Central 70

High Performance Transportation Enterprise
4201 East Arkansas Ave., Room 230
Denver, CO 80222

Colorado Bridge Enterprise
4201 East Arkansas Ave., Room 230
Denver, CO 80222

December 23, 2015

RE: CENTRAL 70 PROJECT; RFP ADDENDUM NO. 1

Dear Proposer,

We refer to the Request for Proposals to Design, Build, Finance, Operate and Maintain the I-70 East Project [(now re-named as the Central 70 Project)] issued September 15, 2015 and September 29, 2015 (the "**RFP**"). Capitalized terms used but not defined herein have the meanings given to them in the RFP.

This letter, together with the documents attached hereto, constitute Addendum No. 1 to the RFP ("**Addendum No. 1**"). This Addendum No. 1 modifies the RFP pursuant to Section 1.3.1 of Part C of the Instructions to Proposers contained in the RFP.

Attached hereto are the following documents, each of which hereby replaces in its entirety the corresponding placeholder document included in the RFP immediately prior to the date of this letter:

(a) Section 25 of the Project Agreement;
(b) Schedule 1 (*Financial Close*) to the Project Agreement;
(c) Schedule 3 (*Commencement and Completion Mechanics*) to the Project Agreement;
(d) Schedule 7 (*Compensation on Termination*) to the Project Agreement; and
(e) Schedule 13 (*Required Insurances*) to the Project Agreement.

Except as expressly modified by this Addendum No. 1, the RFP for the Central 70 Project otherwise remains unchanged.

Please note that Addendum No. 1 is simultaneously being released to each Proposer and to all other interested parties through the Project website at: www.codot.gov/projects/i70east.

Sincerely,

Nicholas Farber
Designated Representative
Colorado Bridge Enterprise
High Performance Transportation Enterprise

Enclosures

Section 25
Insurance Provisions Rider

[*In a future Addendum, the following definitions will be added to Part A of Annex A to the Agreement, and therefore deemed deleted from this document (to the extent that this document is not otherwise superseded by such Addendum).*]

"Actual Benchmarked Insurance Cost" means, in respect of any Insurance Review Period, the aggregate of the insurance premiums reasonably incurred by Developer to maintain the Benchmarked Insurances during such period, excluding any insurance premium tax or broker's fees and expenses.

"Base Benchmarked Insurance Cost" means, in respect of any Insurance Review Period:

a. the greater of:

i. the sum of:

A. $[ ],[1] indexed[2] annually from [*date of Preferred Proposer's Financial Proposal submission*] to the first day of such Insurance Review Period; *plus*

B. the amount calculated pursuant to paragraph a.i.A. of this definition, indexed from the first day of such Insurance Review Period to the second Insurance Renewal Date in such Insurance Review Period; and

ii. either:

A. in respect of the first Insurance Review Period, the Actual Benchmarked Insurance Costs for such period; or

B. in respect of any other Insurance Review Period, the amount calculated pursuant to paragraph a.ii.A of this definition, indexed annually in respect of each subsequent Insurance Review Period from each Insurance Renewal Date in respect of which such costs were originally paid to the corresponding Insurance Renewal Date in such subsequent Insurance Review Period,

[1] This will be the amount specified in Form E to the ITP as submitted in the Preferred Proposer's Financial Proposal (subject to adjustment in accordance with the instructions to that Form). Form E shall be amended in a future Addendum to conform to this Section 25.

[2] **Note to Proposers:** The indexation mechanism in Section 2.3 of the Agreement will be revised in a future Addendum, including to account for the use of such term in this Section 25 and in Schedule 13.

less

b. any Base Benchmarked Insurance Deduction in respect of such Insurance Review Period.

"Base Benchmarked Insurance Deduction" means, in respect of any Uninsurable risk or any Unavailable Term that relates to any Benchmarked Insurance, an amount calculated in respect of an Insurance Review Period that equals:

a. the amount (if any) by which the Base Benchmarked Insurance Cost would have been a lesser amount had:

i. such risk been an Uninsurable risk; or

ii. such Insurance Term been an Unavailable Term,

in the case of either i. or ii., as of the dates by reference to which the Base Benchmarked Insurance Cost in respect of such Insurance Review Period is calculated; or

b. if, in the reasonable opinion of the Insurance Broker that prepares the applicable Joint Insurance Cost Report, it is impossible to determine an amount pursuant to paragraph a. of this definition in respect of any such Uninsurable risk or Unavailable Term, the amount (if any) by which it is reasonable to reduce the Base Benchmarked Insurance Cost under such circumstances, having due regard (to the extent possible) to:

i. the amount by which the Actual Benchmarked Insurance Cost is less than it would have been as a result of such risk becoming an Uninsurable risk or of such Insurance Term becoming an Unavailable Term; and

ii. the amount determined pursuant to paragraph b.i. of this definition as a percentage of the Actual Benchmarked Insurance Cost as calculated immediately prior to such risk becoming an Uninsurable risk or such Insurance Term becoming an Unavailable Term.

"Benchmarked Insurance Inception Date" means the Substantial Completion Date.

"Benchmarked Insurances" means all of the Insurance Policies required pursuant to Section 2 of Schedule 13 (*Required Insurances*).

"Eligible Insurer" means an insurer that:

a. is authorized to transact insurance in the State;

b. except as otherwise Approved by the Enterprises, has either (i) a policyholder's management and financial size category rating of not less than "A-X" according to A.M. Best's Financial Strength Rating and Financial Size Category or (ii) a rating of not less than "BBB" according to Standard and Poor's Rating Services;

c. is not the subject of:

i. an Insolvency Event; or

ii. a Governmental Authority order or directive limiting its business activities as related to or affecting any Insurance Policies placed or to be placed with such insurer; and

d. satisfies any conditions imposed by the Enterprises as a condition to any Approval given pursuant to b. of this definition.

"Exceptional Cost" means, in respect of an Insurance Review Period, the amount, if positive (and, if not, $0), calculated as:

"Exceptional Cost" = Insurance Cost Increase – (20% x Base Benchmarked Insurance Cost in respect of that Insurance Review Period).

"Exceptional Saving" means, in respect of an Insurance Review Period, the amount if positive (and, if not, $0), calculated as:

"Exceptional Saving" = Insurance Cost Decrease – (20% x Base Benchmarked Insurance Cost in respect of that Insurance Review Period).

"Insurance Broker" means Developer's insurance broker, provided that such broker shall at all times be a reputable international insurance broker of good standing.

"Insurance Cost Decrease" means, if the Insurance Cost Differential is less than $0, the amount thereof multiplied by minus one.

"Insurance Cost Differential" means, subject to the procedure set out in Section 25.7, the amount determined as follows:

"Insurance Cost Differential" = (ABIC - BBIC) - (PIC),

where:

"ABIC" is the Actual Benchmarked Insurance Cost;

"BBIC" is the Base Benchmarked Insurance Cost; and

"PIC" is any Project Insurance Change (which, for certainty, can

be less than $0).

"Insurance Cost Increase"	means, if the Insurance Cost Differential is greater than $0, the amount thereof.
"Insurance Policies"	has the meaning given to it in Section 25.1.1.[3]
"Insurance Renewal Date"	means the first anniversary of the Benchmarked Insurance Inception Date and, thereafter, each date falling on the anniversary of the prior Insurance Renewal Date.
"Insurance Review Period"	means: a. the two year period commencing on the Benchmarked Insurance Inception Date and ending on the Calendar Day immediately prior to the second Insurance Renewal Date; and b. each subsequent two year period commencing on each even-numbered anniversary of the Benchmarked Insurance Inception Date and ending on the Calendar Day immediately prior to the second anniversary of the first day of such two year period, in the case of either a. or b., except where the end of such period lies beyond the last Calendar Day of the Term, in which case the relevant Insurance Review Period shall end on the last Calendar Day of the Term.
"Insurance Term"	means a provision that must be included in one or more of the Insurance Policies in order for Developer to comply with Section 25.1.1.
"Joint Insurance Cost Report"	has the meaning given to it in Section 25.7.2.
"Project Insurance Change"	means any net increase or net decrease in the Actual Benchmarked Insurance Cost relative to the Base Benchmarked Insurance Cost (including any such increase or decrease resulting from a change in the amount of any deductible), excluding only any increase or decrease arising from: a. any unavoidable circumstances generally prevailing in the Relevant Insurance Markets; and b. any claims history in relation to the Project resulting from the acts or omissions of the Enterprises and/or CDOT, with the amount of any such net increase or net decrease to be expressed as a positive number in the event of a net increase and a negative number in the event of a net decrease for purposes of

[3] **Note to Proposers:** The definition of "Insurance Policies" currently in Annex A of the Agreement will be revised in a future Addendum to reflect this definition.

determining the Insurance Cost Differential.

"Relevant Insurance Markets" — the insurance markets which collectively insure the majority of transportation-related infrastructure projects in the United States from time to time, which as of the Agreement Date are New York, Bermuda and London.

"Specified Additional Insured" means each:

a. Indemnified Party;

b. any Railroad to the extent required to be treated as an additional insured under any Insurance Policy;

c. any Utility Owner to the extent required to be treated as an additional insured under any Insurance Policy;

d. any other Person as and when agreed by the Parties or otherwise reasonably required by the Enterprises.

"Unavailable Term" means any Insurance Term that, at the time an Insurance Policy is obtained or renewed:

a. is not available to Developer in the worldwide insurance market from Eligible Insurers on terms required by this Agreement; or

b. is not generally being incorporated in insurance procured in the worldwide insurance market from Eligible Insurers by contractors in relation to transportation-related infrastructure projects in the United States due to the level of the insurance premium payable for insurance incorporating such Insurance Term.

"Uninsurable" means a risk, at the time an Insurance Policy is required to be obtained or renewed:

a. for which Insurance Policies are not available to Developer in the worldwide insurance market from Eligible Insurers on terms required by this Agreement; or

b. that is not generally being insured against in insurance procured in the worldwide insurance market from Eligible Insurers by contractors in relation to transportation-related infrastructure projects in the United States due to the level of the insurance premium payable for insuring such risk.

* * *

25. INSURANCE

25.1. Obligation to Obtain and Maintain Insurance

25.1.1. Developer shall, at a minimum, obtain and maintain, or cause to be obtained and maintained, all insurance policies specified in Schedule 13 (*Required Insurances*) (the "Insurance Policies") pursuant to the requirements of this Section 25 and Schedule 13 (*Required Insurances*).

25.1.2. Notwithstanding Section 25.1.1, Developer acknowledges and agrees that:

a. the Enterprises make no representation or warranty as to the adequacy or sufficiency of the minimum Insurance Policy requirements specified in this Agreement, including as to whether such Insurance Policies shall be adequate to protect Developer against:

i. the performance or non-performance of its obligations under this Agreement;

ii. the risks it is assuming under this Agreement; and

iii. its liabilities to any third party;

b. except as otherwise expressly provided in this Agreement, no limit of liability specified for any Insurance Policy, or approved variances therefrom, shall preclude the Enterprises from exercising any right otherwise available to them under this Agreement or at Law; and

c. to the extent required by Law in connection with Work to be performed during the Term, Developer shall obtain and maintain, or cause to be obtained and maintained, in addition to the Insurance Policies, such other insurance policies for such amounts, for such periods of time and subject to such terms, as required by Law.

25.1.3. For certainty, the insurance coverage Developer is required to obtain and maintain, or cause to be obtained and maintained, pursuant to Sections 25.1.1 and 25.1.2.c may support but shall not limit Developer's indemnification and defense obligations under this Agreement.

25.2. General Insurance Requirements

25.2.1. Placement of insurance with Eligible Insurers

a. All Insurance Policies shall be obtained from, and maintained with, Eligible Insurers.

b. If an insurer providing any Insurance Policy ceases to be an Eligible Insurer, then Developer shall promptly, and in any event within 10 Working Days of such event occurring, secure alternate coverage with an Eligible Insurer unless the Enterprises otherwise Approve the continued maintenance of such Insurance Policy with the existing insurer.

25.2.2. Language; governing law

All Insurance Policies shall be issued in the English language and governed by the laws of Colorado.

25.2.3. Developer liability and deductibles

Except to the extent included in any Termination Amount or in any compensation paid with respect to a Supervening Event or Change, as between Developer and the Enterprises, Developer shall be liable for all insurance deductibles, premiums, and liabilities in excess of the coverage provided under any Insurance Policy, and the Enterprises shall have no liability for the same.

25.2.4. Primary coverage

a. Each Insurance Policy shall provide that the coverage thereof is primary and non-contributory with respect to all named insureds, additional insureds (including the Enterprises, CDOT and the Specified Additional Insureds) and loss payees, as their interests may appear.

b. Any insurance or self-insurance that is maintained by an insured or any additional insured (including the Enterprises, CDOT and any Specified Additional Insured) in addition to any Insurance Policy shall be in excess of such Insurance Policy and not contribute with it.

25.2.5. Endorsements

Each Insurance Policy shall be written or endorsed such that:

a. any:

i. failure on the part of a named or any additional insured (including any Specified Additional Insured) to comply with reporting provisions or other conditions of such Insurance Policy;

ii. breach of representation or warranty by, breach of any provision in such policy by, or other action or inaction of, a named insured, any additional insured (including any Specified Additional Insured) or others; or

iii. change in ownership of all or any portion of the Project or Developer's interest in the same,

shall not affect or vitiate the coverage provided under such Insurance Policy to the other named insureds or any additional insureds (including any Specified Additional Insured) (or to any such named insured's or additional insured's respective members, directors, officers, employees and agents);

b. such Insurance Policy shall apply separately to each named insured and additional insured (including any Specified Additional Insured) against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability;

c. coverage under and limits with respect to such Insurance Policy cannot be canceled, voided, suspended, lapsed, modified or reduced except following 30 Calendar Days' (or for non-payment of premium, 10 Calendar Days') prior notice by registered or certified mail (return receipt requested) to the Enterprises, where the insurer shall not have any limitation of liability for failure to provide such notice;

d. endorsements adding additional insureds (including Specified Additional Insureds) to required policies shall contain no limitations, conditions, restrictions or exceptions to coverage beyond those that apply under the Insurance Policy generally; and

e. Specified Additional Insureds may be added as additional insureds from time to time as anticipated by the definition thereof,

in the case of each of a. to e., to the extent not prohibited by Law.

25.2.6. Waivers of subrogation

a. The Enterprises waive all rights against each Developer-Related Entity, and Developer waives all rights against the Enterprises, CDOT and each Specified Additional Insured, in each case for any claims to the extent covered and paid by the Insurance Policies, or by any other insurance obtained and maintained pursuant to Section 25.1.2.c, except such rights as they may have to the proceeds of such insurance.

b. Developer shall require each Principal Subcontractor and all Subcontractors, to the extent applicable, to provide written waivers (equivalent to Developer's waivers set out in Section 25.2.6.a) in favor of the Enterprises, CDOT and each Specified Additional Insured.[4]

c. The Enterprises may, at their discretion (provided that such discretion is exercised and notice of the same is given to Developer at least 15 Calendar Days prior to any associated loss) require Developer to provide written waivers equivalent to the waivers set out in Sections 25.2.6.a and 25.2.6.b in favor of the City of Denver, Denver Public Schools and the Cover Maintainer.

25.2.7. Defense costs

No defense costs shall be included within or erode the limits of coverage under any Insurance Policy, except that defense costs may be included within the limits of coverage under each Insurance Policy required pursuant to Sections 1.2, 1.4, 1.5, 1.6, 2.2, 2.4, 2.5 and 2.6 of Schedule 13 (*Required Insurances*).

