

Hampton Roads Transportation Accountability Commission Agenda

Special Meeting March 28, 2019

12:00 Noon
The Regional Board Room
723 Woodlake Drive, Chesapeake, VA 23320

- 1. Call to Order**
- 2. Approval of Agenda**
- 3. Public Comment Period**
- 4. Chair's Comments**
- 5. Action and Discussion Items of the Commission**
 - *Recommended Action: Discussion or Approval as indicated below*
 - A. I-64 Hampton Roads Bridge Tunnel Expansion: Project Agreement for Funding and Administration - (Attachment 5A)** - Executive Director Page, Counselors Inglima, Wall, and Ballou, and David Miller, PFM - Recommended Action: Discussion/Approval
 - B. Resolution to Preserve Flexibility to Reimburse Expenditures on I-64 Hampton Roads Bridge Tunnel Expansion Project, with Proceeds of a Bond Issue - (Attachment 5B)** - Executive Director Page, Counselor Ballou - Recommended Action: Discussion/Approval
- 6. Information Items**
 - A. Next Meeting - HRTAC Annual Organization Meeting – Thursday, June 20, 2019, 12:30 p.m., Regional Building Board Room.**
- 7. Adjournment**

To: Chair Hipple and the other members of HRTAC

From: Kevin B. Page, Executive Director

Date: March 28, 2019

Re: I-64 Hampton Roads Bridge-Tunnel Expansion Project; Approval of and Authorization to enter into Project Agreement for Funding and Administration

Recommendation:

The HRBT Funding Agreement Advisory Committee recommends that the Commission approve the I-64 Hampton Roads Bridge-Tunnel Expansion Project Funding and Administration and authorize the Chair to execute and deliver the definitive Project Administration and Funding Agreement (PAFA) on behalf of the Commission with any clarifying edits or modifications thereto (expressly excluding any increase to the Maximum Commission Financial Commitment, described below) that the Chair and the Executive Director, upon advice of counsel, determine to be necessary or appropriate.

Background:

At the Commission's March 21, 2019 meeting, the HRBT Funding Agreement Advisory Committee and the Commission's staff, counsel and financial advisors fully briefed the Commission on the Commission's funding obligations that would be set forth in a Project Agreement for Funding and Administration for the I-64 Hampton Roads Bridge-Tunnel Expansion Project (the "Funding Agreement") between the Commission and the Virginia Department of Transportation (VDOT). Because the Commission's funding plan assumes that \$345 million would be sourced through toll revenues, the Commission was briefed on the development of the terms of a Master Tolling Agreement to be executed in the fall by the Commonwealth Transportation Board ("CTB"), VDOT, and the Commission (the "Master Tolling Agreement"). The Master Tolling Agreement will addresses tolling implementation, policies, procedures, and other matters relating to tolling.

On March 21, 2019, the CTB granted to the Commissioner of VDOT approval and authorization to execute, on behalf of VDOT, the I-64 Hampton Roads Bridge-Tunnel Expansion Project Administration and Funding Agreement with the Commission.

Chair Hipple called a special meeting of the Commission for March 28, 2019, for purpose of approving the I-64 Hampton Roads Bridge-Tunnel Expansion Project Administration and Funding Agreement and related actions.

The attached presentation summarizes the I-64 Hampton Roads Bridge-Tunnel Expansion Project PAFA.



Fiscal Impact:

The Commission's maximum financial commitment will not exceed the sum of: (i) \$3.217 billion, plus (ii) \$345 million if the toll-backed financing contemplated by the Funding Plan is received by the Commission, minus (iii) Applicable Award Funds and Excess CTB-Sourced Toll Funds (as those terms are defined in the PAFA), if any (such sum, the "Maximum Commission Financial Commitment")

Suggested Motion:

Motion is to adopt "Resolution 2019-01; I-64 Hampton Roads Bridge-Tunnel Expansion Project; Approval of and Authorization to enter into Project Agreement for Funding and Administration."





