

DESIGN-BUILD CONTRACT

BOOK 1

Illinois State Toll Highway Authority

Illinois Tollway Route 390

RR-23-4920R



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CONTRACT

This Contract is entered into by and between The Illinois State Toll Highway Authority (“Illinois Tollway”) and [PM: Complete prior to Contract execution. Insert name of Design- Builder] (“Design-Builder”), collectively, “Parties,” effective upon the date fully executed.

Recitals:

- A. The Illinois Tollway wishes to use design-build for the delivery of pavement and structural preservation and rehabilitation, and stormwater pond improvements of Illinois Route 390 Tollway between Mile Post 6.0 (US 20/Lake St) to Mile Post 13.0 (“Project”).
- B. The Parties intend for the Contract to be a lump-sum design-build contract obligating Design-Builder to perform all Work necessary to complete the Project by the dates specified herein, for the Contract Price including the Shared Risk Work items, subject only to certain specified limited exceptions. To allow the Illinois Tollway to budget for the Project and reduce the risk of cost overruns and schedule delays, the Contract includes restrictions affecting Design-Builder’s ability to make Claims for an increase to the Contract Price or an extension of the Completion Deadline(s).
- C. If Design-Builder fails to complete the Project within the time limitations set forth in the Contract Documents, the Illinois Tollway will suffer substantial losses and damages that will be difficult to quantify. Therefore, the Contract Documents provide that Design-Builder shall pay the Illinois Tollway Liquidated Damages if completion is delayed.
- D. The Illinois Tollway provided the Conceptual Design to the Design-Builder for the purposes of defining certain aspects of the Project. The Illinois Tollway also provided the Design-Builder Reference Information and Supplemental Information for the purpose of defining certain aspects of the Project. The Design-Builder has no right to rely on the Reference Information, Supplemental Information, and Conceptual Design, except to the extent specifically permitted in the Contract Documents. The Illinois Tollway and Design-Builder both intend: (i) for the Design-Builder to assume full responsibility and liability with respect to the Design of the Project, and (ii) to defend, indemnify and hold harmless the Illinois Tollway in conjunction with performance of the Work under this Contract.

NOW, THEREFORE, in consideration of good and valuable consideration, including the sums to be paid to Design-Builder by Illinois Tollway, the aforementioned Recitals and the covenants and agreements set forth herein, the Parties hereby mutually covenant and agree as follows.

1 CONTRACT DOCUMENTS

1.1 Certain Definitions

Exhibit 1 (*Definitions and Acronyms*) hereto contains the meaning of various terms used in the Contract Documents.

1.2 Contract Documents

1.2.1 Content and Order of Precedence

The term Contract Documents (“Contract Documents”) shall mean the following documents, in the below-listed order of precedence:

1. Change Orders;
2. Book 1 (Contract) and its Exhibits, as amended, except Exhibits 2, 3-A, 3-B, 3-C, and 3-D;
3. Design-Builder’s Proposal Commitments (Exhibit 2 (*List of Proposal Commitments*));
 - a. Proposal Commitments are those identified in Exhibit 2 (*List of Proposal Commitments*). Proposal Commitments include statements in Design-Builder’s Proposal that can reasonably be interpreted as offers to (i) provide higher quality items than otherwise required by the Contract Documents, (ii) perform services in addition to or of a higher quality than otherwise required, or (iii) constitute terms that are more advantageous to Illinois Tollway than the requirements of the Contract Documents. The determination of whether a statement in Design-Builder’s Proposal represents a higher level of quality than the Contract Documents shall be made by, and at the sole discretion of, the Illinois Tollway.
4. Alternative Technical Concepts (ATC) (Exhibit 3-A (*Alternative Technical Concepts*)) and Pre-Accepted Elements (PAE) (Exhibit 3-B (*Pre-Accepted Elements*)) approved or conditionally approved by the Illinois Tollway and incorporated into the Proposal;
5. Book 2 (Project Requirements) and its Exhibits, as amended;
6. Book 3 (Applicable Standards), as amended;
7. Design-Builder’s Proposal (Exhibit 3-C (*Design-Builder’s Proposal*));
8. Statement of Qualifications (Exhibit 3-D (*Statement of Qualifications*)); and
9. Responses to Proposer RFP Questions, as published in Addenda

1.2.2 Conflicts

In the event of conflict between the provisions of different Contract Documents, the provisions in the Contract Document first enumerated in above Section 1.2.1 (*Content and Order of Precedence*) shall control and take precedence over the provisions of any subsequently listed Contract Document. In the event of conflict within any Contract Document or in Contract Documents with the same level of precedence, the provisions that establish the higher quality, manner or method of performing the Work or that use more stringent standards shall prevail.

1.3 Interpretations and References

1.3.1 References to this Contract and the Contract Documents

In the Contract Documents, where appropriate, the singular includes the plural and vice versa; references to statutes or regulations include all statutory or regulatory provisions consolidating, amending, or replacing the statutes or regulations. The words “herein”, “hereby”, “hereof”, “hereto”, “hereunder”, and words of similar import refer to this Contract and the Contract Documents as a whole, not to any particular portion of the Contract or Contract Documents. The words “Article”, “section”, “paragraph”, “sentence”, “clause”, and “Exhibit” mean and refer to the specified Article, section, paragraph, sentence, clause or Exhibit in, or to, this Contract or the Contract Documents. A reference to a subsection or clause “above” or “below” refers to the denoted subsection or clause within the section in which the reference appears.

1.3.2 References to Other Documents and Contracts

Unless specified otherwise, a reference to an agreement or other document is to be considered a reference to such agreement or other document (including any schedules or Exhibits thereto) as it may be amended, modified or supplemented from time to time in accordance with its terms.

1.3.3 References to Persons and Gender

In phrases involving performance by a Person, the words “shall”, “must”, “will”, and other words commonly construed as indicative of a mandatory obligation indicate a requirement imposed on the Person. Unless otherwise indicated, reference to a Person include the Person’s permitted successors and assigns. Words of any gender used herein include all genders where appropriate.

1.3.4 Defining the Project and the Work

Unless otherwise specified, lists contained in the Contract Documents defining the Project or the Work shall not be considered or deemed all-inclusive. Design-Builder acknowledges and agrees that it has independently reviewed the Contract Documents with legal counsel and that it has the requisite experience and sophistication to understand, interpret and agree to the language in the Contract Documents.

1.3.5 Disputes Regarding the Interpretation of Contract Documents

In the event of any ambiguity in or dispute regarding the interpretation of the Contract Documents, the Contract Documents shall not be construed against the Person who prepared them; other rules of interpretation shall be used. By executing this Contract, the Design-Builder acknowledges that it had the opportunity to clarify the Contract Documents with the Illinois Tollway prior to the Proposal Due Date, and it understands that (i) the Illinois Tollway will not extend the Completion Deadline or increase the Contract Price based on any Design-Builder misinterpretation of the Contract Documents, and (ii) it is not entitled to and shall not seek an extension or increased compensation due to its misunderstanding of the Contract Documents.

1.3.6 Meaning of Including

The words “including,” “included,” “includes,” and “include” are deemed to be followed by the words “without limitation” and shall not be considered to set forth an exhaustive list, unless the context requires otherwise.

1.3.7 Meaning of Promptly

In the Contract Documents, the word “promptly” means as soon as reasonably practicable in light of then-prevailing circumstances.

1.3.8 Trade Meanings

Unless otherwise defined herein, words or abbreviations that have common trade meanings are used herein in accordance with those meanings; provided, however, that such common trade meanings shall not be construed to reduce the quality of any Work to be performed or delivered under this Contract.

1.3.9 Addenda Responses to Proposer Questions

In case of any ambiguity or Dispute, Responses to Proposer Questions may be used as an aid to interpretation of the Contract Documents. Responses to Proposer Questions are not intended to modify the agreed-upon Contract Documents.

1.4 Referenced Standards and Specifications

Except as otherwise specified in the Contract Documents or otherwise directed by the Illinois Tollway, Work specified by the number, symbol or title of any standard established by reference to a described publication affecting any portion of the Project shall comply with the latest edition or revision thereof and amendments and supplements thereto in effect on the Setting Date. Only the Design and Construction Bulletins for the current year approved at the time of RFP shall be used, unless otherwise specified.

1.5 Error or Omission of Details; Clarification by Illinois Tollway

Design-Builder shall not take advantage of any apparent Error or Omission in the Contract Documents. Should it appear that the Work to be done or any matter relative thereto is not sufficiently detailed or explained in the Contract Documents, Design-Builder shall seek, in writing, further written explanations as may be necessary from the Illinois Tollway and shall conform its performance to the explanation provided. Design-Builder shall promptly notify the Illinois Tollway of all Errors or Omissions which it may discover in the Contract Documents and shall obtain specific written instructions regarding any such Error or Omission before proceeding with the Work affected thereby. The fact that the Contract Documents do not describe any details of any Work necessary to carry out the intent of the Contract Documents or omit details regarding tasks customarily performed under similar circumstances shall not relieve Design-Builder from including such details and tasks as part of the Work as if fully and correctly set forth and described in the Contract Documents, and Design-Builder shall do so without entitlement to a Change Order hereunder, except as specifically allowed under Article 17 (*Changes In the Work*).

1.6 Computation of Time Periods

References to “days” or “Days” contained in the Contract Documents shall mean Calendar Days unless otherwise specified. “Business Days” or “Working Days” refer to all weekdays, Monday through Friday, that the Illinois Tollway is open for business. If the day on which a Contract Document requirement is due falls on a holiday or non-working day, the requirement shall be interpreted to mean as falling due on the following business or working day.

1.7 Dimensions

On plans, working drawings, and standard plans, calculated dimensions shall prevail over scaled dimensions.

1.8 Time Zones

Unless specified otherwise, references in the Contract Documents to time or hours are as observed in the State of Illinois.

1.9 Currency

Unless specified otherwise, all statements of or references in the Contract Documents to monetary dollar amounts are to the lawful currency of the United States of America.

2 OBLIGATIONS OF DESIGN-BUILDER

2.1 General Obligations of Design-Builder

Design-Builder, in addition to performing all other requirements of the Contract Documents, shall:

- a. Furnish all Design and other services, provide all Equipment, materials and labor, and undertake all efforts necessary or appropriate (excluding only those services, materials and efforts which the Contract Documents specify will be undertaken by other Persons) to: (i) construct the Project and maintain it during Construction in accordance with the requirements of the Contract Documents, all State Rules, all Governmental Approvals, and all other applicable safety, environmental, licensing and other requirements, taking into account other constraints affecting the Project, so as to achieve, Substantial Completion and Final Acceptance by the applicable Completion Deadline(s); and (ii) otherwise do everything required by and in accordance with the Contract Documents;
- b. Accept the payment terms in accordance with Article 14 (*Payment*);
- c. At all times provide a Design-Builder Project Manager, Approved by Illinois Tollway, who will (i) be fully responsible for the prosecution of the Work, (ii) act as agent and be a single point of contact in all matters on behalf of Design-Builder, (iii) be present (or present through its Approved designee) at the Site at all times that Work is performed, and (iv) have authority to bind Design-Builder on all matters relating to the Project;

The Illinois Tollway will have the right to require that the Design-Builder replace the Design-Builder Project Manager prior to or anytime during the Project. Approval of the proposed Design-Builder Project Manager shall be in the sole discretion of the Illinois Tollway, and such Approval will be based on the qualification requirements set forth in Table 2-1 (*Key Personnel for the Project*) Book 2, Section 2 and elsewhere in the Contract Documents;

- d. Obtain all necessary Governmental Approvals identified in Book 2, Section 1.6 (*Governmental Approvals and Conceptual Design*) in coordination with the Illinois Tollway (other than the Environmental Approvals and certain New Environmental Approvals as provided in Section 8.3 (*Environmental Approvals*));
- e. Comply with all conditions included in Governmental Approvals, undertake all actions required by Governmental Approvals, and undertake all actions necessary to maintain all Governmental Approvals in full force and effect, including implementation of all environmental mitigation measures required by the Contract Documents, except to the extent that such responsibility is expressly assigned in the Contract Documents to another Person;
- f. Provide such assistance as is reasonably requested by the Illinois Tollway in dealing with any Person and/or in prosecuting and defending lawsuits in any and all matters relating to the Project, which may include providing information and reports regarding the Project, executing declarations and attending meetings and hearings. In defending or prosecuting such lawsuits or matters, Design-Builder shall secure the approval of the Illinois Attorney General in accordance with Section 22.1 (*General Indemnification*);

- g. Comply with all requirements of applicable Governmental Rules, federal and State laws, local laws, ordinances, and regulations and orders and decrees of bodies or tribunals having any jurisdiction or authority;
- h. Cooperate with the Illinois Tollway and Governmental Persons with jurisdiction over the Project in the review and oversight of the Project and other matters relating to the Work;
- i. Supervise and be responsible to the Illinois Tollway for acts, errors and omissions of all Design-Builder-Related Entities, as though all such Persons were directly employed by Design-Builder;
- j. Mitigate delay to the Project and mitigate damages due to delay to the extent possible, including by resequencing, reallocating or redeploying Design-Builder's forces to other work, as appropriate at no cost to the Illinois Tollway, except as expressly provided for herein;
- k. Subject to Exhibit 11 (*State Requirements*), pay all applicable federal, State and local sales, consumer, use and similar taxes, property taxes and any other taxes, fees, charges or levies imposed by a Governmental Person, whether direct or indirect, relating to, or incurred in connection with, the performance of the Work. In its Proposal, the Design-Builder taken into account any and all taxes that may be payable by the Design-Builder in connection with the Work;
- l. Provide all Utility service facilities required to carry out the Work. The Utility service facilities include those needed for power, gas, communications, water, irrigation, sewage, and drainage. Except as provided in the Contract, Design-Builder is responsible for all costs of such Utility service facilities, including costs of design and construction, Governmental Approvals, connection fees, testing, inspection, maintenance, repairs, certification, and Utility service/usage fees and charges incurred to perform the Work or in connection with the Work; and
- m. Provide all Key Personnel and Required Personnel, in addition to the Design-Builder Project Manager referenced in above Section 2.1(c) (*General Obligations of Design-Builder*), in accordance with Book 2, Section 2.1.1.1 (*Key Personnel*).

2.2 Representations, Warranties and Covenants

Design-Builder represents, warrants and covenants for the benefit of the Illinois Tollway as follows:

2.2.1 Form of Organization

As of the Effective Date, the Design-Builder is a [PM: Complete prior to Contract execution. Indicate if Design-Builder is a corporation/joint venture/partnership/other form of organization], duly organized, validly existing, and in good standing under the laws of the State of Illinois with all requisite power and all required licenses to (i) carry on its present and proposed obligations under the Contract Documents and the subcontracts to which the Design-Builder is (or will be) a party, and (ii) perform each and every obligation of the Design-Builder therein.

Design-Builder shall not change its legal form of organization without the prior approval of the Illinois Tollway, which consent may be granted or withheld at the Illinois Tollway's sole discretion.

2.2.2 Authorization

The execution, delivery and performance of the Contract has been duly authorized by the Design-Builder and, if applicable, Design-Builder-Related Entities, each having taken all actions necessary therefor. The execution, delivery and performance of the Contract will not result in a breach or a default under the organizational documents of any such Person or any term indenture, loan, credit agreement, or other material agreement or instrument to which any such Person or any Guarantor is a party or by which their properties and assets may be bound or affected.

2.2.3 Legal, Valid and Binding Obligation

The Contract constitutes the legal, valid and binding obligation of Design-Builder and is enforceable in accordance with its terms.

If at any time the Contract Documents require a Guaranty to be in place, the Design-Builder shall ensure that all required approvals have been obtained with respect to the execution, delivery, and performance of such Guaranty, and that performance of such Guaranty will not result in a breach of or a default under the applicable Guarantor's organizational documents or any indenture or loan or credit agreement or other material agreement or instrument to which the applicable Guarantor is a party or by which its properties and assets may be bound or affected.

2.2.4 Financial Capacity

Design-Builder and its design subcontractor(s) with a total contract value of \$100,000.00 or more possess and will continue to possess financial capacity to execute and complete the Work in accordance with the terms and conditions of the Contract Documents.

2.2.5 Lead Contractor, Lead Design Firm Not Design-Builder

[PM: Complete this section prior to Contract execution. Modify this section depending on the team structure of the Design-Builder. If the Design-Builder is the Lead Contractor, modify this section to only apply to the Lead Design firm. If the Design-Builder is a special purpose vehicle that is distinct from the Lead Contractor and the Lead Design firm, there is no need to modify this section. If the Design-Builder is a joint venture comprised of the Lead Contractor and the Lead Design firm, do not use this section.]

To the extent the Lead Contractor and/or Lead Design Firm is not the Design-Builder, the Design-Builder represents and warrants, as of the effective date of the relevant subcontract between the Design-Builder and the Lead Contractor, and the Design-Builder and the Lead Design Firm as follows:

- a. The Lead Contractor and/or the Lead Design Firm are duly organized, validly existing, in good standing under the laws of the state of its organization, duly qualified to do business, and in good standing, in the State of Illinois;

- b. The Lead Contractor and/or the Lead Design Firm has the power and authority to do all acts and things, including executing and delivering all documents, as are required to be done, observed or performed by it in connection with its engagement by Design-Builder;
- c. The Lead Contractor and/or the Lead Design Firm has obtained and will maintain the (i) necessary or required registrations, permits, licenses, and approvals required under applicable Legal Requirements to perform the Work in accordance with the Contract Documents, and (ii) expertise, qualifications, experience, competence, skills, and know-how to perform the Work in accordance with the Contract Documents;
- d. The Lead Contractor and/or the Lead Design Firm will comply with all applicable health, safety, and Environmental Laws in the performance of any Work activities for, or on behalf of, Design-Builder for the benefit of the Illinois Tollway; and
- e. The Lead Contractor and/or the Lead Design Firm is not in breach of any applicable Legal Requirements that would have a material adverse effect on any aspect of the Work.

2.2.6 Design-Builder Team

Design-Builder shall perform the Work in accordance with the organization chart set forth in the Statement of Qualifications and the Proposal. Unless otherwise Approved by the Illinois Tollway, as of the Effective Date, there have been no organizational changes to the Design-Builder or subcontractors identified in the Statement of Qualifications and Proposal that has been approved by the Illinois Tollway. Design-Builder represents, warrants, and covenants that all Key Personnel are available for and will perform the roles identified for such Key Personnel in Book 2, Section 2.1.1.1 (*Key Personnel*).

2.2.7 Maintenance of Professional Qualifications

Design-Builder and its design subcontractor(s) have maintained, and throughout the term of the Contract, shall maintain, all required authority, licenses, professional ability, skills and capacity to perform the Work.

2.2.8 Design and Engineering Personnel

As may be required by the Project, all Design and engineering Work furnished by Design-Builder shall be performed by or under the supervision of Persons licensed to practice architecture (“LA”), engineering (“PE”), structural engineering (“SE”) or surveying (“PLS”) in the State of Illinois, and by personnel who are careful, skilled, experienced and competent in their respective trades or professions, who are professionally qualified to perform the Design Work in accordance with the Contract Documents, and who shall assume professional responsibility for the accuracy and completeness of the Design Documents and Construction Documents prepared or checked by them.

2.2.9 Evaluation of Constraints

Subject to Design-Builder’s review and investigations performed during the Scope Validation period in Section 2.3.1 (*Scope Validation Period*), Design-Builder represents that it is familiar

with and accepts the physical requirements and conditions of the Work, including the nature and location of the Work, the character and accessibility of the Site, the existence of obstacles to construction, the availability of facilities and utilities, the location and character of existing or adjacent work or structures, the surface and subsurface conditions, and other general and local conditions (including labor) which might affect its performance of the Work or the cost thereof.

Design-Builder has evaluated the constraints affecting delivery of the Project as well as the conditions of the Environmental Approvals and has grounds for believing and does believe that the Project can be delivered within such constraints.

2.2.10 Feasibility of Performance

Design-Builder has evaluated the feasibility of performing the Work within the time specified herein and for the Contract Price and has grounds for believing and does believe that such performance (including achievement of the Completion Deadline(s), for the Contract Price) is feasible and practicable. Furthermore, Design-Builder has identified all relevant assumptions for Design, Contract Price, and Contract Time, has reflected such assumptions in its Proposal, and acknowledges that Illinois Tollway clarified any initially unclear or vague assumptions prior to Design-Builder's submission of its Proposal.

2.2.11 Reasonable Investigations

Design-Builder has performed Reasonable Investigations, which were performed by appropriate, qualified personnel. Such Reasonable Investigations shall have included, at a minimum, and not limited to, the following activities: (i) review and analysis of the Contract Documents; (ii) review and analysis of the RFP Documents, including the Illinois Tollway's responses to RFP questions, Reference Information, and Supplemental Information; (iii) conducting good engineering practice to verify the Directive Designs and mitigate Errors or Omissions in any such documents, if any; (iv) familiarizing itself with the Site, including review and analyses of historical data, public records, and as-builts provided as part of the Project Information; and (v) visiting and visually inspecting the Site and surrounding locations to familiarize the Design-Builder with surface, conditions including the presence of Utilities, Hazardous Materials, archaeological, paleontological and cultural resources or artifacts, and threatened or endangered species.

Design-Builder acknowledges that RFP Documents were developed by the Illinois Tollway based on actual site conditions prevailing at the time the RFP documents were prepared or based on assumptions available at the time.

2.2.12 Governmental Approvals

Design-Builder has no reason to believe that any Governmental Approval required to be obtained by Design-Builder will not be granted in due course and thereafter remain in effect so as to enable the Work to proceed in accordance with the Contract Documents. If any Governmental Approvals required to be obtained by Design-Builder must formally be issued in the name of the Illinois Tollway, Design-Builder shall undertake all efforts to obtain such approvals, subject to the Illinois Tollway's reasonable cooperation with Design-Builder, including execution of appropriate applications and other documentation in a form Approved by the Illinois Tollway Project Manager. Design-Builder shall assist the Illinois Tollway in obtaining any Governmental Approvals which

the Illinois Tollway may be obligated to obtain in accordance with Book 2, Section 1.6 (*Government Approvals and Conceptual Design*) including providing information requested by the Illinois Tollway and participating in meetings regarding such Governmental Approvals.

2.2.13 Progression of Work

Design-Builder shall at all times schedule and direct its Work to provide an orderly progression of the Work to achieve the Completion Deadline(s) and in accordance with the Approved Baseline Schedule, including furnishing such employees, materials, facilities and Equipment and working such hours (including extra shifts and overtime operations) as may be necessary to achieve such goals, all at Design-Builder's own expense, except as otherwise specifically provided in Article 17 (*Changes in the Work*).

2.3 Scope Validation

2.3.1 Scope Validation Period

The term Scope Validation Period ("Scope Validation Period") is the period of time that begins on Design-Builder's receipt of the NTP 1 and extends for sixty (60) days from such date of receipt. During the Scope Validation Period, Design-Builder shall thoroughly: (i) review and compare all of the then-existing Contract Documents, the RFP Documents, and the Proposal; and (ii) investigate the actual conditions at the Site and any other areas necessary for the completion of the Work. Design-Builder activities described in clauses (i) and (ii) shall be limited to verifying and validating Design-Builder's proposed Design concept, and identifying any defects, errors, or inconsistencies in the Reference Information (categorized as "Reference" in Book 1 Exhibit 13 (*Project Information*)) that affect Design-Builder's ability to complete its proposed Design concept within the Contract Price and/or Completion Deadline(s) (referred to as "Scope Issues"). The term Scope Issues shall not be deemed to include: (i) items that Design-Builder should have reasonably discovered prior to the Effective Date, under Reasonable Investigations; or (ii) defects, errors or inconsistencies found in Supplemental Information as defined in Article 3 (*Information Supplied to Design-Builder*). For the avoidance of doubt, Design-Builder's errors or omissions in its Proposal shall not constitute a Scope Issue.

2.3.2 Site Testing, Inspections, and Investigations

Design-Builder will, after its receipt of the NTP 1 and during the Scope Validation Period, undertake such testing, inspections, and investigations as may be necessary to perform its obligations under the Contract Documents, including but not limited to additional geotechnical evaluations or Hazardous Material studies to supplement or corroborate the information contained in the RFP Documents. All reports or analyses generated by Design-Builder's testing, inspections and investigations, including but not limited to additional geotechnical testing, shall be furnished to the Illinois Tollway no later than five (5) business days after such reports or analyses are generated.

2.3.3 Scope Validation Period for Non-Accessible Areas of the Site

The Parties recognize that Design-Builder may be unable to conduct additional investigations contemplated because it will not have access to certain areas of the Site within the Scope Validation Period set forth in Section 2.3.1 (*Scope Validation Period*) above. Design-Builder shall notify the

Illinois Tollway in writing of all such non-accessible areas and the dates upon which such areas are expected to become accessible. If the Illinois Tollway agrees that such areas are non-accessible, then, for the limited purpose of Scope Issues that directly arise from non-accessible areas, the term Scope Validation Period (“Scope Validation Period”) shall mean the thirty (30) day period after the date the specified area becomes accessible for purposes of conducting the additional investigations. If the Illinois Tollway does not agree that such areas are non-accessible, the Scope Validation Period shall not be extended.

2.3.4 Submission Requirements for Scope Issues

If Design-Builder intends to seek relief for a Scope Issue, it shall promptly, but in no event later than the expiration of the Scope Validation Period, provide the Illinois Tollway with written notice (“Notice of Scope Issue”) of the existence of such Scope Issue, which Scope Issue Notice shall generally explain the basis for such Scope Issue.

Within twenty-one (21) days of providing the Notice of Scope Issue, Design-Builder shall provide Illinois Tollway with documentation that specifically supports the Scope Issue. The supporting documentation shall include, among other things: (i) the assumptions Design-Builder made during the preparation of its Proposal that form the basis for its allegation regarding the Scope Issue,, along with documentation verifying that it made such assumptions in developing its Proposal; (ii) an explanation of the defect, error, omission, or inconsistency in the RFP Documents that Design-Builder could not have reasonably identified prior to the Effective Date; and (iii) the specific impact that the alleged Scope Issue has had on Design-Builder’s price and time to perform the Work.

For the avoidance of doubt: (i) Design-Builder shall not be entitled to raise in its supporting documentation any Scope Issues that were not previously identified in a Notice of Scope Issue; and (ii) Design-Builder shall have no right to seek any relief for any Scope Issues that have not been specifically identified in a Notice of Scope Issue provided to Illinois Tollway during the Scope Validation Period.

2.3.5 Resolution of Scope Issues

Within a reasonable time after the Illinois Tollway’s receipt of the supporting documentation described in Section 2.3.4 (*Submission Requirements for Scope Issues*) above, the Parties shall meet and confer to discuss the resolution of Scope Issues. If the Illinois Tollway agrees that Design-Builder has identified a valid Scope Issue that materially impacts Design-Builder’s price or time to perform the Work, a Change Order shall be issued in accordance with Section 17.2 (*Definition of and Requirements Relating to Change Orders*). If the Illinois Tollway disagrees that Design-Builder has identified a valid Scope Issue that materially impacts Design-Builder’s price or time to perform the Work, Design-Builder’s recourse shall be to file a Dispute in accordance with Article 23 (*Relationship of the Parties*). Notwithstanding anything to the contrary in the Contract Documents or as a matter of law, Design-Builder shall have the burden of proving that the alleged Scope Issue could not have been reasonably identified prior to the Effective Date and that such Scope Issue materially impacts its price or time to perform the Work.

2.3.6 Design-Builder's Assumption of Risk of Scope Issues

The Parties acknowledge that the purpose of the Scope Validation Period is to enable Design-Builder to identify those Scope Issues that could not reasonably be identified prior to the Effective Date. By executing the Contract, Design-Builder acknowledges that the Scope Validation Period is a reasonable time to enable Design-Builder to identify Scope Issues that will materially impact Design-Builder's price or time to perform the Work. After the expiration of the Scope Validation Period, with the sole exception of those Scope Issues made the subject of a Notice of Scope Issue during the Scope Validation Period and subject to valid requests for Change Orders, Extra Work Orders under Article 17 (*Changes in the Work*) and Dispute Resolution Procedures in accordance with Article 23 (*Relationship of the Parties*), the Parties agree as follows:

- a. Design-Builder shall assume and accept all risks, costs, and responsibilities of any Scope Issue arising from or relating to the Contract Documents, including but not limited to conflicts within or between the RFP Documents and Proposal;
- b. Design-Builder shall be deemed to have expressly warranted that the Contract Documents existing as of the end of the Scope Validation Period are sufficient to enable Design-Builder to complete the design and construction of the Project without any increase in the Contract Price or adjustment to the Completion Deadline(s);
- c. The Illinois Tollway expressly disclaims any responsibility for, and Design-Builder expressly waives its right to seek any increase in the Contract Price or adjustment to the Completion Deadline(s) for, any Scope Issue associated with any of the Contract Documents or the RFP Documents; and
- d. The purpose of the Scope Validation Period is limited to providing Design-Builder with an opportunity to identify Scope Issues that will materially impact Design-Builder's price or time.

2.3.7 Waiver of Rights

The failure of Design-Builder to meet the submission requirements required under this Section 2.3.4 (*Submission Requirements for Scope Issues*) for a Scope Issue, including but not limited to the times for providing notice and documentation of the Scope Issue, shall conclusively constitute a waiver of Design-Builder's rights to seek relief for such Scope Issue.

2.3.8 Failure of Technical Proposal to Meet Requirements of the Contract Documents

Notwithstanding anything to the contrary in this Section 2.3 (*Scope Validation*) or elsewhere in the Contract Documents, the Illinois Tollway shall have no responsibility in the event Design-Builder's Proposal fails to meet the requirements of the Contract Documents, regardless of whether: (i) the Illinois Tollway modified the RFP Documents to permit Design-Builder to implement a technical approach, including approved ATCs or PAEs; (ii) the Illinois Tollway accepted Design-Builder's Proposal; or (iii) any other action or inaction of the Illinois Tollway is alleged by Design-Builder.

2.4 Design Requirements

2.4.1 Compliance with Contract Documents and Design

Design-Builder shall deliver the Project in accordance with and otherwise meet the requirements of the Contract Documents and Design Documents furnished by the Design-Builder.

2.4.2 Ownership of Design and Design Deliverables

RFC Documents and other Design Documents become the Illinois Tollway's property upon preparation and payment to the Design-Builder. Other documents prepared or obtained by Design-Builder in connection with the performance of its obligations under the Contract, including Construction Documents, studies, manuals, as-built drawings, electronic data files, calculations, technical and other reports and the like, become the Illinois Tollway's property upon Design-Builder's preparation or receipt thereof.

2.5 Performance Requirements

2.5.1 Performance of Work

All labor, Equipment, materials, services and efforts necessary to achieve the Completion Deadline(s) shall be Design-Builder's sole responsibility, except as otherwise specifically provided in the Contract Documents. Subject to the terms of Article 17 (*Changes in the Work*), the costs of all such materials, services and efforts are included in the Contract Price.

2.5.2 Performance Standards

Design-Builder shall furnish the Design of the Project in accordance with all professional engineering principles and practices generally accepted as standards of the industry in the State of Illinois and in accordance with the Contract Documents. Design-Builder shall construct the Project as designed and accepted by the Illinois Tollway, in a good and workmanlike manner, and free from defects in accordance with construction practices generally accepted as standards of the industry in the State of Illinois, the Contract Documents. Illinois Tollway-issued Approvals, Governmental Approvals, and other Persons' Approvals shall not relieve the Design-Builder of any liability or responsibility with respect to the proper design and construction of the Project and the obligations under this Contract.

2.5.3 Performance as Directed

At all times during the term hereof, including during the course of, and notwithstanding the existence of, any dispute, Design-Builder shall perform the Work as directed by the Illinois Tollway in a diligent manner and without delay, shall abide by the Illinois Tollway's decision or order, and shall comply with all applicable provisions of the Contract Documents. If a dispute arises regarding such performance or direction, the dispute shall be resolved in accordance with Article 23 (*Relationship of the Parties*).

3 INFORMATION SUPPLIED TO DESIGN-BUILDER

3.1 Information Supplied

The Illinois Tollway has made available to Design-Builder certain background and technical information regarding the Project (“Project Information”). Project Information is categorized as either (a) information that has been incorporated as Exhibits to Book 2 and are considered Contract Documents; (b) Reference Information as described in Section 3.2 (*Reference Information*); or (c) Supplemental Information as described in Section 3.3 (*Supplemental Information*). Exhibit 13 (*Project Information Index*) lists the Reference Information and Supplemental Information that has been provided to Proposers.

The Illinois Tollway has also provided a Conceptual Design and Directive Design(s) as described in Section 3.4 (*Conceptual Design and Directive Design*).

3.2 Reference Information

The Illinois Tollway has provided Reference Information for Design-Builder to consider in developing the Proposal and for executing the Work. Design-Builder is not entitled to rely on the Reference Information, or any opinions, suggestions, directions, or recommendations therein as presenting design, engineering or construction solutions, or other direction, means or methods for complying with the requirements of the Contract Documents, Government Approvals or Legal Requirements. Instead, Design-Builder is assumed to have thoroughly reviewed and verified all such documents as part of its Reasonable Investigation and during the Scope Validation Period. To the extent that any Scope Issues arise on the basis of defects, errors or inconsistencies in the Reference Information, the Illinois Tollway shall consider such issues in accordance with Section 2.3 (*Scope Validation*) of the Contract.

