts to minimize the effect and

duration of any disruption to or impairment of the Project or the Development Entity's rights or responsibilities under this PPA, having regard to the nature of the inspections, reviews, tests and audits being performed.

- (j) Failure by the Department to review, test or Audit the Development Entity's responsibilities under this PPA or any part thereof or the Information, shall not constitute a waiver of any of the rights of the Department hereunder or any of the obligations or liabilities of the Development Entity hereunder. Inspection, review, testing or Audit not followed by a notice of Development Entity Default shall not constitute a waiver of any Development Entity Default or constitute an acknowledgement that there has been or will be compliance with this PPA and applicable Law.

27. Intellectual Property

27.1 Intellectual Property

- (a) The Development Entity shall make available to the Department free of charge (and hereby, for itself and on behalf of each Development Entity-Related Entity, irrevocably licenses the Department to use) all Project Data in its ownership or possession or the ownership or possession of a Development Entity-Related Entity that might reasonably be required by the Department; and the Development Entity shall ensure that it obtains all necessary licenses, permissions and consents to ensure that it can make the Project Data available to the Department on these terms, for the purposes of:
 - (i) the Department making the Project Facilities available for use and operating the Project generally; and
 - (ii) following termination of this PPA, the design or construction of the Project Facilities, the maintenance or improvement of the Project Facilities and/or the provision of works and/or services the same as or similar to the Work (it being understood and agreed between the parties that any use of the Project Data, including but not limited to the Intellectual Property associated with such Project Data, other than in connection with any Project Facility, is on an "AS IS" basis, and no representations or warranties, express or implied, are provided as to such Project Data and related Intellectual Property, including no representation or warranty against infringement or fitness for particular purpose).

In this Section 27.1(a) "use" shall include the acts of copying, modifying, adapting and translating the material in question and/or incorporating them with other materials and the term "the right to use" shall be construed accordingly. As between the Parties, the Project Data, and all Intellectual Property encompassed therein, is and shall remain the property of the Development Entity-Related Entities and their licensors, notwithstanding the Development Entity licensing and otherwise making that Project Data available to the Department.

- (b) The Department shall have and is hereby granted by the Development Entity, for itself and on behalf of each Development Entity-Related Entity, a nonexclusive, transferable (subject to Section 27.1(d)), royalty-free, irrevocable, worldwide, fully paid up right and license to use, reproduce, modify, adapt, disclose to and sublicense to other persons engaged by or on behalf of the Department (directly or indirectly), the Intellectual Property owned or licensable by any Development Entity-Related Entity; **provided**, that the Department shall have the right to exercise such license only for the Licensed Purposes.
- (c) The Department shall have no right to sell any Intellectual Property of the Development Entity or to use, reproduce, modify, adapt and disclose, or allow any party to use, reproduce, modify, adapt and disclose, any such Intellectual Property for any other purpose other than the Licensed Purposes and must ensure that any Person to which it discloses any Intellectual Property pursuant to the licenses granted under this Section 27.1 (Intellectual Property) agrees to be bound by the provisions of this Section 27.1 (Intellectual Property) and the confidentiality obligations set out in Section 32.19 (Confidentiality) of this PPA with respect to that Intellectual Property.
- (d) The right to transfer any of the licenses granted to the Department in this Article 27 (Intellectual Property) is limited to any Governmental Entity that succeeds to the power and authority of the Department generally or with respect to the Project.
- (e) The Development Entity shall continue to have a full and complete right to use any and all duplicates or other originals of its Intellectual Property in any manner it chooses.
- (f) With respect to any Intellectual Property that is not owned or licensable by a Development Entity-Related Entity, the Development Entity shall use Reasonable Efforts to obtain from the owner of that Intellectual Property (or any person entitled to license that Intellectual Property), concurrently with execution of any contract, subcontract or purchase order with such Person or with the first use or adaptation of the Intellectual Property in connection with the Project, both for the Development Entity and the Department, a nonexclusive, transferable (subject to Section 27.1(d)), irrevocable, royalty-free license to use, reproduce, modify, adapt and disclose such Intellectual Property solely in connection with the Project of at least identical scope, purpose, duration and applicability as the license granted under Section 27.1(b). Any such license shall be subject to the terms of this Article 27 (Intellectual Property).

27.2 Maintenance of Data

- (a) To the extent that any data, materials and documents referred to in this Article 27 (Intellectual Property) are generated by or maintained on a computer or similar system, the Development Entity shall use Reasonable Efforts to procure for the benefit of the Department, at no charge or at the lowest reasonable fee, the grant of a license or sublicense for any relevant software to enable the Department or its

nominee to access and otherwise use (subject to the payment by the Department of the relevant fee, if any) such data for the purposes set out in Section 27.1 (Intellectual Property). As an alternative, the Development Entity may provide such data, materials or documents in a format which may be read by software generally available in the market at the relevant time or in hard copy format.

- (b) The Development Entity shall ensure the back-up and storage in safe custody of the data, materials and documents referred to in Section 27.2(a) in accordance with Good Industry Practice. Without prejudice to this obligation, the Development Entity shall submit to the Department's Authorized Representative for approval its proposals for the back-up and storage in safe custody of such data, materials and documents and the Department shall be entitled to object if the same is not in accordance with Good Industry Practice. The Development Entity shall comply, and shall use Reasonable Efforts to cause all the Development Entity-Related Entities to comply, with all procedures to which the Department's Authorized Representative has given its approval. The Development Entity may vary its procedures for such back-up and storage subject to submitting its proposals for change to the Department's Authorized Representative, who shall be entitled to object on the basis set out above.

27.3 Indemnity

Where a claim or proceeding is made or brought against the Department, which alleges that the use of any Intellectual Property provided to the Department under the terms hereof or that the use of any materials, plant, machinery or equipment in connection with the Project Services or the Project by the Department or a Development Entity-Related Entity, infringes any intellectual property of a third party then, unless such infringement has arisen out of the use of any Intellectual Property by or on behalf of the Department otherwise than in accordance with the terms of this PPA, the Development Entity shall indemnify the Department at all times from and against all Losses arising as a result of such claims and proceedings and the provisions of Article 20 (Development Entity Indemnity) shall apply.

28. Federal Requirements

28.1 Compliance with Federal Requirements

The Development Entity shall comply, and shall require its Contractors to comply, with federal Applicable Law, including, without limitation, the Federal Requirements.

28.2 Cooperation with FTA

The Development Entity shall cooperate with FTA in the reasonable exercise of FTA's duties and responsibilities in connection with the Project.

28.3 Conflicting Provisions

In the event of any conflict between any Federal Requirements and the other requirements of the Project Documents, the Federal Requirements shall prevail, take precedence and be in force over and against any such conflicting provisions.

29. Assignment and Transfer; Fundamental Changes

29.1 Assignment by the Development Entity

The Development Entity shall not assign or transfer any of its rights or obligations under this PPA without the written consent of the Department.

29.2 Assignment by the Department

The Department may assign all or any portion of its rights, title and interests in and to this PPA, the Project, the Project Sites, the Project Facilities, appropriations, Project Documents, guarantees, letters of credit and other security for payment or performance:

- (a) without the Development Entity's consent, to any other Governmental Entity of the Commonwealth that:
 - (i) succeeds to the governmental powers and authority of the Department, including the power and authority to request appropriations; and
 - (ii) has the sources of funding for Project Completion that is at least as adequate and secure as the Department's at the time of the assignment; and
- (b) to others with the prior written consent of Development Entity.

29.3 Change of Organization or Name

- (a) The Development Entity shall not change the legal form of its organization without providing prior written notice to the Department.
- (b) If either Party changes its name, such Party agrees to promptly furnish the other Party with written notice of change of name and appropriate supporting documentation.

30. Dispute Resolution Procedures

30.1 General

The Parties agree to use Reasonable Efforts to resolve promptly any Dispute pursuant to the terms of this Article 30 (Dispute Resolution Procedures).

30.2 Consultation

If any Dispute arises in relation to any aspect of the Project Documents, the Development Entity and the Department shall consult in good faith in an attempt to come to an agreement. Participation in consultation shall not excuse a failure to comply with the time limits set out in Sections 30.3 (Written Protest to Department) and 30.4 (Disputes Review Board) below.

30.3 Written Protest to Department

- (a) Without prejudice to Section 30.2 (Consultation), the Development Entity shall submit a Dispute by way of a written protest to the Department within fifteen (15) days of the Dispute arising, outlining in detail the basis of the Dispute, the Development Entity's position relative to the Dispute and submitting all relevant documentation. Such written protest shall not constitute a claim for purposes of 62 Pa. C.S. § 1712.1. The Department shall have fifteen (15) days following the receipt of such written protest from the Development Entity to render a written decision on the Dispute taking into consideration the relevant Project Documents and the Development Entity's submission, together with the facts and circumstances involved in the Dispute. Such written decision shall not constitute a determination by the relevant contracting officer of the Department for purposes of 62 Pa. C.S. § 1712.1.
- (b) If the Development Entity objects to the Department's written decision, the Development Entity may file a written rebuttal with the Department within ten (10) days after its receipt of the written decision, stating clearly and in detail the basis for the objection. Such written rebuttal shall not constitute a claim for purposes of 62 Pa. C.S. § 1712.1.
- (c) The Department will review the Development Entity's written rebuttal and issue a final written decision to the Development Entity within ten (10) days after receipt of the rebuttal. Such final written decision shall not constitute a determination by the contracting officer of the Department for purposes of 62 Pa. C.S. § 1712.1.
- (d) The Department's final written decision in response to the Development Entity's rebuttal is final and conclusive on the Dispute, unless within fifteen (15) days of the Department's final written decision, the Development Entity (i) files a claim in relation to the Dispute with the contracting officer pursuant to 62 Pa. C.S. § 1712.1(d) (a **Chapter 17 Claim**) and (ii) submits such Dispute to the Disputes Review Board as set out in Section 30.4 (Disputes Review Board).

30.4 Disputes Review Board

- (a) In the event that the Parties are unable to reach agreement on a Dispute pursuant to Section 30.2 (Consultation), and in the case of a Dispute raised by the Development Entity, which is submitted to the Department under Section 30.3 (Written Protest to Department), and properly filed by the Development Entity in accordance with Section 30.3(d), then the Department or the Development Entity

may submit such Dispute to the Disputes Review Board, subject to the terms of this Article 30 (Dispute Resolution Procedures); **provided**, that the Parties shall not refer Disputes with respect to the legal validity of this PPA to the Disputes Review Board for determination nor shall the Disputes Review Board make any determination relating to the legal validity of this PPA.

- (b) The Department and administrative procedures with respect to the Disputes Review Board are set out in Part 2 (Disputes Review Board Procedures) of Schedule 10 (Disputes Review Board Procedures). Unless otherwise agreed by the Parties, any Dispute may be submitted for resolution by the Disputes Review Board in accordance with the following procedures:
- (i) Upon submittal by either Party of the matter to Disputes Review Boards, the Disputes Review Board will decide when to conduct the hearing; **provided**, that the Disputes Review Board shall hold the hearing within twenty (20) days of the referral, unless the Parties agree to a longer time period.
 - (ii) Either Party may furnish written evidence or documentation to the Disputes Review Board regarding the Dispute. If either Party furnishes such information to the Disputes Review Board, it will furnish copies of such information to the other Party promptly after having provided it to the Disputes Review Board and in any event prior to the date the Disputes Review Board sets to convene the hearing for the Dispute. If the Disputes Review Board requests any additional documentation or evidence prior to, during, or after the hearing, the relevant Party will provide the requested information to the Disputes Review Board and to the other Party, in accordance with the deadlines set by the Disputes Review Board.
 - (iii) The Development Entity and the Department will each be afforded a reasonable opportunity to be heard by the Disputes Review Board and to offer evidence. Neither the Department nor the Development Entity may present information at the hearing that was not previously distributed to both the Disputes Review Board and the other Party.
 - (iv) The Disputes Review Board's recommendations for resolution of the Dispute will be given in writing to both the Department and the Development Entity within fifteen (15) days after completion of the hearings. In cases of substantial complexity, both Parties may agree to allow additional time for the Disputes Review Board to formulate its recommendations.
 - (v) Within fifteen (15) days of receiving the Disputes Review Board's recommendations, both the Department and the Development Entity will respond to the other and to the Disputes Review Board in writing, signifying either acceptance or rejection of the Disputes Review Board's recommendations. The failure of the Development Entity to respond within the fifteen (15) day period will be deemed an acceptance of the

Disputes Review Board's recommendations by the Development Entity. The failure of the Department to respond within the fifteen (15) day period or before the 120th day after its receipt of the related Chapter 17 Claim, whichever is earlier, will be deemed (A) a rejection of the Disputes Review Board's recommendations by the Department and (B) a denial of the Chapter 17 Claim in accordance with 62 Pa. C.S. § 1712.1(d).

- (vi) The recommendations of the Disputes Review Board shall be final and binding only to the extent the Parties accept such recommendations, either expressly or to the extent deemed accepted by virtue of that Party's failure to respond within such fifteen (15) day period. If the Parties accept (or if the Development Entity is deemed to have accepted) any recommendation of the Disputes Review Board in accordance with this Section 30.4(b)(vi), each Party shall (unless otherwise specified in the relevant recommendation) give effect to such recommendation as soon as is reasonably practicable.
- (vii) Should the Dispute remain unresolved, either Party may seek reconsideration of the decision by the Disputes Review Board only when there is new evidence to present.

30.5 Right to Litigate Dispute

- (a) The Department and the Development Entity agree that the right of the Department or the Development Entity to proceed to litigation of any unresolved Dispute is subject to:
 - (i) the submission of such Dispute to the Disputes Review Board under this Article 30 (Dispute Resolution Procedures); and
 - (ii) where such Dispute is raised by the Development Entity:
 - A. the proper filing of the related Chapter 17 Claim by the Development Entity in accordance with Section 30.3(d); and
 - B. such claim remaining unresolved for at least 120 days after the receipt thereof by the Department pursuant to 62 Pa. C.S. § 1712.1;

provided, that:

- (iii) to the extent provided by Applicable Law, either Party may seek specific performance of any obligation under the Project Documents or injunctive relief following consultation as set out in Section 30.2 (Consultation); and
 - (iv) such condition shall not apply if there is a good faith determination by the disputing Party that a statute of limitations would expire pending any such process.
- (b) If a recommendation of the Disputes Review Board is:

- (i) not accepted (or deemed to have not been accepted) by both Parties pursuant to Section 30.4(b)(v); or
- (ii) accepted by both Parties, but a Party does not give effect to such recommendation in accordance with the requirements of Section 30.4(b)(vi), then

either Party may proceed to litigation of such unresolved Dispute, and all records and written recommendations of the Disputes Review Board will be admissible as evidence in any subsequent proceedings.

30.6 Continuance of Project Services During Dispute

During the course of the dispute resolution process, the Development Entity will continue with the Project Services (including any portion of the Project Services that is the subject of the Dispute) in a diligent manner and without delay or otherwise conform to the Department's decision or order, and will be governed by all applicable provisions of this PPA, and the Department shall continue to make payments of any amounts not in dispute pursuant to the terms of this PPA. Throughout any disputed Project Services, the Development Entity will keep complete and detailed records of extra costs and time incurred. The Development Entity will provide the Department and any Disputes Review Board members access to these and any other records needed for evaluating the Dispute.

30.7 Costs of Dispute Resolution

Each Party will bear its own attorneys' fees and costs in any Dispute arising out of or pertaining to this PPA and no Party will seek or accept an award of attorneys' fees or costs, except as otherwise expressly provided herein.

31. Sole Remedy and Liabilities

31.1 Common Law Rights of the Department

Without prejudice to:

- (a) any entitlement of the Department to specific performance of any obligation under the Project Documents;
- (b) any entitlement of the Department to injunctive relief;
- (c) any other express right of the Department pursuant to the Project Documents; and
- (d) the Department's right to claim, on or after termination of this PPA, the amount of its reasonable costs, losses, damages and expenses suffered or incurred by it as a result of rectifying or mitigating the effects of any breach of the Project Documents by the Development Entity, save to the extent that the same has already been recovered by the Department pursuant to this PPA or has been taken into account to calculate any compensation payable pursuant to Schedule 6 (Compensation on Termination).

31.2 Consequential Losses

Save where stated to the contrary, neither Party shall have the right to claim damages, including punitive and incidental damages, against the other Party for breach of this PPA, in tort or on any other basis whatsoever, to the extent that any loss claimed by either Party is for Indirect Losses. The Parties agree that, notwithstanding the foregoing limitation on each Party's liability, such limitation shall not apply to or limit either Party's right to recover from the other Party:

- (a) any Losses (excluding defense costs) to the extent that they are either covered by the proceeds of insurance carried by the relevant Party or are required to be insured against pursuant to Article 19 (Insurance) and Schedule 9 (Insurance Coverage Requirements) or the Development Entity is deemed to have self-insured the Loss pursuant to Schedule 9 (Insurance Coverage Requirements);
- (b) Losses arising out of fraud, criminal conduct, intentional misconduct, recklessness or bad faith on the part of the relevant Party;
- (c) Losses arising out of any Third-Party Claims in respect of a Hazardous Materials Release or Pre-Existing Hazardous Materials; and
- (d) interest, late charges, fees, transaction fees and charges, penalties and similar charges that the Project Documents expressly state are due from the relevant Party.

Notwithstanding the foregoing, this Section 31.2 (Consequential Losses) shall not in any way be construed to limit the doctrine of sovereign immunity as applicable to the Department or the Commonwealth.

31.3 No Double Recovery

Notwithstanding any other provisions of this PPA to the contrary, neither Party shall be entitled to recover compensation or make a claim under this PPA in respect of any loss that it has incurred to the extent that it has already been compensated in respect of that loss pursuant to this PPA or otherwise.

31.4 Contractor Losses

Where:

- (a) a Contractor is entitled to claim any compensation and/or relief from the Development Entity under any Contract; and
- (b) the Development Entity subsequently makes a claim against the Department under this PPA in relation to such compensation and/or relief,

the Department waives any right to defend the Development Entity's claim on the ground that the Development Entity is only required to pay compensation or grant relief to the

Contractor under the relevant Contract to the extent that the same is recoverable from the Department.

31.5 Development Entity Liabilities

Wherever in this PPA reference is made to the Department providing assistance, services, approvals or consents to or on behalf of the Development Entity or to the Department performing an Audit or inspecting, testing, reviewing or examining the Project or any part thereof or the books, records, documents, budgets, proposals, requests, procedures, certificates, plans, drawings, specifications, contracts, agreements, schedules, reports, lists or other instruments of the Development Entity, such undertaking by the Department shall not relieve or exempt the Development Entity from, or represent a waiver of, any requirement, liability, Development Entity Default, covenant, agreement or obligation under this PPA or at law or in equity and shall not create or impose any requirement, liability, covenant, agreement or obligation (including an obligation to provide other assistance, services or approvals) on the Department not otherwise created or imposed pursuant to the express provisions of this PPA.

32. Miscellaneous

32.1 Amendments

The Project Documents may be amended only by a written instrument duly executed by the Parties or their respective permitted successors or assigns.

32.2 Waiver

Either Party's waiver of any breach or failure to enforce any of the terms, covenants, conditions or other provisions of any Project Document at any time shall not in any way limit or waive that Party's right thereafter to enforce or compel strict compliance with every term, covenant, condition or other provision thereof, any course of dealing or custom of the trade notwithstanding (other than the waived breach or failure in accordance with the terms of such waivers). Furthermore, if the Parties make and implement any interpretation of the Project Documents without documenting such interpretation by an instrument in writing signed by both Parties, such interpretation and implementation thereof will not be binding in the event of any future Disputes.

32.3 Independent Contractor

- (a) The Development Entity is an independent contractor, and nothing contained in the Project Documents shall be construed as constituting any relationship with the Department other than that of the Development Entity of the Project and independent contractor. It is the express intent and agreement of the Parties that nothing in the Project Documents other than the Ground Lease is intended or shall be construed to create any landlord-tenant, lessor-lessee of real property, optionor-optionee, vendor-purchaser, or mortgagor-mortgagee relationship between the Department and the Development Entity; and in no event shall either Party take a position in any tax return, insurance application or questionnaire,

financial statement, financial report, regulatory filing, securities filing, loan document, or other writing of any kind that any such relationship exists.

- (b) Nothing in the Project Documents is intended or shall be construed to create any partnership, joint venture or similar relationship between the Department and the Development Entity; and in no event shall either Party take a position in any tax return or other writing of any kind that a partnership, joint venture or similar relationship exists. While the term “public-private partnership” may be used on occasion to refer to contractual relationships of the type hereby created, the Parties do not thereby express any intention to form or hold themselves out as a *de jure* or *de facto* partnership, joint venture or similar relationship, to share net profits or net losses, or to give the Department control or joint control over the Development Entity’s financial decisions or discretionary actions concerning the Project and Project Services.
- (c) In no event shall the relationship between the Department and the Development Entity be construed as creating any relationship whatsoever between the Department and the Development Entity’s employees. Neither the Development Entity nor any of its employees is or shall be deemed to be an employee of the Department. Except as otherwise specified in the Project Documents, the Development Entity has sole authority and responsibility to employ, discharge and otherwise control its employees and has complete and sole responsibility as a principal for its agents, for all Contractors and for all other Persons that the Development Entity or any Contractor hires to perform or assist in performing the Project Services.

32.4 Successors and Assigns

The Project Documents shall be binding upon and inure to the benefit of the Department and the Development Entity and their respective permitted successors and assigns.

32.5 Designation of Representatives; Cooperation with Representatives

The Department and the Development Entity shall each designate an individual or individuals who shall be authorized to make decisions and bind the Parties on matters relating to the Project Documents (each, an **Authorized Representative**). Schedule 11 (Initial Designation of Authorized Representatives) to this PPA provides the initial Authorized Representative designations. Such designations may be changed by a subsequent writing delivered to the other Party in accordance with Section 32.10 (Notices and Communications).

32.6 Survival

The Development Entity’s and the Department’s representations and warranties, the Dispute Resolution Procedures contained in Article 30 (Dispute Resolution Procedures), the indemnifications and releases contained in Article 20 (Development Entity Indemnity), the rights to all indemnities and compensation contained in Article 24 (Termination and Force Majeure) and any other obligations to pay amounts hereunder

and under the other Project Documents, Article 26 (Maintenance and Inspection of Records), Article 27 (Intellectual Property), Article 31.5 (Development Entity Liabilities

Wherever in this PPA reference is made to the Department providing assistance, services, approvals or consents to or on behalf of the Development Entity or to the Department performing an Audit or inspecting, testing, reviewing or examining the Project or any part thereof or the books, records, documents, budgets, proposals, requests, procedures, certificates, plans, drawings, specifications, contracts, agreements, schedules, reports, lists or other instruments of the Development Entity, such undertaking by the Department shall not relieve or exempt the Development Entity from, or represent a waiver of, any requirement, liability, Development Entity Default, covenant, agreement or obligation under this PPA or at law or in equity and shall not create or impose any requirement, liability, covenant, agreement or obligation (including an obligation to provide other assistance, services or approvals) on the Department not otherwise created or imposed pursuant to the express provisions of this PPA.

Miscellaneous) and all other provisions, which by their inherent character should survive expiration or Early Termination and/or completion of the Project Services under this PPA, shall survive the expiration or Early Termination and/or the completion of the Project Services under this PPA. The Department's obligation to pay compensation to the Development Entity upon Early Termination as provided in Article 24 (Termination and Force Majeure) and any other payment obligations of the Department arising prior to expiration or Early Termination shall survive the expiration or Early Termination.

32.7 Limitation on Third-Party Beneficiaries

It is not intended by any of the provisions of the Project Documents to create any third party beneficiary hereunder or to authorize anyone not a Party hereto to maintain a suit for personal injury or property damage pursuant to the terms or provisions hereof. Except as otherwise provided in this Section 32.7 (Limitation on Third-Party Beneficiaries), the duties, obligations and responsibilities of the Parties with respect to third parties shall be determined and governed by Applicable Law. The Project Documents shall not be construed to create a contractual relationship of any kind between the Department and any Person other than the Development Entity.

32.8 Waiver of Jury Trial

EACH PARTY WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, ANY RIGHT THAT IT MAY HAVE TO A JURY TRIAL IN RESPECT OF ANY CLAIM, CAUSE OF ACTION OR OTHER PROCEEDING IN CONNECTION WITH THIS PPA OR ANY TRANSACTION CONTEMPLATED HEREBY. Each of the Parties hereby (a) certifies that no representative, agent or attorney of any other has represented, expressly or otherwise, that such other would not, in the event of any suit, action or proceedings relating to this PPA, seek to enforce the foregoing waiver and (b) acknowledges that it has been induced to enter into this PPA by, among other things, the mutual waivers and certifications in this Section 32.8 (Waiver of Jury Trial).

32.9 Governing Law and Jurisdiction

This PPA shall be governed by, and interpreted and enforced in accordance with, the Laws of the Commonwealth (without regard to any conflict of laws provisions) and the decisions of the courts of the Commonwealth. The Development Entity consents to the jurisdiction of any court of the Commonwealth and any federal courts in the Commonwealth, waiving any claim or defense that such forum is not convenient or proper. The Development Entity agrees that any such court shall have *in personam* jurisdiction over it, and consents to service of process in any manner authorized by Applicable Law.

32.10 Notices and Communications

(a) Notices under the Project Documents shall be in writing and: (i) delivered personally; (ii) sent by certified mail, return receipt requested; (iii) sent by a recognized overnight mail or courier service, with delivery receipt requested; or (iv) sent by facsimile or e-mail communication followed by a hard copy and with receipt confirmed by telephone, to the following addresses (or to such other address as may from time to time be specified in writing by such Person):

(i) All notices, correspondence and other communications to the Development Entity shall be delivered to the following address or as otherwise directed by the Development Entity's Authorized Representative:

[Name of Development Entity]
[Address of Development Entity]
Tel: [●]
Fax: [●]
Email: [●]

(ii) All notices, correspondence and other communications to the Department shall be marked as regarding the Project and shall be (A) delivered to the following address or as otherwise directed by the Department's Authorized Representative and (B) with the exception of notices regarding Disputes, and termination and default notices, posted on the Collaboration Portal:

Pennsylvania Department of Transportation
8th Floor, Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120-0041
E-mail: [●]
Attention: Secretary

(iii) In addition, copies of all notices regarding Disputes, and termination and default notices shall be delivered to the following person:

Pennsylvania Department of Transportation
Office of Chief Counsel
P.O. Box 8212
17105-8212
Attention: Chief Counsel

- (b) Notices shall be deemed received when actually received in the office of the addressee (or by the addressee if personally delivered) or when delivery is refused, as shown on the receipt of the U.S. Postal Service, private carrier or other Person making the delivery. Notwithstanding the foregoing, notices sent by facsimile after 4:00 p.m., Eastern Standard or Daylight Time (as applicable), and all other notices (including by e-mail communication) received after 5:00 p.m., Eastern Standard or Daylight Time (as applicable), shall be deemed received on the first Business Day following delivery (that is, in order for a fax or e-mail communication to be deemed received on the same day, at least the first page of the fax or the email communication must have been received, respectively, before 4:00 p.m. or 5 p.m., Eastern Standard or Daylight Time (as applicable)). Any technical or other communications pertaining to the Project Services shall be conducted by the Development Entity's Authorized Representative and technical representatives designated by the Department.

32.11 Integration of Project Documents; Compliance

- (a) The Department and the Development Entity agree and expressly intend that this PPA (including all Exhibits, Schedules, Forms and Appendices hereto) and other Project Documents constitute a single, non-severable, integrated agreement whose terms are interdependent and non-divisible, such that, among other things, no part of this PPA could be separated from any other part for the purposes of assumption or rejection under Section 365 of title 11 of the United States Bankruptcy Code.
- (b) Notwithstanding anything contained in this PPA to the contrary, the Development Entity and the Department shall comply with all terms and conditions set out in this PPA and the other Project Documents, including all Exhibits, Schedules, Forms and Appendices hereto and thereto (including, without limitation, the Technical Provisions).

32.12 Severability

If any clause, provision, Section or part of the Project Documents is ruled invalid by a court having proper jurisdiction, then the Parties shall:

- (a) promptly meet and negotiate a substitute for such clause, provision, Section or part, which shall, to the greatest extent legally permissible, effect the original intent of the Parties, including any adjustment to the Department's compensation to the Development Entity's account for any change in the Project Services resulting from such invalidated portion; and

- (b) if necessary or desirable, apply to the court or other decision maker (as applicable), which declared such invalidity for an interpretation of the invalidated portion to guide the negotiations.

The invalidity or unenforceability of any such clause, provision, Section or part shall not affect the validity or enforceability of the balance of the Project Documents, which shall be construed and enforced as if the Project Documents did not contain such invalid or unenforceable clause, provision, Section or part.

32.13 Headings

The captions of the Articles, Sections and subsections of this PPA are for convenience purposes only and shall not be deemed part of this PPA or considered in construing this PPA.

32.14 Entire Agreement

The Project Documents contain the entire understanding of the Parties with respect to the subject matter thereof and supersede all prior agreements, understandings, statements, representations and negotiations between the Parties with respect to their subject matter.

32.15 Counterparts

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

32.16 No Commonwealth Obligations

The Development Entity acknowledges and agrees that, notwithstanding any concurrence by the Commonwealth in, or approval of, the solicitation or award of this PPA, the Commonwealth shall not incur any liability to any person pursuant to the terms of this PPA. For the avoidance of doubt, nothing in this Section 32.16 (No Commonwealth Obligations) shall have the effect of limiting the Department's rights, obligations or liabilities under this PPA.

32.17 No Personal Liability

No officer, agent, representative or employee of the Department or of the Commonwealth or of the Development Entity shall be held personally liable under any term or provision of this PPA or because of the execution or attempted execution of this PPA, or because of any breach thereof.

32.18 Public Release of Information

- (a) The Development Entity shall not, and shall cause (by way of contract and enforcement thereof) all the Development Entity-Related Entities not to, issue or permit to be issued any press release, advertisement, public statement or literature of any kind, or make any statements or comments through the media (including print, television or internet) which refers to the Department, the Project or any of

the services or obligations to be performed in connection with the Project Documents, without first obtaining the written approval of the Department. Such approval may be withheld if for any reason the Department believes that the publication of such information would be harmful to the public interest or is any way undesirable.

- (b) This provision shall survive termination or expiration of this PPA.

32.19 Confidentiality

- (a) In this Section 32.19 (Confidentiality), **Information** means all information relating to the other Party which is supplied by or on behalf of the other Party (whether before or after the date of this PPA), either in writing, orally or in any other form, directly or indirectly from or pursuant to discussions with the other Party or which is obtained through observations made by the receiving Party and such term includes all, analyses, compilations, studies and other documents whether prepared by or on behalf of a Party which contain or otherwise reflect or are derived from such information.
- (b) Each Party will maintain the confidentiality of any Information, except that Information may be disclosed or provided:
 - (i) by either Party to its and its Affiliates' directors, officers, employees, consultants and agents, including accountants, legal counsel and other advisors;
 - (ii) by the Department, to any Governmental Entity or otherwise as the Department may require for the maintenance or improvement of the Project in the event of, or following, termination of this PPA;
 - (iii) by the Development Entity, to any Contractor to the extent such Information is necessary for the performance by the Development Entity of its obligations under this PPA;
 - (iv) by either Party to the extent:
 - A. it is required to disclose such Information pursuant to an Applicable Law or by any subpoena or similar legal process or by any Governmental Entity;
 - B. the other Party confirms in writing that such Information is not required to be treated as confidential (such confirmation not to be unreasonably withheld or delayed);
 - C. such Information is or comes into the public domain otherwise than through any disclosure prohibited by this PPA;

provided, that, in the cases of Sections 32.19(b)(i), 32.19(b)(ii) and 32.19(b)(iii) of this Section 32.19 (Confidentiality), the Persons to whom such disclosure is

made will be informed of the confidential nature of such Information and will so provide such Information subject to the same or similar requirements to maintain confidentiality as contained in this PPA.

32.20 Right-to-Know Law

- (a) The Development Entity acknowledges that the Department is required to comply with the Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101-3104 (the **RTKL**). The Department's policy in relation to the RTKL in operation as of the date of this PPA is available online at <ftp://ftp.dot.state.pa.us/public/bureaus/BOS/>.
- (b) Upon written notification from the Department that it requires the Development Entity's assistance in responding to a request under the RTKL for information related to this PPA that may be in the Development Entity's possession, constituting, or alleged to constitute, a public record in accordance with the RTKL (**Requested Information**), the Development Entity shall:
 - (i) provide the Department, within ten (10) days after receipt of written notification, access to, and copies of, any document or information in the Development Entity's possession which directly relates to the governmental function of the Department, which the Development Entity has been contracted to perform pursuant to this PPA that the Department reasonably believes is Requested Information; and
 - (ii) provide such other assistance as the Department may reasonably request, in order to comply with the RTKL with respect to this PPA.
- (c) Pursuant to 65 P.S. § 67.707(b), if the Development Entity considers the Requested Information to include a request for a "Trade Secret" or "Confidential Proprietary Information" (as those terms are defined by the RTKL) or other information that the Development Entity considers exempt from production under the RTKL or other viable source of law, including without limitation the P3 Law (*see, e.g., Department of Transportation v. Walsh/Granite JV*, 149 A.3d 425 (Pa. Cmwlth. Ct. 2016)), the Development Entity must notify the Department and provide, within five (5) calendar days of receiving the written notification, a written statement signed by a representative of the Development Entity explaining why the requested material is exempt from public disclosure under the RTKL. When the Development Entity provides the Department with Requested Information pursuant to Section 32.20(b) above which it believes is exempt from public access under the RTKL, the Development Entity shall sufficiently identify the Requested Information with the applicable exemption(s).
- (d) The Department will rely upon the written statement from the Development Entity in denying a RTKL request for the Requested Information unless the Department determines that the Requested Information is clearly not protected from disclosure under the RTKL.

- (e) If the Development Entity fails to provide the Requested Information within the time period required by these provisions, the Development Entity shall indemnify and hold the Department harmless for any damages, penalties, costs, detriment or harm that the Department may incur as a result of the Development Entity's failure, including any statutory damages assessed against the Department.
- (f) The Department will reimburse the Development Entity for any costs associated with complying with these provisions only to the extent allowed under the fee schedule established by the Office of Open Records or as otherwise provided by the RTKL if the fee schedule is inapplicable.
- (g) The Development Entity may file a legal challenge to any Department decision to release a record to the public with the Office of Open Records, or in the Pennsylvania courts; however, the Development Entity shall indemnify the Department for any legal expenses incurred by the Department as a result of such a challenge and shall hold the Department harmless for any damages, penalties, costs, detriment or harm that the Department may incur as a result of the Development Entity's failure, including any statutory damages assessed against the Department, regardless of the outcome of such legal challenge. As between the parties, the Development Entity agrees to waive all rights or remedies that may be available to it as a result of the Department's disclosure of Requested Information pursuant to the RTKL.

[Signature Pages to Follow]

IN WITNESS WHEREOF, the Parties have caused this PPA to be executed by their respective duly authorized officers as of the date below.

[NAME OF DEVELOPMENT ENTITY]

By: _____

Name: _____

Title: _____

By: _____

Name: _____

Title: _____

Date: _____

**COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION**

By: _____
Secretary of Transportation

APPROVED AS TO FORM AND LEGALITY

By: _____
Office of Chief Counsel
Department of Transportation

By: _____
Deputy General Counsel
Office of General Counsel

By: _____
Deputy Attorney General
Office of Attorney General

CERTIFIED FUNDS AVAILABLE UNDER
SAP NO. _____
SAP COST CENTER _____
GL. ACCOUNT _____
AMOUNT _____

By: _____
Office of Comptroller Operations

Date: _____

SCHEDULE 1

DEFINITIONS

As used in this PPA or any other Project Document, the capitalized terms set out in this Schedule 1 (Definitions) shall have the respective meanings below. Unless expressly provided otherwise, all references to Articles, Sections, Exhibits, Schedules and Appendices refer to the Articles, Sections, Exhibits, Schedules and Appendices of or attached to this PPA, as applicable.

Access means, in relation to any Project Site, the right to access and use such Project Site in accordance with the terms of this PPA, subject to:

- (a) its state and condition at the time access is first granted to the Development Entity;
- (b) the rights of Governmental Entities, Utility Owners or third parties to have access to any of the Project Sites existing as of the Proposal Due Date and communicated in writing to the Development Entity or included in the Disclosed Information prior to the Setting Date, including any restrictions set forth on Schedule 3 (Site Access Restrictions);
- (c) the statutory rights or public franchise rights of Governmental Entities and Utility Owners to have access to such of the Project Sites existing as of the Proposal Due Date;
- (d) the rights, including rights of access, granted to the Department and its employees, agents, consultants and contractors and to other Persons under any Project Document;
- (e) restrictions of use set out in easement deeds and/or right of entry permits of record applicable to any Governmental Approval; and
- (f) restrictions set out in any title commitments or ALTA maps related to any of the Project Sites included in the Disclosed Information on or prior to the Setting Date.

Access Standard means the standards set out in Schedule 18 (Technical Provisions).

Additional Federal Requirements means the provisions set out in Schedule 15 (Additional Federal Requirements) of this PPA.

Affected Party has the meaning set out in the definition of Force Majeure Event.