25.2.8. Exhaustion of limits

With respect to each Insurance Policy required pursuant to Sections 1.2 and 2.2 of Schedule 13 (*Required Insurances*), whenever the aggregate limit is exhausted by at least 25% of the required aggregate limit by claims paid or reserved by insurer(s) (such that, for certainty, 75% or less of such required aggregate limit then remains available), Developer shall promptly:

a. notify the Enterprises of such exhaustion; and

b. and in any event within five Working Days, deliver evidence to the Enterprises (such evidence reasonable satisfactory to the Enterprises) that Developer has obtained, or caused to be obtained, additional insurance to reinstate the aggregate limit to the minimum amount required by Section 1.2 or Section 2.2 of Schedule 13 (*Required Insurances*), as the case may be.

25.3. Verification of coverage

25.3.1. Developer shall, not less than five Working Days prior to the effective (or renewal) date of each Insurance Policy, deliver to the Enterprises:

a. a written certificate of insurance that:

[4] **Note to Proposers:** The form of Principal Subcontractor Direct Agreements, which will be provided in a subsequent Addendum, will incorporate this waiver.

i. is on the most recent ACORD form consistent with the required coverage and in standard form;

ii. states the identity of all insurers, named insureds and additional insureds;

iii. states the type and limits of coverage;

iv. included as attachments all additional insured endorsements; and

v. is signed by an authorized representative of the insurer shown on the binder; and

b. a letter from the Insurance Broker placing the Insurance Policy addressed to the Enterprises certifying that:

i. such Insurance Broker has reviewed this Section 25 and Schedule 13 (*Required Insurances*);

ii. the Insurance Policy so certified has been issued in accordance with this Section 25 and Schedule 13 (*Required Insurances*);

iii. all premiums in respect of such Insurance Policy have been paid, or arrangements have been made to pay such premiums in a timely manner; and

iv. in the absence of material non-disclosure, misrepresentation or fraud by the named insured, the Enterprises may rely on such letter.

25.3.2. Developer shall promptly, and in any event no later than 90 Calendar Days after the effective (or renewal) date of each Insurance Policy, deliver to the Enterprises a true and complete certified copy of each such Insurance Policy, including all endorsements thereto, provided that if any Insurance Policy insures subject matter other than the Work or the Project (or any part of either thereof) any reference to such other subject matter may be removed from such certified copies so long as such certified copies are accompanied by a letter from the Insurance Broker confirming that such removal has no effect on the conclusions in the letter that it previously provided pursuant to Section 25.3.1.b in respect of such Insurance Policy.

25.3.3. If Developer fails to comply with its obligations under Sections 25.3.1 or 25.3.2, the Enterprises shall, without limiting any of their other rights under this Agreement, have the right, but not the obligation, without notice to Developer, to:

a. obtain any insurance that is the subject of such failure at Developer's cost and expense; and/or

b. exercise their right to suspend, in whole or in part, the Work pursuant to Section 23.3.1.[5]

25.4. Reporting and Handling of Claims

25.4.1. Developer's obligations to report and process claims

a. Unless notified otherwise by the Enterprises pursuant to Section 25.4.2.a with respect to the Enterprises' (or CDOT's) insurance claims (and potential claims), as between the Enterprises and Developer, Developer shall:

[5] **Note to Proposers:** Section 23.3.2 shall be revised in a future Addendum to clarify that a suspension due to a failure to maintain insurance (or proof thereof) shall be treated as equivalent to an unsafe condition, such that Developer would not be entitled to claim a Compensation Event in connection with any such suspension.

i. promptly report and process all potential claims under the Insurance Policies;

ii. promptly and diligently pursue all claims pursuant to the claims procedures specified in such Insurance Policies, whether for defense or indemnity or both; and

iii. enforce all legal rights against insurers under the Insurance Policies and under Law in order to collect on all claims, including pursuing necessary litigation and enforcement of judgments, provided that Developer shall be deemed to have satisfied this obligation if a judgment is not collectible through the exercise of lawful and diligent means,

in each case, to the extent applicable, following (x) notice to and regular consultation with the Enterprises pursuant to Section 25.4.1.b and (y) the use by Developer of Reasonable Efforts to reflect Enterprises' resulting input.

b. Developer shall:

i. promptly notify the Enterprises of any incident, potential claim, claim or other matter of which Developer becomes aware that:

A. involves or could conceivably involve an Indemnified Party as a defendant;

B. involves a claim or potential claim by Developer or any other Person under an Insurance Policy, or any other insurance obtained and maintained pursuant to Section 25.1.2.c, with, in any such case, a potential value of $25,000 (indexed) or more;

C. involves a claim which is being denied by an insurer; or

D. involves a fatality, and

ii. regularly consult with the Enterprises (as and when reasonably requested by the Enterprises) regarding, and thereafter keep the Enterprises fully informed of, any incident, claim or matter of the type referenced in Sections 25.4.1.b.i.A through 25.4.1.b.i.D above (including, for certainty, any such incident, claim or matter of which Developer becomes aware by notice from the Enterprises).

25.4.2. Enterprise involvement in reporting and processing claims

a. Notwithstanding Section 25.4.1, the Enterprises (and CDOT, to the extent it is a Specified Additional Insured with respect to any relevant Insurance Policy) shall have the right, but not the obligation, to report directly to insurers and, subject to prior notice to Developer, process the Enterprises' (or, as applicable, CDOT's) claims under the Insurance Policies.

b. The Enterprises agree to promptly notify Developer of any Enterprise and/or CDOT incident, or any claim or potential claim against the Enterprises and/or CDOT, and/or any other matters that are reasonably expected to give rise to an insurance claim, in each case of which the Enterprises become aware, and to render to the insurers the Enterprises' and/or CDOT's defense of any claim resulting from the same under such Insurance Policies.

c. The Enterprises shall use Reasonable Efforts to cooperate with Developer as necessary for Developer to satisfy its obligations under Section 25.4.1, including providing Developer a copy of all written materials that the Enterprises receive asserting a claim against the Enterprises and/or CDOT that is subject to defense by an insurer under an Insurance Policy.

25.4.3. Insurance meetings

Without limiting Developer's obligations under this Section 25.4, Developer and Developer's insurers and control claims adjuster shall meet with the Enterprises' designated insurance representatives at such intervals as the Enterprises may reasonably request, but no less than twice in each Calendar Year, to review all incidents, potential claims and claim files together with such other matters related to the Insurance Policies as the Enterprises may reasonably request.

25.5. Reinstatement

[ ][6]

25.6. Unavailability of Insurance

25.6.1. Unavailability due to an Uninsurable risk

a. If a risk otherwise covered by any Insurance Policy becomes, or is likely to become, Uninsurable then:

i. Developer shall notify the Enterprises promptly, and in any event within five Working Days, after becoming aware of that any such risk has become, or is likely to become, Uninsurable;

ii. Developer shall thereafter provide the Enterprises with such information as the Enterprises reasonably request regarding the Uninsurable risk; and

iii. the Parties shall promptly meet to discuss the means by which the risk should be managed or shared under the circumstances.

b. If it is agreed or determined that any risk has become Uninsurable, then:[7]

i. Developer shall be relieved of its obligations pursuant to Section 25.1.1 to the extent, and only to the extent, that Developer's inability to comply with such obligations is due solely and directly to, and limited to the duration of, such risk having become Uninsurable; and

ii. the Enterprises shall (at their discretion):[8]

A. terminate this Agreement pursuant to Section 33.1.7 and pay to Developer an amount equal to the amount calculated pursuant to Section 2 of Schedule 7 (*Compensation on Termination*);

---

[6] **Note to Draft:** The reinstatement provisions will be provided in a future Addendum.

[7] **Note to Proposers:** Section 33.1.7 of the Agreement will be revised in a future Addendum to provide Developer with an opportunity to respond to certain Enterprise Termination Notices with respect to an Uninsurable risk such that the Agreement would remain in effect.

[8] **Note to Proposers** Section 33.1.7 of the Agreement as revised in a future Addendum will provide a default option if the Enterprises do not affirmatively choose one of the following options.

B. elect to continue this Agreement, in which case, but only for so long as such risk remains Uninsurable:

(I) the Enterprises agree that, following the occurrence of such risk, they shall pay Developer an amount equal to the insurance proceeds that would have been payable under the Insurance Policies had such risk not become Uninsurable, subject to the limitations, conditions and exclusions set out in the certificates and policies of insurance relating to the relevant Insurance Policies most recently provided by Developer to the Enterprises (or, if no such certificates or policies of insurance have previously been provided, such limitations, conditions and exclusions as the Enterprises may reasonably determine would have applied), provided that Developer shall remain responsible for any deductibles; and

(II) in respect of each month during any part of which the relevant insurance relating to such risk is not maintained, Developer shall pay to the Enterprises, or (at the Enterprises' discretion during the Operating Period) the Enterprises shall set-off against the Performance Payments pursuant to Section 5 of Part 3 of Schedule 4 (*Payments*), an amount equal to the premium paid by Developer in respect of the relevant risk in respect of the month prior to such risk becoming Uninsurable (using a reasonable estimate of such amount where a precise figure is not available and pro-rating any annual or other premium previously payable where appropriate); or

C. issue an Enterprise Change, as a result of which Developer shall be left in a No Better and No Worse position (relative to the position that it would have been had the Enterprises elected to proceed under Section 25.6.1.b.ii.B) with respect to such Uninsurable risk and, for certainty, this Agreement shall continue.

c. For so long as any risk remains Uninsurable and this Agreement remains in effect, Developer shall approach the insurance market at least once every three months to establish whether the risk continues to be Uninsurable. Promptly upon Developer becoming aware that the risk is no longer Uninsurable, Developer shall, as soon as is reasonably practicable, take out and maintain, or cause to be taken out and maintained, the insurance required to be maintained for such risk pursuant to this Agreement, and on such insurance becoming effective the provisions of Section 25.6.1.b shall cease to apply in respect of such risk.

25.6.2. Unavailable Terms

a. If any Insurance Term that would otherwise be included in an Insurance Policy becomes, or is likely to become, an Unavailable Term then:

i. Developer shall notify the Enterprises promptly, and in any event within five Working Days, after becoming aware of the existence of an Unavailable Term or the likelihood of an Insurance Term becoming an Unavailable Term;

ii. Developer shall thereafter provide the Enterprises with such information as the Enterprises reasonably request regarding the Unavailable Term; and

iii. the Parties shall promptly meet to discuss the means by which the existence of such Unavailable Term should be managed or its consequences shared under the circumstances.

b. If it is agreed or determined that an Insurance Term has become an Unavailable Term, then:

i. Developer shall be relieved of its obligations pursuant to Section 25.1.1 to include the relevant Insurance Term in the relevant Insurance Policies to the extent, and only to the extent, that Developer's inability to comply with such obligations is due solely and directly to, and limited to the duration of, such term having become an Unavailable Term; and

ii. in respect of each month during any part of which the relevant Insurance Term is an Unavailable Term, Developer shall pay to the Enterprises, or (at the Enterprises' discretion during the Operating Period) the Enterprises shall set-off against the Performance Payments pursuant to Section 5 of Part 3 of Schedule 4 (*Payments*), an amount of premium equal to the amount paid by Developer in respect of the Unavailable Term in respect of the month prior to such term becoming an Unavailable Term (using a reasonable estimate of such amount where a precise figure is not available and pro-rating any annual or other premium previously payable where appropriate) net of any annual amount paid or payable by Developer with respect to such month to maintain, or cause to be maintained, any (whether full or partial) alternative or replacement term and/or condition in respect of such Insurance Term pursuant to Section 25.6.2.d.

c. For so long as an Insurance Term is an Unavailable Term, Developer shall approach the insurance market at least once every three months to establish that the relevant term remains an Unavailable Term. Promptly upon Developer becoming aware that the term is no longer an Unavailable Term, Developer shall, as soon as is reasonably practicable, take out and maintain, or cause to be taken out and maintained, the relevant insurance including such previously Unavailable Term pursuant to this Agreement, and on such insurance becoming effective the provisions of Section 25.6.2.b shall cease to apply in respect of such Insurance Term.

d. Notwithstanding Section 25.6.2.b, to the extent that it is agreed or determined that an alternative to or replacement of the Unavailable Term is available to Developer in the worldwide insurance market with Eligible Insurers, which if included in the relevant Insurance Policy would fully or partially address Developer's inability to fully comply with its obligations pursuant to Section 25.1.1, at a cost which contractors in relation to transportation-related infrastructure projects in the United States are (at such time) generally prepared to pay, Developer shall obtain and maintain, or cause to be obtained and maintained, insurance including such alternative or replacement Insurance Term.

25.7. Benchmarking of Insurance Costs

25.7.1. The procedure set out in this Section 25.7 shall be used to determine how the Parties shall share any increase, or benefit from any decrease, in the cost of Benchmarked Insurances.

25.7.2. Developer shall cause the Insurance Broker to prepare (at Developer's cost and expense) and deliver to the Enterprises (no later than 10 Working Days after the end of the most recent Insurance Review Period a report in respect of such Insurance Review Period (the "Joint Insurance Cost Report"). Each Joint Insurance Cost Report shall be addressed to both Developer and the Enterprises on a reliance basis.

25.7.3. Each Joint Insurance Cost Report shall, at a minimum, contain the following information in respect of the relevant Insurance Review Period:

a. a full breakdown of the Actual Benchmarked Insurance Cost;

b. a full breakdown of the Base Benchmarked Insurance Cost;

c. a spreadsheet detailing separately:

i. the sum(s) insured/limit(s) of indemnity (i.e. rateable factor) for each of the Benchmarked Insurances;

ii. the premium rate for each of the Benchmarked Insurances;

iii. the net premium paid (or to be paid) for each of the Benchmarked Insurances (i.e. excluding both insurance premium tax and broker's fees and expenses);

iv. the actual deductible(s) applicable to the calculations made in the Joint Insurance Cost Report; and

v. details of all claims paid or reserved (including incident date and type and amount of claim);

d. an assessment, quantification and breakdown of each increase or decrease in insurance costs that, in aggregate, determine the amount of any Project Insurance Change together with an explanation of the reasons therefor;

e. the calculation of the Insurance Cost Differential and of any resulting Exceptional Cost or Exceptional Saving arising from this calculation;

f. the opinion of the Insurance Broker as to the reasons why the Actual Benchmarked Insurance Cost has varied from the Base Benchmarked Insurance Cost, specifying the impact of each explanatory factor and quantifying the amount attributable to each such factor; and

g. such other evidence as reasonably requested by the Enterprises of any changes to circumstances generally prevailing in the Relevant Insurance Markets that the Insurance Broker indicates to account for the Insurance Cost Differential.

25.7.4. The Enterprises, at their discretion and at their cost and expense, may independently assess the accuracy of the information in the Joint Insurance Cost Report and otherwise conduct their own independent insurance review, which review may include retaining advisors and/or performing their own assessment as to, among other things, the impact of the claims history on renewal costs. Developer shall cooperate with respect to any reasonable requests from the Enterprises for additional information in relation to such independent assessment (including, if applicable, by ensuring that the Insurance Broker provides any reasonably requested additional information).