3.3 Supplemental Information

The Illinois Tollway has additionally provided Supplemental Information for Design-Builder to consider in developing the Proposal and for executing the Work. Design-Builder is not entitled to rely on the Supplemental Information, or any opinions, suggestions, directions, or recommendations therein as presenting design, engineering or construction solutions, or other direction, means or methods for complying with the requirements of the Contract Documents, Government Approvals or Legal Requirements. Instead, Design-Builder is assumed to have thoroughly reviewed and verified all such documents as part of its Reasonable Investigation. Defects, errors or inconsistencies in such Supplemental Information shall not entitle Design-Builder to relief for any Scope Issues.

3.4 Conceptual Design and Directive Design

The Illinois Tollway has provided a Conceptual Design as part of the RFP Documents. Within the Conceptual Design, and as indicated therein, are Directive Design(s) described in Book 2, Section 1.7 (*Directive Design*) which illustrate either the Illinois Tollway’s or a major stakeholder’s prescribed Design for certain aspects of the Project.

Any changes to the Directive Design(s) must have been approved by the Illinois Tollway as an ATC, or in accordance with the design review process described in Book 2, Section 2.1.2 (*Document and Data Management Plan*). Notwithstanding the foregoing, Design-Builder shall have full responsibility and liability for the Design of the Project subject to Section 22.3 (*Design Defects*).

3.5 No Other Liability Regarding Reference Information and Supplemental Information

Except to the extent provided in Section 2.3 (*Scope Validation*), Design-Builder understands and agrees that the Illinois Tollway shall not be responsible or liable in any respect for any loss, damage, injury, liability, cost or cause of action whatsoever suffered by the Design-Builder, Design-Builder-Related Entity, or subcontractors by reason of any use of any information contained in the Reference or Supplemental Information or any action or forbearance in reliance thereon. Design-Builder further acknowledges and agrees that Design-Builder is capable of conducting and obligated hereunder to conduct any and all studies, analyses and investigations as it deems advisable as part of its Reasonable Investigation and during the Scope Validation period, and that any use of said information is entirely at Design-Builder's own risk and at its own discretion.

The Illinois Tollway does not represent or warrant that the information contained in the Reference or Supplemental Information is either complete or accurate or that such information conforms with the requirements of the Contract Documents. The foregoing shall in no way affect the Illinois Tollway's agreement herein to issue Change Orders in accordance with Section 2.3.6 (*Design-Builder's Assumption of Risk of Scope Issues*) and Section 17.2 (*Definition of and Requirements Relating to Change Orders*).

3.6 Design-Builder Responsibility for Design

Design-Builder agrees that it has full responsibility for the Design of the Project and that Design-Builder shall furnish the Design of the Project.

3.7 Design-Builder Representations, Warranties, and Covenants Regarding Information Supplied

Design-Builder specifically acknowledges and agrees that:

- a. The Conceptual Design and Directive Design(s) contained therein are preliminary in nature.
- b. The Conceptual Design and Directive Design(s) contained therein may include information that is not consistent with Book 2 and Book 3. Except for the contractually prescribed Directive Design(s), Design-Builder shall not be entitled to an increase in the Contract Price or adjustment of Completion Deadline(s), or any other Claim arising from inconsistencies between Book 2, Book 3, and the Conceptual Design. The Design-Builder is responsible for correcting any Errors or Omissions therein through the design and/or construction process without any increase in the Contract Price or extension of a Completion Deadline.

- c. Project Information is provided for information and disclosure only, except to the extent that the Contract Documents incorporate such Project Information. Design-Builder is not entitled to rely on and has not relied on (i) the Reference Information or Supplemental Information or (ii) any other documents or information provided by the Illinois Tollway, except to the extent specifically permitted in Section 2.3 (*Scope Validation*).
- d. Except as provided in Section 2.3 (*Scope Validation*), Design-Builder shall not be entitled to an increase in the Contract Price or adjustment of Completion Deadline(s), or any other Claim arising from inconsistencies between Book 2, Book 3, and the Reference Information and Supplemental Information. The Design-Builder is responsible for correcting any Errors or Omissions therein through the design and/or construction process without any increase in the Contract Price or extension of a Completion Deadline.
- e. Design-Builder's use of approved and accepted ATCs and PAEs shall be at the sole risk of the Design-Builder. In case Design-Builder is (i) unable to obtain Governmental Approvals or other Approvals, or to comply with the Legal Requirements necessary to implement an ATC or PAEs, or (ii) other conditions arise that render the implementation of an ATC, or PAEs impossible or unfeasible, the Design-Builder shall design and construct the Project in accordance with the Contract Documents. In such an event, the Design-Builder shall not have a basis for a Claim or Change order.

3.8 Professional Licensing Laws

The Illinois Tollway does not intend to contract for, pay for, or receive any design services which are in violation of any professional licensing laws, and by execution of the Contract, Design-Builder acknowledges that Illinois Tollway has no such intent. It is the intent of the parties that Design-Builder is fully responsible for furnishing the Design of the Project and only fully licensed design firm(s) or individuals designated herein will perform the Design Work required by the Contract Documents. Any references in the Contract Documents to Design-Builder's responsibilities or obligations to perform the design portions of the Work shall be deemed to mean that Design-Builder shall furnish the Design for the Project. The terms and provisions of this Section 3.8 (*Professional Licensing Laws*) shall control and supersede every other provision of the Contract Documents.

4 TIME WITHIN WHICH PROJECT SHALL BE COMPLETED

4.1 Time of Essence

Time is of the essence for this Contract. The Design-Builder will be expected to mobilize sufficient workforce and Equipment to adhere to the Baseline Schedule and to meet the Completion Deadline(s) within the specified timeframes. In an effort to meet the Completion Deadline(s) and adhere to the Baseline Schedule, the Design-Builder may increase the Working Hours, at the Design-Builder's sole expense.

4.2 Notices to Proceed (NTP)

Work as described in this Section 4.2 (*Notice to Proceed*) shall proceed upon the issuance by the Illinois Tollway of the Notice(s) to Proceed described below.

4.2.1 Notice to Proceed 1 (NTP 1)

Award shall be considered the date when the Illinois Tollway Board has given its approval of the Contract. Following Award, the Parties shall enter into this Contract.

Prior to execution of the Contract, the Design-Builder shall ensure all Insurance Policies, Performance and Payment Bonds, and/or Guaranties required under the Contract Documents have been obtained and are in full force and effect, and the Design-Builder has delivered to the Illinois Tollway verification thereof.

Illinois Tollway intends to issue NTP 1 promptly after execution of the Contract.

The Illinois Tollway shall ensure that all ROW and rights of access necessary for the activities permitted under NTP 1 has been secured. Within ten (10) days of issuance of NTP 1, Design-Builder shall begin performance of:

- a. Scope validation as described under Section 2.3 (*Scope Validation*);
- b. Design Work related to scope validation;
- c. Work necessary to satisfy the conditions precedent to NTP 2, as described in Section 4.2.2 (*Notice to Proceed (NTP 2)*) and;
- d. Other preliminary activities as authorized under the NTP 1 issued by the Illinois Tollway for the Project including:
 - i. tree removals;
 - ii. clearing and grubbing;
 - iii. utility coordination;

- iv. soil borings; and
- v. temporary construction.

4.2.2 Notice to Proceed 2 (NTP 2)

The Illinois Tollway anticipates issuing NTP 2 within five (5) business days after the Design-Builder's satisfaction of the following conditions:

- a. NTP 1 has been issued;
- b. All Key Personnel and Required Personnel required to be available and at a certain location at for the activities permitted under NTP 2 have been made available and are at the specified location, if applicable;
- c. All Governmental Approvals, New Environmental Approvals, and other Approvals necessary for the activities permitted under NTP 2 have been secured, unless otherwise specified by Illinois Tollway;
- d. All ROW and other rights of access necessary for the activities permitted under NTP 2 have been obtained, unless otherwise specified by Illinois Tollway;
- e. All Scope Validation activities are completed; and
- f. The Design-Builder has obtained Illinois Tollway Approval on the following submittals:
 - i. Design Quality Management Plan in accordance with Book 2, Section 5.3.4 (*Design Quality Management Plan*)
 - ii. Baseline Schedule in accordance with Book 2, Section 2.2.1 (*Baseline Schedule Requirements*);
 - iii. Schedule of Values in accordance with Book 2, Section 2.3.2 (*Schedule of Values*);
 - iv. Project Management Plan under Book 2, Section 2.1 (*Project Management Plan*);
 - v. Safety Management Plan under Book 2, Section 2.1.8 (*Safety Management Plan*);
 - vi. Ethical standard of conduct under Section 9.3 (*Ethical Standards*); and
 - vii. Other submittals identified in Book 2 that are a condition of NTP 2, if applicable;

The following Design-Builder activities are permitted following Illinois Tollway issuance of NTP 2:

- a. Design Work;
- b. Those necessary to obtain any Governmental Approvals that have not been obtained, including any amendment or supplement, as may be required;
- c. Coordination with stakeholders and third parties;
- d. Work necessary to satisfy the conditions precedent to NTP 3; and
- e. Other activities as authorized under the NTP 2 issued by the Illinois Tollway for the Project.

4.2.3 Notice to Proceed 3 (NTP 3)

The Illinois Tollway anticipates issuing NTP 3 within five (5) business days after the Design-Builder's satisfaction of the following conditions:

- a. NTP 2 has been issued;
- b. All Key Personnel and Required Personnel required to be available and at a certain location for the activities permitted under NTP 3 have been made available and are at the specified location, if applicable;
- c. All Governmental Approvals, New Environmental Approvals, and other Approvals necessary for the activities permitted under NTP 3 have been obtained;
- d. The Illinois Tollway has Approved the applicable RFC Documents;
- e. All ROW and other rights of access necessary for the activities permitted under NTP 3 has been secured, unless otherwise specified by Illinois Tollway;
- f. All requirements of the Quality Management Plan that are a condition to construction have been met in Book 2, Section 5.3 (*Quality Management Plan*); and
- g. Any additional conditions for Construction Work set forth in the Contract Documents.

The following Design-Builder activities are permitted following the Illinois Tollway's] issuance of NTP 3:

- a. Construction Work; and
- b. All other Work and activities not authorized under NTP 1 and NTP 2.

4.2.4 At-Risk Work

The Design-Builder may proceed with construction of certain elements prior to the RFC Documents have been issued. This is considered At-Risk Work and is at the Design-Builder’s sole risk. In order to proceed with At Risk Work, Design-Builder shall submit an At-Risk Work Plan for Approval by the Illinois Tollway prior to performing At-Risk Work, that includes the following:

- a. Advantages/disadvantages of performing the At-Risk Work;
- b. Any associated risk to the Illinois Tollway by performing the At-Risk Work;
- c. The proposed maintenance of traffic plan to be utilized during the At-Risk Work;
- d. A description of how At-Risk Work will be reconciled with the RFC Documents. Also, include a narrative of how the work, materials, quantities, testing requirements, etc. will be coordinated with the Illinois Tollway for inspection purposes;
- e. Detail how the Design-Builder will request payment for any At-Risk Work; and
- f. Any other requirements requested by the Illinois Tollway specific to the At-Risk Work.

Any payment for At Risk Work will be made after NTP3 has been issued and is subject to Approval of the At-Risk Work Plan. At-Risk Work does not relieve the Design-Builder of their obligations and final construction shall be in conformance with the Illinois Tollway’s Accepted RFC Documents.

4.3 Completion Deadline(s)

Milestone	Completion Deadline
Substantial Completion of Project	November 1, 2027
Final Acceptance of Project	December 30, 2027

4.3.1 Substantial Completion Deadline

The Design-Builder shall achieve Substantial Completion of the entire Project on or before November 1, 2027 (“Substantial Completion Deadline”).

4.3.2 Final Acceptance Deadline

The Design-Builder shall achieve Final Acceptance for the Project on or before December 30, 2027 (“Final Acceptance Deadline”).

4.3.3 Interim Completion Deadline – Not Used

4.4 Early Completion Incentive – Not Used

4.5 Schedule

4.5.1 Contract Schedule

Design-Builder shall deliver the Project, including planning, design, construction, management, development and completion, in accordance with the Baseline Schedule using the Critical Path Method (CPM), as described in Book 2, Section 2.2.1 (*Baseline Schedule Requirements*).

Design-Builder shall prepare and deliver each Revised Contract Schedule in accordance with Book 2.2.5 (*Revised Baseline Schedule*). Except for Section 4.5.3 (*Updates to Baseline Schedule*), the Revised Contract Schedule is not intended to amend the Baseline Schedule. The Current Contract Schedule refers to the most recent Revised Contract Schedule.

Design-Builder shall afford the Illinois Tollway every opportunity and facility for keeping account of the actual nature, cost and impact of the Work, and any Work that is subject of a Change Order, Extra Work Order, or Claim on the Contract Schedule.

4.5.2 Schedule Float

All Float contained in the Current Contract Schedule shall be a shared, jointly owned resource available to either or both Parties as needed to absorb Project schedule delays. All Float and corresponding Controlling Work Items shall be shown as such in the Current Contract Schedule on each affected schedule path. The Illinois Tollway will have the right to examine the identification of (or failure to identify) Float and Controlling Work Items on the Current Contract Schedule. The Design-Builder shall monitor and account for Float in accordance with the Critical Path Method.

Design-Builder shall submit a Time Impact Analysis within 10 Business Days of the day on which Float is seventy-five (75) percent consumed.

4.5.3 Updates to the Baseline Schedule

Upon the Illinois Tollway’s approval of a Change Order or Claim to adjust Completion Deadline(s), the Design-Builder shall submit to the Illinois Tollway within ten (10) Business Days a Revised Baseline Schedule, in accordance with the approved Change Order or Claim. Upon the Illinois Tollway’s acceptance of the Revised Baseline Schedule, such Revised Baseline Schedule shall be the Baseline Schedule.

5 CONTROL OF WORK

5.1 Designation of Representatives

The Illinois Tollway and Design-Builder shall each designate an individual or individuals with the authority to make decisions and bind the Parties on matters relating to the Contract Documents (for each Party, its respective “Authorized Representative”). Exhibit 4 (*Initial Authorized Representatives*) hereto provides the Parties’ initial Authorized Representative designations. Either Party may change its initial Authorized Representative designation by a subsequent writing delivered to the other Party in accordance with Section 27.1 (*Contract Amendments*).

5.2 Control and Coordination of Work

Subject to requirements in the Contract Documents, Design-Builder shall be solely responsible for and have control over the construction means, methods, techniques, sequences, procedures and Site safety, and shall be solely responsible for coordinating all portions of the Work.

5.3 Vehicles and Equipment

Design-Builder’s vehicles and Equipment in the work zone must bear company identification and shall be equipped with a yellow, high-intensity rotating, flashing, oscillating or strobe warning light visible on a sunny day from a distance of 1000 feet in accordance with Section 701.06 of the Illinois Tollway Supplemental Specifications.

5.4 Safety and Damages

5.4.1 Site and Workplace Safety

Design-Builder shall meet all reasonable precautions to prevent damage, injury, or loss to, all persons on the Site or who would reasonably be expected to be affected by the Work, including individuals performing Work, employees of the Illinois Tollway and its consultants, visitors to the Site and members of the public who may be affected by the Work. Any and all safety regulations and other provisions of applicable federal, State and local laws and building, construction, and environmental codes shall be observed.

Design-Builder shall be solely responsible for the adequacy and safety of all construction methods and the safe prosecution of the Work and develop a Safety Management Plan (“SMP”) in accordance with the requirements set forth in Book 2, Section 2.1.8 (*Safety Management Plan*). Any Acceptance by the Illinois Tollway of the Work (specifically any forms, Falsework, scaffolding, trench protection, protective barricades, protective rails and warning lights) relate only to general conformance with the Design concept of the project and general compliance with the information given in the Contract Documents and the SMP. Such Acceptance by the Illinois Tollway shall not relieve Design-Builder from full and complete responsibility for safe prosecution of the Work at all times and for obtaining satisfactory results.

Additionally, Design-Builder guarantees to the Illinois Tollway a safe workplace shall be provided for all employees of Design-Builder and each of its subcontractors. There shall be no violation by the Design-Builder, Design-Builder Related Entities, a subcontractor, or anyone directly or

indirectly employed by them, or anyone for whose acts they may be liable of the applicable standards of the Occupational Safety and Health Act ("OSHA"), or any other workplace safety act of this State. Design-Builder agrees to require this workplace safety guarantee of all subcontractors according to Article 15 (*Subcontractors*), and expressly to require the Illinois Tollway to be a third-party beneficiary of each guarantee.

During the course of performance of the Work under the Contract, if any operation, practice, or condition is deemed by the Illinois Tollway to be unsafe, Design-Builder, when notified verbally (which will later be confirmed in writing) by the Illinois Tollway, shall take such corrective action as shall be appropriate. However, when, in the opinion of the Illinois Tollway, any operating practice or condition endangers persons or property, such operation, practice, or condition shall be summarily discontinued, and adequate remedial action taken by the Design-Builder before the affected part of the Work is resumed.

5.4.2 Liability for Damages

Nothing in this Contract is intended or shall be construed, unless otherwise expressly stated, to reduce the responsibility of Design-Builder, Design-Builder Related Entities, a subcontractor, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable, from full and complete supervision and achievement of workplace safety and safe prosecution of the Work at all times. Any inspection of Work conducted by the Illinois Tollway, whether notice of the results thereof is provided to anyone or not provided to anyone, shall neither establish any duty on its part nor create any expectation of a duty to anyone, including but not limited to third parties, regarding Site and workplace safety.

In the event the Illinois Tollway is held by a court or administrative body to be liable for personal injuries or damages to persons or property arising from deficiencies in Site or workplace safety, Design-Builder shall promptly indemnify and hold them harmless there from as provided for in Article 22 (*Indemnification*).

5.5 Process to be Followed for Discovery of Certain Site Conditions

5.5.1 Discovery of Certain Site Conditions

If Design-Builder becomes aware of (i) any on-Site material, except for Known Pre-Existing Hazardous Materials, that Design-Builder believes may contain Hazardous Material that is required to be removed or treated, (ii) any paleontological, aboriginal records and antiquities of archaeological or historical, cultural or biological resources, or (iii) any Differing Site Conditions, Design-Builder shall immediately notify Illinois Tollway via telephone or in person, to be followed by written notification within fourteen (14) days of encountering such Site condition. Design-Builder, to the extent reasonably possible, shall provide such written notice before the site conditions have been substantially disturbed or altered ("Notice of Site Condition"). Provision of a Notice of Site Condition by Design-Builder constitutes a condition precedent to Illinois Tollway's consideration of a Change Order with respect to the site conditions in question.

Upon notifying the Illinois Tollway, Design-Builder shall immediately stop Work in the affected area and secure the affected area pending receipt of direction from the Illinois Tollway

5.5.2 Hazardous Waste

Design-Builder may be entitled to submit a Request for Change Order in accordance with Section 17.16 (*Change Order Due to Hazardous Material*) if the presence, existence or release of an Unknown Pre-Existing Hazardous Material, Third Party Hazardous Waste, Illinois Tollway Release of Hazardous Material, or Third Party Release of Hazardous Material constitutes a potential Hazardous Environmental Condition and requires Remediation Work as described in Section 5.5.6 (*Further Investigation & Remediation Work – Hazardous Environmental Condition*).

5.5.3 Differing Site Conditions

Concealed or latent physical conditions or subsurface conditions at the Site that: (i) materially differ from the conditions identified through Reasonable Investigations (as such conditions may be further described through reports or analyses undertaken during the Scope Validation Period); or (ii) are of an unusual nature, differing materially from the conditions ordinarily encountered and generally recognized as inherent in the Work are collectively referred to herein as Differing Site Conditions.

If Design-Builder encounters a Differing Site Condition, Design-Builder will be entitled to submit a request for a Change Order to the extent Design-Builder's cost and/or time of performance are adversely impacted by the Differing Site Condition in accordance with Article 17 (*Changes in the Work*).

5.5.4 Other Site Conditions

The discovery of any paleontological, aboriginal records and antiquities of archaeological or historical, cultural or biological resources will entitle the Design-Builder to submit a request for a Change Order to the extent Design-Builder's cost and/or time of performance are adversely impacted by the Differing Site Condition in accordance with Section 17.7(e) (*Adjustments to Completion Deadline(s)*) and Section 17.8 (*Adjustments to Contract Price*).

5.5.5 Further Investigation & Remediation Work – Differing Site Conditions and Other Conditions

The Illinois Tollway will view the location within two (2) Working Days of receipt of the Notice of Site Condition from Design-Builder and may advise Design-Builder at that time whether to resume Work or whether further investigation is required. Design-Builder shall promptly conduct such further investigation as the Illinois Tollway deems appropriate. Except in the case of a Hazardous Environmental Condition, within one (1) Working Day after viewing the locations, the Illinois Tollway will advise the Design-Builder of the recommended action plan regarding the situation. Any delay in prosecution of the Work due to suspension of Work during the three (3) Working Day period following the Illinois Tollway's receipt of notification from Design-Builder shall not be considered an Illinois Tollway -Caused Delay.

5.5.6 Further Investigation & Remediation Work – Hazardous Environmental Condition

Design-Builder shall control access to the site and take immediate steps to address the Hazardous Environmental Condition upon issuance of the Notice of Site Condition. The Illinois Tollway will view the location of the potential, Hazardous Environmental Condition within two (2) Working

Days of receipt of the Notice of Site Condition from Design-Builder. Within one (1) Working Day after viewing the location, the Illinois Tollway will advise Design-Builder to resume Work and to develop a Remediation Work Plan setting out the scope of the Remediation Work that Design-Builder proposes to take, including but not limited to: (i) conducting such further investigations as may be necessary or appropriate to determine the nature and extent of the Hazardous Material and submitting copies of such data and reports to the Illinois Tollway for its review and approval; (ii) taking reasonable steps, including in the case of excavation, construction, reconstruction, rehabilitation, or modifications and/or construction techniques, to avoid or minimize excavation or dewatering in areas with Hazardous Material; (iii) preparing and obtaining Governmental Approvals for Remedial Action Plans, including Illinois Tollway approval; (iv) carrying out the Remedial Action Plan, including, as necessary, disposal of the Hazardous Materials; and (v) timely informing the Illinois Tollway of all such actions.

However, in the case of a sudden release of any Unknown Pre-Existing Hazardous Materials, Design-Builder may take all reasonable actions necessary to stabilize and contain the release without providing a prior Notice of Site Condition to or prior viewing by the Illinois Tollway; provided that Design-Builder will promptly notify the Illinois Tollway of the sudden release and its location.

5.5.7 Recommence Work

The Illinois Tollway shall have the right to require Design-Builder to recommence Work in the area at any time, even though an investigation may still be ongoing (so long as such Work is not in violation of any Governmental Rules or Governmental Approvals). Design-Builder shall promptly recommence Work in the area upon receipt of notification from the Illinois Tollway to do so. On recommencing Work, Design-Builder shall follow all applicable procedures contained in the Contract Documents and all other Governmental Rules with respect to such Work, consistent with the Illinois Tollway's determination or preliminary determination regarding the nature of the material, resources, species or condition.

5.5.8 Alternative Procedure

Notwithstanding the foregoing, to the extent that any Governmental Approval specifies a procedure to be followed which differs from the procedure set forth herein, Design-Builder shall follow the procedure set forth in the Governmental Approval. This Work may be considered an Illinois Tollway -Directed Change.

5.6 Obligation to Minimize Impacts

Design-Builder shall ensure that all of its activities and the activities of all Design-Builder-Related Entities are undertaken in a manner that will minimize the effect on surrounding property and the public to the maximum extent practicable.

5.7 Consent to Oversight; Obligation to Uncover Work

5.7.1 Oversight, Inspection, and Testing by the Illinois Tollway and Others

All materials and each part or detail of the Work shall also be subject to oversight, inspection and testing by the Illinois Tollway and other Persons designated by the Illinois Tollway at any time.

When any Utility Owner is to accept or pay for a portion of the cost of the Work, its respective representatives have the right to oversee, inspect and test the Work. Such oversight, inspection and/or testing does not make such Person a party to the Contract, nor will it change the rights of the Parties hereto. Examples of oversight, inspection and testing include but are not limited to:

- a. Monitoring and auditing Design-Builder, Design-Builder-Related Entities, and the books and records of the foregoing as more particularly set forth in Article 26 (*Documents and Records*);
- b. Conducting periodic reviews of Project documentation and files;
- c. Conducting material tests, according to the Illinois Tollway's test methods, to verify: (i) Design-Builder's compliance with all testing frequencies and requirements, including performance and acceptance testing set forth in the Contract Documents and the approved Project Management Plan; (ii) the accuracy of the tests, inspections, and audits performed by or on behalf of Design-Builder pursuant to the approved Design Quality Management Plan and approved Construction Quality Management Plan; and (iii) compliance of materials incorporated into the Project with the applicable requirements, conditions, and standards of the Contract Documents, Governmental Approvals, the Project Management Plan, and Legal Requirements;
- d. Reviewing, commenting on, and if applicable, Approving submittals;
- e. Reviewing records and conducting interviews as necessary to verify compliance with federal, State, and local laws and regulations;
- f. Participating in meetings described in Book 2, Section 2.1.1.4 (*Meetings*) to discuss design progress, construction progress, Design-Builder's quality control processes, audit activities, and other Project Management Plan issues;
- g. Accompanying Design-Builder on Inspections, conducting its own inspections in addition to the Inspections, assessing Design-Builder's records of Inspections and Project conditions, and assessing the condition of Elements;
- h. Attending and witnessing Design-Builder's other tests and inspections, including ITS and irrigation system start-up and acceptance tests and inspections, as applicable;
- i. Reviewing Design-Builder's certification of Record Drawings and surveys and Current Contract Schedule; and
- j. Investigating and confirming Design-Builder's compliance with the Safety Management Plan.
- k. Design-Builder hereby consents to such oversight, inspection and testing. Upon request from the Illinois Tollway, Design-Builder shall furnish information to such Persons as are designated in such request and shall permit such Persons access to the Site and all parts of the Work.

5.7.2 Obligation to Uncover Finished Work

At all times before Final Acceptance, the Illinois Tollway may direct Design-Builder to remove or uncover such portions of the finished construction Work. After examination by the Illinois Tollway and any other Persons designated by Illinois Tollway, Design-Builder shall restore the Work to the standard required by the Contract Documents. If the Work exposed or examined is not in conformance with the requirements of the Contract Documents, then uncovering, removing and restoring the Work and recovery of any delay to the Critical Path occasioned thereby shall be at Design-Builder's expense and Design-Builder shall not be entitled to a time extension.

Furthermore, any Work done or materials used without notice to and opportunity for prior inspection by the Illinois Tollway may be ordered uncovered, removed or restored at Design-Builder's expense and without adjustments in the Completion Deadline(s), even if the Work proves acceptable after uncovering.

Except with respect to Work done or materials used as described in the foregoing sentence, if Work exposed or examined under this Section 5.7.2 (*Obligation to Uncover Finished Work*) is in conformance with the requirements of the Contract Documents, then any delay in the Critical Path from uncovering, removing and restoring Work shall be considered an Illinois Tollway - Caused Delay, and Design-Builder shall be entitled to a Change Order for the cost of such efforts and recovery of any delay to the Critical Path occasioned thereby, subject to the provisions of Article 17 (*Changes in the Work*).

5.8 Effect of Oversight, Spot Checks, Audits, Tests, Acceptances, and Approvals

5.8.1 Oversight and Acceptance

Design-Builder shall not be relieved of its obligation to perform the Work in accordance with the Contract Documents, or any of its other obligations under the Contract Documents, by oversight, spot checks, audits, reviews, tests, inspections, acceptances or approvals by any Persons, or by any failure of any Person to take such action. The oversight, spot checks, audits, reviews, tests, inspections, acceptances and approvals by any Person do not constitute Final Acceptance of the particular material or Work, or waiver of any legal or equitable right with respect thereto. The Illinois Tollway may reject or require Design-Builder to remedy any Nonconforming Work and/or identify additional Work which must be done to bring the Project into compliance with Contract requirements at any time prior to Final Acceptance, whether or not previous oversight, spot checks, audits, reviews, tests, inspections, acceptances or approvals were conducted by any Person.

5.8.2 No Estoppel

The Illinois Tollway shall not be precluded or estopped by any measurement, estimate, certificate, or payment made either before or after Final Acceptance. This includes showing that any such measurement, estimate, certificate, or payment is incorrectly made or untrue, from showing the true amount and character of the Work performed and materials furnished by Design-Builder, or from showing that the Work or materials do not conform in fact to the requirements of the Contract Documents. Notwithstanding any such measurement, estimate, certificate, or payment made in accordance therewith, the Illinois Tollway shall not be precluded or estopped from recovering from

Design-Builder and its Sureties such damages as the Illinois Tollway may sustain by reason of Design-Builder's failure to comply or to have complied with the terms of the Contract Documents.

5.9 Nonconforming Work

5.9.1 Rejection, Removal and Replacement of Work

The Illinois Tollway may, in its sole discretion, Accept or reject Nonconforming Work. Design-Builder shall remove and replace rejected Nonconforming Work so as to conform with the requirements of the Contract Documents, at Design-Builder's expense and without adjustment to the Completion Deadline(s); and Design-Builder shall promptly take all action necessary to prevent similar deficiencies from occurring in the future.

The fact that the Illinois Tollway or its agents may not have discovered the Nonconforming Work shall not constitute an Acceptance of such Nonconforming Work.

The Illinois Tollway may cause the Nonconforming Work to be remedied or removed and replaced, and may deduct the cost of doing so from any monies due or to become due Design-Builder or obtain reimbursement from Design-Builder for such cost as provided in Section 14.2 (*Contract Price Deductions*) if Design-Builder fails to:

- a. Correct Nonconforming Work within five (5) Working Days of receipt of notice from the Illinois Tollway requesting correction;
- b. Begin correction of Nonconforming Work within five (5) Working Days of receipt of notice from the Illinois Tollway requesting correction and thereafter to diligently prosecute such correction in accordance with an Approved schedule to completion;
- c. Provide to the Illinois Tollway a schedule for correcting any such Nonconforming Work within five (5) Working Days of receipt of notice from the Illinois Tollway requesting correction for Nonconforming Work where correction cannot be commenced within the five (5) Working Day period described in (b); or
- d. Correct Critical Nonconforming Work immediately from receipt of notice from the Illinois Tollway requesting correction. In addition, Design-Builder's failure to facilitate satisfactory progress or ensure completion of the Critical Nonconforming Work may result in liquidated damages described in Section 21.4 (*Failure to Rectify Critical Nonconforming Work*).

5.9.2 Acceptance of Nonconforming Work

The Illinois Tollway may, in its sole discretion, accept any Nonconforming Work without requiring it to be fully corrected, and shall be entitled to one hundred percent of any cost savings realized through a reimbursement of a portion of the Contract Price (or if Design-Builder will incur costs for impacts related to Nonconforming Work, a pay adjustment, if applicable)

In certain events, it may not be possible for the Nonconforming Work to be made to conform to the requirements of the Contract Documents. In general, the pay adjustment (or reimbursement) shall equal, at the Illinois Tollway's election:

- a. Design-Builder's cost savings associated with its failure to perform the Work in accordance with the Contract requirements. The calculation of the cost savings shall take into account all avoided costs of Design-Builder, including avoided design, material, Equipment, labor, construction, testing, commissioning, acceptance and overhead costs, and avoided costs due to time savings. The Illinois Tollway will have the right to deduct such cost savings from any sums owed by the Illinois Tollway to Design-Builder pursuant to this Contract; or
- b. The amount deemed appropriate by the Illinois Tollway to provide compensation for impacts to affected parties such as future maintenance and/or other costs relating to the Nonconforming Work. In certain events, the Illinois Tollway shall be entitled to a pay adjustment (or reimbursement) as expressly set forth elsewhere in the Contract Documents.

5.9.3 Nonconforming Work After Final Acceptance

If any part of the Work in the judgment of the Illinois Tollway needs to be replaced, repaired or made good during the period from when the Illinois Tollway has completed the MA Process confirming that Final Acceptance has been met as described in Article 24 (*Acceptance of the Work*) has been issued, and while a Bond Against Defective Work as defined in Article 24 (*Acceptance of the Work*) is effective, the Illinois Tollway will so notify the Design-Builder in writing by mail or through the Illinois Tollway's WBPMS. Within fourteen (14) days from the date of receipt of such notice, the Design-Builder shall submit a method and schedule of corrective work for the Illinois Tollway's review and approval. If the Design-Builder fails to respond within said fourteen (14) days or disputes the Illinois Tollway's findings, the Illinois Tollway may elect to have the work done by others, and the cost thereof shall be invoiced to the Design-Builder or the Surety for reimbursement.

In an emergency, the Illinois Tollway reserves the right to immediately perform both temporary and permanent repairs or arrange for others to perform such repairs without notification to any affected or responsible Surety or the Design-Builder, and the Design-Builder agrees that in such event the Illinois Tollway may charge such costs as may be incurred against the Design-Builder or any affected or responsible Surety.