Affiliate of any Person means any entity which, directly or indirectly, through one or more intermediaries, (a) has a ten percent (10%) or more voting or economic interest in such Person or (b) Controls, is Controlled by, or is under common Control with such Person.

Allowance has the meaning set out in Section 5.2(c)(i).

Amtrak User means any User who is a documented passenger on an Amtrak train.

Applicable Law means any statute, law, code, regulation, ordinance, rule, common law, judgment, judicial or administrative order, decree, directive, or other requirement having the

force of law or other governmental restriction (including those resulting from the initiative or referendum process) or any similar form of decision of or determination by, or any interpretation or administration of any of the foregoing by, any Governmental Entity, which is applicable to the Project, Project Services or any relevant Person, whether taking effect before or after the date of this PPA. **Applicable Laws**, however, excludes Governmental Approvals.

Archaeological Remains means antiquities, fossils, coins, articles of value, precious minerals, cultural artifacts, human burial sites, paleontological and human remains and other similar remains of archaeological or paleontological interest discovered at any of the Project Sites.

As-Built Drawings means, in respect of each Project Facility, the Final Design Documents submitted by the Development Entity, revised to incorporate all changes made in the specifications and working drawings during construction and show the dimensions, geometry, and location of each Element in respect of such Project Facility.

As-Built Schedule means, in respect of each Project Facility, the schedule developed and submitted by the Development Entity in accordance with the Technical Provisions.

Audit means with respect to any matter or thing relating to the Project or this PPA, the performance by the Department of such reviews, investigations, inspections and audits relating to such matter or thing as the Department may determine, in its reasonable determination, to be necessary in the circumstances, conducted in each case in accordance with all applicable industry accepted practices for similar projects in the United States and the terms of this PPA.

Authorized Representative has the meaning set out in Section 32.5 (Designation of Representatives; Cooperation with Representatives).

Blue Book has the meaning set out in Section 2.4(a)(i) of Schedule 19 (Extra Work Costs).

Borough means the Borough of Middletown, Pennsylvania located in Dauphin County.

Business Day means any day that is not a Saturday, Sunday or other day on which:

- (a) the Department is officially closed for business;
- (b) banks located in New York City are required or authorized by law or executive order to close; or
- (c) the New York Stock Exchange is closed.

Calendar Year means the consecutive 12-month period starting on January 1 and ending on December 31.

Capital Expenditure means any expenditure that is treated as a capital expenditure in accordance with GAAP or equivalent auditing standards utilized and generally accepted in the country of incorporation of such party.

Certificate of Project Facility Completion has the meaning set out in Section 7.6(a).

Change in Costs means, in respect of any Compensation Event, the effect of that Compensation Event upon the actual or anticipated costs, losses or liabilities of the Development Entity.

Change in Law means the introduction or repeal (in whole or in part) of or amendment, alteration or modification to or change in interpretation of (in each case including, to the extent applicable, by retroactive effect), any Law or standards, practices or guidelines issued or published by any Governmental Entity that occur at any time after the Setting Date and that are either binding on the Development Entity or if non-binding on the Development Entity are both typically complied with in the construction and/or railroad industries and are necessary in order to comply with Good Industry Practice, **excluding** however, any such introduction, repeal, amendment, alteration, modification or change in relation to federal Law (other than any federal Law that imposes liability or standards of conduct for or otherwise regulates, concerns or relates to the protection of public health, safety, or welfare and the Environment; Hazardous Substances; or pollution as defined by any federal Applicable Law), standards, practices and guidelines.

Chapter 17 Claim has the meaning set out in Section 30.3(d).

Closing Conditions Precedent means the conditions set out in Section 2.2 (Conditions Precedent to the Commercial Closing Date).

Collaboration Portal means the secure collaborative program website to communicate, store, share and/or distribute documentation related to the Project (including during the period prior to the date of this PPA).

Commercial Closing Date means the date on which all of the Closing Conditions Precedent are satisfied or otherwise waived in accordance with this PPA.

Commercial Facility means [●].

Commercialization Activities means any retail, lodging or other services and/or facilities developed and managed by the Commercialization Entity on a Commercialization Site, including any third-party sales, marking of public access of the Commercialization Activities to third-party customers, permitting and licensing requirements, demand studies, drainage, and all other requirements needed in connection with Commercialization Activities.

Commercialization Entity means [●] or its successors or assigns, which shall be an Affiliate of the Development Entity.

Commercialization Management Plan means the Initial Commercialization Management Plan or the Updated Commercialization Management Plan, as applicable.

Commercialization Revenues means any revenue generated from Commercialization Activities.

Commercialization Site means the parcel of land located at [_____], as more fully described in the Technical Provisions.

Commonwealth means the Commonwealth of Pennsylvania.

Compensation Event means any of the following with respect to a Project Site:

- (a) any Discriminatory Change in Law;
- (b) a General Change in Law issued or published by the Commonwealth which involves Capital Expenditure;
- (c) violation of any Applicable Law by the Department;
- (d) any Department Change or the issuance of any Directive Letter;
- (e) any damage, interruption or interference to the Construction Work caused by a capital works project (other than the Project) by the Department, Amtrak or Norfolk Southern (or any contractor on behalf of the Department, Amtrak or Norfolk Southern) within the Project Site; and
- (f) any delay by the Department in providing any Governmental Approval;

except, in each case, to the extent attributable to any breach of this PPA or any negligent act or negligent omission of a Development Entity-Related Entity.

Conceptual Drawings means the limits, layout, and configurations depicted in the plan set “[●] Site Plan Layouts” dated [_____], as updated from time to time prior to the Setting Date, contained in [Folder 02 – Design of the RID] portion of the Disclosed Information contained on the Collaboration Portal.

Construction Documents means all shop drawings, working drawings, fabrication plans, material and hardware descriptions, specifications, construction quality control reports, construction quality assurance reports and samples necessary or desirable for construction of the Project in accordance with the Project Documents.

Construction Manager has the meaning set out in the Technical Provisions.

Construction Period means the period starting on the Commercial Closing Date and ending on the date on which the Project Facilities shall have achieved Project Facility Completion.

Construction Period Insurance means the Insurance Policies described in Section 2 of Schedule 9 (Insurance Coverage Requirements), but only in respect of the Construction Period.

Construction Quality Plan has the meaning set out in the Technical Provisions.

Construction Security means any letter of credit or performance or surety bond issued to secure the obligations (whether performance or payment) of the D&C Contractor pursuant to the D&C Contract.

Construction Work means all work and services required to upgrade, build, construct, make, form, manufacture, furnish, install, supply, deliver, landscape or equip the Project Facilities, excluding Design Work.

Contract means any agreement, and any supplement or amendment thereto, by the Development Entity with any other Person, Contractor or Supplier to perform any part of the Project Services or provide any materials, equipment or supplies for any part of the Project Services, or any such agreement, supplement or amendment at a lower tier, between a Contractor and its lower tier Contractor or a Supplier and its lower tier Supplier, at all tiers.

Contractor means any Person with whom the Development Entity has entered into any Contract to perform any part of the Project Services or provide any materials, equipment or supplies for the Project, on behalf of the Development Entity, and any other Person with whom any Contractor has further subcontracted any part of the Project Services, at all tiers.

Critical Path means the longest (in terms of time) unbroken chain or path of logically connected activities in the Preliminary Project Baseline Schedule, Project Baseline Schedule or (as the case may be) Project Working Schedule ending with the achievement of Project Facility Completion for all Project Facilities.

D&C Contract means any Contract entered into by the Development Entity for third party management, direction, supervision or performance of all of the D&C Work or any significant portion thereof (including any guaranty or similar credit support provided by a creditworthy entity to backstop obligations under such a Contract). There may be more than one D&C Contract concurrently in effect.

D&C Contractor means [_____].

D&C Direct Agreement means the agreement substantially in the form attached as Schedule 17 (Form of D&C Direct Agreement) by and among the Department, the Development Entity, and the D&C Contractor.

D&C Guarantor means any parent company guarantor in respect of a D&C Contract.

D&C Price means (i) with respect to the Parking Facility, \$[_____], (ii) with respect to the Pedestrian Bridge, \$[_____] and (iii) with respect to the Emaus Street Extension, \$[_____]. **[To come from RFP response.]**

D&C Work means the Design Work and the Construction Work.

Day or **day** means calendar days unless otherwise expressly specified as a Business Day.

Defect means any defect in any of the D&C Work or Renewal Work attributable to:

- (a) defective design;
- (b) defective workmanship or defective materials, plant or machinery used in such construction having regard to Good Industry Practice and to appropriate industry standards and codes of practice current at the date of construction;
- (c) the use of materials in the D&C Work which (whether defective or not defective in themselves) prove to be defective in the use to which they are put;

- (d) defective installation of anything in or on a Project Site; or
- (e) defective preparation of a Project Facility.

Department has the meaning set out in the introductory paragraph to this PPA.

Department Change means any change in the Project Services by the Department that the Development Entity is required to implement pursuant to Article 10 (Department and Development Entity Changes).

Department Change Request has the meaning set out in Section 10.1(b) (Department Changes).

Department Default has the meaning set out in Section 23.1(Department Default).

Department Termination Notice has the meaning set out in Section 24.5(a).

Department Termination Sum means the amount calculated in accordance with Section 1.2 of Schedule 6 (Compensation on Termination).

Design Documents means all drawings (including plans, profiles, cross-sections, notes, elevations, typical sections, details and diagrams), design criteria, specifications, reports, studies, calculations, electronic files, records and submittals necessary for, or related to, the design of the Project and developed specifically for the Project. Design Documents include the Final Design Documents.

Design Lead has the meaning set out in the Technical Provisions.

Design Quality Plan (DQP) has the meaning set out in the Technical Provisions.

Design Work means all work and services related to the design, redesign, engineering or architecture for the Project.

Development Entity has the meaning set out in the introductory paragraph to this PPA.

Development Entity Change has the meaning set out in Section 10.6(a).

Development Entity Change Request has the meaning set out in Section 10.6(a).

Development Entity Default has the meaning set out in Section 22.1 (Development Entity Default).

Development Entity-Related Entity means:

- (a) the Development Entity;
- (b) Contractors (including Suppliers);
- (c) the Guarantor(s);

- (d) any other Persons performing any of the Project Services for or on behalf of the Development Entity;
- (e) any other Persons for whom the Development Entity may be legally or contractually responsible; and

the employees, agents, officers, directors, shareholders, representatives, consultants, successors, assigns and invitees of any of the foregoing, excluding, for the avoidance of doubt, any Patrons.

Development Entity Release of Hazardous Material means any Hazardous Materials Release:

- (a) to the extent attributable to the acts, omissions, negligence, willful misconduct or breach of Applicable Law or contract by any Development Entity-Related Entity, **provided**, that the removal of Hazardous Materials, or any Remedial Action in respect of Hazardous Materials, by a Development Entity-Related Entity in accordance with the requirements of the Project Documents shall not be a Development Entity Release of Hazardous Material;
- (b) involving any Hazardous Materials arranged to be brought onto a Project Site or elsewhere by any Development Entity-Related Entity, regardless of cause (unless brought onto a Project Site pursuant to a removal of Hazardous Materials, or any Remedial Action in respect of Hazardous Materials, by a Development Entity-Related Entity in accordance with the requirements of the Project Documents); or
- (c) to the extent attributable to the use, containment, storage, management, handling, transport and disposal of any Hazardous Materials by any Development Entity-Related Entity in breach of any of the requirements of the Project Documents or any Applicable Law or Governmental Approval.

Development Entity Termination Notice has the meaning set out in Section 24.2(a).

Development Entity Termination Sum means the amount calculated in accordance with Section 2.2 of Schedule 6 (Compensation on Termination).

Development Entity's Estimate has the meaning set out in Section 10.3(a).

Development Entity's Initial Design means the conceptual design of the Project forming part of the Development Entity's Proposal Commitments.

Development Entity's Interest means all rights, title, and/or interest of the Development Entity derived from this PPA and the other Project Documents.

Development Entity's Final Design means the design prepared by the Development Entity and Signed and Sealed by the Engineer of Record, in compliance with the Technical Provisions, consistent with the Development Entity's Initial Design and subject to the Department's review.

Development Entity's Proposal Commitments means those commitments made by the Development Entity in its Proposal and attached as Appendix 1 (Development Entity's Proposal Commitments) to this PPA.

Directive Letter has the meaning set out in Section 10.2 (Directive Letter).

Disadvantaged Business Enterprise or **DBE** has the meaning set out in 49 CFR Part 26.

Disclosed Information means all written information provided to the Development Entity or any Development Entity-Related Entity by the Department or any of its employees, agents, officers, directors, shareholders, representatives, consultants, successors and assigns prior to the date of this PPA, including: (a) the RFP and its contents; and (b) all contents of the Collaboration Portal.

Discretionary Submittal means any Submittal that is expressed in the Project Documents to be subject to the approval or consent of the Department in its sole or absolute discretion.

Discriminatory Change in Law means a Change in Law, the terms of which apply to:

- (a) the Project or projects substantially the same as the Project; or
- (b) the Development Entity,

provided, that in each case, such Change in Law is not of general application to other Persons.

Dispute means any dispute, disagreement or controversy between the Department and the Development Entity concerning their respective rights and obligations under any Project Document, including in respect of any claim, alleged breach or failure to perform and any remedy.

Dispute Resolution Procedures means the procedures for resolving Disputes set out in Article 30 (Dispute Resolution Procedures).

Disputes Review Board means the disputes review board established to aid in the resolution of Disputes pursuant to Section 30.4 (Disputes Review Board).

Disputes Review Board Agreement means the agreement in the form attached to this PPA as Part 1 (Form of Disputes Review Board Agreement) of Schedule 10 (Disputes Review Board).

Diverse Business or **DB** has the meaning set out in 74 Pa.C.S. Section 303.

Document and Data Management Plan (DDMP) has the meaning set out in the Technical Provisions.

Dollars or **\$** refers to the lawful money of the United States of America.

Early Termination means the termination of this PPA for any reason prior to the expiration of the Term.

Early Termination Date means the effective date of termination of this PPA for any reason prior to the stated expiration of the Term, as specified in the relevant provisions of Article 24 (Termination and Force Majeure).

Earned Value Payment means the amount earned by the Development Entity for each period set forth in Schedule 13 (Earned Value Payment Mechanism), calculated in accordance with Schedule 13 (Earned Value Payment Mechanism) and taking into account the calculations, adjustments and deductions provided for in this PPA, including the Holdback Payment.

Electronic Document Management System (EDMS) has the meaning set out in the Technical Provisions.

Element or **Project Element** means an individual component, system or subsystem of the Project.

Eligible Security Issuer means:

- (a) in respect of a letter of credit, any Person; and
- (b) in respect of a demand guaranty, any surety bond provider licensed to do business in the Commonwealth;

which in each case has a credit rating for long-term, unsecured debt of not less than “A-/A3” from one of the Rating Agencies, and has an office in the Commonwealth at which the demand guaranty or letter of credit (as relevant) can be presented for payment by facsimile or by electronic means.

Emergency means any unplanned event affecting the Project that:

- (a) presents an immediate or imminent hazard to Patrons, or a risk of immediate or imminent structural failure, or an immediate or imminent risk of damage to a third party’s property or equipment, or an immediate or imminent risk of damage to the Environment or a threat to the long term integrity of any part of the Project;
- (b) has jeopardized the safety of the public using the Project Facilities;
- (c) is a declared state of emergency pursuant to Commonwealth or federal Law; or
- (d) is recognized or declared by any law enforcement agency or any other Governmental Entity (other than the Department) as an Emergency.

Emaus Street means the section of Emaus Street located in the Borough between PA 230 and its current terminus at Wood Street.

Emaus Street Extension has the meaning set out in clause (A) of the Background to this PPA, as more fully described in the Technical Provisions.

Encumbrance means any mortgage, lien, judgment, execution, pledge, charge, security interest, restriction, easement, servitude, option, reservation, lease, claim, trust, deemed trust or encumbrance of any nature whatsoever, whether arising by operation of Law, judicial process, contract, agreement, or otherwise created.

Engineer of Record or **EOR** means the Professional Engineer employed by the Development Entity responsible for preparing Final Design Documents, all specifications, certification of all shop drawings and providing As-Built Drawings for the Project.

Environment means air, soils, surface waters (including wetlands), groundwater, land, stream sediments, surface or subsurface strata, biological resources, including endangered, threatened and sensitive species, natural systems, including ecosystems, and cultural, historic, archaeological and paleontological resources.

Environmental Approval means a Governmental Approval required under any Applicable Law for the Project or any Project Site that imposes liability or standards of conduct for or otherwise regulates, concerns or relates to the protection of public health, safety, or welfare and the Environment, Hazardous Materials or pollution as defined by any Applicable Law.

Environmental Commitment means each of the environmental requirements of the Development Entity as further described in the Technical Provisions.

Environmental Liability Acknowledgement has the meaning set out in Section 2.2(h) (Environmental Liability Acknowledgement).

Equity Member means any Person that directly holds an equity interest in the Development Entity.

Escrow Agent has the meaning set out in Section 8.5(a) (Establishment and Security).

Extra Work means any work which is required by the Department to be performed by the Development Entity and which at that time is not otherwise covered or included in the Project by the Project Documents, whether it is in the nature of additional work, altered work, deleted work, or otherwise, including by means of a Department Change and/or Directive Letter.

Federal Requirements means the provisions required to be part of federal-aid construction contracts by Applicable Law, including without limitation the Additional Federal Requirements (Schedule 15) and other federal Applicable Laws identified in the Project Documents.

Final Design means, depending on the context:

- (a) the Final Design Documents;
- (b) the design concepts set out in the Final Design Documents; or
- (c) the process of developing the Final Design Documents.

Final Design Documents means the complete final construction drawings, including plans, profiles, cross-sections, notes, elevations, typical sections, details and diagrams, design criteria, specifications, reports, studies, calculations, electronic files, records and submittals prepared by the Development Entity, necessary or related to construction and maintenance of the Project and developed specifically for the Project.

Final Warning Notice has the meaning set out in Section 22.4(b) (Final Notice).

Financial Model means the base case financial model set out in Schedule 12 (Form of Financial Model) (as updated from time to time in accordance with the terms of this PPA).

Force Majeure Event means the occurrence after the date of this PPA of:

- (a) war, civil war, invasion, violent act of foreign enemy or armed conflict;
- (b) nuclear, chemical or biological contamination unless the source or cause of the contamination is brought to or near a Project Site by the Development Entity or its Contractors or is as a result of any breach by the Development Entity of the terms of this PPA;
- (c) ionizing radiation unless the source or cause of the ionizing radiation is brought to or near a Project Site by the Development Entity or its Contractors or is as a result of any breach by the Development Entity of the terms of this PPA;
- (d) any blockade or embargo;
- (e) any:
 - (i) official or unofficial strike;
 - (ii) lockout;
 - (iii) go-slow; or
 - (iv) other dispute,generally affecting the construction industry or a significant sector of it; or
- (f) any act of Terrorism,

which directly causes either Party (the **Affected Party**) to be unable to comply with all or a material part of its obligations under this PPA.

GAAP means the Generally Accepted Accounting Principles approved and adopted by the American Institute of Certified Public Accountants.

General Change in Law means a Change in Law which is not a Discriminatory Change in Law.

Good Industry Practice means the exercise of the degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from time to time from a skilled and experienced designer, engineer, constructor, maintenance contractor or operator or developer seeking in good faith to comply with its contractual obligations, complying with all Applicable Laws and Governmental Approvals, using accepted design and construction standards and criteria normally used on similar projects in the Commonwealth, and engaged in the same type of undertaking in the United States under similar circumstances and conditions, including environmental conditions.

Governmental Approval means all approvals, permits, permissions, consents, licenses, certificates (including sales tax exemption certificates) and authorizations (whether statutory or otherwise) which are required from time to time in connection with the Project to be issued by the Department, or any Governmental Entity.

Governmental Entity means the government of the United States of America, the Commonwealth, the Borough, the cities and counties within the Commonwealth and any other agency, or subdivision of any of the foregoing, including any federal, state, or municipal government, and any court, agency, special district, commission or other authority exercising executive, legislative, judicial, regulatory, administrative or taxing functions of, or pertaining to, the government of the United States of America, the Commonwealth, the Borough, or the cities and counties within the Commonwealth. Governmental Entity does not include the Department.

Ground Lease means the Ground Lease dated as of the date hereof between the Department, as lessor, and the Commercialization Entity, as lessee.

[**Guarantor** means any Person guaranteeing the Development Entity's performance of its obligations under the Project Documents.]

Handback Amount has the meaning set out in Section 2 of Schedule 5 (Calculation of Handback Amounts).

Handback Period means the period beginning on the date thirty-six (36) months before the scheduled end of the Term and ending on the Termination Date.

Handback Plan has the meaning set out in the Technical Provisions.

Handback Requirements has the meaning set out in Section 8.4(a).

Handback Reserve Account has the meaning set out in Section 8.5(a) (Establishment and Security).

Handback Reserve Amount has the meaning set out in Section 5(b) of Schedule 5 (Calculation of Handback Amount).

Handback Year has the meaning set out in Section 8.5(b)(i).

Hazardous Environmental Condition means the presence of any Hazardous Materials on, in, under or about a Project Site at concentrations or in quantities that are required to be removed or

remediated as a matter of Law or in accordance with the requirements of the Project Documents or any Governmental Entity.

Hazardous Materials means any element, chemical, compound, mixture, material or substance, whether solid, liquid or gaseous, which at any time is defined, listed, classified or otherwise regulated in any way under any Applicable Law, or any other such substances or conditions (including mold and other mycotoxins, fungi or fecal material) which may create any unsafe or hazardous condition or pose any threat or harm to the Environment or human health and safety. Hazardous Materials includes the following:

- (a) hazardous wastes, hazardous material, hazardous substances, hazardous constituents, and toxic substances, ignitable, corrosive and reactive substances or related materials, whether solid, liquid, or gas, including substances defined as or included in the definition of hazardous substance, hazardous waste, hazardous material, extremely hazardous waste, acutely hazardous waste, radioactive waste, radioactive materials, bio-hazardous waste, pollutant, toxic pollutant, contaminant, restricted hazardous waste, infectious waste, toxic substance, toxic waste, toxic material, or any other term or expression intended to define, list or classify substances by reason of properties harmful to health, safety or the indoor or outdoor Environment (including harmful properties such as ignitability, corrosivity, reactivity, carcinogenicity, toxicity, reproductive toxicity, TCLP toxicity or EP toxicity or words of similar import under any Applicable Law);
- (b) any petroleum product, including crude oil and any fraction thereof, and including any refined petroleum product or any additive thereto or fraction thereof; and any waste oil or waste petroleum byproduct or fraction thereof or additive thereto;
- (c) any solvent, solvent waste, including any refined solvent product, and any waste solvent or waste solvent byproduct, including any additive, byproduct or fraction of any of the foregoing;
- (d) any drilling fluids, produced waters and other wastes associated with the exploration, development or production of crude oil, natural gas or geothermal resources;
- (e) any flammable substances or explosives;
- (f) any radioactive materials;
- (g) any asbestos or asbestos-containing materials;
- (h) silica;
- (i) any lead, cadmium, or lead-based paint or any other heavy metal-based paint or material, or any metal listed in or regulated by the Resource Conservation and Recovery Act (42 U.S.C. §§ 6901 et seq.);
- (j) any radon or radon gas;
- (k) any methane gas or similar or regulated gaseous materials;

- (l) any urea formaldehyde foam insulation;
- (m) electrical equipment and components which contain any oil or dielectric fluid containing polychlorinated biphenyls;
- (n) pesticides, herbicides or fungicides;
- (o) any other chemical, material or substance, exposure to which is prohibited, limited or regulated by any Governmental Entity or which may or could pose a hazard to the health and safety of the owners, operators, Patrons or any Persons in the vicinity of the Project or to the indoor or outdoor Environment; and
- (p) soil, or surface water or groundwater, containing any of the Hazardous Materials as defined above.

Hazardous Materials Release means any spill, leak, emission, release, discharge, injection, escape, leaching, dumping or disposal of Hazardous Materials into the soil, air, surface water, groundwater or indoor or outdoor Environment, including any of the foregoing that exacerbates an existing release or condition of Hazardous Materials contamination.

Holdback Payment means the final payment due to the Development Entity, which is equal to 10% of the overall D&C Price for the Parking Facility.

Incident means a localized disruption to the Project, any Project Site or safety of the Project Facilities (including the safety of users of the Project Facilities).

Indemnified Parties means the Department and its respective successors, assigns, agencies, divisions, officers, agents, representatives, employees, and the Commonwealth.

Indirect Losses means loss of profits, loss of use, loss of production, loss of business, loss of business opportunity or any claim for consequential loss or for indirect loss of any nature, but excluding any of the same that relate to payments expressly provided for under this PPA.

Information has the meaning set out in Section 32.19(a).

Initial Commercialization Management Plan means the portion of the Project Management Plan addressing Commercialization Activities as described in the Technical Provisions.

Initial Warning Notice has the meaning set out in Section 22.4(a) (Warning Notice).

Insolvency Event means in respect of any Person:

- (a) any involuntary bankruptcy, insolvency, liquidation, company reorganization, restructuring, suspension of payments, scheme of arrangement, appointment of provisional liquidator, receiver or administrative receiver, resolution, or petition for winding up or similar proceeding, under any Applicable Law, in any jurisdiction, except to the extent that the same has been dismissed within sixty (60) days;

- (b) any voluntary bankruptcy, insolvency, liquidation, company reorganization, restructuring, suspension of payments, scheme of arrangement, appointment of provisional liquidator, receiver or administrative receiver, resolution, or petition for winding up or similar proceeding, under any Applicable Law, in any jurisdiction; or
- (c) any general inability on the part of that Person to pay its debts as they fall due.

Insurance Policies means all of the insurance policies the Development Entity is required to carry pursuant to Schedule 9 (Insurance Coverage Requirements).

Insurance Proceeds means all proceeds from insurance payable to the Development Entity (or that should have been payable to the Development Entity but for the Development Entity's breach of any obligation under this PPA to take out or maintain such insurance) on or after the Early Termination Date.

Intellectual Property means any and all patents, trademarks, service marks, copyright, database rights, moral rights, rights in a design, know-how, confidential information and all or any other intellectual or industrial property rights whether or not registered or capable of registration and whether subsisting in the United States or any other part of the world together with all or any goodwill relating or attached thereto which is created, brought into existence, acquired, used or intended to be used by any Development Entity-Related Entity for the purposes of carrying out the Project Services and/or otherwise for the purposes of this PPA.

Invoice has the meaning set out in Section 14.2 (Invoicing).

Key Assets means all assets and rights to enable the Department or a successor contractor to own, operate and maintain each Project Facility in accordance with this PPA including:

- (a) any land or buildings;
- (b) any core equipment;
- (c) any books and records (including operations and maintenance manuals, health and safety manuals and other know how);
- (d) any contractual rights; and
- (e) to the extent set forth in Article 27 (Intellectual Property), any Intellectual Property,

but excluding (i) any assets and rights in respect of which the Department is full legal and beneficial owner, and (ii) any of the above to the extent that the relevant asset or right is not owned by the Development Entity).

Key Contract means:

- (a) any D&C Contract;
- (b) any Maintenance Contract; or

- (c) any guaranty, performance and/or payment security, or any other support provided by a creditworthy entity in respect of the obligations of a Key Contractor under any of the foregoing.

Key Contractor means the Contractor under any Key Contract.

Key Personnel has the meaning set out in the Technical Provisions.

Law means any federal, state, local and municipal laws, rules and regulations, orders, codes, directives, permits, approvals, decisions, decrees, ordinances or by-laws having the force of law and any common or civil law, whether adopted or enacted prior to or after the date of this PPA including binding court and judicial decisions having the force of law, and includes any amendment, extension or re-enactment of any of the same in force from time to time and all other instruments, orders and regulations made pursuant to statute, including those made by any Governmental Entity.

Licensed Purposes means the design, construction, operation, maintenance, management, provision, carrying out, replacement and/or operation of the Project Facilities and/or the Project Services.

Long Stop Deadline means, in respect of any Project Facility, the date that is 270 days after the Project Facility Completion Deadline in respect of such Project Facility (as such date may be extended pursuant to the terms of this PPA).

Loss or **Losses** means any loss, damage, injury, liability, obligation, cost, response cost, expense, fee, charge, judgment, penalty, or fine. Losses include injury to or death of persons, damage or loss of property, and harm or damage to natural resources.

Maintained Facility means each of the Station and the Parking Facility.

Maintenance Contract means any Contract entered into by the Development Entity for third party management, direction, supervision or performance of all of the Maintenance Work or any significant portion thereof (including any guaranty or similar credit support provided by a creditworthy entity to backstop obligations under such a Contract). There may be more than one Maintenance Contract concurrently in effect.

Maintenance Contractor means the Contractor under any Maintenance Contract.

Maintenance Management Plan means the plan developed by the Development Entity that identifies the approach, methods, staffing, systems, schedule and procedures for performing the Maintenance Work, as described in more detail in the Technical Provisions.

Maintenance Performance Requirements means in respect of each Element of the Project, the minimum performance requirements set out in the Technical Provisions.

Maintenance Quality Plan has the meaning set out in the Technical Provisions.

Maintenance Work means (i) Routine and Preventative Maintenance of the Station; (ii) Routine and Preventative Maintenance and Renewal Work of the Parking Facility; and (iii) Routine and Preventative Maintenance and Renewal Work of the Commercial Facilities.

Major Service Failure has the meaning set out in Schedule 7 (Unavailability Penalty and Service Failures).

Major Service Failure Penalty means the penalty due to the Department from the Development Entity with respect to any Major Service Failure as set out in Schedule 7 (Unavailability Penalty and Service Failures).

Management & Staffing Plan has the meaning set out in the Technical Provisions.

Minor Service Failure has the meaning set out in Schedule 7 (Unavailability Penalty and Service Failures).

Minor Service Failure Penalty means the penalty due to the Department from the Development Entity with respect to any Minor Service Failure as set out in Schedule 7 (Unavailability Penalty and Service Failures).

Month or month means a time period comprised of one calendar month.

Non-Amtrak User means any User who is not an Amtrak User.

Non-Discretionary Submittal means any Submittal that is expressed in the Project Documents to be subject to the approval or consent of the Department, but which is not a Discretionary Submittal.

Norfolk Southern means Norfolk Southern Railway Company.

NTP1 has the meaning set out in Section 7.4 (Conditions Precedent to NTP1).

NTP2 has the meaning set out in Section 7.5 (Conditions Precedent to NTP2).

O&M Breach has the meaning set out in Section 8.1(b).

O&M Period means, in respect of a Project Facility, the period starting on the Project Facility Completion Date for that Project Facility and ending on the last day of the Term.

Operations and Maintenance Manager has the meaning set out in the Technical Provisions.

Overage has the meaning set out in Section 5.2(c)(i).

PA 230 means the intersection of Ann Street and West Main Street in the Borough.

Parking Facility has the meaning set out in clause (A) of the Background to this PPA, as more fully described in the Technical Provisions.

Parking Facility Revenues has the meaning set out in Section 17.1.

Parking Fees means fees with respect to the parking of any vehicle in the Parking Facility in accordance with the provisions of this PPA.

Party means the Development Entity or the Department, as the context may require, and **Parties** means the Development Entity and the Department, collectively.

Patron means any user of the Project Facilities.

Pedestrian Bridge has the meaning set out in clause (A) of the Background to this PPA, as more fully described in the Technical Provisions.

Persistent Breach means a breach for which a Final Warning Notice has been issued, which has continued for more than thirty (30) consecutive days or recurred in three (3) or more months within the six (6)-month period after the date on which such Final Warning Notice is served on the Development Entity.

Person or **Persons** means any natural person, corporation, joint venture, limited liability company, company, voluntary association, partnership, trust, unincorporated organization or Governmental Entity or other type of entity.

Pre-Existing Hazardous Materials means Hazardous Materials that exist in, on or under a Project Site prior to the date at which the Development Entity gains vacant possession to a relevant portion of the particular Project Site, including those that manifest themselves after that date.

Preliminary Project Baseline Schedule means the logic-based summary schedule as provided in the Development Entity's Proposal Commitments and is the basis of the Project Baseline Schedule.

Preliminary Work means:

- (a) the Design Work; and
- (b) any work or services that the Development Entity is required to undertake in order to satisfy the conditions precedent listed in Part 2 (Conditions Precedent to NTP2) of Schedule 20 (Conditions Precedent to Notices to Proceed).

Principal Department Documents means each Project Document to which the Department is expressed to be a party.

Principal Development Entity Documents means each Key Contract.

Professional Engineer means an engineer who is licensed in the Commonwealth.

Project has the meaning set out in clause (A) of the Background to this PPA.

Project Baseline Schedule means the logic-based critical path schedule for all D&C Work as described in the Technical Provisions, as may be revised and updated in accordance with the Project Documents.

Project Completion means the occurrence of Project Facility Completion for the Project Facilities.

Project Data means:

- (a) Design Documents; and
- (b) any other information, documents or data acquired or brought into existence or used specifically in relation to the Project Services or this PPA,

in each case that is used by or on behalf of any Development Entity-Related Entity in connection with the provision of the Project Services or the performance of the Development Entity's obligations under this PPA. Project Data shall not include information, documents or data used generally by any Development Entity-Related Entity in the course of their wider business operations, except to the extent such information, documents or data have been brought into existence specifically for the Project.

Project Documents means this PPA, the Technical Provisions, the Ground Lease, the Development Entity's Proposal Commitments, any amendments to the foregoing undertaken in accordance with the terms hereof or thereof and any other document that the Department and the Development Entity may deem to be a Project Document from time to time after the date hereof.

Project Facilities means each of the Station, the Parking Facility, the Emaus Street Extension and the Pedestrian Bridge.

Project Facility Completion means the occurrence of all events and satisfaction of all conditions set out in Schedule 21 (Conditions Precedent to Project Facility Completion).

Project Facility Completion Conditions means all of the conditions set out in Schedule 21 (Conditions Precedent to Project Facility Completion).

Project Facility Completion Date means, in respect of a Project Facility, the date upon which the Development Entity achieves Project Facility Completion in respect of that Project Facility.

Project Facility Completion Deadline means December 31, 2020.

Project Management Plan (PMP) means the document approved by the Department, in accordance with the terms of the Project Document, describing the Project Services necessary to manage the development, design, construction, and maintenance of the Project, and containing the component parts, plans and documentation required under the Project Documents.

Project Revenues means Commercialization Revenues and Parking Facility Revenues.

Project Services means all work and services required to be furnished, performed and provided by the Development Entity in order to design, construct, upgrade, implement, operate and maintain the Project, as applicable for each Project Site, in accordance with the Project Documents.

Project Site means each of the Station, the Parking Facility, Emaus Street and the Pedestrian Bridge.

Project Working Schedule means a copy of the most current approved Project Baseline Schedule that is to be or is in the process of being revised and updated by the Development Entity to reflect current project status in accordance with the Technical Provisions.

Proposal means the proposal submitted by the Development Entity to the Department in response to the RFP.

Proposal Due Date means the date set forth in the RFP.

Proposer has the meaning set out in clause (E) of the Background to this PPA.

Protection in Place means any action taken to avoid damaging a Utility which does not involve removing or relocating that Utility, including staking the location of the Utility, exposing the Utility, avoidance of a Utility's location by construction equipment, installing steel plating or concrete slabs, encasement in concrete, temporarily de-energizing power lines, and installing physical barriers. The term includes both temporary measures and permanent installations meeting the foregoing definition.

Qualifying Change in Law means:

- (a) a Discriminatory Change in Law; or
- (b) a General Change in Law which involves Capital Expenditure,

which, in each case, was not foreseeable at the Proposal Due Date.

Quality Management Plan has the meaning set out in the Technical Provisions.

R&C Submittal means any Submittal that is expressed in the Project Documents that is not a Discretionary Submittal or a Non-Discretionary Submittal.

Rating Agency means any of Standard & Poor's Rating Services, a division of The McGraw-Hill Companies, Inc., Moody's Investors Service, Inc., Dominion Bond Rating Service, Inc. or Fitch Investors Service, Inc.

Reasonable Efforts means all those actions in the power of the relevant Party that are capable of producing the desired result, being actions which a prudent, determined and reasonable person desiring to achieve that result would take; **provided**, that subject to its other express obligations under this PPA, the relevant Party shall not be required to expend funds except for those necessary to meet the reasonable costs reasonably incidental or ancillary to the actions to be

taken by the relevant Party (including its reasonable travel expenses, correspondence costs and general overhead expenses).

Registered Business Partner of the Commonwealth means a person that has obtained “SAP-Vendor Number” through the Department’s “Supplier Portal Website” at www.pasupplierportal.state.pa.us (or otherwise in accordance with the instructions set out in page 5 (Vendor Registration) of Department Publication IV (12-13), *Conducting Business with the Pennsylvania Department of Transportation*).

Released For Construction Documents means all drawings, specifications, revisions thereto, and any other items necessary to upgrade and construct the Project Facilities, Signed and Sealed by the Engineer of Record.

Relief Event means any of the following with respect to a Project Site:

- (a) any Force Majeure Event;
- (b) any change in Law that is not a Qualifying Change in Law;
- (c) fire, explosion, earthquakes, riot and civil commotion;
- (d) named windstorm and any ensuing storm surge, including the direct action of wind originating from a named windstorm;
- (e) any accidental loss or damage to any roads servicing a Project Site (including obstructed waterways); and
- (f) any delay in obtaining any Governmental Approval; **provided**, that such delay is beyond the reasonable control of any Development Entity-Related Entity;

except, in each case, to the extent attributable to any breach of this PPA or any negligent act or negligent omission of a Development Entity-Related Entity.

