

## GENERAL TERMS AND CONDITIONS

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## **ARTICLE 1**

### **(Compliance with Laws, Standards, and Specifications)**

#### **1.1 Compliance with Laws**

Contractor shall comply with all applicable Laws in its performance of the Work. Contractor shall keep fully informed of all applicable Laws that may affect the conduct of the services provided by Contractor. If any discrepancy or inconsistency is discovered between this Contract and any Law, Contractor shall immediately report such discrepancy or inconsistency to VPRA's Contract Administrator in writing.

#### **1.2 Violations of Law**

If Contractor violates Laws that govern the Project, Contractor shall take prompt action to correct or abate such violation and shall indemnify and hold VPRA harmless against any fines and/or penalties that result from such violation. Contractor shall also indemnify and hold VPRA harmless against any third-party claims, suits, awards, actions, causes of action or judgments, including attorney's fees and costs incurred thereunder, that arise from Contractor's violation of Laws.

#### **1.3 Referenced Standards and Specifications**

Work that must comply with a specified standard established by reference to a described publication must comply with the latest edition or revision of that standard in effect on the date of submission of the Final Binding GMP Proposal, including any amendments in effect on that date, unless otherwise specified in the Contract Documents or otherwise directed by VPRA. In the event of a conflict among any standards, criteria, requirements, conditions, procedures, specifications or other provisions applicable to the Project established by reference to a described manual or publication within a Contract Document or set of Contract Documents, the standard, criterion, requirement, condition, procedure, specification or other provision offering higher quality or better performance will apply, unless VPRA approves otherwise in writing. VPRA may direct Contractor to comply with an updated standard after submission of the Final Binding GMP and Contractor may follow the process for a VPRA-Directed Change if Contractor contends that following the updated standard entitles Contractor to an adjustment of the Contract Price or a Completion Deadline.

#### **1.4 Standards for Approvals**

In all cases where approvals, acceptances, or consents are required from VPRA or Contractor, these approvals, acceptances, or consents may not be withheld unreasonably except in cases where a different standard (such as sole discretion) is specified, and may not be unreasonably delayed if no response time is specified. In cases where sole discretion is specified, VPRA's decision is binding and mandatory and Contractor shall have no right to an increase in the Contract Price or adjustment of a Completion Deadline, and VPRA's decision will not be subject to dispute resolution or other legal challenge.

## **ARTICLE 2**

### **(Interpretation of Contract Documents)**

#### **2.1 Interpretation, Generally**

In the Contract Documents, where appropriate:

- (a) the singular includes the plural and vice versa;



- (b) references to statutes or regulations include all statutory or regulatory provisions consolidating, amending, or replacing the statute or regulation referred to;
- (c) the words “including,” “included,” “includes,” and “include” are deemed to be followed by the words “without limitation”;
- (d) unless the context requires otherwise, in phrases involving performance by a Person, the words “will,” “must” or “shall” indicate a requirement imposed on the Person;
- (e) unless otherwise indicated, references to sections, appendices, and exhibits are to the document that contains such references;
- (f) words not otherwise defined that have well-known technical or construction industry meanings are used in accordance with such recognized meanings;
- (g) references to Persons include their respective permitted successors and assigns and, in the case of Governmental Persons, Persons succeeding to their respective functions and capacities; and
- (h) words of any gender include each other gender where appropriate.

The parties intend that the Contract Documents be interpreted in harmony so as to avoid conflict, with words and phrases interpreted in a manner consistent with construction industry standards.

## **2.2 Computation of Periods**

References to “days” or “Days” in the Contract Documents mean Calendar Days unless otherwise specified. Unless stated otherwise, the counting of Days shall not include the day triggering the applicable time period, but shall include the last day. For example, if a Party must respond within 3 days of receipt of notice, and notice is received on a Monday, Tuesday shall be day 1, Wednesday day 2, and Thursday day 3, with the response due on Thursday.

If the date to perform any act or give any notice specified in the Contract Documents (including the last date for performance or provision of notice “within” a specified time period) falls on a non-Working Day, the act or notice may be timely performed on the next succeeding day that is a Working Day. Notwithstanding this provision, requirements contained in the Contract Documents relating to actions to be taken in the event of an emergency, requirements contained in Sections 14.12.2 and 19.2.3 of these General Terms and Conditions, and any other requirements for which it is clear that performance is intended to occur on a non-Working Day, will be required to be performed as specified, even though the date in question may fall on a non-Working Day.

## **2.3 Omission of Details**

Contractor shall not take advantage of any apparent error in the Contract Documents. If it appears that the Work to be done or any matter related to the Work is not sufficiently detailed or explained in the Contract Documents, Contractor shall request in writing from VPRA further written explanations as may be necessary and will conform to the explanation provided. Contractor shall promptly notify VPRA of any error that it discovers in the Contract Documents and must obtain specific instructions in writing from VPRA regarding any such error before proceeding with the affected Work. The fact that the Contract Documents omit or misdescribe any minor details of any Work that are necessary to carry out the intent of the Contract Documents, or that are customarily performed under similar circumstances, will not relieve Contractor from performing the omitted Work or the misdescribed details of the Work, and they must be performed as if fully and correctly stated and described in the Contract Documents, without entitlement to adjustment of the Contract Price or a Completion Deadline except as specifically allowed under Article 14 of these General Terms and Conditions.

## **2.4 Discrepancies**

Contractor acknowledges that, prior to the execution of this Contract, it has carefully reviewed the Contract Documents for errors, omissions, conflicts or ambiguities (each, a “Discrepancy”), and is not aware of any Discrepancies as of the execution of this Contract. If the Contractor becomes aware of a Discrepancy, the Contractor shall immediately notify VPRA’s Project Manager of that Discrepancy in writing. VPRA’s Project Manager shall promptly resolve the Discrepancy in writing. Contractor’s failure to promptly notify VPRA of an apparent discrepancy will be deemed a waiver of Contractor’s right to seek an adjustment of the Contract Price and Substantial Completion Date due to the discrepancy.

## **2.5 Legal Review**

Contractor 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 of the Contract Documents. If there is an ambiguity in or dispute regarding the interpretation of the Contract Documents, the Contract Documents will not be construed against the Person who prepared them; instead, other rules of interpretation shall be used.

# **ARTICLE 3**

## **(Performance Standards; Warranties and Representations)**

### **3.1 General Obligations of Contractor**

Contractor shall perform the following obligations, in addition to meeting all other requirements of the Contract Documents:

- (a) Obtain all Governmental Approvals, except those the Contract Documents identify as to be obtained by others;
- (b) Comply with all conditions imposed by all Governmental Approvals, and undertake all actions required by and necessary to maintain the Governmental Approvals in full force and effect. This includes implementing all environmental mitigation measures required by the Contract Documents, except where the Contract Documents expressly assign responsibility for those measures to another Person;
- (c) Provide such assistance as is reasonably requested by VPRA in dealing with any Person, and in prosecuting and defending lawsuits in any and all Project-related matters. This may include providing information and reports regarding the Project, executing declarations, and attending meetings and hearings.
- (d) Comply with all requirements of all Laws.
- (e) Cooperate with VPRA and Governmental Persons with jurisdiction over the Project in the review and oversight of the Project and other Work-related matters.
- (f) Supervise and be responsible to VPRA for acts and omissions of all Contractor-Related-Entities, as though all such entities (and Persons employed by those entities) were directly employed by Contractor.
- (g) Pay all applicable taxes, fees, charges or levies, whether direct or indirect, relating to, or incurred in connection with, performing the Work.

## **3.2 Contractor's Performance Requirements**

### **3.2.1 Performance of Work**

Contractor shall provide all Materials and perform all Work and services necessary to achieve Substantial Completion and Final Acceptance on or before the applicable Completion Deadlines, except for the Materials, work, and services that are the responsibility of others as specifically provided in the Contract Documents. The costs of all such Materials, services, and efforts are included in the Contract Price, except for changes in the Work as provided in Article 14 of these General Terms and Conditions.

Without limiting the foregoing, Contractor shall perform or cause to be performed all Work to complete construction of the Project consistent with the Contract Documents. Contractor shall endeavor to develop, implement, and maintain, a spirit of cooperation, collegiality, and open communication with VPRA so that the goals and objectives of each are clearly understood, potential problems are resolved promptly, and, upon completion, the Project is deemed a success by the Parties.

### **3.2.2 Performance as Directed**

Contractor shall, at all times, comply with all provisions of the Contract Documents. Contractor shall perform the Work diligently, without delay, and in compliance with VPRA's decisions and orders, including during the course of a dispute between the Parties. The existence of a dispute between the Parties shall not be grounds for Contractor to stop Work on any aspect of the Project.

### **3.2.3 Management of the Work**

Contractor shall be responsible for completely supervising and directing the Work under this Agreement and all Subcontractors using its best skill and attention. Subcontractors who perform Work under this Contract shall be responsible to the Contractor, and Contractor agrees that it is as fully responsible for the acts and omissions of its Subcontractors as it is for the acts and omissions of its own employees. Contractor shall manage the services provided under this Contract until all services have been completed in accordance with the Contract Documents and Final Acceptance of the Project has been achieved. Contractor understands and acknowledges that the Work may be only part of the Project and that the Project may include the construction of other structures or other construction activities on the same Site. Contractor shall conduct all its activities so as not to interfere with the construction of, or operations within or from, other structures on the Site.

**3.2.3.1** Contractor shall proceed with construction in accordance with the approved Construction Documents.

**3.2.3.2** Except to the extent that the Contract Documents expressly identify VPRA obligations related to the Work, Contractor shall provide through itself or Subcontractors, subject to any minimum or maximum concerning the amount of Work that may be self-performed, the necessary supervision, labor, inspection, testing, start-up, material, equipment, machinery, temporary utilities and other temporary facilities (whether or not expressly stated or depicted in the Contract Documents or Construction Documents) to permit Contractor to complete construction of the Project consistent with the Contract Documents.

**3.2.3.3** Contractor is responsible for securing the Site until VPRA issues a Notice of Substantial Completion.

- 3.2.3.4** Contractor shall perform all construction activities efficiently and with the requisite expertise, skill and competence to satisfy the requirements of the Contract Documents. Contractor shall perform Construction Work in accordance with Good Industry Practice (but at least meeting the requirements of the Contract Documents) and in a good and workmanlike manner, free from defects.
- 3.2.3.5** Contractor shall be solely responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Work. Contractor shall take necessary precautions for the safety of, and shall provide necessary protection to prevent damage, injury or loss to the following: (i) all Contractor, Subcontractor, VPRA employees, the public and other persons who may be affected thereby; (ii) all Work and all equipment and materials to be incorporated into the Work; and (iii) other property at the Site or adjacent thereto. Contractor shall also be responsible for all additional measures as necessary to protect persons and property and comply with applicable Legal Requirements related to safety. If applicable, Contractor shall be responsible for its and its Subcontractor's compliance with all Federal Railroad Administration regulations applicable to Work to be performed in VPRA railroad corridors including, without limitation, those set forth in 49 CFR Parts 214, 219, 228, 234 and 236.
- 3.2.3.6** Contractor shall employ only Subcontractors who are duly licensed and qualified to perform the Work consistent with the Contract Documents. VPRA may require Contractor to remove from the Project a Subcontractor or anyone employed directly or indirectly by any Subcontractor, if VPRA reasonably concludes that the Subcontractor is creating safety risks at the Site or quality risks to the Project.
- 3.2.3.7** Contractor is responsible for the proper performance of the Work by Subcontractors and for any acts and omissions in connection with such performance. Nothing in the Contract Documents is intended or deemed to create any legal or contractual relationship between VPRA and any Subcontractor, including but not limited to any third-party beneficiary rights.
- 3.2.3.8** Contractor shall coordinate the activities of all of its Subcontractors. If VPRA performs other work on the Project or at the Site with separate contractors under VPRA's control, Contractor agrees to reasonably cooperate and coordinate its activities with those of such separate contractors so that the Project can be completed in an orderly and coordinated manner without unreasonable disruption.
- 3.2.3.9** Contractor shall keep the Site reasonably free from debris, trash and construction wastes to permit Contractor to perform its construction services efficiently, safely and without interfering with the use of adjacent land areas. Upon Substantial Completion of the Work, or a portion of the Work, Contractor shall remove all debris, trash, construction wastes, materials, equipment, machinery and tools arising from the Work or applicable portions thereof to permit VPRA to occupy the Project or a portion of the Project for its intended use.

### **3.3 Representations, Warranties, and Covenants**

Contractor represents, warrants, and covenants as follows.

#### **3.3.1 Maintenance of Professional Qualifications**

Contractor and all Subcontractors have all required professional licenses and the professional skills, competence, and capacity to perform the Work in accordance with the requirements of the Contract Documents.

#### **3.3.2 Evaluation of Constraints**

During its preparation of its Proposal and its performance of the Phase 1 Services, Contractor evaluated the constraints affecting delivery of the Project, including the availability of ROW, the conditions of the Environmental Approvals, and the timing of Utility Work. Contractor represents that such constraints are incorporated into the Baseline Schedule and that the Project can otherwise be delivered within those constraints.

#### **3.3.3 Feasibility of Performance**

Contractor has evaluated the feasibility of performing the Work within the Completion Deadlines specified in the Contract Documents and for the Contract Price. Contractor represents that it is feasible to perform the Work within those cost and time constraints.

#### **3.3.4 Review of Site Information**

Contractor has, before submitting its Final Binding GMP Proposal, and in accordance with prudent and generally-accepted engineering and construction practices, undertaken appropriate and reasonable activities sufficient to familiarize itself with surface conditions and subsurface conditions affecting the Project. These activities included reviewing the utility and geotechnical information provided by VPRA, including in the Reference Documents, if any, and inspecting and examining the Site and surrounding locations to the extent possible. Having performed these activities, Contractor represents that it is familiar with and accepts the physical requirements of the Work, subject to the right to receive a Change Order only for Differing Site Conditions as provided in Article 14 of these General Terms and Conditions. Before commencing any Work on a particular aspect of the Project, Contractor shall verify all governing dimensions and conditions at the Site and examine all adjoining work that may have an impact on such Work.

#### **3.3.5 Governmental Approvals**

Contractor represents and warrants that it has obtained or will obtain all Governmental Approvals to permit the Work to proceed in accordance with the Contract Documents. If any Governmental Approval that Contractor is required to obtain must formally be issued in the name of VPRA, Contractor shall undertake all efforts to obtain such Governmental Approvals. VPRA will cooperate with Contractor, including by executing and delivering appropriate applications and other documentation in a form approved by VPRA. Contractor shall assist VPRA in obtaining any Governmental Approvals that VPRA is obligated to obtain, including by providing information requested by VPRA and participating in meetings regarding the Governmental Approvals.

#### **3.3.6 Personnel Performing Professional Services**

Where applicable, Contractor shall ensure that the Work is performed by or under the supervision of Persons licensed to practice architecture, engineering or surveying (as applicable) in the Commonwealth. Contractor's Work shall be performed by personnel who are: (1) competent, skilled, and experienced in their respective trades or professions, (2) professionally qualified to perform the Work in accordance with the Contract Documents, and (3) able and willing to assume

professional responsibility for the accuracy and completeness of the any documents that they prepare or check.

### **3.3.7 Organization**

Contractor represents and warrants that it is a [##] duly organized and validly existing under the laws of the state of [##]. Contractor represents and warrants that it is in good standing and duly qualified to conduct business in the Commonwealth. Contractor warrants that it will remain in good standing for as long as needed to perform its obligations under the Contract Documents. *[Insert information for Guarantor, if required]*

### **3.3.8 Authorization**

Contractor represents and warrants that it has taken all actions necessary to execute, deliver, and perform the Contract. If applicable, Contractor's members have also taken all actions necessary to execute, deliver, and perform the Contract. Contractor represents that executing and performing this Contract will not result in a material breach or a default under any other contract or legal obligation.

### **3.3.9 Legal, Valid, and Binding Obligation**

The Contract constitutes the legal, valid, and binding obligation of Contractor and, if applicable, of each Principal Participant of Contractor. If applicable, each Guaranty constitutes the legal, valid, and binding obligation of Guarantor.

### **3.3.10 False or Fraudulent Statements and Claims**

Contractor recognizes that the requirements of the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. § 3801 *et seq.*) and the USDOT regulations, "Program Fraud Civil Remedies," (49 C.F.R. Part 31), apply to its actions under this Contract. By signing this Contract, Contractor certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, or it may make pertaining to the Contract. Any false, fictitious, or fraudulent claim, statement, submission, or certification is subject to penalties under federal law and regulations.

Contractor recognizes that the Virginia Fraud Against Taxpayers Act (Va. Code § 8.01-216.1. *et seq.*) applies to this Contract.

### **3.3.11 Covenant Regarding Brokerage**

Contractor warrants that it has not employed or retained any company or person to solicit or secure this Contract and that it has not paid or agreed to pay any company or person, other than Subcontractors procured under this Contract or a bona fide employee working solely for Contractor, any fee, commission, percentage, brokerage fee, gifts, or any other consideration contingent upon or resulting from the award or making of this Contract. For breach or violation of this warranty, VPRA shall have the right to void this Contract without liability or, at its discretion, to deduct from the Contract Price or consideration, or otherwise recover, the full amount of such fee, commission, brokerage fee, gift, or contingent fee.

## **ARTICLE 4**

### **(Warranties)**

#### **4.1 Warranties by Contractor**

##### **4.1.1 Project Warranties**

Contractor warrants that:

- (a) the Project shall be free of defects in Materials and workmanship;
- (b) Materials and Equipment furnished under the Contract Documents shall be of good quality and be new when installed; and
- ~~(c)~~ the Work shall meet all of the requirements of the Contract Documents; ~~and~~
- ~~(d)~~ (c) ~~the Project shall be fit for use for the intended function.~~

##### **4.1.2 Project Warranty Period**

Contractor's Warranty period starts at Substantial Completion, except that a Warranty for a specific element owned by a Third-Party may start at the date the Third-Party accepts that specific element if (1) that date is prior to Substantial Completion, and (2) VPRA and Contractor have documented the earlier Warranty start date. Subject to extensions under Section 4.1.5 of these General Terms and Conditions Contractor's Warranty obligations for all elements of the Project that will be owned by VPRA shall remain in effect until two years after Substantial Completion, except that any longer Warranty period specified elsewhere in the Contract Documents for a specific element of the Project shall control.

If at any time during the Warranty period VPRA determines that any of the Work has not met the standards specified in this Section 4.1 of these General Terms and Conditions, then Contractor shall correct such Work as specified in this Article 4 of these General Terms and Conditions, even if the performance of such Warranty Work extends beyond the stated Warranty period. Alternatively, VPRA may elect, in its sole discretion, to Accept the Work in accordance with Section 6.5.3 of these General Terms and Conditions and adjust the Contract Price or seek damages as provided therein.

##### **4.1.3 Corrective Work**

###### **4.1.3.1 Site Inspections**

VPRA and Contractor will conduct a joint walkthrough of the Site at the following times: (i) once no less than one year after commencement of the Warranty period; and (ii) once 60 Days prior to the end of the Warranty period specified in Section 4.1.2 of these General Terms and Conditions. VPRA may require additional Site inspections with Contractor if VPRA identifies Warranty Work. On each walkthrough or Site visit, VPRA will produce a list of items requiring Warranty Work. In addition, VPRA reserves the right at any time during the Warranty period to identify Work that fails to meet the Warranties.

Contractor may also monitor the Site for any Warranty Work required during the Warranty period. Contractor must provide advance notice to VPRA of all monitoring dates and times.

###### **4.1.3.2 Notification and Performance of Corrective Work**

VPRA will notify Contractor of any failure of any of the Work that is Contractor's responsibility to correct under the terms of the Warranty. Contractor shall perform necessary Warranty Work to

remedy any failures of Contractor's Work to meet Contractor's Warranties, whether identified by VPRA or Contractor. Such Warranty Work shall be performed at Contractor's sole expense.

#### **4.1.3.3 Contractor Plan to Perform Warranty Work**

For all corrective actions required, Contractor shall provide a written proposal to VPRA for performing Warranty Work within five (5) Days after receiving notice from VPRA that Warranty Work is required. Contractor shall also provide a written proposal to VPRA for performing Warranty Work if Contractor elects to perform Warranty Work based on Contractor's assessment of the Site. The proposal must include, as a minimum:

- (a) The proposed remedy;
- (b) The proposed schedule for prosecution and completion of the Warranty Work; and
- (c) The proposed plan to manage rail or road traffic, as applicable.

VPRA will respond to Contractor's proposal within five (5) Days after VPRA receives Contractor's complete submittal, provided that, if the Warranty Work requires approval from a Railroad, VPRA shall respond to Contractor's proposal within two (2) days of receiving such approval or rejection from a Railroad.

#### **4.1.3.4 Performance of Warranty Work**

Contractor must begin corrective action Work within 30 Days after VPRA's Acceptance of the written plan for Warranty Work. If the Work cannot be started within such time because of seasonal or other limitations, Contractor must notify VPRA of this circumstance in writing and submit a schedule for completion of the Warranty Work for VPRA's Approval. If Contractor does not use its best efforts to perform Warranty Work within the agreed time, or if Contractor and VPRA fail to reach an agreement, VPRA, after notice to Contractor, will have the right to perform the Warranty Work itself or have the Warranty Work performed by Third-Parties. Contractor shall be responsible for the costs of performance of Warranty Work by VPRA or Third-Parties. Contractor shall also be responsible for the performance or cost of inspection and testing of the Warranty Work.

#### **4.1.3.5 Emergency Corrective Work**

If VPRA determines that emergency repairs are necessary for public safety, VPRA may perform Warranty Work. Before performing the emergency repairs, VPRA will (1) document the basis for the emergency action; and (2) preserve evidence of the defective condition. VPRA will coordinate emergency repairs with Contractor when possible. Contractor is responsible for all costs associated with the emergency repairs that are covered by the Warranty.

#### **4.1.3.6 Contractor Not Responsible for Certain Corrective Work**

During the Warranty period, Contractor shall not be responsible for defects caused by identifiable factors unrelated to Contractor's Work. Upon written request from Contractor and on a case-by-case basis, VPRA will consider other factors that appear to be beyond the control of Contractor and may relieve Contractor from particular Warranty obligations.

#### **4.1.4 Costs of Correction of Work**

All costs of correcting rejected Work, including additional testing and inspections, shall be borne by Contractor. Contractor shall reimburse VPRA and pay VPRA's expenses made necessary by the correction of rejected Work within 10 Days after Contractor's receipt of an invoice from VPRA for such costs. Contractor shall be responsible for obtaining any required Governmental Approvals or other consents from any other Person in connection with the Warranty Work.



#### 4.1.5 Warranty of Corrected Work

The Warranties will apply to all Work redone, repaired, corrected or replaced. The Warranties as to each redone, repaired, corrected or replaced element of the Work shall extend for the longer of:

- (a) the remaining Warranty period; or
- (b) one year after completion of the Warranty Work.

(b) Notwithstanding the foregoing, no Warranty period shall extend beyond the fifth anniversary of Final Acceptance, provided however, that the expiration of a Warranty period shall not be construed to prevent VPRA from pursuing any other remedies it has then available at law or otherwise with respect to Nonconforming Work, even though Contractor is no longer responsible to perform Warranty Work.

#### 4.2 Subcontractor Warranties

##### 4.2.1 Assignment

Contractor shall obtain from all Subcontractors appropriate representations, warranties, guarantees, and obligations with respect to the Materials, workmanship, Equipment, tools, and supplies furnished by Subcontractors, including the representations, warranties, guarantees, and obligations that Subcontractors are required to furnish under the Contract Documents. The Subcontractor representations, warranties, guarantees, and obligations must expressly extend to VPRA. The Subcontractor representations, warranties, guarantees, and obligations in no way reduce or negate Contractor's own representations, warranties, guarantees, and obligations, including Contractor Warranties. All representations, warranties, guarantees, and obligations of Subcontractors must (a) expressly survive all VPRA and Contractor inspections, tests, Acceptance, and Approval, and (b) run directly to and be enforceable by Contractor and/or VPRA and their respective successors and assigns.

##### 4.2.2 Enforcement

Upon receipt from VPRA of notice of a failure of any of the Work to satisfy any Subcontractor warranty, representation, guarantee, or obligation, Contractor shall enforce or perform the representation, warranty, guarantee or obligation, in addition to Contractor's other obligations under this Article 4 of these General Terms and Conditions. VPRA's rights under this Section 4.2.2 of these General Terms and Conditions begin at the time the representation, warranty, guarantee or obligation is furnished, and must continue until the expiration of Contractor's relevant Warranties. Until expiration, Contractor shall be responsible for the cost of any Equipment, Material, labor (including re-engineering) or shipping, and Contractor shall replace or repair defective Equipment, Material or workmanship furnished by any Subcontractor.

#### 4.3 Assignment of Other Warranties

Contractor shall assign, and cause all Subcontractors to assign, any warranties received or otherwise acquired in connection with the installation of any products or Materials incorporated into the Project.

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 VPRA using commercially reasonable efforts. In such case, Contractor shall acquire the proper rights for VPRA to make use of such products for the time necessary for Contractor to comply with the Contract Documents. Upon notice from VPRA, Contractor agrees to pursue any necessary remedies under such warranties to cause the

correction of any defects in the warranted Materials or products until such time as the applicable warranty expires.

Contractor's warranties in Section 4.1 of these General Terms and Conditions are not intended to limit any manufacturer's warranty that provides VPRA with greater warranty rights than specified. Contractor shall provide VPRA with all manufacturers' warranties as a condition to Final Acceptance.

#### **4.4 No Limitation of Liability**

The warranties described in this Article 4 of these General Terms and Conditions are in addition to all rights and remedies available under the Contract Documents or applicable Law and will not limit Contractor's liability or responsibility imposed by the Contract Documents or applicable Law with respect to the Work, including liability for construction defects, strict liability, negligence or fraud.

#### **4.5 Warranty Beneficiaries**

When Local Agencies, Railroads, or Utility Owners own and control a portion of the Work, then these Local Agencies, Railroads, or Utility Owners are intended to be benefitted by and may directly enforce the Warranties and Subcontractor Warranties related to that work.

### **ARTICLE 5**

#### **(Performance of Construction Work)**

#### **5.1 Completion Deadlines**

##### **5.1.1 Substantial Completion Deadline**

Contractor shall achieve Substantial Completion of the Phase 2 Services by the date stated in the Phase 2 Amendment.

##### **5.1.2 Final Acceptance Deadline**

Contractor shall achieve Final Acceptance no later than [120] days after it achieves Substantial Completion.

##### **5.1.3 No Completion Deadline Extensions**

No Completion Deadline shall be extended, except as specifically provided in Article 14 of these General Terms and Conditions.

#### **5.2 Baseline Schedule**

Contractor shall plan, schedule, and construct the Project by using a P6 Critical Path Method schedule (the "Baseline Schedule"). Contractor shall use the Baseline Schedule for coordinating and monitoring the Work, including all activities of Subcontractors, vendors, Suppliers, utilities, VPRA, and all other parties associated with the Project. All Work, including activities associated with milestones, permits, Utility Work, and submittals must be represented by schedule activities. All Work, including submittals, major procurement, delivery, and Construction Work including any required Hold Points for inspection and testing activities must be included. All appropriate schedule logic relationships must be shown. All activities, including Work breakdown line items, quantified in the Contract Documents must be included. Contractor shall base the Baseline Schedule upon the entirety of the Contract Documents.

### **5.3 Prerequisites for Start of Construction**

Contractor shall not start Construction Work (or recommence Construction Work following any suspension) of any portion of the Project, until all the following events have occurred:

- (a) VPRA has issued the Phase 2 NTP or an Early Work NTP, as applicable;
- (b) Contractor has met all requirements of the Quality Plan and the Safety Plan that are a condition to commencing construction;
- (c) The Design Consultant has furnished the Design related to that portion of the Work;
- (d) Contractor and VPRA have obtained all Governmental Approvals necessary for construction of the relevant portion of the Project and have satisfied all conditions of those Governmental Approvals that are a prerequisite to commencing the relevant portion of Construction Work;
- (e) VPRA and Contractor have obtained all necessary rights of access for the relevant portion of the Project;
- (f) Contractor has complied with the relevant insurance requirements of Exhibit E of the Contract, and bond requirements of Article 9 of these General Terms and Conditions, and has delivered to VPRA certificates of such insurance, and executed bonds in the required forms; and
- (g) any additional conditions for construction set forth in the Contract Documents have been satisfied, including that Contractor has received VPRA's Acceptance or Approval of any other submittals required for construction of the portion of Work.

### **5.4 Contractor's Self-Performance of Construction Work**

#### **5.4.1 Minimum Self-Performed Work**

Contractor shall Self-Perform a minimum of 30% of the value of the Construction Work during the Phase 2 Services. This portion of the Self-Performed Work is not subject to the competitive bidding process requirements in the Subcontracting Plan, and Contractor shall negotiate the construction price of this portion of the Self-Performed Work with VPRA.