5.10 Limitation of Operations

Design-Builder shall at all times conduct its work so as to minimize interference with or inconvenience to vehicular and pedestrian traffic. At any time when, in the judgment of the Illinois Tollway, Design-Builder has obstructed or closed a road or is carrying on an operations-causing greater interference or inconvenience than necessary for the proper prosecution of the Work, the Illinois Tollway may require Design-Builder to finish the section of the Work which is in progress before Work is started on any additional section and, in addition thereto, may require Design-Builder take any other actions which will minimize inconvenience to vehicular and pedestrian traffic.

Design-Builder shall arrange its work and material so as not to interfere with the operations of Separate Contractors, and to join its work to that of others in a proper manner and in accordance with the plans and Contract Documents to coordinate the sequence of its work in relation to that of Separate Contractors and as may be directed by the Illinois Tollway, from time to time, as the Work progresses.

Design-Builder shall be responsible for any damage done by it or its agents to Separate Contractors.

It shall be Design-Builder's responsibility to determine and comply with the limitations imposed by local ordinances with respect to construction operations and Equipment noise and working time restrictions. Nothing herein referenced shall limit the rights of the Illinois Tollway as provided in this Section 5.10 (Limitation of Operations).

6 UTILITIES AND RAILROADS

6.1 Responsibility for Utility Adjustment Work and Railroad Work

The Design-Builder shall be responsible for all utility coordination activities associated with the Project. This includes determining utility conflicts, utility adjustments, and working closely with Utility Owners to mitigate them.

The Design and construction of all private utility facilities will be performed by the utility company. The Design-Builder shall coordinate design reviews and oversee the utility construction work to ensure it meets Illinois Tollway requirements, including all permit and agreement conditions.

The Design and construction of all public utility facilities will be performed by the Design-Builder. The Design-Builder shall coordinate design reviews with the public utility owner, who will Approve the Release for Construction designs, and coordinate during construction with the public utility owner to accommodate any required field inspections. The Design-Builder shall coordinate with the Illinois Tollway on agreements associated with any public utility facility Utility Adjustment Work.

The Design-Builder shall be responsible for all railroad coordination activities associated with the Project. This includes the planning, design, permitting, and construction of Work within specific proximity of, below, above, or adjacent to Railroad ROW or affecting Railroad facilities (“Railroad Work”), including but not limited to acquiring the agreements, permits, and Approvals necessary to perform the Railroad Work in accordance with any railroad agreements.

6.2 Known Utilities and Known Railroads

Known Utilities pertain to utility facilities referenced in the Contract Documents, in Book 2 Section 6 Utilities or the Conceptual Design. In accordance with *Illinois Tollway Supplemental Specification 105.07 Cooperation with Utilities*, the Illinois Tollway assumes no responsibility with respect to the sufficiency or accuracy of information provided in the Contract Documents relative to the location of Known Utilities including underground facilities, or the manner in which Known Utilities are to be removed or adjusted. It shall be Design-Builder’s responsibility to determine the actual location of all Known Utilities through Reasonable Investigations and Scope Validation activities. Design-Builder shall also obtain from the respective Utility Owners, and from the Illinois Tollway any and all information needed relative to the location of their facilities and the work schedules of the Utility Owners or the Illinois Tollway for removing or adjusting them.

Except as provided in Illinois Tollway Supplemental Specification 105.07 Cooperation with Utilities, or in Section 6.4 (Failure of Utility Owners, Railroad Owners and/or Railroad Operators to Cooperate) the Design-Builder will not be entitled to a Claim or Change Order related to Known Utilities, including those based on (i) errors or inaccuracies in the Contract Documents.

Known Railroads pertain to Railroads referenced in the Contract Documents, in Book 2 Section 21 Railroads or in the Conceptual Design. In accordance with *Illinois Tollway Supplemental*

Specification 105.12 Work Involving Railroads, the Design-Builder shall be responsible for all Railroad coordination for the Project. The Illinois Tollway assumes no responsibility with respect to the sufficiency or accuracy of information provided in the Contract Documents relative to the location of Known Railroads, including underground facilities. It shall be Design-Builder's responsibility to determine the actual location of all Known Railroads through Reasonable Investigations and Scope Validation activities. Design-Builder shall also obtain from the respective Railroad Owners and/or Railroad Operators, and from the Illinois Tollway, any and all information needed relative to the location of their facilities and the work schedules of the Railroad Owners and/or Railroad Operators.

Except as provided in Section 6.4 (*Failure of Utility Owners, Railroad Owners and/or Railroad Operators to Cooperate*), or a change to an existing Railroad agreement in the Contract Documents, the Design-Builder will not be entitled to a Claim or Change Order related to Known Railroads, including those based on (i) errors or inaccuracies in the Contract Documents.

6.3 Unknown Utilities and Railroads

Unknown Utilities and Unknown Railroads pertain to utility and railroad facilities that were not identified in the Contract Documents.

The Design-Builder may be entitled to a Claim or Change Order for any adjustments to the Completion Deadline(s) and Contract Price due to Utility Adjustment Work of Unknown Utilities and Work associated with Unknown Railroads.

6.4 Failure of Utility Owners, Railroad Owners, and/or Railroad Operators to Cooperate

6.4.1 Notice to the Illinois Tollway

Design-Builder shall use diligent efforts to obtain the cooperation of each Utility Owner, Railroad Owner and/or Railroad Operator as necessary for the Utility Adjustment Work and Railroad Work. Design-Builder shall notify ("Notice of Uncooperative Utility Owner" or "Notice of Uncooperative Railroad Owner and/or Railroad Operator") the Illinois Tollway promptly if Design-Builder reasonably believes that:

- a. Any Utility Owner, Railroad Owner and/or Railroad Operator would not undertake or permit a Utility Adjustment or Railroad Work in a manner consistent with the timely completion of the Work, or in accordance with Legal Requirements, or any Governmental Approval;
- b. Any Utility Owner, Railroad Owner and/or Railroad Operator is not cooperating in a timely manner to provide agreed-upon work or approvals; or
- c. Any other dispute will arise between Design-Builder and a Utility Owner, Railroad Owner and/or Railroad Operator with respect to the Project, despite Design-Builder's diligent efforts to obtain such Utility Owner, Railroad Owner or Railroad Operator's cooperation or otherwise resolve such dispute.

The Notice of Uncooperative Utility Owner or Notice of Uncooperative Railroad Owner and/or Railroad Operator may include a request that the Illinois Tollway assist in resolving the dispute or in otherwise obtaining the Utility Owner, Railroad Owner and/or Railroad Operator's timely cooperation. Design-Builder shall provide the Illinois Tollway with such information as the Illinois Tollway requests regarding the Utility Owner's failure to cooperate and the effect on any resulting delay on the Baseline Schedule. After delivering to the Illinois Tollway any notice or request for assistance, Design-Builder shall continue to use diligent efforts to pursue the Utility Owner, Railroad Owner and/or Railroad Operator's cooperation.

6.4.2 *Design-Builder Request for Assistance*

If Design-Builder requests the Illinois Tollway's assistance pursuant to Section 6.4.1 (*Notice to the Illinois Tollway*), the following provisions shall apply:

Design-Builder shall provide evidence reasonably satisfactory to the Illinois Tollway that: (i) the subject Utility Adjustment is necessary; (ii) the time for completion of the Utility Adjustment Work or Railroad Work in the Baseline Schedule was, at its inception, a reasonable amount of time for completion of such work; (iii) Design-Builder has made diligent efforts to obtain the Utility Owner, Railroad Owner and/or Railroad Operator's cooperation; and (iv) the Utility Owner, Railroad Owner and/or Railroad Operator is not cooperating (the foregoing clauses (i) through (iv), "Conditions to Assistance").

Any assistance the Illinois Tollway provides shall not relieve Design-Builder of its sole responsibility for satisfactory compliance with its obligations and timely completion of Utility Adjustments or Railroad Work, except as otherwise expressly set out in this Contract.

If the Illinois Tollway objects in writing to a request for assistance pursuant to Section 6.4.2 (*Design-Builder Request for Assistance*) based on Design-Builder's failure to satisfy one or both of the Conditions to Assistance described in clauses (i) and (ii), then Design-Builder shall take such action as is appropriate to satisfy the condition(s) and shall then have the right to submit another request for assistance on the same subject matter.

If the Illinois Tollway objects in writing to a request for assistance pursuant to Section 6.4.2 (*Design-Builder Request for Assistance*) based on Design-Builder's failure to satisfy one or both of the Conditions to Assistance described in clauses (iii) and (iv) of Section 6.4.2 (*Design-Builder Request for Assistance*), then Design-Builder shall take such action as Design-Builder deems advisable during the next ten (10) days to obtain the Utility Owner, Railroad Owner and/or Railroad Operator's cooperation and shall then have the right to submit another request for assistance on the same subject matter.

Notwithstanding the foregoing, no resubmittal will be accepted unless all of the Illinois Tollway's objections have been addressed. This process shall be followed until Design-Builder succeeds in obtaining the Utility Owner, Railroad Owner and/or Railroad Operator's cooperation or in otherwise resolving the dispute until the Illinois Tollway determines, based on evidence the Design-Builder presents, that the Conditions to Assistance have been satisfied, at which time the Illinois Tollway will take such reasonable steps as Design-Builder may request to obtain the cooperation of the Utility Owner, Railroad Owner and/or Railroad Operator to resolve the dispute.

Design-Builder shall have the right to submit the question of the reasonableness of the Illinois Tollway's determination for resolution in accordance with the dispute resolution procedures set forth in Article 23 (*Relationship of the Parties*).

The Design-Builder shall use diligent efforts to obtain the cooperation of Utility Owners, Railroad Owners and/or Railroad Operators as necessary to respectively perform the Utility Adjustment Work or Railroad Work.

6.4.3 Notice of Satisfactory Efforts

Following the Illinois Tollway's receipt of satisfactory evidence regarding the Conditions to Assistance, the Illinois Tollway shall issue a Notice of Satisfactory Efforts and take such reasonable steps as Design-Builder may request to obtain the cooperation of the Utility Owner, Railroad Owner or Railroad Operator to resolve the dispute. The Illinois Tollway has sole discretion to determine whether information provided by the Design-Builder constitutes satisfactory evidence.

In the sole discretion of the Illinois Tollway, the Design-Builder shall be entitled to a Change Order for an extension to Completion Deadline(s) under Section 17.7 (*Adjustments to Completion Deadline(s)*) in the event of failure of a Utility Owner, Railroad Owner and/or Railroad Operator to perform its obligations leads to a substantial delay in the Design-Builder's schedule.

In the sole discretion of the Illinois Tollway, the Design-Builder shall be entitled to a Change Order for costs under Section 17.8 (*Adjustments to Contract Price*) in the event of failure of a Known Railroad to perform its obligations.

7 RIGHT-OF-WAY AND ACCESS TO SITE

7.1 Illinois-Tollway ROW Acquisition

7.1.1 Responsibility for ROW Acquisition

The Illinois Tollway will be responsible for acquiring the Right of Way (i) for property identified in ROW Plans, and (ii) for property not identified in ROW Plans that is required as a result of an Illinois-Tollway Directed Change (“Additional Project ROW”).

Design-Builder may request the Illinois Tollway to acquire the Right-of-Way that is: (i) required as part of an ATC that has been approved or conditionally-approved by the Illinois Tollway, (ii) determined by Design-Builder to be necessary to complete the Work in accordance with the Design that is not characterized as Additional Project ROW, or (iii) associated with a Request for Change Order (“Design-Builder Requested ROW”). The Illinois Tollway, upon its sole discretion, may determine whether it shall grant Design-Builder’s request to acquire Design-Builder Requested ROW.

7.1.2 Access to Project ROW

Concurrently with the review of the Baseline Schedule, Design-Builder and the Illinois Tollway shall discuss the access requirements for the Project ROW associated with the scheduled activities, mutually determine which parcels are on the Critical Path and establish deadlines to be included in the Baseline Schedule for activities associated with provision of access.

Design-Builder shall be provided access to the Project ROW that has not been obtained by the Proposal Due Date no later than the deadline specified in Book 2, Section 7. The Baseline Schedule must be structured to provide reasonable work-arounds to progress the Project until Project ROW becomes available, and to reasonably minimize dependence on these parcels.

If the Illinois Tollway at any time determines it will be unable to provide access to Project ROW by the scheduled date, the Illinois Tollway shall notify Design-Builder regarding the revised projected date for delivery of access. Design-Builder shall take appropriate action to minimize any cost and time impact and shall work around such parcel(s) until access can be provided, including rescheduling and resequencing Work so as to avoid any delay to the Project. To the extent that a delay to the Critical Path cannot be avoided, such delay to the Critical Path shall be considered an Illinois Tollway-Caused Delay.

7.1.3 Access to Additional Project ROW

The cost and schedule impacts of acquiring Additional Project ROW shall be addressed in a Change Order in accordance with Article 17 (*Changes in the Work*). The Illinois Tollway shall provide Design-Builder access to the Additional Project ROW by the date indicated in the Change Order. Delay in providing access to the Design-Builder for Additional ROW shall be considered an Illinois Tollway-Caused Delay.

7.1.4 Access to Design-Builder Requested ROW

The Illinois Tollway and Design-Builder shall mutually establish deadlines for acquisition of and access to Design-Builder Requested ROW. The established dates, and associated activities for the provision of access shall be included in the Baseline Schedule.

The Illinois Tollway shall provide Design-Builder access to Design-Builder Requested ROW by the date indicated in the Contract Documents or by the date indicated in the associated Change Order.

Design-Builder shall describe any anticipated impacts to the Contract Price and/or Completion Deadline(s) relating to the acquisition of Design-Builder Requested ROW in its request for the Illinois Tollway to acquire Design-Builder Requested ROW or an associated Request for Change Order in accordance with Article 17 (*Changes in the Work*).

If the Illinois Tollway at any time determines it will be unable to provide access to Design-Builder Requested ROW by the scheduled date, the Illinois Tollway shall notify Design-Builder regarding the revised projected date for delivery of access. Design-Builder shall take appropriate action to minimize any cost and time impact and shall work around such parcel(s) until access can be provided, including rescheduling and resequencing Work so as to avoid any delay to the Project. To the extent that a delay to the Critical Path cannot be avoided, such delay to the Critical Path shall not be considered an Illinois Tollway-Caused Delay.

7.2 Obligations Relating to Design-Builder Requested ROW

The Illinois Tollway shall be responsible for performing activities described in Book 2, Section 7.4 (*Illinois Tollway Responsibilities for Design-Builder Requested ROW*) relating to the acquisition of Design-Builder Requested ROW.

Design-Builder shall be responsible for performing activities described in Book 2, Section 7.5 (*Illinois Tollway Responsibilities for Design-Builder Requested ROW*) relating to the acquisition of Design-Builder Requested ROW.

7.2.1 Costs Relating to Design-Builder Requested ROW Acquisition

Design-Builder shall reimburse the Illinois Tollway for services rendered and costs incurred pursuant to this Article 7 (*Right-of-Way and Access to Site*) and Book 2, Section 7.4 (*Illinois Tollway Responsibilities for Design-Builder Requested ROW*). The Illinois Tollway may deduct these amounts from payments owing to Design-Builder.

Related costs may include the purchase price, closing costs, severance damages (including cost-to-cure damages), relocation assistance payments (if any), title insurance premiums, and any uneconomic remnants that result from the Illinois Tollway's acquisition of such real properties.

7.2.2 Prior Acquisitions of Property Interests

If at any time, Design-Builder or any Design-Builder-Related Entity directly or indirectly (i) acquires or has previously acquired any interest in real property likely to be Project ROW, Additional Project ROW, or Design-Builder Requested ROW or the remainders of any such parcels, (ii) loans or has previously loaned money to any interest holder in any real property likely to be Project ROW, Additional Project ROW, or Design-Builder Requested ROW parcel(s) and accepts as security for such loan the parcel(s), or the remainder of any such parcel(s) that is not a whole acquisition, or (iii) purchases or has previously purchased from an existing mortgagee the mortgage instrument that secures an existing loan against real property likely to be Project ROW, Additional Project ROW, or Design-Builder Requested ROW, or the remainder of any such parcel(s), Design-Builder shall promptly disclose the same to the Illinois Tollway.

8 ENVIRONMENTAL COMPLIANCE

8.1 Environmental Compliance

In performance of the Work, Design-Builder shall comply with all requirements of all applicable Environmental Laws and Governmental Approvals issued thereunder, whether obtained by the Illinois Tollway or Design-Builder. Design-Builder acknowledges and agrees that it will be responsible for all fines and penalties that may be assessed in connection with any failure to comply with such requirements.

8.2 Mitigation Requirements

Design-Builder shall perform all environmental mitigation measures (which term shall be deemed to include all requirements of the Environmental Approvals and similar Governmental Approvals, regardless of whether such requirements would be considered to fall within a strict definition of the term) for the Project. The Contract Price includes compensation for Design-Builder's performance of all such mitigation measures, and for performance of all mitigation measures arising from New Environmental Approvals, which Section 8.3.2 (*New Environmental Approvals*) designates as Design-Builder's responsibility as well as the cost of all activities to be performed by Design-Builder as described in Book 2, Section 4 (*Environmental*).

8.3 Environmental Approvals

8.3.1 ESIS Approvals

The Illinois Tollway has completed Part I of the ESIS for this Project. The Design-Builder shall be responsible for completing Part II of the ESIS. Delay in the approval of the ESIS due to changes in a Governmental Rule, Force Majeure event, or through no fault of Illinois Tollway or the Design-Builder, may entitle the Design-Builder to an adjustment to the Contract Price or relevant Completion Deadline(s) in accordance with Article 17 (*Changes in the Work*).

8.3.2 New Environmental Approvals

In accordance with the Illinois Tollway Environmental Studies Manual, additional Environmental Approvals or revisions to Environmental Approvals, including Part I of the ESIS, may be required ("New Environmental Approval").

8.3.2.1 Illinois Tollway-Triggered New Environmental Approval

Design-Builder will not be responsible for any schedule and cost implications resulting from a New Environmental Approval necessitated by an Illinois Tollway-Directed Change or Illinois Tollway-Caused Delay ("Illinois Tollway-Triggered New Environmental Approval"), and a Change Order shall be issued in accordance with Article 17 (*Changes in the Work*).

8.3.2.2 Design-Builder-Triggered New Environmental Approval

All other New Environmental Approvals that are not Illinois-Tollway Triggered New Approvals shall be deemed (“Design-Builder Triggered New Environmental Approvals”). Design-Builder shall bear any cost or schedule implications resulting from Design-Builder-Triggered New Environmental Approvals including:

- a. Obtaining the Design-Builder-Triggered New Environmental Approval;
- b. Complying with the terms of the Design-Builder-Triggered New Environmental Approval; and
- c. Any litigation arising in connection with the Design-Builder-Triggered New Environmental Approval.

9 LABOR

9.1 Labor Standards and Employee Performance Requirements

Design-Builder shall at all times comply and require by subcontract that all subcontractors, and Suppliers comply, with all applicable federal and State labor, occupational safety, and health standards, rules, regulations, and federal and State orders.

All individuals performing Work shall have the skill and experience and any licenses required to perform the Work assigned to them.

If the Illinois Tollway determines in its sole discretion that any individual employed by Design-Builder, Design-Builder Related Entities, any subcontractor or anyone directly or indirectly employed by them, or anyone for whose acts they may be liable is intemperate or disorderly, or not performing the Work in a proper, safe, and skillful manner, or fails to perform effectively, then Design-Builder shall, or shall cause such subcontractor to, remove such individual and such individual shall not be re-employed on the Work.

If, after notice from Illinois Tollway and reasonable opportunity to cure, such individual is not removed or if Design-Builder fails to ensure that skilled and experienced personnel are furnished for the proper performance of the Work, then the Illinois Tollway may (i) require Design-Builder or the subcontractor to remove such individual or replace such individual with properly skilled personnel or (ii) suspend the affected portion of the Work by delivery of notice of such suspension to Design-Builder. Such suspension by the Illinois Tollway pursuant to this Section 9.1 (*Labor Standards and Employee Performance Requirements*) shall be considered a suspension for cause in accordance with Section 18.2 (*Suspension for Cause*) and shall in no way relieve Design-Builder of any obligation contained in the Contract Documents or entitle Design-Builder to an increase in the Contract Price, a Completion Deadline adjustment or any other Claim hereunder. Once compliance is achieved, Design-Builder shall be entitled to and shall promptly resume the Work.

9.2 Prevailing Wages

Design-Builder shall pay or cause to be paid to all applicable workers employed by it or its subcontractors not less than the prevailing rates of wages, as provided in the statutes and regulations applicable to public works contracts. Design-Builder shall comply and cause its subcontractors with a total contract value of \$100,000 or more to comply with Exhibit 11 (*State Requirements*), Section (1) (*Wage Stipulations*) and all other Legal Requirements pertaining to prevailing wages. For the purpose of applying such Legal Requirements, the Project shall be treated as a public work paid for in whole or in part with public funds (regardless of whether public funds are actually used to pay for the Project).

It is Design-Builder's sole responsibility to determine the wage rates required to be paid. If rates of wages and benefits change while this Contract is in effect, Design-Builder shall bear the cost of such changes and shall not be entitled to an increase in the Contract Price or a Completion Deadline adjustment and shall have no other Claim against the Illinois Tollway on account of such changes. Without limiting the foregoing, no Claim will be allowed that is based upon Design-Builder's lack

of knowledge or a misunderstanding of any such requirements or Design-Builder's failure to include in the Contract Price adequate increases in such wages over the duration of this Contract.

Design-Builder shall comply and cause its subcontractors to comply with all Legal Requirements regarding notice and posting of intent to pay prevailing wages, of prevailing wage requirements, and of prevailing wage rates.

9.3 Ethical Standards

Within thirty (30) days after the Effective Date, Design-Builder shall adopt written policies establishing ethical standards of conduct applicable to all Design-Builder-Related Entities, including Design-Builder's supervisory and management personnel, in dealing with (1) the Illinois Tollway; and (2) employment relations. Such policy shall be subject to review and comment by the Illinois Tollway prior to adoption. Such policy shall include standards of ethical conduct concerning the following:

- a. Restrictions on gifts and contributions to, and lobbying of the Illinois Tollway, and any of the respective commissioners, directors, officers, and employees of any of the foregoing;
- b. Protection of employees from unethical practices in selection, use, hiring, compensation or other terms and conditions of employment, or in promotion and termination of employees;
- c. Protection of employees from retaliatory actions (including discharge, demotion, suspension, threat, harassment, pay reduction or other discrimination in the terms and conditions of employment) in response to reporting of illegal (including the making of a false claim), unethical or unsafe actions or failures to act by any Design-Builder Related Entity;
- d. Restrictions on directors, members, officers or supervisory or management personnel of any Design-Builder Related Entity engaging in any transaction or activity, including receiving or offering a financial incentive, benefit, loan or other financial interest, that is, or to a reasonable person appears to be, in conflict with or incompatible with the proper discharge of duties or independence of judgment or action in the performance of duties, or adverse to the interests of the Project or employees;
- e. Restrictions on use of office or job position for a purpose that is, or would to a reasonable person appear to be, primarily for the private benefit of a director, member, officer or supervisory or management person, rather than primarily for the benefit of Design-Builder or the Project, or primarily to achieve a private gain or an exemption from duty or responsibility for a director, member, officer or supervisory or management person; and
- f. Restrictions on directors, members, officers or employees of any Design-Builder-Related Entity performing any of the Work if the performance of such services would be prohibited under Illinois Tollway's published conflict of interest rules and policies applicable to the Project or would be prohibited under applicable Legal Requirements.

Design-Builder shall cause its directors, members, officers, and supervisory and management personnel, and include contract provisions requiring those of all other Design-Builder-Related Entities, to adhere to and enforce the adopted policy on ethical standards of conduct. Design-Builder shall establish systems and procedures to promote and monitor compliance with the policy.

10 DIVERSITY AND EQUAL EMPLOYMENT OPPORTUNITY (EEO)

10.1 Equal Employment Opportunity

10.1.1 Equal Employment Opportunity Policy

Design-Builder shall comply with the Special Provisions on Equal Employment Opportunity (“EEO”) Program requirements set forth in Exhibit 5 (*Special Provision for Equal Employment Opportunity*). The Illinois Tollway has established an EEO goal for women of 6.9%, and an EEO goal for minorities of 19.6%.

10.1.2 Inclusion in Subcontracts

Design-Builder shall include Section 10.1 (*Equal Employment Opportunity*) and Exhibit 5 (*Special Provision for Equal Employment Opportunity*) in every subcontract (including purchase orders) and shall require that they be included in all subcontracts at lower tiers, so that such provisions will be binding upon each subcontractor.

10.2 Disadvantaged Business Enterprises (DBE) Program

The Illinois Tollway has instituted a best-efforts affirmative action program to encourage Design-Builder to increase the participation of Disadvantaged Business Enterprises (“DBE”) on the Project. The Illinois Tollway has established a DBE participation goal of **twenty-six (26) percent** of the Professional Services Work and **twenty-nine (29) percent** of the Construction Work. Other requirements are set forth in the Special Provision for Disadvantaged Business Enterprises Participation attached as Exhibit 6 (*Special Provision for Disadvantaged Business Enterprise Participation*). The Illinois Tollway encourages the Design-Builder to make a best effort to achieve the established Illinois Tollway DBE goals. Design-Builder must meet its commitment and the requirements of the DBE program. The Illinois Tollway will be monitoring the Project and will require monthly and quarterly reports during the life of the Project to ensure the Design-Builder meets its commitment to the DBE goals and to determine if the DBE firms have been performing a commercially useful function and if all firms have been paid promptly. This regular monitoring will also bring timely awareness if the Design-Builder experiences challenges in meeting its DBE goals. Documentation of DBE goals shall be in the form prescribed by the Illinois Tollway.

Design-Builder shall ensure compliance by subcontractor with the DBE program and require that this Section 10.2 (*Disadvantaged Business Enterprises (DBE) Program*) is included in all subcontracts at lower tiers, so that such provisions will be binding upon each subcontractor.

10.3 Service-Disabled Veteran-Owned Small Businesses (SDVOSB) and Veteran Owned Small Businesses (VOSB)

The Illinois Tollway has created a Veterans Small Business Program to promote and encourage the continued economic development of small businesses owned and controlled by qualified veterans and that qualified Service-Disabled Veteran-Owned Small Businesses (“SDVOSB”) and Veteran Owned Small Businesses (“VOSB”) participate in the State’s procurement process as both

a Design-Builder and subcontractors. The Illinois Tollway has established an SDVOSB/VOSB participation goal of **three (3) percent** of the Professional Services Work and **one and one-half (1.5) percent** of the Construction Work. The SDVOSB/VOSB Special Provision for Design Build Projects is attached as Exhibit 7 (*Special Provision for Veteran Small Business Participation and Utilization Plan*) to assist the Design-Builder in achieving its goals. The Illinois Tollway encourages the Design-Builder to make a best effort to achieve the established Illinois Tollway VOSB goals. Design-Builder must meet its commitment and the requirements of the VOSB program. The Illinois Tollway will be monitoring this project and will require monthly and quarterly reports during the life of the Project to ensure the Design-Builder meets its commitment to the VOSB goals and to determine if the VOSB firms have been performing a commercially useful function and if all firms have been paid promptly. This regular monitoring will also bring timely awareness if the Design-Builder experiences challenges in meeting its VOSB goals. Documentation of VOSB goals shall be in the form prescribed by the Illinois Tollway.

Design-Builder shall ensure compliance by each subcontractor with the VOSB program and require that this Section 10.3 (*Service-Disabled Veteran-Owned Small Businesses (SDVOSB) and Veteran Owned Small Business (VOSB)*) is included in all subcontracts at lower tiers, so that such provisions will be binding upon each subcontractor.

10.4 Partnering for Growth (P4G) Program

The Illinois Tollway has created a Partnering for Growth (“P4G”) Program which encourages prime consultants and contractors to assist disadvantaged, minority-and women-owned business enterprise (D/M/WBE) firms and SDVOSBs/VOSBs in remaining self-sufficient, competitive and profitable businesses. This program is applicable to both construction and professional services for DBE and VOSB firms. Design-Builder has reviewed P4G Program requirements set forth in Section 1.12 of the Instructions to Proposers to assist the Illinois Tollway in achieving its goals. Design-Builder is strongly encouraged to meet its requirements and should contact the Illinois Tollway during the life of the Project if it experiences challenges in meeting P4G and VOSB goals. P4G and VOSB goals shall be in the form prescribed by the Illinois Tollway.

Design-Builder shall ensure compliance by each subcontractor with the P4G and VOSB program and require that this Section 10.4 (*Partnering for Growth (P4G) Program*) is included in all subcontracts at lower tiers, so that such provisions will be binding upon each subcontractor.

10.5 ConstructionWorks Program

Design-Builder is encouraged to participate in the ConstructionWorks, a program established by the Illinois Tollway. Design-Builder may be entitled to a reimbursement for employment of eligible ConstructionWorks apprentices in the Project in accordance with the Contract Allowance for ConstructionWorks Apprentices included in Book 3.

11 BONDS

11.1 Contract Bonds

Prior to Effective Date, Design-Builder shall furnish Performance and Payment Bonds (collectively, “Contract Bonds”) in forms prescribed in Section 6.2.1 of the Instructions to Proposers and each in an amount equal to the Contract Price. By providing a Performance Bond, Design-Builder agrees to perform the Work in accordance with all of the provisions of the Contract Documents. By providing a Payment Bond, Design-Builder agrees: (i) to pay not less than the prevailing wages for the Work to be performed in accordance with the Contract and the laws of the State of Illinois; and (ii) to pay all sums of money when due for any labor, taxes, materials, apparatus, fixtures or machinery, and transportation with respect thereto.

All bonds provided to the Illinois Tollway must be from a surety which is listed in the United States Bureau of Fiscal Service Current List of Certified Companies for Surety and must be licensed to conduct business as a surety in the State of Illinois in accordance with 30 ILC 550/1. The Surety agrees to be bound by each and every provision of the Contract. The Performance and Payment Bonds shall remain in full force and effect until Final Acceptance of the Work by the Illinois Tollway and thereafter provide a bond against defective work for a period of one (1) year as provided in Section 24.5.4 (*Bond Against Defective Work*).

If a Surety becomes unacceptable to the Illinois Tollway or if a Surety fails to furnish reports as to its financial condition from time to time as requested by the Illinois Tollway, the Design-Builder shall promptly furnish such additional security as may be required from time to time by the Illinois Tollway to protect the interests of the Illinois Tollway and all persons supplying labor, Equipment, or materials in the prosecution of the Work contemplated by this Contract.

In the event the Surety shall make any assignment for the benefit of creditors or commit any act of bankruptcy, or if it shall be declared bankrupt, or if it shall file a voluntary petition in bankruptcy, or shall in the opinion of the Illinois Tollway be insolvent, the Design-Builder agrees forthwith upon request of the Illinois Tollway to furnish and maintain other corporate surety with respect to said Performance and Payment Bonds satisfactory to the Illinois Tollway.

11.2 Utility Work and Railroad Work

The Utility Work and Railroad Work furnished or performed by Design-Builder hereunder will automatically be covered by the Performance and Payment bonds.

Alternatively, Design-Builder may provide separate bonds satisfactory to the Utility Owners, Railroad Owners and/or Railroad Operators. Design-Builder shall provide all information necessary for such coverage to the sureties providing such bonds. All cost estimates required to be provided under the Contract Documents with respect to Utility Work furnished or performed by Design-Builder shall include the cost of bond premiums.

11.3 No Relief of Liability

Notwithstanding any other requirements of the Contract Documents, performance by a Surety of any of the obligations of Design-Builder shall not relieve Design-Builder of any of its obligations hereunder.

11.4 Guaranty

[Remove this section if none of the shortlisted Proposers require a Guarantor].

[Name of Guarantor, if applicable] are the Guarantors Guarantying Design-Builder's obligations under the Contract Documents as of the Effective Date and each has provided a Guaranty in accordance with the form attached as Exhibit 9 (individually, "Guaranty"; collectively, "Guaranties").

If at any time during the course of this Contract the total combined Tangible Net Worth of Design-Builder and the Guarantors is less than [●], Design-Builder shall provide, not later than [●] days thereafter, one or more additional Guaranties so that the combined tangible net worth of Design-Builder and the applicable Guarantors is at least [●].

If this Contract is executed by a Design-Builder that is a joint venture, each joint venture member shall be jointly and severally liable for any and all of the duties and obligations of Design-Builder under the Contract Documents. The tangible net worth of each joint venture member will be counted toward the tangible net worth requirement.

Each Guaranty shall be in the form attached as Exhibit 9 together with appropriate evidence of authorization, execution, delivery, and validity thereof, and shall Guaranty the performance of obligations under the Contract Documents. Design-Builder shall provide an opinion from the Guarantor's legal counsel, in form and substance acceptable to Illinois Tollway, concerning due authorization, execution, delivery, validity, and enforceability of each Guaranty.