Remaining Work means, in respect of a Project Facility, any Construction Work that is not Preliminary Work.

Remedial Action means any remediation or removal of a Hazardous Environmental Condition that the Development Entity is responsible for pursuant to Article 6 (Hazardous Materials).

Renewal Work means maintenance, repair, reconstruction, rehabilitation, restoration, renewal or replacement of any worn-out, deficient, damaged or under-performing Element that is not Routine and Preventative Maintenance so that such Element does not prematurely deteriorate and remain fully functional.

Requested Information has the meaning set out in Section 32.20(a).

Required Action has the meaning set out in Section 25.3(a).

Required Project Services means (i) developing, designing, constructing, financing, operating and maintaining of the Parking Facility that provide a minimum of 400 parking spaces specific for transportation use, including the administration, collection, and accounting for all parking fees; (ii) constructing and financing the Emaus Street Extension; (iii) constructing, financing and maintaining the Pedestrian Bridge; and (iv) providing Maintenance Work with respect to the Station.

Reviewable Submittal means any Submittal that is a Discretionary Submittal, Non-Discretionary Submittal or R&C Submittal.

Risk Management Plan has the meaning set out in the Technical Provisions.

RFP has the meaning set out in clause (D) of the Background to this PPA.

RFQ has the meaning set out in clause (B) of the Background to this PPA.

Routine and Preventative Maintenance means work and services to preserve the current condition of assets, including any inspection, that is routine in nature and includes matters that are typically included as an annually or bi-annual recurring cost in the maintenance budgets with respect to each Maintained Facility, as more fully described in the Technical Provisions.

RTKL has the meaning set out in Section 32.20(a).

Safety Compliance means any and all improvements, repair, reconstruction, rehabilitation, restoration, renewal, replacement and changes in configuration or procedures respecting the Project to correct a specific safety condition of the Project that the Department or a Governmental Entity has reasonably determined to exist by investigation or analysis (including if the condition exists despite prior compliance with Safety Standards).

Safety Compliance Order means a written order or directive from the Department to the Development Entity to implement Safety Compliance.

Safety Standards means those provisions of the Technical Provisions that are measures to protect public safety or worker safety. As a matter of clarification, provisions of the Technical Provisions primarily directed at durability of materials or equipment, where the durability is primarily a matter of life cycle cost rather than protecting public or worker safety, are not Safety Standards.

Service Failure means a failure by the Development Entity to perform any of the Maintenance Work as described in the Technical Provisions.

Service Failure Penalty means a Major Service Failure Penalty or Minor Service Failure Penalty, as applicable.

Service Line means:

- (a) a Utility line, the function of which is to directly connect the improvements on an individual property to another Utility line located off such property, which other Utility line connects more than one such individual line to a larger system; or
- (b) any cable or conduit that supplies an active feed from a Utility Owner's facilities to activate or energize the Department's or a local agency's lighting and electrical systems, traffic control systems, communications systems and/or irrigation systems.

Setting Date means the date falling thirty (30) days before the Proposal Due Date.

Shared Risk Limit has the meaning set out in Section 5.2(c)(i)(A).

Signed and Sealed means the signature and seal of a Professional Engineer on a document indicating that the licensee takes professional responsibility for the work and, to the best of the licensee's knowledge and ability, the work represented in the document is accurate, in conformance with applicable codes at the time of submission and has been prepared in conformity with normal and customary standards of practice and with a view to the safeguarding of life, health, property and public welfare. The Professional Engineer certifies that the documents have been signed and sealed in accordance with laws, rules and regulations of the Commonwealth.

Station means the Amtrak Middletown Station located in the Borough, as more fully described in the Technical Provisions. For the avoidance of doubt, the construction of the Station is not in the scope of work for the Development Entity.

Station Completion Date means the date upon which Amtrak finishes the construction and development of the Station.

Station Documents means any agreements entered into by the Department with respect to the development of the Station, including (i) the Cooperative Agreement – New Middletown Station Facility and Related Improvements effective as of May 1, 2018 by and among the Department, Norfolk Southern and Amtrak, (ii) the Lease Agreement by and between Amtrak and the Department with respect to the Station and (iii) any easements entered into by the Department with respect to the development of the Station.

Submittal means any document, work product or other written or electronic product or item required under the Technical Provisions to be delivered or submitted to the Department for approval, review, comment or otherwise.

Supplier means any Person not performing work at or on a Project Site which supplies machinery, equipment, materials, hardware, software, systems or any other appurtenance to the Project to the Development Entity or to any Contractor in connection with the performance of the Project Services. Persons who merely transport, pick up, deliver or carry materials, personnel, parts or equipment or any other items or persons to or from a Project Site shall not be deemed to be performing Project Services at such Project Site.

Technical Provisions means the Technical Provisions set out in Schedule 18 (Technical Provisions).

Term has the meaning set out in Section 2.1(a).

Termination by Court Ruling means any of the following:

- (a) issuance of a final, non-appealable order by a court of competent jurisdiction to the effect that this PPA is void and/or unenforceable or impossible to perform in their entirety, except where void, unenforceable or impossible to perform by reason of the Development Entity's acts, omissions, negligence, willful misconduct, fraud or breach of warranty or representation; or
- (b) issuance of a final, non-appealable order by a court of competent jurisdiction upholding the binding effect on the Development Entity or the Department of a Change in Law that causes impossibility of performance of a fundamental obligation by the Development Entity or the Department under the Project Documents or impossibility of exercising a fundamental right of the Development Entity or the Department under the Project Documents.

Termination Date means:

- (a) the date of expiration of the Term; or
- (b) if applicable, the Early Termination Date.

Termination Notice means a Development Entity Termination Notice or a Department Termination Notice.

Termination Sum means the Department Termination Sum or the Development Entity Termination Sum, as applicable.

Terrorism means activities against Persons or property of any nature:

- (a) that involve the following or preparation for the following:
 - (i) use or threat of force or violence; or
 - (ii) commission or threat of an act that interferes with or disrupts an electronic, communication, information, or mechanical system;
- (b) when one or both of the following applies:
 - (i) it appears that the intent is to intimidate or coerce the Department or a Governmental Entity or the civilian population or any segment thereof, or to disrupt any segment of the economy; or
 - (ii) it appears that the intent is to intimidate or coerce the Department or a Governmental Entity, or to further political, ideological, religious, social or economic objectives or to express (or express opposition to) a philosophy or ideology; and

(c) that are criminally defined as terrorism for purposes of Commonwealth, federal or international Law.

Third-Party Claims means any and all claims, disputes, disagreements, causes of action, demands, suits, actions, investigations or administrative proceedings brought by a Person that is not an Indemnified Party or the Development Entity with respect to damages, injuries, liabilities, obligations, losses, costs, penalties, fines or expenses (including attorneys' fees and expenses) sustained or incurred by such Person.

Time Impact Analysis means a time impact analysis prepared in accordance with the Technical Provisions.

Tribunal means a court, tribunal, agency, special district, commission or other authority exercising judicial or regulatory functions.

Unavailability Event means an event during which all or a portion of the Project Site is closed, restricted, blocked or otherwise rendered unavailable as set out in Schedule 7 (Unavailability Penalty and Service Failures) by the Development Entity unless the reason is otherwise permitted by this PPA.

Unavailability Payment has the meaning set out in Section 7.7(a).

Unavailability Payment Notice has the meaning set out in Section 7.7(a).

Unavailability Penalty means the penalty due to the Department from the Development Entity with respect to a Unavailability Event as set out in Schedule 7 (Unavailability Penalty and Service Failures).

Updated Commercialization Management Plan has the meaning set out in Section 15.1.

Users means any Person parking a vehicle in the Parking Facility.

Utility means a privately, publicly, or cooperatively owned line, facility, or system for transmitting or distributing communications, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, a combined storm water and sanitary system, or other similar commodities, including wireless telecommunications, television transmission signals and publicly owned fire and police signal systems, which directly or indirectly serve the public, which shall include any undisclosed Utilities. The necessary appurtenances to each Utility facility shall be considered part of such Utility. Without limitation, any Service Line connecting directly to a Utility shall be considered an appurtenance to that Utility, regardless of the ownership of such Service Line.

Utility Incorporated Work means, in respect of each Project Facility, Utility Relocation Work that is the subject of an incorporated work agreement between the Department and the relevant Utility Owner or is otherwise incorporated into the Construction Work and required to be performed by the Development Entity.

Utility Owner means the owner or operator of any Utility (including both privately held and publicly held entities, cooperative Utilities, and municipalities and other governmental agencies (including, without limitation, the Department)).

Utility Relocation means each relocation (temporary or permanent), abandonment, Protection in Place, removal (of previously abandoned Utilities as well as of newly abandoned Utilities), replacement, reinstallation, and/or modification of existing Utilities necessary to accommodate construction, maintenance and/or use of the Project or the Project Services; **provided**, that the term Utility Relocation shall not refer to any of the work associated with facilities owned by any railroad. The Utility Relocation Work for each crossing of a Project Site by a Utility that crosses such Project Site more than once shall be considered a separate Utility Relocation. For any Utility installed longitudinally within a Project Site, the Utility Relocation Work for each continuous segment of that Utility located within such Project Site shall be considered a separate Utility Relocation.

Utility Relocation Work means all efforts and costs necessary to accomplish the required Utility Relocations during the Construction Period, including all coordination, design, design review, permitting, construction, inspection and maintenance of records, whether provided by the Department, the Development Entity or by the Utility Owners. For the avoidance of doubt, Utility Relocation Work includes Utility Incorporated Work.

Work means the D&C Work and Maintenance Work, and all other work and services required to be furnished, performed and provided by the Development Entity under the Project Documents.

ACRONYMS

As used in this PPA to which this Schedule 1 (Definitions) is attached and in the other Project Documents (unless otherwise specified therein), the following acronyms shall have the meanings set out below (unless the context requires otherwise).

ACORD – Association for Cooperative Operations Research and Development

ADA – Americans With Disabilities Act

ALTA – American Land Title Association

CAD – computer-assisted drafting

CFR – Code of Federal Regulations

D&C – Design and Construction

DB – Diverse Business

DNCR – Pennsylvania Department of Conservation & Natural Resources

EDMS – electronic document management system

EEO – Equal Employment Opportunity

EIS – Environmental Impact Statement

EOR – Engineer of Record

EPA – Environmental Protection Agency (see USEPA)

ESA – environmental site assessment

ESD – Emergency Shut Down

FAA – Federal Aviation Administration

FEMA – Federal Emergency Management Agency

FHWA – Federal Highway Administration

FTA – Federal Transit Administration

GFI – Ground Fault Interrupter

HVAC – heating, ventilation, and air conditioning

IBC – International Building Code

ID – identification number

IES, IESNA – Illuminating Engineering Society (of North America)

JEDEC – Joint Electron Devices Engineering Council

LAN – local area network

LDD – lamp dirt depreciation

LED – light-emitting diode

LLD – lamp lumens depreciation
MFM – Metal Finishes Manual
MMSCF – one million standard cubic feet
NAAMM – National Association of Architectural Metal Manufacturers
NCR – Non-conformance Report
NEC – National Electric Code
NEMA – National Electrical Manufacturers Association
NEPA – National Environmental Policy Act, 42 U.S.C. s 4321 *et seq.* as amended from time to time
NFPA – National Fire Protection Agency
O&M – operations and maintenance
OD – outside diameter
OSHA – Occupational Safety and Health Administration (United States)
P&ID –Piping and Instrumentation Diagram
PADEP – Pennsylvania Department of Environmental Protection
PBS – Project Based Schedule
PDF – Portable Document File format
PFBC – Pennsylvania Fish & Boat Commission
PGC – Pennsylvania Game Commission
PHMC – Pennsylvania Historic and Museum Commission
PI – pavement index
PLC – programmable logic controller
PLS – Professional Land Surveyor
PPA – Public-Private Transportation Partnership Agreement
Psig – pounds per square inch gauge
PVC – polyvinyl chloride
RSPL – recommended spare parts list
SAE – Society of Automotive Engineers Standard
SBE – Small Business Enterprise
SCF – standard cubic feet
SCFM –Standard cubic feet per minute
TIA – Time Impact Analysis
TP – Technical Provisions

USACOE – United States Army Corps of Engineers
USCG – United States Coast Guard
USDA – United States Department of Agriculture
USDOL – United States Department of Labor
USDOT – United States Department of Transportation
USEPA – United States Environmental Protection Agency
USFWS – United States Fish and Wildlife Service
WBS – Work Breakdown Structure
XER – Oracle Primavera Project Management electronic compressed file format

SCHEDULE 2
FORM OF GROUND LEASE

SCHEDULE 3

SITE ACCESS RESTRICTIONS

<i>Project Site</i>	<i>Access Restrictions</i>
Station	<ul style="list-style-type: none">• Development Entity shall cooperate and coordinate with Amtrak with respect to the Station.• Development Entity shall cooperate and coordinate with Capital Area Transit with respect to any bus gantries.
Parking Facility	<ul style="list-style-type: none">• No specific restrictions
Emaus Street	<ul style="list-style-type: none">• Development Entity shall cooperate and coordinate with the Borough.
Pedestrian Bridge	<ul style="list-style-type: none">• Development Entity shall cooperate and coordinate with Penn State Harrisburg and the Borough.

SCHEDULE 4

FORM OF ENVIRONMENTAL LIABILITY ACKNOWLEDGEMENT

THIS ENVIRONMENTAL LIABILITY ACKNOWLEDGEMENT dated as of [●], 2018 (this Acknowledgement) is entered into by and

BETWEEN:

- (1) **THE PENNSYLVANIA DEPARTMENT OF TRANSPORTATION** (the **Department**), an executive agency of the Commonwealth of Pennsylvania (the **Commonwealth**); and
- (2) [●], a [*describe corporate form and jurisdiction of formation*] (the **Development Entity**).

This Acknowledgement is entered into pursuant to Section 2.2(j) of the Public-Private Transportation Partnership Agreement dated as of [●], 2018 (the **PPA**) is entered into by and between the Department and the Development Entity. Capitalized terms used but not defined herein have the meanings given to them in the PPA.

The Parties hereto acknowledge and agree that the delivery of this Acknowledgement is a condition precedent to the achievement of Commercial Closing under the PPA. The Department hereby acknowledges and agrees as follows:

- (a) The Department will be responsible for the management, treatment, handling, storage, monitoring, remediation, removal, transport, and disposal of any Hazardous Materials in, under or on a Project Site that are not the responsibility of the Development Entity under Section 6.1(a) of the PPA.
- (b) To the extent that the Department is deemed to be the generator or arranger for Hazardous Materials pursuant to Article 6 (Hazardous Materials) of the PPA, the Department acknowledges and agrees that the Development Entity shall be entitled to seek contribution (in an amount net of any insurance proceeds received pursuant to the Insurance Policies or any amounts which the Development Entity is deemed to have self-insured in accordance with Schedule 9 (Insurance Coverage Requirements) of the PPA) from the Department for any Losses arising from or in connection with or in respect of any Third-Party Claims initiated against the Development Entity or any Development Entity-Related Entity in connection with such Hazardous Materials; **provided**, that:
 - (i) the Department shall cause the Development Entity to promptly notify the Department of Incidents, potential claims and matters which may give rise to any such Third-Party Claim;
 - (ii) the Department may give written notice to the Development Entity to tender defense of any such Third-Party Claim to the Department at any time, in which case the Department shall cause the Development Entity to

cooperate with the Department as necessary or reasonably requested by the Department to defend such claim; **provided**, that the Department shall have agreed in writing to pay or reimburse Development Entity's reasonable and documented costs incurred in tendering such defense.

- (iii) unless and until the Department assumes defense of any such Third-Party Claim, the Development Entity shall keep the Department reasonably informed at all times regarding such claim; and
 - (iv) the Department shall cause the Development Entity not to enter into any agreement or settlement with respect to any such claim without the prior written approval of the Department.
- (c) As between the Department and the Development Entity, the Department will be deemed the sole generator and arranger under 40 CFR, Part 262 in respect of any Hazardous Materials for which the Development Entity is not identified as the generator and arranger in accordance with Section 6.3(a) of the PPA. The Department will be identified as the sole generator and arranger of such Hazardous Materials on waste manifests and any other documentation submitted to transporters, disposal facilities and any Governmental Entity. For the avoidance of doubt, the Department's sole generator and arranger status under 40 CFR Part 262 does not alter the Development Entity's responsibilities and duties in accordance with Section 6.1.

IN WITNESS WHEREOF, each of the Department and the Development Entity has caused this Acknowledgement to be executed by their respective duly authorized officers as of the date below.

**COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION**

By: _____
Secretary of Transportation

APPROVED AS TO FORM AND LEGALITY

By: _____
Office of Chief Counsel
Department of Transportation

By: _____
Deputy General Counsel
Office of General Counsel

By: _____
Deputy Attorney General
Office of Attorney General

[Name of Development Entity]

By: _____

Name: _____

Title: _____

By: _____

Name: _____

Title: _____

Date: _____

SCHEDULE 5

CALCULATION OF HANDBACK AMOUNT

- (1) This Schedule sets forth the methodology for calculating the Handback Reserve Amount.
- (2) The “Handback Amount” means the aggregate amount, which shall be calculated prior to the beginning of each Handback Year and at the end of the Term, of the estimated cost (in real dollars) to improve, repair, renew or replace the Parking Facility so that as of the relevant Handback Date, the Parking Facility complies with the Technical Provisions.
- (3) As required by Section 8.5(b)(i) of the PPA, no later than sixty (60) days prior to the commencement of each Handback Year, the Development Entity shall deliver to the Department a report setting out its calculations of:
 - (a) the Handback Amount in respect of the remaining Handback Period; and
 - (b) the amount required to be reserved in the Handback Reserve Account (the **Handback Reserve Amount**) for such Handback Year shall be equal to the percentage of the Handback Amount set out below for the applicable Handback Year

Handback Years	Handback Reserve Amount
First Handback Year (i.e., the 12-month period beginning on the first Business Day of the Handback Period)	75% of the Handback Amount
Second Handback Year	100% of the Handback Amount
Third Handback Year	120% of the Handback Amount

SCHEDULE 6

COMPENSATION ON TERMINATION

1. COMPENSATION ON TERMINATION FOR CONVENIENCE, FOR DEPARTMENT DEFAULT AND TERMINATION BY COURT RULING

1.1 On termination of this PPA pursuant to Sections 24.1, 24.2 and 24.3, the Department shall pay to the Development Entity the Department Termination Sum in accordance with and subject to this Schedule 6 (Compensation on Termination). The Department Termination Sum shall equal the amount calculated at the Early Termination Date (without double-counting) as follows:

- (a) Equity component to be established based on pricing / financing structure; plus
- (b) Subcontractor Breakage Costs; plus
- (c) Redundancy Payments for employees of the Development Entity that have been or will be reasonably incurred by the Development Entity as a direct result of termination of this PPA; minus
- (d) Account Balances; minus
- (e) Insurance Proceeds (excluding proceeds of personal injury, property damage or other third party liability insurance payable to or for the account of a third party); minus
- (f) any Deduction accrued prior to the Early Termination Date that has, in each case, not been deducted.

2. COMPENSATION ON TERMINATION FOR DEVELOPMENT ENTITY DEFAULT

2.1 On termination of this PPA pursuant to Section 24.5 (Termination for Development Entity Default) prior to Project Completion, the Department shall pay to the Development Entity the Development Entity Default (Construction Period) Termination Sum in accordance with and subject to this Schedule 6 (Compensation on Termination). The Development Entity Default (Construction Period) Termination Sum shall be an amount equal to the D&C Work Value.

3. MISCELLANEOUS COMPENSATION PROVISIONS

3.1 Timing of Payment of Department Termination Sum

Any Termination Sum shall be due and payable by the Department thirty (30) Business Days after such amount is finally agreed or determined.

3.2 Transfer of Key Assets

As a condition precedent to the payment of any Termination Sum, the Department may require the Development Entity to transfer its rights, title and interest in and to the Key Assets to the Department.

3.3 Exclusivity of Remedy

Any Termination Sum irrevocably paid by the Department to the Development Entity shall be in full and final settlement of each Party's rights and claims against the other for breaches and/or termination of this PPA or any other Project Document whether under contract, tort, restitution or otherwise, but without prejudice to:

- (a) any antecedent liability of either Party to the other that arose prior to the Early Termination Date (but not from the termination itself) to the extent such liability has not already been taken into account in the calculation of the Termination Sum; and
- (b) any liabilities arising in respect of any breach by either Party after the Early Termination Date of any obligation under this PPA that survives the Early Termination Date, to the extent not taken into account in the calculation of any Termination Sum.

3.4 Contract Termination Costs

For purposes of this Schedule 6 (Compensation on Termination), the term "Contract Termination Costs" means the net costs that have been or will be incurred by the Development Entity as a direct result of termination of this PPA arising from termination of Contracts for D&C Work, including reasonable and documented out of pocket and demobilization costs, but only to the extent (i) such costs are incurred in connection with the Project and relate to the provision of services or the completion of D&C Work required to be provided by the Development Entity, (ii) such costs are incurred under arrangements and/or agreements that are consistent with the terms of the Project Documents, have been entered into in the ordinary course of business, and in the case of Contracts with Affiliates, are on commercially reasonable terms, and (iii) each of the Development Entity and the relevant Contractor has used commercially reasonable efforts to mitigate such costs, excluding in all cases any Indirect Losses of any Person.

SCHEDULE 7

UNAVAILABILITY PENALTY AND SERVICE FAILURES

1. ENTITLEMENT TO MAKE PENALTIES

- 1.1. If at any time during the Construction Period or O&M Period, a Service Failure or Unavailability Event shall occur, the Department shall be entitled to enforce a Service Failure Penalty and/or Unavailability Penalty, as applicable.
- 1.2. The maximum aggregate of all Service Failure Penalties and Unavailability Penalties owed to the Department in any month is \$25,000.

2. CLASSIFICATION OF PENALTIES

- 2.1. The classification of a Service Failure and/or Unavailability Event shall be made at the time at which the occurrence of the Service Failure and or Unavailability Event is reported to the Department. A Service Failure and/or Unavailability Event which is incorrectly classified may be re-classified with the approval of the Department and the Development Entity, acting reasonably, in which case the applicable plans and reports pursuant to Schedule 18 will be revised accordingly.

3. UNAVAILABILITY PENALTIES

- 3.1. If a Project Site is not in compliance with the Access Standard set forth in Schedule 18, the Unavailability Penalty for such event shall be \$1,000 per Unavailability Event.
- 3.2. If a Project Site is not in compliance with the Access Standard set forth in Schedule 18, but the following conditions hold:
 - (a) The rail platform is accessible by stairwell, and access to the rail platform is otherwise in compliance with the Access Standard; and
 - (b) At least one entrance to the Station is open and access through this entrance to the accessible rail platform is in compliance with the Access Standard,

then the Unavailability Penalty shall be \$500 per Unavailability Event.

4. SERVICE FAILURE PENALTY

- 4.1. The amount of the penalty in respect of a Service Failure shall be as follows:
 - (a) in the case of a Minor Service Failure, the sum of \$100 will be paid by the Development Entity to the Department for each Service Failure that fails to meet the Acceptance Criteria outlined in the Technical Provisions (each a “Minor Service Failure Penalty”); and

- (b) in the case of a Major Service Failure, the sum of \$500 will be paid by the Development Entity to the Department for each Service Failure that fails to meet the Acceptance Criteria outlined in the Technical Provisions (each a “Major Service Failure Penalty”).
- 4.2. A Minor Service Failure shall only occur if the Event in question has not been responded to within the applicable Performance Time Frame.
- 4.3. Following the occurrence of a Minor Service Failure, the Development Entity shall be allowed an additional Performance Time Frame (as the case may be) equivalent to the original Performance Time Frame. If, before the expiry of this additional period, the Development Entity demonstrates, to the reasonable satisfaction of the Department, that it has remedied the Minor Service Failure, no further Minor Service Failure Penalty shall be made in respect of the Service Failure. Otherwise, a Major Service Failure Penalty shall be made and a further Performance Time Frame of equal duration shall apply (and, if appropriate, Penalties shall continue to be made) until such time as the Development Entity shall demonstrate, to the reasonable satisfaction of the Department, that it has remedied the Service Failure.
- 4.4. The provisions of Section 4.3 of this Schedule 7 shall not apply to Service Failures where, if the response or rectification is not carried out within the Performance Time Frame, as applicable, the Department notifies the Development Entity that the Department no longer requires the Development Entity to address such Service Failure.
- 4.5. Where a Service Failure Performance Time Frame, a Service Failure shall occur upon the occurrence of the Event in question and a Minor Service Failure Penalty shall apply in accordance with Sections 4.1 and 4.3 of this Schedule 7.

SCHEDULE 8

PARKING FEE SCHEDULE

	PARKING FEES		
DATE	DAILY	WEEKLY	MONTHLY
Commercial Closing Date	\$2.00	\$10.00	\$40.00

SCHEDULE 9

INSURANCE COVERAGE REQUIREMENTS

1. GENERAL INSURANCE REQUIREMENTS

1.1 Insurers

All insurance required hereunder shall be procured from insurers that at the time coverage commences have a current financial strength and financial size category rating of not less than “A-/VIII” according to A.M. Best’s Insurance Reports Key Rating Guide (or an equivalent rating issued by Standard and Poor’s), except as approved in writing by the Department in its reasonable discretion. All Insurance Policies shall be issued by insurers authorized to do business in the Commonwealth.

1.2 Deductibles and Self-Insured Retentions

Except to the extent expressly provided otherwise in the Project Documents, the Development Entity or its Contractor, as the case may be, shall be responsible for paying all insurance deductibles and self-insurance retentions and the Department shall not have any liability for deductibles, self-insured retentions and/or claim amounts in excess of the required coverage.

1.3 Primary Coverage

Each insurance policy, except workers compensation and professional liability, required herein shall provide that the coverage thereof is primary and noncontributory with respect to all named and additional insureds and/or loss payees as their interests may appear, except for coverage that by its nature cannot be written as primary. Any insurance or self-insurance beyond that specified in this PPA that is maintained by an insured or any such additional insured shall be excess of such insurance and shall not contribute with it.

1.4 Verification of Coverage

- (a) Each time the Development Entity is required to initially obtain or cause to be obtained each Insurance Policy, and thereafter not less than five (5) Business Days prior to the expiration date of each Insurance Policy, the Development Entity shall deliver to the Department a written certificate(s) of insurance. The certificate of insurance shall be on the most recent ACORD form consistent with the required coverage. Each certificate must be in standard form, state the identity of all insurers, named insureds and additional insureds, state the type and limits of coverage, include as attachments all additional insured endorsements, and be signed by an authorized representative of the insurance company shown on the binder, including its licensed agent or broker.
- (b) In addition, as soon as they become available, but not to exceed 90 days from the effectiveness of each Insurance Policy, the Development Entity shall, if requested by the Department, deliver to the Department (A) a true and complete certified

copy of each such Insurance Policy or modification, or renewal or replacement Insurance Policy and all endorsements thereto either electronically or by hard copy and (B) evidence of payment of any premium then due that is satisfactory to the Department (acting reasonably).

- (c) If the Development Entity has not provided the Department with the foregoing proof of coverage via certificate of insurance and payment within ten (10) days after receipt of written request therefor, or otherwise fails or refuses to obtain or maintain in force the insurance required by this Schedule 9 (Insurance Coverage Requirements), the Department may, upon three (3) Business Days' written notice to the Development Entity, in addition to any other available remedy, without obligation and without further inquiry as to whether such insurance is actually in force, obtain such an Insurance Policy; and the Development Entity shall reimburse the Department for the cost thereof upon demand. In addition, the Department shall have the right, without obligation or liability, to suspend all or any portion of Work during any time that such proofs of coverage, in compliance with this Schedule 9 (Insurance Coverage Requirements), have not been provided as required herein.

1.5 Contractor Insurance Requirements

The Development Entity shall cause each Contractor to obtain (prior to commencing any Work) and maintain all insurance that is required by this Schedule 9 (Insurance Coverage Requirements), to the extent that such Contractor is not covered by the Development Entity-provided liability insurance. The Development Entity shall cause each such Contractor to include the additional insureds specified in the applicable Insurance Policies as required under this Schedule 9 (Insurance Coverage Requirements). The Development Entity shall cause each such Contractor to require that its insurer agree to waive any subrogation rights the insurers may have against such additional insureds. If requested by the Department, the Development Entity shall promptly provide certificates of insurance evidencing coverage for each Contractor.

1.6 Endorsements and Waivers

All Insurance Policies the Development Entity is required to provide hereunder shall contain or be endorsed to comply with all requirements specified in the Project Documents, as well as the following provisions; **provided**, that for the workers' compensation and professional liability policies, only Section 1.6(c) and 1.6(f) below shall be applicable:

- (a) any failure on the part of a named insured to comply with reporting provisions or other conditions of the policies, any breach of warranty, any action or inaction of a named insured or others, or any change in ownership of all or any portion of the Project or the Development Entity's Interest shall not affect coverage provided to the other named insureds or additional insureds (and their respective members, directors, officers, employees, agents and Project consultants);
- (b) the commercial general liability insurance and excess liability insurance shall apply separately to each named insured and additional insured against whom a

claim is made or suit is brought, except with respect to the limits of the insurer's liability;

- (c) each policy shall be endorsed to state that coverage cannot be canceled or reduced in coverage or in limits (except with respect to payments under the policy which by their nature erode or deplete the limits of such policy) except after thirty (30) days' (or for non-payment of premium, ten (10) days') prior written notice by registered or certified mail, return receipt requested, has been given to the Department. Such endorsement shall not include any limitation of liability of the insurer for failure to provide such notice;
- (d) endorsements adding additional insureds to required policies for both on-going operations and completed operations shall be ISO endorsement CG 20 10 11 85 or equivalent, or in the alternative CG 20 33 10 01 and GC 20 37 04 13 or their equivalent (to ensure coverage for both operations and completed operations), shall contain no additional limitations, conditions, restrictions or exceptions to coverage beyond those that apply under the policy generally, and the interests and protections of each additional insured shall not be affected by any misrepresentation, act or omission of a named insured or any breach by a named insured of any provision in the policy which would otherwise result in forfeiture or reduction of coverage;
- (e) the liability policy(ies) must contain, and the certificates of insurance must evidence, the following endorsement for the liability coverages required by this Schedule 9 (Insurance Coverage Requirements):

“The insurer(s) shall not, without obtaining the express advance written permission from the Office of Chief Counsel of the Pennsylvania Department of Transportation (the Department), raise any defense involving in any way the jurisdiction of a Tribunal over the person of the Department, the immunity of the Department, its officers, agents or employees, the governmental nature of the Department, or the provisions of any statutes respecting suits against the Department.”;

- (f) the Department shall be named as an additional insured on the Commercial General Liability, Business Automobile Liability, Umbrella/Excess and Pollution Liability policies of the Development Entity and any Contractors. In addition, the Department shall be named as an “alternate employer” on the Workers’ Compensation and Employer’s Liability insurance policy;
- (g) unless specified otherwise in this Schedule 9 (Insurance Coverage Requirements), each policy shall provide coverage on an “occurrence” basis and not a “claims made” basis.

1.7 Waivers of Subrogation

The Department and the Development Entity waive all rights against each other, against each of their agents, employees and Project consultants, against Contractors and their respective members, directors, officers, employees, subcontractors, consultants and

agents for any claims to the extent covered and paid by insurance, except such rights as they may have to the proceeds of such insurance; *provided*, that the Development Entity shall have the right, but not the obligation, to waive its rights of subrogation against the Development Entity's own Contractors and their respective members, directors, officers, employees, subcontractors, consultants and agents. The Development Entity shall require all Contractors to provide similar waivers in writing each in favor of all other parties specified above. Each policy for which the Development Entity is required to provide coverage for the additional insureds shall include a waiver of any right of subrogation against the additional insureds (and their respective members, directors, officers, employees, agents and Project consultants).

1.8 No Recourse

Except as expressly stated otherwise in the Project Documents, there shall be no recourse against the Department for payment of premiums or other amounts with respect to the insurance the Development Entity is required to provide hereunder.

1.9 Support of Indemnifications

The insurance coverage the Development Entity is required to provide hereunder shall support but is not intended to limit the Development Entity's indemnification obligations otherwise set out under the Project Documents.

1.10 Alternative Insurance Terms

There is no provision for alternate or other replacement insurance that provides less coverage than that provided in accordance with the provisions in the PPA and in Schedule 9 (Insurance Coverage Requirements), unless the Development Entity demonstrates to the Department's reasonable satisfaction that the required insurances are no longer available in the worldwide insurance market with reputable insurers of good standing at a cost which contractors in North America are (at such time) generally prepared to pay. If there is such unavailability, the Development Entity may, with the Department's prior written consent and at the Development Entity's sole cost and expense, procure and maintain alternative or replacement insurance with differing terms and conditions that would fully or partially address the Development Entity's exposures.

1.11 Defense Costs

Unless otherwise agreed to in writing by the Department in its reasonable discretion, no defense costs shall be included within or erode the limits of coverage of any of the Insurance Policies, except that defense costs may be included within the limits of coverage of professional liability, contractor's pollution and environmental impairment liability policies.

1.12 Contesting Denial of Coverage

If any insurer under an Insurance Policy described in this Schedule 9 (Insurance Coverage Requirements) denies coverage with respect to any claims reported to such insurer, the Development Entity and the Department shall cooperate in good faith to

establish whether and to what extent to contest, and how to fund the cost of contesting, the denial of coverage; **provided**, that if the reported claim is a matter covered by an indemnity in favor of the Department or the denial is the result of the Development Entity's failure to comply with an insurance requirement, then the Development Entity shall bear all costs of contesting the denial of coverage.

1.13 Prosecution of Claims

- (a) Unless otherwise directed by the Department in writing with respect to the Department's insurance claims, the Development Entity shall be responsible for reporting and processing all potential claims by the Department or the Development Entity against the Insurance Policies required to be provided by the Development Entity hereunder. The Development Entity agrees to report timely to the insurer(s) under such policies any and all matters which may give rise to an insurance claim by the Development Entity or the Department and to promptly and diligently pursue such insurance claims in accordance with the claims procedures specified in such policies, whether for defense or indemnity or both. The Development Entity shall enforce all legal rights against the insurer under the applicable Insurance Policies and Applicable Laws in order to collect thereon, including pursuing necessary litigation and enforcement of judgments; **provided**, that the Development Entity shall be deemed to have satisfied this obligation if a judgment is not collectible through the exercise of lawful and diligent means or, in relation to the pursuit of litigation, if there is no reasonable likelihood of success for the litigation. The Development Entity and their insurer(s) shall not, without obtaining the advance written consent from the General Counsel of the Department, raise any defense involving in any way the jurisdiction of a Tribunal over the person of Department, the immunity of Department, its Commissioners, Directors, officers, agents or employees, the governmental nature of Department, or the provisions of any statutes respecting suits against Department.
- (b) The Department agrees to promptly notify the Development Entity of the Department's Incidents, potential claims, and matters which may give rise to a Department insurance claim, to tender to the insurer the Department's defense of the claim under such Insurance Policies, and to cooperate with the Development Entity as necessary for the Development Entity to fulfill its duties hereunder.
- (c) If in any instance the Development Entity has not performed its obligations respecting insurance coverage set out in the PPA or this Schedule 9 (Insurance Coverage Requirements) or is unable to enforce and collect any such insurance for failure to assert claims in accordance with the terms of the Insurance Policies or to prosecute claims diligently, then for purposes of determining the Development Entity's liability and the limits thereon or determining reductions in compensation due from the Department to the Development Entity on account of available insurance, the Development Entity shall be treated as if it has elected to self-insure up to the full amount of insurance coverage which would have been available had the Development Entity performed such obligations. Nothing in this Schedule 9 (Insurance Coverage Requirements) shall be construed to treat the Development Entity as electing to self-insure where the Development Entity is

unable to collect due to the bankruptcy or insolvency of any insurer which at the time the Insurance Policy is written meets the rating qualifications set out in Section 1(a) (Insurers) of this Schedule 9 (Insurance Coverage Requirements).

- (d) In the event that an insurer providing any of the Insurance Policies required by this Schedule 9 (Insurance Coverage Requirements) becomes the subject of bankruptcy proceedings, becomes insolvent, or is the subject of an order or directive limiting its business activities given by any Governmental Entity, the Development Entity shall exercise best efforts to promptly and at its own cost and expense secure alternative coverage in compliance with the insurance requirements contained in this Schedule 9 (Insurance Coverage Requirements) so as to avoid any lapse in insurance coverage.
- (e) If in any instance the Development Entity has not promptly performed its obligation to report to applicable insurers and process any potential insurance claim tendered by the Department, then the Department may, but is not obligated to, report the claim directly to the insurer and thereafter process the claim.

1.14 Notices

The Development Entity shall provide the Department with the following written notices:

- (a) within thirty (30) days of the occurrence thereof, any claim made by the Development Entity or any other party under any insurance obtained in connection with the Project or any other party under any insurance obtained or maintained by the Development Entity in connection with the Project; and
- (b) the expiration of any Insurance Policy at least ten (10) days (if due to non-payment of premium) or thirty (30) days (if by its terms or otherwise) prior to such expiration, including notification of the date of such expiration.