#### **5.4.2 Maximum Self-Performed Work**

Contractor shall Self-Perform a maximum of 70% of the value of the Construction Work during the Phase 2 Services. The value of Self-Performed Work in a Construction Cost Estimate shall not exceed 70% of the total value of the Construction Work included in a Construction Cost Estimate. If Contractor intends to Self-Perform a portion of the Construction Work in excess of 50% of the Construction Work during the Phase 2 Services, such Self-Performed Work shall be subject to the competitive bidding requirements in the Subcontracting Plan.

#### **5.4.3 Subcontracted Work**

At least 50% of the value of the Construction Work shall be priced under the competitive bidding process in the Subcontracting Plan.

#### **5.4.4 Value of the Construction Work**

To determine the value of Construction Work that is Self-Performed or subject to competitive bidding, all costs of performing the Construction work, whether direct or indirect, shall be included, except for the direct cost of permanent Materials. For purposes of clarity, this means that the

value of Construction Work for purposes of this Section 5.4 of these General Terms and Conditions shall include all direct costs (other than permanent Materials), profit, overhead, Field Indirect Costs, general conditions costs, and other costs of a similar nature, however named. This Section 5.4.4 of these General Terms and Conditions applies only to the value of Construction Work for purposes of determining compliance with the Self-Performed Work and competitive bidding requirements.

## **ARTICLE 6**

### **(Control of the Work; Quality Management)**

#### **6.1 Control and Coordination of Work**

Contractor is solely responsible for and has control over the means, methods, techniques, sequences, procedures, and Site safety for the Construction Work. Contractor is solely responsible for coordinating all portions of the Work under the Contract Documents, subject to all requirements contained in the Contract Documents.

#### **6.2 Safety**

##### **6.2.1 Safety obligations**

Contractor shall take 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 VPRA and its consultants, visitors to the Site, and members of the public who may be affected by the Work. Contractor shall at all times comply with the Safety Plan. Contractor shall immediately notify VPRA if Contractor believes that any requirement in the Contract Documents creates a safety risk.

Contractor recognizes the importance of performing the Work in a safe manner and shall be responsible for preventing damage, injury or loss to: (i) all individuals at the Site, whether working or visiting; (ii) the Work, including Materials and Equipment incorporated into the Work or stored on-Site or off-Site; and (iii) all other property at the Site or adjacent thereto. Contractor shall be responsible for implementing and monitoring all safety precautions and programs related to the performance of the Work.

##### **6.2.2 Safety Plan**

Within thirty (30) Days of the Phase 1 NTP, Contractor shall develop and submit a comprehensive, Site specific Safety Plan to VPRA for review and Approval. Contractor shall comply with all applicable regulations, including OSHA, and any state, local and federal laws. At a minimum, the Safety Plan shall include:

- (a) policies and procedures utilized by personnel on-site;
- (b) performance objectives for all line supervisors for the achievement of a zero-incident goal;
- (c) definition of administrative responsibilities for implementing the Safety Plan and identification of the personnel accountable for incident prevention. Incidents include employee injuries, equipment and property damage, fires, and injury to the public. Include the name of Contractor's Safety Manager, and delineate their authority to direct work stoppage and cause the elimination or correction of hazardous conditions;
- (d) means for coordinating and controlling Work activities of Contractor, Subcontractors, and suppliers;

- (e) training programs required and/or anticipated to complete the Work, including railroad training programs, environmental training and quality training;
- (f) personal protective equipment required on-site as required for protection against Contaminated Materials;
- (g) safety and security measures to be utilized to protect workers and any VPRA or other agency representatives while on-site, as well as measures to protect the general public;
- (h) an incident management and response plan;
- (i) all applicable regulations;
- (j) environmental monitoring and compliance; and
- (k) emergency contacts.

VPRA is under no obligation to detect safety issues or issue a notice of deficiency or non-compliant condition, in the Safety Plan or during performance of Work by the Contractor, Subcontractor(s), Suppliers, or any other Contractor-Related-Entity. Under no circumstances shall Contractor (or Subcontractor(s), Suppliers, or any other Contractor-Related-Entity) be relieved of the obligations, pursuant to any applicable law or regulatory requirements, to provide a safe workplace and comply fully with the safety laws and regulations.

### **6.2.3 Maintenance of Railroad Traffic**

Contractor shall maintain two (2) tracks of railroad operations at all times unless there is a CSXT approved closure of the railroad corridor. Contractor shall maintain proper safety measures and emergency protocols on standby at all times. Any shutdown, impact, or construction work on or adjacent to CSXT track shall be approved in writing by CSXT and communicated via established notice protocols prior to any Work commencing on or adjacent to CSXT track.

## **6.3 Construction Quality Management**

### **6.3.1 Contractor Quality Management**

Contractor shall perform the quality management necessary for Contractor to comply with its obligations under the Contract Documents. During the Construction Work, Contractor shall only be responsible for Quality Control;

### **6.3.2 Oversight, Inspection, and Testing by VPRA and Others**

All Materials and each part or detail of the Work is subject to oversight, inspection, testing, and Acceptance by VPRA and other Persons designated by VPRA. When any Utility Owner is required to accept Work 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, testing, and Acceptance does not make the Person a party to the Contract and does not change the rights of Contractor or VPRA. Contractor consents to this oversight, inspection, testing, and Acceptance. Upon request from VPRA, Contractor shall furnish information to the Persons VPRA designates and permit these Persons access to the Site and all parts of the Work.

### **6.3.3 Obligation to Uncover Finished Work**

Contractor shall remove or uncover portions of the finished Construction Work as directed by VPRA at any time before Final Acceptance. After VPRA and any other Persons designated by VPRA examine the Work, Contractor 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 any delay or recovery thereof as a result of these activities will be at Contractor's expense and Contractor shall not be entitled to a Contract Price or Completion Deadline adjustment.

VPRA may also order Contractor to uncover, remove, and restore any Work (i) that was performed or Materials that were used without notice to and opportunity for prior inspection by VPRA or (ii) was performed past a Hold Point but did not receive proper Acceptance prior to proceeding. Any uncovering, removal, or restoration undertaken by Contractor will be at Contractor's expense and without eligibility for a Contract Price or Completion Deadline adjustment, even if the Work proves acceptable after uncovering.

Except for Work performed or Materials used without opportunity for inspection or past a Hold Point without Acceptance prior to proceeding, if Work exposed or examined under this Section 6.3.3 of these General Terms and Conditions is in conformance with the requirements of the Contract Documents, then Contractor shall be entitled to a Change Order adjusting the Contract Price for the costs of performance of these activities and a Completion Deadline adjustment for any delay, subject to the provisions and limitations of Article 14 of these General Terms and Conditions.

#### **6.3.4 Quality Plan**

Contractor shall prepare and submit to VPRA for review and Approval a written Quality Plan that encompasses all requirements of the Contract Documents with regard to design, construction, environmental compliance, and documentation for all quality processes. The Quality Plan shall identify Contractor's overall framework for implementation of its Quality Control programs across all aspects of the Project.

The Quality Plan shall:

- (a) include an organizational chart showing all key roles and persons, and lines of communication and authority between Contractor and VPRA teams, and with other organizations involved;
- (b) define a process consistent with the draft Quality Plan presented in Contractor's Proposal;
- (c) be approved and endorsed by Contractor's executive management committee;
- (d) be in effect until all requirements of the Contract Documents have been fulfilled and VPRA issues the Notice of Final Acceptance;
- (e) describe the quality manager's accountability for ensuring the effective implementation and maintenance of the Quality Plan;
- (f) define project quality staff levels of authority and authorized individuals for signing and certifying all quality documents;
- (g) describe all verification resources, such as design verifiers, checkers, inspectors, and testers that Contractor will use;
- (h) detail how Contractor will provide quality management for Construction Work, including any supporting administrative activities associated with the Project;
- (i) detail how Contractor will ensure compliance with all Environmental Laws, Environmental Approvals and any other environmental requirements and permit conditions;

- (j) detail the quality management for elements to be completed by a Subcontractor, Supplier, vendor, agent, or other entity with contractual obligations to complete the Work;
- (k) describe procedures for identifying training needs and provide for the training of all personnel performing activities affecting quality; and
- (l) describe the process for performing internal quality audits.

#### **6.3.4.1 Submittal and Composition of Quality Plan**

- (a) Contractor shall submit the Quality Plan for VPRA's Approval. VPRA's Approval of the overall Quality Plan shall be a condition precedent to execution of a Phase 2 Amendment and issuance of the Phase 2 NTP.
- (b) Contractor shall revise its Quality Plan and its implementation to reflect current conditions or when either Contractor or VPRA identifies a systemic problem. These revisions must be Approved by VPRA prior to implementation. Contractor shall submit a conformed copy of the updated Quality Plan with revisions redlined and highlighted.
- (c) The structure of the documents describing the Quality Plan shall be: Quality policy (for the entire quality program), quality objectives, policies (for each element of the Quality Plan), and procedures.
- (d) All written procedures shall clearly describe the purpose of the process, overview of the process, responsibilities, steps of the process, and records resulting from the process.

#### **6.3.4.2 Contractor Review of Quality Plan**

Contractor shall review the performance of the Quality Plan at least quarterly to ensure its continuing suitability in satisfying the requirements of the Contract Documents and Contractor's stated quality policy and objectives. The Contractor's reviews shall, at a minimum, review the results of internal audits, VPRA audit results, corrective actions taken, trends in Nonconforming Work, and time to resolution. VPRA may, in its sole discretion, participate in the Contractor's reviews and may request data from the reviews. Contractor shall incorporate the findings and quality improvement recommendations of Contractor reviews into the Quality Plan and documented in an appendix to the Quality Plan.

#### **6.3.4.3 Internal Quality Audits**

Contractor shall establish and maintain documented procedures for planning and implementing internal quality audits to verify whether quality activities and related results comply with planned arrangements and to determine the effectiveness of the quality system. Contractor shall ensure that internal quality audits:

- (a) are conducted at least every quarter and in accordance with sound auditing principles;
- (b) shall be initiated early enough in the life of the Project to assure effective Quality Control during all phases of the Work;
- (c) shall include Contractor's entire quality management program and technical work activities;
- (d) are undertaken by personnel independent of those having direct responsibility for the activity being audited;

- (e) provide verification that the quality system is operating effectively and being implemented as planned. Audits shall be conducted on a planned and scheduled basis, consistent with the importance of the activities being performed;
- (f) results are recorded and brought to the attention of the personnel having responsibility in the area audited.

The Contractor's management personnel responsible for the relevant area shall take timely corrective action on deficiencies found during the audit. VPRA shall have the right to request and review the audit results. Follow-up audit activities shall verify and record the implementation and effectiveness of the corrective action taken. VPRA may require Contractor to perform follow-up audits at VPRA's sole discretion.

## **6.4 Effect of Oversight**

### **6.4.1 Oversight and Acceptance**

Contractor 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, Hold Points, Acceptances or Approvals by any Persons, or by any failure of any Person to take this action. The oversight, spot checks, audits, reviews, tests, inspections, Hold Points, Acceptances, and Approvals by any Person do not constitute Final Acceptance of the Material or Work, or a waiver of any legal or equitable right regarding the Material or Work. VPRA may reject or require Contractor to remedy any Nonconforming Work and/or VPRA may identify additional Work that must be done to bring the Project into compliance with the requirements of the Contract Documents at any time before Final Acceptance, whether or not previous oversight, spot checks, audits, reviews, tests, inspections, Hold Points, Acceptances or Approvals were conducted or provided by any Person.

### **6.4.2 No Estoppel**

VPRA will not be precluded or estopped by any measurement, estimate or certificate, made either before or after Final Acceptance and payment for the Work, from showing: (1) that any measurement, estimate or certificate is incorrectly made or untrue, or (2) the true amount and character of the Work performed and Materials furnished by Contractor, or (3) that the Work or Materials do not conform to the requirements of the Contract Documents. Notwithstanding any measurement, estimate or certificate, or payment, VPRA will not be precluded or estopped from recovering from Contractor and its Surety(ies) the damages that VPRA may sustain as a result of Contractor's failure to comply with the Contract Documents.

## **6.5 Nonconforming Work**

### **6.5.1 Rejection, Removal, and Replacement of Nonconforming Work**

VPRA may, in its sole discretion, reject Nonconforming Work. Upon the discovery of Nonconforming Work by Contractor or VPRA, VPRA shall provide notice of its decision to Contractor and Contractor shall remove and replace rejected Nonconforming Work to ensure compliance with the requirements of the Contract Documents within ten (10) Days of VPRA's notice or, if the Nonconforming Work cannot be removed and replaced within ten (10) Days, provide VPRA with a schedule for correcting the Nonconforming Work to be Approved by VPRA. Contractor shall provide such schedule to VPRA within ten (10) Days after receipt of VPRA's notice. All work required to remove and replace the Nonconforming Work shall be undertaken at Contractor's expense and without any adjustment of the Contract Price or Completion Deadline. Contractor shall promptly take all action necessary to prevent similar deficiencies from occurring in the future.



For purposes of clarity, VPRA's sole discretion applies to the decision of whether to reject or Accept Nonconforming Work. VPRA does not possess sole discretion over whether Work constitutes Nonconforming Work.

### **6.5.2 VPRA Removal and Replacement of Nonconforming Work**

If:

- (a) Contractor fails to correct any Nonconforming Work within ten (10) Days of receipt of notice from VPRA requesting correction, or
- (b) the Nonconforming Work cannot be corrected within ten (10) Days and, Contractor does not provide a schedule Approved by VPRA for correcting the Nonconforming Work; or
- (c) Contractor does not diligently prosecute the correction of the Nonconforming Work in accordance with the Approved schedule to completion; then

VPRA will have the right to cause the Nonconforming Work to be remedied, removed, and/or replaced, and may either:

- (d) deduct the cost of doing so from any payment due or to become due to Contractor; or
- (e) obtain reimbursement from Contractor for the cost of remediation, removal, and/or replacement.

### **6.5.3 Acceptance of Nonconforming Work**

VPRA may, in its sole discretion, Accept any Nonconforming Work without requiring it to be fully corrected. If VPRA Accepts Nonconforming Work, VPRA will be entitled to reduce the Contract Price (or to be reimbursed a portion of the Contract Price, if applicable). The reduction in Contract Price (or reimbursement) shall equal, at VPRA's election:

- (a) Contractor's cost savings associated with its failure to perform the Work in accordance with the requirements of the Contract Documents; and/or
- (b) the amount deemed appropriate by VPRA to provide compensation for impacts to affected Nonconforming Work, such as future additional maintenance and other costs and loss of value.

When VPRA deems it appropriate, VPRA will be entitled to a pay adjustment (or reimbursement) as expressly stated elsewhere in the Contract Documents.

Any failure by VPRA to discover Nonconforming Work after Acceptance of the Work, including Acceptance at a Hold Point, shall not constitute VPRA's Acceptance of the Nonconforming Work and does not relieve Contractor of its obligations under this Section 6.5 of these General Terms and Conditions. Notwithstanding Final Acceptance, Contractor shall remain liable to VPRA for latent defects, fraud, including gross mistakes that amount to fraud, and failing to meet its obligations to VPRA under any warranty or guaranty.

## **ARTICLE 7**

### **(Site Access, Utilities, Environmental, Railroads)**

#### **7.1 Access to Project ROW**

##### **7.1.1 VPRA to Acquire Project ROW**

VPRA shall acquire the Project ROW.

### **7.1.2 Contractor to Work within the Project ROW**

Other than Temporary Work Areas, Contractor affirms that it can construct the Project within the Project ROW. Contractor shall not be entitled to an adjustment of the Contract Price or a Completion Deadline arising out of a claim that there is insufficient ROW to construct the Project.

### **7.1.3 Obligation to Provide ROW**

VPRA will provide access to the Right of Way identified on the ROW Work Map by the dates stated therein.

### **7.1.4 Delays to ROW Access**

If VPRA is unable to provide access to a particular parcel by the scheduled date on the ROW ~~Work Map~~ Schedule, VPRA will notify Contractor of the revised projected date for provision of access. Contractor shall take appropriate action to minimize any cost and time impact and must work around the parcel until access can be provided, including rescheduling and resequencing Work so as to avoid any delay to the Project. Subject to Section 7.1.5 and Article 14 of these General Terms and Conditions, to the extent that a delay to the Critical Path cannot be avoided, Contractor may seek relief for a VPRA-Caused Delay ~~and shall prepare an estimate of the cost and schedule impact of the inability to access the particular parcel. Upon agreement between VPRA and Contractor on the scope of the change to the Work, and the adjustment, if any, to the Contract Price and/or Completion Deadlines, VPRA and Contractor shall execute a written Change Order.~~

### **7.1.5 Obligation to Provide Written Notice**

Contractor shall not be entitled to an increase in the Contract Price or adjustment of a Completion Deadline related to VPRA's delivery of access to the parcels identified on the ROW Work Map ~~later than the date identified in the ROW Schedule~~ unless Contractor: (a) gives ~~30-Day~~ written notice to VPRA within thirty (30) days of VPRA's notice provided under Section 7.1.4 of these General Terms and Conditions, describing how the unavailability of a given parcel will result in an impact to the cost or schedule, and, and (b) complies with the requirements of Section 7.1.4 of these General Terms and Conditions.

### **7.1.6 Temporary Work Areas**

Contractor may acquire, in its own name, Temporary Work Areas beyond the limits of the Project ROW. Contractor is responsible for the acquisition and cost of all Temporary Work Areas and in no event will VPRA exercise its power of eminent domain in connection with Contractor's acquisition of any such property right or interest for Contractor's Temporary Work Areas. VPRA will have no obligations or liabilities with respect to the acquisition, maintenance or disposition of Contractor's Temporary Work Areas, with all such costs and expenses to be borne by Contractor. Contractor shall not be entitled to an adjustment of the Contract Price or Completion Deadlines arising out of a delay in obtaining or inability to obtain a Temporary Work Area.

## **7.2 Utility Work**

### **7.2.1 Contractor to Perform Utility Work**

Contractor shall perform the Utility Work consistent with the responsibility for the Relocation of Utilities stated in the Phase 2 Amendment.

### **7.2.2 Betterments**

Utility Betterments may be added to the Work pursuant to this Section 7.2.2 of these General Terms and Conditions. The addition of Betterments is subject to VPRA's Approval.

### **7.2.2.1 Procedure**

Any Utility Owner may ask VPRA to permit Contractor to construct Betterments, at the Utility Owner's expense. If VPRA Approves the request, Contractor shall perform the work, with the right to receive an adjustment to the Contract Price and Completion Deadline(s). VPRA will pay Contractor for the work relating to the Betterment based on either a lump sum amount that Contractor negotiates with the Utility Owner, or on a Force Account cost method as specified below. Any extension of any Completion Deadline(s) or Contract Price increase requested for any Betterment will be subject to the requirements of this Section 7.2 and Article 14 of these General Terms and Conditions, as applicable.

### **7.2.2.2 Betterment Pricing**

If a Utility Owner requests that Contractor construct a Betterment, Contractor shall use its best efforts to negotiate a lump sum price or unit prices with the Utility Owner in good faith. If Contractor and the Utility Owner are not able to agree on a lump sum price or unit prices, VPRA may direct Contractor to perform the work with compensation determined by the Parties, provided that the conditions set forth in Section 7.2.2.4 of these General Terms and Conditions are satisfied.

### **7.2.2.3 Change Order Increasing the Contract Price**

If VPRA approves a proposed Betterment, it will be added to the scope of the Work through a Change Order that adjusts the scope of Work and Contract Price. The amount of any Change Order issued will be a direct pass-through of the lump sum price negotiated by Contractor and the Utility Owner (with no additional mark-ups) or, if no such price has been negotiated, an amount determined in accordance with Exhibit J of the Contract. Contractor may not request or accept any payment directly from the Utility Owner for any Betterment added to the Work.

### **7.2.2.4 VPRA's Approval of Betterments**

VPRA may approve the addition of a Betterment to the scope of the Work only if: (a) the Utility Owner has requested the addition of the Betterment to the Work, (b) the Betterment is compatible with the Project, (c) the Utility Owner has agreed to reimburse VPRA for all the costs of the Work relating to the Betterment, including costs associated with a Completion Deadline adjustment (d) the Utility Owner has agreed to the method of pricing the Work (e.g., negotiated lump sum amount, unit prices or Force Account cost basis), and (e) it is feasible to separate the pricing of the Betterment work from the pricing of any other Utility Work being furnished by Contractor. Contractor shall provide VPRA with information, analyses, and certificates requested by VPRA in connection with any Approval needed from VPRA for a potential Betterment.

### **7.2.2.5 Change Order Reducing the Contract Price**

If any Betterment has been added to the Work and the Contract Price has been increased accordingly by Change Order, but the Betterment is later deleted from the Work, or the scope of Contractor's Work relating to the Betterment is materially reduced, VPRA will be entitled to issue a Change Order reducing the Contract Price to reflect the value of any reduction in the costs of the Work and reducing any adjustment of a Completion Deadline, in both cases to the extent directly attributable to the deletion or reduction of the Betterment. With respect to costs, the Change Order will be equal to the lump sum amount added to the Contract Price pursuant to Section 7.2.2.3 of these General Terms and Conditions, if applicable, if the entire Betterment has been deleted from the Work, and the reduction in time will be equal to the Completion Deadline adjustment previously granted. If the entire Betterment is not deleted from the Work, the amount of the Change Order and the time adjustment will be determined in accordance with Article 14 of these General Terms and Conditions.

### **7.2.2.6 Betterment not a VPRA-Directed Change**

Any change in the scope of the Work pursuant to this Section 7.2.2 of these General Terms and Conditions will not be considered a VPRA-Directed Change.

## **7.3 Utility Work Obligations**

### **7.3.1 Multiple Relocations of the Same Utility**

Contractor shall make reasonable efforts to avoid multiple Relocations of the same Utility, whether by the Utility Owner or by Contractor. After a Utility has been Relocated once for the Project, Contractor shall be responsible for all costs incurred by either Contractor or the Utility Owner for all further instances to Relocate the Utility to accommodate the Project. If the Utility Owner performs subsequent Relocation(s) at VPRA's expense, then Contractor shall reimburse VPRA for all amounts paid by VPRA to the Utility Owner in reimbursement for the later Relocation(s). If Contractor performs the subsequent Relocation(s), then Contractor shall not receive any adjustment of a Completion Deadline or increase in the Contract Price based on the performance of the later Relocation(s).

The foregoing shall not apply if the subsequent Relocation(s) must occur due to a Relief Event subject to Article 14 of these General Terms and Conditions and provided that the Relief Event is the cause of the subsequent Relocation(s).

### **7.3.2 Minimizing Utility Costs**

Contractor shall take all reasonable steps to minimize costs to the Utility Owners that are entitled to reimbursement from VPRA, to the extent practicable and otherwise consistent with the requirements of the Contract Documents.

### **7.3.3 Utility-Related Right of Way Costs**

#### **7.3.3.1 VPRA's Responsibility**

With respect to Utility Easements other than those described in Section 7.3.3.2 of these General Terms and Conditions, VPRA will be responsible for any compensation required to be paid to Utility Owners for relinquishing their Utility Easements.

#### **7.3.3.2 Contractor's Responsibility**

With respect to Utility Easements relinquished as a result of a Contractor--initiated ~~Change Proposal~~Contract modification, Contractor shall be responsible for any compensation that VPRA may be obligated to pay to the Utility Owners for relinquishing the Utility Easements. Contractor shall reimburse VPRA for these costs no later than ten (10) days after receiving an invoice for the costs.

## **7.4 Environmental Compliance**

Contractor shall comply with all requirements of all applicable Environmental Laws and Governmental Approvals issued under these laws, whether obtained by VPRA or Contractor. Contractor acknowledges and agrees that it will be responsible for all fines and penalties that may be assessed in connection with any failure by Contractor to comply with these requirements. Contractor shall promptly deliver to VPRA (i) notice of any pending or threatened environmental claim with respect to the Project, and (ii) upon becoming available, copies of written communications with any Governmental Person relating to any such environmental claim.

## 7.4.1 Mitigation Requirements

Contractor shall perform all environmental mitigation measures for the Project. The phrase "environmental mitigation measures" includes all requirements of the Environmental Approvals and similar Governmental Approvals, regardless of whether these requirements fall within a strict definition of the phrase. The Contract Price includes compensation for Contractor's performance of all mitigation measures and for performance of all mitigation measures arising from New Environmental Approvals that Section 7.4.2 of these General Terms and Conditions designates as Contractor's responsibility, and the cost of all activities to be performed by Contractor.

## 7.4.2 New Environmental Approvals

### 7.4.2.1 New Environmental Approvals under Certain Conditions

Unless otherwise agreed, Contractor shall be responsible for obtaining any New Environmental Approvals necessitated by a VPRA-Directed Change, VPRA-Caused Delay, or Force Majeure event. Any Change Order resulting from a VPRA-Directed Change, VPRA-Caused Delay, or Force Majeure may include compensation to Contractor for any changes in the Work (including performance of additional mitigation measures and performance of the support services) resulting from such New Environmental Approvals and Contractor shall prepare an estimate of the cost and schedule impact of such New Environmental Approval. Upon agreement between VPRA and Contractor on the scope of the change to the Work, and the adjustment, if any, to the Contract Price and/or Completion Deadlines, VPRA and Contractor shall execute a written Change Order.

### 7.4.2.2 Approvals to be Obtained by Contractor

If a New Environmental Approval becomes necessary for any reason ~~other than those specified in Section 7.4.2.1 of these General Terms and Conditions~~ within Contractor's reasonable control, Contractor shall be fully responsible for the effort and cost of obtaining the New Environmental Approval and for all requirements resulting from these approvals. Contractor shall be responsible for any litigation and shall notify VPRA of any potential or pending litigation arising in connection with any such New Environmental Approval. VPRA shall reasonably assist Contractor in obtaining any New Environmental Approvals and provide support as necessary to Contractor in the conduct of any litigation arising in relation to a New Environmental Approval. Contractor shall confer and coordinate with VPRA as necessary in relation to any potential, pending or ongoing litigation arising from a New Environmental Approval. If the New Environmental Approval is associated with a Contractor-initiated ~~Change Proposal~~ Contract modification, Contractor shall be responsible for obtaining the approval, and the costs of obtaining and complying with the terms of the New Environmental Approval will be considered in determining the Contract Price adjustment under Article 14 of these General Terms and Conditions.

## 7.4.3 Environmental Compliance Plan

~~Design-Builder~~ Contractor shall prepare and submit an Environmental Compliance Plan to VPRA within sixty (60) days after Phase 1 NTP that details all necessary approvals and permits required to complete the Project and how all environmental commitments and permit or authorization conditions that will be maintained throughout Construction. Contractor shall update the Environmental Compliance Plan throughout the Project as environmental requirements change or are added.

## 7.5 Railroads

### 7.5.1 Railroad Permits

Contractor shall comply with the terms of all permits obtained by VPRA for Work that impacts a Railroad.

### **7.5.2 Railroad Coordination**

Contractor shall coordinate with Railroad Owners impacted by the Project to obtain all necessary permits and approvals from such Railroads other than those permits obtained by VPRA.

### **7.5.3 Railroad Rights to Review and Approve Contractor's Work**

Railroad Owners have the right to review and approve certain aspects of Contractor's Work that may impact a Railroad. Where a Railroad Owner is required to approve an element of the Work, VPRA shall be responsible for obtaining such required approval before Contractor's scheduled performance of the Work. VPRA and Contractor shall coordinate the submittals to the Railroad Owners. Contractor shall allow at least thirty (30) Working Days for a Railroad Owner to provide approval of any submission that must be approved by a Railroad Owner. Contractor may request relief for a Railroad Delay if the Railroad Owner does not deliver the required approval within such time, subject to Article 14 of these General Terms and Conditions and other conditions hereunder concerning a Railroad Delay.

### **7.5.4 Indemnity and Insurance Obligations – Railroad Owners**

Contractor shall comply with the indemnity and insurance obligations applicable to the Railroad Owners as set forth in Exhibit F of the Contract.

## **ARTICLE 8**

### **(Site Conditions)**

#### **8.1 Differing Site Conditions**

**8.1.1** If Contractor encounters a Differing Site Condition, Contractor will be entitled to an adjustment to the Contract Price and/or Completion Deadline(s) to the extent Contractor's cost and/or time of performance have been adversely impacted by the Differing Site Condition.

**8.1.2** Upon encountering a Differing Site Condition, Contractor shall provide prompt written notice to VPRA of such condition, which notice shall not be later than two (2) Days after such condition has been encountered. Contractor shall, to the extent reasonably possible, provide such notice before the Differing Site Condition has been substantially disturbed or altered.