Design-Builder may replace an existing Guaranty with a new Guaranty only with prior approval by the Illinois Tollway. Any new Guaranty shall be provided in the form attached as Exhibit [9] together with appropriate evidence of authorization, execution, delivery, and validity thereof, and with legal opinions as required by this Section 11.4, and shall Guaranty performance of Design-Builder's obligations under this Contract. The Guaranty being replaced shall remain in effect until the approved replacement Guaranty becomes effective.

12 INSURANCE

The Design-Builder shall obtain and thereafter keep in force for the term of the Contract including all options and extensions the insurance requirements described below. Whether stated in this Article 12 (*Insurance*) or elsewhere, the Illinois Tollway does not warrant the adequacy of the types of insurance coverage, or the limits of liability specified. Failure to request certificates of insurance, policy endorsements or insurance policies, either initially or at any policy renewal, does not constitute a waiver by the Illinois Tollway of Design-Builder's obligations and requirements to maintain the minimum coverage specified.

12.1 Qualified Insurers

Insurance coverage shall be provided by insurance companies acceptable to the Illinois Tollway and authorized to transact business under the laws of the State of Illinois. The insurance companies providing coverage shall be rated by A.M. Best Company with a Financial Strength Rating of A- or better and a financial size category of not less than VII.

12.2 Documentation

Design-Builder shall procure and maintain insurance against claims for bodily injury or property damage, which may arise from or in connection with the performance of the work under Contract by Design-Builder, Design-Builder's agents, representatives, employees and subcontractors. Design-Builder shall not commence work until all the insurance required by this Article 12 (*Insurance*) has been obtained, and proper insurance documentation has been submitted and accepted by the Illinois Tollway.

Insurance documentation, including copies of applicable additional insured endorsements shall be filed with the Illinois Tollway at or before the Effective Date.

Upon Illinois Tollway request, the Design-Builder shall promptly provide copies of current insurance policies, forms, and endorsements, properly certified as accurate copies. Within three (3) Business Days after any renewal or replacement of coverage, the Design-Builder shall submit to the Illinois Tollway insurance documentation evidencing the limits and coverages as required herein. The obligations under this Section 12.2 (*Documentation*) are mandatory.

12.3 Deductibles and Self-Insured Retention

Design-Builder shall be solely responsible for any deductible or self-insured retention for any insurance policy provided by Design-Builder. Any self-insured retention must be declared. Self-insured retentions in excess of \$50,000 must be accepted by the Illinois Tollway.

12.4 Policy Requirements

Policies, Certificates of Insurance, and other insurance documentation submitted by the Design-Builder will be on forms acceptable to the Illinois Tollway. Unless the Illinois Tollway consents in writing, all insurance procured by the Design-Builder pursuant to these requirements shall be written on an occurrence basis. Insurance shall not be cancelled or materially reduced unless a

thirty (30) day prior written notice is given by the Design-Builder to the Illinois Tollway, except as otherwise provided by State statute or insurance policy terms.

If any policy is written on a claims-made basis and the Illinois Tollway has consented to its use for the Contract:

- a. The policy retroactive date must be shown and must be before the date of the Contract;
- b. Insurance must be continuously maintained, and evidence of insurance must be provided for at least five (5) years after completion of the Contract of work; and
- c. If coverage is cancelled or non-renewed, and not replaced with another claims-made policy form with a retroactive date prior to the contract effective date, the Design-Builder must purchase “extended reporting period” coverage for a minimum of five (5) years after completion of Contract work.

12.5 Commercial General Liability Insurance

Commercial General Liability insurance must include coverage for premises and operations, products and completed operations, independent contractor’s liability and unendorsed contractual liability. Policy coverage shall be on ISO occurrence form CG 00 01 (or an alternative form providing equivalent protection).

Limits of liability shall not be less than \$1,000,000 each occurrence and \$2,000,000 general aggregate, and \$2,000,000 products-completed operations aggregate. The general aggregate limit shall be endorsed on a per project basis. Products completed operations coverage will be maintained by the Design-Builder for a minimum of two (2) years following acceptance of Work.

12.6 Business Automobile Liability

Business Automobile Liability insurance must cover any vehicles, including owned, hired or non-owned vehicles, and including uninsured and underinsured motorist insurance coverage. Policy coverage shall be on the latest filed ISO occurrence form (or an alternative form providing equivalent protection).

Limits of liability shall not be less than \$1,000,000 combined single limit for bodily injury and property damage each accident.

12.7 Workers’ Compensation

Workers’ Compensation shall be as required by the State of Illinois and include Employer’s Liability. Coverage will be at least as broad as the Workers Compensation and Employers Liability Policy, National Council on Compensation Insurance Form #WC 00 00 00 A (ed. 4-92). Design-Builder may use a self-insured plan if the plan is approved by the Illinois Worker’s Compensation Commission.

If applicable, coverage shall include U.S. Longshore and Harbor Workers' Compensation Act (LHWCA), Jones Act, or other Federal act exposures.

Limits of liability shall be as follows:

- a. Workers' Compensation – Statutory benefit; and
- b. Employer's liability – \$1,000,000 each accident; \$1,000,000 disease each employee; and \$1,000,000 disease policy limit, including voluntary compensation.

12.8 Excess/Umbrella Liability

Excess/Umbrella Liability insurance shall provide excess coverage over Design-Builder's Commercial General Liability, Business Automobile Liability and Employers Liability Insurance. Coverage shall include drop-down provisions if the underlying coverage limit is reduced or exhausted.

In addition to the limits of coverage specified in Section 12.5 (*Commercial General Liability Insurance*), Section 12.6 (*Business Automobile Liability*), and Section 12.7 (*Workers' Compensation*) above, not less than \$25,000,000 each occurrence and aggregate per project shall be maintained by the Design-Builder.

12.9 Pollution Liability Insurance

Design-Builder's Pollution Liability insurance shall cover third-party injury and property damage claims, including coverage for clean-up costs, defense costs, contractual liability, transportation, and owned and non-owned disposal sites, as a result of pollution conditions arising from Design-Builder's operations and completed operations.

Limits of liability shall not be less than \$2,000,000 each pollution occurrence and \$2,000,000 general aggregate. This insurance shall be maintained for completed operations for a minimum of two (2) years following acceptance of Work.

12.10 Professional Liability Insurance

[Note: This can be finalized prior to Contract execution, and upon confirmation that it will be the Design-Builder / Lead Design Firm procuring Professional Liability Insurance]

The [Design-Builder or the Lead Design Firm] shall procure Professional Liability insurance to cover any act, error, or omission in the rendering of or failure to render professional services required for the Contract. The Professional Liability insurance shall be continuously maintained for the duration of the Contract and for a period of five (5) years after completion of the Contract.

The Professional Liability insurance policy may be written on a claims-made policy form.

Documentation for any extended reporting period requirement for Professional Liability insurance may be met by either (i) an endorsement to the Professional Liability policy indicating the five-year extended reporting period or, alternatively, (ii) a letter from the Design-Builder, signed by an officer of the Design-Builder, warranting that Professional Liability insurance shall be maintained continuously for a period of not less than five years after Final Acceptance.

Limits of liability shall not be less than \$5,000,000 per claim and \$5,000,000 general aggregate.

12.11 Railroad Protective Liability Insurance

The work under this contract includes work upon, above, adjacent to and/or along the right-of-way and facilities of the Metra Railroad (Milwaukee District West Line) under Burlington Northern's 1601 and 1602 and the Canadian Pacific Railroad Spur under Burlington Northern's 1615 and 1616. Each of these entities require railroad protective insurance be in place prior to Design-Builder beginning Railroad Work. Their requirements are as follows:

Metra:

DOT/AAR Number: 920575L

DOT Structure ID 1: 016-2828

Milepost: 27.00

Traffic: 16 trains\day Freight

Traffic: 70 trains\day Commuter

Speed: 70 mph

Insurance Limits: \$2,000,000

Aggregate: \$6,000,000

Canadian Pacific:

DOT/AAR Number: 689607O

DOT Structure ID 1: Not provided

Milepost: 25.99

Traffic: Unknown (Spur)

Speed: Unknown

Insurance Limits: \$2,000,000

Aggregate: \$6,000,000

12.12 Environmental Liability Insurance

Insurance documentation must show limits of liability of not less than \$5 million each claim and \$5 million annual aggregate for personal injury, death and injury to or destruction of real or personal property arising from any escape or broad discharge or any Hazardous Materials or pollutants discharges. Design-Builder is responsible to provide the insurance documentation from their specialized subcontractor (with a total contract value of \$100,00.00 or more), if applicable, who will complete the Work. The insurance documentation shall include the Illinois Tollway and other designated parties as additional insureds on a primary and non-contributory basis on the insurance. Coverage will be maintained for a minimum of five years following acceptance of the Work.

12.12.1 Asbestos and Lead Paint Liability Insurance

Insurance documentation must show limits of liability of not less than \$5 million each claim and \$5 million annual aggregate for personal injury, death and injury to or destruction of real or personal property arising out of the removal, enclosure, encapsulation, disposal, storage or transportation of asbestos, lead paint, or asbestos containing materials. Design-Builder is responsible to provide the insurance documentation from their specialized subcontractor (with a total contract value of \$100,000.00 or more), if applicable, who will complete the Work. The insurance documentation shall include the Illinois Tollway and other designated parties as additional insureds on a primary and non-contributory basis on the insurance.

12.13 Builder's Risk Insurance

Builder's Risk insurance shall provide coverage, for the term of the contract, on an "all-risks" basis for physical loss or damage including, without duplication of coverage, theft, vandalism, and malicious mischief. This insurance shall name as named insureds the Illinois Tollway, the Design-Builder, and any subcontractor of any tier to the extent of their insurable interest in the work and pre-existing structure(s).

Design-Builder shall provide a copy of the Builders Risk insurance policy within sixty (60) days from Effective Date.

The policy limit shall be provided equal to the original Contract Price amount and shall be adjusted as needed to include all Change Orders and Extra Work Orders.

12.14 Certification of Coverage by Design-Builder's Broker or Agent

The Agent/Broker for Design-Builder must provide a certification letter on its letterhead attesting that: (i) all provisions of the accepted certificates of insurance and policy binders have been obtained and, (ii) all endorsements indicated have been secured from the insurance carrier.

This letter must clarify if the agency is a binding agent or a broker for the insurance carrier. Each certification letter must be signed by an officer of the brokerage or by a principal of the agency.

An updated letter must be provided with every submittal of insurance documentation for insurance policy renewals or changes.

12.15 Cost of Insurance

The cost of all insurance required by this Article 12 (*Insurance*) shall be considered as included in the prices for the various pay items of the Contract and no additional compensation will be allowed.

12.16 Waiver of Subrogation

Policies shall contain a waiver of subrogation waiving any right of recovery that the insurance company may have against the Illinois Tollway, any additional insured, or any of the Illinois Tollway's engineering firms and consultants.

12.17 Additional Insured Protection

The Illinois Tollway together with its officials, directors and employees are to be named as "Additional Insured" with coverage as least as broad as set forth in ISO Form CG 2010 and CG 2037. This endorsed coverage shall be applicable to the primary commercial general liability insurance coverage of the Design-Builder for the Project. Similar additional insured protection will be added to the business automobile liability and Design-Builder's pollution liability insurance coverage.

The Illinois Tollway Consulting Engineer (General Engineering Consultant (GEC)), Program Management Office (PMO), Project Manager, Design-Build Master Planner, Design Section Engineer, Design Corridor Manager, Construction Manager, and Construction Corridor Manager are to be named as Additional Insured with coverage at least as broad as set forth in ISO Form CG 2032 providing coverage for engineers, architects or surveyors. **[PM: During contract finalization, review all the entities that should be named as Additional Insured and revise accordingly. Consider adding the Innovative Delivery Program Manager.]**

As part of the provisions and requirements for this Contract there may be contracts, agreements, or intergovernmental agreements related to the Contract or work upon, above, adjacent to and/or along the right-of-way and facilities of third parties that require the Design-Builder to include the contracting, agreement or other entity as an "additional insured" on the liability insurance of the Design-Builder. Design-Builder's insurance coverage, required by and in conformance with this Article 12 (*Insurance*), shall include the entities specified herein, its agents and employees as additional insureds.

The Design-Builder's coverage shall be primary for the "Additional Insured" and not contributing with any other insurance or similar protection available to the "Additional insured" whether said other coverage be primary, contributing or excess.

13 RISK OF LOSS

13.1 Site Security

Design-Builder shall take all necessary precautions for the protection of public or private property, such as vaults, underground structures of public utilities, underground drainage facilities, overhead structures of public utilities, trees and shrubbery within the Site.

Design-Builder shall familiarize itself with the location of all public utility and Illinois Tollway services, facilities, and structures that may be found within the Site. Design-Builder shall conduct its operations to avoid damages to the utilities or structures belonging to the Illinois Tollway and any other Persons. Design-Builder is responsible for meeting all the requirements established by the Illinois Tollway and such other Persons for the protection and restoration of their property and facilities.

When or where there occurs any direct or indirect damage or injury to public or private property, by or on account of any act, omission, neglect, or misconduct in the execution of the Work, or in consequence of the execution or non-execution thereof on the part of Design-Builder or any Design-Builder-Related Entity, such property shall be restored by Design-Builder and at Design-Builder's expense to a condition equal to that existing before such damage or injury, in a manner or amount acceptable to the Illinois Tollway and to Persons owning such property. In the event Design-Builder fails to restore or compensate for such property damage or injury, the Illinois Tollway may, upon 48 hours' notice, compensate the owner or owners, or proceed to repair, rebuild or otherwise restore such property in amounts or in a manner as may in the sole judgment of the Illinois Tollway be deemed necessary, and the cost thereof shall be deducted from any monies due or which may become due Design-Builder under this Contract.

13.2 Maintenance and Repair of Work and On-Site Property

Design-Builder shall maintain, rebuild, repair, restore, or replace all Work (including Design Documents, Construction Documents, materials, Equipment, supplies and maintenance Equipment which are purchased for permanent installation in, or for use during construction of, the Project, regardless of whether the Illinois Tollway has title thereto under the Contract Documents) that is injured or damaged prior to the date of acceptance of maintenance liability by the Illinois Tollway or third parties as specified in Section 13.2.1 (*Relief from Liability for Maintenance*). All such work shall be at no additional cost to Illinois Tollway. Design-Builder shall also have full responsibility during such period for rebuilding, repairing and restoring all other property at the Site, whether owned by Design-Builder, the Illinois Tollway or any other Person. Additional requirements regarding maintenance during construction are set forth in Book 2, Section 19 (*Maintenance During Construction*).

13.2.1 Relief from Liability for Maintenance

Except as required under Book 2, Section 19 (*Maintenance During Construction*), effective as of the date on which Substantial Completion occurs, the Illinois Tollway shall be considered to have Accepted maintenance liability for all elements of the Project which are one hundred (100) percent

complete as of such date and placed in service. Except as required under Book 2, Section 19 (*Maintenance During Construction*), all remaining elements of the Project shall be considered Accepted for maintenance purposes as of the date on which Final Acceptance occurs. Notwithstanding the foregoing, all elements of the Work which will be owned by Persons other than Illinois Tollway (such as Utility facilities) will be considered accepted for purposes of maintenance responsibility only as of the date of acceptance of maintenance responsibilities by such Persons.

13.3 Damage to Off-Site Property

Design-Builder shall take all reasonable precautions and provide protection to prevent damage, injury, or loss to property adjacent to the Site or likely to be affected by the Work. Design-Builder shall restore damaged, injured or lost property caused by an act or omission of any Design-Builder-Related Entity to a condition similar or equal to that existing before the damage, injury or loss occurred. In the event Design-Builder fails to restore or compensate for such property damage or injury, the Illinois Tollway may, upon 48 hours' notice, proceed to repair, rebuild or otherwise restore such property in amounts or in a manner as may in the sole judgment of the Illinois Tollway be deemed necessary, and the cost thereof shall be deducted from any monies due or which may become due to Design-Builder under this Contract.

13.4 Title

Design-Builder warrants that it owns, or will own, and has, or will have, good and marketable title to all materials, Equipment, tools and supplies furnished, or to be furnished, by it and its subcontractors that become part of the Project or are purchased for the Illinois Tollway for the operation, maintenance, or repair thereof, free and clear of all liens. Title to all of such materials, Equipment, tools and supplies which shall have been delivered to the Site shall pass to the Illinois Tollway, free and clear of all liens, upon incorporation into the Project. Notwithstanding any such passage of title, Design-Builder shall retain sole care, custody and control of such materials, Equipment, tools and supplies, and shall exercise due care with respect thereto as part of the Work until Final Acceptance or until Design-Builder is removed from the Project.

14 PAYMENT

14.1 Contract Price

Proposer's written offer to perform Work within the submitted Price Proposal is subject to this Article 14 (*Payment*). The Contract Price is full compensation for the Work. The Contract Price may be increased or decreased only by a Change Order issued under Article 17 (*Changes In the Work*). Notwithstanding the foregoing, the payment of the Contract Price is subject to limitations on draws from the allowance in accordance with Article 16 (*Shared Risk Item Work and Allowances*).

Specifically, Design-Builder acknowledges that the Contract Price includes:

- a. Performance of each and every portion of the Work;
- b. All designs, Equipment, materials, labor, insurance and bond premiums, home office, jobsite and other overhead, office, profit and services relating to Design-Builder's performance of its obligations under the Contract Documents (including all Work, Warranties, Equipment, materials, labor and services provided by subcontractors and intellectual property rights necessary to perform the Work);
- c. The cost of obtaining all Governmental Approvals (except for approvals which are the responsibility of the Illinois Tollway, as specifically provided elsewhere in the Contract Documents);
- d. All costs of compliance with and maintenance of the Governmental Approvals and compliance with Governmental Rules;
- e. Payment of any taxes, duties, and permit and/or other fees imposed with respect to the Work (except for permits which are the responsibility of Illinois Tollway, as specifically provided elsewhere in the Contract Documents);
- f. Any Equipment, materials, labor, or services included in the Work;
- g. The Total Allowance for Shared Risk Items in Table 16-1 and the allowances described in Section 16.2 (*Allowances*); and
- h. Any and all other costs to comply with obligations to be performed by the Design-Builder under the Contract Documents.

14.2 Contract Price Deductions

The Illinois Tollway may deduct from any amounts otherwise owing to Design-Builder in the monthly payment, the following:

- a. Any anticipated or accrued losses, liability, Liquidated Damages, or other damages for which Design-Builder is responsible hereunder. The Illinois Tollway will notify the Design-Builder of the estimated cost of any proposed deductions associated with this Section 14.2 (*Contract Price Deductions*) prior to Final Acceptance. The final deduction associated with this Section 14.2 (*Contract Price Deductions*) may not be known until after Final Acceptance;
- b. The estimated cost of remedying any Nonconforming Work or otherwise remedying any breach of Contract by Design-Builder. Nonconforming Work and any costs associated with a breach of Contract by the Design-Builder must be addressed by the Design-Builder prior to achieving Final Acceptance. Illinois Tollway will notify the Design-Builder of the estimated cost of any proposed deductions associated with this Section 14.2 (*Contract Price Deductions*) prior to each monthly payment or prior to Final Acceptance;
- c. Any amounts that Illinois Tollway deems advisable, in its sole discretion, to cover any existing claims or liens by subcontractor, Suppliers, laborers, Utility Owners or other third parties relating to the Project. Illinois Tollway will notify the Design-Builder as soon as the estimated costs for these items are known;
- d. Any sums expended by the Illinois Tollway in performing any of Design-Builder's obligations under the Contract which Design-Builder has failed to perform. The Illinois Tollway will notify the Design-Builder of the estimated cost of any deductions associated with this Section 14.2 (*Contract Price Deductions*) prior to Final Acceptance; and
- e. Any other sums which the Illinois Tollway is entitled to recover from Design-Builder under the terms of the Contract. The Illinois Tollway will notify the Design-Builder of any deductions associated with this Section 14.2 (*Contract Price Deductions*) prior to Final Acceptance.

The Illinois Tollway's failure to deduct from a payment any amount which Illinois Tollway is entitled to recover from Design-Builder under the Contract shall not constitute a waiver of the Illinois Tollway's right to such amounts. Design-Builder shall be entitled to any excess amounts being withheld by Illinois Tollway at the time of Design-Builder's final payment.

14.2.1 Retainage

There shall be deducted from the monthly payment ten (10) percent of the amounts due to the Design-Builder to be retained until after the completion of the entire Work to the satisfaction of the Illinois Tollway. The balance shall be certified by the Illinois Tollway for payment.

Notwithstanding the above, after fifty (50) percent or more of the Work for any activity is completed, the remaining partial payments will be made without any further retention; provided that satisfactory progress is being made in accordance with the Contract Documents and continues to be made; and provided further that the total amount retained shall not, at any time, be less than five (5) percent of the Contract Price as defined under Section 14.1 (*Contract Price*).

If at any time, satisfactory progress is not being made in accordance with the Contract Documents, the Illinois Tollway may require ten (10) percent of the total payment to date to be retained until

after the completion of the entire Work to the satisfaction of the Illinois Tollway or until satisfactory progress is made in accordance with the Contract Documents.

14.3 Progress Invoices and Payment

14.3.1 Payment Process

The Illinois Tollway agrees to make payments to the Design-Builder in accordance with the terms of this Contract.

Requirements relating to invoicing are set forth in Book 2, Section 2.3 (*Cost Management*). Within five (5) Business Days after receipt by the Illinois Tollway of each invoice, the Illinois Tollway will provide comments to the Design-Builder or pay the amount of the invoice Approved for payment less any amounts which Illinois Tollway is entitled to retain. Retained payments will not accrue interest.

Design-Builder and subcontractors are required to submit partial lien waivers through the B2gNow system for all applications for payment and release of retainage, and final waivers of lien for final applications for payment under Section 24.5 (*Final Payment*).

The Current Contract Schedule shall provide for payment of the Contract Price to be made solely on the basis of progress by Design-Builder in accordance with the Schedule of Values. The Design-Builder shall, as necessary, revise the Schedule of Values to always reflect the Current Contract Schedule, however, the Design-Builder shall not adjust the Contract Price unless otherwise agreed by the Illinois Tollway.

14.3.2 Progress Payment Limitation

In no event shall the Illinois Tollway have any obligation to pay Design-Builder any amount which would result in:

- a. Payment for any activity in excess of the permitted retainage for activities under each Notice to Proceed;
- b. Payment for any activity in excess of the value of the activity times the completion percentage of such activity, in accordance with the Schedule of Values submitted with the invoice;
- c. Aggregate payments hereunder in excess of the overall completion percentage of the Project in accordance with the Current Contract Schedule submitted with the invoice times the Contract Price;
or
- d. Payment for Materials incorporated into the work that are not properly documented with testing orders and appropriate material certifications.

14.3.3 Delivery of Materials

Materials shall be delivered to the Site, or delivered to Design-Builder and promptly stored by Design-Builder in storage Approved by the Illinois Tollway Project Manager. Design-Builder shall be responsible for loss or damage to materials that have been delivered and are in Design-Builder's possession. Materials that have not been delivered to or adjacent to the Site will be eligible for payment only if they were specifically manufactured or produced for the Project, and then only after being irrevocably assigned to Illinois Tollway. As a condition to inclusion of such materials in any invoice, Design-Builder shall include the Materials in the Schedule of Values prior to issuing the invoice and submit certified bills for such Materials with its invoice.

14.3.4 Title to Materials

All such materials so delivered shall become the property of the Illinois Tollway. At the Illinois Tollway's request, Design-Builder at its own expense shall promptly execute, acknowledge and deliver to the Illinois Tollway actual bills of sale or other instruments in a form acceptable to the Illinois Tollway, conveying and assuring to the Illinois Tollway title to such materials free and clear of all Liens. Design-Builder at its own expense shall conspicuously mark such materials as the property of the Illinois Tollway, shall not permit such materials to become commingled with non- Illinois Tollway -owned property and shall take such other steps, if any, as the Illinois Tollway may require or regard as necessary to vest title to such materials in Illinois Tollway free and clear of liens. The required invoice, billing, title, or assignment documents, furnished by Design-Builder, shall contain complete material description and identification data.

14.4 Payment of Tolls

Design-Builder shall be required to pay the full amount of tolls, if any, incurred by it during the duration of the Contract. Said tolls will not be refunded by the Illinois Tollway. Furthermore, in the event that a final determination is made by the Illinois Tollway that Design-Builder has failed to pay any required tolls and associated fines, the Illinois Tollway is authorized to take steps necessary to withhold the amounts of unpaid tolls and fines from any payment due the Design-Builder by the Illinois Tollway and/or other State of Illinois office, department, commission, board or agency.

15 SUBCONTRACTORS

15.1 Subcontracting Requirements

15.1.1 General

Design-Builder shall comply with all applicable requirements of the Contract Documents relating to subcontracts, and shall ensure that its subcontractors, other subcontractors (at all tiers) and vendors comply with all applicable requirements of the Contract Documents relating to subcontracting. Subcontracting any portion of the Work shall not relieve the Design-Builder of full responsibility for the performance of the Work. The Design-Builder shall not sell or assign any portion of the Work to another entity, including subcontractors, without the written consent of Illinois Tollway. Design-Builder remains fully responsible to the Illinois Tollway for completion of the Work according to the Contract as if no portion of it had been subcontracted.

15.1.2 Subcontracting of Contract Work

The Design-Builder shall not subcontract any portion of the Work, except as provided for in the Illinois Tollway procedures for subcontracting. Design-Builder must not enter into any subcontracts, with any Person currently debarred or suspended from submitting bids by the federal government or the State of Illinois. Contract work amounting to not less than thirty-five (35) percent of the original total Contract Price shall be performed by the Design-Builder’s own organization (including Major Participants) unless approved by the Illinois Tollway. All items, including those identified as Specialty Items (for Construction Work) and Specialty Categories (for Design Work) may be performed by subcontract. The amount of Specialty Items or Specialty Category work performed may be deducted from the original total Contract Price before computing the amount of work required to be performed by the Design-Builder’s own organization. The Design-Builder’s “own organization” shall be construed to include only workers employed and paid directly by the Design-Builder and Equipment owned or rented by the Design-Builder, with or without operators. The percentage of work available for subcontracting shall include work identified in the Contract except those designated as Specialty Items or Specialty Category.

Any bonds furnished by a subcontractor with a total contract value of \$100,000.00 or more shall not reduce the Design-Builder’s bonding requirements.

No subcontract will be issued unless the subcontractor is prequalified by Illinois Department of Transportation (“IDOT”) to perform the classification of Work proposed, when applicable. Design-Builder shall submit the subcontract cover page and Work items to the Illinois Tollway prior to the start of the Work associated with the subcontract. It is understood and agreed that the Illinois Tollway’s prequalification of the subcontractor is for the benefit of Illinois Tollway and is not for the benefit of the Design-Builder or any other person. IDOT’s prequalification is not a guaranty or warranty of the subcontractor’s ability to perform or complete the Work subcontracted. Design-Builder shall itemize the name of each subcontractor, dollar amount of each subcontract, as well as the actual amount paid for each subcontract.

No subcontractor or Supplier may maintain an action against the Illinois Tollway for payment relating to goods or services provided in connection with the Contract; any such action must be brought against the Design-Builder or other responsible party.

The Illinois Tollway may direct the immediate removal of any subcontractor working or of any subcontractor's Equipment being operated in violation of this subsection. Any costs or damages incurred are assumed by the Design-Builder by the acceptance of the Contract. It is further understood that the Design-Builder's responsibilities in the performance of the Contract, in case of a subcontract, are the same as if the Design-Builder had handled the work with the Design-Builder's own organization.

15.1.3 Subcontract Terms

Subcontractors shall complete the forms prescribed in either Exhibit 16 (*Vendor Disclosure (No IPG Registration)*), or Exhibit 17 (*IPG Active Registered Vendor Disclosure*). In addition, each subcontract shall include terms and conditions sufficient to ensure compliance by the subcontractor with all applicable requirements of the Contract Documents, including as set forth below. All subcontracts will be subject to the review, approval and audit requirements of the Illinois Tollway.

Each subcontract shall:

- a. Set forth a standard of professional responsibility or a standard for commercial practice equal to the requirements of the Contract Documents and Good Industry Practice for work of similar scope and scale and shall set forth effective procedures for claims and change orders;
- b. Require the subcontractor to carry out its scope of work in accordance with the Contract Documents, the Governmental Approvals, and applicable Law;
- c. Provide that the Illinois Tollway is a third-party beneficiary of the subcontract with the right to enforce all terms of the subcontract for its own benefit;
- d. Without cost to the Illinois Tollway, expressly permit assignment to the Illinois Tollway or its successor of all Design-Builder's rights under the subcontract, contingent only upon delivery of request from the Illinois Tollway following termination of this Contract under Article 19 (*Termination of Contract*). The subcontract shall not be assignable by the subcontractor to any Person other than the Illinois Tollway (or its successor, assignee or designee)

Such assignment will allow the Illinois Tollway or its successor, assign or designee to assume the benefit of Design-Builder's rights, with liability only for those remaining obligations of Design-Builder accruing after the date of assumption, such assignment to include the benefit of all subcontractor warranties, indemnities, guarantees, and professional responsibility;

Any acceptance of assignment of the subcontract to the Illinois Tollway or its successor, assign or designee shall not operate to make the successor, assignee or designee responsible or liable for any breach of the subcontract by Design-Builder or for any amounts due and owing under the subcontract for work or services rendered prior to assumption (but without restriction on the subcontractor's rights to suspend work or demobilize due to Design-Builder's breach);

- e. Expressly require that the subcontractor will (1) maintain usual and customary books and records for the type and scope of business operations in which it is engaged (e.g., constructor, equipment Supplier, designer, service provider, etc.); (2) permit audit of books and records pursuant to Section 26.3 (*Project Records*); and (3) provide progress reports to Design-Builder appropriate for the type of work it is performing sufficient to enable Design-Builder to provide the reports it is required to furnish the Illinois Tollway under this Contract;
- f. Include the right of Design-Builder to terminate the subcontract in whole or in part upon any Termination for Convenience of this Contract without liability of Design-Builder or the Illinois Tollway for the subcontractor's lost profits, business opportunity or other consequential damages; and
- g. Expressly require the subcontractor to make payments to its lower tier subcontractors, and be liable for interest payments to such subcontractors.

15.1.4 Subcontractor Insurance

Design-Builder shall have subcontractors with a total contract value of \$100,000.00 or more provide commercial general liability, business automobile liability, workers' compensation and employer's liability insurance and excess liability insurance with coverage as broad as is described in Article 12 (*Insurance*). The limits of coverage for the foregoing will be determined by Design-Builder.

Unless otherwise required by a third party, Design-Builder shall determine if subcontractor(s) must also provide pollution liability insurance as described under Article 12 (*Insurance*). If the third-party requirement is not known at the time of the Proposal, then Design-Builder may submit a Request for Change Order in accordance with Section 17.6 (*Request for Change Order*).

Design-Builder shall cause its subcontractors providing professional services with a total contract value of \$100,000.00 or more to procure and keep in force professional liability insurance with limits of liability of not less than \$2,000,000 per claim and \$2,000,000 aggregate. Such insurance shall be carried by the subcontractor for the period of the Work and three (3) years thereafter. The professional liability insurance policy may be written on a claims-made policy form. The continuous coverage requirement may be met by either (a) an endorsement to the professional liability policy indicating the three-year extended reporting period or, alternatively, (b) a letter from the subcontractor, signed by a principal or officer, warranting that Professional Liability insurance shall be maintained continuously for a period of not less than three years after project completion. Insurance documentation for such subcontractor must be submitted to the Illinois Tollway for review and approval prior to commencing Work.

Each insurance policy (other than professional liability and workers' compensation) for subcontracts with a total value of \$100,000.00 or more shall include the Illinois Tollway and each other party identified in Section 12.17 (*Additional Insured Protection*) as additional insureds. Each policy shall provide that coverage is primary and noncontributory and that there is a waiver of subrogation in favor of the Illinois Tollway and any additional insured.

Design-Builder shall maintain evidence of all insurance coverage for subcontracts with a total contract value of \$100,000.00 or more.

15.1.5 Major Participants

Design-Builder shall not add, delete, or change the role of any Major Participant as set forth in its Proposal and Statement of Qualifications without the prior written Approval of the Illinois Tollway Project Manager.

15.2 Payments to Subcontractors

15.2.1 Prompt Payment to Subcontractors

Design-Builder is responsible to ensure that all Subcontractors and suppliers at every tier are promptly paid.

Upon receipt of payment from the Illinois Tollway, Design-Builder shall pay each subcontractor with which it holds a direct subcontract within seven (7) days after Design-Builder receives payment from the Illinois Tollway, out of the amount paid to Design-Builder on account of such subcontractor's portion of the Work, the amount to which such subcontractor is entitled, less any retainage provided for in the subcontract. Design-Builder shall pay retainage, if any, on a subcontractor's work within ten (10) days after satisfactory completion of all of the subcontractor's work. If Design-Builder fails to comply with this requirement, the Illinois Tollway Project Manager may withhold the amount due from any bi-weekly or monthly progress payment until the required payment(s) have been made.

Design-Builder shall include in all subcontracts a provision that this requirement for prompt payment to the subcontractors and suppliers must be included in all subcontracts at every tier.