25.7.5. No later than 60 Calendar Days' after Developer's submission of any Joint Insurance Cost Report, the Enterprises shall (acting reasonably) determine in respect of the Insurance Review Period to which such report relates, and with reference to such report, whether:

a. there is an Exceptional Cost, in which case the Enterprises shall within 45 Calendar Days of such determination make a one-off lump-sum payment to Developer equal to 80% of the Exceptional Cost;

b. there is an Exceptional Saving, in which case Developer shall within 30 Calendar Days of such determination make a one-off lump-sum payment to the Enterprises equal to 80% of the Exceptional Saving; and

c. there is neither an Exceptional Cost nor an Exceptional Saving, in which case any Insurance Cost Differential shall be borne by or be for benefit of Developer.

Schedule 1[1]
Financial Close

[*In a future Addendum, the following definitions will be added to Part A of Annex A to the Agreement, and therefore deemed deleted from this Schedule (to the extent that this Schedule is not otherwise superseded by such Addendum).*]

"Bank Financing"	means any Project Debt financing to be provided by a commercial bank or similar institution (other than in the form of a Bond Financing or TIFIA Financing) that is assumed in the Base Financial Model.
"Base CPP"	means the "Base Capital Performance Payment" set out in Section 2(f) of Part 2 of Schedule 6 (*Performance Mechanism*).
"Base MPP"	means the Base CPP plus the Base OMRP.
"Base OMRP"	means the "Base OMR Payment" set out in Section 2(f) of Part 2 of Schedule 6 (*Performance Mechanism*).
"Baseline Credit Spreads"	means the credit spreads in the "Proposer Basis Scale" submitted by the Preferred Proposer pursuant to Section 5.6 of the "Financial Proposal Submission Requirements" of the ITP.[2]
"Baseline TIFIA Term Sheet"	means the Baseline TIFIA Term Sheet attached as Exhibit 1 in Part I to the ITP.
"Benchmark Interest Rates"	means the publicly documented interest rates of each maturity included in the following indices: (a) the LIBOR swap spot curve, as provided by Bloomberg; (b) the LIBOR swap forward curves, as provided by Bloomberg; (c) the U.S. Spot Treasury Yield Curve; (d) the Municipal Market Data (MMD) benchmark, as provided by Thomson Reuters; (e) the Securities Industry and Financial Markets Association (SIFMA) Municipal Swap Index (formerly known as the Bond Market Association (BMA) Municipal Swap Index); and (f) the Treasury Securities – State and Local Government Series (SLGS) index, as provided by the US Treasury.
"Bond Financing"	means any Project Debt financing to be provided through the capital markets issuance (including through a private placement) of either:

[1] This Schedule (including Annex A) will be updated prior to execution of this Agreement to reflect (a) any prior waiver by the Preferred Proposer of rights to receive the benefit of interest rate and/or credit spread protection and (b) any decision by the Preferred Proposer not to assume the use of TIFIA and/or PABs.

[2] **Note to Proposers:** For certainty, the Baseline Credit Spreads shall not include credit spreads for any private placement that is not also an offering under Rule 144A and Regulation S of the Securities Act of 1933. The ITP will be revised in a future Addendum to clarify this.

(a) PABs by the PABs Issuer; or

(b) taxable bonds,

that, in the case of (a) or (b), is assumed in the Base Financial Model.

"Developer Conditions Precedent" means the conditions set out in Section 2.2 of Schedule 1 (*Financial Close*).

"Enterprise Closing Agreements" means:

(a) the Project Agreement Amendment;

(b) the Lenders' Direct Agreement;

(c) each of the Principal Subcontractor Direct Agreements; and

(d) [each of the other Financing Documents that require execution by either or both of the Enterprises (including by BE acting as PABs Issuer)].[3]

"Enterprise Conditions Precedent" means the conditions set out in Section 2.3 of Schedule 1 (*Financial Close*).

"Financial Close" has the meaning given to it in Section 2.1(a) of Schedule 1 (*Financial Close*).

"Financial Close Base CPP" has the meaning given to it in Section 5(d) of Annex A to Schedule 1 (*Financial Close*).

"Financial Close Security" means:

(a) one or more letters of credit in the aggregate amount of at least $20,000,000, each issued by an Eligible Financial Institution and delivered by Developer pursuant to Section 7.3.1.f. of Part C of the ITP on or prior to the Agreement Date; and

(b) any replacement letter of credit delivered pursuant to Section 1.2(b) of Schedule 1 (*Financial Close*) that is in the same form as any letter of credit previously delivered pursuant to Section 7.3.1 of Part C of the ITP or otherwise in such other form as the Enterprises may Approve.

"Financial Close Termination Amount" means:

(a) $1,500,000; *plus*

(b) the lesser of:

(i) Developer's reasonable and documented external costs incurred in connection with:

[3] To be replaced with a list of the final relevant agreements prior to execution of this Agreement.

(A) execution of this Agreement;

(B) the performance of any NTP1 Work; and

(C) its efforts to achieve Financial Close,

after the issuance of the Notice of Award and through but not including the date of delivery of any notice of termination pursuant to Schedule 1 (*Financial Close*); and

(ii) $500,000.

"Key Financial Event" means any of the following:

(a) the Preferred Proposer:

(i) assumed a TIFIA Financing in its Base Financial Model and a TIFIA Event occurs; and/or

(ii) assumed a Bond Financing using PABs in its Base Financial Model and a PABs Event occurs; or

(b) on any Calendar Day in any applicable Protection Period the cumulative effect of fluctuations in applicable Benchmark Interest Rates, together with any changes in credit spreads applicable to a Bond Financing (excluding any private placement that is not also an offering under Rule 144A and Regulation S of the Securities Act of 1933) relative to the Baseline Credit Spreads, during the applicable Protection Period would result in an increase to the Base CPP in an amount that would result in an upward adjustment to the Base MPP of more than 10% as determined pursuant to Annex A to Schedule 1 (*Financial Close*) assuming, for such purposes, that such adjustment were to be made on such day; or

(c) in the reasonable opinion of the Enterprises, any of the foregoing events referred to in paragraphs (a) and (b) of this definition is likely to occur (in the case of paragraph (b), on the anticipated Financial Close Date.

"Notice of Award" means the notice issued on [*date*] by the Enterprises notifying the Preferred Proposer of its selection as the Preferred Proposer.

"PABs Event" means, at any time after the issuance of the Notice of Award, either:

(a) the relevant allocation of PABs is rescinded or reduced by US DOT with the effect that the PABs allocation shall not be available to Developer to the extent assumed in its Base Financial Model; or

(b) the PABS Issuer unreasonably (i) delays issuance of, or (ii) refuses to issue, the PABs in the amount that Developer's underwriters are otherwise prepared to underwrite, provided that Developer's time schedule for the issuance of the PABs includes normal and customary time periods for the PABs Issuer to issue the PABs as a conduit issuer,

provided that neither of the events referred to in paragraphs (a) and (b) of this definition shall be deemed to be a PABs Event if such event arises as a result of any breach of Law, Governmental Approval or this Agreement, fraud, willful misconduct, criminal conduct, recklessness, bad faith or negligence by or of the Preferred Proposer or any Developer-Related Entity.

"Project Agreement Amendment" means an amendment to this Agreement to be executed on the Financial Close Date, which shall reflect any adjustments or amendments that have been accepted or agreed, as applicable, by the Enterprises and Developer pursuant to Annex A to Schedule 1 (*Financial Close*), including:

(a) the Financial Close Base CPP calculated pursuant to Section 5(d) of Annex A to Schedule 1 (*Financial Close*);

(b) the Base Case Equity IRR calculated pursuant to Section 5(e) of Annex A to Schedule 1 (*Financial Close*);and

(c) the replacement of the Base Financial Model attached as Schedule 26 (*Base Financial Model*) with a copy of the Financial Model Accepted by the Enterprises pursuant to Section 2.2(h)(i) of Schedule 1 (*Financial Close*).

"Protection Period" means the period from 3:00 pm Eastern Standard Time on [ ][4] to and including:

(a) with respect to any Bank Financing, the earlier of (i) Financial Close and (ii) the date on which the principal amount of such Bank Financing is fully[5] hedged by Developer;

(b) with respect to any TIFIA Financing, the date that any loan agreement evidencing TIFIA Financing is entered into between Developer and US DOT; and

(c) with respect to any Bond Financing, the date of the signing of the bond purchase agreement among Developer, the underwriters as bond purchasers and, in respect of any issuance of PABS, the PABs Issuer.

"TIFIA Betterment" means any betterment in a financial term of the TIFIA Financing as compared to the Baseline TIFIA Term Sheet, net of any adverse changes in financial terms as compared to the Baseline TIFIA Term Sheet that are required by the TIFIA Joint Program Office as a condition of accepting such betterment.

"TIFIA Event" means, at any time after the issuance of the Notice of Award, either:

(a) the TIFIA Joint Program Office decides not to, or is unable to, provide credit assistance to Developer in an amount at least equal to the amount set out in, or (other than with respect to TIFIA Betterments) on terms materially consistent with the terms of, the Baseline TIFIA

[4] To insert the date of the Interest Rate and Credit Spread Start Time under the ITP (i.e. the date on which Proposers must submit the Interest Rate and Credit Spread Submittals, which is expected to be 10 Working Days prior to the date on which the Financial Proposal Deadline occurred).
[5] To be updated to reflect the Preferred Proposer's actual financing terms (e.g. to the extent that these provide for hedging of an amount slightly different than the principal amount of the Bank Financing).

Term Sheet; or

(b) after the Agreement Date, the TIFIA Joint Program Office fails to work diligently and reasonably towards achieving Financial Close by the Financial Close Deadline (including unreasonable negotiation),

provided that neither of the events referred to in paragraphs (a) or (b) of this definition shall be deemed to be a TIFIA Event if:

(c) the Preferred Proposer, Developer or any other Developer-Related Entity failed to comply with the requirements of Section 3.3 of Part B of the ITP or otherwise sought to achieve TIFIA Betterments on its own behalf or on behalf of its Lenders;

(d) Developer has failed to use Reasonable Efforts to achieve Financial Close, which Reasonable Efforts shall include:

(i) complying with all TIFIA Joint Program Office policy requirements;

(ii) negotiating in good faith mutually agreeable terms and conditions with the TIFIA Joint Program Office, including by making commercially reasonable concessions as necessary and appropriate under the circumstances; and

(iii) furnishing all required information and credit ratings in a timely manner; or

(e) such event arises as a result of any breach of Law, Governmental Approval or this Agreement, fraud, willful misconduct, criminal conduct, recklessness, bad faith or negligence by or of the Preferred Proposer or any Developer-Related Entity

"TIFIA Financing" means any debt financing to be provided by the US DOT pursuant to TIFIA that is assumed in the Base Financial Model.

* * *

1. Financial Close Security

1.1 Delivery of Financial Close Security

The Parties acknowledge that, pursuant to Section 7.3.1.f. of Part C of the ITP, on or prior to the Agreement Date Developer delivered the Financial Close Security to the Enterprises for the purposes set out in this Schedule 1.

1.2 Maintenance of Financial Close Security

(a) Developer shall monitor the status of each issuer of Financial Close Security as an Eligible Financial Institution. Developer shall promptly notify the Enterprises if at any time prior to Financial Close any issuer of Financial Close Security ceases to be an Eligible Financial Institution.

(b) No later than 10 Working Days after Developer becomes aware of such cessation, Developer shall submit to the Enterprises new Financial Close Security issued by an

Eligible Financial Institution that, together with all other outstanding and valid Financial Close Security (if any) issued by one or more Eligible Financial Institutions, shall have an aggregate undrawn value of at least $20,000,000. Following the Enterprises' receipt of such Financial Close Security, they shall return to Developer the undrawn portion of the replaced Financial Close Security issued by any issuer that has ceased to be an Eligible Financial Institution.

1.3 **Drawing on Financial Close Security**

(a) Developer understands and agrees that the Enterprises will be entitled to draw on the Financial Close Security (up to a maximum amount of $20,000,000) if, and only if:

(i) Developer withdraws, or attempts to withdraw, any part or all of the Financial Close Security without the Enterprises' prior Approval (provided that no such Approval shall be required if Developer terminates this Agreement pursuant to Section 5.2(a) of this Schedule 1);

(ii) Developer fails to comply with Section 1.2(b) of this Schedule 1; or

(iii) the Enterprises have an entitlement to draw on the Financial Close Security pursuant to Section 5.1(b) of this Schedule 1.

(b) The Parties acknowledge and agree that:

(i) forfeiture of the Financial Close Security pursuant to the terms thereof and Section 1.3(a) of this Schedule 1 are in the nature of liquidated damages and not a penalty; and

(ii) any amount forfeited is a fair and reasonable estimate of fair compensation to the Enterprises for the work required to procure the Project and any Losses that may accrue to the Enterprises as a result of the circumstances giving rise to such forfeiture, which amounts were impossible to ascertain as of the initial date of the delivery of the Financial Close Security.

2. **Conditions Precedent to Achieving Financial Close**[6]

2.1 **Occurrence of Financial Close**

(a) "Financial Close" will occur upon:

(i) satisfaction (or waiver by the Enterprises) of each of the Developer Conditions Precedent; and

(ii) satisfaction (or waiver by Developer) of each of the Enterprise Conditions Precedent.

[6] **Note to Proposers:** The Enterprises recognize that the Parties should, in limited circumstances, each be excused from their obligations to achieve Financial Close by the Financial Close Deadline where material litigation related to this Agreement or the Project, including with respect to the ROD, has been filed and remains unresolved. The Enterprises intend to add appropriate and balanced protections to address this risk in the context of this Project in a future Addendum (most likely, RFP No. 3). This may include revisions to Sections 2 and 5 of this Schedule 1. For certainty, if this Agreement were to be terminated under such circumstances (and assuming no fault on the part of Developer or a Developer-Related Entity): (a) the Enterprises would not be entitled to draw on Developer's Financial Close Security; and (b) Developer would be entitled to receive the Financial Close Termination Amount.

(b) Without limiting or otherwise modifying any Party's obligations under this Agreement with respect to Financial Close, no later than three Working Days after the Agreement Date, Developer shall submit to the Enterprises:

(i) for Information, a closing checklist and timeline, identifying all documents, submissions and actions necessary to achieve Financial Close by the Financial Close Deadline;[7] and

(ii) for Acceptance, a protocol for calculating the Financial Close Base CPP (and, accordingly, the Base MPP) and for calculating the Base Case Equity IRR pursuant to Section 5 of Annex A to this Schedule 1 and for determining any other necessary adjustments or amendments to the Financial Model pursuant to Section 2.2(h)(i) of, and Annex A to, this Schedule 1 and pursuant to Section 28.3.

(c) For purposes of Sections 2.2 and 2.3 of this Schedule 1, any matter that must be "certified" by a Party shall be certified in writing by an authorized representative of such Party, such certification being in form and substance consented to by the other Party (such consent not to be unreasonably withheld).

2.2 **Developer Conditions Precedent**

Developer shall be responsible for satisfying the following conditions precedent to Financial Close.

(a) On and from the Agreement Date through and including the Financial Close Date, Developer shall have performed and complied with all its obligations under this Agreement, and no Developer Default shall have occurred and be continuing on the Financial Close Date.

(b) As of the Financial Close Date, each representation and warranty made by Developer pursuant to Section 5.1.1 shall be true and correct as of such date, as certified by Developer.