1.15 Compliance with Insurance Policies

The Development Entity shall:

- (a) comply with the terms, conditions and requirements of all Insurance Policies
- (b) comply with the terms, conditions and requirements of the insurance provisions set forth in the Station Documents; and
- (c) not do or omit to do anything, or permit (insofar as it is within its power) any other person to do or omit to do anything, on or with respect to the Project Sites or the Project or with respect to the Work that results in or could reasonably be expected to result in the cancellation of any Insurance Policies or that would entitle any insurer to refuse to pay any claim under any Insurance Policy (in whole or in part) or that would otherwise prejudice an Insurance Policy or claim under any Insurance Policy.

2. CONSTRUCTION PERIOD INSURANCE

2.1 “All Risk” Builders’ Risk

- (a) With respect to each Project Site, at all times from the issuance of NTP2 until Project Facility Completion (and thereafter during any period during which the Development Entity is performing D&C Work at such Project Site), the Development Entity shall procure and maintain, or cause to be procured and maintained with the Department to be covered as its interest may appear, Builders’ Risk insurance for “all risks” of direct physical loss or damage including, but not limited to the following perils: loss or damage by fire, collapse, lightning, windstorm, flood, earthquake, hail, ice flow, explosion, riot, vandalism and malicious mischief, civil commotion, aircraft, vehicle impact, and smoke. Such policy shall contain extensions of coverage that are typical for a project of the nature of the Project including, but not limited to those listed below and including coverage for physical damage resulting from faulty workmanship or faulty materials (but not for repairing the faulty workmanship or faulty materials themselves). The Development Entity may include interest of contractors, as appropriate.
- (b) The policy shall provide coverage up to the full replacement cost of the Project Facilities under construction at any given time. In addition, coverage will be provided, on a sublimited basis for the exposures noted below, as follows:
 - (i) Flood and Earthquake - \$5 million each;
 - (ii) Professional Fees, Expediting Expenses, Property in Transit, Property Stored Offsite – \$1 million each;
 - (iii) Demolition and Debris Removal – 25% of loss amount with maximum of \$2 million;
 - (iv) Increased Cost of Construction – 25% of loss amount with maximum of \$2 million;
 - (v) Soft Costs (including, but not limited to, engineering and architectural fees, legal costs and related permitting charges, etc.) – \$1 million;
 - (vi) Existing Department Property – \$2 million; and
 - (vii) Parking Revenue/Delayed Start-up - \$1 million.
- (c) The policy shall cover all roads, property, buildings and other structures, materials, supplies, foundations, pilings, machinery and equipment that are a part of or related to the portion or elements of the Project under construction at such Project Site, as well as the works of improvement, including permanent and temporary structures, works and materials and any goods intended for incorporation into the Project at such Project Site.

Coverage shall be extended to include, with appropriate sublimit as noted above, materials, equipment and property in transit or storage.

2.2 Commercial General Liability

- (a) At all times from the issuance of NTP1, (and thereafter during any period during which the Development Entity is performing D&C Work at such Project Site), the Development Entity shall procure and keep in force commercial general liability insurance against claims for personal injury, bodily injury, death or property damage occurring as a result of work or other activities for all Project Sites. The Development Entity shall maintain coverage on an “occurrence” basis and coverage shall include premises and operations, products and completed operations, independent contractors, broad form property damage, contractual liability and other coverage extensions typical of a project of this type and scope. Coverage shall be extended for non-owned and hired automobile liability unless coverage is provided separately under Section 2.4 below.
- (b) The policy shall have limits of not less than \$1,000,000 per occurrence and \$2,000,000 aggregate with the General Aggregate applying on a per project basis and per location basis (with all Project Sites to be considered a single location). Coverage at this level shall be provided throughout the Construction Period and the Department and other Indemnified Parties shall be named as additional insureds under such policy on a primary and non-contributory basis.
- (c) The commercial general liability policy shall cover liability arising out of the acts or omissions of the Development Entity’s employees and for any others for whom the Development Entity is responsible on the terms and to the extent the Development Entity is provided coverage under such liability policy.

2.3 Workers’ Compensation and Employers’ Liability Insurance

At all times from the issuance of NTP1, the Development Entity shall procure and keep in force Workers’ Compensation insurance, as required by any Governmental Entity or legal requirement, including Employers’ Liability coverage with limits of not less than \$1,000,000. This shall include, as required, coverage for any claims under the United States Longshore and Harbor Workers’ Compensation Act and the Jones Act. The Department will be named as an alternate employer on the policy.

2.4 Automobile Liability Insurance

Should the Development Entity have any owned or leased vehicles, at all times from the issuance of NTP1, the Development Entity shall procure and keep in force automobile liability insurance with a limit of at least \$1,000,000 covering all owned, non-owned, hired, or borrowed vehicles on or off-site. Coverage shall be extended to the Department and other Indemnified Parties as required on a primary and non-contributory basis, but solely in respect of the Project. The automobile liability insurance policy for Contractors who will at any time transport Hazardous Materials shall be endorsed as required to include Motor Carrier Act Endorsement-Hazardous Materials Clean-up (MCS-90) for those Contractors who will at any time transport Hazardous Materials.

2.5 Umbrella/Excess Liability Insurance

During the Construction Period, the Development Entity shall procure and cause to be kept in force, in excess of underlying limits noted above for commercial general liability, employer's liability and automobile liability, a following-form umbrella/excess liability policy with limits of at least \$15 million per occurrence, \$15 million general aggregate, applicable on an annual basis, and \$15 million completed operations aggregate. The Department and other Indemnified Parties shall be additional insureds on a primary and non-contributory basis under the policy solely with respect to the Project and coverage shall be written on an occurrence basis.

2.6 Professional Errors and Omissions

- (a) As of the issuance of NTP1, the Development Entity shall carry or cause to be carried Professional Liability insurance providing protection from claims arising from acts, errors or omissions arising from design, engineering, surveying, inspection and related work undertaken in connection with the Project. If another Person is providing the coverage, the Development Entity shall be named as an insured or carry separate coverage.
- (b) Coverage may be provided on a claims-made basis and may be provided either through a project-specific professional liability insurance policy covering all such professionals working on the Project or through utilization of the Development Entity's practice professional liability policy; **provided**, that, in either instance, coverage must remain in force from the date of this PPA to the earlier of six years after Project Facility Completion shall have been achieved or ten years after the date of this PPA. The Department will also consider other alternatives such as utilizing the practice policies of the professionals for primary coverage and placing a Contractor Professional Protective Liability Insurance (CPPI) policy covering the Development Entity above the practice policy limits carried by the professionals.
- (c) The policy, if provided on a project-specific basis, covering all design professionals must have a limit of at least \$10 million per claim and in the aggregate and include at least a six year extended reporting or "run-off" period. If the "practice policy" option is selected, the Development Entity shall maintain professional liability coverage with a minimum of at least \$5 million in the aggregate.
- (d) If the "practice policy" option is selected, any other subconsultants or professionals engaged on the Project must, in turn, carry their own professional liability insurance from the date they start work on a Project Site until either six years after Project Facility Completion shall have been achieved or ten years after the date they start work, whichever comes first. Such sub consultants and other professionals shall carry professional liability limits, on a claims-made basis, as follows:

<u>Estimated Contract Value</u>	<u>Minimum Limit Required</u>
\$10 million or more	\$5 million per claim/aggregate
\$5 million to \$9.99 million	\$2 million per claim/aggregate
\$500,000 to \$5 million	\$1 million per claim/aggregate
<\$500,000	\$500,000 per claim/aggregate

2.7 Contractor’s Pollution Liability Insurance

During the Construction Period (and thereafter during any period during which the Development Entity is performing D&C Work at any Project Site), the Development Entity shall procure and maintain Contractor’s Pollution Liability Insurance covering activities associated with such Project Site with a limit of at least \$3,000,000. Coverage shall include third-party property damage and bodily injury and environmental impairment/clean-up costs, as well as coverage for off-site transportation and disposal at a non-owned disposal site. Such insurance shall include the Development Entity as Named Insured and list the Department and the other Indemnified Parties as Additional Insureds. Coverage may be written on a claims-made basis and shall be carried for the period from the issuance of NTP2 until six years after the end of the Construction Period.

2.8 Option to Procure Project-Specific Coverage

The Development Entity and its Contractors performing D&C Work shall retain the option to procure a consolidated or coordinated insurance program covering the activities of the Development Entity, such Contractors, and other contractors and consultants working at each Project Site; **provided**, that the activities of such other contractors and consultants shall not be required to be covered in the event they maintain their own insurance policies compliant with the relevant terms in this Schedule 9 (Insurance Coverage Requirements). If such coverage is purchased and includes both the Development Entity and the Contractors as Named Insureds, the requirement for separate insurance programs and limits as noted above will be waived; however, the Commercial General Liability Insurance Completed Operations coverage must be continued for a period of at least six (6) years after the end of the Construction Period. Such project-specific insurance must provide each of the coverages noted above in Sections 2.2 (Commercial General Liability), 2.3 (Workers’ Compensation and Employers’ Liability Insurance), 2.4 (Automobile Liability Insurance), and 2.5 (Umbrella/Excess Liability Insurance). Should such an approach be utilized by the Development Entity, the limit for the Umbrella/Excess Liability shall be at least \$50 million per occurrence, \$50 million general aggregate, reinstated annually and \$50 million completed operations aggregate and aggregate reinstated annually. If such consolidated insurance program does not provide all required insurances (e.g., only Commercial General Liability is provided on a consolidated or coordinated basis), then the Development Entity and the relevant Contractor must separately comply with all other insurance requirements.

2.9 Other Construction Insurance Coverage Required of Other Contractors and Consultants

- (a) If the Development Entity and its Contractors performing D&C Work determine that they will not purchase a consolidated or coordinated, project-specific insurance program covering all project participants in respect of a Project Site,

then the following additional insurance requirements shall apply to all other Contractors and consultants with respect to each Project Site during the Construction Period (and thereafter during any period during which the Development Entity is performing D&C Work at such Project Site):

- (i) Commercial General Liability Insurance including premises and operation, products/completed operations, contractual liability, and related coverages with limits of \$1,000,000 per occurrence and \$2,000,000 aggregate applicable on a per project basis (with all Work at each Project Site to be considered a single project). The Department and all indemnified parties shall be added as additional insured.
 - (ii) Workers' Compensation and Employer's Liability Insurance with statutory workers' compensation coverage and employer's liability limits of \$500,000.
 - (iii) Automobile Liability Insurance with at least \$1,000,000 combined single limit. The Department and all indemnified parties shall be added as additional insured.
- (b) For those contractors or consultants with estimated contract values of \$5,000,000 and above, such contractors and consultants shall additionally be required to carry umbrella/excess liability insurance above the underlying commercial general liability, employer's liability and automobile liability limits noted above in accordance with the following schedule:

<u>Estimated Contractor Contract Value</u>	<u>Minimum Limit Required</u>
\$10 million or more	\$5 million per claim/aggregate
\$5 million to \$9.99 million	\$2 million per claim/aggregate

- (c) If any aircraft or watercraft is utilized in the course of completing construction, appropriate aircraft liability and/or hull and protection and indemnity insurance will be procured and maintained in an amount not less than \$5,000,000.
- (d) Railroad Protective Liability Insurance, as required by any railroads. Such insurance will be in addition to any coverage already provided under the 'Commercial General Liability' insurance referred to above.

3. O&M PERIOD INSURANCE

3.1 Commercial General Liability

- (a) At all times from the commencement of the O&M Period in respect of each Maintained Facility, the Development Entity shall procure and keep in force commercial general liability insurance against claims for personal injury, bodily injury, death or property damage occurring as a result of work or other activities associated with the applicable Maintained Facility. The Development Entity shall maintain coverage on an "occurrence" basis and coverage shall include premises and operations, products and completed operations, independent contractors,

broad form property damage, contractual liability and other coverage extensions typical of a project of this type and scope. Coverage shall be extended for non-owned and hired automobile liability unless coverage is provided separately under Section 3.4 below.

- (b) The policy shall have limits of not less than \$1,000,000 per occurrence and \$2,000,000 aggregate with the General Aggregate applying on a per project basis (with all Work at the applicable Maintained Facility to be considered a single project). Coverage at this level shall be provided from the commencement of the O&M Period in respect of the applicable Project Facility until the last day of the Term and the Department and other Indemnified Parties as provided for in the PPA shall be named as additional insureds under the policy on a primary and non-contributory basis, but solely in respect of the applicable Maintained Facility.

3.2 Workers' Compensation and Employers' Liability Insurance

At all times from the commencement of the O&M Period, the Development Entity shall procure and keep in force Workers' Compensation insurance, as required by any Governmental Entity or legal requirement, including Employers' Liability coverage with limits of not less than \$1,000,000. This shall include, as required, coverage for any claims under the United States Longshore and Harbor Workers' Compensation Act and the Jones Act. The Department will be named as an alternate employer on the policy.

3.3 Automobile Liability Insurance

Should the Development Entity have any owned or leased vehicles, at all times from the commencement of the O&M Period, the Development Entity shall procure and keep in force automobile liability insurance with a limit of at least \$1,000,000 covering all owned, non-owned, hired, or borrowed vehicles on or off-site. Coverage shall be extended to the Department and other Indemnified Parties as required on a primary and non-contributory basis, but solely in respect of the Project. The automobile liability insurance policy for Contractors who will at any time transport Hazardous Materials shall be endorsed as required to include Motor Carrier Act Endorsement-Hazardous Materials Clean-up (MCS-90) for those Contractors who will at any time transport Hazardous Materials.

3.4 Umbrella/Excess Liability Insurance

From the commencement of the O&M Period, the Development Entity shall procure and cause to be kept in force, in excess of underlying limits noted above for commercial general liability, employer's liability and automobile liability, a following-form umbrella/excess liability policy with limits of at least \$25 million per occurrence, \$25 million general aggregate, applicable on an annual basis, and \$25 million completed operations aggregate. The Department and other Indemnified Parties shall be additional insureds on a primary and non-contributory basis under the policy solely with respect to the Project and coverage shall be written on an occurrence basis.

3.6 Property Insurance

At all times during the O&M Period, Development Entity shall procure and keep in force, or cause to be procured and kept in force, a policy of property insurance as specified below.

- (a) The policy shall provide coverage for "all risks" of direct physical loss or damage to the Project within the O&M Limits for terrorism, fire, collapse, earthquake, earth movement, volcanic activity, tsunami, flood, storm, tempest, lightning, windstorm, hurricane, tornado, ice flow, subsidence, explosion, riot, vandalism and malicious mischief, civil commotion, aircraft, vehicle impact, smoke, resulting damage from faulty workmanship or faulty materials (but not for the repairing of the faulty workmanship or faulty materials themselves). The policy shall contain extensions of coverage that are typical for a project of the nature of the Project, and shall contain only those exclusions that are typical for a project of the nature of the Project (including the sublimits noted below). The policy shall
- (b) The policy shall cover all (i) property, roads, buildings, bridge structures, other structures, fixtures, materials, supplies, foundations, pilings that are part of the Project, and (ii) machinery and equipment that are part of the Project.
- (c) The policy shall provide coverage on a full replacement cost basis, and will include reasonable sublimits for property in the course of construction, professional fees, demolition and debris removal, without risk of co-insurance.
- (d) Development Entity shall be the named insureds on the policy and the Department shall be named as additional insured on the policy, as its interests may appear. Department and Development Entity shall be named as loss payees under the policy, as their interests may appear.
- (e) To the extent commercially available, the policy shall include coverage for (i) foundations, including pilings, but excluding normal settling, shrinkage, or expansion, (ii) physical damage resulting from machinery accidents but excluding normal and natural wear and tear, corrosion, erosion, inherent vice or latent defect in the machinery, (iii) plans, blueprints and specifications, (iv) physical damage resulting from faulty work or faulty materials, but excluding the cost of making good such faulty work or faulty materials, (v) physical damage resulting from design error or omission but excluding the cost of making good such design error or omission, (vi) physical damage resulting from mechanical breakdown or electrical apparatus breakdown, (vii) demolition and debris removal coverage, (viii) the increased replacement cost due to any change in applicable codes or other Laws, (ix) expense to reduce loss, (x) building ordinance compliance, with the building ordinance exclusion deleted, (xi) "soft cost expense" (including costs of Governmental Approvals, mitigation costs, attorneys' fees, and other fees and costs associated with such damage or loss or replacement thereof) and (xii) property in the course of construction with a sublimit of at least \$5,000,000. The sublimit for coverage (vii) shall be not less than \$2,000,000. The sublimit coverage for (xi) shall be not less than \$1,000,000. The aggregate sublimit for coverages (viii) and (x) shall be not less than \$2,000,000.

- (f) The policy shall provide for at least 12 months of business interruption and extra expense with a minimum loss limit of \$5,000,000 for any one occurrence.

3.6 Other Insurances

At all times from the commencement of the O&M Period, the Development Entity shall also require any subcontractors and subconsultants to maintain appropriate insurance with limits and coverage provisions as outlined in Sections 2.6 and 2.9 above.

SCHEDULE 10

DISPUTES REVIEW BOARD

PART 1

FORM OF DISPUTES REVIEW BOARD AGREEMENT

THIS DISPUTES REVIEW BOARD AGREEMENT (DRB Agreement) is made and entered into this [] day of [], 201[], among The Pennsylvania Department of Transportation (the **Department**), [●] (the Development Entity), and [] (collectively, the **Board Members**), with reference to the following facts:

- (A) The Department and the Development Entity have entered into that certain Public-Private Transportation Partnership Agreement dated [●] (the **PPA**). Pursuant to the PPA, the Development Entity has agreed, among other things, to design, construct, finance and maintain certain Elements in connection with the Amtrak Station Improvement Project Keystone Corridor – Middletown Station Project (**Project**).
- (B) Article 30 (Dispute Resolution Procedures) of the PPA provides for the establishment and operation of a Disputes Review Board to assist in resolving Disputes that may arise among the Department, the Development Entity and others in respect to the Project.

NOW, THEREFORE, in consideration of the terms, conditions, covenants and agreements contained herein, the parties hereto agree as follows:

1. ESTABLISHMENT OF BOARD

- (a) The Dispute Review Board (the **Board**) shall begin operation upon execution of this DRB Agreement by the Department, the Development Entity and all three Board Members. The Board Members' tenure shall terminate upon completion of all work required to be performed by the Board hereunder unless sooner terminated in accordance with this DRB Agreement or applicable law.
- (b) Each member of the Board represents, warrants and covenants on his/her behalf that he/she complies with the criteria and limitations for membership described in Part 2 (Disputes Review Board Procedures) of Schedule 10 (Disputes Review Board) to the PPA.
- (c) All three Board Members must have submitted and received approval of disclosure statements according to the requirements of Section 1.5 (Additional Criteria Applicable to any Disputes Review Board Members) of Part 2 (Disputes Review Board Procedures) of Schedule 10 (Disputes Review Board) to the PPA.
- (d) If during the term of this DRB Agreement, a Board Member has a discussion regarding employment or enters into any agreement for employment with the Department, the Development Entity or a Development Entity-Related Entity, the Board Member shall promptly disclose such discussion or agreement to both the Department and the

Development Entity and the Board Member shall be disqualified from serving on the Board.

2. BOARD RESPONSIBILITIES

- (a) The Board shall fairly and impartially consider and provide written decisions for resolution of disputes in accordance with Article 30 (Dispute Resolution Procedures) of the PPA and Part 2 (Disputes Review Board Procedures) of Schedule 10 (Disputes Review Board Procedures Disputes Review Board) attached thereto. The Board Members shall perform the services necessary to participate in the Board's actions in accordance with this DRB Agreement.
- (b) Board Members will be kept informed monthly of Project-related activities and other developments by means of regular progress reports, minutes of progress meetings, and other relevant information prepared by the Department and the Development Entity.
- (c) All Board Members are to act independently in the consideration of facts and conditions surrounding any Dispute. Seeking the Board Members' advice or consultation, ex parte, is expressly prohibited; **provided**, that either the Department or the Development Entity may seek such advice or consultation from the entire Board, at a Board meeting, after first giving notice to all interested parties. A Board Member who has ex parte contact with the Department or the Development Entity or a representative of either party shall be subject to removal from the Board for cause.
- (d) Board Members may withdraw from the Board upon delivery of written notice of withdrawal to the Department, the Development Entity and the other Board Members, which notice shall specify a withdrawal date at least 30 days following the date of delivery of the notice. In addition, a Board Member may be terminated by the Department or the Development Entity if at any time that Board Member fails to meet the relevant qualifications set out in Sections 1.2 (Board Membership) through 1.5 (Additional Criteria Applicable to any Disputes Review Board Members) of, or is otherwise disqualified pursuant to Section 1.10 (Disqualification and Replacement of Board Members) of Part 2 (Disputes Review Board Procedures) of Schedule 10 (Disputes Review Board) to the PPA. Should the need arise to appoint a replacement Board Member, the replacement member shall be appointed in the same manner as provided by the PPA for appointment of the original member. The selection of a replacement Board Member shall begin promptly upon notification of the necessity for a replacement and shall be completed within 30 days thereafter. The change in Board membership shall be evidenced by the new member's signature on this DRB Agreement.
- (e) The personal services of the Board Member are a condition to receiving payment hereunder. No Board Member shall assign any of his or her work pursuant to this DRB Agreement without the prior written consent of both the Department and the Development Entity.
- (f) Each Board Member will keep matters related to the DRB Agreement confidential.

- (g) Each Board Member, in the performance of his or her duties on the Board, is acting as an independent contractor and not as an employee of either the Department or the Development Entity. No Board Member will be entitled to any employee benefits.

3. HEARINGS AND DECISIONS

- (a) Each Dispute under the PPA shall be heard and decided by the Board in accordance with the procedures and timelines established in Section 30.4 (Disputes Review Board) of the PPA.
- (b) Within the limits set by Section 30.4 (Disputes Review Board) of the PPA, the Board shall have the right to establish its own procedures and time limits, including the right to establish or to waive evidentiary rules and procedures. Each party involved in the Dispute shall retain the right to discovery, within the parameters set by the Board.

4. PROVISION OF DOCUMENTS TO BOARD

- (a) The Department shall furnish each Board Member one copy of Project-related documents in accordance with Section 2.2 (The Department's Responsibilities) of Part 2 (Disputes Review Board Procedures) of Schedule 10 (Disputes Review Board) to the PPA.
- (b) The Development Entity shall furnish to each Board Member one copy of all Project-related documents it might have, other than those furnished by the Department, in accordance with Section 2.1 (The Development Entity's Responsibilities) of Part 2 (Disputes Review Board Procedures) of Schedule 10 (Disputes Review Board) to the PPA.

5. PAYMENT

- (a) The Department and the Development Entity shall each pay its portion of the costs related to the services rendered by each Board Member in accordance with Section 3 (Basis of Payment) of Part 2 (Disputes Review Board Procedures) of Schedule 10 (Disputes Review Board) to the PPA.
- (b) Invoices for payment for Board Member work completed under this DRB Agreement shall be submitted monthly. Such invoices shall be in a format approved by the Department and the Development Entity and accompanied by a general description of activities performed during the relevant period. The value of work accomplished for payment shall be established from the billing rate and hours expended by the Board Member together with direct, reasonable, non-salary expenses. Billings for expenses shall include an itemized listing supported by copies of the original bills, invoices, expense accounts and miscellaneous supporting data.
- (c) Each Board Member shall keep available for inspection, for a period of five years after final payment, the cost records and accounts pertaining to this DRB Agreement.

6. MISCELLANEOUS

- (a) This DRB Agreement shall become effective upon execution hereof by the Development Entity, the Department and all three Board Members. The foregoing is subject to the right of the Department and the Development Entity to terminate the services of Board Members as specified herein.
- (b) This DRB Agreement shall terminate automatically upon termination of the PPA.
- (c) Capitalized terms used but not defined herein shall have the meanings set out in the PPA.
- (d) The parties to this DRB Agreement intend for Article 30 (Dispute Resolution Procedures) and Part 2 (Disputes Review Board Procedures) of Schedule 10 to the PPA and the other terms of this DRB Agreement to be complementary. Except as otherwise specifically provided herein, in the event of any conflict between this DRB Agreement and said Article 30 (Dispute Resolution Procedures) and Part 2 (Disputes Review Board Procedures) of Schedule 10 to the PPA, Article 30 (Dispute Resolution Procedures) and Part 2 (Disputes Review Board Procedures) of Schedule 10 to the PPA shall control.
- (e) Notices hereunder shall be sent as provided in Section 32.10 (Notices and Communications) of the PPA. The addresses for the Board Members are set out on the signature pages hereof.
- (f) Each of the parties hereto irrevocably submits to the exclusive jurisdiction of the Board of Claims established pursuant to 62 Pa.C.S. §1721 for the settlement of any dispute in connection with this DRB Agreement. In the event of an appeal by a party hereto from a decision of the Board of Claims pursuant to 62 Pa.C.S. § 1725(f), such appeal shall be brought in any Commonwealth Court of Pennsylvania in accordance with such section. Each of the parties hereto waives objection to such court on the grounds of inconvenient forum or otherwise in relation to proceedings in connection with this DRB Agreement.
- (g) EACH OF THE PARTIES HERETO WAIVES ANY RIGHT IT MAY HAVE TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION IN CONNECTION WITH THIS DRB AGREEMENT OR ANY TRANSACTION CONTEMPLATED HEREBY. THIS DRB AGREEMENT MAY BE FILED AS A WRITTEN CONSENT TO TRIAL BY A COURT.
- (h) The Development Entity irrevocably consents to service of process by personal delivery, certified mail, postage prepaid or overnight courier in relation to any proceedings before any court located in the Commonwealth of Pennsylvania. Each of the Board Members irrevocably appoints the person named below as its respective agent for service of process in any proceedings before any court located in the Commonwealth:
 - (i) [Board Member #1] irrevocably appoints _____ as its agent for service of process;
 - (ii) [Board Member #2] irrevocably appoints _____ as its agent for service of process; and

(iii) [Board Member #3] irrevocably appoints _____ as its agent for service of process.

This clause does not affect any other method of service allowed by applicable law.

- (i) If any person appointed as process agent is unable for any reason to act as agent for service of process, the Development Entity or the relevant Board Member, as the case may be, must promptly appoint another agent on terms acceptable to the Department. Failing this, the Department may appoint another agent for this purpose. The Development Entity and each of the Board Members agree that failure by its respective process agent to notify it of any process will not invalidate the relevant proceedings. This clause does not affect any other method of service allowed by law.
- (j) This DRB Agreement shall be governed by, and interpreted and enforced in accordance with, the laws in force in the Commonwealth of Pennsylvania (excluding any conflict of laws rule or principle which might refer such interpretation to the laws of another jurisdiction).
- (k) This DRB Agreement may be executed in any number of counterparts, and any party hereto may execute any such counterpart, each of which when executed and delivered shall be deemed to be an original and all of which counterparts taken together shall constitute but one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have executed this DRB Agreement as of the day and year first above written.

Board Members

MEMBER #1

Signature

Name/Address:

MEMBER #2

Signature

Name/Address:

MEMBER #3

Signature

Name/Address:

Development Entity

[Name of Development Entity]

By: _____

Name: _____

Title: _____

By: _____

Name: _____

Title: _____

The Department

**PENNSYLVANIA DEPARTMENT OF
TRANSPORTATION**

ATTEST:

By: _____

Name: _____

Title: _____

By: _____

Name: _____

Title: _____

APPROVED AS TO FORM

By: _____

PART 2

DISPUTES REVIEW BOARD PROCEDURES

1. ESTABLISHMENT OF DISPUTES REVIEW BOARD

1.1 Purpose

The Parties shall establish the Disputes Review Board to provide special expertise and assist in and facilitate the timely and equitable resolution of Disputes between the Department and the Development Entity as set out under Section 30.4 (Disputes Review Board) of the PPA and any Disputes Review Board Agreement for the Disputes Review Board.

1.2 Board Membership

The Disputes Review Board will consist of one member selected by the Department, one member selected by the Development Entity, and a third member selected in accordance with Section 1.8 below. The third member will act as chairman. Once established, each Disputes Review Board will remain active and in full force and effect until all Disputes submitted to such Disputes Review Board have been decided by it.

1.3 Neutral and Impartial

The members of the Disputes Review Board shall be neutral, act impartially, and not have any conflict of interest (as further provided in Section 1.5 (Additional Criteria Applicable to any Disputes Review Board Members) of this Part 2 (Disputes Review Board Procedures) of Schedule 10 (Disputes Review Board)).

1.4 Experience Criteria for any Disputes Review Board Members

- (a) Each party-selected member of the Disputes Review Board shall be a nationally recognized expert in matters pertinent to the nature of the Project.
- (b) The Chair of the Disputes Review Board shall be a nationally recognized expert in matters pertinent to the resolution of commercial disputes outside of litigation and shall have served on at least one Disputes Review Board, preferably as Chair.

1.5 Additional Criteria Applicable to any Disputes Review Board Members

In addition to the criteria set out in Section 1.4 (Experience Criteria for any Disputes Review Board Members) of this Part 2 (Disputes Review Board Procedures) of Schedule 10 (Disputes Review Board), the criteria for membership for all members of the Disputes Review Board includes the following:

- (a) No member shall have an ownership interest in any party involved in the PPA, or a financial interest in the PPA, except for payment for services on any Disputes Review Board; **provided**, that for purposes of determining conflicts of interests and disqualification, the term **member** shall include the member's current primary or full-time employer, and **involved** shall mean having a contractual relationship with the Department or the Development Entity at any tier.

- (b) Except for fee-based consulting services on other projects, no member shall have been previously employed by, or have had financial ties to, any party involved in the PPA within a period of eight (8) years prior to award of the PPA.
- (c) No member shall have provided to either Party fee-based consulting services within the two (2) years prior to award of the PPA, where the consulting fees paid by that Party have exceeded 20% of that member's total consulting revenue in either year.
- (d) No member shall have had a close professional or personal relationship with any key member of any party involved in the PPA which, in the judgment of either Party, could suggest partiality, or give an appearance of impropriety.
- (e) No member shall have had prior involvement in the Project, of a nature which could compromise his or her ability to participate impartially in the activities of either board.
- (f) Each member shall have completed any Disputes Review Board training course provided by the Department for the Project.
- (g) During his or her tenure as a member of the Disputes Review Board, no member shall be employed, including fee-based consulting services, by any party involved in this PPA except with express approval of both Parties.
- (h) During his or her tenure as a member of the Disputes Review Board, no member shall engage in any discussion or make any agreement with any Party regarding employment after the Project is completed.
- (i) No member shall currently be a member of any other Disputes Review Board that involves issues related to either of the Parties.

1.6 **Disclosure Statement**

Before their appointments are final, the first two (2) prospective members of the Disputes Review Board shall submit complete disclosure statements for the approval of both the Department and the Development Entity. Each statement shall include a resume of experience, together with a declaration describing all past, present and anticipated or planned future relationships (including indirect relationships through the prospective member's primary or full-time employer) to this Project and with all Parties involved in this PPA. This disclosure shall also include any financial relationship relative to the criteria in Section 1.5 (Additional Criteria Applicable to any Disputes Review Board Members) of this Part 2 (Disputes Review Board Procedures) of Schedule 10 (Disputes Review Board), and disclosure of close relationships, either professional or personal, with all key members of all Parties to this PPA. The third member of the Disputes Review Board shall supply such a statement to the first two (2) members and to the Department and the Development Entity before his or her appointment is final.

1.7 **Selection of First Two Members**

The Department and the Development Entity shall each select a proposed member for the Disputes Review Board and convey the selected member's name and reference

information to the other Party within three (3) weeks after execution of the PPA. If either Party reasonably believes that the member appointed by the other Party does not meet the criteria for membership as set out in this Part 2 (Disputes Review Board Procedures) of Schedule 10 (Disputes Review Board), that Party shall notify the other Party of such failure and the reason therefor. If either Party's member fails to meet the criteria, the other Party may require substitution of that member pursuant to Section 1.10 (Disqualification and Replacement of Board Members) of this Part 2 (Disputes Review Board Procedures) of Schedule 10 (Disputes Review Board).

1.8 Nomination and Approval of Third Member

Immediately after the Department and the Development Entity selections for a Disputes Review Board are final, the Department will provide a list of five (5) proposed members acceptable to both Parties and will notify the first two (2) members of the Disputes Review Board to begin the process of selecting the third member from this list. The first two (2) members shall select the third member from the list provided by the Department and shall ensure that the third member meets all of the relevant criteria listed above. The first two (2) members shall select the third member within two (2) weeks after they receive the notice from the Department to begin the selection process.

If the first two (2) members of the Disputes Review Board do not select a third member within these two (2) weeks after their selections are final, the Department and the Development Entity shall select the third member by mutual agreement. In so doing, the Parties may, but are not required to, consider other nominees offered by the first two (2) members of the Disputes Review Board. In the event of failure to agree on the appointment of the third member of the Disputes Review Board within two weeks following such four-week period, such person may be appointed by the International Institute for Conflict Prevention and Resolution, upon the request of either Party.

1.9 Execution of Three-Party Agreement

The Department, the Development Entity and all three members of the Disputes Review Board shall execute its respective Disputes Review Board Agreement substantially in the form attached as Part 1 (Form of Disputes Review Board Agreement) of Schedule 10 within four (4) weeks after the selection of the third member.

1.10 Disqualification and Replacement of Board Members

If (i) any member of the Disputes Review Board has a discussion regarding employment or enters into any employment agreement with the Development Entity, the Department or any Contractor on the Project during his or her tenure on any Disputes Review Board, (ii) any member of the Disputes Review Board is discovered not to meet the relevant qualifications set out in this Part 2 (Disputes Review Board Procedures) of Schedule 10 (Disputes Review Board) or (iii) any member cannot continue to serve because of death, illness or permanent disability, that member shall be disqualified from serving on the Disputes Review Board. In the event of such a disqualification, a replacement member meeting the qualifications in this Part 2 (Disputes Review Board Procedures) of Schedule 10 (Disputes Review Board) will be selected by the Department if the disqualified member was originally selected by the Department, by the Development Entity if the disqualified member was originally selected by the Development Entity or by both the

Department and the Development Entity if the disqualified member was the third member.

2. THE DEPARTMENT AND THE DEVELOPMENT ENTITY RESPONSIBILITIES

2.1 The Development Entity's Responsibilities

Except for its participation in the Disputes Review Board's activities as provided in its Disputes Review Board Agreement, the Development Entity will not solicit advice or consultation from any Disputes Review Board or any member on matters dealing in any way with the Project, the conduct of the Project Services or resolution of problems.

The Development Entity shall furnish to each of the Disputes Review Board members a set of all pertinent documents which are or may become necessary for the Disputes Review Board to perform its function, except documents furnished by the Department. Pertinent documents are any drawings or sketches, calculations, procedures, schedules, estimates, or other documents used in the performance of the Project Services or in justifying or substantiating the Development Entity's position regarding a particular Dispute. The Development Entity shall also concurrently furnish a copy of such documents to the Department.

2.2 The Department's Responsibilities

Except for its participation in the Disputes Review Board's activities as provided in its Disputes Review Board Agreement, the Department will not solicit advice or consultation from the Disputes Review Board or any members on matters dealing in any way with the Project, the conduct of the Project Services or resolution of problems.

The Department shall furnish the following services and items:

- (a) **Contract-Related Documents:** The Department shall furnish each Disputes Review Board member and the Development Entity a copy of all Project Documents, written instructions issued by the Department to the Development Entity, or other documents pertinent to the performance of the PPA and necessary for either board to perform its function.
- (b) **Coordination and Services:** The Department, in cooperation with the Development Entity, shall coordinate the operations of the Disputes Review Board. The Department shall arrange or provide conference facilities at or near a Project Site, provide any Disputes Review Board training course, for the Project, and provide secretarial and copying services for the Disputes Review Board.

2.3 Reports to any Disputes Review Board

The Department and the Development Entity shall provide each of the Disputes Review Board members monthly with regular progress reports, minutes of progress meetings, and other relevant information they each prepare in order to keep the Disputes Review Board informed of Project-related activity and other developments.

3. BASIS OF PAYMENT

The Department and the Development Entity are each responsible to pay the fees and expenses of any Disputes Review Board member it selected without recourse to the other Party. The Development Entity shall also pay the fees and expenses invoiced by the third member of the Disputes Review Board, after approval by both Parties, and the Development Entity will then invoice the Department for 50% of the payment it made to the third member of any Disputes Review Board. The Department will review and process payment of the invoice promptly upon receipt.

The Department will prepare and mail minutes and progress reports, will provide administrative services, such as conference facilities and secretarial services for meetings with the Disputes Review Board for any Dispute hearing, and will bear the cost of these services. If the Disputes Review Board desires special services, such as, but not limited to, legal consultation, accounting, and data research, both Parties must agree, and the costs will be shared by them as mutually agreed.

SCHEDULE 11

INITIAL DESIGNATION OF AUTHORIZED REPRESENTATIVES

DEPARTMENT

[Name]

Tel: [●]

Email: [●]

DEVELOPMENT ENTITY

[Name]

Tel: [●]

Email: [●]

SCHEDULE 12
FORM OF FINANCIAL MODEL

SCHEDULE 13

EARNED VALUE PAYMENT MECHANISM

A portion of the Project will be funded with federal funds. The Project Baseline Schedule shall define the timeframe for completion of the Project and achievement of milestones, and be used to monitor progress and denote changes that occur during design and construction. The Department agrees to make Earned Value Payments to the Development Entity based on the approved Project Baseline Schedule and full compliance with the Project Documents.