15.2.2 Supporting Documentation

Payroll records for all types of subcontractors shall be open to the Illinois Tollway for review at all times. If requested, Design-Builder shall deliver to the Illinois Tollway a form showing the numbers, classifications and wages / salaries of persons employed on the Work each day, certified by the Design-Builder to be complete and accurate.

The Illinois Tollway reserves the right to request and receive documents from Design-Builder, all subcontractors of any tier, and Suppliers to determine whether prompt payment requirements were met.

16 SHARED RISK ITEM WORK AND ALLOWANCES

16.1 Shared Risk Item Work

16.1.1 Generally

[PM Prompt: the unit price and total amount for the Shared Risk Items in Table 16-1 will be as entered from BidBuy as part of the Design-Builder’s Price Proposal and accepted by the Illinois Tollway.]

The Illinois Tollway allows for adjustments to the Contract Price for certain items identified in the Proposal as Shared Risk Items. Shared Risk Items are for specific identified items and may not include all work associated with completion of the Work. All other associated elements of Work not included in the listing of Shared Risk Items in Table 16-1 or addressed in the Contract Documents shall be deemed included in the Contract Price, and no Change Order shall be issued for any adjustments due to such associated Work.

The Shared Risk Items are identified in Table 16-1.

Table 16-1: Shared Risk Item

SHARED RISK ITEM	QUANTITY	UNIT	UNIT PRICE	ALLOWANCE
Slope Wall Removal	327	Sq Yd	\$[]	\$[]
Slope Wall 4 Inch	369	Sq Yd	\$[]	\$[]
Approach Slab Repair (Partial)	64	Sq Yd	\$[]	\$[]
Approach Slab Repair (Full Depth, Type II)	2	Sq Yd	\$[]	\$[]
Reset Bridge Expansion Bearings	43	Each	\$[]	\$[]
Low Pressure Epoxy Injection	4,711	Foot	\$[]	\$[]
Deck Slab Repair (Partial)	9	Sq Yd	\$[]	\$[]
Accelerated Deck Slab Repair (Partial)	5	Sq Yd	\$[]	\$[]
Accelerated Approach Slab Repair (Partial)	48	Sq Yd	\$[]	\$[]
Deck Slab Repair (Full Depth, Type I)	10	Sq Yd	\$[]	\$[]
Accelerated Deck Slab Repair (Full Depth, Type I)	30	Sq Yd	\$[]	\$[]

Deck Slab Repair (Full Depth, Type II)	16	Sq Yd	\$[]	\$[]
Accelerated Deck Slab Repair (Full Depth, Type II)	115	Sq Yd	\$[]	\$[]
Structural Repair of Concrete (Depth Equal to or Less Than 5 In.)	3,195	Sq Ft	\$[]	\$[]
Structural Repair of Concrete (Depth Greater Than 5 In.)	38	Sq Ft	\$[]	\$[]
Slope Wall Repair	48	Sq Yd	\$[]	\$[]
Slopedwall Crack Sealing	4,349	Foot	\$[]	\$[]
Slopedwall Gap Filler Removal and Replacement	648	Foot	\$[]	\$[]
Portland Cement Concrete Patching, Class A	957	Sq Yd	\$[]	\$[]
Portland Cement Concrete Patching, Class B	2,883	Sq Yd	\$[]	\$[]
Stone Matrix Warm Mix Asphalt Binder Course, IL-12.5, N80	4,783	Ton	\$[]	\$[]
Stone Matrix Warm Mix Asphalt Surface Friction Course, IL-12.5, N80	11,479	Ton	\$[]	\$[]
Warm-Mix Asphalt Surface Course, Mix "D", N70	6,119	Ton	\$[]	\$[]
Mixture For Cracks, Joints, And Flangeways	24	Ton	\$[]	\$[]
Crack Routing (Pavement)	70,214	Foot	\$[]	\$[]
Crack Sealing	20,081	Pound	\$[]	\$[]
Joint Routing Asphalt Shoulder	49,325	Foot	\$[]	\$[]
Joint Sealing Asphalt Shoulder	14,107	Pound	\$[]	\$[]
Asphalt Partial Depth Removal and Overlay Patching	1146	Sq Yd	\$[]	\$[]
SHARED RISK ITEMS TOTAL			\$[]	

16.1.2 Performance of Shared Risk Item Work

Design-Builder shall perform Work associated with Shared Risk Items (“Shared Risk Item Work”), as directed by the Illinois Tollway, and based upon Design-Builder’s finding that such Work is necessary to complete the Project. Completion of Shared Risk Item Work will not be grounds for extension of any Completion Deadline.

16.1.3 Measurement of Shared Risk Item Work

Shared Risk Items shall be measured and paid for according to the actual quantity of Shared Risk Item Work performed and calculated in accordance with the standard units of measure and the unit prices in Table 16-1. The unit prices in Table 16-1 shall be used with no basis of changing them, meaning payment will be based on the final measured quantity multiplied by the unit price from Table 16-1. After completion of all Shared Risk Item Work, any funds remaining in the total amount for Shared Risk Items will be deducted from the Contract Price.

16.1.4 Changes to Shared Risk Item Work

For the Shared Risk allowance items in Table 16-1, the Design-Builder and Tollway shall jointly develop a process to address changes in actual field conditions encountered when the repair work is occurring. The process shall describe and document how requests to changes in the RFC Documents design quantities for the Shared Risk Items or changes in repair types will be made during Construction. This should include how such requests will be made, who is involved in reviewing and approving such requests, and how the requests will be documented, in terms of Field Design Changes and as-builts. Use of any repair types not listed in Table 16-1 or for overrunning of the total Shared Risk Items total dollar value shall be approved by the Illinois Tollway through an Extra Work Order in accordance with Section 17.17 (*Procedure for Extra Work Orders*).

16.2 Allowances

16.2.1 Generally

Design-Builder may be entitled to the reimbursement or payment for the work described in this Section 16.2 (*Allowances*), subject to terms of the special provisions establishing the applicable budgetary allowances included in Book 3.

16.2.2 Allowance For Emergency Pavement and Shoulder Repair

The Illinois Tollway may direct Design-Builder to perform emergency pavement and shoulder repair, in addition to Design-Builder’s obligations under Section 13.2 (*Maintenance and Repair of Work and On-Site Property*) Book 2, Section 19 (*Maintenance During Construction*). Design-Builder shall be entitled to payment in accordance with the Special Provision on Allowance for Emergency Pavement and Shoulder Repair included in Book 3.

16.2.3 Allowance For Disposal of Unknown Pre-Existing Hazardous Material

Design-Builder may be entitled to an allowance in accordance with Section 17.16 (*Change Order Due to Hazardous Material*), and the Special Provision for Allowance for Disposal of Unknown Pre-Existing Hazardous Materials included in Book 3

16.2.4 Allowance for Use of Constructionwork Apprentices

Design-Builder may be entitled to an allowance in accordance with Section 10.5 (*ConstructionWorks Program*) the Contract Allowance for ConstructionWorks Apprentices included in Book 3

16.2.5 Allowance for Railroad Flagging and Services

Any flagging protection, inspector service or design reviews required and performed by a Railroad Owner and/or Operator shall be procured by the Railroad Owner and/or Operator and billed directly to Design-Builder. Design-Builder shall be subject to a reimbursement for such costs in accordance with the Special Provision for Allowance for Railroad Flagging and Services included in Book 3.

16.2.6 Allowance for Drainage Pipe Repair

The Illinois Tollway may direct the Design-Builder to perform drainage pipe repairs and/or appurtenances, in addition to Design-Builder's obligations under Book 2, Section 12 (*Drainage*). Design-Builder shall be entitled to payment in accordance with the *Special Provision on Allowance for Drainage Pipe Repair* included in Book 3.

16.2.7 Allowance for Maintenance Repair

The Illinois Tollway may direct the Design-Builder to perform roadway maintenance repairs for all work associated with maintenance of aggregate shoulders outside the overlay section, additional scope for lighting work, additional scope for curb and gutter and additional scope for fencing in addition to Design-Builder's obligations under Book 2. Payment for this work will be made as specified in Book 1 – Section 17.14 (*Time and Materials Change Orders*).

17 CHANGES IN THE WORK

17.1 General Requirements

This Article 17 (*Changes in the Work*) sets forth the requirements for obtaining any adjustments to the Contract Price and/or Completion Deadline(s). Design-Builder hereby acknowledges and agrees that the Contract Price constitutes full compensation for performance of all of the Work, subject only to those exceptions specified in this Article 17 (*Changes in the Work*), and that the Illinois Tollway is subject to constraints which limit its ability to increase the Contract Price or extend the Completion Deadline(s). Design-Builder hereby waives the right to make any claim for a time extension or for any monetary compensation in addition to the Contract Price and other compensation specified in the Contract, except as set forth in this Article 17 (*Changes in the Work*). To the extent that any other provision of the Contract Documents expressly provides for a Change Order to be issued, such provision is hereby incorporated into this Article 17 (*Changes in the Work*).

17.2 Definition and Requirements Relating to Change Orders

The term Change Order (“Change Order”) shall mean a written order to Design-Builder issued by the Illinois Tollway ordering a change in the Work resulting in an adjustment in the Contract Price or in Completion Deadline(s).

A Change Order shall not be effective for any purpose unless executed by the Illinois Tollway, as specified herein. As used herein, execution of a Change Order by the Illinois Tollway shall mean that the Change Order has been fully executed with all the required signatures.

Change Orders may be initiated through a Notice of Request for Change Order by Design-Builder in accordance with Section 17.6 (*Request for Change Order*), or may result from an Illinois Tollway Request for Proposal pursuant to Section 17.5 (*Request for Change Proposal*). If a Request for Change Order is disapproved by the Illinois Tollway, Design-Builder may pursue the Dispute Resolution Procedures in accordance with Article 23 (*Relationship of the Parties*).

Change Orders may be issued for the following purposes (or combination thereof):

- a. To modify the scope of the Work;
- b. To adjust the Completion Deadline(s) in accordance with Section 17.7 (*Adjustment to Completion Deadline(s)*);
- c. To revise a Contract Price in accordance with Section 17.8 (*Adjustments to Contract Price*); and
- d. To revise other terms and conditions of the Contract Documents.

Payment for Change Orders that modify the Contract Price will be in accordance with Article 14 (*Payment*).

17.3 Matters Not Eligible for Change Orders

Design-Builder acknowledges and agrees that no increase in the Contract Price or extension of a Completion Deadline is available except in circumstances expressly provided for in the Contract, and that Design-Builder shall bear full responsibility for the consequences of all other events and circumstances. Matters which are Design-Builder's exclusive responsibility include the following:

- a. Except as provided in Section 2.3 (*Scope Validation*) and in Article 3 (*Information Supplied to Design-Builder*), errors in the Design Documents and Construction Documents;
- b. Any design changes required by the Illinois Tollway as part of the process of Accepting the Design Documents for consistency with the requirements of the Contract Documents, the Governmental Approvals required in Book 2, Section 1.6 (*Governmental Approvals and Conceptual Design*) and/or Governmental Rules;
- c. Defective or incorrect schedules of Work or changes in the planned sequence of performance of the Work (except to the extent arising from causes which otherwise give rise to a right to a Change Order);
- d. Action or inaction of Design-Builder's employees, Suppliers, subcontractors or any Design-Builder-Related Party (unless arising from causes which otherwise give rise to a right to a Change Order);
- e. Untimely delivery of Equipment or material, or unavailability, defectiveness, or increases in costs of material, Equipment or products specified by the Contract Documents (except to the extent arising from causes which otherwise give rise to a right to a Change Order);
- f. Delays not on the Critical Path;
- g. Costs covered by insurance proceeds received by or on behalf of Design-Builder;
- h. Correction of Nonconforming Work and oversight and related activities in connection therewith by Illinois Tollway (including rejected design submittals);
- i. Failure by Design-Builder to comply with Contract requirements;
- j. Any situations (other than Force Majeure events) which, while not within one of the categories delineated above, were or should have been anticipated because such situations are referred to elsewhere in the Contract or arise out of the nature of the Work; and

Design-Builder hereby assumes responsibility for all such matters and acknowledges and agrees that assumption by Design-Builder of responsibility for such risks and the consequences, costs and delays resulting therefrom is reasonable under the circumstances of the Contract and that

contingencies included in the Proposal Price in Design-Builder's sole judgment, constitute sufficient consideration for its acceptance and assumption of said risks and responsibilities.

17.4 Limitations on Change Orders

17.4.1 Limitation on Contract Price Increases

Any increase in the Contract Price allowed hereunder shall exclude:

- a. Costs caused by the breach of contract, fault, negligence, or act or failure to act of Design-Builder or any Design-Builder-Related Entity;
- b. Costs which could reasonably have been avoided by diligent prosecution of the Work by Design-Builder, including by resequencing, reallocating or redeploying its forces to other portions of the Work or to other activities unrelated to the Work (including any additional costs reasonably incurred in connection with such reallocation or redeployment); and
- c. Costs for any rejected Work that failed to meet the requirements of the Contract Documents and any necessary remedial Work.

17.4.2 Limitation on Completion Deadline Extensions

Any extension of a Completion Deadline allowed hereunder shall exclude any delay to the extent that it:

- a. Did not impact the Critical Path;
- b. Was due to the breach of contract by fault, negligence, or act or failure to act of Design-Builder or any Design-Builder-Related Entity; or
- c. Could reasonably have been avoided by diligent prosecution of the Work by Design-Builder, including by resequencing, reallocating or redeploying its forces to other portions of the Work (provided that if the request for extension involves an Illinois Tollway-Caused Delay, the Illinois Tollway shall have agreed, if requested to do so, to reimburse Design-Builder for its costs incurred, if any, in resequencing, reallocating or redeploying its forces).

Delays due to any rains, floods, windstorms or other natural phenomena of reasonable expectancy based on NOAA National Weather Service, for the particular locality and for the particular season of year in which the Work is being prosecuted, whether or not the above conditions apply, shall not result in an extension of Completion Deadline(s). No extension of Completion Deadline(s) shall be granted unless, among other things, Design-Builder demonstrates, to the Illinois Tollway's satisfaction, that the change in the Work or other event or situation that is the subject of the Claim for a change in a Completion Deadline has caused or will result in an identifiable and measurable disruption of the Work and has materially impacted the Critical Path activity.

17.4.3 Acceleration Costs

Acceleration Costs shall be compensable hereunder only with respect to Change Orders issued by the Illinois Tollway as an alternative to allowing an extension of a Completion Deadline as contemplated by Section 17.7 (*Adjustments to Completion Deadline(s)*).

17.5 Request for Change Proposal

If the Illinois Tollway desires an Illinois Tollway-Directed Change resulting in a Change Order or to evaluate whether to initiate such a change, the Illinois Tollway may, in its sole discretion, issue a Request for Change Proposal. The Request for Change Proposal shall set forth the nature, extent, and details of the proposed Illinois Tollway-Directed Change. The Request for Change Proposal also may include an opinion that the Illinois Tollway-Directed Change will reduce Design-Builder costs or save time. The Illinois Tollway may, in its sole discretion, determine whether to implement the potential change after consultation with Design-Builder on the scope of the change in Work and the impact, if any, on price and schedule.

Within fourteen (14) days of Design-Builder's receipt of the Request for Change Proposal and in advance of consultation with the Illinois Tollway, Design-Builder shall prepare and submit its response the Request for Change Proposal, which shall include the documents required in Section 17.6 (*Request for Change Order*).

17.6 Request for Change Order

As provided in Section 17.7 (*Adjustment to Completion Deadline(s)*), Design-Builder may request changes in the Work or modifications in the Contract Documents, resulting in adjustments to the Contract Price and/or Completion Deadline(s), by submitting a written Notice of Request for Change Order with the supplementary information to the Illinois Tollway, through the WBPM, within seven (7) days after the date on which the Design-Builder first became aware of the event or basis for a potential Change Order.

If a Notice of Request for Change Order is not timely filed, or not filed in the manner stated herein, Design-Builder's right to seek any relief for the facts or circumstances underlying the Request for Change Order shall be deemed waived. The Design-Builder shall not seek or be entitled to any adjustment to the Contract Price and/or Completion Deadline(s) based on such Request for Change Order, and the Illinois Tollway shall be released from any and all demands and obligations for extra compensation or extra time arising from or associated with the underlying facts or circumstance.

17.7 Adjustment to Completion Deadline(s)

Design-Builder may submit a Request for Change Order to extend a Completion Deadline, subject to the limitations stated in Section 17.4 (*Limitations on Change Order*) and contained herein, only for excusable delays, as determined by the Illinois Tollway in its sole discretion, that materially change the duration of the Critical Path. The following may constitute an excusable delay:

- a. Illinois Tollway-Directed Changes;

- b. Illinois Tollway-Caused Delays including delays in providing Design-Builder with access to Project ROW and Additional ROW under Article 7 (*Right-of-Way and Access to Site*);
- c. Delays directly attributable to Differing Site Conditions, to the extent permitted by Section 17.15 (*Change Order Due to Differing Site Conditions*);
- d. Delays directly attributable to a Force Majeure event;
- e. Delays relating to the discovery at, near, or on the Site of any paleontological, cultural or biological resources, or any species presently or in the future listed as threatened or endangered under federal or state endangered species laws (provided that the existence of the same was not disclosed in the RFP Documents), as described in Section 5.5.4 (*Other Site Conditions*);
- f. Delays relating to Hazardous Material, as described in Section 5.5.2 (*Hazardous Waste*), to the extent permitted therein and Section 17.16 (*Change Order Due to Hazardous Material*);
- g. Delays directly attributable to uncovering, removing, and restoring the Work, to the extent provided in Section 5.7.2 (*Obligation to Uncover Finished Work*);
- h. Delays relating to Unknown Utilities or Unknown Railroads within the Project ROW or Additional ROW;
- i. Delays relating to Known Utilities or Known Railroads within the Project ROW or Additional ROW, in the event of (i) an unreasonable and unjustified delay by a Utility Owner, Railroad Owner and/or Railroad Operator to undertake or permit a Utility Adjustment or Railroad Work in a manner consistent with timely completion of the Work or in accordance with Legal Requirements or any Governmental Approval, or (ii) failure of a Utility Owner, Railroad Owner and/or Railroad Operator to perform its obligations under an agreement, including providing agreed-upon work or approvals, to the extent permitted under Section 6.4 (*Failure of Utility Owners, Railroad Owners, and/or Railroad Operators*);
- j. Delays directly attributable to the suspension, termination, interruption, denial, failure to obtain, nonrenewal or amendment of any Environmental Approval or New Environmental Approval that is not a Design-Builder Triggered Approval, except as otherwise provided in Article 8 (*Environmental Compliance*);
- k. Delays directly attributable to any change in a Governmental Rule or Governmental Approval, change in the judicial interpretation of a Governmental Rule or Governmental Approval, or adoption of any new Governmental Rule or Governmental Approval, which is materially inconsistent with Governmental Rules or Governmental Approvals in effect on the Proposal Due Date (excluding any such change or new Governmental Rule passed or adopted but not yet effective as of the Proposal Due Date), and which (i) requires a material modification in the Project Design, (ii) requires Design-Builder to obtain a major State or federal environmental approval not previously required for the Project, or (iii) specifically applies to the Project or Design-Builder;

- l. Delays directly attributable to the issuance of a temporary restraining order or other form of injunction by a court that prohibits prosecution of a material portion of the Work, except if (i) such risk has been assumed by Design-Builder, or (ii) such risk arises out of, relates to, or is caused by the negligent or improper act, omission, willful misconduct, recklessness, or breach of contract or Governmental Rule by any Design-Builder-Related Entity;
- m. Delays directly attributable to a valid Scope Validation Issue identified in accordance with Section 2.3 (*Scope Validation*);
- n. Delays directly attributable to a change, after the Proposal Due Date, in other documents and agreements referenced within the Contract Documents;
- o. Delays directly attributable to a change, after the Setting Date, in Project Standards referenced within the Contract Documents; and
- p. Delays directly attributable to securing a Governmental Approval that is not specifically identified in Book 2, Section 1.6 (*Governmental Approvals and Conceptual Design*); provided that the Illinois Tollway shall not be responsible for delays attributable to the implementation of Approved ATCs or PAE, as described in Section 2.3.8 (*Failure of Technical Proposal to Meet Requirements of the Contract Documents*); and
- q. Delays directly attributable to any acts or omissions of the Illinois Tollway, its agents or employees, or Separate Contractors.

17.8 Adjustments to Contract Price

Design-Builder may submit a Request for Change Order to increase the Contract Price, subject to the limitations stated in Section 17.4 (*Limitations on Change Orders*) and contained herein, and only for increased costs in the Work as follows:

- a. Additional costs directly attributable to additional Work resulting from Illinois Tollway-Directed Changes;
- b. Additional costs directly attributable to Illinois Tollway-Caused Delays, including delays in providing Design-Builder access to Project ROW and Additional ROW under Article 7 (*Right-of-Way and Access to Site*);
- c. Additional costs directly attributable to Differing Site Conditions, to the extent provided in Section 17.15 (*Change Order Due to Differing Site Conditions*);
- d. Additional costs directly attributable to a Force Majeure event;

- e. Additional costs directly attributable to the discovery at, near, or on the Site of any paleontological, cultural or biological resources, or any species presently or in the future listed as threatened or endangered under state endangered species laws (provided that the existence of the same was not disclosed in the RFP Documents), as described in Section 5.5.4 (*Other Site Conditions*);
- f. Additional costs directly attributable to the suspension, termination, interruption, denial, failure to obtain, nonrenewal or amendment of any Environmental Approval or New Environmental Approval, except as otherwise provided in Article 8 (*Environmental Compliance*);
- g. Additional costs directly attributable to any change in a Governmental Rule or Governmental Approval, change in the judicial interpretation of a Governmental Rule or Governmental Approval, or adoption of any new Governmental Rule or Governmental Approval, which is materially inconsistent with Governmental Rules in effect on the Proposal Due Date (excluding any such change or new Governmental Rule passed or adopted but not yet effective as of the Proposal Due Date), and which (i) requires a material modification in the Project Design, (ii) requires Design-Builder to obtain a major State or federal environmental approval not previously required for the Project, or (iii) specifically applies the Project or Design-Builder;
- h. Additional costs relating to Hazardous Materials, as described in Section 5.5.2 (*Hazardous Waste*), to the extent provided in in Section 17.16 (*Change Order Due to Hazardous Material*);
- i. Additional costs directly attributable to uncovering, removing, and restoring the Work, to the extent provided in Section 5.7.2 (*Obligation to Uncover Finished Work*);
- j. Additional costs relating to Unknown Utilities or Unknown Railroads within the Project limits that could not have been reasonably foreseen or anticipated by the Design-Builder;
- k. Additional costs relating to Known Railroads within the Project ROW or Additional ROW, in the event of (i) an unreasonable and unjustified delay by a Railroad Owner and/or Railroad Operator to undertake or permit a Utility Adjustment or Railroad Work in a manner consistent with timely completion of the Work or in accordance with Legal Requirements or any Governmental Approval, or (ii) failure of a Railroad Owner and/or Railroad Operator to perform its obligations under an agreement, including providing agreed-upon work or approvals, to the extent permitted under Section 6.4 (*Failure of Utility Owners, Railroad Owners, and/or Railroad Operators*);
- l. Additional costs directly attributable to a valid Scope Validation Issue identified in accordance with Section 2.3 (*Scope Validation*);
- m. Additional costs directly attributable to a change, after the Proposal Due Date, in other documents and agreements referenced within the Contract Documents; and
- n. Additional costs directly attributable to a change, after the Setting Date, in Project Standards referenced within the Contract Documents; and

- o. Additional costs directly attributable to securing a Governmental Approval that is not specifically identified in Book 2, Section 1.6 (*Governmental Approvals and Conceptual Design*); provided that the Illinois Tollway shall not be responsible for additional costs attributable to the implementation of Approved ATCs or PAE, as described in Section 2.3.8 (*Failure of Technical Proposal to Meet Requirements of the Contract Documents*).

17.9 Contents of Change Orders

Design-Builder shall prepare a work plan, cost estimate, delay analysis and other information as required by this Section 17.6 (*Request for Change Order*) for each Change Order.

17.9.1 Work Plan

The work plan shall describe, in detail satisfactory to the Illinois Tollway, all activities associated with the Change Order, including a description of additions, deletions and amendments to the existing Contract requirements.

17.9.2 Cost Estimate

The cost estimate shall set out the estimated costs or reduction in costs to Design-Builder in such a way that a fair evaluation can be made. It shall include a breakdown for labor, materials, Equipment, overhead (which includes all indirect costs) and profit, unless Illinois Tollway agrees otherwise. The estimate shall include costs allowable under this Article 17 (*Changes in the Work*), if any. If the work is to be performed by subcontractors and if the work is sufficiently defined to obtain subcontractor quotes, Design-Builder shall obtain quotes (with breakdowns showing cost of labor, materials, Equipment, overhead and profit) on the subcontractor's stationery and shall include such quotes as back-up for Design-Builder's estimate. No mark-up shall be allowed in excess of the amounts allowed under Sections 17.11 (*Revising Scope of Work Through Change Order*). Design-Builder shall identify all conditions with respect to prices or other aspects of the cost estimate, such as pricing contingent on firm orders being made by a certain date or the occurrence or non-occurrence of an event.

17.9.3 Impacted Delay Analysis

If Design-Builder claims that such event, situation or change delays the Critical Path, it shall provide an impacted delay analysis indicating all activities represented or affected by the change, with activity numbers, durations, predecessor and successor activities, resources and cost, and with a narrative report, in form satisfactory to Illinois Tollway, which compares the proposed new schedule to then-Current Contract Schedule, as appropriate. The proposed revision to the then-Current Contract Schedule associated with the time extension shall not modify the "early and late start cost curves" of then-Current Contract schedule, except with respect to activities which have been impacted by the event which justifies the extension. Design-Builder may reschedule activities not otherwise affected by the event, in order to take advantage of additional Float available as the result of the delay to the Critical Path. Any such rescheduling shall be reflected in the CPM Schedule.

17.9.4 Other Supporting Documentation

Design-Builder shall provide such other supporting documentation as may be required by the Illinois Tollway. This may include an alternative cost and schedule proposal showing the Acceleration Costs and any other additional costs associated with meeting Completion Deadline(s) without an adjustment.

17.10 Change Order Pricing

The Illinois Tollway and Design-Builder (on its own behalf and on behalf of its subcontractors) shall endeavor to negotiate, in good faith, a reasonable cost for each Change Order. In general, the price of a Change Order shall be negotiated in accordance with this Section 17.10 (*Change Order Pricing*) or shall be based on time and materials records pursuant to Section 17.14 (*Time and Materials Change Orders*).

Instead of negotiating the price for a Change Order in accordance with this Section 17.10 (*Change Order Pricing*) or Section 17.11 (*Revising Scope of Work through Change Orders*), the Illinois Tollway and Design-Builder may agree to negotiate unit prices for changed Work. Measurement of unit-priced quantities will be as specified in the Change Order. The unit prices shall be deemed to include all costs for the Work, including labor, Equipment, material, overhead, markups and profit, and shall not be subject to change regardless of any change in the estimated quantities.

Unit-priced Change Orders shall initially include an estimated increase in the Contract Price based on estimated quantities. The final price of a Change Order may be lump sum or may be based upon a final determination of the quantities.

Design-Builder may also be entitled to an adjustment for the risk of estimated item quantity miscalculations. If Design-Builder believes an adjustment for risk is necessary, Design-Builder will submit a justification for an increase of up to two (2) percent of the estimated quantities. At the Illinois Tollway's option, the risk may be eliminated by completing negotiations after the Design is complete.

Regardless of the method of pricing the Change Order, any adjustment to the Contract Price shall not include interest charges, loss of anticipated profit, undocumented loss of efficiency, pro rata home overhead, unabsorbed overhead, lost opportunity, expenses in preparation of the Change Order or Claim, and other consequential indirect costs.

17.11 Revising Scope of Work through Change Orders

When the Change Order adds Work to Design-Builder's scope, the increase in the Contract Price shall be negotiated based on estimated costs of labor, material and Equipment, or shall be based on costs in accordance with Section 17.14 (*Time and Materials Change Orders*). Mark-ups for profit and overhead shall be as provided in this Section 17.14 (*Time and Materials Change Orders*).

When the Change Order deletes Work from Design-Builder's scope (including deletion of any Work contained in the Contract due to a Request for Change Proposal in Section 17.5 (*Request for Change Proposal*)), or due to Design Deviations in accordance with Book 2, Section 8.3.3 (*Design Deviations*)), or because the Work is found to be unnecessary, the amount of the reduction in the Contract Price shall be based upon a current estimate including a bill of material, a breakdown of labor and Equipment costs and overhead and profit associated with the deleted work. Credits for mark-up for profit and overhead shall be as provided in Section 17.14 (*Time and Materials Change Order*). When a deduction is involved, documented cancellation and restocking charges may be included in costs and subtracted from the price deduction. The Illinois Tollway and Design-Builder shall cooperate in good faith to determine the estimated net cost savings and time savings. The Illinois Tollway will be entitled to one hundred (100) percent of the estimated net cost savings, if any, attributable to the Change Order.

When the Change Order includes both added and deleted Work, Design-Builder shall prepare separate cost breakdowns for added Work and deleted Work. The cost (or credit) amount of the Change Order shall be the difference between the cost of added Work and deleted Work cost breakdowns. If the change results in a net change of zero, there will be no change in the Contract Price.

17.12 Other Matters Relating to Change Orders

17.12.1 Waiver

Design-Builder hereby expressly waives all rights to assert any and all claims based on any change in the work, delay or acceleration (including any change, delay, suspension or acceleration which, but for the express terms of the Contract Documents, could be inferred or implied at law) for which Design-Builder failed to initiate a Claim and agrees that Design-Builder shall be entitled to no compensation or damages whatsoever in connection with the Work except to the extent that the Contract Documents expressly specify that Design-Builder is entitled to a Change Order or other damages.

17.12.2 No Release or Waiver Due to Completion Deadline Extension

No extension of time granted hereunder shall release Design-Builder's Surety or any Guarantor from its obligations. The Illinois Tollway shall not be deemed to have waived any rights under the Contract (including its right to abrogate the Contract for abandonment or for failure to complete within the time specified, or to impose and deduct damages as may be provided herein) as the result of any grant of an extension of time beyond the date fixed for the completion of any part of the Work, any acceptance of performance of any part of the Work after a Completion Deadline, or the making of any payments to Design-Builder after such date.

17.12.3 No Change Order Based on Course of Conduct or Order by Unauthorized Person

No course of conduct or dealings between the Parties nor express or implied acceptance of alterations or additions to the Work, and no claim that the Illinois Tollway has been unjustly enriched shall be the basis for any claim, request for additional compensation or extension of a Completion Deadline. Further, Design-Builder shall undertake, at its risk, work included in any request, order or other authorization issued by a person in excess of that person's authority as provided herein, or included in any oral request. Design-Builder shall be deemed to have performed such work as a volunteer and at its sole cost. In addition, the Illinois Tollway may require Design-Builder to remove or otherwise undo any such work, at Design-Builder's sole cost.

17.13 Change Orders Due to Significant Changes in the Character of Work

If an Illinois Tollway-Directed Change significantly changes the character of the Work, whether the alterations or changes included in such direction are in themselves significant changes to the character of the Work or by affecting other Work it causes such other Work to become significantly different in character, a Change Order shall be issued and an adjustment, excluding anticipated profit, will be made to the Contract.

The basis for the adjustment shall be agreed upon prior to performance of such Work. If a basis cannot be agreed upon, then an adjustment will be made either for or against Design-Builder in accordance with the

procedure for Claims described in Exhibit 9 (*Claims Process*), subject to resolving the Dispute in accordance with Article 23 (*Relationship of the Parties*).

The term Significant Change (“Significant Change”) shall be construed to apply only when the character of the Work as altered differs materially in kind or nature from that involved or included in the original proposed construction or: (i) when a major item, defined as a Schedule of Value line item whose total original contract cost plus any adjustments, exceeds ten (10) percent of the total original Contract Price, or (ii) when a major item is increased in excess of twenty-five (25) percent or decreased more than twenty-five (25) percent of the original Contract Price for that item.

Changes that are specifically contemplated by the Contract shall not be considered significant changes in the character of the Work. If the changes do not significantly change the character of the Work to be performed under the Contract, the altered Work will be paid for as provided elsewhere in the Contract.

17.14 Time and Materials Change Orders

The Illinois Tollway may, in its sole discretion, issue a Time and Materials Change Order whenever it determines that a Time and Materials Change Order is advisable. Specifically, when the Illinois Tollway deems it impracticable to price the extra Work contemplated by the Change Order on a lump sum or unit price basis or if an agreement between the Parties cannot be reached, the Illinois Tollway shall issue a Time and Materials Change Order under this Section 17.14 (*Time and Materials Change Order*).