(c) Developer shall have provided the Enterprises with:

(i) a copy, certified by Developer as true, complete and accurate, of each executed Financing Document that is not also an Enterprise Closing Agreement, each of which shall be in form and substance Accepted by the Enterprises; and

(ii) a counterpart of each Enterprise Closing Agreement executed by all parties thereto other than the Enterprises (including other than BE acting as PABs Issuer), each of which shall be in form and substance Approved by the Enterprises.

(d) Developer shall have provided the Enterprises with such documents and certificates as the Enterprises may reasonably request evidencing:

(i) Developer's organization, existence and qualification to do business, including any articles of incorporation, bylaws, partnership agreement, joint venture

[7] Note to Proposers: The Enterprises expect to revise the Financial Close Deadline, and the commercial closing timeline and process, in RFP No. 2 in order to reflect certain Proposer feedback received to date.

agreement and/or other appropriate organizational documents and a statement of foreign entity authority, if applicable;

(ii) that all necessary company or partnership action has been taken by Developer to authorize the execution, delivery and performance of each Financing Document and each Enterprise Closing Agreement to which it is a party;

(iii) the authority, power and capacity of the individuals executing the agreements referred to in Section 2.2(d)(ii) of this Schedule 1 on behalf of Developer;

(iv) satisfaction, or waiver, of all conditions precedent to closing and funding the Project Debt under the Financing Documents;

(v) Committed Investments that satisfy the requirements of Section 26.1;

(vi) Developer's irrevocable commitment, subject only to the occurrence of Financial Close, to pay the Enterprises (and/or, at the Enterprises' direction, their designee(s)) in such manner and to such accounts as the Enterprises shall, in their discretion, instruct Developer:

(A) $25,000,000 pursuant to Section 3.7 of Part B of the ITP; and

(B) all the Enterprises', CDOT's and/or the PABs Issuer's reimbursable fees, costs and expenses associated with the issuance and subsequent administration of any PABs issued in connection with Financial Close pursuant to Section 3.2.2.c. of Part B of the ITP, in the final amount notified to Developer by the Enterprises prior to the Financial Close Date; and

(C) all the Enterprises' and/or CDOT's reimbursable fees, costs and expenses associated with the origination, credit processing and administration of any TIFIA Financing undertaken in connection with Financial Close pursuant to Section 3.3.4.b.(ii) of Part B of the ITP, in the final amount notified to Developer by the Enterprises prior to the Financial Close Date.

(e) Developer shall have delivered to the Enterprises legal opinions to the effect set out in Part B of Schedule 22 (*Forms of Legal Opinions*) from Developer's external counsel and the Principal Subcontractors' external and (to the extent permitted by such Part B of Schedule 22 (*Forms of Legal Opinions*)) internal counsel, which opinions shall otherwise be in form and (subject to reasonable and customary assumptions and qualifications) substance Accepted by the Enterprises.

(f) Developer shall have delivered to the Enterprises the Contractor Bonds as required pursuant to Section 9.3.1.a.i. and, if applicable, Section 9.3.1.c.

(g) With respect to all Insurance Policies that are required pursuant to Section 25 and Schedule 13 (*Required Insurance*) to be in effect on and from the Financial Close Date:

(i) such policies have been obtained from Eligible Insurers on terms that comply with Section 25 and Schedule 13 (*Required Insurance*) and are in full force and effect; and

(ii) the Enterprises shall have received binding verifications of coverage from the relevant insurers (or Developer's insurance brokers) of such Insurance Policies, in compliance with Section 25.3.5 as Accepted by the Enterprises.

(h) On or immediately prior to the anticipated Financial Close Date, Developer shall have delivered to the Enterprises, and the Enterprises shall have Accepted:

(i) an unrestricted electronic version of the Financial Model, which version incorporates any amendments previously agreed by the Parties (including to reflect the Financial Close Base CPP), together with an updated "Assumptions Book" (in the form previously submitted by the Preferred Proposer pursuant to Section 6.2 of the "Financial Proposal Submission Requirements" in the ITP) and with any other documentation necessary or reasonably requested by the Enterprises to operate the Financial Model; and

(ii) an update to the audit report previously submitted by the Preferred Proposer pursuant to Section 6.3 of the "Financial Proposal Submission Requirements" in the ITP in respect of the Financial Model delivered pursuant to Section 2.2(h)(i) of this Schedule 1, which audit report shall otherwise comply with Section 28.4.

2.3 Enterprises Conditions Precedent

The Enterprises shall be responsible for satisfying the following conditions precedent to Financial Close.

(a) As of the Financial Close Date, each representation and warranty made by each Enterprise pursuant to Section 5.1.2 shall be true and correct as of such date, as certified by the Enterprises.

(b) Subject to Developer's delivery to the Enterprises of executed counterparts of each such agreement pursuant to Section 2.2(c)(ii) of this Schedule 1, the Enterprises (including BE as PABs Issuer) shall have each (as applicable) executed, and procured execution by the State Controller of, counterparts of each Enterprise Closing Agreement.

(c) The Enterprises shall have provided Developer with a legal opinion of the State Attorney General's Office in substantially the form of Part A of Schedule 22 (*Forms of Legal Opinions*) to this Agreement.

3. Achievement of Financial Close

3.1 Interest Rate Fluctuation and Benchmarking

Subject to Section 4 of this Schedule 1, pursuant to Annex A to this Schedule 1 the Enterprises shall assume certain Benchmark Interest Rate and/or credit spread fluctuation risks in connection with Financial Close.

3.2 Financial Close Certificate

Upon the occurrence of Financial Close in accordance with Section 2.1(a) of this Schedule 1, the Parties shall sign a certificate in such form as the Parties shall reasonably agree specifying the Financial Close Date.

3.3 Actions Upon Occurrence of Financial Close

Promptly following Financial Close:

(a) the Parties shall place the Financial Model and audit report submitted and Accepted pursuant to Section 2.2(h) of this Schedule 1 into escrow with the Escrow Agent pursuant to the terms of the Financial Model Escrow Agreement; and

(b) the Enterprises shall return the Financial Close Security to Developer.

4. Key Financial Events

4.1 Parties' rights with respect to Key Financial Events

If a Key Financial Event occurs prior to Financial Close:

(a) the Enterprises may, at any time after such Key Financial Event occurs, in their discretion and by notice to Developer:

(i) take any action pursuant to Section 4.2 of this Schedule 1; or

(ii) with or without first taking action pursuant to Section 4.2, terminate this Agreement by notice, in which case Section 4.4 of this Schedule 1 shall apply; and

(b) if, and only if, Section 5.2(a)(ii) of this Schedule 1 applies, Developer may terminate this Agreement by notice.

4.2 Mitigation of a Key Financial Event prior to Financial Close

If a Key Financial Event has occurred, the Enterprises may, in their discretion, take any one or more of the following actions:

(a) agree to an increase to the Base CPP, including to an amount that would result in an upward adjustment to the Base MPP of more than 10%;

(b) with the agreement of Developer and, as necessary, the Lenders, agree to lower the amount and/or timing of the Committed Investments otherwise required in order to comply with Section 26.1;

(c) require Developer to introduce alternative sources of debt for Project Debt relative to those set out in the Base Financial Model, in which case, the Enterprises may require Developer to conduct a timely, transparent financing competition to identify and arrange for the lowest-priced alternative debt financing commercially available on terms reasonable satisfactory to Developer and Approved by the Enterprises, provided that Developer shall be entitled to recover from the Enterprises the reasonably incurred and documented costs and expenses associated with conducting such a funding competition; and/or

(d) take any other action as may be proposed by any Party and mutually agreed among all the Parties.

4.3 **Successful mitigation of a Key Financial Event**

If, following the occurrence of a Key Financial Event, either:

(a) subject to Section 5.2(c), the Enterprises take any one or more actions pursuant to Section 4.2 of this Schedule 1; or

(b) following the Enterprises' election to terminate this Agreement pursuant to Section 4.1(a)(ii) of this Schedule 1, Developer delivers a notice pursuant to Section 4.4 of this Schedule 1 and, only with respect to any such notice delivered pursuant to Section 4.4(b) of this Schedule 1, Developer subsequently concluded a financing competition that identified and arranged a debt financing solution that is Approved by the Enterprises,

then:

(c) to the extent applicable, this Agreement shall be amended (in a manner to be agreed among the Parties) to reflect the relevant action; and

(d) if requested by Developer, the Enterprises shall extend the Financial Close Deadline to the extent reasonably necessary, provided that Developer correspondingly extends the expiration date of the Financial Close Security.

4.4 **Enterprise Election to terminate due to a Key Financial Event**

If the Enterprises make an election to terminate this Agreement pursuant to Section 4.1(a)(ii) of this Schedule 1, then, except to the extent expressly provided otherwise in Section 5.3 of this Schedule 1, this Agreement shall terminate in its entirety upon 10 Working Days' prior notice to Developer, provided that the Enterprises shall be entitled, in their discretion, to suspend their notice of termination if, within five Working Days after delivery of such notice to Developer, Developer notifies the Enterprises that:

(a) Developer irrevocably and unconditionally agrees that any increase in the Base CPP that would otherwise apply as a result of an adjustment pursuant to Annex A to this Schedule 1 or Section 4.2(a) of this Schedule 1 would be capped such that the resulting upward adjustment to the Base MPP would not exceed 10%;

(b) Developer shall, at its own initiative, conduct a timely, transparent financing competition equivalent to that described in Section 4.2(c) of this Schedule 1, provided that, if Developer notifies the Enterprises pursuant to this Section 4.4(b), any suspension of Enterprises' notice of termination pursuant to this Section 4.4 shall end on the earliest of:

(i) the unsuccessful conclusion of such financing competition without identifying and arranging a debt financing on terms reasonable satisfactory to Developer and that is otherwise Approved by the Enterprises;

(ii) the successful conclusion of such financing competition with the identification and arrangement of a debt financing solution that is on terms reasonable satisfactory to Developer and that is otherwise Approved by the Enterprises (at which time such notice of termination will be deemed void); and

(iii) 60 Calendar Days after the date on which Developer notified the Enterprises pursuant to this Section 4.4(b).

5. Termination prior to Financial Close[8]

5.1 Termination by the Enterprises

(a) In addition to the Enterprises' right to terminate this Agreement pursuant to Section 4.1(a)(ii) of this Schedule 1, if any Developer Condition Precedent is not satisfied (or waived) by the Enterprises on or before the Financial Close Deadline, the Enterprises may in their discretion, on or after the Financial Close Deadline, terminate this Agreement by notice with immediate effect.

(b) If the Enterprises terminate this Agreement pursuant to Section 5.1(a) of this Schedule 1, then upon such termination becoming effective, and unless Developer has been excused from its obligation to achieve Financial Close by the Financial Close Deadline pursuant to Section 5.2(c) of this Schedule 1, the Enterprises may in their discretion draw on, and retain the proceeds of, the Financial Close Security pursuant to Section 1.3 of this Schedule 1.

(c) In the event that the Enterprises terminate this Agreement pursuant to Section 4.1(a)(ii) of this Schedule 1, the Enterprises shall pay the Financial Close Termination Amount to Developer no later than 60 Calendar Days following such termination.

5.2 Termination by Developer

(a) If either:

(i) as of the Financial Close Deadline:

(A) each Developer Condition Precedent has been satisfied or waived (or, to the extent unsatisfied, remains unsatisfied as a direct result of the Enterprises' failure to comply with their obligations to provide assistance to Developer pursuant to Section 27.4.1, which failure Developer has been unable to mitigate through Reasonable Efforts); and

(B) any Enterprise Condition Precedent has not been satisfied and has not been waived; or

(ii) a Key Financial Event occurs and:

(A) the Enterprises have notified Developer that they will not take any action, or will cease to take any action, pursuant to Section 4.2 of this Schedule 1;

(B) the Enterprises have taken any action pursuant to Section 4.2 of this Schedule 1, but, after taking into account any effect of such action, any of the Key Ratios and/or the Equity IRR would be less than that Key Ratio or Equity IRR, as the case may be, would have been had the relevant Key Financial Event had not occurred; or

(C) the Enterprises have not, within 30 Calendar Days of receiving a written request from Developer (or, if earlier, by the Financial Close Deadline if it

[8] **Note to Proposers:** See prior note regarding material litigation risk. In a future Addendum the Enterprises will add provisions entitling the Parties to terminate this Agreement in limited circumstances related to such risk.

occurs following such a written request) notified Developer of their intent to take any action pursuant to Section 4.2 of this Schedule 1,

then Developer shall have the right to terminate this Agreement by notice to the Enterprises with immediate effect, following which the Enterprises shall return the Financial Close Security to Developer within five Working Days.

(b) In the event that Developer terminates this Agreement pursuant to Section 5.2(a) of this Schedule 1, the Enterprises shall pay the Financial Close Termination Amount to Developer no later than 60 Calendar Days following such termination.

(c) For certainty, unless the Enterprises otherwise terminate this Agreement pursuant to either Section 4.1(a)(ii) or Section 5.1(a) of this Schedule 1, Developer's obligation to achieve Financial Close by the Financial Close Deadline shall be excused if, and only if, it has a right to terminate this Agreement pursuant to this Section 5.2 of this Schedule 1.

5.3 **Consequences of Termination**

If this Agreement is terminated pursuant to this Schedule 1, neither Party shall have any obligation or liability to the other Party, except:

(i) any Enterprise entitlement to draw on the Financial Close Security pursuant to this Schedule 1;

(ii) any Enterprise obligation to pay the Financial Close Termination Amount to Developer pursuant to Section 5.1(c) or Section 5.2(b) of this Schedule 1;

(iii) with respect to any antecedent breach of this Agreement; and

(iv) as provided for in Section 41.

Annex A
Interest Rate and Credit Spread Fluctuation Risk Sharing[9]

1. Changes in Financing Terms

The Enterprises reserve the right to Approve any changes in Benchmark Interest Rates or in the debt structure that are proposed to be made at or prior to Financial Close to the extent that any such change constitutes a deviation from the assumptions in the Base Financial Model.

2. Determination of Base Case Equity IRR

(a) Immediately prior to calculating any changes in the Base CPP pursuant to Sections 4 and 5 of this Annex A, the Base Financial Model shall be run to solve for a "first adjusted" Base CPP, inputting only the TIFIA Betterments and holding the Preliminary Equity IRR

---

[9] If the Preferred Proposer submits a Proposer Basis Scale that includes credit spreads that are less than those reflected in the common basis yield curve and set of baseline credit spreads issued by the Enterprises pursuant to Section 4.2.3.c.ii. of Part C of the ITP, then: [**Note to Proposers:** The Enterprises will revise the ITP in a future Addendum to clarify that a Proposer may bid credit spreads that are lower, but not higher, than the baseline credit spreads.]

(a) The definition of Baseline Credit Spreads will be revised to refer to the common yield curve and set of baseline credit spreads and a new term "Preferred Proposer Credit Spreads" will be added to refer to the Preferred Proposer's "Proposer Basis Scale".

(b) An additional step will be added to Section 2 of this Annex A to calculate the "Proposer's Adjusted Preliminary Equity IRR", which will be the TIFIA Adjusted Preliminary Equity IRR" recalculated using Baseline Credit Spreads in place of the "Preferred Proposer Credit Spreads".