I-64 Hampton Roads Bridge-Tunnel Expansion Project

Briefing re: Project Agreement for Funding and Administration with VDOT

March 25, 2019

Status of HRBT Expansion Project

- February 15, 2019, Commonwealth announces that it has selected Hampton Roads Connector Partners as the Design-Builder of the Project
- Fixed price contract of \$3.3 billion with fixed completion date of November 1, 2025
- Funding (discussed below) to be provided primarily by HRTAC
- Project Agreement for Funding and Administration to be submitted for HRTAC approval at Commission's March 28th special meeting

HRBT Expansion Project Budget (Sources and Uses)

Sources		Uses			
Source	Amount \$	Expenditure	Project Budget	PAFA	HRTAC-Funded Budget**** Plus \$200M SMART SCALE Funds or Other Funds under Sec. 3.08(b)(ii) of (Department- Funded Budget)
HRTAC (HRTF Debt and Cash)*	\$ 3,208,469,581	Comprehensive Agreement (Fixed Price)	\$ 3,299,997,227	\$ 3,204,569,251	\$ 95,427,976
Toll-Backed Bond Proceeds **	345,000,000	Owner Costs			
		Administration Costs	122,000,000	118,472,054	3,527,946
VDOT - Department-Funded Budget	108,527,646	Right-of-Way	15,000,000	15,000,000	-
		No Excuses Incentive	90,000,000	90,000,000	-
VDOT - SMART SCALE Funds***	200,000,000	Contingency Reserves (Includes \$4M Stipend)	335,000,000	325,428,277	9,571,723
		Total Owner Costs	562,000,000	548,900,330	13,099,670
Total Sources	\$ 3,861,997,227	Total Estimated Project Costs	\$ 3,861,997,227	\$ 3,753,469,581	\$ 108,527,646

* Subject to reduction to the extent replaced by Project Savings, Applicable Award Funds, and Excess CTB-Sourced Toll Funds.

** Subject to increase by Excess CTB-Sourced Toll Funds; for clarity, any such increase will not increase the Maximum Commission Financial Commitment.

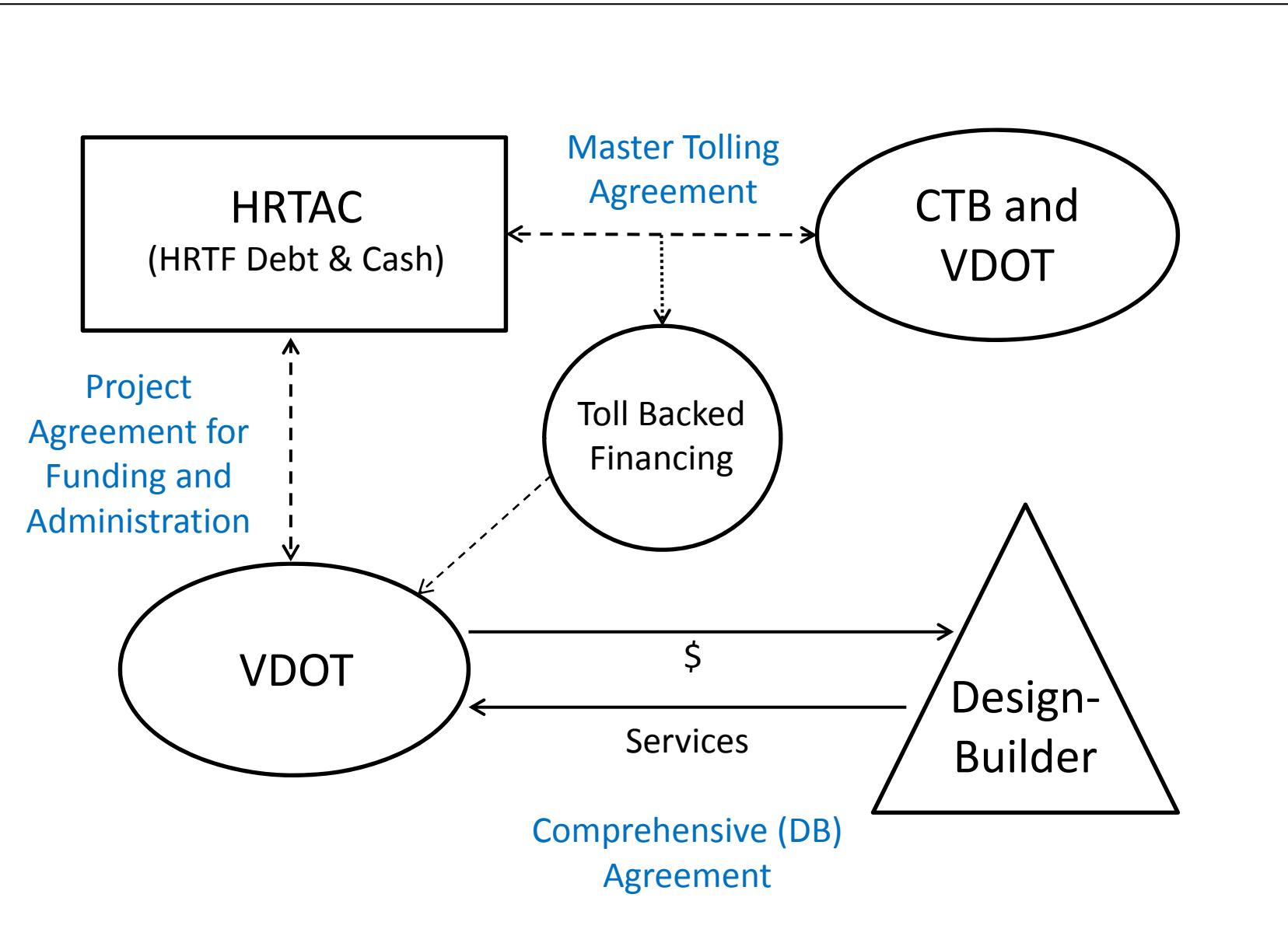
***Amount pending CTB award June 2019; Intent to award provided by CTB on March 21, 2019; Risk of award assumed by VDOT