The Time and Materials Change Order shall instruct Design-Builder to perform the Work, indicating expressly the intention to treat the items as changes in the Work, and setting forth the kind, character, and limits of the Work as far as they can be ascertained, the terms under which changes to the Contract Price will be determined and the estimated total change in the Contract Price anticipated thereunder. Upon final determination of the allowable costs, the Illinois Tollway shall issue a modified Change Order setting forth the final adjustment to the Contract Price as follows:

a. Labor

Design-Builder will be paid for the actual amount of wages for all labor and foremen in direct charge of the specific work for each hour that said labor and foremen are actually engaged in such work. A foreperson shall not be used when there are less than two (2) laborers employed, except with the written consent of the Illinois Tollway. Design-Builder will receive the actual additional amount of the contributions paid for regular and uniform health and welfare benefits, pension fund benefits or other benefits when such amounts are required by collective bargaining agreement or other employment contract generally applicable to the class of labor employed on the Work. An amount equal to thirty-five (35) percent of the sum of the foregoing items will also be paid to Design-Builder.

b. Bonds, Insurance and Tax

Design-Builder will receive the actual cost or increase in cost of required Contract Bonds, Builder’s Risk insurance, Worker’s Compensation and Employer’s Liability insurance, Unemployment Compensation tax, and Social Security tax attributable to the Work under this Section 17.14 (*Time*

and Materials Change Order), to which ten (10) percent shall be added. Design-Builder shall furnish satisfactory evidence of the cost or rates paid for such bonds, insurance and taxes.

c. Materials

Design-Builder will receive the actual cost for all materials, including freight charges as shown by the original paid invoices, which become an integral part of the finished work, to which shall be added fifteen (15) percent of the sum thereof. Paid invoices must carry the name of the supplier on the “paid” stamp. Paid invoices shall be signed in full and dated by the officer or individual receiving payment and shall show that person’s title.

Design-Builder will be reimbursed for any materials used in the construction of such work as sheeting, Falsework, form lumber, etc. which are not an integral part of the finished work. The amount of reimbursement shall be agreed upon in writing before such work is begun, and no percent shall be added. The salvage value of such materials shall be taken into consideration in the reimbursement agreed upon.

d. Equipment

The Equipment shall be of a type and size reasonably required to complete the extra Work contemplated by the Change Order. Compensation will not be allowed for Equipment of a type, size or condition unsuitable for the Work. Equipment used for extra work shall be authorized by the Illinois Tollway. If the Illinois Tollway determines that the Equipment will be idle for an extended period, Design-Builder will be directed to remove and return it at a later date or payment for the Equipment will be made as idle time. These costs will be considered extra Work and paid for by the Illinois Tollway.

1.) Design-Builder Owned Equipment

For any machinery or special Equipment other than small tools, the use of which has been authorized by the Illinois Tollway, Design-Builder will be paid by the hour using the applicable hourly rate in accordance with the latest revision of “EQUIPMENTWATCH RENTAL RATE BLUE BOOK (BLUE BOOK)”.

FHWA hourly rate = (monthly rate/176) x (model year adjustment) x (Illinois adjustment) + EOC

Where: EOC = Estimated Operating Cost per hour (from the Blue Book)

The time allowed will be the actual time the Equipment is operating on the extra work. For the time required to move the Equipment to and from the site of the extra work and any authorized idle (standby) time, payment will be made at the following hourly rate: 0.5 x (FHWA hourly rate - EOC).

All time allowed shall fall within the working hours authorized for the extra work.

The rates above include the cost of fuel, oil, lubrication, supplies, small tools, necessary attachments, repairs, overhaul and maintenance of any kind, depreciation, storage, overhead, profits, insurance, and all incidentals. The rates do not include labor.

Design-Builder shall submit to the Illinois Tollway sufficient information for each piece of Equipment and its attachments to enable the Illinois Tollway to determine the proper category. If a rate is not established in the Blue Book for a particular piece of Equipment, Design-Builder shall obtain a custom rate through EquipmentWatch. If a rate is not available through EquipmentWatch, the Illinois Tollway will establish a rate for that piece of Equipment that is consistent with its cost and use in the industry.

2.) Rented Equipment

Whenever Design-Builder utilizes rented Equipment to perform the extra work, the rental and transportation costs of the Equipment plus five (5) percent for overhead will be paid. In no case shall the rental rates exceed those of established distributors or Equipment rental agencies.

All Equipment rates shall be agreed to in writing before the Equipment is used. No additional allowance will be made for the use of small tools or other costs for which no specific allowance is herein provided

e. Subcontractor Work – Construction Work

In the event any portion of the Extra Work ordered under this Section 17.14(f) (*Time and Materials Change Order*) is performed by a subcontractor, Design-Builder will be paid for the cost of such work in accordance with the provisions as specified above, plus five (5) percent of said costs with the minimum payment being \$100. Only Design-Builder shall be entitled to the five (5) percent add-on.

The foregoing costs and mark-ups (and no others) shall be used for calculating the change in the Contract Price. No direct compensation will be allowed for other miscellaneous costs for which no specific allowance is provided in this Section 17.14 (*Time and Materials Change Order*).

17.15 Change Order Due to Differing Site Conditions

17.15.1 Adjustment to Contract Price, Completion Deadline(s)

Upon Design-Builder's fulfillment of all applicable requirements of Section 5.5.3 (*Differing Site Conditions*) and Article 17 (*Changes in the Work*), Design-Builder may file a Claim to: (i) to compensate Design-Builder for additional costs directly attributable to changes in the scope of the Work arising from Differing Site Conditions; and (ii) to extend the Completion Deadline(s) as the result of any delay in the Critical Path caused by any such conditions. However, Design-Builder shall not be entitled to any adjustment in the Contract Price and/or Completion Deadline(s) due to

a Differing Site Condition not identified during the Scope Validation Period in Section 2.3 (*Scope Validation*), unless the Illinois Tollway determines that the circumstances associated with the Differing Site Condition justify making such adjustment.

17.15.2 Design-Builder Burden of Proof

Design-Builder shall bear the reasonable burden of proving that a Differing Site Condition exists and that it could not reasonably have worked around the Differing Site Condition so as to avoid additional cost. Each request for a Change Order relating to a Differing Site Condition shall be accompanied by a statement signed by a qualified professional setting forth all relevant assumptions made by Design-Builder with respect to the condition of the Site, justifying the basis for such assumptions, explaining exactly how the existing conditions differ from those assumptions, and stating the efforts undertaken by Design-Builder to find alternative design or construction solutions to eliminate or minimize the problem and the associated costs.

17.16 Change Order Due to Hazardous Material

17.16.1 Adjustment to Contract Price, Completion Deadline(s)

Upon Design-Builder's fulfillment of all applicable requirements of Article 17 (*Changes in the Work*) and Section 5.5.2 (*Hazardous Waste*), and the Special Provision for Allowance for Disposal of Unknown Pre-Existing Hazardous Material included in Book 3, Design-Builder may file a Claim for: (i) payment for Remediation Work subject to Section 17.16.3 (*Payment for Remediation Work*); and (ii) an extension of the Completion Deadline(s) to the extent that any delay in the Critical Path is directly attributable to Remediation Work compensable under Section 17.16 (*Change Order Due to Hazardous Material*). Known Pre-Existing Hazardous Materials included in Book 2 Section 4 Environmental are included in the Design-Builder's Price Proposal and not subject to a Change Order.

17.16.2 Design-Builder Burden of Proof

Design-Builder shall bear the reasonable burden of proving that Unknown Hazardous Material exists on the Site, and that it has taken all reasonable steps to minimize any additional costs.

17.16.3 Payment for Remediation Work

Change Orders for the Remediation Work shall be priced according to Section 17.14 (*Time and Materials Change Order*). Payment for Remediation Work shall be adjusted as provided below:

- a. If the Hazardous Material is contained in soils or other solid materials or objects that are removed from the Site for any purpose or reason other than the fact of contamination, then the payment shall be limited to the incremental increase in out-of-pocket cost to excavate, handle, contain, haul, transport, remove, remediate, and dispose of the soils or other solid materials or objects over the out-of-pocket cost to excavate, handle, contain, haul, transport, remove, remediate, and dispose of such soils or other solid materials or objects if they did not contain Hazardous Material.

- b. If avoidance or remediation of such Hazardous Material is capable of being accomplished under applicable laws and Governmental Approvals through measures less costly than excavation, removal, and off-site disposal of contaminated soil and groundwater, or less costly than return to trenches and other areas of excavation, then the Illinois Tollway will only be liable for the least costly alternative. Such alternate, less costly measures may include (i) design modifications and construction techniques to avoid such Hazardous Material or reduce the quantities to be excavated, handled, contained, hauled, transported, removed, remediated, and disposed off-site, and (ii) on-site containment and institutional controls. If, however, Design-Builder demonstrates that the total cost of alternate measures, will exceed the total cost of excavation, removal, and off-site disposal or return to trenches and other areas of excavation, then Design-Builder shall not be obligated to implement the alternate measure. Design-Builder shall respond to all reasonable requests by the Illinois Tollway for supporting information regarding such cost comparison.

None of the following liabilities, costs, expenses and losses shall be chargeable against or reimbursable by the Illinois Tollway:

- a. Liabilities, costs, expenses, and losses to the extent attributable to Design-Builder Release of Hazardous Material;
- b. Liabilities, costs, expenses, and losses that could be avoided by the exercise of Good Industry Practice to mitigate and reduce cost, including exercise of Design-Builder's duties to avoid and mitigate set forth in Section 5.5.6 (*Further Investigation & Remediation Work – Hazardous Environmental Condition*);
- c. Liabilities, costs, expenses, and losses incurred attributable to acts or omissions of Design-Builder or any Design-Builder-Related Entity that exacerbate release of, or costs to undertake Remediation Work of Hazardous Material;
- d. Liabilities, costs, expenses, and losses incurred if the Illinois Tollway is not afforded the opportunity to view the sites containing Hazardous Material pursuant to Section 5.5.6 (*Further Investigation & Remediation Work – Hazardous Environmental Condition*) before Design-Builder takes any action that would inhibit the Illinois Tollway's ability to ascertain, based on a site inspection, the nature and extent of the Hazardous Material, except for Design-Builder's actions necessary to stabilize and contain a sudden release or otherwise required by law to address the release immediately;
- e. Liabilities (except generator liability to the extent assumed by the Illinois Tollway under Section 22.5 (*Responsibility of Design-Builder for Certain Hazardous Material*), costs, expenses, delays, and losses with respect to Hazardous Material in, on or under Design-Builder Requested ROW.

17.17 Procedure for Extra Work Orders

The Illinois Tollway may at any time issue an Extra Work Order to Design-Builder regarding:

- a. any matter for which a Change Order can be issued;
- b. in the event of any disagreement regarding the scope of the Work;
- c. in the event that the Illinois Tollway has disapproved a Request for Change Order; or
- d. whether Design-Builder has performed in accordance with the requirements of the Contract Documents.

In addition, the Illinois Tollway may, in its sole discretion, direct Design-Builder to proceed with an Extra Work Order and subsequently determine any adjustment of a Completion Deadline or the Contract Price in accordance with the Contract Documents.

Extra Work Orders are mandatory, and Design-Builder shall comply immediately with the terms of an Extra Work Order upon receipt.

18 SUSPENSION OF WORK

18.1 Suspension for Convenience

The Illinois Tollway may, at any time and for any reason, order Design-Builder to suspend all or any part of the Work required under the Contract Documents for the period of time the Illinois Tollway deems appropriate for the convenience of the Illinois Tollway. Design-Builder shall promptly comply with any such suspension order. Design-Builder shall promptly recommence the Work upon receipt of notice from the Illinois Tollway directing Design-Builder to resume work.

Any such suspension for convenience shall be considered an Illinois Tollway-Directed Change or an Illinois Tollway-Caused Delay.

18.2 Suspension for Cause

The Illinois Tollway will have the right and authority to suspend for cause all of the Work or any affected portion of the Work based on any of the below-listed grounds or reasons. In addition, upon the Illinois Tollway's delivery of a "Notice of Design-Builder Default," the Illinois Tollway can suspend the Work for cause, regardless of whether an Event of Default has been declared and regardless of any cure period (other than any cure period described in the below paragraphs):

- a. The existence of conditions unsafe for workers, other Project personnel or the general public, including failure to comply with any provision of the Safety Management Plan. The existence of seasonal conditions unfavorable for the prosecution of the Work. Performance of Construction Work sooner than permitted under Article 4 (*Time Within Project Shall Be Completed*);
- b. Design-Builder's failure to (i) substantially cure the Nonconforming Work within fifteen (15) days after Illinois Tollway delivers written notice thereof to Design-Builder, or (ii) demonstrate, within that fifteen-day period and to the Illinois Tollway's satisfaction, that Design-Builder has completed a full and complete cure of the Nonconforming Work, which can practicably be verified by the Illinois Tollway if Work continues without suspension;
- c. Discovery of activity that is proceeding or about to proceed that would constitute or cause Nonconforming Work; provided, however, that Design-Builder fails to (i) modify, cease or substantially cure the activity within fifteen (15) days after Illinois Tollway delivers written notice thereof to Design-Builder, so as to avoid Nonconforming Work, or (ii) demonstrates, within that fifteen-day period and to the Illinois Tollway's satisfaction, that the activity or planned activity will not constitute or cause Nonconforming Work;
- d. Failure to carry out and comply with Extra Work Orders or Change Orders, where such failure is not cured within fifteen (15) days after the Illinois Tollway delivers written notice thereof to Design-Builder;
- e. Failure to replace or remove personnel as set forth in Section 9.1 (*Labor Standards and Employee Performance Requirements*), as applicable, where such failure is not cured within fifteen (15) days after the Illinois Tollway delivers written notice thereof to Design-Builder;

- f. Failure to provide proof of required insurance coverage as set forth in Article 12 (*Insurance*), where such failure is not cured within five (5) days after the Illinois Tollway delivers written notice thereof to Design-Builder;
- g. Failure to perform the Work in compliance with the Contract Documents, where such failure is not cured within fifteen (15) days after the Illinois Tollway delivers notice thereof to Design-Builder;
- h. Failure to deliver or maintain the Payment Bond, Performance Bond, or any other bond or other security required under the Contract, where such failure is not cured within five (5) days after the Illinois Tollway delivers written notice thereof to Design-Builder;
- i. Failure to comply with any provision of the Quality Management Plan, where such failure is not cured within fifteen (15) days after the Illinois Tollway delivers written notice thereof Design-Builder;
- j. Failure to submit DBE LOIs or failure to comply with the Special Provision for DBE Participation, the approved DBE Utilization Plan or the approved DBE Performance Plan, where such failure is not cured within fifteen (15) days after the Illinois Tollway delivers written notice thereof to Design-Builder;
- k. If at any time, the Illinois Tollway determines Design-Builder has Failure to submit SDVOSB/VOSB LOIs or failure to comply with the Special Provision for SDVOSB/VOSB Participation, the approved SDVOSB/VOSB Utilization Plan or the SDVOSB/VOSB Performance Plan, where such failure is not cured within fifteen (15) days after the Illinois Tollway delivers written notice thereof to Design-Builder;

Design-Builder shall promptly comply with any suspension order issued by Illinois Tollway pursuant to above Section 18.1 (*Suspension for Convenience*) or Section 18.2 (*Suspension for Cause*), even if Design-Builder disputes the grounds for suspension. The Illinois Tollway will lift the suspension order promptly after Design-Builder fully cures and corrects all matters based upon which Illinois Tollway issued the suspension order. Design-Builder shall promptly resume the Work upon receipt of notice from the Illinois Tollway directing Design-Builder to resume Work. The Illinois Tollway will have no liability to Design-Builder, and Design-Builder shall have no right to an increase in the Contract Price, an adjustment of the Completion Deadline or any other Claim in connection any suspension of Work properly founded on any of the grounds set forth in Section 18.2 (*Suspension for Cause*).

If Design-Builder contends that the Illinois Tollway's suspension for cause was not properly founded on any of the grounds set forth in Section 18.2 (*Suspension for Cause*), Design-Builder may initiate the Dispute Resolution Procedures to determine whether Illinois Tollway properly issued the suspension order. If the Illinois Tollway orders suspension of Work on one of the foregoing grounds and it is finally determined under the Dispute Resolution Procedures that such grounds did not exist, the suspension shall be treated as a suspension for Illinois Tollway's convenience under Section 18.1 (*Suspension for Convenience*). If Design-Builder initiates the Dispute Resolution Procedures, Design-Builder may request that the same be used to determine

(i) whether the Illinois Tollway properly issued the suspension order, and (ii) whether the Design-Builder is entitled to any additional compensation or any Completion Deadline adjustment.

18.3 Notice and Order of Suspension

The Illinois Tollway will notify the Design-Builder in writing of all suspensions. After all or any part of the Work has been suspended, delayed or interrupted by the Illinois Tollway, or by the Design-Builder with written authorization from the Illinois Tollway, the Design-Builder shall not resume operations until notified to do so, in writing, by the Illinois Tollway.

18.4 Responsibilities of Design-Builder during Suspension

Unless specifically directed otherwise by the Illinois Tollway, Design-Builder shall, during the suspension period, continue to have full responsibility for the Project, including but not limited to its obligations to take such precautions as may be necessary to prevent damage to the Work, comply with Governmental Approvals, and ensure public safety. Such obligations include, but are not limited to, erosion control, drainage, and erection of any temporary structures, signs, or other facilities that may be necessary. Design-Builder also shall have or continue to have the following obligations:

- a. Upon direction of the Illinois Tollway, Design-Builder shall develop a transition and maintenance plan;
- b. Design-Builder shall make passable, place in a maintainable condition, and/or open to traffic such portions of the Project as may be agreed upon with the Illinois Tollway;
- c. Design-Builder shall store all materials in such manner that they will not obstruct or impede the traveling public or become damaged in any way; and
- d. If the Illinois Tollway does not suspend the Work in its entirety, Design-Builder shall continue other Work that has been or can be performed at the Site or off the Site during the period that Work is suspended.

19 TERMINATION OF CONTRACT

19.1 Termination for Convenience by Illinois Tollway

The Contract may be terminated whenever the Illinois Tollway shall determine that termination is in the best interest of the Illinois Tollway. Such termination will be affected by delivery of a written (“Notice of Termination for Convenience”) from the Illinois Tollway to the Design-Builder. The Notice of Termination for Convenience will specify the date or dates upon which the termination will take effect. Termination for Convenience shall not relieve the Design-Builder or the Surety of responsibility for the Work performed prior to termination or for performance of that Work in accordance with the Specifications and other Contract Documents. Upon Termination for Convenience, Design-Builder shall not be entitled to compensation for any Work other than that completed prior to the date termination takes effect.

19.2 Termination for Convenience Settlement Proposal

Whether it results in termination in whole or in part, a Termination for Convenience shall be subject to the conditions herein.

After receiving a Notice of Termination for Convenience, and no later than thirty (30) days from the effective date of termination (unless Design-Builder has requested a time extension in writing within such 30 -day period and the Illinois Tollway has agreed in writing to allow such an extension), Design-Builder shall submit a final termination settlement proposal to the Illinois Tollway consistent with the provisions included in below Section 19.3 (*Amount of Termination Settlement*).

Following the Illinois Tollway’s review and consideration of Design-Builder’s final termination settlement proposal and the Parties’ agreement on the settlement amount, Design-Builder will be paid the agreed amount pursuant to a settlement agreement between the Illinois Tollway and the Design-Builder. The Illinois Tollway’s execution of any such settlement agreement shall not be deemed to affect any of its rights with respect to the Work that achieved Final Acceptance, any of its rights under payment and performance bonds, or any of its rights against Design-Builder.

19.3 Amount of Termination Settlement

In the event of Termination for Convenience, the Design-Builder shall not be entitled to damages compensation except as hereinafter provided. The Illinois Tollway and Design-Builder shall negotiate in good faith to reach an agreement on a settlement amount. The agreed amount payable as a result of the Termination for Convenience shall not exceed (i) the value of the Work performed, plus (ii) Demobilization Costs. The settlement amount shall be in accordance with Section 19.4 (*Effects of Notice of Termination for Convenience*), and specifically include amounts due to subcontractors for any outstanding liabilities and claims arising out of such termination of subcontracts under Section 19.4(c) (*Effects of Notice of Termination for Convenience*).

The Design-Builder will be paid for all Work completed or partially completed by the Design-Builder prior to the effective date of termination.

For all materials Design-Builder obtained for the Work prior to Notice of Termination for Convenience, to the extent that the Illinois Tollway inspected, tested, and accepted the materials and the materials cannot be returned to the supplier, the Design-Builder will be paid for the actual costs for such material (including freight charges), as shown by original bills for the materials and documents evidencing its payment of said bills, plus fifteen (15) percent, of the billed sums. Upon the Illinois Tollway's payment for such materials, the materials shall become the property of the Illinois Tollway.

It is agreed and understood, however, that the Design-Builder shall, in no event, be entitled to compensation for the loss of anticipated or unearned profits (whether for completed, uncompleted or partially completed work), unabsorbed overhead, opportunity costs, or consequential damages (whether arising in contract, warranty, tort (including any theories of negligence), strict liability, or otherwise and including all indirect, incidental, special and punitive damages) as a result of a Termination of Convenience. The payment to Design-Builder under this Section 19.3 (*Amount of Termination Settlement*) constitutes Design-Builder's exclusive remedy for a termination hereunder.

Design-Builder specifically waives any and all rights to assert a claim against the Illinois Tollway for any cost, profit, overhead contribution or any other monetary relief associated with the Contract Documents or Project, including but not limited to Proposal costs, or the costs of any services that might have constituted Work under the Contract documents.

The amount otherwise due Design-Builder under this Section 19.3 (*Amount of Termination Settlement*) shall be reduced by the amount of any valid Claim the Illinois Tollway may have against Design-Builder in connection with this Contract.

19.4 Effects of Notice of Termination for Convenience

Upon receipt of a Notice of Termination for Convenience, and except as directed by the Illinois Tollway, Design-Builder shall immediately proceed as follows, regardless of any delay in determining or adjusting any amounts due under Section 19.3 (*Amount of Termination Settlement*):

- a. Stop Work as specified in the Notice of Termination for Convenience;
- b. Enter into no further subcontracts, terminate all subcontracts, and place no further orders for materials, services, or facilities, unless instructed otherwise by the Illinois Tollway because the Illinois Tollway has determined that the continuation of any such subcontract is necessary in order to mitigate damages;
- c. Settle outstanding liabilities and claims arising out of such termination of subcontracts, and provide to the Illinois Tollway the appropriate lien waivers from the subcontractors;
- d. Transfer and deliver to the Illinois Tollway or its designee, as directed by the Illinois Tollway: (i) possession and control of the Project; and (ii) all right, title and interest of Design-Builder in and to: (a) the Work in process, completed Work, supplies and other materials produced or acquired for the Work terminated; (b) the RFC documents and all other completed or partially completed drawings

(including plans, elevations, sections, details and diagrams), specifications, records, reports, books, samples, information and other Work Product that would have been required to be furnished to the Illinois Tollway if the Work had been completed; and (c) all intellectual property developed specifically for the Project; provided, however, that in the event of such transfer, Design-Builder shall not be liable for any warranties for Work which has not achieved Final Acceptance nor shall Design-Builder have any liability with respect to any design materials produced with respect to the Project;

- e. Complete performance in accordance with the Contract Documents of all Work not terminated, if any; and
- f. Take all action that may be necessary, or that Illinois Tollway may direct, for the protection and preservation of the property related to the Contract Documents that is in the possession of Design-Builder and in which Illinois Tollway has or may acquire an interest.

19.5 Termination for Cause by Illinois Tollway

Upon the occurrence or continuance of the events described in Article 20 (*Default*) (“Events of Default”), and the Design-Builder’s failure to cure the Event of Default within the period of time specified in this Contract, the Illinois Tollway shall have the right to terminate the Contract for cause. Such termination will be affected by delivery of a written (“Notice of Termination for Cause”) from the Illinois Tollway to the Design-Builder. The Notice of Termination for Cause will specify the date or dates upon which the termination will take effect. Termination for Cause shall not relieve the Design-Builder or the Surety of responsibility for the Work performed prior to termination or for the performance of that Work in accordance with the Specifications and other Contract Documents. Upon Termination for Cause, Design-Builder shall not be entitled to compensation for any Work other than that completed prior to the date termination takes effect. If the Contract is terminated for grounds that are later determined not to justify a Termination for Cause, such termination shall be deemed to constitute a Termination for Convenience pursuant to Section 19.1 (*Termination for Convenience by Illinois Tollway*).

19.6 Effects of Termination for Cause

A Termination for Cause shall have the same effects outlined under Section 19.4 (*Effects of Notice of Termination for Convenience*). All costs, fees and expenses incurred by the Illinois Tollway, together with the cost of completing the Work under Contract, may be deducted from any monies due to Design-Builder. Such costs and expenses shall include not only the cost of completing the Work, but also losses, damages, Liquidated Damages, liens claims filed with the Illinois Tollway, expenses (including attorneys’ fees and expenses), costs incurred by the Illinois Tollway in connection with any substitute procurement for the Project or the defense of claims arising from Design-Builder’s default. In the event that such costs, fees and expenses shall exceed the amount of money due to Design-Builder, Design-Builder shall be liable therefore and shall promptly pay to the Illinois Tollway the amount of such excess.

20 DEFAULT

20.1 Events of Default

Each of the following constitutes an Event of Default by Design-Builder:

- a. Failure to begin the Work in accordance with an NTP issued by the Illinois Tollway;
- b. Failure to provide a sufficient number of skilled workers or Equipment;
- c. Failure to supply the materials required by the Contract Documents;
- d. Failure to comply with applicable Governmental Approvals, or Legal Requirements;
- e. Failure, without cause, to timely pay for labor, Equipment, materials, or property in accordance with agreements with subcontractors, Suppliers and Utility Companies;
- f. Failure to make payment to the Illinois Tollway of any undisputed amounts owing to the Illinois Tollway under this Contract when such payment is due;
- g. Failure to prosecute the Work with promptness and diligence to ensure that the Work is completed by the Contract Completion Deadline(s), as such deadlines may be adjusted;
- h. Failure to comply with or perform or cause to be performed any of the material terms, conditions, provisions, or requirements of the Contract;
- i. Repeated violations of the same or similar Contract terms, conditions, provisions, or requirements, whether or not such violations are cured or cease to exist;
- j. Failure to achieve Substantial Completion or Final Acceptance by the applicable Completion Deadline;
- k. Failure to perform the Work in accordance with the Contract Documents, including conforming to applicable standards set forth in the design and construction of the Project;
- l. Failure or refusal to correct, remove, and replace Nonconforming Work;
- m. Suspending, ceasing, stopping or abandoning the Work without the Illinois Tollway's authorization or under other circumstances expressly authorized in the Contract documents;

- n. Failure, after Work is suspended, stopped, or ceased due to an event preventing performance, to resume Work within the time specified by the Illinois Tollway in Section 18.3 (*Notice and Order of Suspension*);
- o. Failure to comply with a written suspension order issued in accordance with Article 18 (*Suspension of Work*);
- p. Failure to timely cure or correct all matters underlying or giving rise to the issuance of a written suspension order;
- q. Making a false, materially misleading or materially inaccurate representation or warranty in or in relation to the Contract Documents or in or any certificate, schedule, report, instrument or other document delivered by or on behalf of Design-Builder to the Illinois Tollway pursuant to the Contract Documents;
- r. Failing to disclose material information in or in relation to the Contract Documents or any certificate, schedule, report, instrument or other document delivered by or on behalf of Design-Builder to the Illinois Tollway pursuant to the Contract Documents;
- s. Entry of any final judgment holding Design-Builder or any Guarantor liable for an amount in excess of \$ 100,000.00 based on a finding of intentional or reckless misconduct or violation of state or federal False Claims Act laws;
- t. After exhaustion of all rights of appeal, any disqualification, suspension or debarment (distinguished from ineligibility due to lack of financial qualifications);
- u. Entry by (i) Design-Builder, (ii) Design-Builder Related Entities, or (ii) any affiliate of Design-Builder or Design-Builder Related Entities (as “affiliate” is defined in 29 CFR § 3.2 or successor regulation of similar import) into any agreement for voluntary exclusion from bidding, proposing or contracting with any federal or state department or agency;
- v. Making or attempting to make or suffering a voluntary or involuntary assignment or transfer of all or any portion of this Contract in violation of Section 27.3 (*Assignment*);
- w. Admission of insolvency, bankruptcy, inability to pay debts as they become due, or applying for or consenting to the appointment of a trustee, custodian or receiver for Design-Builder;
- x. Institution of bankruptcy, reorganization, insolvency or liquidation proceedings, proceedings under Title 11 of the United States Code, or other proceedings for relief under any bankruptcy law or similar law for the relief of debtors are instituted by or against the Design-Builder (other than bankruptcy proceedings instituted by the Design-Builder against third parties) and, if instituted against the Design-Builder, are consented to or are not dismissed, stayed, or otherwise nullified within 30 Calendar Days after such institution;

- y. Use of the Project or Airspace or any portion thereof in violation of this Contract, the Technical Provisions (Book 2), Governmental Approvals or Legal Requirements (except violations of Legal Requirements by Persons other than Design-Builder);
- z. Persistent trespassing on private property.

20.2 Cure Periods for Events of Default

The events described in (i), (q), (s), (t), (u), (v), (x), and (w) shall not be subject to a cure period. For all other events described in Section 20.1 (*Events of Default*), the Design-Builder will have thirty (30) days from written notice to commence to cure the event of default.

20.3 Declaration of Default

In the event of a default, as defined in Section 20.1, the Illinois Tollway will issue a written “Notice of Design-Builder Default” to Design-Builder. If, Design-Builder fails to timely cure the Event of Default described in said Notice to the satisfaction of the Illinois Tollway or fails to provide reasonable assurance to Illinois Tollway that it will do so within an agreed timeframe, the Illinois Tollway may pursue the following rights and remedies:

- a. Terminate the Contract for cause in accordance with Section 19.5 (*Termination for Cause by Illinois Tollway*);
- b. Suspend the Contract for cause in accordance with Section 18.2 (*Suspension for Cause*);
- c. Call upon the Surety to complete the Work in accordance with the terms of the Contract; or
- d. Take over the Work, or any part thereof, including any or all materials and Equipment within the Site as may be suitable and acceptable, and complete the Work by or on its own; or
- e. Enter into a new Contract for the completion of the Work, or any part thereof, which was to be performed by the Design-Builder under the Contract.

The Illinois Tollway’s remedies under this Article 20 (*Default*) are not exclusive and are in addition to any other remedies legally available to Illinois Tollway.

20.4 Notice to Surety

The Illinois Tollway shall have the right, upon the occurrence of any of the conditions set forth in Section 20.1 (*Events of Default*) above, and regardless of whether or not Design-Builder is declared in default and/or terminated, to communicate with Design-Builder’s Surety and, in accordance with the provisions of the Performance Bond, compel such Surety to complete the Work in accordance with the Contract Bonds.

21 DAMAGES

21.1 Failure to Meet Completion Deadlines

Design-Builder acknowledges the unique nature of the Project and acknowledges that it is an essential part of the Illinois Tollway's highway system. Design-Builder understands, acknowledges and agrees that any delay in meeting the Substantial Completion Deadline or the Final Acceptance Deadline ("Completion Deadlines"), which are set forth in Article 4 (*Time Within Which Project Shall Be Completed*), will result in damages to the Illinois Tollway and the traveling public that are uncertain and difficult to quantify as well as substantial inconvenience. Accordingly, in the event of such delay, Design-Builder agrees to pay Liquidated Damages as set forth below:

Milestone	Amount of Liquidated Damages
Failure to meet Substantial Completion Deadline	\$ 10,500.00 per day until the date Design-Builder achieves Substantial Completion, as demonstrated by the Illinois Tollway's completion of the MA Process confirming that Substantial Completion has been met
Failure to meet Final Acceptance Deadline	\$ 5,250.00 per day until the date Design-Builder achieves Final Acceptance, as demonstrated by the Illinois Tollway's completion of the MA Process confirming that Final Acceptance has been met.

The fact that the Illinois Tollway has agreed to accept Liquidated Damages as compensation for damages associated with any delay in meeting a Completion Deadline shall not preclude the Illinois Tollway from pursuing any and all other legal rights and remedies relative to the delay, except that the Illinois Tollway agrees not to exercise such other rights and remedies if (i) the Current Contract Schedule, demonstrates that Design-Builder is capable of meeting such Completion Deadline within one hundred eighty (180) days after the Completion Deadline, and (ii) Design-Builder diligently performs the Work in accordance with said schedule. For the avoidance of doubt, the Current Contract Schedule is the most recent schedule approved by the Illinois Tollway, prior to any adjustments resulting from the subject delay.

No Liquidated Damages will be assessed during Winter if the Work is not completed within the approved Completion Deadline(s) and the Work extends beyond the normal construction season; provided that, the Illinois Tollway may continue to assess Liquidated Damages once Winter has ended and until the approved Completion Deadline(s) have been met.

21.2 Unavailability or Non-Performance of Key Personnel

Design-Builder acknowledges the importance of its Key Personnel, as described in Book 2, Section 2.1.1.1 (*Key Personnel*). During and throughout the term of the Contract, job duties and responsibilities of Key Personnel shall not be delegated to others except with the express approval of Illinois Tollway.