(c) Sections 4 and 5 of this Annex A shall be revised to provide as follows (as applied separately to each tranche / maturity of the Project Debt):

(i) if actual credit spreads exceed the Baseline Credit Spreads, the calculations in Section 5 shall be run by reference to the Proposer's Adjusted Preliminary Equity IRR and Developer shall only be entitled to credit spread projection for actual credit spreads above the Baseline Credit Spreads (with the difference between the Preferred Proposer Credit Spreads and the Baseline Credit Spreads being Developer's risk);

(ii) if actual credit spreads exceed the Preferred Proposer Credit Spreads but are less than or equal to the Baseline Credit Spreads, the calculations in Section 5 shall be run by reference to the TIFIA Adjusted Preliminary Equity IRR (and, for certainty, not the Proposer's Adjusted Preliminary Equity IRR) and Developer shall not be entitled to any credit spread protection; and

(iii) if actual credit spreads are equal to or less the Preferred Proposer Credit Spreads, then the calculations in Section 5 shall be run by reference to the TIFIA Adjusted Preliminary Equity IRR (and, for certainty, not the Proposer's Adjusted Preliminary Equity IRR) and Developer and the Enterprises shall share credit spread fluctuation risk 15%/85% relative to the Preferred Proposer's Credit Spreads.

Worked examples:

	Preferred Proposer Credit Spreads (bps)	Common Credit Spreads (bps)	Actual Credit Spreads (bps)	Risk Sharing
Scenario 1	100	150	200	Developer bears risk on 100% of movements in spreads from 100bps to 150bps. 85/15 risk sharing calculated on movement in spreads from 150bps to 200bps. Calculations use "Proposer's Adjusted Preliminary Equity IRR", to account for Developer bearing 100% of the risk of movements in spreads from 100bps to 150bps.
Scenario 2	100	150	125	Developer bears risk on 100% of movements in spreads from 100bps to 125bps. Calculations use "TIFIA Adjusted Preliminary Equity IRR".
Scenario 3	100	150	75	85/15 risk sharing calculated on movement in spreads from 100bps to 75bps. Calculations use "TIFIA Adjusted Preliminary Equity IRR".

constant. As part of this process the Base Financial Model shall be solved for the lowest possible change in the Base CPP that does not result in a breach of any of the Key Ratios.

(b) Following the calculations made pursuant to Section 2(a) of this Annex A, the Parties shall calculate a "second adjusted" Base CPP that is equal to:

(i) the Base CPP; *minus*

(ii) 85% of the difference between the Base CPP and the "first adjusted" Base CPP.

(c) Following the calculations made pursuant to Section 2(b) of this Annex A, the base Financial Model shall be run to solve for the Equity IRR (which shall be the "TIFIA Adjusted Preliminary Equity IRR" for purposes of Section 5 of this Annex A) that results from inputting the "second adjusted" Base CPP.

3. Market Interest Rate Protection

Subject to the Parties' rights pursuant to Section 4.1 of Schedule 1 following the occurrence of a Key Financial Event, pursuant to Section 5 of this Annex A the Enterprises shall bear the risk and have the benefit of 100% of the impact (either positive or negative) on the Base CPP of changes in any applicable Benchmark Interest Rates over the applicable Protection Period with respect to any Bank Financing, Bond Financing and/or TIFIA Financing.

4. Credit Spread Fluctuation Risk Protection

(a) Subject to the Parties' rights pursuant Section 4.1 of Schedule 1 following the occurrence of a Key Financial Event, pursuant to Section 5 of this Annex A the Enterprises shall bear the risk and have the benefit of 85% of the impact (either positive or negative) on the Base CPP of the differences between:

(i) the Baseline Credit Spreads; and

(ii) the credit spreads for any Bond Financing (excluding any private placement that is not also an offering under Rule 144A and Regulation S of the Securities Act of 1933) as of the last day of the applicable Protection Period, excluding any increases in credit spreads in respect of bonds that are part of any Bond Financing resulting from the final credit rating of such bonds being lower than the indicative investment grade rating(s) of such bonds provided in the Preferred Proposer's Proposal.

(b) For certainty, Developer will bear the risk and have the benefit of 100% of the impact (either positive or negative) of the movements in margins associated with any Bank Financing, including bank lender margins and swap credit margins.

5. Base MPP Update Protocol

The Parties shall use the Base Financial Model to calculate the changes contemplated by Sections 4 and 5 of this Annex A, positive or negative, in the Base CPP. The Parties shall make such calculation and produce the Financial Model to be delivered pursuant to Section 2.2(h)(i) of Schedule 1 by taking the following steps, and otherwise pursuant to the protocol Accepted by the Enterprises pursuant to Section 4.1(a)(ii) of Schedule 1.

(a) *First*, as a means of mitigating against the negative impact of any changes in Benchmark Interest Rates and credit spreads (relative to the Baseline Credit Spreads), as applicable

to any Bank Financing, Bond Financing or TIFIA Financing, as described in, respectively, Sections 3 and 4(a) of this Annex A on the Key Ratios, the debt maturities shall be optimized, to the extent possible, and consequential amendments shall be made to the Base Financial Model.

(b) *Second*, the Base Financial Model, subject to any updates resulting from the step described in Section 5(a) of this Annex A, shall be run to solve for a "first interim" Base CPP, inputting only the changes, if any, in Benchmark Interest Rates as described in Section 3 of this Annex A, and holding the "TIFIA Adjusted Preliminary Equity IRR" calculated pursuant to Section 2(c) of this Annex A constant. In addition, as part of this process the Base Financial Model shall be solved for the lowest possible change in the Base CPP that does not result in a breach of any of the Key Ratios.

(c) *Third*, the interim Financial Model resulting from the step described in Section 5(b) of this Annex A shall be run to solve for a "second interim" Base CPP, inputting only the changes, if any, in credit spreads for any Bond Financing as described in Section 4(a) of this Annex A, and holding the "TIFIA Adjusted Preliminary Equity IRR" calculated pursuant to Section 2(c) of this Annex A constant. In addition, as part of this process the Base Financial Model shall be solved for the lowest possible change in the Base CPP that does not result in a breach of any of the Key Ratios.

(d) *Fourth*, an amended Base CPP (the "Financial Close Base CPP") shall be calculated as follows:

$$\text{Financial Close Base CPP} = \text{Base CPP}^{\text{First}} + (85\% \times (\text{Base CPP}^{\text{Second}} - \text{Base CPP}^{\text{First}})$$

where:

$\text{Base CPP}^{\text{First}}$ = the first interim Base CPP resulting from the step described in Section 5(b) of this Annex A

$\text{Base CPP}^{\text{Second}}$ = the second interim Base CPP resulting from the step described in Section 5(c) of this Annex A

(e) *Fifth*, the interim Financial Model resulting from the step described in Section 5(b) of this Annex A shall be run to solve for the Base Case Equity IRR, inputting:

(i) the Financial Close Base CPP; and

(ii) to the extent applicable, all other changes in the terms of the financing between those assumed and indicated in the Base Financial Model and those set out in or otherwise applicable under the terms of the Financing Documents as of the Financial Close Date.

Schedule 3
Commencement and Completion Mechanics

Part 1: Commencement of NTP1 Work

1. In this Agreement, "NTP1 Conditions" means the following conditions, each of which shall be construed as a separate and independent condition:

   (a) Developer shall have submitted each Deliverable which is identified as "Prior to the issuance of NTP1" in the "Schedule" column in any of the Deliverables tables in Schedule 8 (*Project Administration*), Schedule 10 (*Design and Construction Requirements*), Schedule 11 (*Operations and Maintenance Requirements*), Schedule 14 (*Strategic Communications*), Schedule 17 (*Environmental Requirements*) and Schedule 18 (*Right-of-Way*) (collectively, the "Deliverables Tables") and:

      (i) if Acceptance or Approval of any such Deliverable is required as indicated in the Deliverables Tables, Developer shall have received Acceptance or Approval, as applicable, of each such Deliverable; and

      (ii) if any such Deliverable is required to be submitted for Information as indicated in the Deliverables Tables, the initial review period as determined pursuant to Section 6(a) of Schedule 9 (*Submittals*) shall have expired with respect to each such Deliverable;

   (b) Developer shall have mobilized its quality management staff as anticipated by the Approved Stage 1 Quality Management Plan;

   (c) no Developer Default shall have occurred and be continuing; and

   (d) Developer shall have satisfied any other requirements and conditions that are required by the terms of this Agreement to have been satisfied prior to the issuance of NTP1 or the commencement of any NTP1 Work[1].

2. Pursuant to Section 9.1.a, Developer shall not be entitled to commence any NTP1 Work (other than conducting, outside the Right-of-Way, preparatory activities necessary to satisfy the NTP1 Conditions and to be prepared to begin the NTP1 Work in a timely manner after issuance of NTP1) until the Enterprises have issued NTP1 in accordance with Section 4(a) of this Part 1.

3. Developer shall notify the Enterprises promptly after it considers that all NTP1 Conditions have been satisfied.

4. The Enterprises shall promptly after receipt of a notice from Developer pursuant to Section 3 of this Part 1, and in any event within five Working Days after such receipt, either:

   (a) if they consider that all NTP1 Conditions have been satisfied, issue a notice ("NTP1") to Developer authorizing commencement of the NTP1 Work; or

   (b) if they do not consider that all NTP1 Conditions have been satisfied, notify Developer to such effect, specifying which NTP1 Conditions have not been satisfied and why they consider that such NTP1 Conditions have not been satisfied.

[1] **Note to Proposers:** NTP1 Work will be defined in a future Addendum as: (i) the design Work, (ii) testing and Right-of-Way investigation Work that is authorized by CDOT right of entry permits obtained by Developer prior to the issuance of NTP1, and (iii) Work necessary to develop the Deliverables required to be submitted by Developer to satisfy the NPT1 Conditions.

5. If the Enterprises issue a notice to Developer pursuant to Section 4(b) of this Part 1, then the procedures set out in Sections 3 and 4 of this Part 1 shall be repeated until the Enterprises issue NTP1.

Part 2: Commencement of Construction Work and O&M During Construction Work

1. In this Agreement, "NTP2 Conditions" means the following conditions, each of which shall be construed as a separate and independent condition:

(a) NTP1 shall have been issued;

(b) all Governmental Approvals and Permits applicable to the commencement of Construction Work and O&M Work During Construction shall have been obtained, any conditions thereto that are required to be satisfied in advance of such commencement shall have been satisfied, and Developer shall have otherwise complied with its obligations in relation to such Governmental Approvals and Permits pursuant to this Agreement, including under Section 8.4.2 and under Section 5 of Schedule 8 (*Project Administration*);

(c) Developer shall have delivered to the Enterprises:

(i) copies of all Governmental Approvals and Permits referred to in Section 1(b) of this Part 2; and

(ii) evidence that any conditions thereto that are required to be satisfied in advance of commencement of the Construction Work and O&M During Construction have been satisfied;

(d) Developer shall have demonstrated the functionality and use of its Maintenance Management Information System to the satisfaction of the Enterprises (acting in their discretion) and such Maintenance Management Information System shall be fully populated and operational as determined by reference to Section 7 of Schedule 11 (*Operations and Maintenance Requirements*);

(i) Developer shall have submitted to the Enterprises, and received Acceptance of, a written protocol pursuant to Section 19.1.3.d;

(e) Developer shall have submitted each Deliverable which is identified as "Prior to the issuance of NTP2" in the "Schedule" column in any of the Deliverables Tables and:

(i) if Acceptance or Approval of any such Deliverable is required as indicated in the Deliverables Tables, Developer shall have received Acceptance or Approval, as applicable, of each such Deliverable; and

(ii) if any such Deliverable is required to be submitted for Information as indicated in the Deliverables Tables, the initial review period as determined pursuant to Section 6(a) of Schedule 9 (*Submittals*) shall have expired with respect to each such Deliverable;

(f) Developer shall have delivered to the Enterprises the Contractor Bonds as required pursuant to Section 9.3.1.a.i;

(g) no Developer Default shall have occurred and be continuing; and

(h) Developer shall have satisfied any other requirements and conditions that are required by the terms of this Agreement to have been satisfied prior to the issuance of NTP2 and the commencement of the Construction Work and O&M Work During Construction (other than Snow and Ice Control Services).

2. Pursuant to Section 9.1.b, Developer shall not be entitled to:

   (a) commence any Construction Work or O&M Work During Construction until the Enterprises have issued NTP2 in accordance with Section 4(a) of this Part 2; or

   (b) commence any specific aspect of the Construction Work or O&M Work During Construction pursuant to this Agreement until any applicable condition to such commencement specified in this Agreement (including in Schedule 8 (*Project Administration*), Schedule 10 (*Design and Construction Requirements*) and Schedule 11 (*Operations and Maintenance Requirements*)) has been satisfied.

3. Developer shall notify the Enterprises promptly after it considers that all NTP2 Conditions have been satisfied.

4. The Enterprises shall promptly after receipt of a notice from Developer pursuant to Section 3 of this Part 2, and in any event within five Working Days after such receipt, either:

   (a) if they consider that all NTP2 Conditions have been satisfied, issue a notice ("NTP2") to Developer:

      (i) if Financial Close has occurred prior to the date of issuance of NTP2, authorizing commencement of the Construction Work and O&M Work During Construction (other than Snow and Ice Control Services); or

      (ii) if Financial Close has not occurred prior to the date of issuance of NTP2, conditionally authorizing commencement of the Construction Work and O&M Work During Construction (other than Snow and Ice Control Services) subject to and following the occurrence of Financial Close; or

   (b) if they do not consider that all NTP2 Conditions have been satisfied, notify Developer to such effect, specifying which NTP2 Conditions have not been satisfied and why they consider that such NTP2 Conditions have not been satisfied.

5. If the Enterprises issue a notice to Developer pursuant to Section 4(b) of this Part 2, then the procedures set out in Sections 3 and 4 of this Part 2 shall be repeated until the Enterprises issue NTP2.

Part 3: Commencement of Snow and Ice Control Services[2]

1. In this Agreement, "NTP3 Conditions" means the following conditions :

   (a) NTP1 and NTP2 shall have been issued; and

   (b) Financial Close shall have occurred.

2. Pursuant to Section 9.1.c, Developer shall not be entitled to:

   (a) commence Snow and Ice Control Services pursuant to this Agreement until:

      (i) the Enterprises have issued NTP3 in accordance with this Part 3; and

      (ii) the Snow and Ice Control Services Commencement Date has occurred; and

   (b) commence any specific aspect of Snow and Ice Control Services pursuant to this Agreement until any applicable condition to such commencement specified in this Agreement (including in Schedule 8 (*Project Administration*), Schedule 10 (*Design and Construction Requirements*) and Schedule 11 (*Operations and Maintenance Requirements*)) has been satisfied.

3. After satisfaction of the NTP3 Conditions, the Enterprises shall at any time thereafter issue a notice ("NTP3") to Developer authorizing and requiring commencement of Snow and Ice Control Services on the date specified in such notice (the "Snow and Ice Control Commencement Date"), which date shall be no earlier than: (a) July 1, 2018; and (b) [ ] Calendar Days after the date of such notice.

[2] **Note to Proposers:** For various reasons, the Procuring Authorities have decided that it is appropriate for CDOT to retain responsibility for provision of Snow and Ice Control Services until July 1, 2018 and for Developer only to assume responsibility for such services from that date. As a consequence, if Preferred Proposer elects to use the Maintenance Yard, the Enterprises will agree in the Agreement (relevant provisions will be included in a future Addendum) to provide exclusive use of the Maintenance Yard to Developer from the Snow and Ice Control Commencement Date (as defined in this Part 3). The Procuring Authorities are also considering providing shared use thereof (with the existing CDOT maintenance team) for the period from NTP2 until the Snow and Ice Control Commencement Date. Again, relevant provisions will be included in a future Addendum that describe the extent of shared use rights that would be available to Developer during this period.