****Commission-Funded Budget itself is \$3,553,469,581

HRTAC's Share Supported by Funding Plan

- HRTAC's Max Financial Commitment
 - \$3.562 billion, with \$345 million in toll backed financing
 - OR
 - \$3.217 billion, without toll backed financing
- “With” assumes HRTAC would be the issuer of that debt
- “Without” assumes CTB would be the issuer of that debt
- Determination of issuer will not be made until the traffic and revenue study and the operational analysis (the Toll Studies) are completed and evaluated
- Net toll revenues in excess of \$345 million will supplant HRTAC monies that have been used

Overview of Relationships



Agreements between VDOT and HRTAC

- Project Agreement for Funding and Administration (Funding Agreement)
 - Finalized
 - CTB approved March 21, 2019
 - HRTAC to consider March 28, 2019
- Master Tolling Agreement (Tolling Agreement)
 - The Toll Studies are expected to be completed by May, 2019
 - The Toll Studies and the related evaluations will inform the decisions made to develop and finalize the Tolling Agreement, which is expected to be executed by October 2019

Sequencing of Agreements

- After HRTAC approves the Funding Agreement, HRTAC and VDOT will enter into the Funding Agreement
- Then, VDOT and the Design-Builder will enter into the Comprehensive Agreement* for design and construction of the project – this sequencing, with the Tolling Agreement to follow, is intended to allow the construction to proceed as soon as possible

*HRTAC is not a party to the Comprehensive Agreement

Important Features of Funding Agreement

- HRTAC's maximum financial commitment is \$3.562 billion
- Initially, HRTAC anticipated that the DB fixed price would be \$3.1 billion and SMART SCALE could reduce HRTAC's \$3.562 billion commitment
- However, the best value proposal, as evaluated by VDOT, came in at \$3.3 billion, so HRTAC's full \$3.562 billion plus SMART SCALE is required to support project (HRTPO TIP Amendment likely)
 - \$3.3 billion plus "Owners Costs" (including Administration, ROW, Incentive, and Contingency) = \$3.753 billion
- On March 21, 2019, CTB confirmed its intent to award the \$200 million in SMART SCALE - award decisions will be made in June 2019
- To enable the Project to proceed, VDOT has agreed to backstop the \$200 million award

Important Features of Funding Agreement (cont.)

- Agreement identifies separate budgets for the HRTAC-funded portion (new capacity) and the VDOT-funded portion (South Trestles) (*VDOT has identified non-HRTAC funding and committed to retain South Trestles work in Base Scope at VDOT's expense*)
- Each budget includes:
 - Scheduled Contract Costs (payable to the Design-Builder)
 - Percentage share of the Administration Costs (PE + CEI)
 - Contingency
- HRTAC pays in accordance with a schedule that is designed to align with HRTAC available funds (assumed bond proceeds plus cash)

Important Features of Funding Agreement (cont.)

- Option work: (i) additional bridge repair work, and (ii) 564 Direct Connections
- Based on applicable standards or specifications, bridge repair work could end up being required (and not be optional)
 - If so, VDOT may proceed without HRTAC consent;
 - VDOT may seek reimbursement for work required as a result of an increased capacity standard, but only if and to the extent the funds are available as a result of project savings or a residual contingency exists when the Project is completed

Important Features of Funding Agreement (cont.)