**SCHEDULE 14
CERTAIN PUBLIC POLICY REQUIREMENTS**

PART 1

CONTRACTOR RESPONSIBILITY PROVISIONS

For the purpose of these provisions, the term Contractor is defined as any person, including, but not limited to, the Development Entity, a bidder, offeror, loan recipient, grantee or lessor, who has furnished or performed or seeks to furnish or perform, goods, supplies, services, leased space, construction or other activity, under a contract, grant, lease, purchase order or reimbursement agreement with the Commonwealth. The term Contractor includes a permittee, licensee, or any agency, political subdivision, instrumentality, public authority, or other public entity in the Commonwealth.

1. The Contractor certifies, in writing, for itself and its subcontractors required to be disclosed or approved by the Commonwealth, that as of the date of its execution of this Bid/Contract, that neither the Contractor, nor any such subcontractors, are under suspension or debarment by the Commonwealth or any governmental entity, instrumentality, or authority and, if the Contractor cannot so certify, then it agrees to submit, along with its Bid/Contract, a written explanation of why such certification cannot be made.
2. The Contractor also certifies, in writing, that as of the date of its execution of this Bid/Contract it has no tax liabilities or other Commonwealth obligations, or has filed a timely administrative or judicial appeal if such liabilities or obligations exist, or is subject to a duly approved deferred payment plan if such liabilities exist.
3. The Contractor's obligations pursuant to these provisions are ongoing from and after the effective date of the Contract through the termination date thereof. Accordingly, the Contractor shall have an obligation to inform the Commonwealth if, at any time during the term of the Contract, it becomes delinquent in the payment of taxes, or other Commonwealth obligations, or if it or, to the best knowledge of the Contractor, any of its subcontractors are suspended or debarred by the Commonwealth, the federal government, or any other state or governmental entity. Such notification shall be made within 15 days of the date of suspension or debarment.
4. The failure of the Contractor to notify the Commonwealth of its suspension or debarment by the Commonwealth, any other state, or the federal government shall constitute an event of default of the Contract with the Commonwealth.
5. The Contractor agrees to reimburse the Commonwealth for the reasonable costs of investigation incurred by the Office of State Inspector General for investigations of the Contractor's compliance with the terms of this or any other agreement between the Contractor and the Commonwealth that results in the suspension or debarment of the contractor. Such costs shall include, but shall not be limited to, salaries of investigators, including overtime; travel and lodging expenses; and expert witness and documentary fees. The Contractor shall not be responsible for investigative costs for investigations that do not result in the Contractor's suspension or debarment.

6. The Contractor may obtain a current list of suspended and debarred Commonwealth contractors by either searching the Internet at <http://www.dgs.state.pa.us/> or contacting the:

Department of General Services
Office of Chief Counsel
603 North Office Building
Harrisburg, PA 17125
Telephone No: (717) 783-6472
FAX No: (717) 787-9138

PART 2

ANTI-POLLUTION MEASURES

PART I, SECTION A PENNSYLVANIA STATUTES

Act Relating to Abandoned Mines, Act of May 7, 1935, 52 Pa. Stat. §§ 809 et seq., as amended.

Act Relating to Black Powder, Act of May 31, 1974, 73 Pa. Stat. §§ 169 et seq., as amended.

Act Relating to Camp Regulation, Act of Nov. 10, 1959, 35 Pa. Stat. §§ 3001 et seq., as amended.

Act Relating to Cave-in or Subsidence of Surface Above Mines, Act of July 2, 1937, 52 Pa. Stat. §§ 1407 et seq., as amended.

Act Relating to Caving-in, Collapse, Subsidence, Act of May 27, 1921, 52 Pa. Stat. §§ 661 et seq., as amended.

Act Relating to Coal Land Improvement, Act of July 19, 1965, 52 Pa. Stat. § § 30.101 et seq., as amended.

Act Relating to Coal Mine Subsidence Insurance Fund, Act of Aug. 23, 1961, 52 Pa. Stat. §§ 3201 et seq., as amended.

Act Relating to Coal Stripping, Act of June 18, 1941, 52 Pa. Stat. §§ 1471 et seq., as amended.

Act Relating to Coal Under State Lands, Act of June 1, 1933, 52 Pa. Stat. §§ 1501 et seq., as amended.

Act Relating to Control and Drainage of Water from Coal Formations, Act of July 7, 1955, 52 Pa. Stat. §§ 682 et seq., as amended.

Act Relating to Delaware River Pollution, Act of Apr. 19, 1945, 32 Pa. Stat. §§ 815.31 et seq., as amended.

Act Relating to Discharge of Coal into Banks of Streams, Act of June 27, 1913, 52 Pa. Stat. §§ 631 et seq., as amended.

Act Relating to Excavation and Demolition, Act of Dec. 10, 1974, 73 Pa. Stat. §§ 176 et seq., as amended.

Act Relating to Explosives, Act of July 1, 1937, 73 Pa. Stat. §§ 151 et seq., as amended.

Act Relating to Explosives, Act of July 10, 1957, 73 Pa. Stat. §§ 164 et seq., as amended.

Act Relating to Flood Control, Act of Aug. 7, 1936, 32 Pa. Stat. §§ 653 et seq., as amended.

Act Relating to General Safety, Act of May 18, 1937, 43 Pa. Stat. §§ 25-1 et seq., as amended.

Act Relating to Hazardous Materials Transport, Act of June 30, 1984, 75 Pa. C.S.A. §§ 8301 et seq., as amended.

Act Relating to Junkyards along Highways, Act of July 28, 1966, 36 Pa. Stat. § § 2719.1 et seq., as amended.

Act Relating to Land Use, Act of Jan. 13, 1966, 16 Pa. Stat. § § 11941 et seq., as amended.

Act Relating to Maps and Plans, Act of June 15, 1911, 52 Pa. Stat. §§ 823, as amended.

Act Relating to Mine Fires and Subsidence, Act of April 3, 1968, 52 Pa. Stat. §§ 30.201 et seq., as amended.

Act Relating to Mining Safety Zones, Act of Dec. 22, 1959, 52 Pa. Stat. §§ 3101 et seq., as amended.

Act Relating to Noise Pollution, Act of June 2, 1988, 35 Pa. Stat. §§ 4501 et seq., as amended.

Act Relating to Pollution Control Devices, Act of March 4, 1971, 72 Pa. Stat. § § 7602.1 et seq., as amended.

Act Relating to Pollution From Abandoned Mines, Act of Dec. 15, 1965, 35 Pa. Stat. §§ 760.1 et seq., as amended.

Act Relating to Potomac River Pollution, Act of May 29, 1945, 32 Pa. Stat. § § 741 et seq., as amended.

Act Relating to Preservation and Acquisition of Land for Open Space Uses, Act of Jan. 19, 1968, 32 Pa. Stat. §§ 5001 et seq., as amended.

Act Relating to Public Eating and Drinking Places, Act of May 23, 1945, 35 Pa. Stat. §§ 655.1 et seq., as amended.

Act Relating to Schuylkill River Pollution, Act of Apr. 19, 1945, 32 Pa. Stat. §§ 815.31 et seq., as amended.

Act Relating to Stream Clearance, Act of June 5, 1947, 32 Pa. Stat. §§ 701 et seq., as amended.

Act Relating to Water Power and Water Supply Permits, Act of June 14, 1923, 32 Pa. Stat. §§ 591 et seq., as amended.

Act Relating to Weather Modification, Act of Jan. 19, 1968, 3 Pa. Stat. § § 1101 et seq. as amended.

Administrative Code of April 9, 1929, 71 Pa. Stat. § § 194, 510 et seq., as amended.

Agricultural Liming Material Act of March 17, 1978, 3 Pa. Stat. §§ 132-1 et seq., as amended.

Air Pollution Control Act of Jan. 8, 1960, 35 Pa. Stat. §§ 4001 et seq., as amended.

Anthracite Strip Mining and Conservation Act of June 27, 1947, 52 Pa. Stat. § § 681.1 et seq., as amended.

The Bituminous Mine Subsidence and Land Conservation Act of Apr. 27, 1966, 52 Pa. Stat. §§ 1406.1 et seq., as amended.

Bluff Recession and Setback Act of May 13, 1980, 32 Pa. Stat. §§ 5201 et seq., as amended.

Brandywine River Valley Compact Act of Sept. 9, 1959, 32 Pa. Stat. §§ 818 et seq., as amended.

Cave Protection Act of Nov. 21, 1990, 32 Pa. Stat. §§ 5601 et seq., as amended.

Chesapeake Bay Commission Agreement, Act of June 25, 1985, 32 Pa. Stat. §§ 820.11 et seq., as amended.

The Clean Streams Law of June 22, 1937, 35 Pa. Stat. §§ 691.1 et seq., as amended.

Coal and Gas Resource Coordination Act of Dec. 18, 1984, 58 Pa. Stat. §§ 501 et seq., as amended.

The Coal Mine Sealing Act of June 30, 1947, 52 Pa. Stat. §§ 28.1 et seq., as amended.

Coal Refuse Disposal Control Act of September 24, 1968, 52 Pa. Stat. §§ 30.51 et seq., as amended.

Conservation and Natural Resources Act of June 28, 1995, 71 Pa. Stat. §§ 1340.101 et seq., as amended.

Conservation District Law, Act of May 15, 1945, 3 Pa. Stat. §§ 849 et seq., as amended.

The Crimes Code, Act of Dec. 6, 1972, 18 Pa. C.S.A. §§ 101 et seq., as amended.

Dam Safety and Encroachments Act of Nov. 26, 1978, 32 Pa. Stat. §§ 693.1 et seq. as amended.

Delaware River Basin Compact, Act of July 7, 1961, 32 Pa. Stat. § § 815.101 et seq., as amended.

Fish and Boat Code, Act of October 16, 1980, 30 Pa. C.S.A. §§ 101 et seq., as amended.

Flood Plain Management Act of Oct. 4, 1978, section 302 and 402, 32 Pa. Stat. §§ 679 et seq., as amended.

The Game and Wildlife Code, Act of July 8, 1986, 34 Pa. C.S.A. §§ 101 et seq., as amended.

Great Lakes Protection Fund Act of July 6, 1989, 32 Pa. Stat. §§ 817.11 et seq., as amended.

Hazardous Material Emergency Planning and Response Act of Dec. 7, 1990, 35 Pa. Stat. §§ 6022.101 et seq., as amended.

Hazardous Sites Cleanup Act of Oct. 18, 1988, 35 Pa. Stat. §§ 6020.101 et seq., as amended.

Highway Vegetation Control Act of Dec. 20, 1983, 36 Pa. Stat. §§ 2720.1 et seq., as amended.

History Code, Act of May 26, 1988, 37 Pa. C.S.A. §§ 101 et seq., as amended.

Interstate Mining Compact, Act of May 5, 1966, 52 Pa. Stat. §§ 3251 et seq., as amended.

Land Recycling and Environmental Remediation Standards Act of May 19, 1995, 35 Pa. Stat. §§ 6026.101 et seq., as amended.

Land and Water Conservation and Reclamation Act of Jan. 19, 1968, 32 Pa. Stat. §§ 5101 et seq., as amended.

Low-Level Radioactive Waste Disposal Act of February 9, 1988, 35 Pa. Stat. §§ 7130.101 et seq.

Noncoal Surface Mining Conservation and Reclamation Act of Dec. 19, 1984, 52 Pa. Stat. §§ 3301 et seq., as amended.

Noxious Weed Control Law, Act of April 7, 1982, 3 Pa. Stat. §§ 255.1 et seq., as amended.

Nutrient Management Act of May 20, 1993, 3 Pa. Stat. § 1701 et seq.

Ohio River Valley Water Sanitation Compact, Act of Apr. 2, 1945, 32 Pa. Stat. §§ 816.1 et seq., as amended.

Oil and Gas Act of Dec. 19, 1984, 58 Pa. Stat. §§ 601.101 et seq., as amended.

Oil and Gas Conservation Law, Act of July 25, 1961, 58 Pa. Stat. §§ 401 et seq., as amended.

Oil Spill Responder Liability Act of June 11, 1992, 35 Pa. Stat. §§ 6023.1 et seq., as amended.

Pennsylvania Anthracite Coal Mine Act of Nov. 10, 1965, 52 Pa. Stat. §§70-101 et seq., as amended.

Pennsylvania Appalachian Trail Act of Apr. 28, 1978, 64 Pa. Stat. §§ 801 et seq., as amended.

Pennsylvania Bituminous Coal Mine Act of July 17, 1961, 52 Pa. Stat. §§ 701-101 et seq., as amended.

Pennsylvania Fertilizer Law of May 29, 1956, 3 Pa. Stat. §§ 68.1 et seq., as amended.

Pennsylvania Occupational Disease Act of June 21, 1939, 77 Pa. Stat. §§ 1201 et seq., as amended.

Pennsylvania Pesticide Control Act of 1973, Act of March 1, 1974, 3 Pa. Stat. §§ 111.21 et seq., as amended.

Pennsylvania Safe Drinking Water Act of May 1, 1984, 35 Pa. Stat §§ 721.1 et seq., as amended.

Pennsylvania Scenic Rivers Act of Dec. 5, 1972, 32 Pa. Stat. §§ 820.21 et seq., as amended.

Pennsylvania Sewage Facilities Act of Jan. 24, 1966, 35 Pa. Stat. §§ 750.1 et seq., as amended.

Pennsylvania Solid Waste Management Act of July 7, 1980, 35 Pa. Stat. §§ 6018.101 et seq., as amended.

Pennsylvania Solid Waste-Resource Recovery Development Act of July 20, 1974, 35 Pa. Stat. §§ 755.1 et seq., as amended.

Pennsylvania Used Oil Recycling Act of Apr. 9, 1982, 58 Pa. Stat. §§ 471 et seq., as amended.

Pennsylvania Workmen's Compensation Act of June 2, 1915, 77 Pa. Stat. §§ 1 et seq., as amended.

Phosphate Detergent Act of July 5, 1989, 35 Pa. Stat. §§ 722.1 et seq., as amended.

Plant Pest Act of Dec. 16, 1992, 3 Pa. Stat. §§ 258.1 et seq.

Plumbing System Lead Ban and Notification Act of July 6, 1989, 35 Pa. Stat. §§ 723.1 et seq., as amended.

Project 70 Land Acquisition and Borrowing Act of June 22, 1964, 72 Pa. Stat. §§ 3946.1 et seq., as amended.

The Public Bathing Law, Act of June 23, 1931, 35 Pa. Stat. §§ 672 et seq., as amended.

Publicly Owned Treatment Works Penalty Law, Act of March 26, 1992, 35 Pa. Stat. §§ 752.1 et seq., as amended.

Radiation Protection Act of July 10, 1984, 35 Pa. Stat. §§ 7110.101 et seq., as amended.

Rails to Trails Act of Dec. 18, 1990, 32 Pa. Stat. §§ 5611 et seq.

Seasonal Farm Labor Act of June 23, 1978, 43 Pa. Stat. §§ 1301.101 et seq., as amended.

Sewage System Cleaner Control Act of May 28, 1992, 35 Pa. Stat. §§ 770.1 et seq., as amended.

Sewage Treatment Plant and Waterworks Operators' Certification Act of Nov. 18, 1968, 63 Pa. Stat. §§ 1004 et seq., as amended.

Site Development Act of May 6, 1968, 73 Pa. Stat. §§ 361 et seq., as amended.

Snowmobile Law, Act of June 17, 1976, 75 Pa. C.S.A. §§ 7701 et seq., as amended.

State Highway Law, Act of June 1, 1945, 36 Pa. Stat. §§ 670-101 et seq., as amended.

Storage Tank and Spill Prevention Act of July 6, 1989, 35 Pa. Stat. §§ 6021.101 et seq., as amended.

Storm Water Management Act of Oct. 4, 1978, 32 Pa. Stat. §§ 680.1 et seq., as amended.

Surface Mining Conservation and Reclamation Act of May 31, 1946, 52 Pa. Stat. §§ 1396.1 et seq., as amended.

Susquehanna River Basin Compact, Act of July 17, 1968, 32 Pa. Stat. §§ 820.1 et seq., as amended.

Vehicle Code, Act of June 17, 1976, 75 Pa. C.S.A. §§ 101 et seq., as amended.

Water Power and Water Supply Act of June 14, 1923, 32 Pa. Stat. § 597, as amended.

Water Well Drillers License Act of May 29, 1956, 32 Pa. Stat. §§ 645.1 et seq., as amended.

Wheeling Creek Watershed Protection and Flood Prevention District Compact, Act of Aug. 2, 1967, 32 Pa. Stat. §§ 819.1 et seq., as amended.

Wild Resource Conservation Act of June 23, 1982, 32 Pa. Stat. §§ 5301 et seq., as amended.

PART I, SECTION B
PENNSYLVANIA REGULATIONS

Pursuant to the above statutes, regulations are promulgated by State agencies and are published in the Pennsylvania Code (PA. Code). The following are the sections of the PA. Code that are assigned to the following State agencies:

Pennsylvania Department of Environmental Protection—Title 25 of the PA. Code;

Pennsylvania Department of Conservation and Natural Resources—Title 17 of the PA. Code;

Pennsylvania Department of Transportation—Title 67 of the PA. Code;

Pennsylvania Department of Labor and Industry—Title 34 of the PA. Code;

Pennsylvania Department of Agriculture—Title 7 of the PA. Code;

Pennsylvania Historical and Museum Commission—Title 46 of the PA. Code;

Public Utility Commission—Title 52 of the PA. Code;

Pennsylvania Fish and Boat Commission—Title 58, Part II of the PA. Code;

Pennsylvania Game Commission—Title 58, Part III of the PA. Code;

Delaware River Commission—Title 4 of the PA. Code.

PART II
FEDERAL STATUTES AND REGULATIONS

Abandoned Mine Reclamation Act of 1990, 30 U.S.C.¹ §§ 1231 et seq.

Acid Precipitation Act of 1980, 42 U.S.C. §§ 8901-8905, 8911, 8912.

Act to Prevent Pollution from Ships, 33 U.S.C. §§ 1901-1915, as amended.
40 C.F.R.². Part 122

Agricultural Act of 1970, 16 U.S.C. §§ 1501-1510.

Airport and Airway Development Act of 1970, 49 U.S.C. §§ 1701-1703, 1711-1727.

Anadromous Fish Conservation Act, 16 U.S.C. §§ 757a-757g et seq., as amended.

Appalachian Regional Development Act of 1965, 40 app. §1, 2, 101-109, 201-208, 211-214, 221-225, 226, 301-304, 401-405, as amended.

Asbestos Hazard Emergency Response Act of 1986 (See Toxic Substances Control Act, Sections 201-214 (15 U.S.C. §§ 2641-2654)).

Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 et seq., as amended.

10 C.F.R. Parts 1, 2, 4, 10, 15, 19, 20, 21, 25, 26, 30-36, 39, 40, 50, 52-55, 60-62, 70-76, 95, 100, 110, 150, 171, 605, 707, 710, 730, 760, 768, 770-777, 779, 782, 785-791, 799, 810, 820, 862, 960, 962, 1004, 1009, 1017, 1046, 1047

32 C.F.R. Part 518

37 C.F.R. Part 5

40 C.F.R. Parts 23, 191, 192

48 C.F.R. Parts 901, 910, 912, 917, 919-933, 935-937, 942-945, 949-952

Aviation Safety and Noise Abatement Act of 1979, 49 App. U.S.C. §§ 47501 et seq., as amended.

Bankhead-Jones Farm Tenant Act, 7 U.S.C. §§ 1000 et seq., as amended.

Clean Air Act 42 U.S.C. §§ 7401 et seq., as amended.

40 C.F.R. Parts 2, 6, 9, 15, 22, 23, 30, 31, 34, 35, 40, 42, 45, 46, 50, 51, 52, 55, 56, 57, 58, 60, 61, 62, 63, 65, 67, 69, 70, 72-74, 76-78, 80, 81, 82, 85, 86, 87, 88, 89, 90, 93, 122-124, 144, 145, 233, 270, 271, 450, 600, 613, 771, 1500, 1503-1507

10 C.F.R. Parts 101, 201

14 C.F.R. Parts 34, 1216

18 C.F.R. Parts 101, 201

¹ U.S.C. refers to the United States Code.

² Pursuant to the above statutes, regulations are promulgated by the Federal agencies and are published in the Code of Federal Regulations (C.F.R.).

19 C.F.R. Part 12
23 C.F.R. Part 450
29 C.F.R. Part 24

Clean Vessel Act of 1992, Pub. L. 102-587, Title V, 106 Stat. 5086.

Coastal Wetlands Planning, Protection and Restoration Act, 16 U.S.C. §§ 3951-3956

Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464, as amended.

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, 42 U.S.C. §§ 9601 et seq., as amended.

40 C.F.R. Parts 9, 51, 279, 300

Department of Transportation Act, 49 U.S.C. §§ 503, 20302, 20304, 20305, 20701-20703, 20901, 20902, 21302, as amended.

Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. §§ 11001 et seq., as amended.

40 C.F.R. Part 17

Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544, as amended.

Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. §§ 791-798, as amended.

10 C.F.R. Parts 303, 305

18 C.F.R. Parts 157, 270, 271, 275, 290, 292

Environmental Quality Improvement Act of 1970, 42 U.S.C. §§ 4371-4375, as amended.

40 C.F.R. Parts 1500-1508, 1515

Federal Agriculture Improvement and Reform Act of 1996, 7 U.S.C. §§ 1932, 2204f, 3224, 3319d, 2279c, 1101, 7201-7491.

Federal Aid in Fish Restoration Act (of 1950), 16 U.S.C. §§ 777 et seq., as amended.

43 C.F.R. Part 17

Note: also known as “Fish Restoration and Management Projects Act” and the “Dingell-Johnson Sport Fish Restoration Act”.

Federal Facility Compliance Act of 1992, Pub. L. 102-386, 106 Stat. 1505.

Federal-Aid Highway Act, 23 U.S.C.A. §§101 et seq., as amended.

Federal Aid in Wildlife Restoration Act, 16 U.S.C. §§ 669, 669a-669i, as amended.

Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y, as amended.

19 C.F.R. Part 12

29 C.F.R. Part 1440

40 C.F.R. Parts 2, 16, 23, 30-32, 34, 35, 152, 153, 155-158, 160, 162, 166, 168, 169, 170-173

Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1785, as amended.

7 C.F.R. Part 1

36 C.F.R. Parts 222, 242, 251, 254
43 C.F.R. Parts 37, 1600, 1820, 1860, 1880, 2090, 2200, 2210, 2300, 2540, 2710,
2740, 2800, 2810, 2910, 2920, 3000, 3110, 3120, 3130, 3140, 3150, 3160,
3200, 3400, 3410, 3420, 3430, 3450, 3460, 3470, 3500, 3510, 3520, 3530,
3540, 3550, 3560, 3570, 3580, 3590, 3730, 3800, 3830, 4100, 4200, 4300,
4700, 5000, 8000, 8200, 8300, 8340, 8350, 8360, 8370, 8560, 9180, 9210,
9260

Federal Power Act, 16 U.S.C. §§ 791a et seq., as amended.

10 C.F.R. Part 205

18 C.F.R. Parts 1b, 2, 3, 4, 6, 8, 9, 11, 12, 16, 20, 24, 32-35, 45, 46, 101, 116, 125,
131, 141, 154, 225, 290, 292, 294, 375, 381, 385

33 C.F.R. Parts 208, 209, 221, 222

Federal Water Project Recreation Act, 16 U.S.C. §§ 4601-5, 4601-12 to -21, 662, as amended.

36 C.F.R. Part 297

43 C.F.R. Part 17

Fish and Game Sanctuary Act, 16 U.S.C. §§ 694-694b

Fish and Wildlife Act of 1956, 15 U.S.C. §§ 713c-3; 16 U.C.S.A. §§ 742a-742j, as amended.

30 C.F.R. Part 773

33 C.F.R. Part 209

43 C.F.R. Parts 17, 21

50 C.F.R. Parts 25-33, 70, 71

16 U.S.C. §§ 742a – 742j

50 C.F.R. Parts 10, 19, 20, 36, 217, 250, 251, 260

Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666c, as amended.

30 C.F.R. Part 773

33 C.F.R. Part 209

43 C.F.R. Parts 17, 21

50 C.F.R. Parts 25-33, 70, 71

Flood Control, 33 U.S.C. §§ 701 et seq., as amended

7 C.F.R. Parts 622, 624, 654

33 C.F.R. Parts 208, 222

Fishermen's Protective Act of 1967 (Pelly Amendment), 22 U.S.C. §§ 1971 – 1980, as amended.

22 C.F.R. Part 33

50 C.F.R. Part 611

Food Quality Protection Act of 1996, 7 U.S.C. §§ 136-136y.

Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. §§ 1600-1614, as amended.

Forest Ecosystems and Atmospheric Pollution Control Act of 1988, 16 U.S.C. § 1641.

Game and Wildlife Act, 16 U.S.C. §§ 141 b, 715d-1, 715d-3, 715e, 715e-1, 715k-1, 715s, 718b – 718e, as amended.

Geothermal Energy Research, Development, and Demonstration Act of 1974 (GERDDA), 30 U.S.C. §§ 1101, 1102, 1121-1126, 1141-1144, 1161-1164, as amended.

Global Climate Protection Act of 1987, 15 U.S.C. § 2901, as amended.

Hazardous Material Transportation Act, 46 U.S.C. § 170; 49 U.S.C. §§ 103, 104, 106; 49 App. §§ 1471, 1472, 1801- 1819, as amended.

Hazardous Substance Response Revenue Act of 1980, 26 U.S.C. §§ 4611, 4612, 4661, 4662.

Hazardous Materials Transportation Authorization Act of 1994, 49 U.S.C. §§ 5101-5127, as amended.

Hazardous Materials Transportation Uniform Safety Act of 1990, 49 App. §§ 1801-1819, 2509.

Intermodal Surface Transportation Efficiency Act of 1991 (see Transportation Equity Act of the 21st Century (TEA 21)).

Lacey Act Amendments of 1981 16 U.S.C. §§ 3371 et seq., as amended.

Land and Water Conservation Fund Act of 1965, 16 U.S.C. §§460d, 460l-4 – 460l-11, as amended.

Lead-Based Paint Exposure Reduction Act, 15 U.S.C. §§ 2681-2692.

Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. §§ 4801, 4811, 4821, 4822, 4831, 4841-4843, as amended.

Lead Contamination Control Act of 1988, 42 U.S.C. §§ 201 note, 247b-1, 300j-4, 300j-21 to -26.

Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §§ 2021b-2021j, as amended.

Magnuson-Stevens Fisheries Conservation and Management Act, 16 U.S.C. §§ 1801 et seq., as amended.

Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401-1445, as amended.

Migratory Bird Conservation Act, 16 U.S.C. §§ 715-715r, as amended.

Migratory Bird Treaty Act, 16 U.S.C. §§703-708, 709a, 710, 711.

Mining and Mineral Resources Research Institutes Act, 30 U.S.C. 1221-1230.

Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 475, 528, 531, as amended.

National Climate Program Act, 15 U.S.C. §§ 2901-2908, as amended.

National Coastal Monitoring Act, 33 U.S.C. §§ 2801-2805.

National Contaminated Sediment Assessment and Management Act, 33 U.S.C. §§ 1271.

National Emission Standards Act, 42 U.S.C. §§7521-7550, as amended.

National Energy Conservation Policy Act, Pub. L. 95-619, 92 Stat. 306, as amended.

National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, 4331-4335, 4341-4347, as amended.

National Invasive Species Act of 1996, 16 U.S.C. §§ 4701-4751.

National Ocean Pollution Planning Act of 1978, 33 U.S.C. §§ 1701-1709, as amended.

National Trails System Act, 16 U.S.C. §§ 1241-1249, as amended.

National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. §§ 668dd, 668ee, 715s, as amended.

Noise Control Act of 1972, 42 U.S.C. §§ 4901-4918.

Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10101 -1 0270, as amended.

Oil Pollution Act, 1961, 33 U.S.C. §§ 1001-1015, as amended.

Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2761, as amended.

Organotin Antifouling Paint Control Act of 1988, 33 U.S.C. §§ 2401-2410, as amended.

Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. §§ 1801-1866, as amended.

Pollution Prevention Act of 1990, 42 U.S.C. §§ 13101-13109.

Public Health Service Act, 42 U.S.C. §§ 300f-300j-11.

Radon Gas and Indoor Air Quality Research Act of 1986, 42 U.S.C. § 7401.

Recreation Use of Conservation Areas Act, 16 U.S.C. § 560k.

Refuse Act of 1899, 33 U.S.C. §§ 401 et seq., as amended.

Renewable Resources Extension Act of 1978, 16 U.S.C. §§ 1671-1676 as amended.

Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6991.

River and Harbor Act of 1958, 33 U.S.C. §610 as amended.

Safe Drinking Water Act (see Public Health Service Act Sections 1401-1451 (42 U.S.C. §§ 300f - 300j-11, as amended)).

Shore Protection Act of 1988, 33 U.S.C. §§2601-2609, 2622, 2623.

Soil and Water Resources Conservation Act of 1977, 16 U.S.C. §§ 2001-2009, as amended.

Soil Conservation and Domestic Allotment Act, 16 U.S.C. §§ 590a et seq., as amended.

Solid Waste Disposal Act, 42 U.S.C. §§ 6901 et seq., as amended.

Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201 et seq., as amended.

Toxic Substances Control Act, 15 U.S.C. §§ 2601-2692, as amended.

Transportation Equity Act of the 21st Century (TEA 21), Pub. L. 105-178, 112 Stat. 107, as amended.

Travel and Transportation Reform Act of 1998, 5 U.S.C. §§ 5701 et seq.

United States Public Vessel Medical Waste Anti-Dumping Act of 1988, 33 U.S.C. §§ 2501-2504.

Uranium Mill Tailings Radiation Control Act of 1978, 42 U.S.C. §§ 7901 - 7942.

Water Bank Act, 16 U.S.C. §§ 1301-1311, as amended.

Water Pollution Prevention and Control Act, 33 U.S.C. §§ 1251 et seq., as amended.

Commonly known as the Clean Water Act.

14 C.F.R. Part 1204

40 C.F.R. Parts 7, 9, 15, 30 - 32, 34, 104, 108, 110, 113, 116, 117, 122, 124, 125,
129, 130, 131 - 133, 136, 144, 145, 270, 271, 401, 403, 405 - 413, 415,
417 - 429, 436, 440, 443, 446, 447, 454, 457-460, 501, 503

Water Resources Research Act of 1984, 42 U.S.C. §§ 10301-10309.

Water Resources Development Act of 1996, 33 U.S.C. §§ 467-467j.

Watershed Protection and Flood Prevention Act, 16 U.S.C. §§ 1001-1008; 33 U.S.C. § 701 b.

Wetlands Loan Act, 16 U.S.C. §§ 715k-3-715k-5, as amended.

Wilderness Act, 16 U.S.C. §§ 1331-1336, as amended.

Wood Residue Utilization Act of 1980, 16 U.S.C. §§ 1681-1687.

PART 4
CONTRACTOR INTEGRITY PROVISIONS

January 14, 2015

CONTRACTOR INTEGRITY PROVISIONS

It is essential that those who seek to contract with the Commonwealth of Pennsylvania (“Commonwealth”) observe high standards of honesty and integrity. They must conduct themselves in a manner that fosters public confidence in the integrity of the Commonwealth contracting and procurement process.

- 1. DEFINITIONS.** For purposes of these Contractor Integrity Provisions, the following terms shall have the meanings found in this Section:
 - a. “Affiliate”** means two or more entities where (a) a parent entity owns more than fifty percent of the voting stock of each of the entities; or (b) a common shareholder or group of shareholders owns more than fifty percent of the voting stock of each of the entities; or (c) the entities have a common proprietor or general partner.
 - b. “Consent”** means written permission signed by a duly authorized officer or employee of the Commonwealth, provided that where the material facts have been disclosed, in writing, by prequalification, bid, proposal, or contractual terms, the Commonwealth shall be deemed to have consented by virtue of the execution of this contract.
 - c. “Contractor”** means the individual or entity, that has entered into this contract with the Commonwealth.
 - d. “Contractor Related Parties”** means any affiliates of the Contractor and the Contractor’s executive officers, Pennsylvania officers and directors, or owners of 5 percent or more interest in the Contractor.
 - e. “Financial Interest”** means either:
 - (1) Ownership of more than a five percent interest in any business; or
 - (2) Holding a position as an officer, director, trustee, partner, employee, or holding any position of management.
 - f. “Gratuity”** means tendering, giving, or providing anything of more than nominal monetary value including, but not limited to, cash, travel, entertainment, gifts, meals, lodging, loans, subscriptions, advances, deposits of money, services, employment, or contracts of any kind. The exceptions set forth in the *Governor’s Code of Conduct, Executive Order 1980-18*, the *4 Pa. Code §7.153(b)*, shall apply.
 - g. “Non-bid Basis”** means a contract awarded or executed by the Commonwealth with Contractor without seeking bids or proposals from any other potential bidder or

offeror.

2. In furtherance of this policy, Contractor agrees to the following:
 - a. Contractor shall maintain the highest standards of honesty and integrity during the performance of this contract and shall take no action in violation of state or federal laws or regulations or any other applicable laws or regulations, or other requirements applicable to Contractor or that govern contracting or procurement with the Commonwealth.
 - b. Contractor shall establish and implement a written business integrity policy, which includes, at a minimum, the requirements of these provisions as they relate to the Contractor activity with the Commonwealth and Commonwealth employees and which is made known to all Contractor employees. Posting these Contractor Integrity Provisions conspicuously in easily-accessible and well-lighted places customarily frequented by employees and at or near where the contract services are performed shall satisfy this requirement.
 - c. Contractor, its affiliates, agents, employees and anyone in privity with Contractor shall not accept, agree to give, offer, confer, or agree to confer or promise to confer, directly or indirectly, any gratuity or pecuniary benefit to any person, or to influence or attempt to influence any person in violation of any federal or state law, regulation, executive order of the Governor of Pennsylvania, statement of policy, management directive or any other published standard of the Commonwealth in connection with performance of work under this contract, except as provided in this contract.
 - d. Contractor shall not have a financial interest in any other contractor, subcontractor, or supplier providing services, labor, or material under this contract, unless the financial interest is disclosed to the Commonwealth in writing and the Commonwealth consents to Contractor's financial interest prior to Commonwealth execution of the contract. Contractor shall disclose the financial interest to the Commonwealth at the time of bid or proposal submission, or if no bids or proposals are solicited, no later than Contractor's submission of the contract signed by Contractor.
 - e. Contractor certifies to the best of its knowledge and belief that within the last five (5) years Contractor or Contractor Related Parties have not:
 - (1) been indicted or convicted of a crime involving moral turpitude or business honesty or integrity in any jurisdiction;
 - (2) been suspended, debarred or otherwise disqualified from entering into any contract with any governmental agency;
 - (3) had any business license or professional license suspended or revoked;
 - (4) had any sanction or finding of fact imposed as a result of a judicial or administrative proceeding related to fraud, extortion, bribery, bid rigging, embezzlement, misrepresentation or anti-trust; and

- (5) been, and is not currently, the subject of a criminal investigation by any federal, state or local prosecuting or investigative agency and/or civil anti-trust investigation by any federal, state or local prosecuting or investigative agency.

If Contractor cannot so certify to the above, then it must submit along with its bid, proposal or contract a written explanation of why such certification cannot be made and the Commonwealth will determine whether a contract may be entered into with the Contractor. The Contractor's obligation pursuant to this certification is ongoing from and after the effective date of the contract through the termination date thereof. Accordingly, the Contractor shall have an obligation to immediately notify the Commonwealth in writing if at any time during the term of the contract it becomes aware of any event which would cause the Contractor's certification or explanation to change. Contractor acknowledges that the Commonwealth may, in its sole discretion, terminate the contract for cause if it learns that any of the certifications made herein are currently false due to intervening factual circumstances or were false or should have been known to be false when entering into the contract.

- f. Contractor shall comply with the requirements of the *Lobbying Disclosure Act (65 Pa.C.S.*

§13A01 et seq.) regardless of the method of award. If this contract was awarded on a Non-bid Basis, Contractor must also comply with the requirements of the *Section 1641 of the Pennsylvania Election Code (25 P.S. §3260a)*.