Part 4: Milestone Completion

1. In this Agreement, "Milestone Completion Conditions" means, in respect of any Payment Milestone, the following conditions, each of which shall be construed as a separate and independent condition:

   (a) Developer shall have completed the Construction Work related to the relevant Payment Milestone in accordance with this Agreement including:

      (i) the repair, replacement or correction and full remediation of all Defects[3] and the remediation of all Nonconforming Work pursuant to Section 6.5 of Schedule 8; and

      (ii) any such Construction Work related to Local Agency Roadways (subject only to completion of (A) any Milestone Completion Punch List Items in respect of the relevant Payment Milestone; and (B) any Construction Work completion of which constitutes a Final Acceptance Condition), including such that: (x) in the case of all Payment Milestones, the infrastructure constituting the relevant Payment Milestone is in a condition that can be operated for normal and safe vehicular travel in all lanes and at all points of entry and exit; and (y) in the case of Payment Milestone 3 and Payment Milestone 4, the traffic shall have been properly transferred on to the infrastructure constituting such Payment Milestone pursuant to Schedule 10 (*Design and Construction Requirements*);

   (b) Developer shall have provided the Enterprises with a written certificate, in form and substance reasonably acceptable to the Enterprises, that no Closures on the infrastructure constituting such Payment Milestone are required or expected for the remainder of the Construction Period other than Excused Closures;

   (c) Developer shall have complied with Sections 3.5.6 and 3.5.7 of Schedule 10 (*Design and Construction Requirements*) as relevant to such Payment Milestone, and each time period referenced therein shall have expired;

   (d) Developer shall have conducted, and provided the Enterprises with an opportunity to witness, all tests and inspections necessary to provide measurement records for each Element of the relevant Payment Milestone in accordance with the Performance and Measurement Table set out in Appendix A-1 to Schedule 11 (*Operations and Maintenance Requirements*) and Developer's Approved Quality Management Plan;

   (e) any systems and equipment in relation to the relevant Payment Milestone installed by Developer shall comply, in all respects, with applicable Laws, shall be fully operational and functional, and shall have passed any tests and inspections required under this Agreement (subject only to completion of:

      (i) any Milestone Completion Punch List Items in respect of the relevant Payment Milestone; and

      (ii) any Construction Work completion of which constitutes a Final Acceptance Condition); and

[3] **Note to Proposers:** The Procuring Authorities expect to revise the definition of Defects in a future Addendum in order to improve clarity as to what constitutes a Defect.

Developer shall have delivered to the Enterprises all reports, data and documentation relating to such tests and inspections;

(f) a Milestone Completion Punch List for the relevant Payment Milestone shall have been Approved by the Enterprises;

(g) Developer shall have provided the Enterprises with lien waivers as required pursuant to Section 4 of Schedule 5 (*Milestone Payments*);

(h) no Developer Default shall have occurred and be continuing; and

(i) Developer shall have satisfied any other requirements and conditions that are required by the terms of this Agreement to have been satisfied prior to completion of such Payment Milestone.

2. Developer shall provide the Enterprises with at least 40 Working Days' advance notice of the date of the expected Milestone Completion of any Payment Milestone, which notice shall expressly and conspicuously state that it is being delivered pursuant to this Section 2 of Part 4 of this Schedule 3.

3. During the 40 Working Day period following receipt by the Enterprises of a notice pursuant to Section 2 of this Part 4, Developer and the Enterprises shall meet, confer and exchange information on a regular and cooperative basis, and the Enterprises shall conduct:

(a) an inspection of the Construction Work comprising the relevant Payment Milestone and its components (which may be conducted jointly with FHWA and/or CDOT pursuant to Section 21.1.1.a.); and

(b) such other investigation and review of reports, data and documentation, as in each case may be necessary (as determined in the Enterprises' discretion) to evaluate whether all of the applicable Milestone Completion Conditions in respect of the relevant Payment Milestone have been satisfied.

4. After Developer has given a notice pursuant to Section 2 of this Part 4 in respect of a Payment Milestone, Developer shall provide the Enterprises a further notice when Developer considers that all applicable Milestone Completion Conditions have been satisfied, which notice shall include a written certification, in form and substance reasonably acceptable to the Enterprises, that all applicable Milestone Completion Conditions in respect of the relevant Payment Milestone have been satisfied.

5. Within five Working Days after receipt of a notice and certification pursuant to Section 4 of this Part 4, the Enterprises shall either:

(a) if they consider that all applicable Milestone Completion Conditions have been satisfied, issue a certificate to such effect (a "Milestone Completion Certificate"), and the date of such Milestone Completion Certificate shall be the "Milestone Completion Date"; or

(b) if they do not consider that all applicable Milestone Completion Conditions have been satisfied, notify Developer to such effect, specifying which Milestone Completion Conditions have not been satisfied and why they consider that such Milestone Completion Conditions have not been satisfied.

6. If the Enterprises issue a notice to Developer pursuant to Section 5(b) of this Part 4, then the procedures set out in Sections 2 to 5 of this Part 4 shall be repeated until the Enterprises issue a Milestone Completion Certificate in respect of the relevant Payment Milestone.

Part 5: Substantial Completion

1. In this Agreement, "Substantial Completion Conditions" means the following, each of which shall be construed as a separate and independent condition:

(a) the Milestone Completion Date shall have occurred in respect of each of the Payment Milestones and all Milestone Completion Conditions in respect of all Payment Milestones shall remain satisfied;

(b) the Enterprises shall have Approved Developer's completion of all Milestone Completion Punch List Items;

(c) Developer shall have completed the Construction Work for the Project in accordance with this Agreement, including:

(i) the repair, replacement or correction and full remediation of all Defects[4]; and

(ii) the remediation of all Nonconforming Work pursuant to Section 6.5 of Schedule 8;

such that the Project is in a condition that can be open to traffic (subject only to completion of (A) any Substantial Completion Punch List Items and (B) any Construction Work the completion of which constitutes a Final Acceptance Condition);

(d) Developer shall have provided the Enterprises with a written certificate, in form and substance reasonably acceptable to the Enterprises, that no Closures are required or expected during the Operating Period other than (i) Excused Closures and (ii) Permitted Operating Period Closures;

(e) Developer shall have complied with Sections 3.5.6 and 3.5.7 of Schedule 10 (*Design and Construction Requirements*), and each time period referenced therein shall have expired;

(f) Developer shall have conducted, and provided the Enterprises an opportunity to witness, all tests and inspections necessary to provide measurement records for each Element of the entire Project in accordance with the Performance and Measurement Tables and Developer's Approved Quality Management Plan;

(g) Developer shall have delivered to the Enterprises the Contractor Bonds as required pursuant to Section 9.3.1.a.ii and Section 9.3.1.a.iii;

(h) the Enterprises shall have Approved any updates:

(i) that Developer has submitted to the Enterprises pursuant to Section 4.2.7 of Schedule 11 (*Operations and Maintenance Requirements*); and

(ii) to the Performance and Measurement Table set out in Appendix A-2 to Schedule 11 (*Operations and Maintenance Requirements*);

[4] **Note to Proposers:** The definition of Defects will be refined in a future Addendum.

(i) any systems and equipment installed by Developer shall comply, in all respects, with applicable Laws, shall be fully operational and functional, and shall have passed any tests and inspections required under this Agreement (subject only to completion of:

(i) any Substantial Completion Punch List Items; and

(ii) any Construction Work the completion of which constitutes a Final Acceptance Condition), and

Developer shall have delivered to the Enterprises all reports, data and documentation relating to such tests and inspections;

(j) a Substantial Completion Punch List shall have been Approved by the Enterprises;

(k) if any Governmental Authority, Railroad or Utility Owner with jurisdiction over any portion of the Project requires any form of certification of design, engineering or construction with respect to such portion, including any certifications or approvals required under any Permit or Governmental Approval, Developer shall have caused such certificates or approvals to be executed and delivered and shall have concurrently provided copies of such certificates or approvals to the Enterprises;

(l) Developer shall have submitted each Deliverable which is identified as "Prior to issuance of Substantial Completion" in the "Schedule" column in any of the Deliverables Tables and:

(i) if Acceptance or Approval of any such Deliverable is required as indicated in the Deliverables Tables, Developer shall have received Acceptance or Approval, as applicable, of each such Deliverable; and

(ii) if any such Deliverable is required to be submitted for Information as indicated in the Deliverables Tables, the initial review period as determined pursuant to Section 6(a) of Schedule 9 (*Submittals*) shall have expired with respect to each such Deliverable;

(m) Developer shall have submitted appropriate certifications, in the form set out in Section [●] of Schedule 8 (*Project Administration*), certifying that the Construction Work complies with the requirements of this Agreement;[5]

(n) with respect to all Insurance Policies that are required by Section 25 and Schedule 13 (*Required Insurances*) to be in effect on and from the Substantial Completion Date:

(i) such policies shall have been obtained from Eligible Insurers on terms that comply with Section 25 and Schedule 13 (*Required Insurances*) and shall be in full force and effect; and

(ii) the Enterprises shall have received binding verifications of coverage from the relevant insurers (or Developer's insurance brokers) of such Insurance Policies, in compliance with Section 25.3.5 as Accepted by the Enterprises;

(o) Developer shall have provided the Enterprises with lien waivers as required pursuant to Section 4 of Schedule 5 (*Milestone Payments*);

[5] **Note to Proposers:** Forms will be provided as part of revised Schedule 8 to be issued in a future Addendum.

(p) no Developer Default shall have occurred and be continuing; and

(q) Developer shall have satisfied any other requirements and conditions that are required by the terms of this Agreement to have been satisfied prior to Substantial Completion.

2. Developer shall provide the Enterprises with 40 Working Days' advance notice of the date of expected Substantial Completion, which notice shall expressly and conspicuously state that it is being delivered pursuant to this Section 2 of Part 5 of this Schedule 3.

3. During the 40 Working Day period following receipt by the Enterprises of a notice pursuant to Section 2 of this Part 5, Developer and the Enterprises shall meet, confer and exchange information on a regular and cooperative basis, and the Enterprises shall conduct;

(a) an inspection of the entire Project and its components (including all Milestone Completion Punch List Items) (which may be conducted jointly with FHWA and/or CDOT pursuant to Section 21.1.1.a.); and

(b) such other investigation and review of reports, data and documentation, as in each case may be necessary (as determined in the Enterprises' discretion) to evaluate whether all of the Substantial Completion Conditions have been satisfied.

4. After Developer has given a notice pursuant to Section 2 of this Part 5, Developer shall provide the Enterprises a further notice when Developer considers that all Substantial Completion Conditions have been satisfied, which notice shall include a written certification, in form and substance reasonably acceptable to the Enterprises, that all Substantial Completion Conditions have been satisfied.

5. Within five Working Days after receipt of a notice and certification pursuant to Section 4 of this Part 5, the Enterprises shall either:

(a) if they consider that all applicable Substantial Completion Conditions have been satisfied, issue a certificate to such effect (a "Substantial Completion Certificate"), and the date of such Substantial Completion Certificate shall be the "Substantial Completion Date"; or

(b) if they do not consider that all Substantial Completion Conditions have been satisfied, notify Developer to such effect, specifying which Substantial Completion Conditions have not been satisfied and why they consider that such Substantial Completion Conditions have not been satisfied.

6. If the Enterprises issue a notice to Developer pursuant to Section 5(b) of this Part 5, then the procedures set out in Sections 2 to 5 of this Part 5 shall be repeated until the Enterprises issue a Substantial Completion Certificate.

Part 6: Final Acceptance

1. In this Agreement, "Final Acceptance Conditions" means the following, each of which shall be construed as a separate and independent condition and, except where expressly provided to the contrary, shall not be limited or restricted by reference to or inference from the terms of this Agreement or any other condition:

   (a) the Substantial Completion Date shall have occurred and all Substantial Completion Conditions shall remain satisfied;

   (b) the Enterprises shall have Approved Developer's completion of all Substantial Completion Punch List Items;

   (c) all previously identified Defects shall have been repaired, replaced or otherwise corrected and fully remedied as required by this Agreement and all Nonconforming Work shall have been remedied pursuant to Section 6.5 of Schedule 8;

   (d) Developer shall have provided the Enterprises with a written certificate, in form and substance reasonably acceptable to the Enterprises, that no Closures are required or expected during the Operating Period other than (i) Excused Closures and (ii) Permitted Operating Period Closures;

   (e) the Enterprises shall have received and Accepted a complete set of As-Built survey sheets for the Project in the form and content as required by Schedule 10 (*Design and Construction Requirements*);

   (f) the Enterprises shall have received and Accepted a complete set of the As-Built drawings in the form and content required by Section 5 of Schedule 10 (*Design and Construction Requirements*);

   (g) Developer shall have submitted to the Enterprises, and received Approval of:[6]

      (i) documentation relating to DBE and ESB utilization for the Project; and

      (ii) if the DBE and ESB Goals have not been met, documentation supporting Developer's good faith efforts to meet the DBE and ESB Goals;

   (h) Developer shall have submitted each Deliverable which is identified as "Prior to issuance of Final Acceptance" in the "Schedule" column in any of the Deliverables Tables and:

      (i) if Acceptance or Approval of any such Deliverable is required as indicated in the Deliverables Tables, Developer shall have received Acceptance or Approval, as applicable, of each such Deliverable; and

      (ii) if any such Deliverable is required to be submitted for Information as indicated in the Deliverables Tables, the initial review period as determined pursuant to Section 6(a) of Schedule 9 (*Submittals*) shall have expired with respect to each such Deliverable;

   (i) no Developer Default shall have occurred and be continuing; and

[6] **Note to Proposers:** To be updated in a future Addendum to reflect Schedule 15 (*Federal and State Requirements*) once issued, including with respect to local hiring goals.

(j) Developer shall have satisfied any other requirements and conditions that are required by the terms of this Agreement to have been satisfied prior to Final Acceptance.

2. Developer shall provide the Enterprises with 40 Working Days' advance notice of the date of expected Final Acceptance, which notice shall expressly and conspicuously state that it is being delivered pursuant to this Section 2 of Part 6 of this Schedule 3.

3. During the 40 Working Day period following receipt by the Enterprises of a notice pursuant to Section 2 of this Part 6, Developer and the Enterprises shall meet, confer and exchange information on a regular and cooperative basis, and the Enterprises shall conduct:

(a) an inspection of the entire Project and its components (including all Substantial Completion Punch List Items) (which may be conducted jointly with FHWA and/or CDOT pursuant to Section 21.1.1.a.); and

(b) such other investigation and review of reports, data and documentation, as in each case may be necessary to evaluate whether all of the Final Acceptance Conditions have been satisfied.

4. After Developer has given a notice pursuant to Section 2 of this Part 6, Developer shall provide the Enterprises a further notice when Developer considers that all Final Acceptance Conditions have been satisfied, which notice shall include a written certification, in form and substance reasonably acceptable to the Enterprises, that all Final Acceptance Conditions have been satisfied.

5. Within five Working Days after receipt of a notice and certification pursuant to Section 4 of this Part 6, the Enterprises shall either:

(a) if they consider that all applicable Final Acceptance Conditions have been satisfied, issue a certificate to such effect (a "Final Acceptance Certificate"), and the date of such Final Acceptance Certificate shall be the "Final Acceptance Date"; or

(b) if they do not consider that all Final Acceptance Conditions have been satisfied, notify Developer to such effect, specifying which Final Acceptance Conditions have not been satisfied and why they consider that such Final Acceptance Conditions have not been satisfied.