- Contingency is designed to establish reserve for potential additional costs, consistent with VDOT practice
- Although fixed price contract, Design-Builder may seek additional compensation if (i) certain differing conditions are encountered or (ii) other Compensation Events occur
- Separate contingencies for (a) HRTAC-funded main Project scope (without South Trestles) and (b) VDOT-funded South Trestles

Important Features of Funding Agreement (cont.)

Potential Adjustments to Fixed Price

- Change Orders may arise during the Scope Validation Period (180 days following LNTP1)
 - Design-builder has opportunity to investigate Project ROW and identify inconsistencies in VDOT reference documents that affect DB's ability to complete its proposed design
 - DB can seek additional compensation and/or time for scope issues impacting road/bridge improvements it could not have reasonably identified prior to its proposal
 - For any inaccessible area, period extended for an additional 90 days after area becomes accessible for geotechnical evaluation
 - Impacts to tunnel improvements not limited to Scope Validation Period
- After Scope Validation, additional change orders or claims may arise:
 - Contract Price may increase due to Compensation Events (impacts to the work caused by VDOT delays, changes to permit requirements, interference with the work, changes in law, discovery of unknown hazardous conditions, etc.)
 - Differing site conditions affecting tunnel improvements also included
 - Most impactful issues likely to arise before boring is complete
 - Amount of compensation based on unit prices, agreed-upon lump sum, established cost/fee/markup provisions, or handled through a change directive
 - Extensions to contract deadlines may also be triggered

Important Features of Funding Agreement (cont.)

Potential Adjustments to Fixed Price (cont.)

- Funding Agreement establishes protocols for addressing when VDOT must obtain HRTAC approval for change orders or claim settlements
 - Designed to balance (i) VDOT's need to efficiently and effectively manage project with (ii) HRTAC's desire to monitor and control expenditures out of reserves
 - Also designed to reserve certain approvals to the HRTAC governing body/members and delegate others to Chair and Executive Director

Important Features of Funding Agreement (cont.)

Change Order Protocols

- Before the end of Scope Validation, VDOT has discretion to approve Change Orders without HRTAC approval, provided that the cumulative amount approved does not exceed ~\$65 million or cause the remaining HRTAC-funded contingency to fall below 20% of the contingency initially established
 - If HRTAC approval is not required, but the amount of the Change Order exceeds \$20 million, HRTAC input would still be necessary
- After the end of Scope Validation, a similar, but more restrictive, system is used: if (i) any individual Change Order exceeds \$20 million, or (ii) the remaining HRTAC-funded contingency has fallen below certain specific thresholds (tied to the remaining activities), then HRTAC approval will be required

Important Features of Funding Agreement (cont.)

Change Order Protocols (cont.)

- When HRTAC approval is required:
 - Chair and ED (acting collectively) would have delegated authority to approve VDOT entering into Change Orders that do not exceed \$20 million, provided that such Change Orders would not, in the aggregate, exceed \$50 million per Project year
 - If not within such delegated authority, the Change Orders would have to be approved at a Commission meeting
 - Exception: If the Commission calls two special meetings to consider a Change Order and fails to have a quorum to act, the Chair and ED's delegated authority described above shall be deemed increased to \$100 million so they have discretion to act

Important Features of Funding Agreement (cont.)

Ongoing Assessment of Reserve Sufficiency – Handling of Anticipated Cost Overrun

- On a quarterly basis (or monthly if the remaining contingency reserve is below the then-applicable minimum), VDOT must evaluate whether the costs to complete the Project could reasonably be expected to exceed the remaining contingency reserve
- If VDOT determines additional funding may be necessary, VDOT and HRTAC to consider the following solutions in the following order:
 - Reducing Project scope
 - Collaborating to identify other funding sources
 - Terminating the Project

Important Features of Funding Agreement (cont.)

Savings and Damages Recoveries

- HRTAC is entitled to cost savings other than those relating to South Trestles
 - Assumes such savings are not otherwise applied to bridge repair work required as a result of an increased capacity standard or any costs charged against the contingency
- VDOT entitled to cost savings relating to South Trestles
- Any recovery of damages to be shared *pro rata* between HRTAC (97%) and VDOT (3%) unless the parties otherwise agree

Important Features of Funding Agreement (cont.)