Design-Builder acknowledges and agrees that the Illinois Tollway will suffer significant, substantial and uncertain losses (i) if Design-Builder changes or substitutes any of the individuals identified as Key Personnel in the Proposal for reasons other than the voluntary or involuntary termination of employment, retirement, death, disability or incapacity of any such individual, and (ii) if individuals filling certain Key Personnel positions (a) are not performing the roles identified for those individuals in Book 2, Section 2.1.1.1 (*Key Personnel*), (b) do not maintain active involvement in the prosecution and performance of the Work, or (c) do not commit the amount of time specified in Book 2, Section 2.1.1.1 (*Key Personnel*) for the particular Key Personnel role. In the foregoing instances, upon Approval of the Illinois Tollway, in its sole discretion, Design-Builder may substitute such Key Personnel.

21.3 Lane Closures

Design-Builder acknowledges that lane closures that are unplanned or not permitted will result in damages to the Illinois Tollway and the traveling public that are uncertain and difficult to quantify in addition to causing substantial inconvenience. Thus, Design-Builder agrees to pay to the Illinois Tollway Liquidated Damages for lane closures that occur outside the time period(s) permitted in Book 2, Section 18. Liquidated Damages shall be assessed by the hour or day or incident in accordance with Book 2, Section 18 until Design-Builder is compliant. A non-permitted lane closure will cease when traffic has been restored. Restoration of traffic shall mean removal of all blockages, including the removal of all traffic control devices, signs, workers, materials, and Equipment from the roadway, thereby allowing all lanes to be opened safely to public traffic.

Design-Builder acknowledges and agrees that (i) it is difficult or impossible to determine with precision the amount of damages that would be or might be incurred by Illinois Tollway as a result of a lane closure not permitted by Book 2, Section 18, and (ii) the occurrence of such lane closure shall result in the liquidated damages in accordance with Book 2, Section 18.

21.4 Failure to Rectify Critical Nonconforming Work

Design-Builder acknowledges that if Critical Nonconforming Work, as described in Section 5.9 (*Nonconforming Work*), is not immediately rectified, the Illinois Tollway will suffer significant and substantial losses that are difficult to quantify, public safety may be impacted, and the traveling public will experience uncertain loss, harm and inconvenience. Accordingly, if Design-Builder fails to rectify Critical Nonconforming Work within the time periods prescribed in any notice issued by the Illinois Tollway or fails to facilitate satisfactory progress of efforts to complete rectification of Critical Nonconforming Work, Design-Builder agrees to pay the Illinois Tollway a sum of \$500/hour until the Critical Nonconforming Work is rectified to Illinois Tollway's satisfaction. No Liquidated Damages will accrue if the Critical Nonconforming Work is corrected within one (1) hour of notice issued by the Illinois Tollway.

21.5 Non-Compliance With Special Provisions for DBE Participation and SDVOSB/VOSB Participation

The Illinois Tollway may impose liquidated damages or exercise such other remedies for Design-Builder's failure to comply with Exhibit 6 (*Special Provision for Design-Build Projects for Disadvantaged Business Enterprise Participation*) Exhibit 7 (*Special Provision for Design-Build Projects for Veteran Small Business Participation*). The amount of liquidated damages assessed shall be based on the damage to the Illinois Tollway from the Design-Builder's lack of good faith supporting documentation and/or failure to meet other requirements of the Special Provision in an amount up to the monetary difference between the amount committed to by the Design-Builder in its DBE Utilization Plan and the amount actually paid to DBEs.

21.6 Other Matters Relating to Damages

21.6.1 Reasonableness of Liquidated Damages

Design-Builder understands and agrees that the events described under this Article 21 (*Liquidated Damages*) will result in significant impact to the travelling public, the actual costs of which are impractical or difficult to ascertain, and that the Parties have instead agreed to stipulate to the amounts of Liquidated Damages payable under these sections. Any Liquidated Damages payable in accordance with this Article 21 are in (*Liquidated Damages*) the nature of liquidated damages, not a penalty, and Design-Builder agrees that the amounts of such Liquidated Damages are reasonable under the circumstances existing as of the date of execution of the Contract. Design-Builder waives any right or ability to contest the validity or enforceability of the Liquidated Damages provisions in this Contract or the amount of Liquidated Damages assessed or recoverable by Illinois Tollway on the grounds that such Liquidated Damages amounts are void as penalties or are not reasonably related to actual damages.

21.6.2 Offset

The Illinois Tollway shall have the right to deduct any damages owed by Design-Builder under this Article 21 (*Liquidated Damages*) from any amounts the Illinois Tollway owes the Design-Builder.

21.6.3 No Waiver

The following events shall not act as a waiver of the Illinois Tollway's right to receive Liquidated Damages or any related rights or remedies available to the Illinois Tollway:

- a. Permitting or requiring Design-Builder to continue and finish the Work or any part thereof after the Substantial Completion Deadline or Final Acceptance Deadlines;
- b. Inaction by the Illinois Tollway relative to the unavailability or non-performance of a Key Personnel;
- c. Subsequently authorizing a non-permitted lane closure; and

- d. Acceptance of Critical Nonconforming Work that is rectified outside the time periods prescribed in a notice issued by Illinois Tollway.

22 INDEMNIFICATION

22.1 General Indemnification

Design-Builder shall indemnify, defend and hold harmless the Illinois Tollway, its directors, officers, employees, agents, and the State of Illinois (individually, “Indemnified Party,” collectively, “Indemnified Parties”) from any and all third-party claims, suits, causes of action, judgments, administrative proceedings, investigations, penalties, fines, damages, demands, losses, liabilities, costs and fees (including reasonable attorneys’ fees), of every nature or description, arising from, growing out of, connected with or on account or in consequence of any of the matters set forth in Section 22.2 (*Indemnifications by Design-Builder*). The obligations set forth in this paragraph shall not be limited by or as a result of any insurance maintained by Design-Builder or required by the Contract Documents. Defense counsel retained by Design-Builder to defend Illinois Tollway shall be subject to approval of the Illinois Attorney General. Nothing herein contained shall be construed as prohibiting the Illinois Tollway, its directors, officers, agents, or employees from defending, through the selection and use of their own agents, attorneys and experts, any claims, actions or suits brought against them. Design-Builder shall be liable for the costs, fees and expenses incurred in such defense. In the event any such claim, suit or action is asserted, the Illinois Tollway is authorized to withhold from any monies due or to be paid to Design-Builder, the value of such claim, suit or action, as determined by the Illinois Tollway, until such suit, claim or action is settled or finally resolved by judicial determination.

22.2 Indemnifications by Design-Builder

Subject to Section 22.4 (*Exclusions*), Design-Builder’s obligations under Section 22.1 (*General Indemnification*) apply to any and all claims, suits, causes of action, judgments, administrative proceedings, investigations, penalties, fines, damages, demands, losses, liabilities, costs and fees (including reasonable attorneys’ fees), whether sounding in contract, tort, equity or otherwise, arising from, growing out of, connected with, or on account or in consequence of any of the following:

- a. Work to be performed under this Contract;
- b. The breach or alleged breach of any of the Contract Documents by Design-Builder;
- c. Use of unacceptable materials in performing the Work;
- d. Acts or omissions pertaining to the obligation to safeguard the Work;
- e. Violation of any law, ordinance, order, rule, requirement or decree by Design-Builder or its agents, employees or subcontractors;
- f. The failure or alleged failure by Design-Builder or its agents, employees or subcontractors to comply with Governmental Approvals, any applicable Environmental Laws or other Legal Requirements (including laws regarding management of Hazardous Materials);

- g. Any alleged patent or copyright infringement or other allegedly improper appropriation or use of, or release of trade secrets, patents, proprietary information, know-how, copyright rights or inventions in performance of the Work, or arising out of any use in connection with the Project of methods, processes, designs, information, or other items furnished or communicated to the Illinois Tollway pursuant to this Contract, Design-Builder's Statement of Qualifications or Proposal; provided, however, that this indemnity shall not apply to any infringement to the extent resulting from the Illinois Tollway's failure to comply with specific written instructions regarding use provided to the Illinois Tollway by Design-Builder;
- h. The actual or alleged culpable act, error, omission, negligence, or misconduct of Design-Builder or its agents or subcontractors in or associated with performance of the Work;
- i. Any and all claims by any governmental or taxing authority claiming taxes based on gross receipts, purchases or sales, or the use of any property or income of the Design-Builder with respect to any payment for the Work made to or earned by Design-Builder;
- j. The failure or alleged failure by Design-Builder to pay sums due for the work or services of subcontractors, laborers, or Suppliers, provided that the Illinois Tollway has paid all undisputed amounts owing to Design-Builder with respect to such work;
- k. Any actual or threatened Design-Builder Release of Hazardous Material;
- l. A claim or assertion by a Separate Contractor that: (i) Design-Builder failed to cooperate reasonably with the Separate Contractor, so as to cause disruption, delay or loss, except where Design-Builder was not in any manner engaged in performance of the Work, or (ii) Design-Builder interfered with or hindered the progress or completion of work being performed by such contractor, to the extent such claim arises out of the actual or alleged culpable act, error, omission, negligence, breach or misconduct of Design-Builder or its agents or subcontractors;
- m. Design-Builder's performance of, or failure to perform, the obligations under any utility agreement or any dispute between Design-Builder and a Utility Owner arising out of Utility Adjustment Work;
- n. Design-Builder's or its agent's or subcontractors' (i) breach of or failure to perform an obligation that the Illinois Tollway owes to a third person, including Governmental Person, under Legal Requirements or under any agreement between the Illinois Tollway and a third person, where the Illinois Tollway has delegated performance of the obligation to Design-Builder under the Contract Documents, or (ii) acts or omissions, or the acts of omissions of Design-Builder's agents or subcontractors, that render the Illinois Tollway unable to perform or abide by an obligation that the Illinois Tollway owes to a third person, including Governmental Persons, under any agreement between the Illinois Tollway and a third person, where the agreement was disclosed or known to Design-Builder;
- o. The fraud, bad faith, arbitrary or capricious acts, or violation of Legal Requirements by Design-Builder, its agents or subcontractors in or associated with the performance of the Work;

- p. Inverse condemnation, trespass, nuisance or similar taking of or harm to real property by reason of:
 - (i) the failure of Design-Builder its agents or subcontractors to comply with requirements of the Contract Documents, the Project Management Plan or Governmental Approvals respecting control and mitigation of construction activities and construction impacts, (ii) the negligence or intentional misconduct of Design-Builder its agents or subcontractor, or (iii) the actual physical entry onto or encroachment upon another's property by Design-Builder its agents or subcontractor; or

- q. Errors, inconsistencies or other defects in construction or maintenance of the Project or of Utility Adjustment Work.

22.3 Design Defects

Subject to Section 22.4 (*Exclusions*), Design-Builder shall release, indemnify and hold harmless the Illinois Tollway from and against any and all third-party claims, suits, causes of action, judgments, administrative proceedings, investigations, penalties, fines, damages, demands, losses, liabilities, costs and fees, including any injury to or death of persons or damage to or loss of property (including damage to utility facilities), and including attorneys', accountants' and expert witness fees and costs, to the extent arising out of, relating to or resulting from Errors or Omissions in the Design Documents, except to the extent such Errors or Omissions are inherent in the prescriptive specifications and Directive Designs of this Contract, including the Directive Design in Book 2, Section 1.7 (*Directive Design*).

22.4 Exclusions

Design-Builder's indemnity and other obligations under this Article 22 (*Indemnification*) shall not extend to any loss, damage or cost to the extent that such loss, damage or cost was caused by the negligence or willful misconduct of an Indemnified Party or its agents, employees, or independent contractors directly responsible to the Indemnified Party.

22.5 Responsibility of Design-Builder for Certain Hazardous Material

It is recognized that Illinois Tollway may assert that certain third persons or parties may rightfully bear the ultimate legal responsibility for any and all Hazardous Material which may currently be present on the Site. It is further recognized that certain state and federal statutes provide that individuals and firms may be held liable for damages and claims relating to Hazardous Material under such doctrines as joint and several liability and/or strict liability.

Except for Hazardous Materials for which Design-Builder is responsible:

- a. Design-Builder shall not be required to execute any hazardous waste manifests as a "generator," and

- b. Hazardous Materials encountered in the performance of the Work shall be treated in accordance with Book 2, Section 4 (*Environmental*).

22.6 No Effect on Other Rights

The foregoing obligations shall not be construed to negate, abridge or reduce other rights or obligations which would otherwise exist in favor of an Indemnified Party.

23 RELATIONSHIP OF THE PARTIES

23.1 Communications and Interactions

23.1.1 Definition of Relationship

Nothing herein contained or contained in the Contract Documents is intended to or may be construed as creating or establishing a partnership, joint venture, or agency relationship between Design-Builder and the Illinois Tollway. The Illinois Tollway and Design-Builder are, and shall remain, independent entities, and with respect to all rights conferred and obligations imposed by the Contract Documents, Design-Builder is and shall remain an independent contractor relative to the Illinois Tollway. However, for the mutual benefit of the Parties, Design-Builder and Illinois Tollway shall endeavor to cooperatively identify and resolve critical and other Project-related issues.

In implementing and managing the Project, the Illinois Tollway and Design-Builder shall:

- a. Engage in early and regular communications;
- b. Establish and maintain a relationship of shared trust, equity, and commitment;
- c. Identify, quantify, and support attainment of mutual goals;
- d. Work together to develop strategies for using risk-management tools and concepts;
- e. Engage in cooperative decision making;
- f. Seek to avoid negative impacts and Disputes by attempting to resolve potential problems at the lowest level of responsible management, including by developing a process for escalating field-level issues, such as by informally use of the Issue Resolution Ladder as disputes arise to resolve them before they materialize into Claims and Disputes;
- g. Develop a plan for periodic joint evaluation based on mutually agreed goals;
- h. Hold quarterly meetings to preserve a cooperative relationship and the benefits of same; and
- i. Establish periodic joint evaluations of the cooperative process and the attainment of mutual goals.

23.1.2 Management Team

To support implementation of and adherence to the provisions of Section 23.1.1 (*Definition of Relationship*), the Illinois Tollway and Design-Builder shall establish a Management Team for the

Project, which team shall consist of Project-level contributors and decision-makers from the Illinois Tollway and Design-Builder.

The members of the Management Team shall:

- a. Create a charter establishing mutual goals and a plan for both Parties to maintain the cooperative relationship;
- b. Identify the appropriate persons in each Party's organization who shall fill the roles of reviewers for the Issue Resolution Ladder described in Section 23.2.2 (*Issue Resolution Ladder*);
- c. Identify the documentation, in addition to that specifically required by this Contract, that the Parties desire for review of a Dispute at each level of the Issue Resolution Ladder described in Section 23.2.2;
- d. Document lessons learned regarding the Work, to be formally submitted at Final Acceptance.

While the provisions of this Section 23.1 (*Communications and Interactions*) are not part of the Dispute Resolution Procedures contemplated under this Contract, the Parties shall exhaust the use of the cooperative relationship when addressing potential Disputes and prior to proceeding to the Dispute Resolution Procedures set forth in Section 23.2 (*Dispute Resolution Procedures*).

23.1.3 Cost Responsibility

The agreed costs of all Management Team meetings shall be shared equally by the Illinois Tollway and Design-Builder. All other costs associated with Management Team meetings or the cooperative process shall be borne separately by the Party that incurs the costs.

23.2 Dispute Resolution Procedures

23.2.1 General Requirements

The Parties agree that:

- a. A matter that is identified as a Dispute elsewhere in this Contract and is explicitly made eligible for resolution hereunder, and which is not resolved through the cooperative process described above, shall be resolved pursuant to the multi-step Dispute Resolution Procedures described in the below-provisions of this Article 23 (*Relationship of Parties*);
- b. Any Party desiring to initiate a Dispute shall furnish a Notice of Dispute to the other Party in accordance with Section 27.9 (*Notices*) within thirty (30) calendar days after occurrence of the event or circumstances underlying the Dispute.
- c. The party bringing a Dispute shall bear the burden of proving the same, subject to any provisions of this Contract expressly assigning the burden of proof otherwise;

- d. Resolution of Disputes pursuant to this Section 23.2 (*Dispute Resolution Procedures*) shall be final, binding, conclusive, and enforceable as set forth in this Section 23.2 (*Dispute Resolution Procedures*); and
- e. The Issue Resolution Ladder, Claims process, and mediation processes are mandatory contractual procedures and remedies. Failure to comply with either or both of such processes in all material respects as to any Dispute or Claim shall bar prosecution or further prosecution of the Dispute or Claim.

23.2.2 Issue Resolution Ladder

The Issue Resolution Ladder process shall be initiated within thirty (30) calendar days from receipt of the Notice of Dispute.

The Issue Resolution Ladder is the process for elevating Disputes from the Project’s field level to various levels of review, up to the Parties’ executive management if necessary, with defined time limits for each level of review. The goal of the Issue Resolution Ladder is to resolve each Dispute as close to the field level as possible while recognizing the requirement to escalate the Dispute to the next level of review before the Dispute impacts cost or schedule.

The Issue Resolution Ladder shall consist of three levels of review and corresponding time periods to review, as follows:

Level of Review	Design-Builder Reviewer	Illinois Tollway Reviewer	Time Limit
1	Project Level Technical Lead	Construction Manager	7 days, or any lesser period mutually approved
2	Project Manager	Project Manager	7 days, or any lesser period mutually approved
3	Executive Officer	Deputy Program Manager	7 days, or any lesser period mutually approved

If reviewers at any level of the Issue Resolution Ladder cannot resolve a Dispute within the applicable time period set forth in this Section 23.2.2 (*Issue Resolution Ladder*), they may mutually elect to continue efforts to resolve the Dispute at their level, provided that either reviewer shall have the unilateral right after the applicable time period to elevate the Dispute to the next level of review in the Issue Resolution Ladder.

23.2.3 Claims

As a condition to the right to bring a Dispute to the Claims process provided in Exhibit 9 (*Claims Process*), the Party bringing the Dispute must demonstrate that it has attempted to resolve the Dispute directly with the other Party using the Issue Resolution Ladder.

Design-Builder may file a Claim for an adjustment to the Contract Price or to a Completion Deadline following the process outlined in Exhibit 9 (*Claims Process*). The written decision of the Illinois Tollway's Chief Engineering Officer or Chief of Engineering for Program Implementation shall be the final administrative action of the Illinois Tollway. Full compliance with the Claims process shall be a condition precedent to pursuing further Dispute Resolution Procedures under this Section 23.2 (*Dispute Resolution Procedures*).

23.2.4 Mediation

Only upon completion of the requirements of Sections 23.1 (*Communications and Interactions*), 23.2.2 (*Issue Resolution Ladder*) and 23.2.3 (*Claims*), and failure to resolve a Dispute through the Claims process, either Party shall have the right to initiate mandatory mediation proceedings for the unresolved Dispute. Mandatory mediation is a condition precedent to bringing the Dispute to arbitration or litigation.

Mandatory mediation proceedings shall take place as follows:

- a. The Party bringing the Dispute to mediation shall do so by serving the other Party with a written "Notice to Initiate Mediation Proceedings." Such notice must be delivered within thirty (30) days following the conclusion, without resolution, of the Claims process in accordance with Exhibit 9 (*Claims Process*). Failure to timely provide Notice to Initiate Mediation Proceedings shall constitute a waiver of any further right to pursue the Dispute and all issues related thereto, including relief for the Dispute and issues related thereto. Either Party may, in its sole discretion, grant an extension of the thirty (30) day period; provided, however, that no such extension may be in excess of thirty (30) additional days beyond the original 30 -day period.
- b. Within twenty-one (21) days after providing the Notice to Initiate Mediation Proceedings, the Parties shall mutually select a qualified individual to serve as mediator. The mediator shall have at least ten (10) years of experience serving as a mediator, shall have at least five (5) years of experience mediating design or construction disputes, as applicable based on the nature of the Dispute, and preferably shall be an attorney licensed to practice law in Illinois.
- c. If the Parties are unable to agree upon an individual to serve as mediator, the Parties shall enlist the assistance of a nationally-recognized mediation service to select a mediator. All mediators must meet the foregoing qualifications.
- d. The Parties shall use diligent efforts to convene and conclude mediation proceedings within sixty (60) days after the mediator is appointed or at such other date and time as may be set by the mediator or agreed to by the Parties. Each Party shall have the right to present to the mediator such materials and documentation as it may deem relevant to the Dispute, and each Party shall provide to the mediator such further materials, documentation, and information as the mediator may reasonably

request. The Parties shall meet within five (5) days after appointment of the mediator to determine whether and to what extent the Parties will share the materials submitted to the mediator with each other. The Parties may enlist the mediator to assist in determining a process, if any, for sharing such materials. Each Party shall bring to the mediation a representative with authority to mediate and settle the Dispute, and such representative shall actively participate in the mediation process, provided that a proposed settlement may be subject to approval by the Illinois Tollway's Board of Directors and all settlements shall be subject to review by the Illinois Attorney General as to form and constitutionality. Each Party may bring to the mediation such other persons as it chooses; provided, however, that neither Party shall be represented at the mediation by legal counsel unless both Parties consent thereto in advance of the mediation.

- e. Each Party shall make good faith efforts to resolve the Dispute through mediation.
- f. The Parties will share equally the expenses of the mediation. Each Party shall bear its own costs of preparing for and participating in the mediation.
- g. If the Parties do not resolve the Dispute during mediation or within thirty (30) days following the conclusion of the mediation, the Party bringing the Dispute may proceed to either arbitration in accordance with Section 23.2.5 (*Binding Arbitration*) or litigation in accordance with Section 23.2.6 (*State Court Litigation; Jurisdiction and Venue*), as applicable.

23.2.5 Binding Arbitration

Solely after complying with and completing (and only after complying with and completing) the requirements in Sections 23.2.2 (*Issue Resolution Ladder*), 23.2.3 (*Claims*) and 23.2.4 (*Mediation*) relative to a Dispute, either Party shall have the right to initiate binding arbitration proceedings relative to the Dispute if the Dispute remains unresolved and may include in such arbitration proceedings any other unresolved Dispute(s) that qualifies for binding arbitration, so long as all unresolved Dispute(s) arise fairly contemporaneously and arise out of the same set of acts, events or circumstances and so long as the (i) cumulative amount in controversy does not exceed not exceeding \$ 4.5 million , and (ii) any cumulative Completion Deadline adjustment in controversy does not exceed not exceeding one hundred twenty (120) days. The arbitrator shall have no power, whatsoever, to make an aggregate arbitration award for such unresolved Disputes in excess of the foregoing caps. Any such arbitration proceeding shall be de novo.

The arbitration process shall proceed as follows:

- a. The Party electing to bring an unresolved Dispute(s) to arbitration shall serve upon the other Party a written request for mandatory and binding arbitration;
- b. The Parties shall then seek to agree upon the arbitration process and any other matter pertinent to arbitration and not otherwise addressed in this Section 23.2.5 (*Binding Arbitration*);

- c. If the Parties cannot agree upon an arbitration process within thirty (30) days after service of the written request for mandatory and binding arbitration, the Party seeking arbitration shall be entitled to compel arbitration by serving a demand for arbitration in accordance with American Arbitration Association (“AAA”) Construction Industry Arbitration Rules. The scope and extent of discovery shall be determined by the arbitrator in accordance with AAA rules, and the arbitration hearing shall be conducted in DuPage County, Illinois, unless the Parties agree otherwise;
- d. Notwithstanding any contrary AAA rule, the arbitrator shall render a decision by applying the pertinent provision(s) of the Contract Documents and applicable law to the relevant facts and circumstances of the Dispute(s). The arbitrator shall issue a written determination of the Dispute(s), including the reasoning therefor, within thirty (30) days of the arbitration hearing, unless the timeframe in the AAA rules provide otherwise;
- e. If any Party acts to unreasonably delay or prevent arbitration, the other Party shall be entitled to enforce the arbitration provisions of this Contract solely by petitioning the Circuit Court of the Eighteenth Judicial District located in DuPage County, Illinois;
- f. Notwithstanding any contrary AAA rule, the arbitrator shall not have the power to award punitive damages, cancel the Contract, reform the Contract Documents, or void any limitations on liability contained in this Contract; and
- g. The Parties will share equally the expenses of the arbitrator and the arbitration forum. Each Party shall bear its own costs of preparing for and participating in the arbitration.

The decision of the arbitrator shall be binding, and judgment upon the award rendered by the arbitrator may be entered in the Circuit Court of the Eighteenth Judicial District Court located in DuPage County, Illinois and thereafter in any such jurisdiction as may be necessary to enforce the judgment.

23.2.6 State Court Litigation; Jurisdiction and Venue

Either Party shall have the right to file suit relative to an unresolved Dispute exclusively in the Circuit Court of the Eighteenth Judicial District located in DuPage County, Illinois; provided that (a) the Parties have completed and exhausted the requirements of Sections 23.2.2 (*Issue Resolution Ladder*), 23.2.3 (*Claims*), and 23.2.4 (*Mediation*) and (b) the unresolved Dispute is not eligible for arbitration.

Notwithstanding any otherwise applicable statute of limitations, Design-Builder shall file any such suit within the earlier of (i) six months after the Illinois Tollway’s final administrative action, (ii) one year after completing the Work upon which the Claim is based, or (iii) one year after the anticipated date of Substantial Completion.

23.2.7 Evidentiary Impact of the Issue Resolution Ladder, Claims Process or Mediation

For the purposes of state court litigation, the Issue Resolution Ladder process, Claims process and mediation process shall be considered settlement negotiations, subject to any and all protection from disclosure or use in evidence afforded by Illinois law; provided, however, that any settlement

executed by the Parties shall not be considered confidential and may be disclosed, used as evidence and judicially enforced.

Except in connection with actions to enforce a settlement agreement resolving a Dispute, anything said and any admission made during the Issue Resolution Ladder process, Claims process, or in connection with mediation are not admissible in evidence for any purpose, including impeachment, and disclosure of such statements shall not be compelled by an arbitrator or in any civil action.

No document or copy thereof that is prepared for the purpose of or pursuant to the Issue Resolution Ladder process, Claims process or mediation shall be admissible in evidence in any arbitration or civil action, and disclosure of such document or copy shall not be compelled in any arbitration or civil action.

No stenographic or other record of the Issue Resolution Ladder process, Claims process or mediation session(s) shall be made, except to memorialize a settlement agreement.

To the extent permitted by applicable law, all conduct, statements, promises, offers, views, and opinions, oral or written, made, by any Party or agent, during the Issue Resolution Ladder process, Claims process or mediation are confidential and, where appropriate, are to be considered work product and privileged. Except as otherwise provided by law, such conduct, statements, promises, offers, views, and opinions shall not be subject to discovery and shall not be admissible for any purpose, including impeachment, before an arbitrator or in any civil action involving the Parties.

The limitations of this Section 23.2.7 (*Evidentiary Impact of the Issue Resolution Ladder, Claims Process or Mediation*) do not affect the discovery or admissibility of facts, opinions, oral or written statements, documents or other information existing or developed independent of the Issue Resolution Ladder process, Claims process or mediation, and the discoverability or admissibility of such matter is not changed or affected as a result of its use in the Issue Resolution Ladder process, Claims process, or mediation.

The Parties may waive any of the confidentiality provisions of this Section 23.2.7 (*Evidentiary Impact of the Issue Resolution Ladder, Claims Process or Mediation*) by written waiver or consent to disclosure.

23.2.8 Continuation of Work and Payments During Dispute

Failure by the Illinois Tollway to pay any amount in dispute shall not alleviate, diminish or modify in any respect Design-Builder's obligation to perform under the Contract Documents, including Design-Builder's obligation to achieve the Completion Deadline(s) and perform all Work in accordance with the Contract Documents. At all times while any Dispute is pending or during Dispute Resolution Procedures, Design-Builder and all Design-Builder-Related Entities shall continue with the performance of the Work and their obligations (including any disputed Work or obligations) diligently and without delay or slow down, in accordance with the Contract Documents, except to the extent enjoined by order of court or otherwise specified or directed by the Illinois Tollway. Design-Builder acknowledges that it shall be solely responsible for the results of any delaying actions or inactions that Design-Builder or any Design-Builder-Related Entity takes during the pendency of resolution of a Dispute relating to the Work even if Design-Builder's

position in connection with the dispute ultimately prevails. In addition, during the pendency of resolution of a dispute relating to the Work, the Parties shall continue to comply with all provisions of the Contract Documents, the Governmental Approvals, and applicable Legal Requirements.

During the course of any and all Dispute Resolution Procedures, the Illinois Tollway will continue to timely pay Design-Builder all undisputed amounts due and owing under this Contract.

Any Dispute regarding payment shall be resolved pursuant to this Article 23 (*Relationship of the Parties*). Pending resolution of such Dispute, Design-Builder shall proceed as directed by the Illinois Tollway. Upon resolution of any such Dispute, each Party shall promptly pay to the other any amount owing, subject to the restrictions governing payment under the Contract Documents.

23.2.9 Attorney's Fees

Except as expressly provided otherwise in this Contract, each Party shall bear its own attorney's fees and expenses incurred in connection with any Dispute Resolution Procedures, regardless of the outcome.

24 ACCEPTANCE OF PROJECT

24.1 Punch List

Design-Builder will develop a Punch List. The Punch List shall consist of Work items that: (i) are not completed by the Design-Builder, or other Work items, that upon the review of the Illinois Tollway, are not completed in conformance with the Contract Documents, (ii) shall solely consist of items of Work requiring correction, fine-tuning, or adjustment, (iii) shall not contain any items of Work that Design-Builder is commencing or performing for the first time, regardless of whether Design-Builder contends that the item of Work does not need to be commenced to achieve the conditions to Substantial Completion, and (iv) shall not contain any Nonconforming Work for which an NCR has been issued.

The Punch List will be managed through the WBPM. The schedule for preparation and updating of the Punch List shall be consistent and coordinated with the Pre-Final and Final Walk Throughs described in Section 24.2.2 (*Substantial Completion Process*) to verify that the Design-Builder has achieved Substantial Completion, as set forth in Section 24.2.1 (*Substantial Completion*).

The Illinois Tollway may, but is not obligated to, participate in the development of the Punch List. If the Illinois Tollway participates in the development of the Punch List, each party shall have the right to add items to the Punch List, but neither shall remove any item added by the other party without such other party's express permission.

Design-Builder shall immediately commence work on the Punch List items and diligently prosecute such work to completion, consistent with the Contract Documents, within the time period to be set forth in the Project Management Plan and in any case before the Final Acceptance Deadline.

24.2 Substantial Completion

24.2.1 Substantial Completion

The Illinois Tollway will complete the MA process and confirm that Substantial Completion has been met on the date that all the following conditions precedent have been met at all locations on the Site:

- a. Design-Builder has completed all Work (except for items only included in the Punch List and in the requirements for Final Acceptance in Section 24.3 (*Final Acceptance*));
- b. Design-Builder has certified that the Work has been performed in accordance with the requirements of the Contract Documents;
- c. Design-Builder has received all applicable Governmental Approvals required for Project use;

- d. Design-Builder has furnished to the Illinois Tollway certifications from Design-Builder’s Design Manager, in form and substance satisfactory to Illinois Tollway, certifying conformity of the Design Documents with the requirements of the Contract Documents;
- e. Design-Builder has furnished to the Illinois Tollway certifications from Design-Builder’s Project Manager, in form and substance satisfactory to Illinois Tollway, certifying conformity of the construction with the Design Documents;
- f. Design-Builder has furnished to the Illinois Tollway certifications, in form and substance satisfactory to the Illinois Tollway, certifying that there is no outstanding Nonconforming Work (including incomplete Work) necessary to be corrected as a condition to Substantial Completion, other than those identified on the Punch List;
- g. Design-Builder has submitted the final DBE and SDVOSB/VOSB Utilization Plans and each Plan has been approved by the Illinois Tollway. If it is determined the Design-Builder will not meet the DBE goal(s), the Design-Builder must submit a detailed written comprehensive explanation with its Final Utilization Plan for Illinois Tollway approval. This explanation shall demonstrate sufficient evidence that the Design-Builder has exhausted all Good Faith Efforts and has determined that despite anticipated proposed Good Faith Efforts for Disadvantaged Business Participation and the efforts documented quarterly throughout the project it would be insufficient to meet the DBE goals;
- h. Design-Builder has ensured that the Project may be used without damage to any other property on or off the Site, and without injury to any Person;
- i. Design-Builder has obtained all applicable third-party approvals relating to the Work (including Utility Owners as required under any applicable Utility Agreements and Book 2, Section 6 (*Utilities*) and other affected third parties), and all third parties have completed all work that involves obligations by Design-Builder (including Utility Owners under any applicable Utility Agreements and Book 2, Section 6 (*Utilities*) and third parties as identified in other Book 2 Sections); and
- j. Design-Builder has ensured that the Project is fully opened to traffic and that no further work is required which would involve any lane or shoulder closure except, at the Illinois Tollway’s sole discretion: (i) maintenance, (ii) final cleanup, (iii) turf establishment, (iv) final pavement markings landscape planting items, and (v) items that will be included in the Punch List.