~~**8.1.3** Contractor bears the reasonable burden of proving (1) that a Differing Site Condition exists and (2) that it could not reasonably have worked around the Differing Site Condition so as to avoid additional costs or impacts to the Critical Path. Contractor's request for any Change Order relating to a Differing Site Condition must include a statement signed by a Virginia-licensed professional engineer providing: (1) all of Contractor's relevant assumptions concerning the condition of the Site and justifying the basis for such assumptions, (2) a specific explanation of how the existing conditions differ from those assumptions, and (3) a description of Contractor's efforts to find alternative construction solutions to eliminate or minimize the problem and the associated costs.~~

## **ARTICLE 9**

### **(Surety Bonds, Joint & Several Liability)**

## 9.1 Performance and Payment Bond

Contractor shall provide Performance and Payment Bonds in the form attached hereto as Exhibit S of the Contract for the Work in accordance with the Early Work and Phase 2 Services requirements within the Contract. Contractor shall maintain the bonds in effect at all times during the performance of Early Work and the Phase 2 Services: until Final Acceptance of an Early Work Package and the Phase 2 Services, respectively, and thereafter in accordance with Section 9.2 of these General Terms and Conditions. Contractor shall obtain the required bonds from a Surety licensed as a Surety and qualified to do business in the Commonwealth. The surety or insurance company providing the bonds must be rated AA-/Aa3 by two nationally recognized rating agencies or at least A-VII by A.M. Best and Company, be listed on Treasury Department Circular 570, and be authorized to transact the business of suretyship in the Commonwealth.

Contractor shall provide Performance and Payment Bonds in the amount of 100% of the Early Work Price of any Early Work Package(s) and 100% of the Phase 2 Price. At its election, Contractor may provide separate Performance and Payment Bonds for an Early Work Package and the Phase 2 Services.

## 9.2 Duration of Performance Bond

Starting at Final Acceptance, Contractor shall continue to provide a Performance Bond in the amount of ~~{10}%%~~ of the Phase 2 Price until the later of (1) the second anniversary of Final Acceptance; or (2) the expiration of the Warranty if extended in accordance with Section 4.1 of these General Terms and Conditions. For an Early Work Package, starting at Final Acceptance of the Early Work Package, Contractor shall continue to provide a Performance Bond in the amount of 10% the Early Work Price until the later of (1) the second anniversary of Final Acceptance of the Early Work Package; or (2) the expiration of the Warranty if extended in accordance with Section 4.1 of these General Terms and Conditions.

## 9.3 Utility Work

The Utility Work must be covered by the Performance and Payment Bond.

## 9.4 Joint and Several Liability

If Contractor is an unincorporated entity, including a joint venture, partnership, or consortium, all members or Principal Participants shall be jointly and severally liable for all obligations of Contractor under the Contract Documents.

## 9.5 No Relief of Liability and Double Recovery

If a Surety or Guarantor performs any of Contractor's obligations under this Agreement, that performance will not relieve Contractor of any of its other obligations under this Agreement. VPRA shall not, however, be entitled to recover any amount in respect of any claim or to enforce the performance of any obligations under this Agreement to the extent that VPRA has already recovered any amount in respect of such claim or to the extent that a Surety or Guarantor has performed the Contractor's obligations in respect of the same subject matter.

# ARTICLE 10

## (Insurance)

### 10.1 General Insurance Requirements

Contractor shall procure, at its own expense (or, as appropriate, cause others to procure and maintain), insurance with coverage types and limits acceptable to VPRA, as described in Exhibit

E of the Contract and this Article 10 of these General Terms and Conditions (for clarity, the requirements of Exhibit D of the Contract are also deemed requirements of this Article 10 of these General Terms and Conditions), and must maintain the insurance in accordance with the requirements stated therein, or as otherwise approved by VPRA in its sole discretion. The insurance and minimum insurance limits required in this Article 10 of these General Terms and Conditions will not be deemed a limitation on Contractor's liability regarding the indemnities under this Contract.

#### **10.1.1 Evidence of Insurance**

Contractor shall provide evidence of insurance to show that it complies with all insurance requirements contained in this Article 10 of these General Terms and Conditions. VPRA reserves the right, at its sole discretion, to request a complete copy of any policy required by this Article 10 of these General Terms and Conditions.

#### **10.1.2 A.M. Best Rating**

Contractor shall obtain all insurance coverage from insurers that have an A.M. Best rating of A-VII or better, and are authorized to transact business in the Commonwealth.

#### **10.1.3 Full Force and Effect; Notice of Cancellation or Non-Renewal**

Contractor shall ensure that all required policies remain in full force and effect throughout the term of the Contract, and for any extended reporting period or continuation of coverage when required by this Contract. Contractor shall promptly notify VPRA when any policy required by this Contract is cancelled or not renewed.

#### **10.1.4 No Recourse**

Except to the extent covered by the Contract Price, VPRA will not be responsible for: (1) paying premiums or other amounts with respect to Contractor's insurance policies, or (2) paying or reimbursing Contractor for deductibles or self-insured retentions under Contractor's insurance policies.

#### **10.1.5 Indemnification**

The insurance coverage required by this Article 10 of these General Terms and Conditions is intended, among other things, to support Contractor's indemnification obligations under Article 19 of these General Terms and Conditions. The insurance coverage is not intended to limit or otherwise modify such indemnification obligations.

#### **10.1.6 Commercial Unavailability of Required Coverage**

Contractor may propose alternative insurance packages and programs if, through no fault of Contractor, any of the coverages required in this Article 10 of these General Terms and Conditions (or any of the required terms of such coverages, including policy limits) become unavailable. VPRA may approve Contractor's proposal if VPRA determines, in its sole discretion, that the proposed alternative provides coverage equivalent to that specified in this Article 10 of these General Terms and Conditions. Contractor shall demonstrate and document, to VPRA's reasonable satisfaction, that Contractor used diligent efforts in the global insurance markets to place the required insurance coverages. Contractor shall not be entitled to any increase in the Contract Price for increased costs resulting from the unavailability of coverage and the requirement to provide acceptable alternatives. VPRA will be entitled to a reduction in the Contract Price if it agrees to accept alternative policies providing less than equivalent coverage, with the amount to be determined by extrapolation using the insurance quotes included in the CCPDs (or



based on other evidence of insurance premiums as of the Final Binding GMP Proposal if the CCPDs do not provide adequate information).

#### **10.1.7 Primary and Non-Contributory**

For claims covered by the insurance required by this Article 10 of these General Terms and Conditions, the insurance coverage will be primary insurance with respect to the insureds, additional insureds, and their respective members, directors, officers, employees, agents, and consultants, and must specify that coverage continues notwithstanding the fact that Contractor has left the Site. Any insurance or self-insurance beyond that specified in this Contract that is maintained by an insured, additional insured, or their members, directors, officers, employees, agents, and consultants shall be excess of such insurance and shall not contribute with it.

#### **10.1.8 Governmental Immunity**

Insurance companies providing the liability insurance policies required by this Article 10 of these General Terms and Conditions must waive their rights to assert the immunity of VPRA and the Commonwealth as a defense to any claims arising out of this Contract.

### **ARTICLE 11**

#### **(Risk of Loss)**

##### **11.1 Site Security and Maintenance**

Commencing on the date of the Early Work NTP and/or Phase 2 NTP, as applicable, Contractor shall be responsible for securing the Site. Contractor shall provide appropriate security for the Site, including securing any buildings and structures from entry. Contractor shall take all reasonable precautions and provide protection to prevent damage, injury or loss to Equipment, the Work, and Materials to be incorporated into the Work, as well as all other property at the Site, whether owned by Contractor, VPRA, or any other Person. Contractor shall maintain the Site in a neat and clean condition at all times, including removing litter and graffiti and controlling weeds. Trash and scrap shall not be allowed to accumulate on the Site.

##### **11.2 Maintenance and Repair of Work and On-Site Property**

###### **11.2.1 Responsibility of Contractor**

Contractor shall maintain, rebuild, repair, restore, or replace all Work that is injured or damaged prior to the date that VPRA or a third party accepts maintenance liability as specified in Section 11.2.2 of these General Terms and Conditions. This responsibility includes Construction Documents, Materials, Equipment, supplies, and maintenance Equipment that are purchased to be permanently installed in the Work, or for use during Project construction, regardless of whether VPRA has title thereto under the Contract Documents. Contractor is responsible for rebuilding, repairing, and restoring all other property at the Site, whether owned by Contractor, VPRA or any other Person, until acceptance as specified in Section 11.2.2 of these General Terms and Conditions.

For damage within the Site for which VPRA would typically seek compensation from the responsible party (or the responsible party's insurer), VPRA will subrogate to Contractor VPRA's right to seek such financial reimbursement. VPRA will provide copies of accident reports, when they exist, to Contractor. VPRA makes no guarantee that Contractor shall be able to obtain any financial reimbursement based on this subrogation of VPRA's rights.

###### **11.2.2 Relief from Liability for Maintenance**

Starting the day after the date on which VPRA issues a Notice of Substantial Completion, VPRA accepts maintenance responsibility, and the risk of loss shall shift from Contractor to VPRA, for all elements of the Project for which VPRA has issued the Notice of Substantial Completion. Notwithstanding the foregoing, Contractor shall retain maintenance responsibility and risk of loss for any elements of the Project or portions of the Project Site for which performance of a Punch List item or other prerequisite to Final Acceptance requires Contractor to maintain control over a select portion of the Site. VPRA accepts maintenance responsibility for all remaining Project elements at Final Acceptance. For elements of the Work that will be owned by Persons other than VPRA (such as Utility facilities), maintenance responsibility will transfer to those Persons when they accept (or are contractually required to accept) those elements.

### **11.3 Damage to Off-Site Property**

Contractor 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. If property is damaged, injured, or lost due to an act or omission of any Contractor-Related-Entity, then Contractor shall restore such property to a condition similar or equal to that existing before the damage, injury or loss occurred or compensate the owner of the affected property for the cost of restoration. VPRA shall not be responsible for reimbursing or compensating the Contractor for the cost of such damage, injury or loss or compensation.

### **11.4 Title**

Contractor 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 that are otherwise purchased for VPRA in connection with the Project, free and clear of all Liens. Title to all such Materials, Equipment, tools, and supplies will pass to VPRA, free and clear of all Liens, following delivery to the Site and upon the sooner of (a) being incorporated into the Project, or (b) VPRA paying Contractor invoiced amounts pertaining to such Materials, Equipment, tools, and supplies. Notwithstanding any such passage of title, and subject to Section 11.1 of these General Terms and Conditions, Contractor shall retain sole care, custody, and control of such Materials, Equipment, tools, and supplies, and must exercise due care with respect thereto as part of the Work until Final Acceptance or until Contractor is removed from the Project.

## **ARTICLE 12**

### **(Invoicing and Payment)**

#### **12.1 Schedule of Values**

**12.1.1** At least fifteen (15) days prior to its first Application for Payment, Contractor shall submit for VPRA's review and Approval a Schedule of Values for the Work. The Schedule of Values will: (i) subdivide the Work into its respective parts; and (ii) include estimated values for all items comprising the Work; and (iii) serve as the basis for CM/GC Fee payments made to Contractor throughout the Work. This Section shall not apply to the extent that VPRA and the Contractor have agreed to a method of payment for which a Schedule of Values is unnecessary; in such case, the Contractor shall follow the agreed-upon method of submitting an Application for Payment.

**12.1.2** VPRA will timely review and Approve (or reject) the Schedule of Values so as not to delay the submission of the Contractor's first Application for Payment. VPRA and Contractor shall timely resolve any differences so as not to delay the Contractor's

submission of its first Application for Payment. Once Approved by VPRA, the Schedule of Values shall be deemed a part of the Contract Documents.

## **12.2 Application for Payment**

**12.2.1** To receive payment, Contractor shall submit to VPRA an Application for Payment requesting payment for all Work performed during the period of time covered in the Application for Payment. Contractor shall not submit Applications for Payment more often than once per month. The Application for Payment must be accompanied by supporting documentation sufficient to establish, to VPRA's reasonable satisfaction, Contractor's entitlement to receive payment, and shall contain a progress schedule and such information as required by the agreed-upon method of invoicing and payment.

**12.2.2** Reserved.

**12.2.3** The allocable portion of the Construction Cost Markup (CM/GC Fee) for each progress payment shall be a percentage which is equivalent to the percentage of completion of the Work in each payment period.

**12.2.4** Contractor may request payment for equipment and materials not yet incorporated into the Project, provided that: (i) VPRA is satisfied that the equipment and materials are suitably stored at either the Site or another acceptable location; (ii) the equipment and materials are protected by suitable insurance; and (iii) upon payment, VPRA will receive the equipment and materials free and clear of all liens and encumbrances.

**12.2.5** The Application for Payment will constitute Contractor's representation that the Work described therein has been performed consistent with the Contract Documents, has progressed to the point indicated in the Application for Payment, and that title to all materials and equipment will pass to VPRA free and clear of all claims, liens, encumbrances, and security interests upon the incorporation of the materials and equipment into the Project, or upon Contractor's receipt of payment, whichever occurs earlier.

## **12.3 Calculation of Payment for Construction Work.**

Subject to other provisions of the Contract Documents, the amount of each progress payment shall be computed as follows:

- (a) Take Contractor's actual costs for labor and materials directly allocable to the Construction Work together with general conditions;
- (b) Add Contractor's insurance and bonding costs on the Project;
- (c) Add allowable amounts for materials and equipment delivered and suitably stored and otherwise in compliance with these General Terms and Conditions;
- (d) Add the applicable portion of the Construction Cost Markup (CC/GC Fee);
- (e) Subtract the aggregate of previous payments made by the VPRA
- (f) Subtract the shortfall, if any, indicated by the documentation required to substantiate prior applications for payment, or resulting from errors subsequently discovered by VPRA in such documentation; and
- (g) Subtract any amounts for which VPRA has withheld or nullified payment as provided in the Contract Documents.

## 12.4 VPRA's Payment Obligations

**12.4.1** VPRA shall pay Contractor all amounts properly requested and documented within thirty (30) Days of receipt of an Application for Payment. For clarity, no such amount shall be considered due and owing until the thirtieth Day after it has been properly requested and documented.

**12.4.2** Notwithstanding Section 12.4.1 of these General Terms and Conditions, VPRA may offset from such Application for Payment any amounts owed to VPRA by Contractor pursuant to the Contract Documents.

## 12.5 Limitations on Payment; Retainage

**12.5.1** If VPRA determines that Contractor is not entitled to all or part of an Application for Payment as a result of Contractor's failure to meet its obligations under the Contract Documents, VPRA will notify Contractor of the specific amounts VPRA has withheld (or intends to withhold), the reasons and contractual basis for the withholding, and the specific actions Contractor must take to qualify for payment under the Contract Documents. If Contractor disputes VPRA's bases for withholding, Contractor may pursue its rights under the Contract Documents, including those under Article 20 of these General Terms and Conditions.

**12.5.2** VPRA may withhold retainage if VPRA determines that Contractor's progress is unsatisfactory (i.e., not in accordance with the Baseline Schedule). VPRA may in its sole discretion withhold up to five percent (5%) retainage of the monthly payment for each month that Contractor's actual progress is determined to be unsatisfactory. If and when VPRA determines that Contractor's progress has achieved compliance with the Baseline Schedule, the five percent (5%) retainage previously withheld because of unsatisfactory progress will be released in Contractor's next monthly payment, and the remaining monthly payments will not be subject to retainage provided that Contractor's progress continues to be satisfactory. The foregoing right of VPRA to withhold retainage applies solely to the Phase 2 Services and Early Work, and shall not apply to the Phase 1 Services.

## 12.6 Contractor's Payment Obligations.

Contractor shall promptly pay each Subcontractor, out of the amount VPRA paid to Contractor for the Subcontractor, all undisputed amounts (less any retainage and any other offsets and deductions provided in the Subcontract or by Law) due and owing under the Subcontract. In accordance with the Prompt Payment Law, payment by Contractor shall be made the earlier of (i) sixty (60) Days after the satisfactory completion of the portion of the Work for which the Subcontractor has invoiced or (ii) seven (7) days after receipt of amounts paid by VPRA to Contractor for Work performed by the Subcontractor. Within 30 Days after satisfactory completion of all Work to be performed by a Subcontractor, including provision of appropriate releases, certificates, and other evidence of the Subcontractor's compliance with all applicable requirements of the Contract Documents, Contractor shall return any moneys withheld in retention from the Subcontractor. Contractor shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to its lower tier Subcontractors in a similar manner. VPRA will have no obligation to pay or responsibility to cause the payment of money to a Subcontractor, except as may otherwise be required by Law.

## 12.7 Interest on Late Payments

All amounts ~~that Contractor owes to VPRA under this Contract will earn interest from the date on which the amount is owing at the lesser of (i) 10 percent per year or (ii) the maximum rate allowable under Law.~~

All amounts that VPRA owes to Contractor ~~owed~~ under the Contract will earn interest from the date that is seven (7) days after the date on which the amount is owing at the base rate on corporate loans (prime rate) at large United States money center commercial banks as reported daily in the publication entitled The Wall Street Journal. Whenever a split prime rate is published, the lower of the two rates shall be used.

## 12.8 Disputes

Subject to VPRA's right to withhold from payments any amounts in dispute, and except as expressly stated otherwise in this Article 12 of these General Terms and Conditions, any disagreement between VPRA and Contractor relating to this Article 12 of these General Terms and Conditions will be considered a Dispute eligible for resolution under Article 20 of these General Terms and Conditions. Failure by VPRA to pay any amount in dispute will not alleviate, diminish or modify in any respect Contractor's obligation to perform under the Contract Documents, including Contractor's obligation to achieve the Completion Deadlines in accordance with the Contract Documents. Contractor shall not cease or slow down its performance under the Contract Documents due to any amount in dispute. Contractor shall proceed as directed by VPRA pending resolution of the Dispute. Upon resolution of any Dispute, each Party must pay to the other any amount owing within thirty (30) Days.

## 12.9 Final Payment

When Contractor has achieved Final Completion of the Work, Contractor shall submit an Application for Final Payment requesting payment for all Work performed not already subject to an Application for Payment and including the Affidavit of Final Completion in accordance with Section 22.1.2 of these General Terms and Conditions. As used in the Contract Documents, "Final Completion" refers to the Contractor's satisfactory completion of all Work in accordance with the Contract Documents, including completion of Punchlist items, demobilization from the Site and the transmittal of all deliverables required by the Contract Documents.

## 12.10 Shared Cost Savings

If the total aggregate compensation paid by VPRA to Contractor with respect to the Phase 2 Services (as evidenced by the value of Applications for Payment paid by VPRA plus the value of the Application for Final Payment) is less than the GMP, Contractor shall be entitled to payment from VPRA in the amount equaling [50%] of the difference between the total compensation for the Phase 2 Services and the GMP (the "Shared Cost Saving").

If the Contractor is eligible for payment for the Shared Cost Saving under this Section 12.10 of these General Terms and Conditions, Contractor shall provide with the Application for Final Payment:

- (a) all previously paid Applications for Payment; and
- (b) a summary ledger showing: (1) the total value of all Applications for Payment; (2) the Application for Final Payment value; (3) the difference between total construction cost for the Project and the Contract Price; and (4) the dollar amount of the Shared Cost Saving.

## ARTICLE 13

### (Time)

### **13.1 Obligation to Achieve the Completion Deadlines**

Contractor shall commence performance of the Work and achieve the Completion Deadline(s) in accordance with the Contract Documents. The Contract Documents specify critical Completion Deadlines with which Contractor must comply. All time and schedule requirements included within the Contract Documents are of the essence. By executing the Contract, Contractor confirms that the Completion Deadlines in the Contract Documents are reasonable for the performance of the Work. Unless otherwise excused by the terms of the Contract Documents, Contractor's failure to timely perform the Work in accordance with the Completion Deadlines shall result in the assessment of liquidated damages, unless waived by VPRA in its sole discretion.

## **ARTICLE 14**

### **(Changes)**

This Article 14 of these General Terms and Conditions sets forth the requirements for obtaining all Change Orders under the Contract. Contractor agrees (1) that the Contract Price constitutes full compensation for performing all of the Work, subject only to those exceptions specified in this Article 14, and (2) that VPRA is subject to constraints that limit its ability to increase the Contract Price or adjust the Completion Deadlines. Contractor waives the right to make any Claim for an adjustment of the Contract Price or a Completion Deadline, except as set forth in this Article 14 of these General Terms and Conditions. If any other provision of the Contract Documents provides for a Change Order to be issued, the provision is incorporated into, and subject to the limitations of, this Article 14 of these General Terms and Conditions. This Article 14 of these General Terms and Conditions shall constitute Contractor's sole remedy to receive an adjustment to the Contract Price or a Completion Deadline. Contractor shall have no other rights under the Contract Documents, at law or in equity, to obtain an adjustment to the Contract Price or a Completion Deadline.

### **14.1 Circumstances Under Which a Change Order May Be Issued**

#### **14.1.1 Definition and Requirements**

##### **14.1.1.1 Change Orders**

The term "Change Order" means a written amendment to the Contract Documents issued in accordance with this Article 14 of these General Terms and Conditions. VPRA may issue unilateral Change Orders as specified in Section 14.2 of these General Terms and Conditions. A Change Order will not be effective unless executed by VPRA as specified herein. Change Orders may be requested by Contractor only pursuant to Section 14.3 of these General Terms and Conditions. Change Orders may be issued for the following purposes (or combination of the following purposes):

- (a) to modify the scope of the Work;
- (b) to revise a Completion Deadline;
- (c) to revise the Contract Price; and
- (d) to revise other terms and conditions of the Contract Documents.

##### **14.1.1.2 Directive Letters**

VPRA may issue a letter to Contractor, at any time, if VPRA desires a change in the Work or if there is a dispute regarding the scope of the Work ("Directive Letter"). Each Directive Letter will

(1) state that it is issued under this Section 14.1.1.2 of these General Terms and Conditions, (2) describe the required Work, and (3) may state the basis for determining compensation, if any. Contractor shall immediately proceed with the Work as directed in the Directive Letter, and, if applicable, request a Change Order as promptly as possible. If the Directive Letter states that the Work is within the original scope of the Work, Contractor shall proceed with the Work as directed but may request that VPRA issue a Change Order for the work as specified in Section 14.3 of these General Terms and Conditions.

#### **14.1.2 Performance of Changed or Extra Work**

Contractor's receipt of a Change Order executed by VPRA or a Directive Letter is a condition precedent to Contractor's right to receive an adjustment to the Contract Price or a Completion Deadline for changed or Extra Work, provided that VPRA's failure to execute a Change Order or Directive Letter does not negate Contractor's right to pursue the Relief Event process in the event of a dispute over entitlement to relief. If Contractor undertakes any such work without receiving a Directive Letter or Change Order executed by VPRA, Contractor shall be deemed to have performed such work voluntarily and will not be entitled to a Change Order for performing that work. In addition, VPRA has the right to require Contractor to remove or otherwise undo any such voluntary work, at Contractor's sole cost.

#### **14.1.3 Impact of Directive Letter**

The fact that VPRA issued a Directive Letter will not be considered determinative that a VPRA-Directed Change occurred. The determination of whether a VPRA-Directed Change occurred will be made by comparing the original requirements of the Contract Documents and determining whether the Directive Letter constitutes a change to those requirements.

### **14.2 VPRA-Initiated Change Orders**

This Section 14.2 of these General Terms and Conditions describes how VPRA may initiate and unilaterally issue Change Orders, with or without using a Request for Change Proposal.

#### **14.2.1 Request for Change Proposal**

##### **14.2.1.1 Issuance of Request**

VPRA may, at its discretion, issue a Request for Change Proposal if VPRA wishes to issue a VPRA-Directed Change or to evaluate whether to initiate a VPRA-Directed Change.

##### **14.2.1.2 Initial Consultation**

Upon issuance by VPRA of a Request for Change Proposal, VPRA and Contractor shall:

- (a) have a first consultation to define the proposed scope of the change no later than two (2) Working Days after Contractor receives a Request for Change Proposal; and
- (b) have a second consultation concerning the estimated cost and time impacts no later than seven (7) Working Days after the first consultation.

Contractor shall provide data regarding the Request for Change Proposal as requested by VPRA.

##### **14.2.1.3 Notification by VPRA**

VPRA will notify Contractor of VPRA's decision no later than seven (7) Days after the later of: the second consultation described in Section 14.2.1.2(b) of these General Terms and Conditions or Contractor's provision of data as described in Section 14.2.1.2 of these General Terms and Conditions. At such time, VPRA will notify Contractor whether VPRA:

- (a) wishes to issue a Change Order;
- (b) wishes to request Contractor to prepare a Change Order form; or
- (c) no longer wishes to issue a Change Order.

VPRA may require Contractor to provide two alternative Change Order forms: one providing for a Completion Deadline adjustment and any additional costs permitted by the Contract, and the other showing all Acceleration Costs associated with meeting the original Completion Deadlines, as well as any additional costs permitted by the Contract.

#### **14.2.1.4 Submittal of Change Order Form**

If VPRA requests that Contractor prepare a Change Order form, then Contractor shall prepare and submit the Change Order form to VPRA no later than twenty-one (21) Days after Contractor receives notice pursuant to Section 14.2.1.3 of these General Terms and Conditions. Contractor's Change Order form must comply with all applicable requirements of Section 14.4 of these General Terms and Conditions and must incorporate and fully reflect all of VPRA's requests. Contractor shall bear the cost of developing the Change Order form, and modifying the form as requested by VPRA, except that costs of Design Work required to prepare plans and exhibits necessary to the Change Order form may be included in the Change Order as reimbursable items if pre-authorized in writing by VPRA. If VPRA approves the Change Order, the cost of such Design Work may be included within the Change Order; otherwise, VPRA will reimburse those costs through a separate Change Order. VPRA reserves the right not to issue a Change Order after Contractor has provided a Change Order form.

#### **14.2.2 Unilateral Change Orders**

VPRA may unilaterally issue a Change Order at any time if VPRA has not issued a Request for Change Proposal ("Unilateral Change Order"). Contractor's approval of a Unilateral Change Order shall not be required and Contractor shall implement all changes contained within a Unilateral Change Order promptly or by such time as specified therein.

Additive Unilateral Change Orders must state that Contractor shall be entitled to compensation for the corresponding Extra Work. A deductive Unilateral Change Order may contain a corresponding price deduction deemed appropriate by VPRA.

VPRA's issuance of a Unilateral Change Order does not impact Contractor's right to an adjustment of the Contract Price or a Completion Deadline under this Article 14 of these General Terms and Conditions. Contractor may follow the process under this Article 14 of these General Terms and Conditions if Contractor disagrees with the content of a Unilateral Change Order.

### **14.3 Contractor-Initiated ~~Change Orders~~ Contract Modification**

#### **14.3.1 Eligible Changes**

This section outlines when Contractor shall submit a Change Notice and Request for Change Order to VPRA. Contractor shall use this process to request an adjustment to the Contract Price or a Completion Deadline due to a Relief Event. All Relief Events are subject to the limitations stated in this Article 14 of these General Terms and Conditions in addition to any limitations stated in the definition of each Relief Event or elsewhere in the Contract Documents. Other than for the Relief Events herein, Contractor shall not be entitled to any adjustment of the Contract Price or a Completion Deadline. With respect to any request for relief, Contractor shall bear the burden of proving that it is entitled to the relief sought. Contractor shall not be entitled to relief for a Relief Event that occurs during the provision of the Phase 1 Services, provided that this shall not preclude a Relief Event arising out of performance of an Early Work Package.



#### **14.3.1.1 Contract Price Adjustment**

Upon the occurrence of a Relief Event, Contractor shall follow the process in this Article 14 of these General Terms and Conditions to adjust the Contract Price for Extra Work Costs and Delay Costs. Except as otherwise provided herein, Contractor may request a Contract Price adjustment for Extra Work Costs and Delay Costs for all Relief Events.

#### **14.3.1.2 Completion Deadline Adjustment**

Upon the occurrence of a Relief Event, Contractor shall follow the process in this Article 14 of these General Terms and Conditions to request adjustment of a Completion Deadline, subject to the limitations herein. Except as otherwise provided herein, Contractor may submit a request to adjust a Completion Deadline for all Relief Events.

#### **14.3.1.3 Contractor-Initiated ~~Change Proposal~~Contract Modification**

Contractor at any time may submit a Request for Change Order to VPRA that proposes changes to the scope of Work of the Contract Documents. Proposals can include changes to add or reduce the scope of Work or implement changes that are “equal to or better” than the original requirements. The provisions of Section 14.3.23 of these General Terms and Conditions regarding delivery of a Change Notice do not apply to a proposed Contractor-initiated ~~Change Proposal~~Contract modification under this Section 14.3.1.3 of these General Terms and Conditions. All cost and schedule savings associated with a deductive Contractor-~~Initiated Change Proposal~~initiated Contract modification shall accrue to VPRA by issuance of a deductive Change Order in accordance with this Article 14 of these General Terms and Conditions.