Operations and Maintenance of Completed Facility

- Following completion, VDOT is responsible to operate and maintain the Project at its own cost and expense and without the use of any toll revenues generated by the Project
 - Exception: Under the Tolling Agreement, VDOT may be entitled to use toll revenues to pay (i) costs of collecting tolls on the Project, and (ii) operations and maintenance of the Project's toll collections equipment and systems
- HRTAC not responsible to provide funding for O&M or to correct any defects





HRTAC RESOLUTION 2019-01

I-64 HAMPTON ROADS BRIDGE-TUNNEL EXPANSION PROJECT; APPROVAL OF AND AUTHORIZATION TO ENTER INTO PROJECT AGREEMENT FOR FUNDING AND ADMINISTRATION

WHEREAS, on October 20, 2016, the Hampton Roads Transportation Planning Organization selected the Hampton Roads Crossing Study SEIS Preferred Alternative - A, known today as the I-64 Hampton Roads Bridge-Tunnel Expansion Project (the “Project”), and recommended that the Hampton Roads Transportation Accountability Commission (the “Commission”) take action to implement the Project as part of the prioritized congestion relief projects for the Hampton Roads region;

WHEREAS, the Commission has developed and approved a funding plan that includes the Project (the “Funding Plan”) and a related debt management plan;

WHEREAS, under the Funding Plan, the Commission may allocate up to \$3.562 billion to the Project, assuming \$345 million in toll-backed financing is received by the Commission, or \$3.217 billion without such toll-backed financing;

WHEREAS, pursuant to the Virginia Code Section 33.2-1808, the Virginia Department of Transportation (the “Department”) desires to enter into a comprehensive agreement with Hampton Roads Connector Partners (the “Design-Builder”) to design and construct the Project for a fixed price of \$3.3 billion (rounded) (the “D-B Fixed Price”);

WHEREAS, the Commission has negotiated with the Department a Project Agreement for Funding and Administration (the “PAFA”), which includes a “Project Budget” that includes the D-B Fixed Price plus certain other owner costs, both known and contingent, totaling \$562 million;

WHEREAS, through the PAFA, the Commission will provide the primary portion of the funding for the Project, but the Commission’s maximum financial commitment will not exceed the sum of: (i) \$3.217 billion, plus (ii) \$345 million if the toll-backed financing contemplated by the Funding Plan is received by the Commission, minus (iii) Applicable Award Funds and Excess CTB-Sourced Toll Funds (as those terms are defined in the PAFA), if any (such sum, the “Maximum Commission Financial Commitment”);



WHEREAS, the contingent portion of owner costs may include costs arising out of certain Work Orders (as defined in the PAFA) and other compensable costs that are not within the Design-Builder's D-B Fixed Price;

WHEREAS, the PAFA includes certain provisions that address when such Work Orders and other compensable costs (i) may be resolved by the Department without separate approval from the Commission, (ii) are subject to approval by the Commission's Chair and Executive Director ("Delegated Approval Matters"), or (iii) are subject to approval by the Commission's governing body;

WHEREAS, in light of the role that toll-backed financing will have in the funding of the Project, the Commission, the Department and the Commonwealth Transportation Board (the "CTB") intend to enter into a Master Tolling Agreement that addresses tolling and the parties' collective objectives, priorities, and policies relating thereto (the "Master Tolling Agreement");

WHEREAS, under the PAFA, the Commission and the Department agree to use their best efforts and use all reasonable means to reach agreement on the Master Tolling Agreement on or before October 31, 2019;

WHEREAS, on March 20, 2019, Commission staff posted publicly a substantially final version of the PAFA (the "Definitive PAFA"); and

WHEREAS, the Commission now desires to approve the Definitive PAFA;

NOW, THEREFORE, BE IT RESOLVED, that the Commission (i) approves the Definitive PAFA, and (ii) authorizes the Chair to execute and deliver the Definitive PAFA on behalf of the Commission with any clarifying edits or modifications thereto (expressly excluding any increase to the Maximum Commission Financial Commitment) that the Chair and the Executive Director, upon advice of counsel, determine to be necessary or appropriate;

BE IT FURTHER RESOLVED, that, without limiting the foregoing, the Commission expressly delegates to the Chair and Executive Director the ability to make decisions on behalf of the Commission with respect to the Delegated Approval Matters; and

BE IT FURTHER RESOLVED, that each of the Commission's officers, including the Chair and Executive Director, is hereby authorized to take actions, for and on behalf of the Commission, as such officer considers necessary, desirable or appropriate to assist the Commission in the performance of its obligations under the PAFA.



APPROVED and ADOPTED by the Hampton Roads Transportation Accountability Commission at its meeting on the 28th day of March, 2019.