- g. When Contractor has reason to believe that any breach of ethical standards as set forth in law, the Governor's Code of Conduct, or these Contractor Integrity Provisions has occurred or may occur, including but not limited to contact by a Commonwealth officer or employee which, if acted upon, would violate such ethical standards, Contractor shall immediately notify the Commonwealth contracting officer or the Office of the State Inspector General in writing.
- h. Contractor, by submission of its bid or proposal and/or execution of this contract and by the submission of any bills, invoices or requests for payment pursuant to the contract, certifies and represents that it has not violated any of these Contractor Integrity Provisions in connection with the submission of the bid or proposal, during any contract negotiations or during the term of the contract, to include any extensions thereof. Contractor shall immediately notify the Commonwealth in writing of any actions for occurrences that would result in a violation of these Contractor Integrity Provisions. Contractor agrees to reimburse the Commonwealth for the reasonable costs of investigation incurred by the Office of the State Inspector General for investigations of the Contractor's compliance with the terms of this or any other agreement between the Contractor and the Commonwealth that results in the suspension or debarment of the Contractor. Contractor shall not be responsible for investigative costs for investigations that do not result in the Contractor's suspension or debarment.
- i. Contractor shall cooperate with the Office of the State Inspector General in its investigation of any alleged Commonwealth agency or employee breach of ethical

standards and any alleged Contractor non-compliance with these Contractor Integrity Provisions. Contractor agrees to make identified Contractor employees available for interviews at reasonable times and places. Contractor, upon the inquiry or request of an Inspector General, shall provide, or if appropriate, make promptly available for inspection or copying, any information of any type or form deemed relevant by the Office of the State Inspector General to Contractor's integrity and compliance with these provisions. Such information may include, but shall not be limited to, Contractor's business or financial records, documents or files of any type or form that refer to or concern this contract. Contractor shall incorporate this paragraph in any agreement, contract or subcontract it enters into in the course of the performance of this contract/agreement solely for the purpose of obtaining subcontractor compliance with this provision. The incorporation of this provision in a subcontract shall not create privity of contract between the Commonwealth and any such subcontractor, and no third party beneficiaries shall be created thereby.

- j. For violation of any of these Contractor Integrity Provisions, the Commonwealth may terminate this and any other contract with Contractor, claim liquidated damages in an amount equal to the value of anything received in breach of these Provisions, claim damages for all additional costs and expenses incurred in obtaining another contractor to complete performance under this contract, and debar and suspend Contractor from doing business with the Commonwealth. These rights and remedies are cumulative, and the use or non-use of any one shall not preclude the use of all or any other. These rights and remedies are in addition to those the Commonwealth may have under law, statute, regulation, or otherwise.

SCHEDULE 15

ADDITIONAL FEDERAL REQUIREMENTS

1. **No Federal Government Obligations to Third Parties**
 - a. The Department and Development Entity acknowledge and agree that, notwithstanding any concurrence by the Federal Government in or approval of the solicitation of award of the underlying contract, absent the express written consent by the Federal Government, the Federal Government is not a party to this contract and shall not be subject to any obligations or liabilities to the Department, Development Entity, lessee, third party contractor or any other party (whether or not a party to that contract) pertaining to any matter resulting from the underlying contract.
 - b. The Development Entity agrees to include the above clause in each subcontract financed in whole or in part with Federal assistance provided by the FTA. It is further agreed that the clause shall not be modified, except to identify the subcontractor who will be subject to its provisions.
2. **False Statements or Claims, Civil and Criminal Fraud**
 - a. The Development Entity acknowledges and agrees that the provisions of the Program Fraud Civil Remedies Act of 1986, as amended, 31 USC § 3801 et seq. and U.S. Department of Transportation (DOT) regulations, “Program Fraud Civil Remedies,” 49 CFR Part 31, apply to its actions pertaining to this contract. The Development Entity certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, it may make, or causes to be made, pertaining to this contract or the FTA assisted project for which this contract work is being performed. In addition to other penalties that may be applicable, the Development Entity further acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission, or certification, assurance or representation to the Federal Government, the Federal Government reserves the right to impose the penalties of the Program Fraud Civil Remedies Act of 1986, as amended, on the Development Entity to the extent the Federal Government deems appropriate.
 - b. The Development Entity also acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission, or certification, assurance or representation in any agreement with the Federal Government in connection with a project that is financed in whole or in part with federal assistance originally awarded by the FTA under the authority of 49 USC Chapter 53, the Federal Government reserves the right to impose the penalties of 18 USC § 1001 and 49 USC § 5323(1), or other applicable Federal law on the Development Entity, to the extent the Federal Government deems appropriate.
 - c. The Development Entity agrees to include the above two clauses in each subcontract financed in whole or in part with federal assistance provided by the FTA. It is further agreed that the clauses shall not be modified, except to identify the Subcontractor who will be subject to the provisions.

3. **Access to Records and Reports**

- a. The Development Entity agrees to provide the Department, the FTA Administrator, the Comptroller General of the United States, the U.S. Secretary of Transportation, or any of their authorized representatives access to all books, documents, papers and records of the Development Entity that are directly pertinent to this contract for the purposes of making audits, examinations, excerpts and transcriptions, as required by 49 USC § 5323(g). The Development Entity also agrees, pursuant to 49 CFR 633.17, to provide the FTA Administrator or his authorized representatives access to the Contractor's records and construction sites pertaining to a major capital project, defined at 49 USC 5302(a)1, which is receiving federal financial assistance through the programs at 49 USC 5307, 5309, or 5311.
- b. The Development Entity agrees to permit any of the foregoing parties to reproduce by any means whatsoever or to copy excerpts and transcriptions as reasonably needed.
- c. The Development Entity agrees to maintain all books, records, accounts, and reports required under this contract for a period of not less than three (3) years after the date of termination or expiration of this contract, except in the event of litigation or settlement of claims arising from the performance of this contract, in which case the Development Entity agrees to maintain same until the Department, the FTA Administrator, the Comptroller General, or any of their duly authorized representatives, have disposed of all such litigation, appeals, claims or exceptions related thereto. *See* 2 CFR § 200.333.
- d. The Development Entity shall include the above three clauses, without modification (except to identify the subcontractor who will be subject to the provisions) in each subcontract financed in whole or in part with federal assistances provided by the FTA.

4. **Federal Changes**

The Development Entity shall comply with all applicable FTA regulations, policies, procedures and directives, including without limitation those listed directly or by reference in the Master Agreement between the Department and the FTA, as they may be amended or promulgated from time to time during the term of this contract. The Development Entity agrees that the Federal laws, regulations, and directives may change and that the changed provisions will apply to the Project, except to the extent that the FTA determines otherwise in writing. The Development Entity's failure comply shall constitute a material breach of this contract.

5. **Federal Civil Rights Laws and Regulations**

Each FTA recipient has agreed that it and its third party contractors at each tier will comply with:

- a. Federal Equal Employment Opportunity (EEO) Requirements. These include, but are not limited to:
 1. Nondiscrimination in Federal Public Transportation Programs. 49 U.S.C. Section 5332, covering projects, programs, and activities financed under 49 U.S.C. Chapter 53 prohibits discrimination on the basis of race, color, creed, national origin, sex, or age, and prohibits discrimination in employment or business opportunity.

2. Prohibition Against Employment Discrimination. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e, and Executive Order No. 11246, “Equal Employment Opportunity,” September 24, 1965, as amended by Executive Order No. 11375, October 13, 1967, that prohibit discrimination in employment on the basis of race, color, religion, sex, or national origin.
- b. Nondiscrimination on the Basis of Sex. Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. Sections 1681 et seq. and implementing Federal regulations, “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” 49 CFR Part 25 prohibit discrimination on the basis of sex.
- c. Nondiscrimination on the Basis of Age. The “Age Discrimination Act of 1974, as amended, 42 U.S.C. Sections 6101 et seq., and Department of Health and Human Services implementing regulations, “Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance, 45 CFR Part 90, prohibit discrimination by participants in federally assisted programs against individuals on the basis of age. The Age Discrimination in Employment Act (ADEA), 29 U.S.C. Sections 621 et seq., and Equal Employment Opportunity Commission (EEOC) implementing regulations, “Age Discrimination in Employment Act,” 29 CFR Part 1625, also prohibit employment discrimination against individuals on the basis of age.
- d. Federal Protections for Individuals with Disabilities. The Americans with Disabilities Act of 1990, as amended (ADA), 42 U.S.C. Sections 12101 et seq., prohibits discrimination against qualified individuals with disabilities in programs, activities, and services, and imposes specific requirements on public and private public and private entities. Third party contractors must comply with their responsibilities under Titles I, II, III, IV, and V of the ADA in employment, public services, public accommodations, telecommunications, and other provisions, many of which are subject to regulations issued by other Federal agencies.
- e. The Development Entity also agrees to include these requirements in each subcontract financed in whole or in part with federal assistance provided by FTA, modified only if necessary to identify the affected parties.

6. **Socio-Economic Development**

Each FTA recipient must comply with applicable Federal laws and regulations that provide competitive opportunities for a contractor that qualifies as a disadvantaged business enterprise (DBE), minority owned firm, women’s business enterprise, or small business.

- a. Disadvantaged Business Enterprises (DBES). Section 1101 (b) of MAP-21, 23 U.S.C. Section 101 note, extends the Federal statutory requirements that FTA make available at least 10 percent of its funding under that Act for contracts with small business concerns owned and controlled by socially and economically disadvantaged people. Each FTA recipient and sub recipient of FTA funding assists FTA in meeting this national goal. To receive FTA assistance, each FTA recipient and subrecipient of FTA funding must comply with applicable requirements of DOT regulations, “Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs,” 49 CFR Part 26. If the recipient is required to have a DBE

program, the third party contracts that the recipient has included in its DBE program determine whether the recipient meets the DBE threshold for goal setting, and the goal if the threshold is met.

- b. Small and Minority Firms and Women's Business Enterprises. The Common Grant Rules require each recipient and sub recipient to take steps to ensure that it uses small and minority firms and women's business enterprises (irrespective of whether they qualify as DBEs) to the fullest extent practicable. Notably, some potential contractors may have established their home office in a Historically Underutilized Business Zone (HUBZone). A HUBZone small business is determined, qualified, and certified by the Small Business Administration (SBA) and then added to the List of Qualified HUBZone Small Business Concerns at SBA's website at <http://www.sba.gov/hubzone>. Although the Common Grant Rule for governmental recipients includes labor surplus area firms in the category of firms authorized for special treatment, this circular does not include them because Section 7101(a) of the Federal Acquisition Streamlining Act of 1994, 15 U.S.C. Section 644 note, enacted after publication of the Common Grant Rule for governmental recipients removed nearly all labor surplus area preferences.

7. **Disadvantaged Business Enterprise (DBE) Assurance.**

- a. This is a federal-aid contract with a single DBE contract goal and only DBE attainment will be counted towards meeting that goal. However, the utilization of small and minority firms and women's business enterprises is also encouraged. The Development Entity shall provide periodic reports and utilization worksheets regarding utilization of such firms, separate from the reports and utilization worksheets for DBE firms.
- b. The Department has established a DBE race-conscious contract goal of 11.97% of the D&C Work. In executing this PPA, the Development Entity declares that it subscribes to the utilization goal and shall meet the goal or document that it could not meet them despite its good faith efforts. If the PPA is executed with DBE commitment(s) less than the established contract goal, the Development Entity shall thereafter continue to document its good faith efforts to achieve the established goal.

8. **Disadvantaged Business Enterprise Designated Special Provision.**

STATEMENT OF PURPOSE

The purpose of this Special Provision is to carry out the U.S. Department of Transportation's (DOT) policy of ensuring nondiscrimination in the award and administration of DOT assisted contracts and creating a level playing field on which firms owned and controlled by individuals who are determined to be socially and economically disadvantaged can compete fairly for DOT assisted contracts.

Section I. DEFINITIONS

The following definitions apply for terms used in this Special Provision:

- A. Broker.** An intermediary or middleman that does not take possession of a commodity or act as a regular dealer selling to the public.
- B. Commercially Useful Function.** A DBE performs a Commercially Useful Function (CUF) when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a CUF, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, installing (where applicable), and paying for the material itself.
- C. Committee.** The Department's DBE Good Faith Effort Review Committee.
- D. Days.** Calendar days as specified in 49 CFR Part 26, Section 26.5. In computing any interval of time described in this specification, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or state holiday, the period extends to the next day that is not a Saturday, Sunday or state holiday. Similarly, in circumstances where Department offices are closed for all or part of the last day, the period extends to the next day on which Department offices are open.
- E. Director.** The Director of the Bureau of Equal Opportunity.
- F. Disadvantaged Business Enterprise (DBE).** A for-profit small business concern that is 51% owned and controlled by socially and economically disadvantaged individuals as defined in the Department's Program.
- G. Disadvantaged Business Enterprise Participation.** Minority Participation and Commitment documented on the EO-380PT.
- H. DOT.** The United States Department of Transportation, including the Office of the Secretary, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA).
- I. Federal-Aid Contract.** Any contract between the Department and a contractor that is paid in whole or in part with DOT financial assistance.
- J. Good Faith Effort.** Efforts to achieve a DBE goal or other requirement of this Special Provision which, by their scope, intensity, and appropriateness of this objective can reasonably be expected to fulfill the program requirement.
- K. Interdisciplinary Review Team (IRT).** A team of three representing both the Bureau of Equal Opportunity and the Bureau of Public Transportation that performs the initial review of the Good Faith Effort documentation and makes the recommendation to the Director of the Bureau of Equal Opportunity.

- L. Manufacturer.** A firm that operates or maintains a factory or establishment that produces, on its premises, the materials, supplies, articles, or equipment required under this contract and of the general character described by the contract specifications.
- M. Race-Conscious.** A means or measure focused specifically on assisting DBEs only.
- N. Race-Neutral.** A means or measure used to assist all small businesses, not just DBEs. This includes gender-neutrality.
- O. Regular Dealer.** A DBE or SBE that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. To be a regular dealer, the firm must be established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided above if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis. Whether a DBE/SBE firm meets the criteria for being treated as a regular dealer is determined on a case-by-case basis.
- P. Revised DBE Participation.** Minority Participation and Commitment that is documented on the revised EO-380PT which includes new DBE firm(s) as well as those not affected by the revision.
- Q. Shortfall.** The difference between the dollar amount on the approved EO-380PTS DBE Participation form(s) and the amount of payments to the approved DBEs.
- R. Small Business Enterprise (SBE).** A for-profit small business concern certified by the Department as listed on www.dotsbe.pa.gov that meets the ownership and control requirements of the SBE certification program and the Personal Net Worth requirements of the SBE certification program.
- S. Transaction Expeditor/Broker.** A DBE/SBE packager, broker, manufacturer's representative or others who arrange or expedite transactions and who arrange for material drop-shipments.

SECTION II. REQUIRED DBE PROVISIONS

- A. Required DBE Assurances.** The Development Entity, or any sub-recipient, or any contractor or subcontractor utilized under this PPA, shall not discriminate based on race, color, national origin, or sex in the performance of this PPA. The Development Entity shall take all necessary and reasonable steps in accordance with 49 CFR Part 26 to ensure that DBEs have the maximum opportunity to compete for and perform subcontracts. Failure by the Development Entity to carry out these requirements is a

material breach of this PPA, which may result in the termination of this PPA or imposition of other available sanctions.

Each contract, that the Development Entity signs with a contractor, and each subcontract a prime contractor signs with a subcontractor, must include the following clauses:

The contractor, sub-recipient, or subcontractor must take all necessary and reasonable steps under 49 C.F.R. part 26 to ensure nondiscrimination in the award and administration of U.S. DOT- assisted sub-agreements, third party contracts, and third party subcontracts, as applicable.

The contractor, sub-recipient or subcontractor shall not discriminate based on race, color, national origin, or sex in the performance of this contract.

The contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted contracts. Failure, by the contractor to carry out these requirements, is a material breach of this contract, which may result in the termination of this contract or such other remedy as the grant recipient deems appropriate, which may include, but is not limited to:

1. Withholding monthly progress payments;
2. Assessing sanctions;
3. Liquidated damages; and/or
4. Disqualifying the contractor from future bidding as non-responsible.

Additionally, the following language must be included in any contract, proposal or bid document, submitted by the Development Entity: The Development Entity is certifying that the DBE goal or the assurances as stated in the proposal will be met by obtaining commitments from eligible DBEs, or that the Development Entity will provide acceptable evidence of good faith effort to meet the assurances or the commitment.

B. Prompt Payment. The Development Entity and prime contractors are required to make prompt payment under 49 CFR Part 26.29. A certification of prompt payment will be required to certify that all subcontractors were paid from the previous month's payments. The Development Entity will ensure that any prime contractor, who the Development Entity contracts with for work under this PPA, agrees to pay each subcontractor under the prime contract within thirty (30) days, unless a shorter timeframe is provided by the Department, of the prime contractor's receipt of payment from the Development Entity for undisputed services provided by the subcontractor. Furthermore, the Development Entity shall pay each subcontractor under this Project within thirty (30) days (unless a shorter timeframe is provided by the Department) of adequate performance of work for undisputed services. This clause applies to both DBE and non-DBE contractors. Any Contractor making payments to DBE/SBE subcontractors must complete and submit an EO-402 Monthly DBE/SBE Status Report.

SECTION III. REQUIRED PROVISIONS BINDING UPON THE DEVELOPMENT ENTITY, PRIME CONTRACTOR, SUB-RECIPIENT OR SUBCONTRACTOR.

Policy for Federally-Funded Projects. It is the policy of the DOT and the Department that DBEs, as defined in 49 CFR Part 26 (Part 26), Subpart A and in the Department's DBE Program Plan (Program), shall have the opportunity to participate in the performance of contracts financed in whole or in part with Federal funds. The DBE requirements of Part 26, and the Department's DBE Program, apply to this PPA as follows:

A. DBE Obligation. The Development Entity, or any sub-recipient, or any contractor or subcontractor the Development Entity utilizes under this PPA shall take all necessary and reasonable steps to ensure that all DBEs are afforded the opportunity to compete for and perform contracts. The Development Entity, contractor, sub-recipient, or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of the Department and DOT-assisted contracts.

B. Failure to Comply with DBE Requirements. Failure by the Development Entity, or any sub-recipient, or any contractor or subcontractor the Development Entity utilizes under this PPA to carry out these requirements, is a material breach of this PPA, which may result in termination of this PPA, withholding progress payments, assessing sanctions, assessing liquidated damages, or any other remedy that the Department deems appropriate. Failure to comply with DBE requirements may include, but are not limited to, failure to submit DBE Minority Participation and Commitment within the timeframe specified, failure to exert a reasonable Good Faith Effort to meet the established DBE goal, or failure to realize the approved DBE participation level set forth may result in the bidder being declared ineligible for the contract.

C. Small Business Enterprise (SBE) Participation. Recruitment and utilization of certified SBEs is in addition to all other equal opportunity requirements of the contract. There is no SBE contract goal.

SECTION IV. DISADVANTAGED BUSINESS ENTERPRISE IN FEDERAL AID CONTRACTS

As a recipient of federal funding from the Federal Transit Administration (FTA) the Department is required to establish DBE contract goals for this PPA and such goals, as stated in subsection 7 of Schedule 15 to this PPA is incorporated herein by reference, requiring the Development Entity to ensure the utilization of firms owned and controlled by socially and economically disadvantaged individuals certified as DBEs. This DBE goal remains in effect for the life of the project.

The Development Entity, contractor, grantee, subcontractor or sub-recipient shall include the provisions listed in Section 2.a, above, in every subcontract, so that such provisions will be binding not only upon the prime contractor but also upon each subcontractor, supplier, service provider or consultant.

Utilization of certified DBEs is in addition to all other equal opportunity requirements of the PPA.

DBE participation toward meeting the DBE goal for federal projects shall be counted as follows: If a firm is a certified DBE contractor or subcontractor at the time that submission of the bid is due, the total dollar value of the contract awarded to the certified DBE is counted toward the applicable DBE goal as provided below. Any services to be performed by a DBE are required to be readily identifiable to the project.

A. Construction.

1. Prime Contractor. A DBE prime contractor will receive credit for all work performed with its own forces. The Department strongly encourages DBE prime contractors to make additional outreach efforts to solicit DBEs to perform subcontracting work on the project.

2. Subcontractor. When a DBE participates in a contract directly as a subcontractor, or as a second-tier or lower-tier subcontractor, count only the value of the work performed by the DBE.

Count the entire amount of that portion of a construction contract that is performed by the DBE's own forces. Include the cost of supplies and materials obtained by the DBE for the work of the subcontract, including supplies purchased or equipment leased by the DBE.

When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count.

Count expenditures to a DBE contractor only if the DBE is performing a CUF on that contract.

B. Materials and Supplies.

1. DBE Manufacturer. If the materials or supplies are obtained from a DBE manufacturer, count 100% of the cost of the materials or supplies.

2. DBE Regular Dealer. If the materials or supplies are purchased from a DBE regular dealer, count 60% of the cost of the materials or supplies. There is no North American Industry Classification System (NAICS) code for a regular dealer.

3. DBE Transaction Expeditor/Broker. If the materials or supplies are purchased from a DBE which is neither a manufacturer nor a regular dealer, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, provided the fees are determined to be reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the materials and supplies themselves.

C. Service Providers. Count the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance the contract, provided the fee is reasonable and not excessive as compared with fees customarily allowed for similar services.

D. Trucking Firms. Count 100% of trucking costs using the following factors to determine what can be counted:

1. Count if the DBE is responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.
2. Count if the DBE owns and operates at least one fully-licensed, insured, and operational truck used on the contract.
3. Count the total value of the transportation services the DBE provides on the contract using trucks it owns, insures, and operates using drivers it employs.
4. The DBE may lease trucks from another DBE firm, including an owner-operator who is a certified DBE. If the DBE leases trucks from another DBE, count the total value of the transportation services the lessee DBE provides on the contract.
5. The DBE may also lease trucks from a non-DBE firm, including an owner-operator. If the DBE leases trucks from a non-DBE firm and the DBE operates these leased trucks (with its own forces), count the total value of the transportation services. If the DBE leases trucks from a non-DBE owner-operator, count only the fee or commission it paid as the result of the lease arrangement. Do not count the total value of the transportation services provided by the lessee (non-DBE owner- operator), since these services are not provided by a DBE.
6. For purposes of this provision, a lease must indicate that the DBE has exclusive use and control over the truck. This does not preclude the leased truck from being used for work for others during the term of the lease with the consent of the DBE so long as the lease gives the DBE absolute authority priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE. The lease must explicitly state that the DBE leases trucks without operators when the counting of the total value of transportation services is intended.

SECTION V. COUNTING SBE PARTICIPATION

- A. Recruitment and utilization of certified SBEs is in addition to all other equal opportunity requirements of the contract.
- B. There is no SBE goal.
- C. Count SBE participation the same as DBE participation.

SECTION VI. ACTIONS REQUIRED BY THE DEVELOPMENT ENTITY AT THE BIDDING STAGE AND PRIOR TO AWARD FOR PROJECTS WITH A DBE GOAL

A. Submission Preparation. The Development Entity is obliged to obtain and to provide all applicable NAICS codes for each proposed DBE and type of work that it will perform on the contract.

B. Submission Requirements. When the DBE goal established by the Department is met or exceeded, the apparent low bidder is required to submit evidence of such commitments at the bid opening as presented on Form EO-380PT.

When the DBE goal established by the Department is not met (the Department will not round up), the Development Entity shall demonstrate a Good Faith Effort (GFE) to meet the contract DBE goal. The Development Entity shall demonstrate that the efforts made were those that a bidder seeking to meet the DBE goal established by the Department would make, given all relevant circumstances. All submissions must include, as a part of the GFE documentation, copies of each DBE and non-DBE subcontractor quote when a non-DBE subcontractor was selected over a DBE subcontractor for work on the contract.

C. Good Faith Effort Requirements. The demonstration of GFEs is accomplished by seeking out DBE participation in the project given all relevant circumstances. The following illustrate the types of efforts that may be taken, but they are not deemed to be exclusive or exhaustive (for more guidance on GFE requirements, refer to Appendix A of Part 26). The Director and/or Committee will consider other factors and types of efforts that may be relevant:

1. efforts made to conduct market research to identify small business contractors and suppliers and solicit through all reasonable and available means (e.g., use of the PA UCP website, attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The Development Entity should provide written notification, at least 15 calendar days before the bid opening, to allow the DBEs to respond to the solicitation. The Development Entity must determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations;
2. efforts made to select portions of the work to be performed by DBEs to increase the likelihood that the DBE goal will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces;
3. efforts made to provide interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation;
4. efforts made to negotiate in good faith with interested DBEs. It is the Development Entity's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and

telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work. A bidder using good business judgment would consider a variety of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract DBE goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in and of itself sufficient reason for the Development Entity's failure to meet the contract DBE goal, so long as such costs are reasonable. Also, the ability or desire of the Development Entity to perform the work of a contract with its own work force does not relieve the Development Entity of the responsibility to make a GFE. The Development Entity is not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable;

5. the Development Entity's determination of a DBE as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within the industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the contract DBE goal. Another practice considered an insufficient GFE is the rejection of a DBE because its quotation for the work was not the lowest received. However, nothing in this paragraph shall be construed to require the Development Entity or prime contractor to accept unreasonable quotes to satisfy the contract DBE goal;

6. efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance;

7. efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services; and

8. efforts to effectively use the services of the Department's DBE Supportive Services Center; services of the Department's SBE Supportive Services Center; services of available minority/women community organizations; minority/women contractors' groups; local, State, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

SECTION VII. ACTIONS TO BE TAKEN BY THE DEPARTMENT BEFORE AWARD

Good Faith Effort Review. If the apparent low bidder fails to meet the contract DBE goal, the Department will review the GFE documentation. If, during the review of the Contractor's GFE information, the reviewers have questions, the Development Entity may be contacted for clarification. The GFE steps are as follows:

- A. IRT reviews and makes recommendation to the Director.
- B. The Director either:

1. approves recommendation that the GFE was met and the EO-380PT will be approved; or
2. recommends that the GFE Committee provide administrative reconsideration and render a determination.

C. If forwarded to them, the GFE Committee meets and makes the final determination. If the Committee determines that the apparent low bidder met the GFE, the EO-380PT will be approved. If the Committee determines that the apparent low bidder has failed to make a GFE, the bid will be rejected and the apparent low bidder will be notified of the rejection.

SECTION VIII. ACTION TO BE TAKEN BY THE DEPARTMENT DURING PROJECT

To ensure that all obligations awarded to DBEs under this PPA are met, the Department, upon request, will provide assistance in review of the Development Entity's DBE involvement efforts during the performance of the project whether or not the DBE is listed on the approved EO-380PT. The review will include a CUF review and analysis.

Sanctions. Upon completion of the work, the Department, upon request, will provide assistance in reviewing the actual DBE participation. Sanctions may be imposed for noncompliance or unwarranted shortfalls in the approved DBE goal.

A. DBE Participation. The Development Entity must continue to make GFEs for the life of the project. When the EO-380PT is approved with DBE participation less than the contract DBE goal, the Development Entity shall continue GFE toward meeting the contract DBE goal. The Development Entity shall ensure that the Commitment is attained. Proof of attainment is provided by payments to DBEs and documented by the Development Entity.

B. DBE Subcontractor Approval. Firms listed on form EO-380PT are not to commence work until they are approved by the Department.

All firms listed on the approved EO-380PT including those business types other than subcontractor (i.e. dealers, truckers, service providers), must be submitted for subcontractor approval after the contract is executed and approved before DBEs actual performance of work. The subcontractor request must be equal to or greater than the committed amount. The Development Entity shall submit for subcontractor approval any other DBE whether they are listed on the approved DBE Minority Participation and Commitment. When submitting request for subcontractor approval, the Development Entity shall attach a copy of the DBE subcontract or agreement.

C. Substitution. The Development Entity shall obtain written approval from the Department before substituting a DBE or making any change to the DBE participation listed on the approved EO-380PT or approved DBE subcontractor. The Development Entity shall immediately request substitution authorization from the Department in writing. The request must include documentation supporting the substitution and written agreement from the DBE to the change. The Development Entity shall include proof that a certified letter giving the DBE five (5) days to respond with acceptance or to notify the

Department of non-acceptance. The Development Entity must demonstrate to the Department that every effort has been made to allow the DBE to perform.

1. If the arrangement to be replaced is agreeable between the Development Entity and the DBE, the Development Entity shall:

a. make a GFE in accordance with subsection VIII(C)(1)(b), below, to subcontract the work with another DBE, or subcontract other work items to DBE firms, to make up the DBE shortfall. The Development Entity's inability to find a replacement DBE at the contract price is not, in and of itself, adequate to support a finding that GFEs have been made to replace the original DBE. The fact that the Development Entity has the ability and/or desire to perform the contract work with its own forces does not relieve the Development Entity of the obligation to make GFEs to find a replacement DBE, and it is not a sound basis for rejecting a prospective replacement DBE's reasonable quote;

b. when the substitution results in meeting the DBE goal, the Development Entity shall complete a revised EO-380PT and/or a revised subcontractor approval request within seven (7) days. If the DBE performed on the project, the revised EO-380PT and/or subcontractor approval request should include the total amount paid to the DBE before the DBE substitution; and

c. when the substitution does not result in meeting the DBE goal, the Development Entity shall provide a revised EO-380PT within five (5) days, with additional GFE documentation, including (1) a statement of efforts made to negotiate with DBEs for specific work or supplies, including the names, addresses, telephone numbers, and emails of those DBEs that were contacted; (2) the time and date each DBE was contacted; (3) a description of the information provided to DBEs regarding plans and specifications for portions of the work to be performed or the materials supplied; and (4) an explanation of why an agreement between the Development Entity and DBE was not reached. If the DBE performed on the project, the revised EO-380PT should include the total amount paid to the DBE before the DBE substitution.

2, Good Faith Effort Review. The Department will review the GFE documentation for substitution. If, during the review of the Development Entity's GFE information, the Interdisciplinary Review Team (IRT) has questions, the Development Entity may be contacted for clarification. The GFE steps are as follows:

a. The Department reviews and, if acceptable, approves the GFE and DBE revision or recommends that the IRT make the determination.

b. The IRT either:

i. approves the recommendation that the GFE was met and the substitution will be approved; or

ii. disapproves the GFE resulting in a shortfall requiring the contractor to continue GFEs.

- c. If forwarded to the IRT, the IRT makes a final determination.

The Development Entity shall not perform or have another perform any of the DBE work included in the substitution request without prior approval from the Department.

If the projected DBE participation on an approved EO-380PT meets or exceeds the DBE goal amount for the contract without replacing the DBE, then no contract shortfall exists. A revised EO-380PT and/or subcontractor approval request must be submitted by the Development Entity to reflect the decreased dollar amount.

- 3. If the arrangement to be replaced is not agreeable between the Development Entity and the DBE, the following procedures are required:

- a. Until a determination is made, the Development Entity or another cannot perform the DBE work without prior approval.

- b. The IRT will review and make a determination. The Department will notify both the Development Entity and the DBE of the decision.

- c. The Development Entity or the DBE may request a meeting with the Department by contacting the Bureau of Public Transportation.

D. SBE Participation. SBE Firms should not commence work until they are approved by the Department. The SBE, including those business types other than subcontractor (i.e. supplier, trucking, service provider), must be submitted to the Department for subcontractor approval after the contract is executed and approved before to SBEs actual performance of work.

E. Additional Work. When additional work is required for any classification of work, which is identified on the EO-380PT, to be performed by the DBE, at least 50% of this additional work will be performed by the same DBE unless the DBE submits, in writing, that it cannot perform the work due to its own limitations.

F. Payments. If the Development Entity withholds retainage, it shall make payments to its subcontractor(s) within thirty (30) days after the subcontractor's work is satisfactorily completed as defined in 49 CFR Part 26.29(c), in accordance with 49 CFR Part 26.29(b). The Development Entity shall document payments on EO-402 and submit to the Department.

G. Records and Reports. The Development Entity shall keep such project records as are necessary to determine compliance with DBE Requirements. These records can be used as GFE documentation. The Development Entity shall design its records to indicate:

- 1. the number of disadvantaged and non-disadvantaged subcontractors, small businesses, regular dealers, manufacturers, consultants, and service providers, and the type of work or services performed on or materials incorporated in this Project;

- 2. the progress and efforts made in seeking out DBE and SBE contractor organizations and individual DBEs and SBEs for work on this Project; and

3. documentation of all correspondence, personal contacts, telephone calls and the like to obtain the services of DBEs and SBEs for this Project. The Development Entity shall submit reports, as required by the Department. The Development Entity shall certify that the amounts were actually paid to the DBE and SBE for work performed on the Project and keep cancelled checks on file in the home office to reflect payment for the specific project and for inspection and audit by the Department. The Development Entity shall record the payment information on the EO-402 and document the following:

- a.** the number of contracts awarded to DBEs and SBEs, noting the type of work and amount of each contract executed with each firm and including the execution date of each contract;
- b.** the amount paid to each DBE and SBE during the month and the amount paid to date. If no payments are made to a DBE/SBE during the month, enter a zero (\$0.00) payment; and
- c.** paid invoices or a certification attesting to the actual amount paid to each firm, upon completion of the individual DBE's and SBEs work. In the event the actual amount paid is less than the award amount, the Development Entity shall provide a complete explanation of the difference.

In addition to the requirements in the PPA, the Development Entity shall maintain all such records related to DBE for a period of three (3) years following acceptance of final payment and shall make these records available for inspection by the Department and FTA at reasonable times and places.

SECTION IX. ATTACHMENTS REFERENCED

The attachments referenced above can be downloaded using the web addresses below:

Attachment 1: Form EO-354 PT, Commercially Useful Function Report

<http://www.dot.state.pa.us/public/PubsForms/Forms/EO-354PT.pdf>

Attachment 2: Form EO-402, Monthly DBE/SBE Status Report

<http://www.dot.state.pa.us/public/PubsForms/Forms/EO-402.pdf>

Attachment 3: Form EO-380PT, DBE Participation for Federal Projects

<http://www.dot.state.pa.us/public/PubsForms/Forms/EO-380PT.pdf>

Attachment 4: Form PT-27 DBE Project Compliance Review Checklist for Transit Systems

<http://www.dot.state.pa.us/public/PubsForms/Forms/PT-27.pdf>

Should you have any questions or concerns in completing the above attachments, you may contact the BEO for guidance. BEO can be reached by telephone at 717- 787-5891.

9. Disadvantaged Business Enterprise (DBE) Assurance.

The Contractor shall not discriminate on the basis of race, color, national origin or sex in the performance of this contract. The Contractor shall carry out applicable requirements of 49 C.F.R. Part 26 in the award and administration of United States Department of Transportation-assisted contracts. Failure by the Contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate, which may include, but is not limited to:

- a. Withholding monthly progress payments;
- b. Assessing sanctions;
- c. Liquidated damages; and/or
- d. Disqualifying the contractor from future bidding as non-responsible.

The Contractor must include this assurance in each contract into which it enters to carry out the project or activities being funded by this contract. For additional Disadvantaged Business Enterprise requirements please see the terms and conditions within the attached Agreement.

10. Incorporation of FTA Terms

The preceding provisions include, in part, certain standard terms and conditions required by DOT, whether or not expressly set forth in the preceding contract provisions. All contractual provisions required by DOT, as set forth in FTA Circular 4220.1F, “Third Party Contracting Guidance.” are hereby incorporated by reference. Anything to the contrary herein notwithstanding, all FTA mandated terms shall be deemed to control in the event of a conflict with other provisions contained in this agreement. The Development Entity shall not perform any act, fail to perform any act, or refuse to comply with any of the Department’s requests which would cause the Department to be in violation of the FTA terms and conditions.

11. Debarment and Suspension

DOT regulations, “Non-procurement Suspension and Debarment,” 2 CFR Part 1200 apply to each third party contract at any tier of \$25,000 or more, to each third party contract at any tier for a federally required audit (irrespective of the contract amount), and to each third party contract at any tier that must be approved by an FTA official irrespective of the contract amount. See, 2 CFR Part 1200. Thus, the recipient must apply DOT’s debarment and suspension requirements to itself and each third party contractor at every tier to the extent required by DOT’s regulations that incorporate the requirements of Office of Management and Budget (OMB), “Guidelines to Agencies on Government-wide Debarment and Suspension (Non-procurement),” 2 CFR Part 180.

- a. General Services Administration (GSA) Excluded Parties List System. Even though the recipient may collect a debarment and suspension certification from the prospective third party contractor, or include a clause in the third party contract requiring disclosure, FTA strongly recommends that the recipient check the Excluded Parties List System (EPLS). Now a part of the System for Awards Management (SAM), the EPLS is an electronic,

web-based system that identifies those parties excluded from receiving Federal contracts, certain subcontracts, and certain types of Federal financial and non-financial assistance and benefits. The EPLS keeps its user community aware of administrative and statutory exclusions across the entire government, and individuals barred from entering the United States. Go to www.sam.gov and the Extracts and Data Access area and click on the Public Data Access box to find the individual firm, individual or vessel you may seek.

- b. State Debarment and Suspension Lists. A recipient may also treat any prospective contractor or subcontractor listed on a centralized State government debarment and suspension list as non-responsible and ineligible for contract award.

12. **Buy America**

The Development Entity agrees to comply with 49 USC § 5323(j) and 49 CFR Part 661 and with implementing guidance FTA may issue, which provide that federal funds may not be obligated unless steel, iron, and manufactured products used in FTA-funded projects are produced in the United States, unless a waiver has been granted by FTA, or the product is subject to a general waiver. A Buy America Certification must be completed and submitted with a bid for any contract for the acquisition of goods or rolling stock and construction contracts. Bids that are not accompanied by a completed Buy America Certification must be rejected as nonresponsive.

A Certificate of Compliance, Buy America Certificate must be completed and submitted with EACH submittal regarding the acquisition of goods or rolling stock and construction contracts. Submittals that are not accompanied by a completed Buy America Certificate will be rejected. In addition to this, the Development Entity must provide:

- a. Written documentation, on Manufacturer's letterhead, which verifies that the manufactured product being submitted complies with Buy America Requirements, or
- b. Mill Certificates which verify that the steel or iron product being submitted complies with Buy America Requirements.