#### **14.3.2 Conditions Precedent**

The requirements set forth in this Section 14.3 of these General Terms and Conditions constitute conditions precedent to Contractor’s entitlement to request and receive a Change Order in all circumstances except those involving a Request for Change Proposal by VPRA ~~or~~, a Unilateral Change Order, or a Contractor-initiated Contract modification under Section 14.3.1.3 of these General Terms and Conditions. Contractor agrees that the filing of Change Notices and subsequent filing of Requests for Change Orders with VPRA pursuant to Sections 14.3 and 14.4 of these General Terms and Conditions are necessary to begin the administrative process for Contractor-initiated ~~Change Orders~~Contract modifications. Contractor understands that it shall be forever barred from recovering against VPRA under this Article 14 of these General Terms and Conditions and the Contract if it fails to follow the process under Sections 14.3 and 14.4 of these General Terms and Conditions.

#### **14.3.3 Delivery of Change Notice**

Contractor shall deliver to VPRA written notice (“Change Notice”) stating that a Relief Event has occurred within the scope of Section(s) 14.3.1.1 and/or 14.3.1.2 of these General Terms and Conditions. The first notice must be labeled “Change Notice No. 1” and subsequent notices must be numbered sequentially. The identification number shall be used on all subsequent materials connected to the Relief Event. The Change Notice must contain the information stated in Section- 14.3.5 of these General Terms and Conditions.

#### **14.3.4 Prompt Delivery of Change Notice Required**

Early or prior knowledge by VPRA of an existing or impending Claim could alter the plans, scheduling, or other VPRA action or result in mitigation or elimination of the basis for the Claim. Accordingly, each Change Notice must be delivered as promptly as possible after the occurrence of the Relief Event upon which it is based. Except as otherwise provided herein, if any Change

Notice is delivered later than seven (7) Days after Contractor first discovered (or should have discovered in the exercise of reasonable prudence) the occurrence described in the Change Notice, Contractor shall be deemed to have waived the right to collect any and all costs incurred prior to the delivery date of the Change Notice. Contractor's failure to provide a Change Notice within twenty-one (21) Days after Contractor first discovered (or should have discovered in the exercise of reasonable prudence) the occurrence of a Relief Event shall preclude Contractor from any relief associated with the events, actions, omissions, or otherwise that comprise the Relief Event(s). A Change Notice will be deemed delivered only if it fully conforms to the requirements of Section 14.3.5 of these General Terms and Conditions. VPRA will acknowledge receipt of a Change Notice in writing within seven (7) Days of receipt, provided that such written notice shall not constitute acknowledgement that the Change Notice meets the requirements of Section 14.3.5 of these General Terms and Conditions.

Furthermore, if any Change Notice concerns any condition or material described in Sections 14.12.2 or 14.12.7 of these General Terms and Conditions, Contractor shall be deemed to have waived the right to collect any and all costs incurred in connection with the condition or material if VPRA is not afforded the opportunity to inspect the material or condition before it is disturbed.

#### **14.3.5 Contents of Change Notice**

The Change Notice shall, to the maximum extent of the information available at the time of submission:

- (a) specify the applicable Relief Event(s);
- (b) state in detail the facts underlying the potential Change Order;
- (c) state the type of relief sought, including Extra Work Costs, Delay Costs, and/or a Completion Deadline adjustment;
- (d) specify the reasons why Contractor believes that it is entitled to an adjustment of the Contract Price or a Completion Deadline;
- (e) provide the date of occurrence or inception in reasonable detail;
- (f) provide a good faith preliminary estimate of the anticipated cost impacts (including cost savings) due to the Relief Event and the basis for such estimate;
- (g) state the actions Contractor has taken prior to submission of the Change Notice, and proposed actions to be taken thereafter, to mitigate the costs, delay, and other consequences of the Relief Event;
- (h) state in detail the factual and legal bases supporting the conclusion that the work is not required by the Contract Documents, if applicable;
- (i) identify all provisions of the Contract Documents relevant to the issue;
- (j) identify any potential Critical Path impacts;
- (k) if Contractor intends to seek a Completion Deadline extension, include a good faith estimate of the potential time impact;
- (l) provide an estimate of the time within which a response to the notice is required to minimize cost, delay, or disruption of performance; and

- (m) state the type and amount of insurance that may be applicable and amounts that have been or are anticipated to be collected under such insurance.

The nature and scope of the potential Change Order stated in the Change Notice shall remain consistent (except for reductions) for the remainder of the Change Order process and, if applicable, during any subsequent Dispute Resolution Process, except with respect to consequences of a Relief Event that (i) are of a different nature or scope, (ii) first arise or occur after Contractor delivers the Change Notice to VPRA, and (iii) could not have been anticipated through the exercise of reasonable diligence prior to delivering the Change Notice. If any such new consequences arise or occur prior to submission of the Request for Change Order, Contractor shall report them to VPRA by a supplemental Change Notice. If a single Relief Event is a continuing cause of delay, only one Change Notice shall be necessary. If a single Relief Event is a continuing cause of delay, only one Change Notice shall be necessary.

#### **14.4 Delivery of Request for Change Order**

Contractor shall deliver a Request for Change Order to VPRA within sixty (60) Days after Contractor's delivery of the Change Notice. If Contractor fails to submit a complete Request for Change Order within sixty (60) Days after Contractor's delivery of the Change Notice, Contractor shall be deemed to have irrevocably and forever waived and released any right to any relief whatsoever for any effect attributable or related to the Relief Event and the acts or omissions comprising such Relief Event; provided, however, that if Contractor submits a Request for Change Order within sixty (60) Days of the date of Contractor's delivery of the Change Notice and VPRA responds as provided in Section 14.5.1 of these General Terms and Conditions that Contractor's Request for Change Order is incomplete, Contractor shall have until the later of (a) fifteen (15) Days after receipt of VPRA's notice pursuant to Section 14.5.1 of these General Terms and Conditions or (b) sixty (60) Days after Contractor's delivery of the Change Notice, to comply in full with Section 14.4.1 of these General Terms and Conditions before the waiver herein becomes effective.

##### **14.4.1 Contents of Request for Change Order**

Each Request for Change Order shall contain the following information:

- (a) full details of the Relief Event, including its nature, the date of its occurrence, its duration (to the extent that the Relief Event and the effects thereof have ceased, or estimated duration to the extent that the Relief Event and the effects thereof have not ceased), affected locations, items of Work affected, and information required by Section 14.8.5 of these General Terms and Conditions;
- (b) any written communications between VPRA, Contractor, and other Persons concerning the Relief Event and identification of the substance of any material oral communications between VPRA and Contractor, if any, relating to the Relief Event and the name of the Person or Persons making such oral communications;
- (c) identification of the specific provisions of the Contract Documents that are impacted by the Relief Event or that Contractor claims entitles it to the relief sought or pertain to the relief sought, and a complete, detailed statement that explains the reasons why the provisions entitle Contractor to that relief or are otherwise impacted by the requested relief. Contractor shall additionally include any documents or other materials that Contractor contends support entitlement to the relief sought;
- (d) except as provided in Section 14.4.2 of these General Terms and Conditions, where Contractor makes a request for a Completion Deadline adjustment, a Schedule Impact Analysis of the Baseline Schedule that identifies the Critical Path (with activity durations,

predecessor, and successor activities and resources, including total Float), and illustrates the effect of schedule changes or disruptions on the Completion Deadlines;

- (e) a detailed, itemized estimate of all amounts claimed for Extra Work Costs and Delay Costs to the extent such amounts are eligible for compensation under this Article 14 of these General Terms and Conditions for the Relief Event in question, subject to the following requirements:
  - (i) all such amounts shall be broken down in terms of the eligible costs for labor (including hourly wage rates, fringe benefits rates, and audited burden), Materials, Equipment, third party fees and charges, extra insurance, and performance and payment security (e.g., bonds and letters of credit), as applicable, and other costs, including expenses and profit, and any other cost category or categories VPRA specifies; and
  - (ii) Contractor shall provide copies of invoices or other ~~proof~~ documentation of payment incurred or potential future costs for Equipment or Materials, and for Equipment, shall provide evidence of the applicable rental rate or cost of Equipment in accordance with Exhibit J of the Contract;
- (f) the effect of the Relief Event on Contractor's ability to perform any of its obligations under the Contract Documents, including details of the relevant obligations, the effect on each such obligation, and the likely duration of that effect;
- (g) copies of the Construction Pricing Documents and other documents showing Contractor's assumptions forming the basis of Contractor's Final Binding GMP Proposal concerning the Work that is the subject of the Request for Change Order;
- (h) an explanation of the measures that Contractor has previously taken to prevent, and proposes to undertake to mitigate, the costs, delay, and other consequences of the Relief Event;
- (i) the type and amount of insurance that may be applicable and amounts that have been or are anticipated to be collected under such insurance, subject to the following requirements:
  - (i) Contractor shall provide a copy of every notice letter and/or claim submitted to an insurer or other party that may be liable to reimburse or indemnify Contractor due to the Relief Event;
  - (ii) and, if the Relief Event may be covered by Contractor's self-insurance, Contractor shall provide documentation of any claim against such insurance that it prepares in the ordinary course of business; and
- (j) Contractor Representation: Each Request for Change Order must contain a sworn certification by Contractor certifying that the amount of the Completion Deadline or Contract Price adjustment requested includes all known and anticipated impacts or amounts that may be incurred as a result of the event or matter giving rise to the Relief Event and also certifying that Contractor has no reason to believe and does not believe that the factual basis for the Request for Change Order is falsely represented.

#### **14.4.2 Updates to Schedule Impact Analysis in a Request for Change Order**

If Contractor seeks a Completion Deadline adjustment and/or Delay Costs arising from a Relief Event, Contractor shall update VPRA as to the time impact of the Relief Event until such time as VPRA issues a Change Order, Contractor withdraws the Request for Change Order, or resolution

of the Dispute Resolution Process. Unless VPRA has issued a Change Order for the Relief Event, Contractor withdraws the Request for Change Order, or the Dispute Resolution Process is complete, once Contractor knows or should reasonably be expected to know the actual time impact of a Relief Event, Contractor shall submit a revised Schedule Impact Analysis showing the actual impact of the Relief Event to the Critical Path. Such updated information shall supersede any previously submitted Schedule Impact Analysis for purposes of establishing the appropriate amount of a Completion Deadline adjustment and Delay Costs, if applicable, in a Change Order issued with respect to the Relief Event.

#### **14.4.3 Alternative Requests for Change Orders for Time-Related Relief**

If Contractor requests a Completion Deadline adjustment and Delay Costs, if applicable, VPRA, in its sole discretion, may require Contractor to provide two alternative Request for Change Orders, one of which shall provide for a Completion Deadline adjustment and any additional costs permitted hereunder, and the other of which shall show all Acceleration Costs associated with meeting the original Completion Deadlines, as well as any additional costs permitted hereunder. If Contractor reasonably believes that it is not feasible to recover to the non-adjusted Completion Deadlines, or that the costs associated with such a recovery are prohibitive, then Contractor shall so state and provide its applicable, supporting analysis.

Contractor shall not be entitled to Acceleration Costs unless authorized in writing by VPRA.

#### **14.4.4 Supplements to Request for Change Order**

If, following delivery of a Request for Change Order, Contractor receives or becomes aware of any further information or estimates relating to the Relief Event and its impact on cost, schedule, or performance of Work, including information on new consequences as described in Sections 14.3.5 or 14.4.2 of these General Terms and Conditions, Contractor shall submit such further information to VPRA as soon as possible. VPRA may request from Contractor any further information that VPRA may reasonably require, and Contractor shall supply the same within the time period stated in VPRA's request for additional information.

#### **14.5 VPRA Response to Request for Change Order**

Once Contractor has submitted a complete Request for Change Order, VPRA will respond within forty-five (45) Days. VPRA's time to respond to a Request for Change Order does not commence until Contractor submits a complete Request for Change Order and VPRA will have no obligation to review an incomplete Request for Change Order. If Contractor has complied with the requirements of Sections 14.3 and 14.4 of these General Terms and Conditions, and VPRA provides a written response within such forty-five (45)-Day period stating that there are matters in dispute regarding the Request for Change Order, such matters in dispute shall be considered a Dispute for which Contractor may initiate the Dispute Resolution Process in Article 20 of these General Terms and Conditions. If VPRA does not respond within the forty-five (45)-Day period, and Contractor has complied with all requirements of Sections 14.3 and 14.4 of these General Terms and Conditions, then the Request for Change Order shall be considered a Dispute for which Contractor may initiate the Dispute Resolution Process in Article 20 of these General Terms and Conditions. If VPRA responds that it accepts the Request for Change Order in full or in part, the Parties shall execute a corresponding Change Order; with the remainder of a partial acceptance eligible to proceed to the Dispute Resolution Process in Article 20 of these General Terms and Conditions.

##### **14.5.1 VPRA Response to an Incomplete Request for Change Order**

If Contractor does not comply in full with the requirements of Sections 14.3 and 14.4 of these General Terms and Conditions, VPRA may provide written notice rejecting Contractor's Request

for Change Order within the forty-five (45)-Day time period and such notice shall identify the deficiencies within Contractor's submittal. Such response by VPRA shall not constitute recognition that the Request for Change Order is a Dispute eligible for resolution by the Dispute Resolution Process. Contractor shall have the option to the withdraw the Request for Change Order or, subject to Section 14.4 of these General Terms and Conditions, to correct the deficiencies therein and timely resubmit the Request for Change Order for VPRA's consideration.

#### **14.6 Subcontractor Claims**

All Claims must be submitted by Contractor. Subcontractors may not directly submit requests for relief to VPRA. Contractor shall be responsible for verifying the accuracy of all Claims submitted, including those submitted on behalf of Subcontractors. For all Claims made by Contractor on behalf of a Subcontractor, both Contractor and the applicable Subcontractor shall execute the certification required by Section 14.4.1(j) of these General Terms and Conditions and submit it with the Request for Change Order. A Request for Change Order shall not be considered complete until receipt of the certification executed by Contractor and all Subcontractors on whose behalf Contractor is submitting a Claim to VPRA.

#### **14.7 Reserved**

#### **14.8 Limitations on Change Orders**

##### **14.8.1 Duty to Mitigate**

Contractor shall take all steps reasonably necessary to mitigate the consequences of any Relief Event. Contractor shall not be entitled to an adjustment of the Contract Price or a Completion Deadline for impacts that could have been avoided; provided, however, that Contractor shall not be required to implement mitigation measures where the cost or schedule impacts thereof would exceed the Contract Price adjustment or Completion Deadline adjustment if the mitigation measures were not implemented. As part of a Change Order, Contractor shall be entitled to the reasonable costs of mitigation measures provided that such costs are less than the Contract Price adjustment that would have occurred in the absence of Contractor's mitigation efforts.

##### **14.8.2 Limitation on Contract Price Increases**

Any increase in the Contract Price allowed by this Article 14 of these General Terms and Conditions is not eligible to include:

- (a) costs caused by the breach of contract or fault or negligence, or act or failure to act, of any Contractor-Related Entity;
- (b) costs or circumstances that could reasonably have been anticipated due to Contractor's performance of the Phase 1 Services;
- (c) costs that could reasonably have been avoided by Contractor, including by resequencing, reallocating or redeploying its forces to other portions of the Work or to other activities unrelated to the Work, or other work-around measures;
- (d) costs covered by insurance;
- (e) costs for any rejected Work that failed to meet the requirements of the Contract Documents and any necessary remedial Work; and
- (f) any costs incurred to prepare a Claim or Dispute, including costs of preparing a Change Notice, Request for Change Order, and all costs incident thereto, including attorney's fees and expert fees.

### 14.8.3 Completion Deadline Adjustments and Delay Costs

Contractor shall only be entitled to an adjustment of a Completion Deadline and/or Delay Costs for Relief Events that delay the Critical Path and only to the extent of such delay to the Critical Path. Contractor shall not be entitled to any time-related relief, whether a Completion Deadline adjustment or Delay Costs for any delay arising from a Relief Event, that does not delay the Critical Path. No Relief Event shall be considered to delay the Critical Path until all available Float has been exhausted. Contractor shall not be entitled to an adjustment of the Completion Deadline or Delay Costs for the Phase 1 Services.

### 14.8.4 Limitations on Delay Costs

Except for Acceleration Costs authorized by VPRA in accordance with Section 14.4.3 of these General Terms and Conditions, Delay Costs shall be limited to only those costs specified in Exhibit J of the Contract. Other than Delay Costs specified in Exhibit J of the Contract, Contractor shall not be entitled to any other costs, damages, or otherwise attributable to delays, disruption, inefficiencies, or any other claim of a similar nature- arising out of a delay to the Critical Path caused by a Relief Event. The foregoing limitation shall not limit or otherwise impact Contractor's entitlement to Extra Work Costs arising out of a Relief Event. Further, except as otherwise provided by the Contract Documents, in no event shall Contractor submit or be entitled to payment based on any of the following, including: Eichleay formula, the total cost method, original Contract period formula, burden fluctuation method, comparative absorption rates, and other similar or related methods. Regardless of the basis asserted, Contractor shall not recover and is not entitled to recover the following categories of damage:

- (a) any compensation except as provided by {Section 2} of Exhibit J of the Contract;
- (b) loss of anticipated profit, incentives, or bonuses;
- (c) labor inefficiencies that are the fault of Contractor;
- (d) ~~home office overhead~~Home Office Overhead regardless of whether it is characterized as absorbed, unabsorbed, or extended exceeding that provided in {Section 2.4} of Exhibit J of the Contract;
- (e) any damages, costs or expenses that are indirect, special, incidental or consequential, including lost or impaired bonding capacity, loss of bidding and contracting opportunities, loss of credit standing, cost of financing, interest paid, lost Material discounts, economic loss, loss of reputation, loss of other Work, loss of use, loss of business opportunity, loss of product or output, income, loss of profit or revenue, cost of capital, financing, and for loss of management or employee productivity or of the services of such persons, and business devastation, bankruptcy, or insolvency;
- (f) Acceleration Costs, except as provided under Section 14.4.3 of these General Terms and Conditions;
- (g) late payment charges associated with any Claim, or disputed Work or Materials. Contractor is also not entitled to late payment charges on any judgment or award made to Contractor;
- (h) prejudgment or post-judgment interest related to or arising from any disputed Claim or on any award made to Contractor; or

- (i) attorney's fees and costs, Claim preparation expenses, and litigation or other costs related to or arising from any disputed Claim, or prosecution thereof.

#### **14.8.5 Additional Limitations on Completion Deadline Adjustments and Delay Costs**

Contractor shall not be entitled to (i) an adjustment of a Completion Deadline or (ii) any increase in the Contract Price to compensate for Delay Costs or VPRA-authorized Acceleration Costs, to the extent that:

- (a) Contractor's schedule that defines the affected Critical Path did not set forth a reasonable method for completion of the Work;
- (b) the Relief Event that is the subject of the requested Change Order has not caused or will not result in an identifiable and measurable ~~disruptiondelay of the Work that impacted an activity on~~ the Critical Path-~~activity~~;
- (c) the delay or damage was due to any breach of contract or fault or negligence, or act or failure to act, of any Contractor-Related Entity;
- (d) the delay or damage could have reasonably been avoided by Contractor, including by resequencing, reallocating, or redeploying its forces to other portions of the Work or to other activities unrelated to the Work, or other work-around measures; or
- (e) the Relief Event will only impact the provision of the Phase 1 Services.

When requesting a Completion Deadline adjustment and/or Delay Costs, Contractor shall demonstrate in the Request for Change Order that the alleged delay or damage was not attributable to the conditions stated above.

#### **14.8.6 Concurrent Delay**

In the event of a Concurrent Delay, Contractor shall not be entitled to Delay Costs for the duration of the delay that is concurrent with a delay to the Critical Path for which Contractor is responsible. A Concurrent Delay shall not affect Contractor's right to a Completion Deadline adjustment hereunder.

### **14.9 Payment for Extra Work Change Orders**

#### **14.9.1 Negotiated Price for Extra Work**

VPRA and Contractor (on its own behalf and on behalf of its Subcontractors) will endeavor to negotiate, in good faith, a reasonable amount for the Extra Work Costs in a Change Order. In general, the price of a Change Order will be negotiated in accordance with this Section 14.9 of these General Terms and Conditions or be paid in accordance with the Force Account specifications in Exhibit J of the Contract. This Section 14.9 of these General Terms and Conditions shall not apply to Delay Costs, which are payable solely in accordance with Section- 14.10.2 of these General Terms and Conditions and Exhibit J of the Contract.

#### **14.9.2 Extra Work**

When the Change Order includes Extra Work, VPRA and Contractor shall negotiate an increase in the Contract Price based on estimated costs of labor, Material, and Equipment; negotiate a unit price Change Order; or determine the amount based on actual costs in accordance with Exhibit- J. Compensation for Extra Work shall not include any amount covered by insurance.



### **14.9.3 Deleted Work**

When the Change Order deletes Work from Contractor's scope, the amount of the reduction in the Contract Price will be based upon all of the following associated with the deleted work: the cost of Materials, labor and Equipment costs, and overhead and profit. VPRA will be entitled to credits for mark-up for profit and overhead in the amounts provided in Exhibit J of the Contract. Documented cancellation and restocking charges may be included in costs of deleting Work and be subtracted from the price deduction for the deleted Work.

### **14.9.4 Work Both Added and Deleted**

When the Change Order includes both Extra Work and deleted Work, Contractor shall prepare separate cost breakdowns for Extra Work and deleted Work in accordance with Sections 14.9.2 and 14.9.3 of these General Terms and Conditions. The difference between the Extra Work and deleted Work cost breakdowns will be the cost (or credit to VPRA) of the Change Order. If the change results in a net change of zero, the Contract Price will not be changed.

### **14.10 Force Account Change Orders**

VPRA may issue a Force Account Change Order if VPRA determines that doing so is beneficial, including if VPRA and Contractor are unable to negotiate a price for Extra Work Costs in a Change Order as provided in Section 14.9 of these General Terms and Conditions. VPRA may also issue a Directive Letter with pricing determined on a Force Account basis.

#### **14.10.1 Determination of Costs**

Compensation for Force Account Change Orders will be in accordance with Exhibit J of the Contract.

#### **14.10.2 Payment of Delay Costs**

Delay Costs shall solely be payable in accordance with Exhibit J of the Contract.

### **14.11 Payment of Change Orders**

VPRA shall determine how to pay Contractor for Change Orders. VPRA shall compensate Contractor through one of the following:

- (a) to the extent permitted by Law, as a lump-sum payment;
- (b) invoiced as Work is completed; or
- (c) through any combination of the above, subject to Section 14.11.2 of these General Terms and Conditions.

#### **14.11.1 Timing of Change Order Payments**

Following receipt of required documentation establishing the pricing of a Change Order, VPRA will make payment as follows:

- (a) if as a lump sum payment other than a negotiated fixed price, VPRA will make payment of all undisputed amounts not later than with the first Application for Payment after VPRA's receipt of all pertinent data, documents, and information on an Open Book basis with respect to the Extra Work or Delay Costs, as applicable;

- (b) if as a lump sum payment that is a negotiated fixed price, VPRA will make payment of all undisputed amounts with the first Application for Payment after VPRA's receipt of all documentation required from Contractor pursuant to the terms of the negotiated fixed price Change Order with respect to Extra Work or Delay Costs, as applicable;
- (c) if invoiced as the Work is completed, VPRA will make payment of all undisputed amounts with the payment occurring after Contractor submits and VPRA approves an itemized invoice showing the components of the Extra Work and Delay Costs included in the Change Order, to be submitted with Application for Payment request, of the Extra Work and Delay Costs, as applicable, incurred during the previous month.

#### **14.11.2 Limitations on Payment of Change Orders for Work Not Completed**

If any portion of the Extra Work Costs and Delay Costs consists of costs for design or construction not then performed, VPRA shall have no obligation to make advance payments and shall have the right to pay such portion as invoiced payments in accordance with Section 14.11.1(c) of these General Terms and Conditions.

#### **14.11.3 Compliance with Federal Acquisition Regulation**

Reimbursable expenses in Change Orders, regardless of whether unit price, negotiated, or Force Account, must comply with the allowability and allocability requirements under the FAR. Expenses excluded by the FAR are not eligible for reimbursement, and to the extent paid by VPRA, will be subject to recapture upon demand by VPRA. Such right of recapture shall extend beyond Final Acceptance. If a federal agency asserts that any claimed reimbursable expenses are not reimbursable under FAR, VPRA will allow Contractor the opportunity to respond to the federal agency and defend the allowability and allocability of the expenses. Any determination made by a federal agency on the matter shall be deemed final and binding on the Parties.

### **14.12 Additional Conditions and Limitations on Certain Change Orders**

#### ~~14.12.1 VPRA-Directed Change~~

~~A VPRA-Directed Change shall only be eligible for Extra Work Costs. A VPRA-Directed Change shall not be eligible for Delay Costs or an adjustment of a Completion Deadline. Notwithstanding the foregoing, Contractor may seek schedule-related relief for a VPRA-Caused Delay in accordance with Section 14.12.9 of these General Terms and Conditions.~~

#### 14.12.1 Reserved

#### **14.12.2 Differing Site Conditions**

~~If Contractor encounters a Differing Site Condition, Contractor will be entitled to submit a request for an adjustment in the Contract Price and/or Completion Deadlines to the extent Contractor's cost and/or time of performance are adversely impacted by the Differing Site Condition as allowed for herein. Upon encountering a Differing Site Condition, Contractor shall provide prompt written notice to VPRA of such condition, which notice shall not be later than two (2) days after such condition has been encountered. Contractor shall, to the extent reasonably possible, provide such notice before the Differing Site Condition has been substantially disturbed or altered.~~

Contractor bears the reasonable burden of proving (1) that a Differing Site Condition exists and (2) that it could not reasonably have worked around the Differing Site Condition so as to avoid additional costs or impacts to the Critical Path. Contractor's request for any Change Order relating to a Differing Site Condition must include a statement signed by a District of Columbia-licensed

professional engineer providing: (1) all of Contractor's relevant assumptions concerning the condition of the Site and justifying the basis for such assumptions, (2) a specific explanation of how the existing conditions differ from those assumptions, and (3) a description of Contractor's efforts to find alternative design or construction solutions to eliminate or minimize the problem and the associated costs.

### **14.12.3 Inaccurate Utility Information**

#### **14.12.3.1 Inaccurate Utility Information Defined**

If any existing underground Utility that requires Relocation as part of the Work (or any portion of the Utility) is not indicated at all in the Utility Information or is not indicated with "Reasonable Accuracy" therein (as defined in Section 14.12.3.2 of these General Terms and Conditions), Contractor may request a Change Order for Inaccurate Utility Information. Notwithstanding the obligations in this section, Contractor shall be responsible for, and no Change Order will be issued due to, Inaccurate Utility Information for any of the following:

- (a) any Utility (or portion thereof) for which a surface inspection of the area within a 50-foot radius of the Utility would have shown the existence or the likelihood of existence in the correct location and/or size, as applicable, due to above-ground facilities such as buildings, meters, junction boxes or identifying markers; or
- (b) any Utility (or portion thereof) that Contractor encounters after failing to contact the proper Utility Notification Service for the area in which the Utility (or portion thereof) is located or Contractor's failure to wait the minimum time required after contacting the Utility Notification Service; ~~or.~~

~~(c) Service Lines.~~

#### **14.12.3.2 Reasonable Accuracy**

For purposes of Inaccurate Utility Information, a Utility will be deemed indicated with Reasonable Accuracy if:

- (a) with respect to Utility Information that is referred to as "Quality Level A," the Utility's actual location is within 2 feet of the indicated horizontal and vertical locations at the "xyz" coordinates in the SUE data or test holes; or
- (b) with respect to Utility Information that is referred to as "Quality Level B," the Utility's actual location is within 2 feet of the indicated horizontal location at the "xy" coordinates in the SUE data or test holes (with no limitation on vertical location).

For purposes of the definition of "Reasonable Accuracy," a SUE with a higher level of Quality takes precedence over a SUE with a lower level of quality. For example, a SUE Quality Level A takes precedence over a SUE Quality Level B, a SUE Quality Level B takes precedence over a SUE Quality Level C, and a SUE Quality Level C takes precedence over a SUE Quality Level D.

If there is any inconsistency between any two or more Certified SUE Plans of the same quality level or test holes, the most recent of the information will be applicable for purposes of Inaccurate Utility Information.

#### **14.12.3.3 Contractor Acknowledgement Regarding Reference Documents**

Contractor acknowledges that statements in the \Reference Documents about the extent or nature of the Work required to Relocate any Utility shall have no relevance to the determination of Reasonable Accuracy and will not be considered in calculating the amount of the Change Order.