Michael J. Hipple
Chair
Hampton Roads Transportation
Accountability Commission

Linda T. Johnson
Vice-Chair
Hampton Roads Transportation
Accountability Commission

PROJECT AGREEMENT FOR FUNDING AND ADMINISTRATION

for the

I-64 HAMPTON ROADS BRIDGE-TUNNEL EXPANSION PROJECT

Dated [●], 2019

between

HAMPTON ROADS TRANSPORTATION ACCOUNTABILITY COMMISSION,
as Commission

and

VIRGINIA DEPARTMENT OF TRANSPORTATION,
as Department

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PROJECT AGREEMENT FOR FUNDING AND ADMINISTRATION

This PROJECT AGREEMENT FOR FUNDING AND ADMINISTRATION for the I-64 Hampton Roads Bridge-Tunnel Expansion Project (this “Agreement”) is made and entered into as of [●] [●], 2019, and effective as of the date set forth in Section 7.01 (Term; Termination), by and between the HAMPTON ROADS TRANSPORTATION ACCOUNTABILITY COMMISSION (the “Commission”), a body politic and a political subdivision of the Commonwealth of Virginia; and the VIRGINIA DEPARTMENT OF TRANSPORTATION (the “Department”), an agency of the Commonwealth of Virginia, (each a “Party” and, together, the “Parties”).

RECITALS

WHEREAS, Va. Code §§ 33.2-2600 *et seq.* (the “HRTAC Act”) established the Hampton Roads Transportation Fund (the “HRTF”), and provides that moneys deposited in the HRTF are to be used solely for new construction projects on new or existing highways, bridges, and tunnels in the localities comprising Planning District 23;

WHEREAS, the HRTAC Act created the Commission as a political subdivision of the Commonwealth of Virginia, and moved the responsibility for approving the projects that will be funded by the HRTF from the Hampton Roads Transportation Planning Organization, the metropolitan planning organization for Planning District 23 (the “HRTPO”), to the Commission;

WHEREAS, the HRTAC Act authorizes the Commission to issue bonds and other evidences of debt, and to impose and collect certain tolls;

WHEREAS, the Commission is required to use all moneys that it receives (the “Commission-Controlled Moneys”), including, without limitation, moneys from the HRTF as well as any bond proceeds and collections from any tolls imposed by the Commission, solely for the benefit of those counties and cities that are embraced by the Commission, and in a manner that is consistent with the purposes of the HRTAC Act;

WHEREAS, the Department is the agency of the Commonwealth responsible for building, maintaining and operating the interstate, primary, and secondary state highway systems (the “Department Highways”);

WHEREAS, in light of the Department’s responsibilities with respect to the Department Highways, and the Commission’s responsibilities with respect to the application of Commission-Controlled Moneys, the Department and the Commission entered into a Memorandum of Agreement dated March 30, 2015 (the “MOA”);

WHEREAS, the MOA contemplates that the Commission may from time to time enter into agreements for funding and administration of projects that the Commission selects and the Commission requests the Department to administer and/or develop with Commission-Controlled Moneys;

WHEREAS, on October 20, 2016, the HRTPO selected the Hampton Roads Crossing Study SEIS Preferred Alternative - A, known today as the I-64 Hampton Roads Bridge-Tunnel Expansion Project (the “Project”), as further described in Exhibit 2 (Project Scope) hereto, and

recommended that the Commission take action to implement the Project as part of the prioritized congestion relief projects for the Hampton Roads region;

WHEREAS, in accordance with the HRTAC Act, the Commission has approved the Project;

WHEREAS, the Commission has further developed and approved a funding plan for the Project and a related debt management plan;

WHEREAS, the Department desires, and agrees to, procure, develop, and construct the Project in accordance with the budget (the “Project Budget”), as further described in Exhibit 3 (Project Budget) and Exhibit 5, (Estimated Costs and Payout Schedule), hereto;

WHEREAS, in order to advance development of the Project, the Department issued the Request for Proposals (the “RFP”) dated as of September 27, 2018, as amended, pursuant to which the Department requested the submittal of proposals for the design and construction of the Project from offerors (each such entity, as “Offeror”) determined to be qualified following the submission of Statements of Qualification pursuant to the Department’s Request for Qualifications dated as of December 15, 2017, as amended;