6. If the Enterprises issue a notice to Developer pursuant to Section 5(b) of this Part 6, then the procedures set out in Sections 2 to 5 of this Part 6 shall be repeated until the Enterprises issue a Final Acceptance Certificate.

Part 7: Punch List Mechanism

1. Developer shall comply with the procedures and schedules for preparing Punch Lists[7] and for completing Punch List Items[8] pursuant to the Developer's Approved Project Management Plan and the provisions of this Part 7.

2. Following any inspection conducted:

   (a) pursuant to Section 3(a) of Part 4 of this Schedule 3, Developer shall promptly prepare and deliver to the Enterprises a list (a "Milestone Completion Punch List") of Punch List Items applicable to the relevant Payment Milestone ("Milestone Completion Punch List Items"), including a proposed date of completion for each item (which shall in no event be later than the then anticipated Substantial Completion Date);

   (b) pursuant to Section 3(a) of Part 5 of this Schedule 3, Developer shall promptly prepare and deliver to the Enterprises a list (a "Substantial Completion Punch List") of Punch List Items applicable to the entire Project ("Substantial Completion Punch List Items"), including a date of proposed completion for each item (which shall in no event be later than the Final Acceptance Deadline).

3. The Enterprises shall notify Developer within 10 Working Days of receipt of any Punch List pursuant to Section 3 of this Part 7 whether they Approve the contents of such Punch List or dispute or reject the inclusion (or omission) of any Punch List Item on such Punch List.

4. Developer shall promptly commence (or, as applicable, continue) work on all Approved Punch List Items and diligently prosecute such work to completion by the date of completion specified in the Punch List and in any event no later than (i) Substantial Completion with respect to all Milestone Completion Punch Line Items and (ii) the Final Acceptance Deadline with respect to all Substantial Completion Punch List Items.

5. Developer shall, on an ongoing basis:

   (a) (i) verify that each item on any Punch List has been corrected or completed, (ii) provide all final documentation, and (iii) perform a final review and inspection to verify that Punch List Items have been resolved, in the case of each (i)-(iii) to the satisfaction of the Enterprises (acting in their discretion); and

   (b) provide the Enterprises with regular written updates regarding the same.

[7] **Note to Proposers:** Punch List will be defined in a future Addendum to refer to each of the Milestone Completion Punch List and the Substantial Completion Punch List.
[8] **Note to Proposers:** Punch List Items will be defined in a future Addendum to mean "any minor Defect or Nonconforming Work which individually, and in aggregate with all other such Punch List Items, will not, in the Enterprises' discretion, have any material or adverse effect on the normal, uninterrupted and safe use and operation of the affected Element of the Project for its intended purpose".

Schedule 7
Compensation on Termination

[*In a future Addendum, the following definitions will be added to Part A of Annex A to the Agreement, and therefore deemed deleted from this Schedule (to the extent that this Schedule is not otherwise superseded by such Addendum).*]

"Account Balances" means, in respect of each bank account and/or trust account held by or on behalf of Developer (for certainty, excluding the Handback Reserve Account):

(a) the balance of such account; *plus*

(b) to the extent a letter of credit has been issued in partial or full substitution for any amount otherwise required to stand to the credit of any such account pursuant to the Financing Documents, the undrawn principal amount of such letter of credit,

in each case as of the Termination Date.

"Applicable Tax" means any income tax (whether U.S. federal, state or local) imposed on Developer by, and payable to, a Governmental Authority.

"Construction Work Value" means:

(a) $[ ][1]; *minus*

(b) the Cost to Complete; *minus*

(c) the amount of any Milestone Payments previously paid to Developer, where (for purposes of this paragraph (c)) any amounts set-off by the Enterprises against any such payments pursuant to Section 5 of Part 3 of Schedule 4 shall be counted as having been paid to Developer.

"Cost to Complete" means (without double-counting):

(a) those costs (internal and external) that the Enterprises reasonably and properly project that they (and/or CDOT) will incur in carrying out any process to request bids from any parties interested in entering into one or more contracts with the Enterprises (and/or CDOT) to conduct all Work prior to and as necessary to achieve Final Acceptance, including all costs related to the preparation of bid documentation, evaluation of bids and negotiation and execution of relevant contracts; *plus*

(b) the costs that the Enterprises reasonably and properly project that they (and/or CDOT) will incur in performing or having performed all Work prior to and as necessary to achieve Final Acceptance; *plus*

(c) any Losses resulting from the actions of Developer and any other Developer-Related Entity that the Enterprises (and/or CDOT) would, but for the termination of this Agreement, not have incurred prior to

[1] To insert Construction Contract price. For certainty, this figure will include the cost of O&M Work During Construction even if such work is performed under an agreement other than the Construction Contract.

Final Acceptance; *minus*

(d) any insurance proceeds and proceeds of Contractor Bonds available to the Enterprises (and, for certainty, not available to the Lenders) for the purposes of achieving Final Acceptance.

"Deferred Equity Amounts" means any unfunded or undisbursed amount of any Committed Investment that is shown in the Financial Model to be available for use prior to the anticipated Substantial Completion Date, which amount is:

(a) of a type defined in paragraph a. of the definition of Committed Investment in Part A of Annex A; or

(b) of a type defined in paragraph b. of the definition of Committed Investment in Part A of Annex A.

"Developer Employee Redundancy Payments" means the amount of all payments of wages earned, accrued unused vacation time, and any other payments required by Law or required by Developer's employment agreement with Developer's employees, which in each case have been or will be reasonably incurred by Developer as a direct result of termination of this Agreement.

"Handback Reserve Proceeds" means the aggregate of:

(a) all amounts paid to the Enterprises from the Handback Reserve Account pursuant to Section 4.4.c. of Schedule 12; *plus*

(b) all amounts drawn by the Enterprises on any Handback Letter of Credit pursuant to Section 4.5.b. of Schedule 12,

in the case of each of (a) and (b), on or following the occurrence of the Termination Date.

"Lenders' Liabilities" means, as of the Termination Date, the aggregate of (without double-counting):

(a) all:

(i) principal;

(ii) capitalized interest, accrued interest and default interest (but, with respect to default interest, only to the extent that it arose as a result of the Enterprises making any payment later than the date that it was due under this Agreement);

(iii) customary and reasonable lender, agent and trustee fees, costs and expenses; and

(iv) lease financing obligations,

properly owing or outstanding to the Lenders by Developer under or pursuant to the Financing Documents on the Termination Date; *plus*

(b) any Breakage Costs payable by Developer that arise as a result of the early termination of this Agreement on the Termination Date;

minus

(c) any Breakage Costs payable or credited to Developer that arise as a result of the early termination of this Agreement on the Termination Date,

provided that, in the event that any interest rate or inflation rate hedging agreement or other derivative facility in effect on the Termination Date is not terminated until the date of payment by the Enterprises of the undisputed portion of the Termination Amount, any net payments or net receipts under such agreements in the period from the Termination Date to and including such date of payment shall be taken into account in the calculation of the Lenders' Liabilities.

"Maintenance Rectification Costs" means:

(a) all Losses that the Enterprises determine they are reasonably likely to incur as a direct result of the termination of this Agreement after the Substantial Completion Date, including (without double-counting):

(i) those costs (internal and external) that the Enterprises reasonably and properly project that they (and/or CDOT) will incur in carrying out any process to request bids from any parties interested in entering into one or more contracts with the Enterprises (and/or CDOT) to conduct all remaining Work, including all costs related to the preparation of bid documentation, evaluation of bids and negotiation and execution of relevant contracts; *plus*

(ii) those costs (internal and external) that the Enterprises reasonably and properly project that they (and/or CDOT) will incur in relation to:

(A) remediation or, if remediation is not possible or would cost more than renewal, renewal of any defective Work performed by Developer; and

(B) rectification or cure of any breach of this Agreement by Developer; *plus*

(iii) those costs (internal and external) that the Enterprises reasonably and properly project they will incur through the remainder of the Term in order to perform the Work in accordance with the terms of this Agreement, but only to the extent such projected costs exceed the costs assumed in the Financial Model if the Work had been performed by Developer; *minus*

(b) Handback Reserve Proceeds.

"Subcontractor Breakage Costs" means Losses that have been or will be reasonably and properly incurred by Developer under a Principal Subcontract as a direct result of the termination of this Agreement (and which Losses shall not include lost profit or lost opportunity), but only to the extent that:

(a) the Losses are incurred in connection with the Project and in respect of the Work required to be performed by Developer, including:

(i) any materials or goods ordered or Subcontracts placed that cannot be cancelled without such Losses being incurred;

(ii) any expenditure incurred in anticipation of the performance or the completion of Work in the future; and

(iii) the cost of demobilization including the cost of any relocation of equipment used in connection with the Project;

(b) the Losses are incurred under arrangements and/or agreements that are consistent with terms that have been entered into in the ordinary course of business and on an arm's length basis, and that otherwise comply with this Agreement; and

(c) Developer and the relevant Principal Subcontractor have each used their Reasonable Efforts to mitigate such Losses.

"Termination Deduction Amount" means, without double-counting, any:

(a) accrued Monthly Construction Closure Deductions, Monthly Operating Period Closure Deductions and Monthly Noncompliance Deductions that, as of the Termination Date, have not been taken into account in the calculation of any payment actually made to Developer by the Enterprises prior to the Termination Date; and

(b) any other amount that the Enterprises are entitled to set-off against the Termination Amount pursuant to Section 5(a) of Part 3 of Schedule 4 (*Payments*).

"Termination Insurance Proceeds" means all proceeds from insurance payable to Developer under any Available Insurance coverage, or that should otherwise be collectible by Developer from that portion of the Available Insurance that is required to be maintained by Developer pursuant to Section 25 and Schedule 13, in any such case on or after the Termination Date.

* * *

1. **Compensation on Termination For Convenience and Termination for Enterprise Default**

The Termination Amount payable by the Enterprises to Developer in connection with any Termination for Convenience or termination of this Agreement for Enterprise Default pursuant to Section 33.1.4 shall equal the amount calculated at the Termination Date (without double-counting) as follows:

(a) the greater of:

(i) all amounts shown in the then current Financial Model as payable by Developer as Distributions after the Termination Date either to Equity Members or to any of their Affiliates pursuant to any Equity Member Funding Agreement, which amounts shall be discounted at the Base Case Equity IRR from the date on which each such Distribution is shown in the Financial Model to be payable to the Termination Date, *minus* Deferred Equity Amounts; and

(ii) $0; *plus*

(b) Lenders' Liabilities; *plus*

(c) Subcontractor Breakage Costs; *plus*

(d) Developer Employee Redundancy Payments; *minus*

(e) Account Balances; *minus*

(f) Termination Insurance Proceeds; *minus*

(g) any Termination Deduction Amount.

2. **Compensation on Termination for Extended Force Majeure, Termination for Uninsurable Risk and Termination By Court Ruling**

2.1 The Termination Amount payable by the Enterprises to Developer in connection with any Termination for Extended Force Majeure, termination of this Agreement pursuant to Section 33.1.7 or Termination by Court Ruling shall equal the amount calculated at the Termination Date (without double-counting) as follows:

(a) the greater of:

(i) all amounts paid to Developer prior to the Termination Date in the form of direct investments by Equity Members in Developer (for certainty, excluding Equity Member Debt), *minus*, an amount equal to all Distributions made by Developer to the Equity Members on or before the Termination Date with respect to such direct investments; and

(ii) $0; *plus*

(b) the net amount of:

(i) the principal amount of any Equity Member Debt outstanding as of the Termination Date, *plus* any accrued and unpaid interest incurred in respect of such Equity Member Debt; *minus*

(ii) an amount equal to all Distributions made by Developer pursuant to the Equity Member Funding Agreements or otherwise in respect of any Equity Member Debt on or before the Termination Date; *plus*

(c) Lenders' Liabilities; *plus*

(d) Subcontractor Breakage Costs; *plus*

(e) Developer Employee Redundancy Payments; *minus*

(f) Account Balances; *minus*

(g) Termination Insurance Proceeds; *minus*

(h) any Termination Deduction Amount.

3. **Compensation on Termination for Developer Default**

3.1 The Termination Amount payable by the Enterprises to Developer in connection with any termination of this Agreement for Developer Default pursuant to Section 33.1.3 on or prior to the Substantial Completion Date shall equal the amount calculated at the Termination Date (without double-counting) as follows:

(a) the lower of:

(i) the Construction Work Value; and

(ii) an amount equal to:

(A) Lenders' Liabilities; *minus*

(B) Account Balances; *minus*

(C) Termination Insurance Proceeds;

minus

(b) any Termination Deduction Amount.

3.2 The Termination Amount payable by the Enterprises to Developer in connection with any termination of this Agreement for Developer Default pursuant to Section 33.1.3 after the Substantial Completion Date shall equal the amount calculated at the Termination Date (without double-counting) as follows:

(a) 80% of Lenders' Liabilities; *minus*

(b) Maintenance Rectification Costs; *minus*

(c) Account Balances; *minus*

(d) Termination Insurance Proceeds; *minus*

(e) any Termination Deduction Amount.

4. **Miscellaneous Compensation Provisions**

4.1 Set Off and Deductions on Termination

The Enterprises shall only be entitled to deduct any Termination Deduction Amount when calculating any Termination Amount pursuant to Section 1 or Section 2 of this Schedule 7 to the extent that, after making such deduction, the Termination Amount payable to Developer would not be less than an amount equal to the Lenders' Liabilities.

4.2 Timing of Payment of Termination Amount

Any Termination Amount shall be due and payable by the Enterprises 180 Calendar Days after the Termination Date.

4.3 Treatment of Negative Termination Amount Calculations

To the extent that any Termination Amount calculated pursuant to this Schedule 7 is calculated to be less than zero, then such Termination Amount shall be deemed to equal zero.

4.4 Calculation of Termination Amount and Lenders' Liabilities

The Enterprises shall be entitled to rely on a certificate of the Collateral Agent as conclusive as to the amount of the Lenders' Liabilities outstanding at the relevant time.

4.5 Transfer of Key Assets

The Developer shall comply with its obligations under Section 34 as a condition precedent to the Enterprises' payment of any Termination Amount.

4.6 Gross Up of Termination Amount

If any Termination Amount payable by the Enterprises to Developer pursuant to Section 1 or Section 2 of this Schedule 7 is subject to Applicable Tax, then the Enterprises shall pay to Developer such additional amount as the Enterprises reasonably determine will put Developer in the same after tax position as it would have been in had the payment not been subject to Applicable Tax, taking account of any relief, allowances, deductions, setting off or credits in respect of any Applicable Tax (whether available by choice or not) which may be available to Developer to reduce the Applicable Tax to which the payment is subject

Schedule 13
Required Insurances[1]

1. CONSTRUCTION PERIOD INSURANCES[2]

From the Financial Close Date until (unless specified otherwise in this Section 1 of this Schedule 13) the Substantial Completion Date, Developer will obtain and maintain, or cause to be obtained and maintained, the Insurance Policies with respect to the Work (including O&M Work During Construction) and the Project described in this Section 1 of this Schedule 13.