#### **14.12.3.4 Partial Inaccuracy**

If only a portion of an existing underground Utility that requires Relocation to accommodate the Work is not indicated at all in the Utility Information, or is not indicated with Reasonable Accuracy, VPRA will issue a Change Order only for the resulting increased or decreased costs (respectively) of the Utility Work incurred by Contractor related to that portion of the Utility. In the case of any increase in the Contract Price, this obligation is subject to the restrictions set forth in clauses (a) and (b) of Section 14.12.3.1 of these General Terms and Conditions.

#### **14.12.4 Utility Delays**

Contractor shall not be entitled to claim relief for a Utility Delay unless all of the following conditions are satisfied:

- (a) Contractor has provided evidence reasonably satisfactory to VPRA that (i) Contractor has fulfilled its obligation under the applicable Utility Agreement(s) to coordinate with the Utility Owner to prevent or reduce the delays, and (ii) Contractor has otherwise made diligent efforts to obtain the timely cooperation of the Utility Owner but has been unable to obtain this timely cooperation; and
- (b) if Contractor is responsible for the Relocation, Contractor has provided a reasonable Relocation Plan to the Utility Owner and Contractor has obtained, or is in a position to timely obtain, all applicable approvals, authorizations, certifications, consents, exemptions, filings, leases, licenses, permits, registrations, options, and/or rulings required by any Governmental Approval or Law to design and construct the Relocation; and
- ~~(c) no circumstances exist that have delayed or are delaying the affected Relocation that are attributable to Contractor, other than those that fit within the definition of a Utility Delay.~~

Contractor shall provide an explanation and details demonstrating compliance with the above-stated conditions in the Request for Change Order submitted as provided in Section 14.4 of these General Terms and Conditions.

#### **14.12.5 Force Majeure**

A Force Majeure shall be eligible solely for a Completion Deadline adjustment directly attributable to the Force Majeure. Force Majeure shall not be eligible for Extra Work Costs or Delay Costs.

#### **14.12.6 Extreme Weather Event**

An Extreme Weather Event shall be eligible solely for a Completion Deadline adjustment. An Extreme Weather Event shall not entitle Contractor to Extra Work Costs or Delay Costs.

#### **14.12.7 Contaminated Materials**

##### **14.12.7.1 Release of Contaminated Materials**

Contractor shall not be entitled to a Relief Event for the Release of Contaminated Materials (Relief Event (g) of the definition thereof) to the extent that Contractor or any Contractor-Related Entity was the cause of the Release of Contaminated Materials. Further, Contractor shall not be entitled

to any incremental costs or delay that occurs due to Contractor's exacerbation of a Release of Contaminated Materials.

#### **14.12.7.2 Discovery of Unknown Preexisting Contaminated Materials**

Contractor shall not be entitled to a Relief Event for the Discovery of Unknown Preexisting Contaminated Materials (Relief Event (h) of the definition thereof) arising from the discovery of Contaminated Materials that were: (i) identified in the Reference Documents or other information furnished to, or otherwise obtained by, Contractor prior to the Final Binding GMP Proposal; or (ii) where the presence of such Contaminated Materials was discovered ~~or~~ through an investigation of the Site prior to the Final Binding GMP Proposal; or (iii) where the presence of such Contaminated Materials should have been discovered through an investigation of the Site performed by Contractor prior to the Final Binding GMP Proposal, provided however, that this subsection (iii) shall only apply to the extent Site inspection services were actually performed by Contractor as part the Phase 1 Services.

#### **14.12.7.3 Notification of Discovery of Unknown Preexisting Contaminated Materials**

Contractor's entitlement to a Relief Event for the Discovery of Unknown Preexisting Contaminated Materials is subject to Contractor's compliance with notice requirements in Section 19.2.3 of these General Terms and Conditions. Contractor shall not be entitled to Extra Work Costs, a Completion Deadline adjustment, or Delay Costs to the extent attributable to Contractor's failure to provide timely notification to VPRA.

#### **14.12.7.4 Contaminated Materials for Which Contractor is Responsible**

Contractor shall not be entitled to a Change Order for Work dealing with Contaminated Materials for which Contractor is obligated to indemnify VPRA.

#### **14.12.8 Relief Events (i) and (j)**

Contractor shall not be entitled to relief under Relief Events (i) and (j) in the definition thereof to the extent that the archeological, paleontological, cultural, or biological resources, or the threatened or endangered species, were identified in the Reference Documents or other information furnished prior to the Final Binding GMP Proposal, or where the presence of such archeological, paleontological, cultural, or biological resources was discovered or should have been discovered through an investigation of the Site performed by Contractor prior to the Final Binding GMP Proposal.

#### **14.12.8.1 Occurrences Outside the Project ROW**

Contractor shall not be entitled to any relief (Extra Work Costs, Delay Costs, Completion Deadline Adjustment) for Relief Events (g), (h), (i) or (j) in the definition thereof that occur outside the Project ROW: and immediately adjacent parcels. Contractor shall not be entitled to any relief (Extra Work Costs, Delay Costs, Completion Deadline Adjustment) for Relief Events (e), (k) or (p) in the definition thereof that occur outside the Project ROW.

This Section 14.12.8.1 of these General Terms and Conditions shall not preclude Contractor's right to relief under Relief Event (g) of the definition thereof (Release of Contaminated Materials) where, subject to Section 14.12.7 of these General Terms and Conditions, a Release of Contaminated Materials occurs outside the Project ROW but spills or secretes onto the Project ROW and has an impact on the Project.

#### ~~14.12.9 VPRA-Caused Delay~~

~~A VPRA-Caused Delay shall be eligible solely for a Completion Deadline adjustment directly attributable to the VPRA-Caused Delay. VPRA-Caused Delay shall not be eligible for Extra Work Costs or Delay Costs.~~

#### 14.12.9 Reserved

#### **14.12.10 Change in Law**

A Change in Law may be eligible for Extra Work Costs and/or a Completion Deadline adjustment depending on the effects directly attributable to the Change in Law.

#### **14.12.11 Relief Events Impact on Early Work**

If Early Work is impacted by a Relief Event, Contractor shall submit a Change Notice and Request for Change Order to VPRA in accordance with this Article 14 of these General Terms and Conditions.

#### **14.13 Price Adjustments for Certain Materials**

The Phase 2 Price and any Early Work Price shall be subject to adjustment to account for the price of steel and fuel at the time Contractor purchases steel and fuel for use on the Project. Contractor shall submit the actual direct cost of steel and fuel with the Application for Payment in which Contractor seeks payment for steel and fuel. Contractor shall only be entitled to payment for the quantity of steel and fuel in the Construction Pricing Documents for the Phase 2 Price or Early Work Price.

During Phase 1, Contractor may propose similar adjustments to other commodities to be used in the performance of, or incorporated into, the Work, which VPRA may accept or reject in its sole discretion.

#### **14.14 Matters Not Eligible for Change Orders**

Contractor acknowledges and agrees that no increase in the Contract Price or adjustment of a Completion Deadline is available except in circumstances expressly provided for in the Contract, that such Contract Price and Completion Deadline adjustments shall be available only as provided in this Article 14 of these General Terms and Conditions, and that Contractor shall bear full responsibility for the consequences of all other events and circumstances. Matters that are Contractor's exclusive responsibility include the following:

- (a) errors in the Construction Documents (including errors directly attributable to errors in the Reference Documents);
- (b) defective or incorrect schedules of Work or changes in the planned sequence of performance of the Work (except to the extent arising from a Relief Event);
- (c) action or inaction of Contractor's employees, Suppliers, Subcontractors or any Contractor-Related Entity (unless arising from a Relief Event);
- (d) 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 that otherwise constitute a Relief Event or under Section 14.13 of these General Terms and Conditions concerning price adjustments);
- (e) delays not on the Critical Path;

- (f) costs covered by insurance proceeds received by or on behalf of Contractor;
- (g) correction of Nonconforming Work and oversight and related activities in connection therewith by VPRA (including rejected design submittals);
- (h) failure by Contractor to comply with the requirements of the Contract Documents;
- (i) all other events beyond the control of VPRA for which VPRA has not agreed to assume liability hereunder;
- (j) a Railroad Owner's or VPRA's refusal to grant a Track Closure or permission to perform adjacent work, in either case in response to a prior Unpermitted Track Closure, until approval by VPRA and/or a Railroad Owner of ~~Design-Builder's~~ Contractor's plan to avoid future Unpermitted Track Closures, as provided in Section 17.1.2.3 of the Contract; and
- (k) 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 Documents or arise out of the nature of the Work.

Contractor assumes responsibility for all such matters and acknowledges and agrees that assumption by Contractor of responsibility for such risks, and the consequences, costs, and delays resulting therefrom, is reasonable under the circumstances and that contingencies included in the Final Binding GMP Proposal in Contractor's sole judgment, constitute sufficient consideration for its acceptance and assumption of said risks and responsibilities.

#### **14.15 Waiver**

CONTRACTOR 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 CONTRACTOR FAILED TO PROVIDE A PROPER AND TIMELY CHANGE NOTICE OR FAILED TO PROVIDE A PROPER AND TIMELY REQUEST FOR CHANGE ORDER, AND AGREES THAT CONTRACTOR 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 CONTRACTOR IS ENTITLED TO A CHANGE ORDER OR OTHER COMPENSATION OR DAMAGES.

#### **14.16 No Release or Waiver**

##### **14.16.1 Extension of Time for Performance**

No Completion Deadline extension hereunder shall release Contractor, Contractor's Surety, or any Guarantor from its obligations. VPRA 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 a Completion Deadline 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 Contractor after such date.

##### **14.16.2 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 VPRA has been unjustly enriched shall be the basis for any Claim, request for additional compensation or adjustment of a Completion Deadline. ~~Further, Contractor 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. Contractor shall be deemed to have performed such work as a volunteer and at its sole cost.~~ In addition, VPRA may require Contractor to remove or otherwise undo any such work at Contractor's sole cost without the right to an adjustment of the Contract Price or a Completion Deadline.

#### **14.17 Change Order Disputes**

If VPRA and Contractor cannot agree on (i) whether certain matters constitute a Relief Event, (ii) whether a Change Order is required under this Article 14 of these General Terms and Conditions, or (iii) the amount of the adjustments in the Contract Price and/or the Completion Deadline proposed within a Change Order issued under this Article 14 of these General Terms and Conditions, then such matters will be considered a Dispute eligible for resolution under Article 20 of these General Terms and Conditions, provided that Contractor has first complied with the requirements of this Article 14 of these General Terms and Conditions.

#### **14.18 Performance of Disputed Work**

Contractor shall continue to perform all Work, including any disputed Work, during the pendency of a Dispute concerning Contractor's entitlement to a Change Order or the relief due Contractor pursuant to a Directive Letter or VPRA-Directed Change. Contractor's continued performance in accordance with this Section 14.18 of these General Terms and Conditions will be without prejudice to any pending Claim.

#### **14.19 Change Order Status Log**

On the last Working Day of each month, Contractor shall submit a log showing all Change Notices and their status. The log shall be organized by Change Notice number and for each Change Notice shall state, at a minimum:

- (a) a brief description of the issue;
- (b) an estimate of the anticipated cost;
- (c) an estimate of the schedule impact of the issue;
- (d) submission date of the Change Notice;
- (e) whether and when Contractor has submitted a Request for Change Order;
- (f) VPRA's response to the Request for Change Order;
- (g) status of the Dispute Resolution Process; and
- (h) whether and when a Change Order has been issued.



## **ARTICLE 15**

### **(Wages, Subcontracts, and Labor)**

#### **15.1 Prevailing Wages**

##### **15.1.1 Contractor to Pay Federal Prevailing Wage Rates**

Contractor shall pay or cause to be paid to all applicable workers employed by it or its Subcontractors to perform the Work not less than the Federal Prevailing Wage Rates, as provided in the statutes and regulations applicable to public works contracts, including the Davis-Bacon Act. Contractor shall comply and cause its Subcontractors to comply with all Laws pertaining to Federal Prevailing Wage Rates. The foregoing shall not apply to Subcontracts at any tier with VPRA or Governmental Entities.

##### **15.1.2 Changes to Federal Prevailing Wage Rates**

Contractor shall bear the cost of any changes in the Federal Prevailing Wage Rates throughout the life of the Project and shall not be entitled to an increase in the Contract Price or a Completion Deadline adjustment. Without limiting the foregoing, no Claim will be allowed that is based upon Contractor's lack of knowledge or a misunderstanding of any such requirements or Contractor's failure to include in the Contract Price adequate increases for applicable Federal Prevailing Wage Rates to the extent required by law.

##### **15.1.3 Subcontractor Compliance with Federal Prevailing Wage Rates**

Contractor shall comply and cause its Subcontractors to comply with all Laws regarding notice and posting of intent to pay Federal Prevailing Wage Rates, of prevailing wage requirements, and of Federal Prevailing Wage Rates. Contractor shall be responsible for any Subcontractor's failure to pay the Federal Prevailing Wage Rates.

##### **15.1.4 Certified Payrolls**

Contractor and each Subcontractor shall maintain weekly certified payroll records for submittal to VPRA, as required. Contractor shall be responsible for the submittal of payroll records of all Subcontractors. Additionally, the certified payroll records shall be available for inspection at all reasonable hours at the principal office of Contractor.

#### **15.2 Subcontracting Requirements**

Contractor shall comply with all applicable requirements of the Contract Documents relating to Subcontracts and must ensure that its Subcontractors (at all tiers) comply with all applicable requirements of the Contract Documents relating to subcontracting.

##### **15.2.1 Subcontract Terms**

Each Subcontract must include terms and conditions sufficient to ensure each Subcontractor complies with all applicable requirements of the Contract Documents. Each Subcontract must include provisions addressing the requirements below, as well as any other terms that the Contract Documents specifically require to be included in Subcontracts:

- (a) Set forth a standard of professional responsibility or a standard for commercial practice equal to the requirements of the Contract Documents 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) Expressly include the Davis-Bacon prevailing wage rate determinations applicable to the Project;
- (d) Provide that VPRA is a third-party beneficiary of the Subcontract with the right to enforce all terms of the Subcontract for its own benefit;
- (e) Without cost to Contractor or VPRA, expressly permit assignment to VPRA or its successor, assign or designee of all Contractor's rights under the Subcontract, contingent only upon delivery of request from VPRA following termination of this Contract, allowing VPRA or its successor, assign or designee to assume the benefit of Contractor's rights, with liability only for those remaining obligations of Contractor accruing after the date of assumption, such assignment to include the benefit of all Subcontractor warranties, indemnities, guarantees, and professional responsibility;
- (f) Expressly state that any acceptance of assignment of the Subcontract to VPRA 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 Contractor 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 Contractor's breach);
- (g) Expressly include a covenant to recognize and attorn to VPRA upon receipt of notice from VPRA that it has exercised its rights under this Contract, without necessity for consent or approval from Contractor or to determine whether VPRA validly exercised its rights, and Contractor's covenant to waive and release any claim or cause of action against the Subcontractor arising out of or relating to its recognition and attornment in reliance on any such notice;
- (h) Not be assignable by the Subcontractor to any Person other than VPRA (or its successor, assignee or designee) without Contractor's prior consent;
- (i) 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) and maintain records for disputed work in compliance with Section 23.3.6 of these General Terms and Conditions; (2) permit audit of books and records with respect to the Project or Work by each of Contractor and VPRA pursuant to Section 23.3.2 of these General Terms and Conditions; and (3) provide progress reports to Contractor appropriate for the type of work it is performing sufficient to enable Contractor to provide the reports it is required to furnish VPRA under this Contract;
- (j) Include the right of Contractor to terminate the Subcontract in whole or in part upon any termination of this Contract without liability of Contractor or VPRA for the Subcontractor's lost profits, business opportunity or other consequential damages;
- (k) Expressly require the Subcontractor to participate in meetings between Contractor and VPRA, upon VPRA's request, concerning matters pertaining to such Subcontract or the work thereunder, provided that all direction to such Subcontractor shall be provided by Contractor, and provided further that nothing in this clause (k) shall limit the authority of VPRA to give such direction or take such action which, in its sole opinion, is necessary to remove an immediate and present threat to the safety of life or property;

- (l) Include an agreement by the Subcontractor to give evidence in any dispute resolution proceeding pursuant to Article 20 of these General Terms and Conditions, if such participation is requested by either VPRA or Contractor;
- (m) Expressly include a provision prohibiting cross-contract offset between the parties thereto, meaning that if a Subcontractor is performing work on multiple contracts for the other party to the Subcontract or the other party's affiliates, the other party or its affiliate shall not withhold payment from the Subcontractor on its Subcontract because of disputes or claims on another contract;
- (n) Expressly include in every Subcontract (including purchase orders and in every Subcontract of any Contractor-Related Entity for the Work), provisions to effectuate the Small Business requirements and require that they be included in all Subcontracts at lower tiers, so that such provisions will be binding upon each Subcontractor. All Subcontracts at any tier, including those with Small Businesses, and all contracts with Suppliers, shall require compliance with the Small Business utilization requirements in the Contract Documents. The requirements of this subparagraph (n) shall not apply to Subcontracts at any tier with VPRA or Governmental Entities;
- ~~(n)~~(o) Expressly include Sections 16.1 and 16.2 of these General Terms and Conditions (with appropriate changes in the names of the parties);
- ~~(o)~~(p) Expressly require the Subcontractor to make payments to its lower tier Subcontractors, and be liable for interest payments to such Subcontractors, as set forth in Sections 12.6 and 12.7 of these General Terms and Conditions respectively;
- ~~(p)~~(q) Contain no waiver of the prompt payment protections for the Subcontractor;
- ~~(q)~~(r) Expressly provide that all claims and charges of the Subcontractor and its Subcontractors at any tier shall not attach to any interest of VPRA in the Project or the Project ROW;
- ~~(r)~~(s) Expressly include a covenant, expressly stated to survive termination of the Subcontract, to promptly execute and deliver to VPRA a new contract between the Subcontractor and VPRA on the same terms and conditions as the Subcontract, in the event: (1) the Subcontract is rejected by Contractor in bankruptcy or otherwise wrongfully terminated by Contractor; or (2) VPRA delivers a request for such new contract following termination or expiration of this Contract;
- ~~(s)~~(t) Provide that all guarantees and warranties, express and implied, will inure to the benefit of VPRA and VPRA's successors and assigns, as well as Contractor;
- ~~(t)~~(u) Contain the language in Section 15.2.4 of these General Terms and Conditions;
- ~~(u)~~(v) Be consistent in all other respects with the terms and conditions of the Contract Documents to the extent such terms and conditions are applicable to the scope of work of a Subcontractor, and include all provisions required by this Contract;
- ~~(v)~~(w) Include provisions concerning termination consistent with Article 18 of these General Terms and Conditions; ~~and~~
- (x) Include all safety requirements applicable to the Work; and
- ~~(w)~~(y) Expressly include Exhibits K and L of the Contract.

### 15.2.2 Subcontractor Approval

All Subcontractors are subject to VPRA's Approval. Contractor shall submit the following to VPRA no less than seven (7) days prior to the day on which Contractor intends to have a proposed Subcontractor commence Work:

- (a) Documentation that Contractor followed the Subcontractor bidding process in the Subcontracting Plan;
- (b) Identity of the Subcontractor;
- (c) Licenses held by the proposed Subcontractor relevant to the work to be performed;
- (d) Proposed scope of Work;
- (e) A copy of the Proposed Subcontract including the price for the subcontracted work;
- (f) A statement concerning whether the Subcontractor is currently prohibited or has been prohibited from performing work for any local, state, or federal agency in the preceding five (5) years; and
- (g) Evidence that the proposed Subcontractor has obtained the insurance required by Article 10 of these General Terms and Conditions to perform its scope of work.

The foregoing requirements apply to all proposed Subcontractors, including those identified in Contractor's Proposal. A proposed Subcontractor shall not commence Work until receipt of VPRA's Approval.

### 15.2.3 Subcontract Data

Contractor shall allow VPRA access to all Subcontracts and records regarding Subcontracts no later than 7 Days after receiving a request from VPRA. All Subcontracts must be in writing.

### 15.2.4 Responsibility for Work by Subcontractors

Contractor is fully responsible for all of the Work, notwithstanding the terms of any Subcontract. VPRA will not be bound by any Subcontract, and no Subcontract may include a provision purporting to bind VPRA. Each Subcontract shall include the following provision:

Nothing contained in this ~~contract~~subcontract will be deemed to create any privity of contract between VPRA and Subcontractor. Nor will this subcontract create any duties, obligations or liabilities on the part of VPRA to Subcontractor except those allowed under Virginia law. If any claim or dispute arises under this ~~Subcontract~~subcontract or Contractor's contract with VPRA, Subcontractor may look only to Contractor for any payment, redress, relief or other satisfaction. Subcontractor waives any claim or cause of action against VPRA arising out of this ~~Subcontract~~subcontract or in connection with Subcontractor's work.

### 15.2.5 Debarred Subcontractors

Contractor shall not enter into any Subcontracts with any Subcontractor listed on the excluded parties list published by the System for Awards Management (<https://sam.gov/content/exclusions>) or which is otherwise suspended or debarred from submitting bids by the federal government or the Commonwealth. If any Subcontractor or Person becomes suspended or debarred after commencing Work on the Project, Contractor shall immediately notify VPRA. VPRA shall be entitled to require Contractor to remove the Subcontractor or other Person from the Project and Contractor shall not be entitled to an adjustment to the Contract Price or a Completion Deadline.

### **15.3 Employee Performance Requirements**

All individuals performing the Work must have the skill and experience and any licenses or certifications required to perform the Work assigned to them. If VPRA determines, in its sole discretion, that any Person employed by Contractor or by any Subcontractor is not performing the Work properly and skillfully, or is intemperate or disorderly, then Contractor or Subcontractor must remove that Person and must not re-employ that person on the Project without VPRA's prior written approval. If Contractor or the Subcontractor fails to remove such Person(s) or fails to furnish skilled and experienced personnel for the proper performance of the Work, VPRA may suspend the affected portion of the Work by delivering written notice to Contractor. A suspension under this clause will not relieve Contractor of any obligation contained in the Contract Documents or entitle Contractor to an adjustment of the Contract Price or a Completion Deadline. Contractor shall promptly resume the Work when compliance is attained and VPRA provides written notice that Contractor may resume. VPRA reserves the right to require Contractor to disclose the identities of and obtain VPRA's pre-approval for, all employees it intends to utilize in the self-performance of the Work.

## **ARTICLE 16**

### **(Non-Discrimination)**

#### **16.1 Federal Requirements**

Contractor and its Subcontractors shall comply with the non-discrimination requirements set forth in Exhibit K of the Contract.

#### **16.2 State Law Provisions**

**16.2.1** Pursuant to Va. Code § 2.2-4201, in every Contract over \$10,000 the provisions in A. and B. below apply:

A. During the performance of the Contract, Contractor agrees as follows:

1. Contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, age, disability, or any other basis prohibited by state law relating to discrimination in employment, except where there is a bona fide occupational qualification reasonably necessary to the normal operation of Contractor. Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.
2. Contractor, in all solicitations or advertisements for employees placed by or on behalf of Contractor, will state that Contractor is an equal opportunity employer. However, notices, advertisements and solicitations placed in accordance with federal law, rule or regulation shall be deemed sufficient for the purpose of meeting these requirements.
3. If Contractor employs more than five employees, Contractor shall (i) provide annual training on Contractor's sexual harassment policy to all supervisors and employees providing services in the Commonwealth, except such supervisors or employees that are required to complete sexual harassment training provided by the Department of Human Resource Management, and (ii) post Contractor's sexual harassment policy in (a) a conspicuous public place in each building

located in the Commonwealth that Contractor owns or leases for business purposes and (b) Contractor's employee handbook.

4. The requirements of these provisions A. and B. are a material part of the Contract. If Contractor violates one of these provisions, VPRA may terminate the affected part of the Contract for breach, or at its option, the whole Contract. Violation of one of these provisions may also result in debarment from State contracting regardless of whether the specific contract is terminated.

B. Contractor will include the provisions of subdivisions 1-3 above in every subcontract or purchase order over \$10,000, so that the provisions will be binding upon each Subcontractor or supplier.

**16.2.2** Where applicable, Contractor and all Subcontractors shall comply with the provisions of the Virginians with Disabilities Act, Va. Code § 51.5-40 *et seq.*

## **ARTICLE 17**

### **(Suspension)**

#### **17.1 Suspension for Convenience**

VPRA may suspend all or any part of the Work required under the Contract Documents, at any time and for any reason, by written notice to Contractor. The suspension will remain in effect for the period of time that VPRA deems appropriate for the convenience of VPRA. Contractor shall promptly comply with any written suspension order. Contractor shall promptly recommence the Work upon receipt of written notice from VPRA directing Contractor to resume Work. Except for suspensions of work requested by Contractor, a suspension for convenience shall be considered a VPRA-Caused Delay.

#### **17.2 Suspension for Cause**

VPRA may suspend all or part of the Work if Contractor fails to:

- (a) correct conditions unsafe for the Project personnel or general public;
- (b) comply with any Governmental Approval, Law, or otherwise carry out the requirements of the Contract Documents;
- (c) carry out orders of VPRA, including a Directive Letter;
- (d) comply with environmental requirements; or
- (e) comply with requirements for developing and implementing the Quality Plan.

Contractor shall promptly comply with any such written suspension order. Contractor shall promptly recommence the Work upon receipt of written notice from VPRA directing Contractor to resume Work. Contractor shall not be entitled to an adjustment to the Contract Price or Completion Deadlines for a suspension under this Section 17.2 of these General Terms and Conditions.

#### **17.3 Contractor Responsibilities During Suspension**

Unless otherwise directed by VPRA, while the Work is suspended, Contractor remains responsible for the Work and for preventing damage or injury to the Project. Contractor shall continue to provide for drainage, obtain and maintain compliance with all Governmental

Approvals, maintain all Contractor-provided insurance and bonds, and erect necessary temporary structures, signs or other facilities required to maintain the Project, the Site, and other facilities in the Project vicinity. Contractor shall continue to be responsible for maintenance of traffic in accordance with the requirements of the Contract Documents, for plant and landscape maintenance, and for maintenance during construction, unless otherwise directed by VPRA in writing. If the suspension is for VPRA's convenience, the additional work performed by Contractor during the suspension period will be considered VPRA-Directed Changes, unless the suspension was requested by Contractor.

#### **17.4 Suspension of Early Work**

If VPRA suspends an Early Work Package for convenience for more than 180 consecutive Days after issuing the Early Work NTP, Contractor may consider the Early Work as having been terminated for convenience under Article 18 of these General Terms and Conditions. If Contractor wishes to exercise this option, Contractor shall deliver written notice of termination to VPRA, specifying its effective date. The provisions of Article 18 of these General Terms and Conditions shall apply with respect to the terminated Early Work Package if Contractor exercises this option. This Section 17.4 of these General Terms and Conditions shall not apply to suspensions by VPRA for cause.

#### **17.5 Suspension of Phase 2 Services**

If VPRA suspends the Work for convenience for more than 180 consecutive Days after issuing the Phase 2 NTP, Contractor may consider the Contract as having been terminated for convenience under Article 18 of these General Terms and Conditions. If Contractor wishes to exercise this option, Contractor shall deliver written notice of termination to VPRA, specifying its effective date. The provisions of Article 14 of these General Terms and Conditions shall apply if Contractor exercises this option. This Section 17.5 of these General Terms and Conditions shall not apply to suspensions by VPRA for cause.

### **ARTICLE 18**

#### **(Termination for Convenience)**

This Article 18 of these General Terms and Conditions shall apply only to Work authorized by an Early Work NTP or Phase 2 NTP. This Article 18 of these General Terms and Conditions shall not apply to the Phase 1 Services.

#### **18.1 Notice of Termination**

VPRA may terminate all or part of the Contract (including an Early Work Package) if VPRA determines, in its sole discretion, that termination is in the public interest. VPRA will deliver a written notice of termination to Contractor, specifying the extent and effective date of termination. Contractor and Surety will remain responsible for any claims arising out of the Work performed before the effective date of termination, including any claims for latent defects.

##### **18.1.1 Termination for Insufficient Funding**

VPRA may immediately terminate this Contract if the General Assembly fails to appropriate, or the applicable oversight board (i.e., the VPRA board of directors and/or the Commonwealth Transportation Board, depending on the funding source) fails to allocate sufficient funds to continue the services, or if VPRA fails to receive funding anticipated from any other funding

source. VPRA is not obligated to pay for any services that are provided after notice and effective date of termination. However, Contractor will be entitled to recover in the same manner as if VPRA had terminated the Contract for its convenience as provided in this Article 18 of these General Terms and Conditions.