13. **Lobbying**

Public Law 101-121, Section 319, 31 U.S. Code Section 1352, prohibits the recipient or any lower tier subcontractors of a federal contract, grant, loan or cooperative agreement from expending federal funds to pay any person for influencing or attempting to influence any officer or employee of a federal agency or Congress in connection with the awarding of any federal contract, the making of any federal grant or loan or the entering into of any cooperative agreement. In addition, the Development Entity will comply with other applicable Federal laws and regulations prohibiting the use of Federal assistance for activities designed to influence Congress or a State legislature with respect to legislation or appropriations, except through proper, official channels; and the Development Entity will comply, with U.S. DOT regulations, "New Restrictions on Lobbying," 49 C.F.R. Part 20, modified as necessary by 31 U.S.C. § 1352, as amended. The Development Entity agrees to comply with the Lobbying Certification form attached to the ITP, which an authorized official of the Development Entity has executed and submitted with its proposal.

The Development Entity also agrees to include these requirements in each subcontract exceeding \$100,000 financed in whole or in part with Federal assistance provided by the FTA.

14. **Clean Air**

- a. The Development Entity agrees to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act, as amended, 42 USC § 7401 *et seq.* and with U.S. EPA Regulations, “Determining Conformity of Federal Actions to State or Federal Implementation Plans,” 40 CFR Part 93, Subpart A. The Development Entity agrees to report each violation to the Department and understands and agrees that the Department will, in turn, report each violation as required to assure notification to the FTA and the appropriate EPA Regional Office.
- b. The Development Entity also agrees to include these requirements in each subcontract exceeding \$100,000 financed in whole or in part with federal assistance provided by the FTA.
- c. To the extent that the following applies to this contract, the Development Entity agrees to comply with U.S. EPA regulations, “Control of Air Pollution from Mobile Sources,” 40 CFR Part 85; U.S. EPA regulations, “Control of Emissions from New and In-Use Highway Vehicles and Engines,” 40 CFR Part 86; and U.S. EPA regulations, “Fuel Economy and Greenhouse Gas Exhaust Emissions of Motor Vehicles,” 40 CFR Part 600, and any revisions thereto.

15. **Clean Water**

- a. The Development Entity agrees to comply with all applicable standards, orders and regulations issued pursuant to the Federal Water Pollution Control Act, as amended, 33 USC § 1251 *et seq.* The Development Entity agrees to report each violation to the Department and understands and agrees that the Department will, in turn, report each violation as required to assure notification to the FTA and the appropriate EPA Regional Office.
- b. The Development Entity also agrees to include these requirements in each subcontract exceeding \$100,000 financed in whole or in part with federal assistance provided by the FTA.

16. **Cargo Preference**

The Development Entity agrees to comply with 46 USC § 55305 and U.S. Maritime Administration Regulations, “Cargo Preference – U.S. Flag Vessels,” 46 CFR Part 381, to the extent those regulations apply to this project:

- a. To use privately owned and United States Flag commercial vessels to ship at least 50 percent of the gross tonnage (computed separately for dry bulk carriers, dry cargo liners, and tankers) involved, whenever shipping the equipment, material or commodities pursuant to the underlying contract to the extent such vessels are available at fair and reasonable rates for United States Flag commercial vessels;
- b. To furnish within 20 working days following the date of loading for shipments originating within the United States or within 30 working days following the date of loading for shipments originating outside the United States, a legible copy of a rated, "on-board" commercial ocean bill-of-lading in English for each shipment of cargo described in the preceding paragraph to the Division of National Cargo, Office of Market

Development, Maritime Administration, Washington, DC 20590 and to the Department (through the Development Entity in the case of a subcontractor's bill-of-lading.); and

- c. To include these requirements in all subcontracts issued pursuant to this contract when the subcontract may involve the transport of equipment, material, or commodities by ocean vessel.

17. **Fly America**

The Development Entity agrees to comply with 49 USC § 40118 (the Fly America Act) in accordance with the General Services Administration's regulations at 41 CFR Part 301-10, which provide that Recipients and subrecipients of federal funds and their contractors are required to use United States Flag air carriers for U.S. Government financed international air travel and transportation of their personal effects or property, to the extent such service is available, unless travel by foreign air carrier is a matter of necessity, as defined by the Fly America Act. The Development Entity shall submit, if a foreign air carrier was used, an appropriate certification or memorandum adequately explaining why service by a United States Flag air carrier was not available or why it was necessary to use a foreign air carrier and shall, in any event, provide a certificate of compliance with the Fly America requirements. The Development Entity agrees to include the requirements of this section in all subcontracts that may involve international air transportation.

18. **Davis Bacon and Associated Provisions**

- a. **Minimum Wages.** All laborers and mechanics employed or working upon the site of work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the Project), will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act, 29 CFR 3), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at the time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the Development Entity and such laborers and mechanics. Contributions made or costs reasonably anticipated for bona fide benefits under Section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics subject to the provisions of 29 CFR 5.5(a)(1)(iv); also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs that cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to skill, except as provided at 29 CFR 5.5(a)(4). Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein; provided, that the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination and the Davis-Bacon poster (WH-1321) shall be posted at all times by the Development Entity and its subcontractors at the

site of the work in a prominent and accessible place where it can be easily seen by the workers.

- b. Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the Development Entity shall either pay the benefits as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.
- c. If the Development Entity does not make payments to a trustee or other third person, the Development Entity may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, provided, that the Secretary of Labor has found, upon the written request of the Development Entity, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the Development Entity to set aside in a separate account assets for the meeting of obligations under the plan or program.
 1. The contracting officer shall require that any class of laborers or mechanics that is not listed in the wage determination and that is to be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefor only when the following criteria have been met:
 - i. The work to be performed by the classification requested is not performed by a classification in the wage determination; and
 - ii. The classification is utilized in the area by the construction industry; and
 - iii. The proposed wage, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.
 2. If the Development Entity and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the contracting officer to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington D.C. 20210. The Administrator, or an authorized representative, will approve, modify or disapprove every additional classification action within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.
 3. In the event the Development Entity, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and the wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination within

30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

4. The wage rate (including fringe benefits where appropriate) determined pursuant to 29 CFR 5.5(a)(1)(v)(B) or 29 CFR 5.5 (a)(1)(v)(C) shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.
5. Withholding. The Federal Transit Administration (FTA) shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld from the Development Entity, under this agreement or any other Federal contract with the same recipient or any other Federally assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same Development Entity, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees and helpers, employed by the Development Entity or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee or helper, employed or working on the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the FTA assisted project), all or part of the wages required by the contract, FTA may, after written notice to the Development Entity, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance or guarantee of funds until such violations have ceased.

d. Payrolls and Basic Records

1. Payrolls and basic records relating thereto shall be maintained by the Development Entity during the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1947, in the construction or development of the project). Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in Section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in Section 1(b)(2)(B) of the Davis-Bacon Act, the Development Entity shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual costs incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification

of trainee programs, the registration of the apprentices and trainees, and the ratios wage rates prescribed in the applicable programs.

- i. The Development Entity shall submit weekly for each week in which any contract work was performed a copy of all payrolls to FTA if FTA is a party to the contract; but if FTA is not such a party, the Development Entity will submit the payrolls to the Department for transmission to FTA. The payrolls submitted shall set out accurately and completely all the information required to be maintained under 29 CFR 5.5 (a)(3)(i). This information may be submitted in any form desired. Optional form WH-347 is available for this purpose and may be purchased from the Superintendent of Documents (Federal Stock No. 029-005-00014-1), U.S. Government Printing Office, Washington D.C. 20402. The Development Entity is responsible for the submission of copies of payrolls by all subcontractors.
 - ii. Each payroll submitted shall be accompanied by a "Statement of Compliance," signed by the Development Entity or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following:
 - (a) That the payroll for the payroll period contains the information required to be maintained under 29 CFR 5.5 (a)(3)(i) and that such information is correct and complete;
 - (b) That each laborer or mechanic (including each helper, apprentice and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth at 29 CFR 3; and
 - (c) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.
2. The weekly submission of a properly executed certification set forth on the reverse side of optional form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance" required by 29 CFR 5.5 (a)(3)(ii)(B).
 3. The falsification of any of the above certifications may subject the Development Entity or subcontractor to civil or criminal prosecution under 18 USC 1001 and 31 USC 231.
 4. The Development Entity or subcontractor shall make the records required under 29 CFR 5.5 (a)(3)(i) available for inspection, copying or transcription by authorized representatives of FTA or the Department of Labor, and shall permit such representatives to interview employees during working hours on the job. If

the Development Entity or subcontractor fails to submit the required records or make them available, FTA may, after written notice to the Development Entity, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or make such records available may be grounds for debarment actions pursuant to 29 CFR 5.12.

e. Apprentices and Trainees

1. Apprentices. Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training or with a state apprenticeship agency recognized by the Bureau of is a person is employed in his or her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the by the Bureau of Apprenticeship and Training or a state apprenticeship agency (where appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the Development Entity as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site greater than the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the Development Entity's or subcontractor's registered program shall be observed. Every apprentice must be paid at nor less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeyman's hourly rate specified in accordance with the provisions of the apprenticeship program. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator of the Wage and Hour Division of the U.S. Department of Labor determines that a different practice prevails for the applicable apprentice classification, fringe benefits shall be paid in accordance with that determination. In the event the Bureau of Apprenticeship and Training, or a state apprenticeship agency recognized by the Bureau withdraws approval of an apprenticeship program, the Development Entity will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

2. Trainees. Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration. The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration. Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate on the wage determination that provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site greater than the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In the event the Employment and Training Administration withdraws approval of a training program, the Development Entity will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.
3. Equal Employment Opportunity. The utilization of apprentices, trainees and journeymen under 29 C.F.R. Part 5 shall be in conformity with the Equal Employment Opportunity requirements of Executive Order No. 11246, as amended, and 29 CFR Part 30.

f. Subcontracts. The Development Entity or subcontractor shall insert into any subcontract(s) the clauses contained in 29 CFR 5.5(a)(1) thru (10), and such other clauses as the FTA may by appropriate instructions require, and also a clause requiring subcontracts to include these clauses in any lower tier subcontracts. The Development Entity shall be responsible for compliance by any subcontractor or lower tier subcontractor with all the contract clauses in 29 CFR 5.5.

g. Contract Termination, Disbarment. A breach of the contract clauses in 29 CFR 5.5 may be grounds for termination of the contract, and for debarment as a contractor and a subcontractor as provided in 29 CFR 5.12.

h. Compliance with Davis-Bacon and Related Act Requirements. All rulings and interpretations of the Davis-Bacon and related acts contained in 29 CFR Parts 1, 3 and 5 are incorporated herein by reference.

i. Disputes Concerning Labor Standards. Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR Parts 5, 6 and 7. Disputes within the meaning of this clause include disputes between the Development Entity (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor or the employees or their representatives.

19. Certification of Eligibility

By entering into this agreement or a third party contract financed under this agreement, the Development Entity certifies that neither it (nor he nor she) nor any person or firm that has an interest in the Development Entity's firm is a person or firm ineligible to be awarded government contracts by virtue of Section 3(a) of the Davis-Bacon Act or 29 CFR 5.12 (a)(1). No part of this contract shall be subcontracted to any person or firm ineligible for award of a government contract by virtue of Section 3(a) of the Davis-Bacon Act or 29 CFR 5.12 (a)(1). The penalty for making false statements is prescribed in the U.S. Criminal Code, 19 USC 1001.

20. Contract Work Hours and Safety Standards Act

a. The Development Entity agrees to comply with 40 USC § 3701 *et seq.*, specifically, the wage and hour requirements of Section 102 of that Act at 40 USC § 3702, and implementing U.S. Department of Labor regulations, "Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction Also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety Standards Act," 29 CFR Part 5; and the safety requirements of Section 107 of that Act at 40 USC § 3704, and implementing U.S. Department of Labor regulations, "Safety and Health Regulations for Construction," 29 CFR Part 1926, and any amendments thereto.

b. Overtime Requirements. No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any work week in which he or she is employed on such work to work in excess of forty hours in such work week unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such work week.

c. Violation; Liability for Unpaid Wages; Liquidated Damages. In the event of any violation of the requirements of 29 CFR 5.5 (b)(1), the Development Entity and any Subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such district or to such territory) for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic including watchmen and guards, employed in violation of 29 CFR 5.5 (b)(1) in the sum of \$10 for each calendar day on which such individual was required or permitted to work more than the standard work week of forty hours without payment of the overtime wages required by 29 CFR (b)(1).

d. Withholding for Unpaid Wages and Liquidated Damages. FTA or the recipient shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the Development Entity or Subcontractor under any such contract or any other federal

contract with the same prime contractor, or any other federally assisted contract subject to the contract work hours and safety standards act, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or Subcontractor for unpaid wages and liquidated damages as provided in the clause set forth at 29 CFR 5.5 (b)(2).

e. Subcontracts. The Development Entity or subcontractor shall insert in any subcontracts the clauses set forth in Paragraphs a., b., c. and d. above and a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The Development Entity shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in this section.

21. **Copeland Anti-Kickback Act**

For all third-party construction and repair contracts exceeding \$100,000, the Common Grant Rules require provisions for compliance with the Copeland “Anti-Kickback” Act, as amended, 18 USC §§ 874 and 3145, and implementing DOL regulations, “Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in part by Loans or Grants from the United States,” 29 CFR Part 3. The Act prohibits a contractor from inducing, by any means, any employee to give up any part of their compensation to which they are otherwise entitled. Section 4104(c) of the Federal Acquisition Streamlining Act of 1994, 40 USC 3701(b)(3)(A)(iii), increased the threshold for construction and repair to \$100,000 from \$2,000 as set forth in the Common Grant Rules, so that a federally assisted construction contract must exceed \$100,000 before these “Anti-Kickback” prohibitions apply to the contract.

This provision shall be included in all applicable subcontracts.

22. **Bonding Requirements**

The Development Entity agrees to comply with the bid bonding, contract performance and payment bonding, and maintenance bonding requirements set forth in the bid documents.

23. **Seismic Safety**

The Development Entity shall comply with the Earthquake Hazards Reduction Act of 1977, as amended, 42 USC § 7701 *et seq.*, in accordance with Executive Order No. 12699, “Seismic Safety of Federal and Federally-Assisted or Regulated New Building Construction,” 42 USC § 7704, and comply with implementing DOT regulations, “Seismic Safety,” 49 CFR Part 41 (more specifically 49 CFR § 41.117). The Development Entity agrees that any new building or addition to an existing building will be designed and constructed in accordance with the standards for Seismic Safety required in Department of Transportation Seismic Safety Regulations 49 CFR 41 and will certify to compliance to the extent required by the regulation. The Development Entity also agrees to ensure that all work performed under this contract including work performed by a subcontractor is in compliance with the standards required by the Seismic Safety Regulations and the certification of compliance issued on the project.

24. **Energy Conservation**

The Development Entity shall comply with the applicable mandatory energy standards and policies of state energy conservation plans contained in the state conservation plan issued in

compliance with and under the Energy Policy and Conservation Act, as amended, 42 USC § 6321 *et seq.*, except to the extent that the Federal Government determines otherwise in writing. The Development Entity shall always comply with all applicable FTA regulations, policies, procedures and directive, including without limitation those listed directly or by reference in the Master Agreement between the Department and FTA, as they may be amended or promulgated from time to time during the term of this contract. As applicable, the Development Entity shall perform an energy assessment for any building constructed, reconstructed or modified with FTA assistance, in compliance with FTA regulations, "Requirement for Energy Assessments," 49 CFR Part 622, Subpart C. The Development Entity's failure to so comply shall constitute a material breach of this contract.

25. **Recycled Products**

To the extent practical and economically feasible, the Development Entity agrees to provide a competitive preference for products and services that conserve national resources, protect the environment and are energy efficient as provided for in The Resource Conservation and Recovery Act of 1976, 42 U.S.C. Section 6962, which requires governmental recipients to provide a competitive preference to products and services that conserve natural resources, protect the environment, and are energy efficient. EPA guidelines, "Comprehensive Procurement Guideline for Products Containing Recovered Materials," 40 CFR Part 247, direct that third party contracts of \$10,000 or more with governmental recipients specify a competitive preference for products containing recycled materials identified in those EPA guidelines. For information about EPA's recovered materials advisory notices, see EPA's Web site.

26. **27. ADA Access**

The Development Entity agrees to comply with all applicable requirements of the American with Disabilities Act of 1990 (ADA), 42 USC 12101 *et seq.*; Section 504 of the Rehabilitation Act of 1973, as amended, 29 USC 794; 49 USC 5301(d); and the following regulations and any amendments thereto:

- a. DOT regulations, "Transportation Services for Individuals with Disabilities (ADA)," 49 CFR 37;
- b. DOT regulation, "Nondiscrimination on the Basis of Handicap in Programs and Activities receiving or Benefiting from Federal Financial Assistance," 49 CFR 27;
- c. Joint U.S. Architectural and Transportation Barriers Compliance Board and DOT regulations, "Americans With Disabilities (ADA) Accessibility Specifications for Transportation Vehicles," 36 CFR 1192 and 49 CFR Part 38;
- d. U.S. Department of Justice (DOJ) regulations, "Nondiscrimination on the Basis of Disability in State and Local Government Service," 28 CFR 35;
- e. DOJ regulations, "Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities," 28 CFR 26;
- f. U.S. General Services Administration regulations, "Accommodations for the Physically Handicapped," 41 CFR 101-19;

- g. U.S. Equal Employment Opportunity Commission, "Regulations to Implement the Equal Employment Provisions of the American with Disabilities Act," 29 CFR 1630;
- h. U.S. Federal Communications Commission regulations, "Telecommunications Relay Services and Related Customer Premises Equipment for the Hearing and Speech Disabled," 47 CFR 64, Subpart F;
- i. U.S. ATBCB regulations, "Electronic and Information Technology Accessibility Standards," 36 CFR 1194; and
- j. FTA regulations, "Transportation for Elderly and Handicapped Persons," 49 CFR 609.

27. **Notification of Federal Participation**

To the extent required by law, the Development Entity agrees to specify the amount of federal assistance in any subcontract having an aggregate value of \$500,000 or more for goods and services, including construction services, and to express the amount of federal assistance as a percentage of the total cost of that subcontract.

28. **Environmental Protection**

The Development Entity and its subcontractor(s) agree to comply with all applicable requirements of the National Environmental Policy Act of 1969, as amended, 42 USC 4321 et seq., Executive Order No. 11514, as amended, Protection and Enhancement of Environmental Quality, 42 USC 4321 note; FTA statutory requirements on environmental matters at 49 USC 5324(b); Council on Environmental Quality regulations on compliance with the National Environmental Policy Act of 1969, as amended, 40 CFR 1500 et seq.; joint FHWA/FTA regulations, Environmental Impact and Related Procedures, 23 CFR 771 and 49 CFR 622; and when promulgated, FHWA/FTA joint regulations, "NEPA and Related Procedures for Transportation Decision making, Protection of Public Parks, Wildlife and Waterfowl Refuges, and Historic Sites," 23 CFR 1420 and 49 CFR 623.

- a. **Use of Public Lands:** The Development Entity and its subcontractors agree that it will not use any publicly owned land from a park, recreation area, or wildlife or waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, and will not use any land from a historic site of national, State, or local significance unless the Federal Government makes the findings required by 49 USC 303.
- b. **Wild and Scenic Rivers:** The Development Entity and its subcontractors agree to comply with the Wild and Scenic Rivers Act of 1968, as amended, 16 USC 1271 et. seq. relating to protecting components of the national wild and scenic rivers system.
- c. **Coastal Zone Management:** The Development Entity and its subcontractors agree to assure consistency with the approved State management program developed under the Coastal Zone Management Act of 1972, as amended, 16 USC 1451 et. seq.
- d. **Wetlands:** The Development Entity and its subcontractors agree to comply with the protections for wetlands in accordance with Executive Order No. 11990, as amended, "Protection of Wetlands," 42 USC 4321 note.

- e. Floodplains: The Development Entity and its subcontractors agree to comply with the flood hazards protections in floodplains in accordance with Executive Order No. 11988, as amended, “Floodplain Management” 42 USC 4321 note.
- f. Endangered Species: The Development Entity and its subcontractors agree to comply with the protections for endangered species of the Endangered Species Act of 1973, as amended, 16 USC 1531 et. seq.
- g. Historical Preservation: The Development Entity agrees to assist the Department in complying with the Federal historic and archaeological preservation requirements of Section 106 of the National Historic Preservation Act, as amended, 16 USC 470f to avoid or mitigate adverse effects on those historic properties.
- h. Mitigation Of Adverse Environmental Effects: Should the Project cause or result in adverse environmental effects, the Development Entity agrees to assist the Department in taking all reasonable measures to minimize those adverse effects as required by 49 USC 5324(b), and other applicable Federal laws and regulations, including joint FHWA/FTA regulations, “Environmental Impact and Related Procedures,” 23 CFR 771 and 49 CFR 662. The Development Entity and its subcontractors agree to comply with all environmental mitigation measures identified as commitments in applicable environmental documents (i.e., environmental assessments, environmental impact statements, memoranda of agreement, and documents required by 49 USC 303) and with any conditions imposed by the Federal Government in a finding of no significant impact or record of decision.
- i. Environmental Justice: The Development Entity and its subcontractors agree to comply with the policies of Executive Order No. 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” 42 USC 4321 note.

29. Prohibited Interest

No member, officer, or employee of the Department, during their tenure or for one year thereafter, shall have any interest, direct or indirect, in this contract or the proceeds therefrom. The Department’s officers, employees or agents shall neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to sub agreements.

30. Interest of Members or Delegates to Congress

No member or delegate to the Congress of the United States shall be admitted to any share or part of this contract or receive any benefit arising therefrom.

31. Insurance

At a minimum, the Development Entity shall comply with the insurance requirements imposed by the Pennsylvania and local County governments or as otherwise required in the specifications for the project. In accordance with section 102(a) of the Flood Disaster Protection Act of 1973, 42 USC 4012(a), the Development Entity assures that, in the course of implementing the project, it will obtain appropriate insurance for any real estate acquired or construction undertaken within any special flood hazard area as identified by the Federal Insurance Administrator. It is

understood that such insurance is available in the participating area through the U.S. Federal Emergency Management Agency's National Flood Insurance Program.

32. Seat Belt Use

Pursuant to Executive Order No. 13043, April 16, 1997, 23 USC 402, the Development Entity and its subcontractor(s) are encouraged to adopt on-the-job seat belt use policies and programs for its employees when operating company-owned, rented, or personally-operated vehicles.

33. Texting While Driving and Distracted Driving

Consistent with Executive Order No. 13513, "Federal Leadership on Reducing Text Messaging While Driving," October 1, 2009, 23 USC 402 note, and DOT Order 3902.10, "Text Messaging While Driving," December 30, 2009, FTA encourages each third party contractor to promote policies and initiatives for its employees and other personnel that adopt and promote safety policies that decrease crashes by distracted drivers, including policies to ban text messaging while driving, and to include this provision in each third party subcontract involving the project.

34. Neutrality in Labor Relations

To the extent permitted by law, the Development Entity and its subcontractors agrees to comply with Executive Order No. 13202, "Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects," Executive Order No. 13202, as amended by Executive Order 13208, 41 USC 251 note which, among other things, prohibits requirements for affiliation with a labor organization as a condition of award of any third party contracts or subcontract for construction or construction management services.

35. Construction Reports

The Development Entity agrees to provide progress reports and such other information to the Department as the FTA or the Commonwealth of Pennsylvania may require the Department to provide, including but not limited to Commonwealth of Pennsylvania STD-28, "Monthly Contract Compliance Report for Construction Contractors."

36. Sensitive Security Information

Each third party contractor must protect, and take measures to ensure that its subcontractors at each tier protect, "sensitive security information" made available during the administration of a third party contract or subcontract to ensure compliance with 49 USC 40119(b) and implementing DOT regulations, "Protection of Sensitive Security Information," 49 CFR 15, and with 49 USC 114(r) and implementing Department of Homeland Security regulations, "Protection of Sensitive Security Information," 49 CFR 1520.

37. Rights in Data

The following requirements apply to each contract involving experimental, developmental or research work:

- a. The term "subject data" used in this clause means recorded information, whether or not copyrighted, that is delivered or specified to be delivered under the contract. The term includes graphic or pictorial delineation in media such as drawings or photographs; text

in specifications or related performance or design-type documents; machine forms such as punched cards, magnetic tape, or computer memory printouts; and information retained in computer memory. Examples include, but are not limited to: computer software, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identifications, and related information. The term "subject data" does not include financial reports, cost analyses, and similar information incidental to contract administration.

- b. The following restrictions apply to all subject data first produced in the performance of the contract to which this Attachment has been added:
1. Except for its own internal use, the Department or Consultant may not publish or reproduce subject data in whole or in part, or in any manner or form, nor may the Department or Consultant authorize others to do so, without the written consent of the Federal Government, until such time as the Federal Government may have either released or approved the release of such data to the public; this restriction on publication, however, does not apply to any contract with an academic institution.
 2. In accordance with 49 C.F.R. § 18.34 and 49 C.F.R. § 19.36, the Federal Government reserves a royalty-free, non-exclusive and irrevocable license to reproduce, publish, or otherwise use, and to authorize others to use, for "Federal Government purposes," any subject data or copyright described in subsections (2)(b)1 and (2)(b)2 of this clause below. As used in the previous sentence, "for Federal Government purposes," means use only for the direct purposes of the Federal Government. Without the copyright owner's consent, the Federal Government may not extend its Federal license to any other party.
 3. Any subject data developed under that contract, whether or not a copyright has been obtained; and
 4. Any rights of copyright purchased by the Department or Consultant using Federal assistance in whole or in part provided by FTA.
- c. When FTA awards Federal assistance for experimental, developmental, or research work, it is FTA's general intention to increase transportation knowledge available to the public, rather than to restrict the benefits resulting from the work to participants in that work. Therefore, unless FTA determines otherwise, the Department and the Consultant performing experimental, developmental, or research work required by the underlying contract to which this Attachment is added agrees to permit FTA to make available to the public, either FTA's license in the copyright to any subject data developed during that contract, or a copy of the subject data first produced under the contract for which a copyright has not been obtained. If the experimental, developmental, or research work, which is the subject of the underlying contract, is not completed for any reason whatsoever, all data developed under that contract shall become subject data as defined in subsection (a) of this clause and shall be delivered as the Federal Government may direct. This subsection (c), however, does not apply to adaptations of automatic data processing equipment or programs for the Department or Consultant's use whose costs are financed in whole or in part with Federal assistance provided by FTA for transportation capital projects.

- d. Unless prohibited by state law, upon request by the Federal Government, the Department and the Consultant agree to indemnify, save, and hold harmless the Federal Government, its officers, agents, and employees acting within the scope of their official duties against any liability, including costs and expenses, resulting from any willful or intentional violation by the Department or Consultant of proprietary rights, copyrights, or right of privacy, arising out of the publication, translation, reproduction, delivery, use, or disposition of any data furnished under that contract. Neither the Department nor the Consultant shall be required to indemnify the Federal Government for any such liability arising out of the wrongful act of any employee, official, or agents of the Federal Government.
- e. Nothing contained in this clause on rights in data shall imply a license to the Federal Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Federal Government under any patent.
- f. Data developed by the Department or Consultant and financed entirely without using Federal assistance provided by the Federal Government that has been incorporated into work required by the underlying contract to which this Attachment has been added is exempt from the requirements of subsections (b), (c), and (d) of this clause, provided that the Department or Consultant identifies that data in writing at the time of delivery of the contract work.
- g. Unless FTA determines otherwise, the Consultant agrees to include these requirements in each subcontract for experimental, developmental, or research work financed in whole or in part with Federal assistance provided by FTA.
- h. Unless the Federal Government later makes a contrary determination in writing, irrespective of the Consultant's status (i.e., a large business, small business, state government or state instrumentality, local government, nonprofit organization, institution of higher education, individual, etc.), the Department and the Consultant agree to take the necessary actions to provide, through FTA, those rights in that invention due the Federal Government as described in U.S. Department of Commerce regulations, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements, 37 C.F.R. Part 401.
- i. The Consultant also agrees to include these requirements in each subcontract for experimental, developmental, or research work financed in whole or in part with Federal assistance provided by FTA.

38. **Patent Rights**

These following requirements apply to each contract involving experimental, developmental, or research work:

- a. General - If any invention, improvement, or discovery is conceived or first actually reduced to practice during or under the contract to which this Attachment has been added, and that invention, improvement, or discovery is patentable under the laws of the United States of America or any foreign country, the Department and Consultant agree to take actions necessary to provide immediate notice and a detailed report to the party at a higher tier until FTA is ultimately notified.

- b. Unless the Federal Government later makes a contrary determination in writing, irrespective of the Consultant's status (a large business, small business, state government or state instrumentality, local government, nonprofit organization, institution of higher education, individual), the Department and the Consultant agree to take the necessary actions to provide, through FTA, those rights in that invention due the Federal Government as described in U.S. Department of Commerce regulations, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements, 37 C.F.R. Part 401 and 35 U.S.C. Section 200 et seq.
- c. The Consultant also agrees to include the requirements of this clause in each subcontract for experimental, developmental, or research work financed in whole or in part with Federal assistance provided by FTA.

39. Conformance with ITS National Architecture

The Consultant agrees to conform to the National Intelligent Transportation Systems (ITS) Architecture requirements of 23 U.S.C. Section 517(d), as amended by MAP-21 and will follow FTA Notice, "FTA National ITS Architecture Policy on Transit Projects" and other applicable federal guidance, unless it obtains a written exemption from those requirements from the Federal Government.

40. Human Trafficking

The Consultant acknowledges that it shall comply with the following:

- a. Section 106(g) of the Trafficking Victims Protection Act of 2000 (TVPA), as amended, 22 U.S.C. Section 7104(g);
- b. U.S. OMB guidance, "Award Term for Trafficking in Persons," 2 CFR part 175, which the FTA has included in its Master Agreement with the Department at the direction of the U.S. OMB; and
- c. Section 3.g of the FTA's Master Agreement with the Department, containing the award terms excerpted from the U.S. OMB guidance, "Award Term for Trafficking in Persons," 2 CFR Part 175, which FTA has included in its Master Agreement with the Department.

41. Federal Interest

The Consultant acknowledges that the FTA and Department have a vested interest in the settlement of any dispute, default, or breach involving any federally assisted third party contract. The Consultant agrees to pursue all material claims available under any third party contract. FTA and the Department reserve the right to concur in any compromise or settlement of any third party contract claim involving the Consultant. The Consultant agrees to notify the FTA and the Department of any current or prospective major dispute, breach or litigation pertaining to any third party contract. If the Consultant seeks to name the FTA or the Department as a party to litigation for any reason, in any forum, the Consultant agrees to inform the FTA and/or the Department, as applicable, before doing so. The FTA retains the right to a proportionate share, based on the percentage of the federal share committed to the third party contract, of any proceeds derived from any third party recovery.

42. Assignment of Contractual Rights

FTA expects the recipient to limit its procurements to the amount of property and services required to meet its reasonably expected needs without adding excess capacity simply for the purpose of assigning contract rights to others at a later date. For example, if the supplies or services were solicited, competed, and awarded through the use of an indefinite-delivery-indefinite-quantity (IDIQ) contract, the solicitation and also the contract award are expected to contain both a minimum and maximum quantity that represent the recipient's reasonably foreseeable needs. FTA expects the recipient to be able to justify the quantities it procures. Nevertheless, a recipient may find that it has inadvertently acquired contract rights in excess of its needs. The recipient may assign those contract rights to other recipients if the underlying contract contains an assignability provision that permits the assignment of all or a portion of the specified deliverables under the terms originally advertised, competed, evaluated, and awarded, or contains other appropriate assignment provisions.

43. Prompt Payment

The Development Entity shall make prompt payment under 49 C.F.R. § 26.29. A certification of prompt payment is required to certify that all subcontractors were paid from the previous month's payment.

44. Payment of Retainage

Any retainage amounts held by the Development Entity must be paid by the Development Entity to the subcontractor no later than thirty (30) days after the subcontractor has, satisfactorily completed its portion of the work, in accordance with 49 CFR Part 26.29(c). Any delay in or postponement of payment to the subcontractor requires good cause and prior written approval by the Department. The Development Entity shall also provide proof of payment to the Department in the form of an invoice from the subcontractor and a cancelled check made payable to the subcontractor.

SCHEDULE 16

AUDIT CLAUSE

AUDIT CLAUSE TO BE USED IN AGREEMENTS WITH SUBRECIPIENTS RECEIVING FEDERAL AWARDS FROM THE COMMONWEALTH

The Development Entity must comply with all applicable federal and state grant requirements including The Single Audit Act Amendments of 1996; 2 CFR Part 200 as amended; and any other applicable law or regulation, and any amendment to such other applicable law or regulation that may be enacted or promulgated by the federal government .

If the Development Entity is a local government or non-profit organization that expends \$750,000 or more in federal awards during its fiscal year, the Development Entity is required to provide the appropriate single or program specific audit in accordance with the provisions outlined in 2 CFR Part 200.501.

If the Development Entity expends total federal awards of less than the threshold established by 2 CFR 200.501, it is exempt from federal audit requirements for that year, but records must be available for review or audit by appropriate officials (or designees) of the federal agency, pass-through entity, and Government Accountability Office (GAO).

If the Development Entity is a for-profit entity, it is not subject to the auditing and reporting requirements of 2 CFR Part 200, Subpart F-Audit Requirements (Subpart F). However, the pass-through Commonwealth agency is responsible for establishing requirements, as necessary, to ensure compliance by for-profit subrecipients. The contract with the for-profit subrecipient should describe applicable compliance requirements and the for-profit subrecipient's compliance responsibility. Methods to ensure compliance for federal awards made to for-profit subrecipients may include preaward audits, monitoring during the contract and post-award audits. The post-award audits may be in the form of a financial audit in accordance with Government Auditing Standards, a single audit report or program-specific audit report in accordance with Subpart F. However, these post-award audits must be submitted directly to the affected Commonwealth agency that provided the funding. Only single audit reports for local governmental and non-profit subrecipients are electronically submitted to the Federal Audit Clearinghouse.

ADDITIONAL POTENTIAL COMPONENTS OF THE SINGLE AUDIT REPORTING PACKAGE

In instances where a federal program-specific audit guide is available, the audit report package for a program-specific audit may be different and should be prepared in accordance with the appropriate audit guide, Government Auditing Standards, and Subpart F.

In addition to the requirements of Subpart F, Commonwealth agencies may require that the single audit reporting packages include additional components in the SEFA, or supplemental schedules, as identified through the respective grant agreement.

SUBMISSION OF THE AUDIT REPORT

The Development Entity must submit an electronic copy of the audit report package to the Federal Audit Clearinghouse, which shall include the elements outlined in Subpart F.

SUBMISSION OF THE FEDERAL AUDIT CLEARINGHOUSE CONFIRMATION

The subrecipients must send a copy of the confirmation from the Federal Audit Clearinghouse to the resource account RA-BOASingleAudit@pa.gov .

AUDIT OVERSIGHT PROVISIONS

The Development Entity is responsible for obtaining the necessary audit and securing the services of a certified public accountant or independent governmental auditor.

The Commonwealth reserves the right for federal and state agencies or their authorized representatives to perform additional audits of a financial or performance nature, if deemed necessary by Commonwealth or federal agencies. Any such additional audit work will rely on work already performed by the Development Entity's auditor and the costs for any additional work performed by the federal or state agencies will be borne by those agencies at no additional expense to the Development Entity.

Audit documentation and audit reports must be retained by the Development Entity's auditor for a minimum of five years from the date of issuance of the audit report, unless the Development Entity 's auditor is notified in writing by the Commonwealth, the cognizant federal agency for audit, or the oversight federal agency for audit to extend the retention period. Audit documentation will be made available upon request to authorized representatives of the Commonwealth, the cognizant federal agency for audit, the oversight federal agency for audit, the federal funding agency, or the GAO.

SCHEDULE 17

FORM OF D&C DIRECT AGREEMENT

SCHEDULE 18

TECHNICAL PROVISIONS

[See Separate Document.]

SCHEDULE 19

EXTRA WORK COSTS

1. GENERAL

1.1 Design Work

- (a) For Extra Work consisting of Design Work, an amount equal to the salaries paid to technical employees for time actually spent in performing such services, plus one hundred seventy-five percent (175%) of the portion of such salaries representing “straight time” payments.
- (b) As used in this Section 1.1 (Design Work), **salaries paid to technical employees** means salaries actually paid (excluding payments and factors for holidays, vacations, sick time, bonuses, profit participations and other similar payments) to architects, engineers, designers, draftsmen and other technical employees of the Contractor performing such design services, excluding however, any partners, corporate officers and clerical or administrative personnel.

1.2 Construction Work

- (a) For Extra Work consisting of Construction Work, an amount equal to the sum of all applicable costs calculated in accordance with Section 2.

2. CONSTRUCTION EXTRA WORK COSTS

2.1 Records

The Development Entity shall keep records of the Extra Work costs set out in this Section 2 (Construction Extra Work Costs) on a force account basis. The Development Entity shall compare force account records with those kept by the Department, at the end of each day or as otherwise directed, to ensure accuracy and obtain concurrence. The Development Entity shall report any unresolved disagreements with such records to the Department. Failure to review the Department’s records or to report disagreements with such records shall create a presumption that Department’s records are complete and accurate.