24.2.2 Substantial Completion Process

The procedure for confirming Substantial Completion is as follows:

- a. Design-Builder shall provide written notice to the Illinois Tollway through the WBPM (“Notice of Substantial Completion”) with not less than thirty (30) days’ prior notification of the date Design-Builder determines it will satisfy all conditions to Substantial Completion;

- b. During such thirty (30) day period, the Illinois Tollway will conduct a Pre-Final Walk Through of the Project and its components, a review of the applicable RFC Documents and Construction Documents, surveys, testing and such other investigation as may be necessary to evaluate whether Design-Builder has achieved Substantial Completion;
- c. Design-Builder shall provide the Illinois Tollway with a Punch List prior to the Pre-Final Walk Through. A revised Punch List shall be prepared and provided to the Illinois Tollway after the Pre-Final Walk Through;
- d. If such Pre-Final Walk Through, surveys, tests and/or other investigations disclose that the Work does not meet the requirements of the Contract Documents, the Illinois Tollway will advise Design-Builder as to Nonconforming Work necessary to be corrected as a condition to Substantial Completion and Nonconforming Work which may be corrected as Punch List items;
- e. Design-Builder shall initiate the WBPM Milestone Acceptance process when Design-Builder determines it has satisfied all conditions to Substantial Completion; and
- f. Within ten (10) business days after expiration of the 30-day period, the Illinois Tollway will either: (i) complete the WBPM Milestone Acceptance process confirming that Substantial Completion has been completed; or (ii) notify the Design-Builder, setting forth, as applicable, why the Project has not reached Substantial Completion. If the Illinois Tollway and the Design-Builder cannot agree as to the date of Substantial Completion, such dispute shall be resolved according to the dispute resolution procedures in Article 23 (*Relationship of the Parties*).

24.3 Final Acceptance

24.3.1 Conditions to Final Acceptance

Design-Builder shall provide to the Illinois Tollway a written notice notifying the Illinois Tollway of Final Acceptance in accordance with Section 24.3.2 (*Final Acceptance Process*) when all of the following have occurred. Final Acceptance shall not relieve Design-Builder from any of its continuing obligations hereunder, or constitute any assumption of liability by Illinois Tollway:

- a. The Illinois Tollway has completed the WBPM Milestone Acceptance process confirming Substantial Completion has been achieved;
- b. All Punch List items have been completed to the satisfaction of Illinois Tollway;
- c. The Illinois Tollway has received all RFC documents, Construction Documents, Design Documents, As-Built Documents, right-of-way record maps, surveys, material certifications, test data, intellectual property, warranties, special insurance bonds (such as roofing bonds), O&M Manual, and other deliverables required under the Contract Documents;
- d. The Illinois Tollway has received releases from agreements between the Design-Builder and third parties including owners of private property adjacent to the Site and off-Site dumps;

- e. A final audit of the documentation in (c) has been performed and the results are satisfactory;
- f. All special tools, Equipment, furnishings and supplies purchased by and/or used by Design-Builder as provided in the Contract Documents have been delivered to the Illinois Tollway and all replacement spare parts have been purchased and delivered to Illinois Tollway free and clear of liens;
- g. All materials incorporated into the Work have been certified;
- h. All of Design-Builder's and subcontractors' personnel, supplies, Equipment, waste materials, rubbish and temporary facilities have been removed from the Site, Design-Builder has restored and repaired all damage or injury arising from such removal to the satisfaction of Illinois Tollway and the Site is in good working order and condition;
- i. Design-Builder has furnished to the Illinois Tollway certifications, in form and substance satisfactory to Illinois Tollway, certifying that there are no outstanding non-conformances;
- j. All of Design-Builder's other obligations under the Contract Documents (other than obligations which by their nature are required to be performed after Final Acceptance as determined by Illinois Tollway) have been satisfied in full or waived in writing by the Illinois Tollway;
- k. Design-Builder has delivered to the Illinois Tollway a certification representing that there are no outstanding Claims of Design-Builder or claims or stop notices of any subcontractor, Supplier, laborer, Utility Company or other Persons with respect to the Work, other than:
 - (i) Any previously submitted unresolved Claims of Design-Builder and any claims or stop notices of a subcontractor, Supplier, laborer, Utility Company or other Persons being contested by Design-Builder (in which case the certification shall include a list of all such matters with such detail as is requested by the Illinois Tollway and, with respect to all claims or stop notices of a subcontractor, Supplier, laborer, Utility Company, and other Person, shall include a representation by Design-Builder that it is diligently and in good faith contesting such matters by appropriate legal proceedings that shall operate to prevent the enforcement or collection of the same); and
 - (ii) Amounts owed to Utility Companies or Railroad Owners and/or Operators that have not yet been invoiced to Design-Builder, provided that Design-Builder has made diligent efforts to obtain invoices therefor.
- l. Design-Builder has paid in full all Liquidated Damages that are owing to the Design-Builder pursuant to this Contract and are not the subject of a dispute, and has provided to the Illinois Tollway security for the full amount of Liquidated Damages that may then be the subject of an unresolved dispute;
- m. There exist no uncured Events of Default other than those that would be cured by the achievement of Final Acceptance.

24.3.2 Final Acceptance Process

Design-Builder shall provide the Illinois Tollway with thirty (30) days' notice of the date when Design-Builder expects to satisfy all conditions to Final Acceptance.

During the thirty (30) day period following receipt of such notification, Design-Builder and the Illinois Tollway will meet and confer and exchange information as necessary to determine whether the Design-Builder will satisfy the conditions to Final Acceptance at the close of the thirty (30) day period.

During such thirty (30) day period, the Illinois Tollway will conduct a Final Walk Through of the Punch List items to the extent not previously completed, a review of the As-Built Documents, and such other investigation as may be necessary to evaluate whether the Design-Builder has satisfied the conditions to Final Acceptance.

Design-Builder shall provide the Illinois Tollway with a final Punch List prior to the Final Walk Through. The final Punch List shall consist of items that are either physically completed or supported by documentation to indicate why no further action was taken.

Within ten (10) Business Days after expiration of such 30-day period, the Illinois Tollway will either: (i) complete the WBPM Milestone Acceptance process confirming that Final Acceptance has been reached for the Project; or (ii) notify Design-Builder setting forth, as applicable, why Final Acceptance has not been achieved. If the Illinois Tollway and Design-Builder cannot agree as to the date of Final Acceptance, such issue shall be a dispute eligible for resolution according to the dispute resolution procedures in Article 23 (*Relationship of the Parties*).

24.4 Opening of Sections of Project to Traffic

24.4.1 Plan for Opening to Traffic

The Baseline Schedule and Current Contract Schedule shall set forth Design-Builder's plan for completing sections of the Project and opening them to traffic. The Illinois Tollway may request that Design-Builder expedite certain sections of the Project, and Design-Builder shall accommodate such requests to the extent that it can do so without significant disruption to its schedule or a significant change in the character of work. Notwithstanding the foregoing, if the Illinois Tollway orders Design-Builder to open portions of the Project which cannot be accommodated without significant disruption to Design-Builder's schedule or a significant increase in Design-Builder's costs, such direction shall be considered an Illinois Tollway -Directed Change.

24.4.2 Direction to Open Following Design-Builder Failure to Perform

If Design-Builder is delinquent in completing shoulders, drainage structures or other features of the Work, the Illinois Tollway may, but is not obligated to, order all or a portion of the Project opened to traffic notwithstanding such incomplete elements. Design-Builder shall then conduct the remainder of the construction operations, minimizing obstruction to traffic. Design-Builder shall not receive any added compensation due to the added costs attributable to the opening of the Project to traffic.

24.4.3 No Waiver

Opening of portions of the Project prior to Final Acceptance does not constitute Acceptance of the Work or a waiver of any provisions of the Contract Documents.

24.5 Final Payment

24.5.1 Application for Final Payment

Thirty (30) days prior to the date on which Design-Builder believes that it will meet the conditions of Final Acceptance, Design-Builder shall prepare and submit to the Illinois Tollway a proposed Application for Final Payment showing the proposed total amount due to design as of the date of Final Acceptance, including any amounts owing from approved Claims.

The Illinois Tollway will review Design-Builder's proposed Application for Final Payment, and within twenty (20) Business Days after receipt will deliver to Design-Builder any changes or corrections. Any changes or corrections made pursuant to this Section 24.5 (*Final Payment*) will be reflected in an updated payment schedule showing the amount owed to Design-Builder by applicable period.

24.5.2 Inclusions in Application for Final Payment

Before final payment is made, Design-Builder shall furnish the Illinois Tollway with the following final payment documents, which forms shall be provided to Design-Builder by the Illinois Tollway or submitted through B2gNow:

The Application for Final Payment shall include:

- a. Proposed schedule of payments;
- b. List of all outstanding Claims, stating the amount at issue associated with each such Claim;
- c. Information addressing the status of all existing or threatened claims and stop notices of subcontractors, Suppliers, laborers, Utility Owners, and/or other third parties against Design-Builder, the Illinois Tollway or the Project;
- d. Consent of any Guarantors and Sureties to the proposed payment schedule;
- e. Request for release of retainage and such other documentation as Illinois Tollway may reasonably require; and
- f. A statement that Design-Builder (i) releases Illinois Tollway from any and all Claims of Design-Builder arising from the Work, and (ii) releases and waives any claims against the Illinois Tollway, excluding only those matters identified in any Claims that have been timely delivered and are listed as outstanding in the Application for Final Payment;

- g. A sworn affidavit certifying that (i) All Work complies with the Contract Documents; (ii) Design-Builder has resolved any claims made by subcontractors, Suppliers, Utility Owners, laborers, or other third parties against Design-Builder, the Illinois Tollway or the Project, except those listed by Design-Builder in (c); (iii) Design-Builder has no reason to believe that any Person has a valid claim against Design-Builder, the Illinois Tollway or the Project that has not been communicated in writing by Design-Builder to the Illinois Tollway as of the date of the affidavit; and (iv) All Guaranties, warranties, the Payment Bond, and the Performance Bond are in full force and effect.
- h. Design-Builder's Affidavit;
- i. Design-Builder's Verified certificate;
- j. Final waiver of lien; and
- k. Any and all documentation requested by the Illinois Tollway evidencing that all sums of money due for any labor, materials, apparatus, fixtures, or machinery furnished for the purpose of such improvements have been paid, or that the person or persons to whom the payment may be due have consented to such final payment.

24.5.3 Adjustments to Final Payment

Prior applications and payments shall be subject to correction in the Application for Final Payment.

Nothing in the preceding paragraphs concerning payment shall be construed to prevent the Illinois Tollway from withholding or deducting from any partial payments or the final payment to the Design-Builder the total amount of any claims of any type or nature whatsoever which the Illinois Tollway shall have against the Design-Builder including costs to complete or remediate uncompleted Work or Nonconforming Work. Moreover, to the extent the aforementioned claims of the Illinois Tollway exceed the amount otherwise remaining to be paid to the Design-Builder under the Contract; such excess shall be immediately due and payable by the Design-Builder to the Illinois Tollway at such time as the excess is capable of calculation by the Illinois Tollway.

Claims filed concurrently with the Application for Final Payment must be otherwise timely and meet all requirements under Section 23.2.3 (*Claims*). Claims submitted prior to the Application for Final Payment that are not in dispute shall be reconciled in the Application for Final Payment.

24.5.4 Bond Against Defective Work

Before final payment is made, Design-Builder shall furnish a surety bond to the Illinois Tollway in a sum equal to five (5) percent of the final Contract amount. The bond shall be on the form furnished by the Illinois Tollway and with a surety satisfactory to the Illinois Tollway. The bond shall remain in full force and effect for a period of one (1) year. The bond period shall commence on the Contract completion date stated in the Illinois Tollway's completion of the MA Process confirming that Final Acceptance has been met.

The bond shall provide that the Design-Builder guarantees to replace for said period of one (1) year all work performed and materials furnished that were not performed or furnished according to the terms of the Contract, and make good any defects therein, regardless of cause, which have become apparent before the expiration of said period of one (1) year in accordance with Section 5.9 (*Nonconforming Work*) of this Contract.

The obligations of the Design-Builder and Surety under the bond specified in this Section 24.5 (*Final Payment*) shall not be construed as limiting, diminishing or in any way affecting the liability and obligations of the Design-Builder or Surety under the terms of the Performance and Payment Bonds, or the responsibility of Design-Builder and the Surety for performing all work according to the Contract. A copy of the form of the Bond Against Defective Work is attached as Exhibit 14 (*Bond Against Defective Work*).

24.6 Assignment of Causes of Action

Design-Builder hereby offers and agrees to assign to the Illinois Tollway all rights, title and interest in and to all causes of action it may have under Section 4 of the Clayton Act (15 U.S.C. Section 15), arising from purchases of goods, services or materials pursuant to the Contract or any subcontract. This assignment shall be made and become effective at the time the Illinois Tollway tenders final payment to Design-Builder, without further acknowledgment by the parties.

25 WARRANTY AND MAINTENANCE

25.1 Design-Builder's Warranty

Design-Builder warrants that all Work completed under the Contract, including all materials and workmanship furnished by Design-Builder and subcontractors, shall comply with the Contract and that the Work, shall be free from defects or failures for the twelve (12) month period immediately following Final Acceptance. Design-Builder does not warrant the Work against failures due to the Illinois Tollway's routine maintenance operations or due to the occurrence of acts of nature that the finished Work was not designed to withstand. The Design-Builder shall not be responsible for damages caused by negligence of parties other than the Design-Builder following Final Acceptance.

Design-Builder guarantees that after receipt of notice from the Illinois Tollway as provided herein, Design-Builder shall perform warranty work as specified in the notice and in accordance with the Illinois Tollway requirements. Design-Builder agrees to perform said work in accordance with the warranty work actions specified herein, including all necessary incidental work to (i) complete the action and restore the complete facility, and (ii) repair damage to adjoining structures caused by failure of warranted work, including but not limited to removal, engineering, material procurement, reinstallation, or replacement at Design-Builder's cost and expense. The Illinois Tollway's remedies under this Article 25 (*Warranty and Maintenance*) are not exclusive but are in addition to any other legally available remedies and remedies provided by this Contract. The additional obligations undertaken by Design-Builder to provide this warranty for the Work and to perform in accordance herewith shall be secured by the Bond Against Defective Work described in Section 24.5.4 (*Bond Against Defective Work*) and provided by Design-Builder in a form furnished by the Illinois Tollway. Such Bond shall remain in full force and effect for the duration of the warranty period.

25.2 Project Warranties

Exhibit 10 (*Project Warranties*) lists other warranties applicable to this Contract.

Design-Builder shall assemble warranties, properly executed by each of the respective manufacturers, subcontractors and suppliers in accordance with Section 105.18 of the Illinois Tollway Supplemental Specifications.

The warranty period shall commence upon the Illinois Tollway's completion of the WBPM Milestone Acceptance process confirming Final Acceptance under Section 24.3.3 (*Final Acceptance Process*).

The Illinois Tollway will notify Design-Builder of the need for corrective action. Design-Builder shall perform corrective action promptly as defined in the notification. The notification will provide for a requested start date for performance of corrective action covered by the notice, and for a number of Business Days estimated to complete the corrective action. The Illinois Tollway and Design-Builder may agree upon a start date and reasonable period of performance to define prompt completion.

Design-Builder guarantees that it shall perform the work as specified in the notification including all necessary incidental work to complete the corrective action, restore the complete facility, and repair damage to adjoining structures caused by failure of the warranted work, including but not limited to removal, engineering, material procurement, reinstallation, or replacement at Design-Builder's cost and expense.

25.3 Assignment of Warranties

If and to the extent Design-Builder obtains general or limited warranties from any subcontractor with respect to design, materials, workmanship, construction, Equipment, tools, supplies, software, services, or products or materials incorporated into the Project,

Design-Builder shall cause such warranty to be expressly extended to the Illinois Tollway and Design-Builder shall assign such warranty to the Illinois Tollway upon Final Acceptance; provided that the foregoing requirement shall not apply to standard, pre-specified manufacturer warranties of mass-marketed materials, products (including software products), Equipment or supplies where the warranty cannot be extended to Illinois Tollway using commercially reasonable efforts. To the extent that any subcontractor warranty would be voided by reason of Design-Builder's negligence in incorporating materials or Equipment in the construction work, Design-Builder shall be responsible for promptly correcting such omission.

26 DOCUMENTS AND RECORDS

26.1 Escrowed Proposal Documents

26.1.1 EPD

Escrowed Proposal Documents (“EPD”) consist of all documentary information used in preparation of Design-Builder's Price Proposal.

Prior to execution of the Contract, Design-Builder shall convene and coordinate a meeting with the Illinois Tollway to submit the EPD. Failure to schedule a meeting and submit the EPD may result in cancellation of the Contract.

At the scheduled meeting, authorized representatives of the Illinois Tollway and Design-Builder will review the EPD for accuracy and completeness. Should a discrepancy exist between the EPD and the Price Proposal, Design-Builder shall furnish Illinois Tollway with any other needed information within three (3) Business Days. Upon determining that the EPD appear to be complete, the EPD will be stored in accordance with the Illinois Tollway’s storage policies.

26.1.2 Supplemental EPD

Supplemental EPD consist of all documentary information used in preparation of Design-Builder's Request for Change Proposal and the resulting Change Order.

Prior to the storing of Supplemental EPD, the Illinois Tollway may, conduct a review of any EPD to determine whether it is complete. If the Illinois Tollway determines that Supplemental EPD is incomplete, the Illinois Tollway may request that Design-Builder supply information to make the Supplemental EPD complete. Design-Builder shall provide all such information within three (3) working days of the request.

26.1.3 Confidentiality

The EPD and Supplemental EPD shall remain property of Design-Builder, subject to the Illinois Tollway’s right to review, access, and store the EPD and Supplemental EPD as provided herein.

Design-Builder shall mark any confidential information within the EPD and Supplemental EPD that the Design-Builder believes is confidential and exempt from disclosure under, including but not limited to, the Illinois Freedom of Information Act, 50 ILCS 140/1, et seq., Illinois Trade Secrets Act, 765 ILCS 1065/1, et seq., and Innovation for Transportation Infrastructure Act, 630 ILCS 10/40. To the extent that any information within the EPDs is in fact confidential, the Parties will cooperate in the exercise of any exemption available under Law.

26.1.4 Review of EPD

The EPD and Supplemental EPD shall be available during business hours for joint review by Design-Builder and the Illinois Tollway in connection with the negotiation of pricing of a Change Order, resolution of Claims or Disputes or an audit under Section 26.3.1 (*Audit and Inspection Rights*) (if the EPD or Supplemental EPD are the subject of an audit). The Illinois Tollway shall be entitled to review all or any part of the EPD and Supplemental EPD in order to satisfy itself

regarding the applicability of the individual documents to the matter at issue and shall be entitled to make and retain copies of such documents as it deems appropriate in connection with any such matters. The foregoing shall in no way be deemed a limitation on Illinois Tollway's discovery rights with respect to such documents.

26.1.5 Representation and Warranty

Design-Builder represents and warrants that the EPD and Supplemental EPD contain all of the information used in the preparation of its Proposal or Request for Change Order and resulting Change Order and agrees that no other Proposal or Request for Change Order or Change Order preparation information will be considered in resolving Disputes or Claims. Design-Builder also agrees that the EPD are not part of the Contract and that nothing in the EPD or Supplemental EPD shall change or modify the Contract.

26.1.6 Contents of EPD and Supplemental EPD

The EPD and Supplemental EPD shall, at a minimum, clearly detail how the components of the Price Proposal, or the pricing in the Request for Change Order and resulting Change Order were respectively determined and shall be adequate to enable a complete understanding and interpretation of how Design-Builder arrived at such pricing. The EPD and Supplemental EPD shall be provided, as follows:

- a. All Work shall be separated into subitems as required to present a complete and detailed estimate of all costs. For each item of Work, the EPD or Supplemental EPD shall itemize any related amounts not included in the stated price for such item such as any amount allocated for contingency;
- b. Crews, Equipment, quantities and rates of production shall be detailed;
- c. Estimates of costs shall be further divided into Design-Builder's usual cost categories such as mobilization, direct labor, repair labor, Equipment ownership and operation, expendable materials, permanent materials and subcontract costs as appropriate. Plant and Equipment and indirect costs are also detailed in Design-Builder's usual format. Design-Builder's allocation of plant and Equipment, indirect costs, contingencies, mark-up and other items to each direct cost item shall be clearly identified;
- d. The estimated costs of the Performance and Payment Bonds and the insurance premiums for each coverage required to be provided by Design-Builder under Article 12 (*Insurance*) shall be itemized; and
- e. All assumptions, quantity takeoffs, rates of production, Design-Builder internal Equipment rental rates and progress calculations, quotes from subcontractors (including Suppliers), memoranda, narratives and all other information used by Design-Builder to arrive at the Price Proposal or Change Order price, as applicable, shall be included.

26.1.7 Costs

Any costs Design-Builder may incur in fulfilling these requirements under Section 26.1 (*Escrowed Proposal Documents*) shall be considered incidental to the Contract.

26.2 Subcontractor Pricing Documents

Design-Builder must require each subcontractor to submit to Design-Builder a copy of all documents used in determining its subcontract price. Design-Builder must require subcontractor to submit the documents immediately prior to executing the relevant subcontract, change order, or amendment. The documents will be held in the same manner as the EPD and Supplemental EPD and will be accessible by the Illinois Tollway and the Design-Builder, on terms substantially similar to those contained in this Section 26.3 (*Project Records*).

26.3 Project Records

26.3.1 Audit and Inspection Rights

Design-Builder shall maintain in the State of Illinois, for a minimum of five (5) years from the latter of the date of completion of the Contract or the date of final payment under the Contract, adequate books, records, and supporting documents, from an accounting system maintained in accordance with generally accepted accounting principles, to verify the amounts, recipients, uses and methods of all disbursements of funds made in conjunction with the Contract. The five (5) year record maintenance period shall be extended for the duration of any audit in progress at the time of that period's expiration. Design-Builder shall, at its own expense, make such records available in a timely manner for inspection and audit (including copies and extracts of records) as required by the Auditor General and other State Auditors, Chief Procurement Officer, Illinois Attorney General, and the Illinois Tollway's Inspector General, Internal Audit Department or other Illinois Tollway agents at all reasonable times and without prior notice.

The obligations of this Section 26.3.1 (*Audit and Inspection Rights*) shall be explicitly included in any subcontracts or agreements between Design-Builder and any subcontractors or suppliers of goods and services to the extent that those subcontracts or agreements relate to fulfillment of Design-Builder's obligations to the Illinois Tollway. Such subcontractor shall be required to comply with the terms and conditions of this Section 26.3.1 (*Audit and Inspection Rights*), and the Illinois Tollway shall be entitled to enforce a breach of that provision of the subcontract.

Any audit adjustment will be submitted on a final invoice for any underpayment or overpayment to Design-Builder. Design-Builder shall promptly reimburse the Illinois Tollway for any overpayment or the Illinois Tollway, at its option, may deduct any overpayment from any funds due Design-Builder, whether those funds are due under this Contract or other contracts to which Design-Builder is a party, either directly with the Illinois Tollway or as a subcontractor. If Design-Builder fails or refuses to reimburse Illinois Tollway for an overpayment, Design-Builder shall be responsible for all costs, including internal and external attorney's fees, incurred by the Illinois Tollway to collect such overpayment.

Failure to maintain or make available the books, records, and supporting documents required by this Section 26.3.1 (*Audit and Inspection Rights*) shall establish a presumption in favor of the

Illinois Tollway for recovery of any funds paid by the Illinois Tollway under the Contract for which adequate books, records and supporting documentation are not available to support a disbursement.

Design-Builder shall reimburse the Illinois Tollway for the total costs of an audit that identifies significant findings that would benefit the Illinois Tollway, including but not limited to reasonable attorney's fees and other expenses. Significant findings for the purposes of this provision shall be identified as an amount in excess of \$50,000 in aggregate of the audit report or findings of material performance or compliance deficiencies.

If Design-Builder fails to comply with these requirements, Design-Builder may be disqualified or suspended from bidding or proposing on or working on future contracts.

26.3.2 Audit of Time and Materials Work

Where any Work is performed on a time and materials basis, such examination and audit rights shall include all books, records, documents and other evidence and accounting principles and practices sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of such Work. If an audit indicates Design-Builder has been over credited under a previous item of Work, that over credit will be credited against the final payment.

26.3.3 Change Order Pricing Data

For cost and pricing data submitted in connection with pricing Change Orders, unless such pricing is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the public, or prices set by law or regulation, the Illinois Tollway has the right to examine all books, records, documents and other data of Design-Builder related to the negotiation of or performance of Work under such Change Orders for the purpose of evaluating the accuracy, completeness and currency of the cost or pricing data submitted. The right of examination shall extend to all documents deemed necessary by the Illinois Tollway to permit adequate evaluation of the cost or pricing data submitted, along with the computations and projections used therein.

26.3.4 Claims Audit

All Claims filed against Illinois Tollway shall be subject to audit at any time following the filing of the Claim. The audit may be performed by employees of the Illinois Tollway or by an auditor under contract with Illinois Tollway. No notice is required before commencing any audit. Design-Builder, subcontractors or their agents shall provide adequate facilities, acceptable to Illinois Tollway, for the audit during normal business hours. Design-Builder, subcontractors and their agents shall cooperate with the auditors. Failure of Design-Builder, subcontractors or their agents to maintain and retain sufficient records to allow the auditors to verify all or a portion of the Claim or to permit the auditors access to the books and records of Design-Builder, subcontractors or their agents shall constitute a waiver of the Claim and shall bar any recovery thereunder. At a minimum, the auditors shall have available to them the following documents:

- a. Daily time sheets and supervisor's daily reports;
- b. Union agreements;
- c. Payroll records including tax, insurance, welfare and benefit records;
- d. Invoices and requisitions for materials;
- e. Cost distribution worksheet for materials;
- f. Equipment records (list of company Equipment, rates, etc.);
- g. Invoices from vendors, rental agencies, subcontractors and agents;
- h. Subcontractor and agent payment certificates;
- i. Cancelled checks (payroll and vendor);
- j. Job cost report;
- k. Job payroll ledger;
- l. General ledger;
- m. Cash disbursement journal;
- n. Financial statements for all years reflecting operations under the Contract for all period relevant to the Claim;
- o. Depreciation records for all Design-Builder's Equipment;
- p. If a source other than depreciation records is used to develop costs for Design-Builder's internal purposes in establishing the actual cost of owning and operating Equipment, all such other source documents;
- q. All documents including pricing books and Price Proposal documents which relate to each and every Claim together with all documents which purport to support the amount of extra compensation as to each Claim; and
- r. Worksheets used to prepare the Claim or establish the cost components for items of the Claim, including but not limited to labor, benefits and insurance, materials, Equipment, performance bond,

all subcontractor documents verifying the time of the individuals involved, the hours for the individuals and the rates for the individuals.

Full compliance by Design-Builder with the provisions of this Section 26.3 (*Project Records*) is a contractual condition precedent to Design-Builder's right to seek relief under Section 23.2.3 (*Claims*). Design-Builder represents and warrants the completeness and accuracy of all information it or its agents provide in connection with this Section 26.3.4 (*Claims Audit*).

26.3.5 Retention of Records

Design-Builder shall maintain all records and documents relating to the Contract (including copies of all original documents delivered to Illinois Tollway) at Design-Builder's office in the State until three (3) years after the earlier to occur of (a) the date Final Acceptance is achieved, or (b) the termination date. If Approved by the Illinois Tollway's Project Manager, photographs, microphotographs or other authentic reproductions may be maintained instead of original records and documents. Design-Builder shall notify the Illinois Tollway where such records and documents are kept.

Notwithstanding the foregoing, all records which relate to Claims being processed or actions brought under the Dispute Resolution Procedures shall be retained and made available until such actions and Claims have been finally resolved. Records to be retained include all books and other evidence bearing on Design-Builder's costs and expenses under the Contract Documents. Design-Builder shall make these records and documents available for audit and inspection to Illinois Tollway, at Design-Builder's office, at all reasonable times, without charge, and shall allow the Illinois Tollway to make copies of such documents (at no expense to Design-Builder).

26.4 Freedom of Information Act

26.4.1 Applicability of Act

Design-Builder acknowledges and agrees that all records, documents, drawings, plans, specifications and other materials in Illinois Tollway's possession or those to which Illinois Tollway is entitled to access, including materials submitted by Design-Builder, provided to or required to be provided to the State are subject to the Illinois Freedom of Information Act, 50 ILCS 140/1 et seq. Design-Builder shall fully cooperate with Illinois Tollway's efforts to fulfill its obligation to comply with the FOIA. Design-Builder shall be solely responsible for all determinations made by it under such Act. Design-Builder is advised to contact legal counsel concerning such act and its application to Design-Builder.

26.4.2 Confidential Materials

Under no circumstances shall the Illinois Tollway be responsible for or liable to Design-Builder, or any other Person, for disclosing any materials provided to Illinois Tollway by Design-Builder or that Design-Builder causes to be provided to Illinois Tollway, whether the disclosure is required by law, by court order, or occurs through inadvertence, mistake or negligence on the part of Illinois Tollway.

26.4.3 Design-Builder to Defend Against Disclosure Request

In the event of litigation concerning the disclosure of any material submitted by Design-Builder to the Illinois Tollway, the Illinois Tollway's sole involvement will be as a stakeholder retaining the material until otherwise ordered by a court, and Design-Builder shall be fully responsible for otherwise prosecuting or defending any action concerning the materials at its sole cost and risk.

27 MISCELLANEOUS

27.1 Contract Amendments

Except to the extent expressly provided otherwise in this Contract, the Contract Documents may be amended only by a written instrument duly executed by the Parties or their respective successors or assigns and executed, as to form and constitutionality, by the Illinois Attorney General.

27.2 Independent Contractor

Design-Builder is an independent contractor, and nothing contained in the Contract Documents shall be construed as constituting any relationship with the Illinois Tollway other than that of independent contractor.

In no event shall the relationship between the Illinois Tollway and Design-Builder be construed as creating any relationship whatsoever between the Illinois Tollway and Design-Builder's employees. Neither Design-Builder nor any of its employees is or shall be deemed to be an employee of the Illinois Tollway. Except as otherwise specified in the Contract Documents, Design-Builder has sole authority and responsibility to employ, discharge, and otherwise control its employees and has complete and sole responsibility as a principal for its agents, for all subcontractors and for all other Persons that Design-Builder or any subcontractor hires to perform or assist in performing the Work.

27.3 Assignment

Design-Builder shall not, without the prior written consent of the Illinois Tollway (which consent may be withheld or denied for any reason), assign, or transfer the Contract Documents or any portion or part of the Work or the obligations required by the Contract Documents.

27.4 Successorship

The Illinois Tollway and Design-Builder intend that the provisions of the Contract Documents are binding upon the parties, their employees, agents, heirs, successors and assigns.

27.5 Governing Law

The Contract and all Contract Documents shall be governed by the laws of the State of Illinois, without regard to conflict of law principles.

27.6 Severability

If any provision or any part of a provision of the Contract Documents shall be finally determined to be invalid, illegal, or otherwise unenforceable pursuant to any applicable legal requirements, such determination shall not impair or otherwise affect the validity, legality, or enforceability of the remaining provision or parts of the provision of the Contract Documents, which shall remain in full force and effect as if the unenforceable provision or part were never included.

27.7 No Waiver

The failure of either Design-Builder or Illinois Tollway to insist, in any one or more instances, on the performance of any of the obligations required by the other Party under the Contract Documents shall not be construed as a waiver or relinquishment of such obligation or right with respect to any performance or future performance.

27.8 No Third-Party Beneficiary Status

Nothing under the Contract Documents shall afford any third party, including members of the public, third-party beneficiary status hereunder, as the Parties do not intend that the Contract confer or be interpreted to confer or create any rights, remedies, obligations or responsibilities in any third parties.

27.9 Notices

Notices under the Contract Documents shall be in writing and: (a) delivered personally; (b) sent by certified mail, return receipt requested; (c) sent by a recognized overnight mail or courier service, with delivery receipt requested; or (d) sent by email communication followed by a hard copy with receipt confirmed by telephone, to the addresses set forth below:

All notices, correspondence, and other communications to Design-Builder shall be delivered to the following address or as otherwise directed by Design-Builder's Authorized Representative:

All notices, correspondence, and other communications to the Illinois Tollway shall be marked as regarding the Project and shall be delivered to the following address or as otherwise directed by the Illinois Tollway's Authorized Representative:

Tim Ersfeldt
Project Manager
tersfeldt@getipass.com
2700 Ogden Ave.,
Downers Grove, IL 60515

In addition, copies of all notices regarding disputes, suspension, termination, and default shall be delivered to the following:

Kathleen R. Pasulka-Brown
General Counsel
2700 Ogden Ave.,
Downers Grove, IL 60515

Notices shall be deemed received when actually received in the office of the addressee (or by the addressee if personally delivered) or when delivery is refused, as shown on the receipt of the U.S. Postal Service, private carrier or other Person making the delivery. Notices delivered by email communication shall be deemed received when actual receipt at the email address of the addressee is confirmed. Notwithstanding the foregoing, notices sent or received after 5:00 p.m. (measured as

of the prevailing time in Chicago, Illinois) shall be deemed sent or received on the first Business Day following delivery.