## **18.2 Contractor's Responsibilities upon Termination**

Contractor shall take the following actions promptly after receiving a notice of termination from VPRA with respect to the terminated Work, regardless of any delay in determining or adjusting any amounts due under this Article 18 of these General Terms and Conditions:

- (a) stop Work as specified in the notice;
- (b) communicate the termination to all affected Subcontractors and cause Subcontractors to stop Work as specified in the notice, unless otherwise authorized in writing by VPRA;
- (c) not enter into additional Subcontracts or place orders for Materials, services or facilities, except as necessary to complete the continued portion of the Work, if any, or as necessary to mitigate damages;
- (d) terminate all Subcontracts to the extent that they relate to the Work terminated;
- (e) if directed to do so by VPRA and in the manner directed by VPRA, assign to VPRA all of Contractor's right, title, and interest in the terminated Subcontracts. VPRA will have the right, in its sole discretion, to assume Contractor's rights and responsibilities under the assigned Subcontract accruing after the date of assignment, or to settle or pay any or all claims arising out of terminating those Subcontracts;
- (f) settle all outstanding liabilities and claims arising out of the terminated Subcontracts, with VPRA's prior approval, provided that VPRA shall not be responsible for anticipated profit on work not yet performed as of the effective date of the notice of termination;
- (g) provide VPRA with an inventory list of all Materials previously produced, purchased or ordered from Suppliers for use in the terminated Work and not yet used in the terminated Work, including their storage location. Provide VPRA with any documentation or other property required to be delivered for the terminated Work that is either being developed or has been completed but not yet delivered to VPRA. Provide other information as requested by VPRA. Transfer title and deliver to VPRA, in the manner directed by VPRA,:
  - (i) fabricated or unfabricated parts, Work in process, completed Work, supplies, and other Material produced or acquired for the Work terminated; and
  - (ii) the Construction Documents, and all other completed or partially completed drawings (including plans, elevations, sections, details, and diagrams), specifications, records, samples, information, and other property that would have been required to be furnished to VPRA if the terminated Work had been completed;
- (h) perform, in accordance with the Contract Documents, all Work not terminated by VPRA;
- (i) take all action that may be necessary, or that VPRA directs, for the safety, protection, and preservation of (i) the public, including rail users, motorists, bicyclists, and pedestrians, (ii) the Work, and (iii) the Equipment, machinery, Materials, and property related to the Contract Documents that is in the possession of Contractor and in which VPRA has or may acquire an interest;
- (j) use best efforts to sell any property of the types referred to in Section 18.2(g) of these General Terms and Conditions as directed or authorized by VPRA. Best efforts does not require Contractor to extend credit to any purchaser. Contractor may acquire the property



for itself under the conditions prescribed and at prices approved by VPRA. The proceeds of any sale, transfer or disposition will be applied to reduce any payments to be made by VPRA to Contractor due to the termination;

- (k) remove Materials, Equipment, tools and instruments, debris or waste Materials, from all or parts of the Site as directed by VPRA; and
- (l) take other actions directed by VPRA.

### **18.3 Responsibility After Notice of Termination**

Contractor shall remain responsible for damage to Materials after VPRA issues the notice of termination, except as follows:

- (a) Contractor shall not be responsible for damage to Materials for which partial payment has been made as provided in this Agreement when VPRA certifies that Contractor has stored those Materials in the manner and at the locations directed by VPRA; and
- (b) Contractor shall not be responsible for damage to Materials purchased by VPRA after issuing the notice of termination, once VPRA has received and taken title to those Materials.

Contractor shall be relieved of its obligations to provide for continuing safety, security, and maintenance at the Site immediately after VPRA determines that Contractor has completed: (1) the Work directed to be completed before termination, and (2) any other Work that VPRA ordered to secure the Project for termination.

### **18.4 Negotiated Termination Settlement**

#### **18.4.1 Settlement Proposal**

Contractor shall submit a termination settlement proposal to VPRA in the form prescribed by VPRA no later than sixty (60) Days after the effective date of termination. Contractor may request a time extension in writing. An extension request must be received by VPRA within the sixty (60)-Day period in which Contractor was to have delivered the termination settlement proposal.

VPRA will review Contractor's termination settlement proposal and will accept it, return it with comments, or reject it. If Contractor fails to submit the proposal within the time allowed, VPRA may determine the amount, if any, due Contractor because of the termination consistent with Section 18.5 of these General Terms and Conditions.

#### **18.4.2 Negotiated Settlement Amount**

Contractor and VPRA may agree, as provided in Section 18.4.1 of these General Terms and Conditions, on the whole or any part of the amount due to Contractor because of total or partial termination of Work pursuant to this Article 18 of these General Terms and Conditions. A negotiated settlement may include a reasonable allowance for profit solely on Work that has been completed by the termination date and Accepted by VPRA. The negotiated settlement amount will not exceed the total Contract Price, as reduced by (1) the amount of payments already made, and (2) the value of any non-terminated Work for which the Contractor remains obligated to complete. VPRA will promptly pay the agreed amount to Contractor. A settlement under this Section 18.4 of these General Terms and Conditions is not subject to the limits and requirements of Section 18.5 of these General Terms and Conditions. If VPRA and Contractor enter into a settlement agreement, that agreement will not (1) affect any of VPRA's rights under the Contract

Documents with respect to completed Work, (2) relieve Contractor from Contractor's warranty(ies) under the Contract Documents and other obligations with respect to the completed Work, or (3) relieve Contractor of any payment obligations to Subcontractors, or affect obligations under the Performance and Payment Bonds as to completed or non-terminated Work.

### **18.5 Determination of Settlement Amount if Negotiations Fail**

If VPRA terminates the Work pursuant to this Article 18 of these General Terms and Conditions and Contractor and VPRA fail to agree on the whole amount to be paid to Contractor as provided in Section 18.4.2 of these General Terms and Conditions, VPRA will determine the amount payable in accordance with the following, but without duplicating any amounts agreed upon in accordance with Section 18.4 of these General Terms and Conditions.

#### **18.5.1 Payment Amount**

VPRA will pay Contractor the sum of the following amounts for Work performed prior to the effective date of the notice of termination, as such amounts are determined by VPRA:

- (a) Contractor's actual reasonable out-of-pocket cost for all Work performed. This includes mobilization, demobilization, and Work performed to secure the Project for termination, including reasonable overhead but also accounting for any refunds related to insurance premiums, deposits, or similar items, as established to VPRA's satisfaction. When VPRA determines the reasonable cost, VPRA will make deductions for the cost of Materials to be retained by Contractor, amounts realized by Contractor's sale of Materials, and other appropriate credits for other funds received by Contractor due to the termination. VPRA will also make deductions for the cost of damaged Materials. When, in VPRA's opinion, the cost of an item of Work is excessively high due to costs incurred to remedy or replace Nonconforming Work, defective or rejected Work, VPRA will allow the estimated reasonable cost of performing that Work in compliance with the requirements of the Contract Documents, and VPRA will disallow the excessive actual cost.
- (b) A fair and reasonable profit on work performed, as determined by VPRA in its sole discretion. VPRA will allow reasonable profit only on the work actually performed and will not allow loss of anticipated profit on terminated Work not performed.

The cost of settling and paying claims arising out of the termination of Work under Subcontracts as provided in Section 18.2(f) of these General Terms and Conditions. This excludes amounts paid or payable for supplies or Materials delivered or services furnished by the Subcontractor prior to the effective date of the notice of termination; VPRA will include those amounts under Section 18.5.1(a) of these General Terms and Conditions.

The reasonable out-of-pocket cost incurred to preserve and protect property pursuant to Section 18.2(i) of these General Terms and Conditions, and any other reasonable out-of-pocket cost incidental to terminating the Work. This allowance includes reasonable overhead and Contractor's reasonable costs of handling Material returned to the vendor, delivered to VPRA or otherwise disposed of as directed by VPRA. The allowance also includes a reasonable amount for Contractor's administrative costs in determining the amount due to Contractor as the result of the termination of Work.

#### **18.5.2 Maximum Compensation**

Contractor shall not be entitled to any compensation exceeding the amount determined in accordance with Section 18.5.1 of these General Terms and Conditions. Contractor shall not be

entitled to recover for items such as unabsorbed overhead and opportunity costs upon termination of the Contract. Contractor shall not be entitled to loss of anticipated profit, except as provided in Section 18.5.1(b) of these General Terms and Conditions. The total amount to be paid to Contractor shall not exceed the total Contract Price less the amount of payments previously made and less the Contract Price of any non-terminated Work. The Contract Price may only be exceeded, however, due to amounts provided for in Sections 18.5.1(c) and (d) of these General Terms and Conditions. If Contractor is entitled to any refund of insurance or bond premiums, deposits or similar items that Contractor previously passed through to VPRA, then Contractor shall arrange for that refund to be paid directly to VPRA, or Contractor shall otherwise credit those refunds to VPRA.

### **18.5.3 Excluded Items**

Except for normal spoilage, and except to the extent that VPRA will have otherwise expressly assumed the risk of loss, the amounts payable to Contractor under Section 18.5.1 of these General Terms and Conditions will exclude the fair value, as determined by VPRA, of Equipment, machinery, Materials, and property that is destroyed, lost, stolen or damaged so as to become undeliverable to VPRA, or to a buyer pursuant to Section 18.2(j) of these General Terms and Conditions. VPRA may analyze the amount set forth in Contractor's Construction Pricing Documents, in addition to other records provided or maintained by Contractor, as a factor in determining the value of the Work terminated.

### **18.5.4 Payment of Termination Amount**

After the amount of the termination payment has been determined, the Parties will execute a Change Order to reflect the agreed termination payment, and VPRA will pay the amount determined.

### **18.6 Partial Termination**

If the termination is partial, the Contract Price for the remainder of the Work will be adjusted as appropriate to account for the change in the overall Project scope.

### **18.7 Reduction in Amount of Claim**

The amount due to Contractor under this Article 18 of these General Terms and Conditions will be reduced by:

- (a) all unliquidated advance or other payments made by VPRA to or on behalf of Contractor applicable to the terminated portion of the Contract;
- (b) the amount of any claim that VPRA may have against any Contractor-Related-Entity in connection with the Contract;
- (c) the agreed price for, or the proceeds of the sale of, any property, Materials, supplies or other things acquired by Contractor or sold, pursuant to the provisions of this Article 18 of these General Terms and Conditions, and not otherwise recovered by or credited to VPRA;
- (d) amounts that VPRA deems advisable, in its ~~sole~~ discretion, to retain to cover any existing or threatened claims relating to the Project, including claims by Utility Owners or claims for which Contractor may be liable under Article 19 of these General Terms and Conditions;
- (e) the cost of repairing any Nonconforming Work;

- (f) the diminished value of Nonconforming Work;
- (g) the additional future costs that VPRA may incur as a result of Nonconforming Work; and
- (h) any amounts due or payable by Contractor to VPRA.

#### **18.8 Inclusion in Subcontracts**

Contractor shall include a clause in all Subcontracts requiring the Subcontractor to stop Work on the date and to the extent specified in a notice of termination from VPRA in accordance with this Article 18 of these General Terms and Conditions. Contractor shall require Subcontractors to insert the same provision in each Subcontract at all tiers. If Contractor fails to include the clause, Contractor is solely responsible for the impacts of failing to add that clause.

#### **18.9 Limitation on Payments to Subcontractors**

For the purposes of Sections 18.4.2 and 18.5 of these General Terms and Conditions, upon termination of Work under any Subcontract pursuant to Section 18.2(d) of these General Terms and Conditions, Contractor shall not be entitled to reimbursement for any amount under the Subcontract that would constitute anticipatory or unearned profit on Work not performed, or that would constitute consequential damages on account of the termination or partial termination of the Subcontract.

#### **18.10 No Unearned Profits or Consequential Damages**

Contractor shall not be entitled to anticipatory or unearned profits or consequential or other damages as a result of a termination or partial termination under this Article 18 of these General Terms and Conditions. The payment to Contractor determined in accordance with this Article 18 of these General Terms and Conditions constitutes Contractor's sole and exclusive remedy for a termination under this Article 18 of these General Terms and Conditions.

#### **18.11 No Waiver**

A termination under this Article 18 of these General Terms and Conditions does not waive any of VPRA's rights or claim to damages, and VPRA may pursue any cause of action related to the Contract. This Section 18.11 of these General Terms and Conditions takes precedence over any contrary clause in the Contract.

#### **18.12 Dispute Resolution**

If VPRA and Contractor fail to agree on amounts due under this Article 18 of these General Terms and Conditions, the issue shall be a Dispute eligible for resolution in accordance with Article 20 of these General Terms and Conditions.

#### **18.13 Allowability of Costs**

All costs claimed by Contractor under this Article 18 must, at a minimum, be allowable, allocable, and reasonable in accordance with the Contract Documents and applicable Law.

#### **18.14 Provision of Records to Establish Costs**

Contractor shall provide such records, including financial and accounting records, as VPRA determines to be necessary to establish the costs and other amounts under this Article 18 of these General Terms and Conditions, including the records identified in Section 23.3.5 of these General Terms and Conditions. Contractor shall cause Subcontractors to provide such records for costs and other amounts associated with Subcontracts. Costs and other amounts that cannot be

reasonably established through records made available by Contractor and/or its Subcontractors will not be eligible for reimbursement under this Article 18 of these General Terms and Conditions.

## **ARTICLE 19**

### **(Indemnification)**

#### **19.1 Indemnifications by Contractor**

##### **19.1.1 General Indemnification of Virginia Indemnitees**

Contractor shall indemnify, defend, and hold harmless the Commonwealth of Virginia and VPRA together with their officers, agents, and employees (collectively, the “Virginia Indemnitees”) from and against all third-party claims, losses, damages, liabilities, including reasonable attorneys’ fees, costs, and expenses, asserted against a Virginia Indemnatee and arising from Contractor’s performance of, or the failure to perform, the Work.

##### **19.1.2 Losses Due to Negligence or Misconduct of Virginia Indemnitees**

Contractor’s indemnity obligations under Section 19.1.1 of these General Terms and Conditions will not extend to any loss, damage, or cost only to the extent that such loss, damage or cost was caused by the negligence or willful misconduct of a Virginia Indemnatee, *however*, Contractor’s indemnity obligations under Section 19.1.3 of these General Terms and Conditions will be in accordance with Exhibit F of the Contract and will not be limited by this Section 19.1.2 of these General Terms and Conditions.

##### **19.1.3 Railroad Operator Indemnifications**

In addition to its other indemnification obligations hereunder, Contractor shall indemnify Amtrak and CSXT as provided in Exhibit F of the Contract. In the event of a conflict between the indemnification requirements in Exhibit F of the Contract and this Section 19.1 of these General Terms and Conditions, the terms of Exhibit F of the Contract shall prevail.

#### **19.2 Responsibility of VPRA for Certain Contaminated Materials**

##### **19.2.1 Pre-Existing Site Contamination**

VPRA may assert that certain third persons or parties may rightfully bear the ultimate legal responsibility for any or all Contaminated Materials that are present on the Site not due to the presence of Contractor. It is further recognized that certain state and federal statutes provide that individuals and firms may be held liable for damages and claims related to Contaminated Materials under such doctrines as joint and several liability and/or strict liability. It is not the intention of the Parties that Contractor be exposed to any such liability to the extent arising out of (a) pre-existing Site contamination, whether known or unknown, except as provided by Law, (b) the handling of such Contaminated Materials not attributable to the negligence, willful misconduct or breach of contract by any Contractor-Related-Entity, and/or (c) the activities of any Persons not described in clause (b) above, including VPRA.

##### **19.2.2 Generator Number for Contaminated Materials**

Except for Contaminated Materials for which Contractor is responsible:

- (a) Contractor shall not be required to execute any hazardous materials manifests as a “generator”; and

- (b) Contaminated Materials encountered in the performance of the Work shall be disposed of, if at all, utilizing an EPA identification number or other appropriate legal device obtained by, and carried in the name of, VPRA or another Person designated by VPRA.

### **19.2.3 Notification of Discovery of Contaminated Materials**

Upon discovery of Unknown Pre-existing Contaminated Materials, Contractor shall stop work in the impacted area immediately and shall notify VPRA within 8 hours by any means available and shall provide written notice within 24 hours of such discovery. Contractor shall not resume Work in the impacted area until directed by VPRA.

### **19.3 No Effect on Other Rights**

The foregoing obligations must not be construed to negate, abridge or reduce other rights or obligations that would otherwise exist in favor of a party indemnified hereunder.

### **19.4 CERCLA Agreement**

Without limiting their generality, any requirement for Contractor to indemnify any party entitled to indemnity hereunder with respect to Contaminated Materials is intended to operate as an agreement pursuant to Section 107(e) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9607(e), to insure, protect, hold harmless, and indemnify all parties entitled to indemnification hereunder.

## **ARTICLE 20**

### **(Partnering and Dispute Resolution)**

#### **20.1 Partnering**

Contractor and VPRA shall enter into a procedure for Partnering as identified within this Article 20 of these General Terms and Conditions for the Phase 2 Services.

Within seven Days after VPRA's issuance of the Phase 2 NTP, Contractor shall arrange a Partnering meeting between Contractor, VPRA, and, if desired, key stakeholders. This meeting will establish:

- (a) Communication procedures; and
- (b) A partnering checklist to be reviewed at Partnering meetings. The checklist will contain items such as quality, communication, issue resolution, team and work relationships, potential and actual disputes, and schedule.

The Parties shall hold Partnering meetings on a regularly scheduled basis to be established at the first Partnering meeting. The Partnering meetings shall be attended primarily by Project-level personnel and shall also include VPRA's Project Manager and Contractor's Project Manager. The Parties shall additionally hold quarterly Partnering meetings attended by VPRA and Contractor management.

#### **20.1.1 Third-Party Facilitator**

Contractor and VPRA may employ a third-party facilitator for the Partnering process. A third-party facilitator shall only be used if Contractor and VPRA mutually agree to use a third-party facilitator and mutually agree on the Person to serve as the third-party facilitator. If the Parties agree to use a third-party facilitator, Contractor shall make all arrangements to hire the facilitator and provide a suitable meeting location for the workshops and VPRA will reimburse Contractor for half the

costs of the use of the third-party facilitator through a Change Order. Either Party may elect to discontinue use of the third-party facilitator at any time and without cause.

## 20.2 Dispute Resolution Process

A Dispute under the Contract Documents shall be resolved in accordance with the Dispute Resolution Process herein. Issues may only proceed to the Dispute Resolution Process once all prerequisites to ripening into a Dispute under the Contract Documents have been met. All Disputes must be submitted to the Dispute Resolution Process within 30 days of the date that the Dispute becomes eligible for resolution under this Article 20 of these General Terms and Conditions. Unless VPRA provides a written exception, Disputes not timely submitted in accordance with this Section 20.2 of these General Terms and Conditions shall be considered forever waived, abandoned, barred, and ineligible for any relief based on the acts, omissions, and circumstances underlying the matter.

### 20.2.1 Escalation Ladder

As a condition precedent to the right to submit a Dispute to the Neutral and thereafter to litigation, the Parties shall first attempt to resolve the Dispute using the Escalation Ladder.

#### 20.2.1.1 Escalation Ladder Process

- (a) Once a Dispute is eligible, the Escalation Ladder may be commenced by submitting a written request to the other Party. Where Contractor is the Party requesting the Escalation Ladder, to the extent not previously provided, Contractor shall submit all information pertaining to the Dispute, including the information upon which Contractor relies in support of its Claim. This includes the information specified in Section 14.4 of these General Terms and Conditions for Requests for Change Orders, including the certifications from both Contractor and any Subcontractors as required by Section 14.6 of these General Terms and Conditions. A request to invoke the Escalation Ladder by Contractor shall not be considered complete until Contractor complies in full with this provision, including by providing all required information concerning the Dispute.
- (b) Provided that the Party seeking to invoke the Escalation Ladder has complied in full with all requisite notice and information requirements set forth in the Contract before a Dispute is eligible for consideration using the Escalation Ladder, the Parties shall meet and commence the Escalation Ladder within 7 days following the invoking Party's complete written request to initiate the Escalation Ladder.
- (c) The Escalation Ladder shall consist of three levels of review and corresponding time periods, as follows:

Review Level	VPRA Reviewer	Contractor Review	Time Limit
1	Construction Lead	[Project level]	10 days
2	Project Manager	[Project Manager]	10 days
3	Senior Representative	[Executive Officer]	20 days

- (d) All Disputes eligible for the Escalation Ladder shall start at Review Level 1. If the Dispute is not resolved at each Review Level within the time limit stated, the Dispute

shall be eligible to move to the next Review Level. If reviewers at any Review Level of the Escalation Ladder cannot resolve a Dispute within the applicable time limit, then 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 limit to elevate the Dispute to the next Review Level in the Escalation Ladder.

#### **20.2.1.2 Escalation Ladder Outcome**

If VPRA and Contractor succeed in resolving all or part of a Dispute using the Escalation Ladder, the Parties shall memorialize the resolution in writing, including execution of any Change Order as appropriate, and perform their respective obligations in accordance therewith. If the Parties are unable to resolve all or part of a Dispute using the Escalation Ladder, then either Party shall have the right, after the time limit has passed for Review Level 3, to invoke the procedures in Section 20.3 and 20.5 of these General Terms and Conditions, subject to the terms thereof, for the unresolved part of the Dispute.

### **20.3 Use of Neutral for Dispute Resolution**

If issue resolution efforts through the Escalation Ladder are not successful, either Party may submit any unresolved part of a Dispute for resolution to a Neutral who will render a Recommendation concerning the Dispute.

#### **20.3.1 Timing of Submission**

The Party seeking to invoke the Neutral must submit a request to use the Neutral within 60 days after the conclusion of Review Level 3 without resolution of all or part of any Dispute. The submission of the Dispute to the Neutral shall contain the following information:

- (a) identification of the Change Notice number;
- (b) a description of the Dispute, which shall not exceed one (1) page;
- (c) a description of the attempts to resolve the Dispute showing that the Dispute is eligible to be heard by the Neutral, including the dates on which all prerequisite steps took place;
- (d) copies of relevant correspondence concerning the Dispute; and
- (e) a description of the issues that the Neutral will be requested to address and provide Recommendations.

#### **20.3.2 Effect of Submission to Neutral**

Submission of a Dispute to the Neutral is a prerequisite to a Party's right to submit a Dispute to litigation, subject to Section 20.5.1 of these General Terms and Conditions.

#### **20.3.3 Qualifications of Neutral**

Within sixty (60) days of issuance of the Phase 2 NTP, the Parties shall meet to select a Neutral for the Project. The Neutral shall be a Person with a background in law and/or engineering and who has substantial experience resolving disputes related to similar types of construction as the Project. The Parties must mutually agree on the Person to serve as the Neutral, provided that a Party may only object to a Neutral candidate in good faith.

Unless otherwise agreed by the Parties, the Neutral may not have a prohibited conflict of interest. A prohibited conflict of interest includes the following:



- (a) A Person who has a financial interest (including equity or stock ownership) in (i) VPRA or (ii) a Contractor-Related-Entity or an Affiliate thereof,
- (b) A Person who has a financial interest in the Project other than engagement as the Neutral;
- (c) A current employee or consultant of (i) VPRA or (ii) a Contractor-Related-Entity or any Affiliate thereof;
- (d) A Person who was previously employed in the two years preceding selection of the Neutral by (i) VPRA or (ii) a Contractor-Related-Entity or any Affiliate thereof;
- (e) A Person who was previously engaged as a consultant in the two years preceding selection of the Neutral by (i) VPRA or (ii) a Contractor-Related Entity or any Affiliate thereof; or
- (f) A Person who has any other actual or apparent conflict of interest that may prevent the Person from impartially considering any Dispute.

Prior to engagement of the Neutral, all candidates to become the Neutral shall submit a sworn disclosure statement identifying any potential prohibited conflict of interest or affirming that no such prohibited conflict of interest is known to exist. Once a Neutral is engaged, the Neutral shall have a continuous, ongoing obligation to disclose any prohibited conflict of interest that arises or of which the Neutral becomes aware.

Once the Parties have agreed on the Neutral, the Parties shall execute an agreement in a form satisfactory to VPRA with the Neutral for the Neutral's services. The Parties shall each be responsible for 50% of the costs of the Neutral process. Contractor shall pay the Neutral in the first instance and submit an invoice to VPRA for VPRA's share on a monthly basis. Contractor shall submit the costs of the Neutral process with the monthly Application for Payment for the costs incurred in the preceding month.

Except for the exchange of written statements and materials as provided in Section 20.3.5.2 of these General Terms and Conditions, and as may be requested by the Neutral as provided in Section 20.3.5.3 of these General Terms and Conditions, neither Party shall have *ex parte* communications with the Neutral. A party's violation of this restriction shall be grounds for a new Neutral Session with a different Neutral at the sole expense of the Party that improperly engages in *ex parte* communications.

#### **20.3.4 Dismissal of the Neutral**

The intention of the Neutral process is to have a single Person serve as the Neutral for the duration of the Project.

Either Party may dismiss the Neutral for any reason at any time. If a Party dismisses the Neutral, the Neutral shall issue a Recommendation for Disputes previously heard at a Neutral Session, but shall not hold any further Neutral Sessions. All Disputes that have been submitted to the Neutral but for which no Neutral Session has taken place shall be stayed until a new Neutral is engaged.

The Parties shall meet within 10 days of dismissal of a Neutral to discuss engagement of a replacement Neutral. The replacement Neutral shall be subject to the same requirements described in Section 20.3.3 of these General Terms and Conditions. The Parties shall follow the same process if a Neutral resigns.

## **20.3.5 Neutral Procedure**

### **20.3.5.1 Initial Meeting**

Within 10 days of the Neutral's receipt of all information required by Section 20.3.1 of these General Terms and Conditions, the Parties shall arrange a meeting with the Neutral to schedule a Neutral Session for presentation of the Dispute. The schedule for the Neutral Session shall account for sufficient time to comply with the Pre-Neutral Session submissions in Section 20.3.5.2 of these General Terms and Conditions. During this meeting, the Parties and the Neutral shall agree to the amount of time each Party will have to present its position to the Neutral, subject to the total time limit stated in Section 20.3.5.3 of these General Terms and Conditions.

### **20.3.5.2 Pre-Neutral Session Submissions**

In advance of the Neutral Session, the Parties shall perform the following:

- (a) 45 days prior to the Neutral Session, the Parties shall exchange written statements containing their position on the Dispute. The written statements shall be limited to 10 written pages. The Parties may attach no more than 30 pages of exhibits to the written statements. No other information or materials may be submitted with the written statements.
- (b) 20 days prior to the Neutral Session, the Parties shall exchange written statements in rebuttal to the other Party's written statement. The rebuttal statements shall be limited to 5 written pages and 15 pages of exhibits. The rebuttal statements shall only respond to the other Party's arguments in the initial written statements and shall not contain any new arguments or positions. No other information or materials may be submitted with the rebuttal statements.
- (c) 5 days prior the Neutral Session, the Parties shall exchange copies of the presentations they plan to present at the Neutral Session.

Other than as identified in this Section 20.3.5.2 of these General Terms and Conditions, the Parties shall not submit any other materials to the Neutral prior to the Neutral Session, nor may the Neutral consider any other submitted materials. The Parties shall exchange the materials by sending them via electronic transmission to the Neutral without copying the other Party. Once the Neutral receives submissions from both parties, the Neutral will send the materials simultaneously to both Parties. The Neutral may request hard copies of the materials from the Parties.

Neither Party shall be entitled to discover documents or information from the other Party as part of the Neutral process, provided that this limitation shall not in any way limit or otherwise restrict the Parties' rights under the Contract Documents or at law to obtain information from the other Party. Contractor's full compliance with an examination request from VPRA pursuant to Sections 23.1.4 or 23.3 of these General Terms and Conditions shall be a prerequisite to commencement of the Neutral process and the Neutral shall not schedule a Neutral Session until Contractor has fully complied with VPRA's request for information about a Claim or Dispute and VPRA has had no fewer than 15 days to perform a detailed examination of the information and materials provided.

### **20.3.5.3 Neutral Session**

The Parties and the Neutral shall hold a Neutral Session at which the Parties present their positions to the Neutral. A Neutral Session for a single Dispute shall not exceed 6 hours in total duration, including presentations by the Parties and questions from the Neutral.

The Parties' presenters during the Neutral Session shall be limited to project staff with knowledge of the Dispute. Notwithstanding the foregoing, the Parties may engage experts solely to present on cost and schedule impacts. Experts who do not have direct knowledge of the Dispute shall not be permitted to present on technical issues. Legal counsel shall not be permitted to present during the Neutral Session but may attend the Neutral Session provided that the Party intending to have legal counsel present provide no less than 5 days' notice prior to the Neutral Session of its intention.

During the Neutral Session, the Neutral may ask questions of each Party relevant to the Dispute. The Neutral may also hold private conversations with each Party to discuss the Dispute during the designated time for the Neutral Session. If the Neutral finds it necessary, the Neutral may request that the Parties provide supplemental information on a specific issue relevant to the Dispute. Such supplemental information shall be limited to 5 written pages and 10 pages of exhibits and must be submitted to the Neutral within 10 days after requested by the Neutral. The Neutral shall distribute the supplemental information to both Parties in the same manner provided for exchange of written Materials in Section 20.3.5.2 of these General Terms and Conditions. The Neutral Session shall not be considered concluded until receipt by the Neutral of any supplemental material requested.