WHEREAS, the purpose of the RFP is to determine the Offeror to be awarded a comprehensive agreement for the Project (the “Comprehensive Agreement”) pursuant to the Public-Private Transportation Act of 1995, as amended (Va. Code §§ 33.2-1800 *et seq.*) (the “PPTA”), and the Department’s 2017 PPTA Implementation Manual and Guidelines (the “Guidelines”);

WHEREAS, the Department has evaluated the proposals submitted by each Offeror in accordance with the terms of the RFP, and has selected Hampton Roads Connector Partners as the Offeror whose proposal offers the best overall value (such Offeror, the “Successful Offeror”), as further described in the RFP;

WHEREAS, the Department desires to enter into the Comprehensive Agreement with the Successful Offeror, whereupon the Successful Offeror shall become the design-build contractor (the “Design-Builder”) responsible for the design and construction of the Project pursuant to the terms of the Comprehensive Agreement;

WHEREAS, the Commission desires to provide the primary portion of the funding for the procurement, development, and construction of the Project using Commission-Controlled Moneys, subject to the terms, conditions and limitations set forth herein;

WHEREAS, Commissioner Stephen C. Brich, P.E. of the Department sent a letter to Commission Chairman Hipple dated January 22, 2019 (the “January 22, 2019 Letter”) committing to working with the Commission and the HRTPO to find, relative to tolling in the Hampton Roads region, the best operational solutions, define the appropriate tolling policies, and investigate the financial mechanisms available to the Commonwealth Transportation Board (the “CTB”) and the Commission to best address the Parties’ collective objectives, priorities, and policies through an agreement among the Commission, the CTB, and the Department on these matters (the “Master Tolling Agreement”); and

WHEREAS, pursuant to Va. Code § 33.2-214, the CTB has authorized the Commissioner to enter into this Agreement and, pursuant to Va. Code § 33.2-2608, the Commission has authorized its officers to enter into this Agreement, as evidenced by copies of each such entity's clerk's approved minutes or such other official authorizing documents which are, or will be (promptly after approval), appended hereto as Exhibit 4 (Official Authorizing Documents).

NOW, THEREFORE, in consideration of the covenants contained herein and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties agree as follows:

ARTICLE 1.

DEFINITIONS, INTERPRETATION, AND PRECEDENCE; **REPRESENTATIONS AND WARRANTIES**

Section 1.01 Definitions

Unless the context otherwise requires, all capitalized terms and acronyms used in this Agreement have the meanings given in Exhibit 1 (Definitions).

Section 1.02 Interpretation

- (a) In this Agreement:
 - (i) headings are for convenience only and do not affect interpretation;
 - (ii) unless otherwise stated, a reference to any agreement, instrument, or other document is to such agreement, instrument, or other document as amended or supplemented from time to time in accordance with its terms;
 - (iii) a reference to this Agreement or any other agreement includes all exhibits, schedules, forms, appendices, addenda, attachments, or other documents attached to or otherwise expressly incorporated in this Agreement or any such other agreement (as applicable);
 - (iv) subject to Section 1.02(a)(v) (Interpretation), a reference to an Article, Section, subsection, clause, Exhibit, schedule, form, or appendix is to the Article, Section, subsection, clause, Exhibit, schedule, form, or appendix in or attached to this Agreement, unless expressly provided otherwise;
 - (v) a reference in the main body of this Agreement, or in an Exhibit, to an Article, Section, subsection, or clause is to the Article, Section, subsection, or clause of the main body of this Agreement, or of that Exhibit (as applicable);
 - (vi) a reference to a person includes such person's permitted successors and assigns;

(vii) a reference to a singular word includes the plural and vice versa (as the context may require);

(viii) the words “including”, “includes”, and “include” mean “including, without limitation”, “includes, without limitation” and “include, without limitation”, respectively;

(ix) an obligation to do something “promptly” means an obligation to do so as soon as the circumstances permit, avoiding any delay; and

(x) in the computation of periods of time from a specified date to a later specified date, the word “from” means “from and including” and the words “to” and “until” mean “to and including”.

(b) This Agreement is not to be interpreted or construed against the interests of a Party merely because that Party proposed this Agreement or some provision of it, or because that Party relies on a provision of this Agreement to protect itself.

(c) The Parties acknowledge and agree that this Agreement has been prepared jointly by the Parties and has been the subject of arm’s length and careful negotiation, that each Party has been given the opportunity to independently review this Agreement with legal counsel, and that each Party has the requisite experience and sophistication to understand, interpret and agree to the particular language of the provisions of this Agreement. Accordingly, in the event of any ambiguity in or dispute regarding the interpretation of this Agreement, this Agreement will not be interpreted or construed against the Party preparing it simply as a consequence of preparing it, and instead the other applicable rules of interpretation and construction set out herein shall be used.