2.2 Labor

- (a) Wages of forepersons; equipment operators; and skilled, semiskilled, and common laborers directly assigned to the specific operation will be reimbursed, as direct labor costs, at the actual base pay rate and fringe benefit rate paid, for each hour that such employees are engaged in the performance of Extra Work and, if directed, overtime as provided for in existing laws and regulations.
- (b) Indirect labor costs will be allowed as a percentage of the total base labor cost. However, if certified payroll records indicate that the relevant Contractor’s method of making payment is such that fringe benefits are paid directly to the

worker, indirect labor costs will be allowed as a percentage of the total direct labor cost. Compute indirect labor costs as follows:

- (i) Social Security Tax at the percentage legally required;
 - (ii) Medicare Tax at the percentage legally required; and
 - (iii) Unemployment Taxes at the estimated effective rate.
- (c) Compute estimated effective rates for the current Calendar Year by dividing the relevant Contractor's total, company-wide Unemployment Tax payments for the previous Calendar Year by the total wages and salaries paid to all employees for the same period. Recompute estimated effective rates each year thereafter, for the duration of the Project, based on the previous Calendar Year's total wages and salaries and total tax payments.

2.3 **Material**

The cost of material used will be reimbursable, including applicable sales tax and transportation costs charged by the relevant Supplier.

2.4 **Equipment**

Reasonable rental rates for equipment, including trucks and machinery, mutually considered necessary, will be allowed, computed as follows:

- (a) **Owned Equipment**
 - (i) For any Contractor-owned equipment, an hourly rental rate will be determined using the monthly rate listed in the applicable edition of the Rental Rate Blue Book for Construction Equipment (the **Blue Book**), Volume 1. The Blue Book edition in effect as of the first day that Extra Work is performed is the edition that will remain applicable throughout the performance of such Extra Work. The applicable edition of the Blue Book will be authorized for use state-wide on a specified date.
 - (ii) The hourly rental rate for owned equipment will be computed by dividing the monthly rate listed in the Blue Book by 176. Apply to this rate, the area adjustment percentage for the Commonwealth and the age adjustment percentage for the model year of the piece of equipment, as shown on the "Regional Adjustment Maps" and in the "Rate Adjustment Tables," respectively, located at the beginning of each section of the Blue Book.
 - (iii) An allowance will be made for operating costs by adding, to the above adjusted hourly rate, the estimated operating cost per hour, as listed in the Blue Book, for each hour that the equipment or machinery is actually in operation on the Extra Work. If equipment or machinery is required at a Project Site on a standby basis, but is not operating, compensation will be at 50% of the adjusted hourly rate, exclusive of operating costs.

- (iv) Equipment used for maintenance and protection of traffic on a 24-hour basis will be reimbursed at a daily rental rate, which will be determined by dividing the monthly rate listed in the Blue Book by 22.
- (v) Where Contractor-owned equipment or machinery is not listed in the Blue Book, a rental rate will be determined based on the manufacturer's list price for sale (new) of such equipment. In these cases, the monthly rate will be computed as 6% of the sale price (new), and the total hourly rate determined by dividing the monthly rate by 160, when operating, and by 352, when required at a Project Site on a standby basis, but not operating, with no adjustment percentages applied. For equipment used for maintenance and protection of traffic on a 24-hour basis, with no listing in the Blue Book, the daily rental rate will be computed as 6% of the manufacturer's list price for sale (new) of the equipment divided by 22, with no adjustment percentages applied.
- (vi) The rates established above include the cost of fuel; oil; lubrication; supplies; necessary attachments; repairs; overhaul and maintenance of any kind; storage; all costs of moving equipment on to and away from the Project Sites, except as specified below; and all incidentals.
- (vii) The Department will not approve any costs in excess of those outlined above unless such costs were incurred for the convenience of the Department, as directed, and are supported by an acceptable cost breakdown. If a piece of owned equipment, not already on or near the Project Sites, is needed specifically for the Extra Work, the cost of moving the equipment on, to and away from the Project Sites will be reimbursed; **provided**, that the equipment will not be used immediately thereafter in the performance of original D&C Work.
- (viii) The term "owned equipment," as used above applies to equipment (including trucks and machinery) which the relevant Contractor is required to provide for the proper execution of the Project Services whether the equipment is actually owned directly by the Contractor, is leased, or has been obtained in some other manner.

(b) Rented Equipment

- (i) If a piece of equipment needed for the Extra Work is not of the type required to be provided by a Contractor for the proper execution of such work, or if the piece of equipment needed is "owned" but not currently available, and the equipment can be obtained by rental, the Development Entity shall discuss the need to rent the equipment with the Department and obtain approval of the rental rate to be paid before renting the equipment for the Extra Work.
- (ii) Additionally, if an item is purchased specifically for the Extra Work, but does not become a permanent part of such Extra Work, the item will be considered rented equipment for cost reimbursement purposes. If the

item's useful life is completely expended in the performance of the Extra Work, as determined by the Department, the full cost of the item will be reimbursed, including applicable sales tax and transportation costs. Otherwise, that portion of the item's useful life expended in the performance of the Extra Work will be determined and reimbursement made at a prorated cost.

- (iii) The Development Entity will be reimbursed the actual invoiced cost for rented equipment, plus the cost of transporting the equipment to and from the relevant Project Site. An allowance will be made for operating costs by adding, to the rental cost, the estimated operating cost per hour, as listed in the Blue Book, for each hour the rented equipment is actually in operation on the Extra Work. The Development Entity shall furnish a copy of the invoice, receipt, or cancelled check as support for the rental expense incurred.
- (iv) Transportation charges for each piece of rented equipment, to and from the relevant Project Site, will be paid; **provided**, that:
 - (A) Equipment is obtained from the nearest available source;
 - (B) Return charges do not exceed the delivery charges;
 - (C) Haul rates do not exceed the established rates of licensed haulers; and
 - (D) Charges are restricted to those units of equipment not readily available and not on or near the project.

2.5 **Services by Others**

For specialized construction analyses, engineering services, or work not considered subcontract work requiring prequalification, the Development Entity will be reimbursed the invoice price plus 2% to cover administration and all other costs. The Development Entity shall furnish a copy of the invoice, receipt, or cancelled check as support for the expense incurred. The markup on service by others costs will be limited to 2% only, regardless of whether the service was arranged by the Development Entity or any other Contractor performing any or all of the Extra Work. The overhead and profit allowances specified in Section 2.7 (Overhead and Profit) below are not applicable to service by others costs.

2.6 **Permits and Insurance**

When specifically required for the force account Extra Work, as directed, the securing of permits or specialized insurance coverage, of a type not already required by this PPA, will be considered a service by others, as specified in Section 2.5 (Services by Others) above, and reimbursement of the permit fee or insurance premium paid will be allowed plus the specified markup.

2.7 **Overhead and Profit**

Except for Extra Work considered to be service by others, as specified in Section 2.5 (Service by Others) above, to cover all administration, general and project superintendence, other overhead, bonds, insurance, anticipated profit, and use of small tools and equipment for which no rental is allowed, 20% will be added to the total material cost, 35% will be added to the total labor cost, and 5% will be added to the total equipment cost.

3. **STATEMENTS AND FINAL PAYMENT**

3.1 **Statements**

- (a) The Development Entity shall furnish for Department review an itemized statement of all Extra Work costs, in the form of a properly completed force account record, detailed as follows:
 - (i) Name, classification, work dates, daily hours, total hours, base pay rate, fringe benefit rate, total pay rate and extension (as relevant) for each foreperson; equipment operator; and skilled, semi-skilled, and common laborer in respect of Extra Work consisting of Construction Work and for each architect, engineer, designer, draftsman and other technical employee of the Contractor in respect of Extra Work consisting of Design Work;
 - (ii) Description (year, make, model, capacity, etc.), use dates, daily hours, total hours, rental rates (operating and standby) and extension for each piece of rented equipment and/or description, rental cost, transportation costs (if separate), and extension for each piece of rented equipment;
 - (iii) Description, quantity, unit price and extension for all materials, applicable sales tax, and transportation costs charged by any relevant Supplier;
 - (iv) Name, description, unit price and extension for all services by others; and
 - (v) Rates (legally required, estimated effective, or policy percentage) paid for unemployment taxes, medicare tax, and social security tax.
- (b) Statements of labor costs are to be supported by certified payroll records.
- (c) Statements of material costs (including sales tax and transportation costs), rented equipment costs and service by others costs are to be supported and accompanied by invoices.
- (d) If materials used in the Extra Work are not specifically purchased for such Extra Work but are taken from the relevant Contractor's stock or provided by entities that are divisions, affiliates, subsidiaries or in any other way related to such Contractor or its parent company, such Contractor shall furnish an affidavit certifying that the materials were obtained as described above, that the quantity claimed was actually used, and that the price and transportation costs claimed were actually incurred.

3.2 **Final Payment**

- (a) Final payment will not be made for Extra Work performed until the Development Entity has furnished to the Department all statements and applicable supporting documentation described in Section 3.1 (Statements).
- (b) Payment for all Extra Work is accepted as payment in full for all profit and for all equipment, labor, material, field overhead, home office and general administrative expenses, and every other expense incurred as a result of the Extra Work. No claims for additional compensation of any kind arising out of or relating to such Extra Work can be asserted against the Department with the Board of Claims.

SCHEDULE 20

CONDITIONS PRECEDENT TO NOTICES TO PROCEED

PART 1

CONDITIONS PRECEDENT TO NTP1

- (1) The Commercial Closing Date has occurred.
- (2) The Development Entity has caused to be developed and delivered to the Department, and the Department has approved, in accordance with the terms of the Project Documents, the detailed “DBE Performance Plan” describing the methods to be employed for achieving the Department’s DBE goals for the Project, including the Development Entity’s exercise of GFE and the requirements set out in Schedule 15 (Additional Federal Requirements) of this PPA.
- (3) All Insurance Policies required to be procured under Schedule 9 (Insurance Coverage Requirements) as of NTP1 have been obtained and are in full force and effect and the Development Entity has delivered to the Department written verification of insurance coverage as required by Schedule 9 (Insurance Coverage Requirements).
- (4) The Development Entity has caused to be developed and delivered to the Department, and the Department has approved, in accordance with the terms of the Project Documents:
 - (a) the Project Management Plan (including all sub-component plans) as set out in the Technical Provisions; and
 - (b) the Project Baseline Schedule and all component parts thereof.
- (5) The Development Entity has satisfied all other requirements of the Project Documents that are required to be satisfied prior to commencement of Design Work, in the form and content required therein.

PART 2

CONDITIONS PRECEDENT TO NTP2

- (1) NTP1 has been issued.
- (2) All necessary Governmental Approvals necessary to begin the applicable elements of the Construction Work have been obtained and the Development Entity has furnished to the Department fully executed copies of such Governmental Approvals.
- (3) To the extent that any Governmental Approvals contain conditions that must be satisfied before the relevant elements of the Construction Work can commence, satisfaction of such conditions and demonstration of the same to the Department.
- (4) The Development Entity has caused to be developed and delivered to the Department, and the Department has approved, in accordance with the terms of the Project Documents, each of the items set forth in the Technical Provisions in respect of the relevant Project Site.
- (5) The Development Entity has satisfied all other requirements of the Project Documents that are required to be satisfied prior to commencement of the applicable elements of the Construction Work, including delivery to the Department of all Submittals relating to the applicable elements of the Construction Work required by the Project Management Plan or the Project Documents, in the form and content required therein.
- (6) All Insurance Policies required to be procured under Schedule 9 (Insurance Coverage Requirements) as of NTP2 have been obtained and are in full force and effect and the Development Entity has delivered to the Department written verification of insurance coverage as required by Schedule 9 (Insurance Coverage Requirements).
- (7) The Development Entity has issued a written notice to the Department requesting the issuance of NTP2 in respect of the relevant Project Site.
- (8) The “DBE Performance Plan” delivered by the Development Entity in accordance with clause (2) of Part 1 (Conditions Precedent to NTP1) of this Schedule 20 (Conditions Precedent to Notices to Proceed) has been updated as relevant in accordance with Schedule 15 (Additional Federal Requirements) of this PPA.

SCHEDULE 21

CONDITIONS PRECEDENT TO PROJECT FACILITY COMPLETION

1. The Project Facilities as set out in the Final Design Documents are available for normal and safe use and operation, including compliance with all applicable codes and standards (such compliance to be determined by the applicable Governmental Entities).
2. The Project Facilities are able to pass an inspection pursuant to the Technical Provisions.
3. The Development Entity has caused to be developed and delivered to the Department, and the Department has approved, in accordance with the terms of the Project Documents, each of the items set forth in the Technical Provisions in respect of the relevant Project Site.
4. The Development Entity has otherwise completed the Design Work and Construction Work with respect to the relevant Project Site in accordance with the Project Documents, Final Design Documents and Construction Documents.
5. All Utility Relocation Work relating to the relevant Project Site has been completed in accordance all relevant agreements and utility clearances in respect of such Utility Relocation Work.
6. All Insurance Policies required under Article 19 (Insurance) and Schedule 9 (Insurance Coverage Requirements) for the Maintenance Work to be performed on the relevant Project Site have been obtained and are in full force and effect, and the Development Entity has delivered to the Department verification of insurance coverage as required by Article 19 (Insurance) and Schedule 9 (Insurance Coverage Requirements).
7. The Department has received a complete set of the As-Built Drawings for the relevant Project Site, in the form required under the Project Documents.
8. If any Governmental Entity with jurisdiction requires any form of certification of design, engineering or construction with respect to the relevant Project Site, including any certification from the Engineer of Record for the Project, the Development Entity has caused such certificates to be delivered and has concurrently issued identical certificates to the Department.
9. With respect to the relevant Project Site, the Development Entity has restored to their original condition any lands provided by the Department for temporary access and other activities not forming part of the Project Facilities.
10. All of the conditions of the Governmental Approvals relating to the relevant Project Site that relate to Design Work or Construction Work have been satisfied in full.
11. The Development Entity has certified to the Department in writing that no overdue amounts owing to any first-tier Contractor with respect to the relevant Project Site remain unpaid (except for amounts relating to good faith disputes).

12. All demobilization from the relevant Project Site is complete, including the removal of temporary work and equipment used in the performance of the Construction Work.

SCHEDULE 22

FORM OF GUARANTEE

THIS **GUARANTEE** (the **Guarantee**), is made and entered into this [] day of [], 201[●], by and between [**GUARANTOR**] (**Guarantor**), to and for the benefit of The Pennsylvania Department of Transportation, an executive agency of the Commonwealth of Pennsylvania (the **Department**). Capitalized terms not otherwise defined herein shall have the meaning given such terms in the Agreement (as such term is defined below).

RECITALS:

WHEREAS, the Department and [*Development Entity*], a [] (the **Development Entity**) entered into that certain Public-Private Transportation Partnership Agreement dated as of _____, 2018 (as such agreement may be modified, amended or supplemented from time to time, the **Agreement**) for the design, construction, financing, operation and maintenance of the Project (as defined in the Agreement);

WHEREAS, the Development Entity is a [wholly owned] subsidiary of Guarantor;¹ and

WHEREAS, Section [2.2(f)] of the Agreement requires that this Guarantee be executed and delivered by Guarantor concurrently with the effectiveness of the Agreement;

NOW THEREFORE, for valuable consideration and as an inducement to the Department to enter into the Agreement, Guarantor covenants with the Department as follows:

1. Guarantee. Guarantor hereby irrevocably, absolutely and unconditionally guarantees to the Department, its successors and permitted assigns, as primary obligor and not merely as surety, the full and timely performance when due, the payment of all amounts when due and owing, and observance when due of all warranties, covenants, duties, terms, obligations and agreements to be performed, paid or observed, as applicable, by the Development Entity under the Agreement and all other present or future agreements and instruments between the Department and the Development Entity in connection with the performance of the Agreement, all whether presently existing or from time to time hereafter created, incurred or arising (such obligations of the Development Entity collectively the **Obligations**). For the avoidance of doubt, the Obligations include all amounts that would become due but for the operation of an automatic stay under section 362(a) of the U.S. Bankruptcy Code of 1978 (the **U.S. Bankruptcy Code**). The Department expressly acknowledges and agrees that, notwithstanding anything to the contrary in this Guarantee, the liability of Guarantor under this Guarantee shall in no event be greater than that of the Development Entity under the Agreement (other than with respect to Guarantor's obligation hereunder to reimburse the Department for its costs and expenses of enforcing this Guarantee, if any, in accordance with Section 4 hereof) and that Guarantor shall be

¹ **Note to Proposer:** This will be updated to reflect the structure of the Development Entity. To the extent multiple Guarantors are proposed by the Proposer, the guarantee will be provided on a joint and several basis.

entitled to the benefit of all limitations on the Development Entity's liability specified in the Agreement. Subject to the provisions of this Guarantee, including without limitation any defenses expressly waived in this Guarantee, Guarantor may, as a defense to the performance of the Obligations, assert any defense available to the Development Entity under the Agreement that would excuse the Development Entity from performing the obligation in respect of which a claim is made under this Guarantee. Notwithstanding any other provisions of this Guarantee to the contrary, this Guarantee shall not modify the Obligations under the Agreement. This Guarantee is a continuing guarantee, and shall apply to all Obligations whenever arising, and shall remain in full force and effect until the irrevocable and indefeasible payment in full of the ultimate balance of the Obligations, regardless of any intermediate payment or discharge in whole or in part. Guarantor covenants to the Department that if at any time the Development Entity should default in the payment or performance when due of any of its Obligations, Guarantor shall, upon demand by the Department, pay or perform in the Development Entity's stead as if the Guarantor instead of the Development Entity were expressed to be the principal obligor, or cause the payment or performance of, such Obligations.

2. Nature of Guarantor's Obligations. It is expressly understood and agreed by Guarantor that, to the extent Guarantor's obligations hereunder relate to Obligations which require performance other than the payment of money, the Department may proceed against Guarantor to effect specific performance thereof (to the extent such relief is available) or for payment of damages (as limited by the Agreement) resulting from the Development Entity's nonperformance. Guarantor hereby covenants to perform or cause to be performed all of the obligations, terms and conditions on the part of the Development Entity to be performed thereunder for the balance of the term thereof. Should the Agreement be disaffirmed by the trustee in bankruptcy for the Development Entity, or at the option of the Department, Guarantor shall, in the event of the Development Entity's bankruptcy, make and enter into a new contract performing or causing to be performed the balance of the Obligations, which said new agreement shall be in form and substance identical to the Agreement.

3. Payments. All payments by Guarantor to the Department shall be made in the United States in United States Dollars and shall be paid within five (5) Business Days (as such term is defined in the Agreement) after receipt by Guarantor from the Department of written demand for such payment and shall not be the subject of any offset against any amounts which may be owed by the Department to Guarantor for any reason unrelated to the Project. Each and every default or failure by the Development Entity in making a payment or otherwise discharging or performing any of the Obligations set forth in the Agreement shall give rise to a separate liability of the Development Entity to the Department and a separate cause of action hereunder and a separate suit may be brought hereunder as each liability or cause of action arises.

4. Costs and Expenses. Guarantor agrees to pay all costs, expenses and fees, including all reasonable attorneys' fees, which may be incurred by the Department in enforcing this Guarantee, whether by suit or otherwise, to the extent the Department is the prevailing party.

5. Waiver of Defenses. The obligations of Guarantor under this Guarantee shall be irrevocable, absolute and unconditional and shall remain in full force and effect until such time as set forth in Section 18 hereof. The obligations of Guarantor shall not be affected, modified, impaired or prejudiced (i) by any security now or hereafter held by the Department as security

for the obligations of the Development Entity under the Agreement; or (ii) by the happening from time to time of any one or more of the following whether or not with notice to or consent of the Development Entity or Guarantor:

(a) the compromise, composition, settlement, release, change, modification, or termination of any of the Obligations, or any time, forbearance, extension or waiver granted to the Development Entity or any other person;

(b) the waiver by the Department of the payment, performance or observance of any of the Obligations, except to the extent expressly set out in such waiver;

(c) the extension of time for payment of any amounts due or of the time for performance of any of the Obligations, except to the extent expressly set out in such extension;

(d) the modification or amendment (whether material or otherwise) of any of the Obligations or restatement, replacement or novation of the Agreement or any other document, Guarantee or security so that references to the Agreement shall include each amendment, variation, restatement, replacement and novation;

(e) the failure, omission, delay or lack on the part of the Department to enforce, ascertain or exercise any right, power or remedy under or pursuant to the terms of the Agreement or this Guarantee;

(f) the fact that Guarantor may at any time in the future dispose of all or any part of its interest in the Development Entity, or otherwise alter its investment in the Development Entity in any manner;

(g) the avoidance, postponement, discharge, reduction, non-provability or other similar circumstance affecting any obligation of the Development Entity under the Agreement resulting from the bankruptcy, insolvency, receivership, winding up, dissolution, liquidation, administrations, reorganization or other similar or dissimilar failure or financial disability of the Development Entity or Guarantor or any legal limitation, disability, incapacity, or any law, regulation or order, or other circumstances relating to the Development Entity or Guarantor;

(h) the addition, substitution or partial or entire release of any guarantor, maker or other party (including the Development Entity) primarily or secondarily liable or responsible for the performance and observance of any of the Obligations or by any extension, waiver, amendment or thing whatsoever which may release or discharge (in whole or part) a guarantor, maker or third party (other than as a result of the payment and performance of the Obligations in full);

(i) the invalidity, illegality, nonbinding effect or unenforceability of (x) the Obligations or (y) the Agreement in its entirety, to the intent that the Guarantor's obligations under this Guarantee shall remain in full force and be construed accordingly, as if there were no invalidity, illegality, nonbinding effect or unenforceability;

(j) the taking, variation, compromise, exchange, renewal, addition, substitution, subordination, non-perfection or partial or entire release of any security for the

Obligations or the enforcement or refusal or neglect to perfect or enforce any such security, or the non-presentation or non-observance of any formality or other requirement in respect of any instrument or any failure to realize the full value of any security;

(k) any sale, lease or transfer of the assets or change in the ownership of any shares in the capital of the Guarantor; or

(l) any disability, incapacity or lack of powers, authority or legal personality of or dissolution or change in the members or status of the Development Entity or any other person.

6. Waiver of Subrogation. Guarantor irrevocably and absolutely waives, at all times prior to the Obligations being indefeasibly paid or performed in full, any and all right of subrogation, contribution, indemnification, reimbursement or similar rights against the Development Entity with respect to the Guarantee, whether such rights arise under an express or implied contract or by operation of law, it being the intention of Guarantor and the Department that, at all times prior to the Obligations being indefeasibly paid or performed in full, Guarantor shall not be deemed to be a “creditor” (as defined in section 101 of the U.S. Bankruptcy Code or any other applicable law) of the Development Entity by reason of the existence of this Guarantee in the event that the Development Entity becomes a debtor in any proceeding under the U.S. Bankruptcy Code or any other applicable law. In addition, Guarantor will not exercise any rights which it may acquire by way of subrogation under this Guarantee by any payment made hereunder or otherwise, until all of the Obligations shall have indefeasibly been paid or performed in full. If any amount shall be paid to Guarantor on account of such subrogation rights at any time when all such liabilities and obligations shall not have been indefeasibly paid in full, such amount shall be held in trust for the benefit of the Department and shall forthwith be paid to the Department and applied to such liabilities and obligations, whether matured or unmatured.

7. Election of Remedies. The Department shall have the right, in its sole judgment and discretion, from time to time, to make demand for payment or performance and to proceed against Guarantor for recovery of the total of any and all amounts due, or for the performance of any nonmonetary obligation owed, to the Department pursuant to this Guarantee, or to proceed from time to time against Guarantor for such portion of any and all such amounts, or for the performance of any and all such nonmonetary obligations, as the Department may determine.

8. Bankruptcy Proceedings. So long as any Obligations are owed to the Department, Guarantor shall not, without the prior written consent of the Department, commence, or join with any other Person in commencing, any bankruptcy, reorganization, or insolvency proceeding against the Development Entity. The obligations of Guarantor under this Guarantee shall not be altered, limited or affected by any proceeding, voluntary or involuntary, involving the winding up, dissolution, administration, bankruptcy, reorganization, insolvency, receivership, liquidation or arrangement or similar proceeding of the Development Entity, or by any defense which the Development Entity may have by reason of any order, decree or decision of any court or administrative body resulting from any such proceeding.

9. Waivers. With respect to all Obligations, this is a guarantee of payment and performance and not of collection, and Guarantor hereby waives and relinquishes all rights and remedies accorded by applicable law to sureties or guarantors and agrees not to assert or take

advantage of any such rights or remedies, including without limitation:

(a) any right to require the Department to proceed against the Development Entity or any other person or to proceed against or exhaust any security held by the Department at any time or to pursue any other remedy in the Department's power before proceeding against Guarantor;

(b) any defense based upon any right of setoff, counterclaim or other right, defense, or claim based on, or in the nature of, any obligation now or later owed to the Guarantor by the Development Entity or any other person;

(c) any defense that may arise by reason of the incapacity, lack of authority, death or disability of any other person or the failure of the Department to file or enforce a claim against the estate (in administration, bankruptcy or any other proceeding) of any other person;

(d) promptness, diligence, demand, presentment, protest and notice of any kind, including without limitation notice of the existence, creation or incurring of any new or additional Obligations or of any action or non-action on the part of the Development Entity, the Department, any creditor of the Development Entity or Guarantor or on the part of any other person under this or any other instrument in connection with any obligation or evidence of indebtedness held by the Department as collateral or in connection with any Obligations hereby guaranteed;

(e) any defense based upon an election of remedies by the Department which destroys, releases or otherwise impairs the subrogation, exoneration, contribution or indemnification rights of Guarantor or the right of Guarantor to proceed against the Development Entity for reimbursement;

(f) any duty on the part of the Department to disclose to Guarantor any facts the Department may now or hereafter know about the Development Entity, regardless of whether the Department has reason to believe that any such facts materially increase the risk beyond that which Guarantor intends to assume, or has reason to believe that such facts are unknown to Guarantor, or has a reasonable opportunity to communicate such facts to Guarantor, since Guarantor acknowledges that Guarantor is fully responsible for being and keeping informed of the financial condition of the Development Entity and of all circumstances bearing on the risk of non-payment of any Obligations hereby guaranteed; and

(g) any defense arising because of the exercise of any right or remedy available to, or election made by, the Department pursuant to the U.S. Bankruptcy Code, whether as an unsecured or undersecured creditor, seeking adequate protection, or otherwise.

10. No Marshaling. Except to the extent required by applicable law, the Department will not be required to marshal any collateral securing, or any guaranties of, the Obligations, or to resort to any item of collateral or any guarantee in any particular order, and the Department's rights with respect to any collateral and guaranties will be cumulative and in addition to all other rights, however existing or arising. To the extent permitted by applicable law, the Guarantor irrevocably waives, and agrees that it will not invoke or assert, any law requiring or relating to the marshaling of collateral or guaranties or any other law which might cause a delay in or impede the enforcement of the Department's rights under this Guarantee or any other agreement.

11. Successors and Assigns. This Guarantee shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns, **provided**, that Guarantor may not make an assignment or other transfer of this Guarantee or any interest herein by operation of law or otherwise unless it has obtained the prior written consent of the Department to such assignment or other transfer.

12. Notices. All notices to the parties hereto required to be served under this Guarantee shall be in writing and shall be served by registered mail and shall be addressed as follows:

If to the Guarantor:

[GUARANTOR]
[Address]
[Attention:]
[Fax:]

If to the Department:

Pennsylvania Department of Transportation
8th Floor, Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120-0041
E-mail: [●]
Attention: Secretary

With a copy to:

Pennsylvania Department of Transportation
Office of Chief Counsel
P.O. Box 8212
17105-8212
Attention: Chief Counsel

or at such other address such party may from time to time designate in writing.

13. Governing Law. This Guarantee shall be governed by the laws of the Commonwealth of Pennsylvania (without regard to any conflict of law principles) and the decisions of the Pennsylvania Courts. All agreements, instruments and notices referred to herein or supplementary hereto shall be prepared, furnished in, and governed, and controlled by the English language. EACH PARTY HERETO WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY SUIT, ACTION OR PROCEEDING RELATING TO OR ARISING OUT OF THIS GUARANTEE. Guarantor irrevocably consents to the personal jurisdiction of any court of Pennsylvania and any federal courts located in Pennsylvania. Guarantor waives any objection which Guarantor may now or hereafter have regarding the choice of forum whether on personal jurisdiction, venue, forum non conveniens or on any other ground. Guarantor

irrevocably consents to the service of process outside of the territorial jurisdiction of such courts by the mailing of copies thereof by registered or certified United States mail, postage prepaid, to Guarantor's last known address as shown in the records of the Department with the same effect as if Guarantor were a resident of the Commonwealth of Pennsylvania and had been lawfully served in such state. In addition, Guarantor consents to the service of process at [Address, Attn:]. Nothing in this Guarantee shall affect the right to service of process in any other manner permitted by law. If any person appointed by the Guarantor as process agent is unable for any reason to act as agent for service of process, the Guarantor must immediately appoint another agent on terms acceptable to the Department. Failing this, the Department may appoint another agent for this purpose. The Guarantor agrees that failure by a process agent to notify it of any process will not invalidate the relevant proceedings. Guarantor further agrees that final judgment against it in any action or proceeding shall be conclusive and may be enforced in any other jurisdiction within or outside the Commonwealth of Pennsylvania by suit on the judgment, a certified or exemplified copy of which shall be conclusive evidence of the fact and the amount of such judgment. Any finding of fact by, and any interim or final award or judgment made by an arbitrator, a court or tribunal with jurisdiction over a claim (in either case, brought pursuant to Section 30 of the Agreement) under the Agreement shall be binding on the Guarantor to the same extent that it is binding on the Department for the purposes of this Guarantee.

14. Tolling. Guarantor agrees that payment or performance of any of the Obligations or other acts which toll any statute of limitations applicable to the Obligations or the Agreement shall also toll the statute of limitations applicable to Guarantor's liability under this Guarantee.

15. Representations and Warranties. Guarantor represents and warrants to and with the Department that:

(a) Guarantor is a [TYPE OF JURISDICTION] duly organized, validly existing, authorized to do business and in good standing under the laws of [JURISDICTION OF ORGANIZATION];

(b) Guarantor has the requisite [corporate] power and authority to own its property and assets, transact business in which it is engaged and to enter into this Guarantee and carry out its obligations hereunder;

(c) the execution and delivery of this Guarantee and its performance have been duly authorized by all necessary [corporate] action on the part of Guarantor and no other [corporate] proceedings on the part of Guarantor or its affiliates are necessary to authorize this Guarantee or the transactions contemplated thereby;

(d) this Guarantee is the legal, valid and binding obligation of Guarantor, enforceable against it in accordance with its terms, subject to the application of bankruptcy and similar laws and of general equitable principles;

(e) the execution, delivery and performance of this Guarantee does not violate any law or any provision of any security issued by the Guarantor or of any agreement, instrument or undertaking to which the Guarantor is a party or by which it or any of its property is bound, and do not require any license, consent, authorization or approval of, or any notice to or filing with, any governmental authority;

(f) [except as disclosed in Guarantor's public filings with the Securities and Exchange Commission of the United States], no litigation, investigation or proceeding of or before any arbitrator or governmental authority is pending or, to Guarantor's knowledge, threatened by or against the Guarantor or any of its subsidiaries or against any of such parties' properties or revenues which, if adversely determined, would be reasonably likely to have a material adverse effect on the ability on the Guarantor to perform its obligations hereunder;

(g) it has established adequate means of obtaining financial and other information pertaining to the business, operations and condition (financial or otherwise) of the Development Entity and its respective properties on a continuing basis, and Guarantor is completely familiar with the business, operations and condition (financial and otherwise) of the Development Entity and its respective properties; and

(h) the execution, delivery, and performance of this Guarantee does not and will not (i) result in a default, breach or violation of the [certificate or articles of incorporation or bylaws] of Guarantor, or (ii) constitute an event which would permit any person or entity to terminate rights or accelerate the performance or maturity of any indebtedness or obligation of Guarantor, the effect of which would materially affect Guarantor's ability to meet its obligations under this Guarantee, or (iii) constitute an event which would require any consent of a third party or under any agreement to which Guarantor is bound, the absence of which consent would materially and adversely affect Guarantor's ability to meet its obligations under this Guarantee.

16. Covenants. Guarantor covenants and agrees to and with the Department that:

(a) the execution, delivery and performance of this Guarantee will not violate any law or any provision of any security issued by the Guarantor or of any agreement, instrument or undertaking to which the Guarantor is a party or by which it or any of its property is bound, and do not require any license, consent or approval of any governmental authority; and

(b) it has established adequate means of obtaining financial and other information pertaining to the business, operations and condition (financial or otherwise) of the Development Entity and its respective properties on a continuing basis, and Guarantor will maintain complete familiarity with the business, operations and condition (financial and otherwise) of the Development Entity and its respective properties.

17. Consents, Compliance with Laws, Delivery of Information. Guarantor agrees that:

(a) It will maintain in full force and effect all consents of any governmental or other authority that are required to be obtained by it with respect to this Guarantee and will obtain any that may become necessary in the future for the payment and performance of the Obligations;

(b) It will comply in all material respects with all applicable laws and orders to which it may be subject if failure so to comply would materially impair its ability to perform the Obligations; and

(c) Guarantor will, or will cause the Development Entity to, deliver to the Department from time to time, such other reasonable information or documents regarding

Guarantor (that may be relevant to any event that may materially or adversely affect Guarantor's ability to perform the Obligations) as the Department may reasonably request and as may be available to Guarantor without undue cost or effort; **provided**, that Guarantor may impose reasonable confidentiality requirements in connection with the disclosure of such information and documents.

18. Termination; Reinstatement of Guarantee.

(a) This Guarantee will terminate upon the last day of the Term.

(b) Notwithstanding the provisions of Section 18(a), this Guarantee shall be reinstated if at any time following the termination of this Guarantee under Section 18(a), any payment by Guarantor or the Development Entity of the Obligations is rescinded or must otherwise be returned by the Department or other Person upon the insolvency, bankruptcy, reorganization, dissolution or liquidation of the Development Entity, Guarantor or otherwise, and is so rescinded or returned to the party or parties making such payment, all as though such payment had not been made. Such period of reinstatement shall continue until satisfaction of the conditions contained in, and shall continue to be subject to, the provisions of this Section 18.

(c) This Guarantee shall remain in effect notwithstanding any assignment of the Agreement to any Person. Upon request by the Department after any such assignment, Guarantor shall acknowledge the continuing effectiveness of this Guarantee notwithstanding such assignment.

19. Severability. The invalidity or unenforceability of any portion or provision of this Guarantee shall in no way affect the validity or enforceability of any other portion or provision hereof. Any invalid or unenforceable portion or provision shall be deemed severed from this Guarantee and the balance of this Guarantee shall be construed and enforced as if this Guarantee did not contain such invalid or unenforceable portion or provision. If any such provision of this Guarantee is so declared invalid, the parties hereto shall promptly negotiate in good faith new provisions to eliminate such invalidity and to restore this Guarantee as near as possible to its original intent and effect.

20. No Waiver. No failure on the part of the Department to exercise, and no delay in exercising, any right, remedy or power hereunder shall operate as a waiver thereof, nor shall any single or partial exercise by the Department of any right, remedy or power hereunder preclude any other or future exercise of any right, remedy or power. Each and every right, remedy and power hereby granted to the Department or allowed it by law or other agreement shall be cumulative and not exclusive of any other, and may be exercised by the Department at any time or from time to time. No waiver of any provision of this Guarantee and no consent to any departure by Guarantor therefrom, shall be effective unless it is in writing and signed by the Department.

21. Counterparts. This Guarantee may be executed in any number of counterparts, and any party hereto may execute any such counterpart, each of which when executed and delivered shall be deemed to be an original and all of which counterparts taken together shall constitute but one and the same instrument.

22. Entire Agreement. This Guarantee constitutes the entire agreement and

supersedes any other agreements, whether written or oral, that may have been made or entered into between the Department and Guarantor or by any office or officer of such parties relating to the subject matter hereof. No oral or written amendment or modification of this Guarantee by any officer, agent, member, manager or employee of the Department or Guarantor, either before or after execution of this Guarantee, shall be of any force or effect unless such amendment or modification is in writing and is signed by a duly authorized representative of the party to be bound thereby.

IN WITNESS WHEREOF, Guarantor and the Department have caused this Guarantee to be executed as of the date first above written.

[GUARANTOR, a [_____]]

By: _____

Name: _____

Title: _____

ACCEPTED AND AGREED:

**COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION**

By: _____
Secretary of Transportation

APPROVED AS TO FORM AND LEGALITY

By: _____
Office of Chief Counsel
Department of Transportation

By: _____
Deputy General Counsel
Office of General Counsel

By: _____
Deputy Attorney General
Office of Attorney General

CERTIFIED FUNDS AVAILABLE UNDER
SAP NO. _____
SAP COST CENTER _____
GL. ACCOUNT _____
AMOUNT _____

By: _____
Comptroller

Date: _____

APPENDIX 1
DEVELOPMENT ENTITY’S PROPOSAL COMMITMENTS

[●]¹

¹ **Note to Proposer:** To be inserted from the Proposer’s Proposal.