#### **20.3.6 Recommendation**

Within 30 days of the conclusion of a Neutral Session, the Neutral shall issue written Recommendations concerning the Dispute. The Recommendations shall explain the Neutral's view of the Dispute, including the arguments of each Party that have merit and the arguments that lack merit. The Recommendations shall be limited to 10 pages and may refer to the materials submitted by the Parties in accordance with Section 20.3.5.2 and 20.3.5.3 of these General Terms and Conditions.

The Parties may hold a follow-up meeting with the Neutral for further discussion or clarification of the Recommendations. Any such follow-up meeting shall be limited to two hours in duration and shall not include any further written submissions or presentations by the Parties.

#### **20.3.7 Confidentiality**

Except as otherwise provided by Law, all materials submitted and exchanged as part of the Neutral process shall be considered confidential and to have been prepared in contemplation of settlement, and deemed inadmissible in any subsequent proceedings under Section 20.5 of these General Terms and Conditions or otherwise. This includes all written materials submitted in advance of the Neutral Session, the Recommendations, any supplements to the foregoing, and the substance of any communications between the Parties in connection with the Neutral process. The foregoing shall not be construed to prevent the discovery or admissibility of information or materials otherwise discoverable or admissible separate and apart from their inclusion in the Neutral process.

#### **20.3.8 Neutral Process is Non-Binding**

The Neutral process shall be non-binding on the Parties. The Parties are not required to accept or reject the Recommendations in any manner, but are encouraged to use the Recommendations to facilitate resolution of the Dispute.

### **20.4 Continuation of Work During a Dispute**

Failure by VPRA to pay any amount in dispute shall not alleviate, diminish, or modify in any respect Contractor's obligation to perform under the Contract Documents, including Contractor's obligation to achieve the Completion Deadlines and perform all Work in accordance with the

Contract Documents. At all times while any dispute is pending or during the Dispute Resolution Process, Contractor and all Contractor-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 a court or otherwise specified or directed by VPRA.

## **20.5 Litigation of Unresolved Disputes**

### **20.5.1 Tolling of Claims and Statute of Limitations**

Neither Party may invoke the option to litigate the unresolved Disputes in accordance with Section 20.5.2 of these General Terms and Conditions until Contractor has identified all outstanding Claims concurrently with its submission to VPRA of the Application for Final Payment pursuant to Section 12.9 of these General Terms and Conditions (and has released and waived all other potential Claims), and only after full compliance of each Unresolved Dispute with Article 14 and Sections 20.2 and 20.3 of these General Terms and Conditions.

The Parties waive any defense predicated on the expiration of the statute of limitations applicable to a Dispute, provided that all Unresolved Disputes are consolidated into a single litigation that is commenced within the later of: (i) ~~60~~120 Days after Final Acceptance or (ii) ~~30~~60 Days after the Neutral has issued a Recommendation on all Disputes submitted to the Neutral. Any Disputes not included in the single action shall be deemed forever and irrevocably waived, abandoned, and barred and no recovery shall be permitted for the actions, omissions or circumstances comprising such waived Disputes.

The foregoing restriction on the commencement of litigation shall not apply to causes of action that are not related to or arising from a pending Claim or Dispute under the Contract Documents, including the right to seek equitable relief for matters unrelated to a Claim or Dispute.

### **20.5.2 Litigation**

Subject to Section 20.5.1 of these General Terms and Conditions, either Party shall have the right to initiate litigation for Unresolved Disputes. All litigation between the Parties shall be as provided in Section 25.8 of these General Terms and Conditions.

## **20.6 Attorney's Fees**

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

## **ARTICLE 21**

### **(Default)**

## **21.1 Default by Contractor**

### **21.1.1 Events of Default**

Contractor shall be in default if any one or more of the following events or conditions occur:

- (a) Contractor fails to promptly begin the Work under the Contract Documents after VPRA issues a Phase 1 NTP, Early Work NTP or Phase 2 NTP, as applicable, authorizing such Work;
- (b) Contractor fails to perform the Work with sufficient resources to ensure the Work is completed promptly;

- (c) Contractor fails to comply with the Quality Plan;
- (d) Contractor fails to perform the Work in accordance with the Contract Documents;
- (e) Contractor refuses to remove and replace rejected Materials or Nonconforming or unacceptable Work, or fails to remove and replace workers as directed by VPRA under Section 15.3 of these General Terms and Conditions;
- (f) Contractor stops prosecuting the Work (unless due to one of the following:
  - (i) VPRA suspends or terminates the Work;
  - (ii) a Force Majeure event occurs; or
  - (iii) VPRA fails to pay Contractor undisputed sums, subject to Section 21.3 of these General Terms and Conditions;
- (g) Contractor fails to resume performing Work that has been suspended or stopped after receipt of notice from VPRA to do so within the time stated in VPRA's notice or (if applicable) after the event or condition preventing performance has ceased;
- (h) Contractor breaches any other agreement, representation or warranty contained in the Contract Documents;
- (i) Contractor fails to perform any other obligation under the Contract Documents, including EEO and Small Business subcontracting requirements;
- (j) Contractor fails to provide and maintain the required insurance;
- (k) Contractor fails to provide and maintain the required Performance and Payment Bonds;
- (l) Contractor assigns or transfers the Contract Documents or any right under the Contract Documents, except as expressly permitted under Section 25.3 of these General Terms and Conditions;
- (m) Contractor fails to make undisputed payment when due for labor, Equipment or Materials in accordance with its agreements with Subcontractors or Suppliers and applicable law;
- (n) Contractor fails to comply with any Law or Governmental Approval; or fails reasonably to comply with the instructions of VPRA consistent with the Contract Documents, including Directive Letters;
- (o) Contractor fails to discharge or obtain a stay within ten (10) Days of any final judgment(s) or order for the payment of money against it in excess of \$100,000 in the aggregate arising out of the prosecution of the Work (provided that, for purposes hereof, posting of a bond in the amount of 125 percent of such judgment or order will be deemed an effective stay);
- (p) Contractor has become insolvent, is generally not paying Contractor's debts as they become due, admits in writing that Contractor is unable to pay its debts, or makes an assignment for the benefit of creditors;
- (q) Any Guarantor has become insolvent, is generally not paying its debts as they become due, admits in writing that Guarantor is unable to pay its debts, or makes an assignment for the benefit of creditors;
- (r) Contractor or a Principal Participant is the subject of any voluntary or involuntary insolvency, receivership, reorganization, or bankruptcy proceedings, and Contractor fails to have those proceedings dismissed within sixty (60) Days;

- (s) VPRA determines that any representation or warranty made by Contractor or any Guarantor in the Contract Documents or in any certificate, schedule, instrument or other document delivered pursuant to the Contract Documents was false or materially misleading when made;
- (t) Contractor or any Guarantor is a party to fraud;
- (u) Any Guarantor revokes or attempts to revoke its obligations under the Guaranty, or otherwise takes the position that such instrument is no longer in full force and effect;
- (v) Contractor or a Principal Participant is debarred or suspended by the Commonwealth or is suspended or debarred by any federal agency;
- (w) Contractor communicates that it cannot perform its obligations under the Contract Documents; or
- (x) Contractor fails to complete the Phase 1 Services within 400 Days, or any extended date in accordance with Section 7.0 of the Contract, after the date VPRA issues the Phase 1 Services NTP.

### **21.1.2 Right to Cure**

- (a) VPRA may, at any time, notify Contractor in writing that Contractor is in default pursuant to Section 21.1.1 of these General Terms and Conditions. After VPRA gives written notice, Contractor shall have thirty (30) Days to cure the identified breach before VPRA declares an Event of Default. There are two exceptions to the notice provisions and the right to cure: (1) the cure period will only be three (3) Days for a breach under Section 21.1.1(j) of these General Terms and Conditions and (2) no notice and opportunity to cure is required for any breach which by its nature cannot be cured, including the breaches described in Sections 21.1 (k), (p), (s), and (u) of these General Terms and Conditions. If a breach for which a thirty (30)-Day cure period is provided is curable but by its nature cannot be cured within thirty (30) Days, as determined by VPRA, VPRA will not declare an Event of Default if Contractor commences the cure within the thirty (30)-Day cure period and thereafter diligently prosecutes the cure to completion. ~~No cure period may exceed sixty (60) Days in total.~~
- (b) If VPRA believes a condition affecting the Project poses an immediate and imminent danger to public health or safety, VPRA may rectify the condition at Contractor's cost without giving notice or providing any cure period. Public safety is paramount for VPRA; Contractor shall be liable for the costs to correct the danger to the public health or safety even if VPRA was under a mistaken belief that the occurrence of a breach or default required VPRA to take such action. VPRA's good faith determination of the existence of such danger will be deemed conclusive in the absence of clear and convincing evidence to the contrary.
- (c) If Contractor fails to cure any curable breach in accordance with this Section 21.1.2 of these General Terms and Conditions and VPRA declares an Event of Default, VPRA may exercise the remedies in Section 21.2 of these General Terms and Conditions.

## **21.2 Remedies**

### **21.2.1 Rights of VPRA**

If an Event of Default occurs as provided in Section 21.1.2 of these General Terms and Conditions, then, in addition to all other rights and remedies provided by law or equity or available under the Contract Documents or otherwise, including the rights to recover Liquidated Damages

and to seek recourse against the Performance and Payment Bonds required hereunder, any Guaranty, and/or other performance security, VPRA will have the following rights and remedies, without further notice, and without prejudice to any of its other rights or remedies and without waiving or releasing Contractor from any obligations, and Contractor shall have the following obligations (as applicable):

- (a) VPRA may order Contractor to suspend or discontinue the Work or any portion of the Work;
- (b) VPRA may terminate the Contract or a portion thereof, in which case, the provisions of Sections 17.2 and 18.4 of these General Terms and Conditions apply;
- (c) If and as directed by VPRA, Contractor shall withdraw from the Site and must remove such Materials, Equipment, tools, and instruments used by, and any debris or waste Materials generated by, any Contractor-Related-Entity in the performance of the Work;
- (d) Contractor shall deliver to VPRA possession of any or all facilities of Contractor located on the Site as well as any or all Work Product, Construction Documents, and all other completed or partially completed drawings (including plans, elevations, sections, details, and diagrams), specifications, records, information, schedules, samples, and other documents that VPRA deems necessary for completion of the Work;
- (e) Contractor shall confirm the assignment to VPRA of the Subcontracts requested by VPRA, and Contractor shall terminate, at its own cost and without recourse from VPRA, all other Subcontracts;
- (f) VPRA may deduct from any amounts payable by VPRA to Contractor such amounts payable by Contractor to VPRA, including Liquidated Damages or other damages payable to VPRA under the Contract Documents or at law;
- (g) VPRA will have the right, but not the obligation, to pay such amount and/or perform such act(s) as may then be required for the Project;
- (h) VPRA, without incurring any liability to Contractor, will have the rights (i) to take the performance of all or a portion of the Work from Contractor (either with or without the use of Contractor's Materials, Equipment, tools, and instruments) and enter into an agreement with another Person for the completion of such Work; or (ii) to use such other methods, as in the opinion of VPRA, will be required for the completion of the Project; and/or
- (i) If VPRA exercises any right to perform any obligations of Contractor, in the exercise of such right VPRA may, but is not obligated to, among other things: (i) perform or attempt to perform, or cause to be performed, such Work; (ii) spend such sums as VPRA deems necessary and reasonable to employ and pay such architects, engineers, consultants, and contractors, and obtain Materials and Equipment as may be required for the purpose of completing such Work; (iii) execute all applications, certificates, and other documents as may be required for completing the Work; (iv) modify or terminate any contractual arrangements; (v) take any and all other actions that it may consider necessary to complete the Work; and (vi) prosecute and defend any action or proceeding incident to the Work.

## **21.2.2 Liability of Contractor**

### **21.2.2.1 Occurrence of Event of Default**

If an Event of Default has occurred, Contractor, its Principal Participants, Surety, and any Guarantor(s) shall be jointly and severally liable to VPRA for all costs VPRA reasonably incurs to

complete the Work or to have the Work completed by others. This liability is in addition to any other damages under the Contract Documents other than those costs intended to be covered by Liquidated Damages payable under the Contract Documents. Costs of completing the Work include re-procurement costs, cost of construction, and throw away costs for unused portions of the completed Work, ~~and increased financing costs~~. If an Event of Default has occurred, VPRA will be entitled to withhold all or any portion of further payments to Contractor until VPRA determines the amount (if any) that VPRA owes to Contractor. VPRA will promptly notify Contractor in writing of the amount due to Contractor from VPRA, or due to VPRA from Contractor. VPRA will deduct all costs and charges incurred by VPRA, including attorney's, accountant's, and expert witness' fees and costs, together with the cost of completing the Work, under the Contract Documents, from any sum due (or which may become due) to Contractor. If the amount due to VPRA exceeds the amount that would have been payable under the Contract, then Contractor, its Principal Participants, its Surety(ies), and any Guarantor shall be liable for the difference, and shall promptly pay the difference to VPRA.

#### **21.2.2.2 Alternative to Terminating the Contract and Completing the Work**

Instead of exercising the other provisions of this Section 21.2 of these General Terms and Conditions for terminating the Contract and completing the Work, VPRA may pay Contractor for the portions of Work already performed in accordance with the Contract Documents and may eliminate the remaining portions of the Work and treat the remaining portions as if they had never been included or contemplated by the Contract Documents. If VPRA exercises this option, Contractor shall not be entitled to prospective profits on, or any other compensation relating to, Work that Contractor did not complete.

#### **21.2.2.3 Termination Deemed to Constitute a Termination for Convenience**

If VPRA terminates the Contract for grounds that are later determined not to justify a termination for default, then the termination will be deemed a termination for convenience pursuant to Article 18 of these General Terms and Conditions.

#### **21.2.2.4 Damages Resulting From Contractor's Breach or Failure to Perform**

If VPRA suffers damages because Contractor failed to perform an obligation under the Contract Documents, VPRA will be entitled to recover those damages from Contractor regardless of whether the breach or failure that caused the damages ripens into an Event of Default. Contractor, its Principal Participants, Surety, and Guarantor shall be jointly and severally liable for such damages.

#### **21.2.2.5 Cumulative Remedies**

Except as otherwise expressly provided herein, including Section 17.1.1.2 of the Contract all rights, powers, and privileges conferred hereunder upon the Parties hereto shall be cumulative and in addition to all other rights, powers, and remedies hereunder and those available at law or in equity. All such rights, powers, and remedies may be exercised separately or at once, and no exercise of any right, power or remedy shall be construed to be an election of remedies or shall preclude future exercise of any or all other rights, powers, and remedies granted hereunder or available at law or equity, except as provided herein.

#### **21.2.2.6 Continued Liability of Contractor and Surety**

Contractor, any Guarantor, and Surety will not be relieved of liability for continuing Liquidated Damages because VPRA has declared an Event of Default or taken other actions under this Section 21.2 of these General Terms and Conditions.



### **21.3 Right to Stop Work if Undisputed Payment is Not Made**

Contractor has the right to stop Work if VPRA fails to make an undisputed payment. As a precondition to exercising such right, Contractor must submit written notice of nonpayment to VPRA after VPRA's thirty (30) Days to make such payment have lapsed without payment by VPRA, and sixty (60) Days must thereafter elapse without payment of the undisputed amounts from VPRA after VPRA's receipt of such notice. If Contractor stops Work under this Section 21.3 of these General Terms and Conditions, that stoppage will be considered a suspension under Section 17.1 of these General Terms and Conditions. Contractor shall not have the right to terminate the Contract for default if VPRA fails to make an undisputed payment when due, but Contractor shall have the right to declare a termination for convenience under Article 18 of these General Terms and Conditions upon meeting the requirements of Section 17.5 of these General Terms and Conditions. For purposes of clarity, Contractor shall not be entitled to declare a termination for convenience until no less than 240 Days have elapsed since the expiration of VPRA's thirty (30) Days to make payment have passed without payment by VPRA.

### **21.4 Notice and Opportunity to Cure Other Types of VPRA Breaches**

If VPRA breaches the Contract (other than by failing to make payments to Contractor as provided in Section 21.3 of these General Terms and Conditions), Contractor shall provide a written notice to VPRA describing the breach. VPRA will have 30 Days from the date VPRA received the notice to cure the breach. The thirty (30)-Day cure period is extended for any breach that is capable of cure but by its nature cannot be cured within thirty (30) Days; in such case, VPRA will have an additional period of time as may be reasonably necessary to cure the breach so long as VPRA commences the cure within the 30-Day period and diligently proceeds to cure the breach. Contractor shall have no right to exercise any remedies to which it may be entitled at law or in equity until (1) Contractor has given the required notice and (2) the cure period has lapsed and VPRA has not cured the breach.

### **21.5 Availability of Funds; Appropriation**

This Agreement is contingent upon and subject to the availability and appropriation of sufficient state and/or federal funds. A failure by the Parties to perform any condition on its part to be performed under this Agreement as a result of the failure of the General Assembly to appropriate sufficient funds, or the applicable oversight board or funding partner (e.g., FRA, ~~FTA, etc.~~) to allocate sufficient funds, shall not in any manner constitute a breach or default by the Parties. At Contractor's request, VPRA shall promptly furnish reasonable evidence satisfactory to Contractor that VPRA has adequate funds available and committed to fulfill all of VPRA's contractual obligations under the Contract Documents.

## **ARTICLE 22**

### **(Acceptance of Project)**

#### **22.1 Substantial Completion**

##### **22.1.1 Notice by Contractor**

Contractor shall provide written notice to VPRA when all of the following have occurred:

- (a) Contractor has completed all Work, except for Punch List items and other items only included in the requirements for Final Acceptance;

- (b) Contractor has ensured that the Work has been performed in accordance with the requirements of the Contract Documents and that all requirements in the Contract Documents identified as prerequisites to Substantial Completion have been met;
- (c) Contractor has received all applicable Governmental Approvals required for Project use;
- (d) Contractor has furnished to VPRA certifications from Contractor's Project Manager, in form and substance satisfactory to VPRA, certifying conformity of the construction with the Contract Documents;
- (e) Contractor has furnished to VPRA certifications from Contractor's quality manager, in form and substance satisfactory to VPRA, certifying that there are no outstanding nonconformances other than those identified on the Punch List and that such nonconformances will be corrected;
- (f) Contractor has furnished to VPRA a certification from Contractor's quality manager, in form and substance satisfactory to VPRA, certifying that the Work is completed in accordance with the requirements of the Contract Documents.
- (g) Contractor has ensured that the Project may be used without damage to the Project or any other property on or off the Site, and without injury to any Person;
- (h) Contractor has obtained all applicable Third-Party approvals relating to the Work and all Third-Parties have completed all Work that involves obligations by Contractor;
- (i) Contractor has removed all temporary facilities, supports, staging, storage and equipment that require interruption of the final rail and vehicle traffic configuration to remove;
- (j) Contractor has ensured that the bypass structure and track are accessible to rail traffic and all other elements of the Project are complete and functional for final traffic configuration;
- (k) CSXT has inspected the Work and issued a written certificate that the Work is substantially complete; and
- (l) Completion of Punch List items and final cleanup and other construction operations will not alter the final traffic configuration.

When Contractor submits the foregoing, Contractor shall also submit the proposed Punch List to VPRA.

### **22.1.2 Correction of Defects**

Upon receipt of Contractor's notice under Section 21.1.1 of these General Terms and Conditions, VPRA will conduct such inspections, surveys, and/or testing as VPRA deems desirable. If such inspections, surveys, and/or tests disclose that any Work does not meet the requirements of Section 21.1.1 of these General Terms and Conditions or the Contract Documents, VPRA will promptly advise Contractor as to Nonconforming Work (including incomplete Work) necessary to be corrected as a condition to Substantial Completion, Nonconforming Work (including incomplete Work) that may be corrected as Punch List items, and/or whether Contractor shall reassess the accuracy and completeness of its notice. Upon correction of the Nonconforming Work (including incomplete Work) identified as a prerequisite to Substantial Completion, Contractor shall provide written notification to VPRA and VPRA will conduct additional inspections, surveys, and/or tests as VPRA deems desirable. This procedure shall be repeated until VPRA finds that Contractor has met all prerequisites to Substantial Completion.

### **22.1.3 Notice of Substantial Completion**

VPRA will issue a Notice of Substantial Completion when:

- (a) VPRA determines that all conditions set forth in Section 21.1.1 of these General Terms and Conditions have been satisfied;
- (b) VPRA determines that all Nonconforming Work (including incomplete Work) identified as prerequisites to Substantial Completion has been corrected or may be included in the Punch List, or VPRA has Accepted the Nonconforming Work in accordance with Section 6.5.3 of these General Terms and Conditions; and
- (c) VPRA has Approved Contractor's Punch List.

## **22.2 Final Acceptance**

### **22.2.1 Conditions to Final Acceptance**

#### **22.2.1.1 Performance of Work After Substantial Completion**

Promptly after VPRA has issued the Notice of Substantial Completion, Contractor shall perform all Work included on the Punch List. Contractor shall also satisfy all of its other obligations under the Contract Documents, including ensuring that the Project has been completed and all components have been properly adjusted and tested.

#### **22.2.1.2 Conditions to Affidavit of Final Completion**

Contractor shall provide to VPRA an executed and sworn Affidavit of Final Completion stating the following, in addition to including the statement in Section ~~21~~22.2.1.3 of these General Terms and Conditions:

- (a) all requirements for Substantial Completion have been fully satisfied and VPRA has issued Notice of Substantial Completion;
- (b) VPRA has received all Work Product, As-Built Documents, right-of-way record maps, surveys, material certifications, redlined drawings, operating manuals, test data, manufacturer's warranties and warranty assignments, and other deliverables required under the Contract Documents;
- (c) all special tools, Equipment, furnishings, and supplies purchased by and/or used by Contractor as provided in the Contract Documents have been delivered to VPRA and all replacement spare parts have been purchased and delivered to VPRA free and clear of Liens;
- (d) all of Contractor's and Subcontractors' personnel, supplies, Equipment, waste materials, rubbish, and temporary facilities have been removed from the Site, Contractor has restored and repaired all damage or injury arising from such removal to the satisfaction of VPRA, and the Site is in good working order and condition;
- (e) Contractor has furnished to VPRA certifications from Contractor's Project Manager, in form and substance satisfactory to VPRA, certifying conformity of the construction with the Contract Documents;
- (f) Contractor has furnished to VPRA certifications from Contractor's quality manager, in form and substance satisfactory to VPRA, certifying that there are no outstanding nonconformances;

- (g) Contractor has furnished to VPRA certifications from Contractor's Environmental Compliance Manager, in form and substance satisfactory to VPRA, certifying that the Work is completed in accordance with the environmental requirements, including the completion of the Environmental Compliance Plan;
- (h) the Punch List items have been completed to the satisfaction of VPRA;
- (i) all of Contractor'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 VPRA) have been satisfied in full or waived in writing by VPRA;
- (j) Contractor has furnished a list of the Unresolved Disputes to VPRA;
- (k) there are no claims, obligations or liens outstanding or unsatisfied for labor, services, materials, equipment, taxes or other items performed, furnished or incurred for or in connection with the Work which will in any way affect VPRA's interests;
- (l) Contractor has provided certificates of insurance confirming that required coverages will remain in effect consistent with the requirements of the Contract Documents; and
- (m) deficiencies in the Work discovered after Substantial Completion, whether or not such deficiencies would have been included on the Punch List if discovered earlier. The rectification of such deficiencies in the Work will be deemed warranty Work. Contractor shall correct such deficiencies pursuant to Section 4.1 of these General Terms and Conditions, and VPRA may withhold from the final payment the reasonable value of completion of the deficient work until that work is completed.

In addition to confirming that Contractor has met the preceding conditions, Contractor shall attach such documents to the affidavit as are necessary to comply with the conditions or demonstrate compliance with the conditions.

### **22.2.1.3 Requirements of Affidavit of Final Completion**

The Affidavit of Final Completion referred to in Section 2422.2.1.2 of these General Terms and Conditions must include the following statement:

To the best of Contractor's knowledge and belief, the Work under the Contract has been completed in strict accordance with the Contract Documents, no lawful debts for labor or Materials are outstanding, and no federal excise tax has been included in the Contract Price; all requests for funds for undisputed Work under the Contract, including changes in the Work, and under all billings of whatsoever nature are accurate, complete, and final and no additional compensation over and above the Final Payment will be requested or is due under the Contract or under any adjustment issued thereunder for said undisputed Work; except for the disclosed Unresolved Disputes and other disclosed claims and disputes, there are no outstanding claims, Liens or stop work notices relating to the Project, including claims by Utility Owners, Subcontractors, and Suppliers; there is no existing default by Contractor under any Utility Agreement, and no event has occurred which, with the passing of time or giving of notice or both, would lead to a claim relating to the Work or Event of Default under any Utility Agreement; and upon receipt of Final Payment, Contractor and Subcontractors acknowledge that VPRA and any and all employees of VPRA and their authorized representatives will thereby be released, discharged, and acquitted from any and all claims or liability for additional sums on account of undisputed Work performed under the Contract.

If Contractor is unable to provide the affidavit in the above form, the affidavit will certify that all such outstanding matters are set forth in an attached list that will describe the outstanding matters in such detail as may be requested by VPRA. If the affidavit discloses the existence of claims relating to Subcontractors, Suppliers, and/or Utility Owners, the affidavit shall include a representation of Contractor that it is diligently and in good faith contesting all such matters by appropriate legal proceedings and will provide a status report regarding the same, including an estimate of the maximum payable amount with respect to each such matter.

### **22.2.2 Inspection and Issuance of Notice of Final Acceptance**

Upon VPRA's receipt of the Affidavit of Final Completion, VPRA will make final inspection and VPRA will either issue a Notice of Final Acceptance or notify Contractor regarding any Work remaining to be performed. If VPRA does not issue a Notice of Final Acceptance, Contractor shall promptly remedy the defective and/or uncompleted portions of the Work. Thereafter, Contractor shall provide to VPRA a revised Affidavit of Final Completion with a new date based on when the defective and/or uncompleted portions of the Work were corrected. The foregoing procedure will apply successively thereafter until VPRA has issued a Notice of Final Acceptance.

### **22.2.3 Overpayments; No Relief from Continuing Obligations**

Final Acceptance will not prevent VPRA from correcting any measurement, estimate or certificate made before or after completion of the Work, or from recovering from Contractor, the Surety(ies), and/or any Guarantor, the amount of any overpayment sustained due to failure of Contractor to fulfill the obligations under the Contract Documents. A waiver on the part of VPRA of any breach by Contractor shall not be held to be a waiver of any other or subsequent breach. Final Acceptance shall not relieve Contractor from any of its continuing obligations hereunder or constitute any assumption of liability by VPRA.

### **22.3 Clayton Act Assignment**

Contractor hereby offers and agrees to assign to VPRA 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 will be made and become effective at the time VPRA tenders Final Payment to Contractor, without further acknowledgment by the parties.

## **ARTICLE 23**

### **(Documents and Records)**

#### **23.1 Construction Pricing Documents**

##### **23.1.1 Contents of Construction Pricing Documents**

The Construction Pricing Documents ("CPDs") shall consist of all cost, unit pricing, price quote, and other documentary information used in preparation of the Phase 2 Price and any Early Work Price, and provided to VPRA as part of the Construction Cost Estimates. The CPDs shall clearly detail how each cost or price included in the Final Binding GMP Proposal or Early Work Proposal has been determined and shall show cost or price elements in sufficient detail adequate to enable VPRA to understand how Contractor calculated the applicable price. For steel and fuel, the CPDs shall show the unit price and assumed quantity used in the Construction Cost Estimates.

The CPDs provided in connection with quotations and Change Orders shall clearly detail how the total cost or price and individual components of that cost or price were determined. The CPDs shall itemize the estimated costs or price of performing the Work separated into usual and customary

items and cost or price categories to present a detailed estimate of costs and price, such as direct labor, repair labor, Equipment ownership and operation, expendable Materials, permanent Materials, supplies, Subcontract costs, plant and Equipment, insurance, bonds, letters of credit, indirect costs, contingencies, mark-up, overhead, and profit. The CPDs shall itemize the estimated annual costs of insurance premiums for each coverage required to be provided by Contractor under the Contract Documents. The CPDs shall include all assumptions made in determining the scope of the Work and calculating the applicable price, detailed quantity takeoffs, price reductions and discounts, rates of production and progress calculations, and quotes from Subcontractors used by Contractor to arrive at the Phase 2 Price or Early Work Price and any adjustments to the Contract Price.