1.1. "All Risk" Builders' Risk

Builder's Risk insurance written on an "all risks" basis, completed value form, on a non-reporting basis, insuring against "all risks", including the following perils: loss or damage by fire, collapse, lightning, windstorm, tornado, flood, earthquake, hail, explosion, riot, vandalism and malicious mischief, civil commotion, aircraft, vehicle impact, terrorism (both domestic and foreign acts of terrorism), smoke and such other risks as are usual to a similarly situated project, in each case:

a. in an amount not less than:

i. the lesser of:

A. the full replacement cost of the Work and the Project[3], including on and off-site fabrication, installation, storage and staging areas; and

B. the Probable Maximum Loss for the Work and the Project (and, with respect to any sublimits, subject to Section 1.1.e of this Schedule 13, the Probable Maximum Loss in respect of the relevant peril), including on and off-site fabrication, installation, storage and staging areas; *plus*

ii. until such date as the demolition of the existing viaduct is completed:

---

[1] **Note to Proposers**: Developer may satisfy the requirements set out in Schedule 13 by (i) placing any of the Insurance Policies on a Project-specific basis or (ii) relying on corporate policies of Developer-Related Entities (or their Affiliates). In either case, however, Developer must satisfy all requirements of this Schedule 13 and be able to evidence that all such requirements have been satisfied.

[2] **Note to Proposers**: This Schedule 13, as drafted, assumes that Developer will satisfy its Construction Period obligations hereunder (including in respect of (i) O&M During Construction and (ii) completed Payment Milestones in the period between the applicable Milestone Completion Date and Substantial Completion) by placing insurances that satisfy Section 1 of this Schedule 13. The Enterprises will permit amendments to be made to this Schedule 13 prior to execution of the Agreement to reflect Preferred Proposer's insurance program to the extent that such program involves insuring O&M During Construction and/or completed Payment Milestones under Section 2, provided that (A) Proposer has proposed such amendments as commercial/legal Project Agreement comments during the procurement process and (B) such amendments have been approved by the Enterprises (as a result of determining that the resulting coverage would be equivalent and the Project, the Enterprises and CDOT would not be adversely affected).

[3] **Note to Proposers**: The replacement cost is assumed to be the Construction Contract price (not including the cost of O&M Work During Construction), plus an amount to be provided by the Enterprises in a future Addendum reflecting the replacement cost of those portions of the Project that do not require construction or material reconstruction. Developer's proposed replacement cost calculation will be subject to Acceptance by the Enterprises.

A. [ ][4] ; *plus*

B. $100,000,000 in extra expense insurance to cover, among other things, the additional expenses incurred for traffic rerouting following an insured loss to the viaduct;

b. providing for either a DE 5 or LEG 3 exclusion pertaining to the cost of making good any faulty work, faulty materials, or any design error or omission;

c. providing coverage for demolition/debris removal costs and increased cost of construction, with a minimum sublimit of $50,000,000;

d. providing "Ordinance or Law Coverage", with a minimum sublimit of $50,000,000;

e. if such insurance places a sublimit on flood coverage, such sublimit shall be no less than the greater of:

i. $100,000,000; and

ii. the Probable Maximum Loss in respect of such peril;

f. including coverage for delay in start-up on a gross income basis for the greater of:

i. 12 months of delay; and

ii. the Probable Maximum Delay;

g. including coverage for the following, with the limits specified below:

i. property in transit (in-land only) and unnamed locations;

ii. extra/expediting expenses (with a minimum sublimit of $50,000,000);

iii. off premises services interruption;

iv. professional fees (with a minimum sublimit of $10,000,000);

v. valuable papers;

vi. hot and cold testing and commissioning (with a minimum limit of 120 Calendar Days);

vii. prevention of access (with a minimum limit of eight weeks); and

viii. ingress/egress (with a minimum limit of eight weeks); and

h. provide for interim payments in the event of any loss.

1.2. Commercial General Liability

Commercial general liability insurance (together with any excess or umbrella liability) against claims for personal injury (including bodily injury and death) and property damage or loss (including liabilities as a result of repairs and alterations) however arising occurring with respect to the Work or the Project, including on and off-site fabrication, installation, storage and staging areas, such insurance:

---

[4] **Note to Proposers**: The nominal actual cash value of the existing viaduct (to be provided in a subsequent Addendum, and which the Enterprises expect to reflect the existing viaduct's wreckage value).

a. to be on an occurrence form (as that term is used in the insurance industry) with a combined single limit of not less than $100,000,000 per occurrence and in the aggregate which may be provided in a layered placement, with the layers excess of the primary general liability to provide excess automobile liability and employers' liability;

b. to be subject to an ISO CG 22 80 endorsement and no other professional services exclusions; and

c. to cover at least the following hazards:

i. premises and operations liability;

ii. completed operations for a period of not less than eight years after the Substantial Completion Date or, if later, the expiration of any applicable statutes of limitation or repose;

iii. independent contractors;

iv. blanket contractual liability for all contracts;

v. sudden and accidental pollution;

vi. broad form property damage;

vii. contingent employers' liability;

viii. non-owned automobile liability;

ix. cross liability and severability of interests; and

x. employees as additional insureds.

1.3. Workers' Compensation and Employers' Liability

Workers' compensation insurance, as required by the statutory limits of the State, and employers' liability with a limit of not less than $1,000,000 and excess liability coverage.

1.4. Professional Liability

a. From the Financial Close Date until the eighth anniversary of the Substantial Completion Date, professional liability insurance, which may be written on a claims made form, with limits of liability not less than $10,000,000 per claim and $10,000,000 annual aggregate (A) for each of the Principal Subcontractors and (B) for such other Subcontractor(s) (if any), including the Lead Engineer (as defined in the ITP), that are (i) primarily responsible for engineering and design of the Project and (ii) performing structural and design work or [*other types of work*][5].

b. Developer will ensure that all other professionals performing design, engineering, quality management, inspection, surveying and related professional services in respect of the Work and the Project carry or are covered by professional liability insurance for limits that are in accordance with Good Industry Practice.

[5] **Note to Proposers:** To be identified in a future Addendum.

1.5. Contractors' Pollution Liability and Pollution Legal Liability (Combined Form)

Contractors' Pollution Liability and Pollution Legal Liability insurance for the Work and the Project, which may be written on a claims made form, which coverage will:

a. be with limits of not less than $10,000,000 per occurrence and $10,000,000 annual aggregate; and

b. include coverage for:

i. environmental impairment liability;

ii. third party bodily injury;

iii. property damage liability (including remediation and clean-up costs);

iv. disposal site and transportation extensions; and

v. underground storage tanks; and

c. provide for an extended reporting period until the earlier of: (i) the eighth anniversary of the Substantial Completion Date; and (ii) the tenth anniversary of the Agreement Date.

1.6. Automobile Liability

Automobile Liability insurance on any owned, non-owned, and hired automobile used in connection with the Work and the Project with a limit of not less than $10,000,000 per occurrence.

1.7. Aircraft Liability

If aircraft are used in the performance of the Work and the Project, aircraft liability insurance (including owned and non-owned aircraft) which coverage will be with limits of not less than $25,000,000 per occurrence and $25,000,000 in the aggregate.

1.8. Railroad Liability and Railroad Protective Liability

If such coverage is not already provided under the commercial general liability insurance required pursuant to Section 1.2 of this Schedule 13, railroad liability and railroad protective liability insurance which coverage shall be with limits of not less than $5,000,000 per occurrence and $10,000,000 in the aggregate or, if higher, such other limits as required by UPRR, BNSF or DRIR in connection with the Work and the Project.

1.9. Marine Cargo

If any property, materials or equipment intended to be used in connection with the Work and the Project are to be shipped by sea, marine cargo insurance which coverage shall provide coverage in an amount of not less than full replacement value per occurrence.

1.10. Contractors' Equipment

Contractors' equipment insurance covering any piece of equipment with a replacement cost in excess of $500,000, which coverage shall provide coverage in an amount of not less than full replacement value per occurrence.

1.11. Insureds

All Insurance Policies required pursuant to this Section 1 of this Schedule 13, other than the policy required pursuant to Section 1.4 of this Schedule 13, must include:

a. Developer and the Construction Contractor[6] as named insureds; and

b. the Specified Additional Insureds[7] as additional insureds.

2. OPERATING PERIOD INSURANCES

From the Substantial Completion Date for the duration of the Term, Developer will obtain and maintain, or cause to be obtained and maintained, the Insurance Policies with respect to the Work and the Project described in this Section 2 of this Schedule 13.

2.1. "All Risks" Property

"All Risks" property insurance with no co-insurance including the following perils: loss or damage by fire, collapse, lightning, windstorm, tornado, flood, earthquake, hail, explosion, riot, vandalism and malicious mischief, civil commotion, aircraft, vehicle impact, terrorism (both domestic and foreign acts of terrorism), smoke and such other risks as are usual to a similarly situated project, in each case:

a. the lesser of:

   i. the full replacement cost of the Work and the Project, including on and off-site fabrication, installation, storage and staging areas; and

   ii. the Probable Maximum Loss for the Work and the Project (and, with respect to any sublimits, subject to Section 2.2.b of this Schedule 13, the Probable Maximum Loss in respect of the relevant peril), including on and off-site fabrication, installation, storage and staging areas;

b. if such insurance places a sublimit on flood coverage, such sublimit shall be no less than the greater of:

   i. $100,000,000; and

   ii. the Probable Maximum Loss in respect of such peril;

c. include coverage for the following, within the limits specified below:

   i. business interruption on a gross income basis for the greater of:

      A. 12 months of delay; and

      B. the Probable Maximum Delay;

   ii. boiler and machinery perils including machinery breakdown;

   iii. property in transit (in-land only) and unnamed locations;

   iv. extra/expediting expenses (with a minimum sublimit of $50,000,000);

   v. off premises services interruption;

   vi. professional fees (with a minimum sublimit of $10,000,000);

   vii. valuable papers;

---

[6] **Note to Proposers:** This assumes that the Construction Contractor will perform O&M Work During Construction. To also include the O&M Contractor if it will perform such work.

[7] **Note to Proposers:** This term is defined in the Section 25 rider definitions.

viii. prevention of access (with a minimum limit of eight weeks); and

ix. ingress /egress (with a minimum limit of eight weeks); and

d. provide for interim payments in the event of any loss.

2.2. Commercial General Liability

Commercial general liability insurance (together with any excess or umbrella liability) against claims for personal injury (including bodily injury and death) and property damage or loss (including liabilities as a result of repairs and alterations) however arising occurring with respect to the Work or the Project, including on and off-site fabrication, installation, storage and staging areas, such insurance:

a. to be on an occurrence form (as that term is used in the insurance industry) with a combined single limit of not less than $100,000,000 per occurrence and in the aggregate, which may be provided in a layered placement, with the layers excess of the primary general liability to provide excess automobile liability and employers' liability; and

b. include coverage for:

i. premises and operations liability;

ii. products and completed operation liability;

iii. independent contractors;

iv. blanket contractual liability for all contracts;

v. sudden and accidental pollution ;

vi. broad form property damage ;

vii. contingent employers' liability;

viii. non-owned automobile liability;

ix. cross liability and severability of interests clause; and

x. employees as additional insureds.

2.3. Workers' Compensation and Employers' Liability Insurance

Workers' compensation insurance, as required by the statutory limits of the State, and employers' liability with a limit of no less than $1,000,000 and excess liability coverage.

2.4. Pollution Liability

Pollution and Environmental Impairment Liability insurance for the Work and Project, which may be written on a claims made form, which coverage will:

a. be with limits of not less than $10,000,000 per occurrence and $10,000,000 annual aggregate; and

b. include coverage for:

i. environmental impairment liability;

ii. third party bodily injury;

iii. property damage liability (including remediation and clean-up costs);

iv. disposal site and transportation extensions; and

v. underground storage tanks.

2.5. Automobile Liability

Automobile Liability insurance on any owned, non-owned and hired automobile used in connection with the Work and the Project with a limit of not less than $10,000,000 per occurrence.

2.6. Railroad Liability and Railroad Protective Liability

If such coverage is not already provided under the commercial general liability insurance required pursuant to Section 2.1 of this Schedule 13, railroad liability and railroad protective liability insurance which coverage shall be with limits of not less than $5,000,000 per occurrence and $10,000,000 in the aggregate or, if higher, such other limits as required by UPRR, BNSF or DRIR in connection with the Work and the Project.

2.7. Insureds

All Insurance Policies required pursuant to this Section 2 of this Section 13 must include:

a. Developer and the O&M Contractor as named insureds; and

b. the Specified Additional Insureds as additional insureds.

2.8. Indexation

All Dollar figures in Section 2 of this Schedule 13 shall be indexed pursuant to Section 2.3. After indexation has been applied from time to time, Developer's obligation shall be to take out and maintain, or to cause the obtaining and maintenance of, insurance pursuant to Section 25 and this Schedule 13 where the limits are as close to and in excess of the indexed values as is reasonably obtainable in the insurance market, provided that such obligation shall only apply to newly placed or renewed policies.

3. GENERAL REQUIREMENTS

3.1. Probable Maximum Loss Study

3.1.1. Whenever this Schedule 13 references:

a. "Accepted PML Study", such term means the PML Study (and any update thereto) Accepted by the Enterprises;

b. "PML Study", such term has the meaning given to it in Section 3.1.2 of this Schedule 13;

c. "Probable Maximum Delay", such term means each probable maximum delay period limit determined from time to time pursuant to an Accepted PML Study; and

d. "Probable Maximum Loss", such term means each probable maximum loss amount limit (or sublimit) determined from time to time pursuant to an Accepted PML Study.

3.1.2. If, at any time, Developer elects to place the insurance required pursuant to Section 1.1 or 2.1 of this Schedule 13 on a Probable Maximum Loss and Probable Maximum Delay basis, Developer shall submit to the Enterprises, for Acceptance, a Probable Maximum Loss and Probable Maximum Delay study (a "PML Study", which term, if such a study has previously been submitted by Developer pursuant to this Section, shall include any updates thereto submitted by Developer pursuant to this Section) performed for the Developer by its Insurance Broker prior to, as the case may be

a. the placement of coverage required pursuant to Section 1.1 of this Schedule 13;

b. the first placement on such basis of any coverage required pursuant to Section 2.1 of this Schedule 13; and

c. following submission of a PML Study pursuant to Section 3.1.2.b of this Section 13, every sixth anniversary of the placement of coverage referenced in such Section.

3.2. Deductibles

Each Insurance Policy may include deductibles pursuant to Section 3.2 of this Schedule 13 (*Required Insurers*), and, for certainty, shall not include any self-insured retentions.

3.3. Placement on Occurrence Basis

Except for the Insurance Polices required pursuant to Sections 1.4, 1.5 and 2.4 of this Schedule 13, all liability insurance Policies shall be placed on an occurrence and not a claims made basis.

3.4. Reinstatement Work and Loss Payee Provisions

Any loss payee provision in any Insurance Policy shall be consistent and not conflict with the requirements of Section 25.5.

3.5. Maintenance Yard

All references in this Schedule 13 to insuring "the Work and the Project" (or statements to similar effect) shall be interpreted to include, with effect from the Snow and Ice Control Commencement Date, the Maintenance Yard (including activities performed thereat).[8]

[8] **Note to Proposers:** The Enterprises are proposing to provide exclusive use of the Maintenance Yard to Developer from the Snow and Ice Control Commencement Date (as defined in Section 3 of Part 3 of Schedule 3). However, they are also considering providing shared use thereof for the period from NTP2 until the Snow and Ice Control Commencement Date. The Enterprises are still considering how to address insurance arrangements in this period and will specify their requirements in a future Addendum.