### **23.1.2 Manner and Duration of Retaining Construction Pricing Documents**

Prior to execution of each Early Work Amendment and the Phase 2 Amendment, Contractor shall deliver to VPRA one final copy of all the CPDs and a detailed index and catalog of the CPDs used to calculate the price of each Early Work Package and the Phase 2 Services. Upon execution of each Early Work Amendment and the Phase 2 Amendment, the CPDs and index shall be held in locked fireproof cabinet(s) supplied by Contractor and located in VPRA's project office with the key to the fireproof cabinet(s) held only by Contractor. Further, concurrently with execution of each Subcontract or with approval of each Change Order or amendment to any Contract Document, the Parties shall add to the cabinet one copy of all documentary information respecting the Subcontractor bidding, pricing by the Subcontractor, or used in preparation of the Change Order or amendment, and shall update the index and catalog.

### **23.1.3 Retention of Construction Pricing Documents**

The CPDs and index and catalog shall be held in such cabinet or otherwise maintained until all of the following have occurred:

- (a) 180 days have elapsed from the earlier of Final Acceptance or termination of the Contract;
- (b) All Claims or Disputes regarding the Work have been settled; and
- (c) The Final Payment has been made and accepted.

The release of the CPDs from the locked cabinet shall not impair Contractor's obligation to maintain all Project records in accordance with Section 23.3 of these General Terms and Conditions.

### **23.1.4 Availability for Review**

The CPDs shall be available during business hours for joint review by Contractor and VPRA, or by Contractor, VPRA, and any dispute resolver as provided in Article 14 of these General Terms and Conditions, and in connection with approval of the Baseline Schedule and any updates thereto, negotiation of Change Orders, resolution of Claims or disputes under the Contract Documents, and aiding in determining the value of terminated Work. VPRA will be entitled to review all or any part of the CPDs to satisfy itself regarding the applicability of the individual documents to the matter at issue. Contractor shall provide access to VPRA for review of the CPDs upon 24 hours' notice.

### **23.1.5 Proprietary Information**

The CPDs are, and shall always remain, the property of Contractor and shall be considered to be in Contractor's possession, subject to VPRA's right to review the CPDs as provided in this Section 23.1.5 of these General Terms and Conditions. Contractor shall have and control the keys

to the cabinet containing the CPDs. VPRA acknowledges that Contractor may consider that the CPDs constitute trade secrets or proprietary information. VPRA will have the right to copy the CPDs for the purposes set forth in this Section 23.1.5 of these General Terms and Conditions, provided that the Parties execute a mutually agreeable confidentiality agreement with respect to CPDs that constitute trade secrets or proprietary information, which confidentiality agreement shall explicitly acknowledge that it is subject to applicable Law (including VFOIA). If VPRA receives a request for disclosure of information under VFOIA that could be construed to request production of Contractor's CPDs or copies thereof held by VPRA, VPRA will notify Contractor of the request.

#### **23.1.6 Contractor Representation**

Contractor represents and warrants that the CPDs constitute all documentary information used in the preparation of the Construction Cost Estimates, Final Binding GMP Proposal, and each Early Work Proposal. Contractor agrees that no other information used to prepare the Final Binding GMP Proposal or an Early Work Proposal will be considered in resolving Disputes or Claims. Contractor further agrees that the CPDs are not part of the Contract Documents and that nothing in the CPDs shall change or modify any Contract Document.

#### **23.1.7 Form of CPDs**

Except as otherwise provided in the Contract Documents, Contractor shall submit the CPDs in such format as is used by Contractor in connection with the Construction Cost Estimates. Contractor represents and warrants that the CPDs provided with the Final Binding GMP Proposal and each Early Work Proposal were personally examined by an authorized officer of Contractor prior to delivery, and that the CPDs meet the requirements of this Section 23.1 of these General Terms and Conditions. Contractor further represents and warrants that all additional CPDs to be provided hereunder were or will be personally examined prior to delivery by an authorized officer of Contractor, and that they shall meet the requirements of this Section 23.1 of these General Terms and Conditions.

#### **23.1.8 Review by VPRA to Confirm Completeness**

VPRA may at any time conduct a review of the CPDs to determine whether they are complete. If VPRA determines that any data is missing from a CPD, Contractor shall provide such data within three Days after delivery of VPRA's request for such data. At the time of its submission to VPRA, such data will be date stamped, labeled to identify them as supplementary CPD information, added to the CPDs, and added to the CPD catalog. Contractor shall have no right to add documents to the CPDs except upon VPRA's request and as provided by Section 23.1.9 of these General Terms and Conditions.

#### **23.1.9 CPDs for Change Order Pricing**

Contractor shall supplement the CPDs with all documents to prepare the pricing of Change Orders. The CPDs associated with any Change Order or Contract Price adjustment under this Contract shall be reviewed, organized, and indexed in the same manner as the original CPDs.

### **23.2 Subcontractor Documents**

#### **23.2.1 Subcontractor Bidding Documents**

For each Subcontractor, Contractor shall add to the CPDs all bid documents to procure the Subcontractor, including the solicitation materials, all bids received, and records of any negotiations with the selected Subcontractor. Contractor shall also include any document generated in accordance with the competitive bidding requirements in the Subcontracting Plan

for each Subcontractor procurement, including, if applicable, written approval from VPRA for Contractor to select a Subcontractor other than the lowest priced responsible bidder.

### **23.2.2 Subcontractor Pricing Documents**

Contractor shall require each Subcontractor to submit to Contractor a copy of all documents used in determining its Subcontract price. Contractor shall also require each Subcontractor to submit a copy of all documents to determine the price of a Subcontractor change order greater than \$25,000. Contractor shall require each such Subcontractor to submit the documents immediately prior to executing the relevant Subcontract or Subcontractor change order in the same manner as the CPDs. Each Subcontract shall provide that the Subcontractor CPDs will be accessible by Contractor, VPRA, and other dispute resolvers on terms substantially similar to those contained in Article 14 of these General Terms and Conditions. Contractor shall ensure that each Subcontract subject to this Section 23.2 of these General Terms and Conditions includes a representation and warranty from the Subcontractor stating that its CPDs include all the documents used in establishing its Subcontract price or change order price.

## **23.3 Project Records**

### **23.3.1 Maintenance of Records**

Contractor shall maintain a complete set of all books, records, and documents prepared or employed by Contractor with respect to the Project. The books, records, and documents must be maintained at Contractor's Project office and be available for inspection at the office on one Day's notice.

### **23.3.2 Audit and Examination Rights**

Contractor grants to VPRA, Utility Owners, USDOT funding partners including ~~FTA and~~ FRA, the Secretary of Transportation, the Comptroller General of the United States, Amtrak, and other applicable state and federal agencies, as well as authorized representatives of each of the foregoing, the right to audit and examine books and records relevant to the Project (including all tax returns and supporting documentation filed with any Governmental Persons). The entities authorized under this Section 23.3.2 of these General Terms and Conditions may audit and examine the books and records in connection with the issuance of Change Orders, Claims, the resolution of disputes, or as otherwise needed to comply or verify compliance with the Contract and Laws. The audit and examination rights include the rights to have convenient access to all paper and electronic records, and to make and save copies of those records. For Contractor's documents in electronic form, Contractor shall provide the entities authorized under this Section 23.3.2 of these General Terms and Conditions with electronic copies of the documents on a portable media device or through another method of electronic transmission. The entities authorized under this Section ~~23.3.2~~ of these General Terms and Conditions are entitled to review and retain copies of all native electronic files in addition to copies thereof in electronic or other formats. Contractor shall include this Section in all Subcontracts.

### **23.3.3 Audit of Force Account Work**

If VPRA is paying for any Work on a Force Account basis, then the audit and examination rights include all books, records, documents, and other evidence and accounting principles and practices sufficient to reflect all direct and indirect costs of any nature that Contractor claims to have incurred or anticipated to be incurred in performing the Work. If an examination indicates that Contractor has been overpaid under a previous progress report or monthly payment, that overpayment will be credited against current progress reports or payments.



#### **23.3.4 Change Order Pricing Data**

For cost and pricing data submitted in connection with pricing Change Orders or potential Change Orders, the Persons authorized under Section 23.3.2 of these General Terms and Conditions and their representatives have the right to examine all books, records, documents, and other data of Contractor 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 such Persons to permit adequate evaluation of the cost or pricing data submitted, along with the computations and projections used therein.

#### **23.3.5 Claims Examinations**

All Claims filed against VPRA are subject to detailed examination at any time following the filing of the Claim. The examination may be performed by VPRA employees or by an auditor or other Person under contract with VPRA or under contract with VPRA's consultants. No notice is required before commencing any examination prior to sixty (60) Days after Final Acceptance. Thereafter, VPRA will provide 20 Days' notice to Contractor and any Subcontractors or their respective agents whose records will be examined before commencing an examination. Contractor, Subcontractors or their agents must provide adequate facilities, acceptable to VPRA, for the examination during normal business hours. Contractor, Subcontractors, and their agents must cooperate with the auditors. If Contractor, Subcontractors or their agents fail to maintain and retain sufficient records to allow the auditors to examine all of the Claim (or a Subcontractor's portion of the Claim) or fail to provide access to the books and records of Contractor, Subcontractors or their agents, then the Claim will be deemed waived and recovery for the Claim will be barred. At a minimum, the following documents must be available as part of an examination:

- (a) Daily time sheets and supervisor's daily reports;
- (b) Union agreements;
- (c) Insurance, welfare and benefits records;
- (d) Payroll registers;
- (e) Earnings records;
- (f) Payroll tax forms;
- (g) Material invoices and requisitions;
- (h) Material cost distribution worksheet;
- (i) Equipment records (list of company Equipment, rates, etc.);
- (j) Subcontractors' (including Suppliers) and agents' invoices;
- (k) Subcontractors' and agents' payment certificates;
- (l) Canceled checks (payroll and Suppliers);
- (m) Job cost report;
- (n) Job payroll ledger;
- (o) General ledger;

- (p) Cash disbursements journal;
- (q) E-mail, letters, and correspondence, including with Subcontractors and Suppliers;
- (r) Network servers, data storage devices, backup media;
- (s) All documents that relate to each and every Claim together with all documents that support the amount of damages as to each Claim;
- (t) ~~Work~~Non-privileged work sheets used to prepare the Claim establishing the cost components for items of the Claim including labor, benefits and insurance, Materials, Equipment, Subcontractors, all documents that establish the time periods, individuals involved, the hours for the individuals, and the rates for the individuals; and
- (u) The native electronic files for all of the foregoing.

Contractor's full compliance with the provisions of this Section 23.3.5 of these General Terms and Conditions is a condition precedent to Contractor's right to seek relief under Articles 14 and 20 of these General Terms and Conditions and to the scheduling of a Neutral Session as provided in Section 20.3.5.2 of these General Terms and Conditions. Contractor represents and warrants the completeness and accuracy of all information it or its agents provide in connection with this Section 23.3 of these General Terms and Conditions.

#### **23.3.6 Separate Records for Disputed Work**

For any Work performed pursuant to a VPRA-Directed Change or Work that Contractor otherwise contends entitles it to Extra Work Costs or Delay Costs following a Relief Event, and throughout the course of any Work that is in dispute and/or is subject to the Dispute Resolution Process, Contractor shall keep separate and complete books and records that provide a clear distinction between the incurred direct costs of disputed Work (or Work for which Contractor seeks Extra Work Costs and Delay Costs) and that of undisputed Work, and shall permit VPRA access to these records consistent with this Article 23 of these General Terms and Conditions.

#### **23.4 Retention of Records**

Contractor shall maintain all records and documents relating to the Contract (including copies of all original documents delivered to VPRA) for five (5) years after Final Acceptance, unless otherwise notified by VPRA. Contractor shall notify VPRA of where Contractor is storing the records and documents.

Contractor shall retain all records relating to Claims being processed or actions brought under the Dispute Resolution Process of this Contract, even if the preceding paragraph allows Contractor to discard such records. Contractor shall make those records available to VPRA and its agents until the Parties have finally resolved the Claims and disputes. Contractor shall retain all books, records, and other evidence bearing on Contractor's costs and expenses under the Contract Documents. Contractor shall make these records and documents available for examination at Contractor's Project office, at all reasonable times, and without charge to VPRA or VPRA's agents. Contractor shall allow VPRA and VPRA's agents to make copies of such documents. For Contractor's records in electronic form, Contractor shall provide VPRA and VPRA's agents with electronic copies of the documents on a portable media device or through another method of electronic transmission. VPRA and VPRA's agents are entitled to copy and retain all native electronic files in addition to copies thereof in electronic or other formats.

## **23.5 Virginia Freedom of Information Act**

### **23.5.1 Applicability of VFOIA**

Contractor understands VPRA must follow the requirements of the Virginia Freedom of Information Act (“VFOIA”), §§ 2.2-3700 *et seq.* of the Code of Virginia, and must disclose records requested under VFOIA for which there is no applicable exclusion. If Contractor discloses to VPRA information it deems confidential under this Contract, it agrees to clearly mark any information as with the word “confidential” before providing it to VPRA and to use such form as may be required by VPRA to invoke the appropriate provision of VFOIA exempting such records. If Contractor desires to prevent disclosure of certain materials or information, Contractor shall take all steps Contractor deems necessary at its sole cost and expense without the right to an adjustment of the Contract Price or a Completion Deadline. VPRA will respond to all requests for records and information as required by Law or Court Order.

### **23.5.2 Confidential Materials**

If Contractor submits any materials clearly and prominently labeled “trade secret” or “non-public” to VPRA, VPRA will use reasonable efforts to advise Contractor before VPRA produces those materials in response to any VFOIA request. VPRA will not be responsible or liable to Contractor or any other Person for disclosing any Contractor material when the disclosure is required by law or by Court Order.

### **23.5.3 Request for Contractor Construction Pricing Documents**

If VPRA receives a request for disclosure of information under VFOIA that could be construed to request production of Contractor’s CPDs or copies thereof held by VPRA, VPRA will notify Contractor of the request. If Contractor desires to prevent disclosure of certain materials or information, Contractor shall take all steps Contractor deems necessary at its sole cost and expense without the right to an adjustment of the Contract Price or a Completion Deadline. VPRA will respond to all requests for records and information as required by Law or Court Order.

## **23.6 Ownership of Work Product**

### **23.6.1 VPRA Owns All Work Product**

VPRA shall own all rights, title, and interest in the Work Product upon Contractor’s production of such Work Product, except for (i) Governmental Approvals, which shall only transfer to VPRA upon termination of the Phase 1 Services and (ii) Materials, which shall only become property of VPRA upon fulfillment of the conditions in Sections 11.4 and 12.2.2 of these General Terms and Conditions. VPRA’s ownership rights include the right of VPRA, and anyone contracting with VPRA, to incorporate any ideas or information from the Work Product into: (a) any other contract awarded in reference to the Project; or (b) any subsequent procurement by VPRA on another project. In receiving all rights, title, and interest in the Work Product, subject to the exclusions in this Section 23.6.1 of these General Terms and Conditions, VPRA is deemed to own all intellectual property rights, copyrights, patents, trade secrets, trademarks, and service marks in the Work Product, and Contractor agrees that it shall, at the request of VPRA, execute all papers and perform all other acts that may be necessary (if any) to ensure that VPRA’s rights, title, and interest in the Work Product are protected. The rights conferred herein to VPRA include, without limitation, VPRA’s ability to use the Work Product without the obligation to notify or seek permission from Contractor.

### **23.6.2 VPRA to Use the Work Product at its Sole Risk**

VPRA's use of the Work Product in any subsequent procurement by VPRA or on another project shall be at VPRA's sole risk and Contractor neither warrants nor represents that the Work Product is suitable for use in any subsequent procurement by VPRA or on another project without modification. VPRA waives any rights to seek recovery from Contractor for any claims, damages, liabilities, losses, and expenses arising out of or resulting from VPRA's use of the Work Product on another project.

### **23.6.3 Other Documents Prepared by Contractor**

Other documents prepared or obtained by Contractor to meet its obligations under the Contract Documents become VPRA's property when Contractor prepares or receives them, including Construction Documents, studies, manuals, as-built drawings, calculations, technical and other reports, and documents of a similar nature.

## **ARTICLE 24**

### **(Tax Matters)**

#### **24.1 Tax Exempt Status**

VPRA is exempt from state sales and use tax and federal excise tax. Contractor shall not include in any invoice or Application for Payment any taxes imposed by any taxing authority of the state in which the Project is located, or any political subdivision thereof, upon the sale or use of the Work covered by this Contract. Any such sales or use tax, if applicable, shall be paid by Contractor. Tax exemption certification shall be furnished to Contractor upon request.

#### **24.2 Freight and Transportation**

Contractor shall prepay all freight and transportation charges to the F.O.B. point of delivery and such freight charges shall be stated separately, as requested from the sales price of material, so as not to impose any tax upon VPRA.

## **ARTICLE 25**

### **(Miscellaneous Provisions)**

#### **25.1 Amendments**

No amendment to the Contract shall be binding on the Parties hereto unless such amendment is in writing and is executed by an authorized representative of the Party against whom enforcement of such amendment is sought.

#### **25.1 Waiver**

##### **25.1.1 No Waiver of Subsequent Rights**

Either Party's waiver of any breach or failure to enforce any of the terms, covenants, conditions or other provisions of the Contract Documents at any time (including any agreement by VPRA to Accept Nonconforming Work under Section 6.5.3 of these General Terms and Conditions) shall not in any way limit or waive that Party's right to subsequently enforce or compel strict compliance with every term, covenant, condition or other provision, any course of dealing or custom of the trade notwithstanding. Furthermore, if the Parties make and implement any interpretation of the Contract Documents without documenting such interpretation by an instrument in writing signed by both parties, such interpretation and implementation thereof will not be binding in the event of any future disputes. The consent by one Party to any act by the other Party requiring such consent

will not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

### **25.1.2 Custom Does not Constitute Waiver**

No act, delay or omission done, suffered or permitted by one Party or its agents will be deemed to waive, exhaust or impair any right, remedy or power of such Party under the Contract Documents, or to relieve the other Party from the full performance of its obligations under the Contract Documents. No custom or practice between the Parties in the administration of the terms of the Contract Documents will be construed to waive or lessen the right of a Party to insist upon performance by the other Party in strict compliance with the terms of the Contract Documents.

### **25.1.3 Waivers Must Be in Writing**

No waiver of any term, covenant or condition of the Contract Documents will be valid unless in writing and signed by the Party providing the waiver.

## **25.2 Independent Contractor**

Contractor is an independent contractor, and nothing contained in the Contract Documents will be construed as constituting any relationship with VPRA other than that of Project owner and independent contractor. In no event will the relationship between VPRA and Contractor be construed as creating any relationship whatsoever between VPRA and any of Contractor's employees. Neither Contractor nor any of its employees is or will be deemed to be an employee of VPRA. Except as otherwise specified in the Contract Documents, Contractor 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 Contractor or any Subcontractor hires or engages to perform or assist in performing the Work.

## **25.3 Successors and Assigns**

The Contract Documents will be binding upon and inure to the benefit of VPRA and Contractor and their permitted successors, assigns, and legal representatives.

### **25.3.1 Assignment by VPRA**

VPRA may assign all or part of its right, title, and interest in and to the Contract, including rights with respect to the Performance and Payment Bond, any Guaranty, and any other performance security provided, to any Person.

### **25.3.2 Assignment by Contractor**

Contractor may subcontract Work in compliance with the requirements of the Contract Documents. Contractor shall not otherwise sublet, transfer, assign or dispose of any portion of the Contract, or delegate any of its duties hereunder, except with VPRA's prior written approval. Contractor's assignment or delegation of any of its Work under the Contract Documents will not relieve Contractor of its responsibility for the Work assigned or delegated, unless VPRA, in its sole discretion, has approved such relief from responsibility. Any assignment of money is subject to all proper set-offs and withholdings in favor of VPRA and to all deductions provided for in the Contract.

## **25.4 Designation of and Cooperation with Representatives**

### **25.4.1 Designation of Representatives**

VPRA and Contractor shall each designate an individual or individuals who will be authorized to make decisions and bind the Parties on matters relating to the Contract Documents. Such

designations may be changed by a subsequent writing delivered to the other party in accordance with the Contract Documents. The Parties may also designate technical representatives who will be authorized to investigate and report on matters relating to the design and construction of the Project and negotiate on behalf of each of the Parties but who do not have authority to bind VPRA or Contractor.

#### **25.4.2 Cooperation**

Contractor shall cooperate with VPRA and all representatives of VPRA designated as described above.

#### **25.5 Survival**

Contractor's representations and warranties, the obligations and requirements in Article 9 of these General Terms and Conditions representations and warranties, the obligations and requirements, the provisions concerning changes in the work contained in Article 14 of these General Terms and Conditions, the indemnification provisions in Article 19 of these General Terms and Conditions, the Dispute Resolution Process contained in Article 20 of these General Terms and Conditions, the requirements concerning documents and records in Article 23 of these General Terms and Conditions, and all other provisions which by their inherent character should survive termination of the Contract, will survive the termination of the Contract.

#### **25.6 Limitation on Third-Party Beneficiaries**

The Parties do not intend for any of the provisions of the Contract Documents to create any third-party beneficiary unless a specific provision (such as the warranty and indemnity provisions) specifically identifies third parties (such as Utility Owners) and states that they are entitled to benefits under this Contract. Except as otherwise provided in this Section 25.6 of these General Terms and Conditions, the duties, obligations, and responsibilities of the Parties to the Contract Documents with respect to third parties remains as imposed by law. The Contract Documents shall not be construed to create a contractual relationship of any kind between VPRA and a Subcontractor, Supplier, or any other Person except Contractor.

#### **25.7 No Personal Liability**

VPRA's authorized representatives (including its consultants) are acting solely as agents and representatives of VPRA when carrying out the provisions of or exercising the power or authority granted to them under the Contract Documents. They will not be liable either personally or as employees of VPRA for actions in their ordinary course of employment. No agent, consultant, officer or employee of VPRA will be personally responsible for any liability arising under the Contract.

#### **25.8 Forum and Venue; Waiver of Jury Trial**

Any and all Disputes arising out of or in connection with this Contract, or any performances made hereunder that are not otherwise resolved through the processes in Sections 20.2 and 20.3 of these General Terms and Conditions shall be brought, and any judicial proceeding shall take place, only in the Circuit Court of the City of Richmond, Virginia or the United States District Court for the Eastern District of Virginia, Richmond Division. Contractor accepts the personal jurisdiction of such court and waives all jurisdiction and venue-related defenses to the maintenance of such actions. EACH OF THE PARTIES HERETO HEREBY IRREVOCABLY WAIVES ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY LEGAL PROCEEDING ARISING OUT OF OR RELATED TO THIS CONTRACT OR THE TRANSACTIONS CONTEMPLATED HEREBY.

#### **25.9 Notice of Bankruptcy or Insolvency**

In the event Contractor or any Principal Participant enters into proceedings relating to bankruptcy, whether voluntary or involuntary, Contractor agrees to furnish written notification of the bankruptcy to VPRA. This notification shall be furnished within five (5) Days of the initiation of the proceedings relating to bankruptcy filing. This notification shall include the date on which the bankruptcy petition was filed, the identity of the court in which the bankruptcy petition was filed, and a listing of VPRA contract numbers against which the Contractor asserts Final Payment has not been made. This obligation remains in effect until Final Payment under this Contract.

#### **25.10 Immigration Reform and Control Act of 1986**

By signing this Contract, Contractor certifies that it does not and will not during the performance of this Contract violate the provisions of the Federal Immigration Reform and Control Act of 1986, which prohibits employment of illegal aliens.

#### **25.11 Drug Free Workplace**

Contractor acknowledges and certifies that they understand that the following acts by Contractor, its employees, and/or agents performing services on state property are prohibited: The unlawful manufacture, distribution, dispensing, possession or use of alcohol or other drugs; and any impairment or incapacitation from the use of alcohol or other drugs (except the use of drugs for legitimate medical purposes). Contractor further acknowledges and certifies that it understands that a violation of these prohibitions constitutes breach of contract and may result in default action being taken by VPRA in addition to any criminal penalties that may result from such conduct. During the performance of this Contract, Contractor agrees to provide a drug-free workplace for Contractor's employees.

#### **25.12 Occupational Safety and Health Standards**

Contractor shall not require any individual employed in the performance of this Contract to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to health or safety as determined under the Occupational Safety and Health Standards promulgated by the United States Secretary of Labor. This provision shall be made a condition of any Subcontract entered into pursuant to this Contract. In addition, Contractor shall abide by the Virginia Occupational Safety and Health Standards adopted under Section 40.1-22 of the Code of Virginia (1950), as amended, and will fulfill the duties imposed under Section 40.1-51.1 of the Code of Virginia. Any Person violating the aforementioned requirements or duties which is brought to the attention of Contractor shall immediately abate such violation.

#### **25.13 Sensitive Security Information; Critical Infrastructure**

Contractor must protect, and take measures to assure that its Subcontractors at each tier protect sensitive security information ("SSI") made available during the course of administering a VPRA contract or Subcontract in accordance with 49 U.S.C. § 40119(b) and implementing U.S.DOT regulations, "Protection of Sensitive Security Information," 49 C.F.R. Part 15, and with 49 U.S.C. § 114(s) and implementing Department of Homeland Security regulations, "Protection of Sensitive Security Information," 49 C.F.R. Part 1520. VPRA reserves the right to conduct a fingerprint-based CHBC on all employees of Contractor and Subcontractors (together with any proposed replacements) during the term of the Contract to the extent those individuals will require access to SSI and/or Critical Infrastructure associated with the Project. All costs associated with the fingerprint-based CHBC are the responsibility of Contractor. A VPRA issued photo-identification badge may be required for each employee of Contractor or any Subcontractor who will need access to SSI and/or Critical Infrastructure. Based upon the results of the fingerprint-based CHBC, VPRA reserves the right to deny issuance of a VPRA security clearance or a VPRA issued photo-identification badge. Contractor shall promptly return all VPRA-issued photo-identification

badges whenever an employee of Contractor or a Subcontractor is no longer assigned to the Project or is otherwise terminated from employment.

#### **25.14 Marketing and Publicity**

Contractor shall not use VPRA's name for purposes of advertising or soliciting business, including, but not limited to, press releases, social media posts, presentations, brochures, photographs, or verbal announcements without the prior written permission of VPRA.

#### **25.15 Duty to Cooperate on Funding Opportunities**

VPRA seeks to maximize funding opportunities pertaining to its projects and the Work included in this Contract may become eligible for a grant and subject to certain requirements of a funding sponsor. Contractor agrees to work cooperatively and creatively with VPRA in connection with any grant application submittals to VPRA's funding partners. Contractor further agrees to fully comply with any terms and conditions required as a result of VPRA's participation in a grant.

#### **25.16 Further Assurances**

Contractor shall promptly execute and deliver to VPRA all such instruments and other documents and assurances as are reasonably requested by VPRA to further evidence the obligations of Contractor hereunder.

#### **25.17 Severability**

If any clause, provision, section or part of the Contract is ruled invalid under Article 20 of these General Terms and Conditions or otherwise by a court of competent jurisdiction, then the parties will: (a) promptly meet and negotiate a substitute for such clause, provision, section or part, which will, to the greatest extent legally permissible, effect the original intent of the Parties, (b) if necessary or desirable, apply to the court or other decision maker (as applicable) that declared such invalidity for an interpretation of the invalidated portion to guide the negotiations. The invalidity or unenforceability of any such clause, provision, section or part will not affect the validity or enforceability of the balance of the Contract, which will be construed and enforced as if the Contract did not contain such invalid or unenforceable clause, provision, section or part.

#### **25.18 Headings**

The headings of the sections of the Contract Documents are for convenience only and shall not be deemed part of the Contract or considered in construing the Contract.

#### **25.19 Governing Law**

The validity and construction of the solicitation and this Contract shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia, without reference to its choice of law provisions. No doctrine of choice of law shall be used to apply any law other than that of the Commonwealth of Virginia, and no defense, counterclaim or right of set-off given or allowed by the laws of any other state or jurisdiction, or arising out of the enactment, modification or repeal of any law, regulation, ordinance or decree of any foreign jurisdiction, may be interposed in any action hereon.

#### **25.20 Sovereign Immunity**

VPRA, specifically and the Commonwealth of Virginia generally, neither waive nor abrogate their sovereign immunity, in part or in whole, in any manner, under any theory, hereunder. Notwithstanding the foregoing, VPRA agrees and acknowledges that the Contract constitutes a legal, valid, and binding obligation of VPRA, enforceable against VPRA in accordance with its terms, except as enforceability may be limited or otherwise affected by (i) bankruptcy, insolvency,



reorganization, moratorium, and other laws affecting the rights of creditors generally, (ii) principles of equity, whether considered at law or in equity, and (iii) the sovereign immunity of the Commonwealth of Virginia; provided that sovereign immunity shall not bar an action to enforce a claim based on a breach of this Contract presented in accordance with the law of the Commonwealth of Virginia.

### **25.21 Entire Agreement**

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

\*\*\*END OF DOCUMENT\*\*\*

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