Section 1.03 Order of Precedence

(a) Except as otherwise expressly provided in this Section 1.03 (Order of Precedence), if there is any conflict between the provisions of this Agreement (including all Exhibits), the order of precedence will be as follows, from highest to lowest:

(i) amendments to the provisions of the main body of this Agreement;

(ii) the provisions of the main body of this Agreement and Exhibit 1 (Definitions); and

(iii) the provisions of the Exhibits to this Agreement, as amended, other than Exhibit 1 (Definitions).

(b) Additional or supplemental details or requirements in a provision of this Agreement with lower priority will be given effect, except to the extent that they irreconcilably conflict with any provisions of this Agreement with higher priority.

Section 1.04 Representations and Warranties of the Department

The Department hereby represents and warrants to the Commission as of the date hereof and, except in the case of Section 1.04(e) (Representations and Warranties of the Department)

below, as of the date on which this Agreement becomes effective pursuant to Section 7.01(a) (Term; Termination), as follows:

- (a) the Department is an agency of the Commonwealth, and has full power, right, and authority to execute, deliver, and perform its obligations under, in accordance with, and subject to the terms and conditions of this Agreement and the Comprehensive Agreement;
- (b) each person executing this Agreement and the Comprehensive Agreement on behalf of the Department has been or at such time will be duly authorized to execute and deliver each such document on behalf of the Department;
- (c) the execution and delivery by the Department of this Agreement and the Comprehensive Agreement, and the performance of its obligations hereunder and thereunder, will not conflict with, and will not result, at the time of execution, in a default under or violation of, (i) any other agreements or instruments to which it is a party or by which it is bound or (ii) to its knowledge, any Legal Requirement, where such violation will have a material adverse effect on the ability of the Department to perform its obligations under this Agreement;
- (d) this Agreement has been duly authorized, executed, and delivered by the Department and constitutes a valid and legally binding obligation of the Department, enforceable against it in accordance with the terms hereof, subject only to applicable bankruptcy, insolvency, and similar laws affecting the enforceability of the rights of creditors generally and to general principles of equity;
- (e) there is no action, suit, proceeding, investigation, or litigation pending and served on the Department which challenges the Department's authority to execute, deliver or perform, or the validity or enforceability of, this Agreement and the Comprehensive Agreement, or which challenges the authority of the Department official executing this Agreement or the Comprehensive Agreement, and the Department has disclosed to the Commission any pending and unserved or threatened action, suit, proceeding, investigation, or litigation with respect to such matters of which the Department is aware;
- (f) the Department has taken or caused to be taken all requisite action to authorize the execution and delivery of, and the performance of its obligations under, this Agreement and the Comprehensive Agreement and is otherwise in material compliance with the Legal Requirements applicable to the Department's procurement of the Comprehensive Agreement and the terms of the RFP; and
- (g) the Department has developed Parts 2 and 5 of the RFP and the Project Budget, including, without limitation, the contingency reserves, with requisite diligence and otherwise in a manner consistent with the Department's standard policies, procedures, and protocols applicable to its development of technical requirements, specifications and budgets for (x) large-scale design-build projects and (y) major highway, bridge and tunnel projects where the Commonwealth or the Department bears the cost of the project.

Section 1.05 Representations and Warranties of the Commission

The Commission hereby represents and warrants to the Department as of the date hereof and, except in the case of Section 1.05(e) (Representations and Warranties of the Commission) below, as of the date on which this Agreement becomes effective pursuant to Section 7.01(a) (Term; Termination), as follows:

(a) the Commission is a body politic and a political subdivision of the Commonwealth, and has full power, right, and authority to execute, deliver, and perform its obligations under, in accordance with, and subject to the terms and conditions of this Agreement;

(b) each person executing this Agreement on behalf of the Commission has been or at such time will be duly authorized to execute and deliver this Agreement on behalf of the Commission;

(c) the execution and delivery by the Commission of this Agreement, and the performance of its obligations hereunder, will not conflict with, and will not result, at the time of execution, in a default under or violation of, (i) any other agreements or instruments to which it is a party or by which it is bound or (ii) to its knowledge, any Legal Requirement, where such violation will have a material adverse effect on the ability of the Commission to perform its obligations under this Agreement;

(d) this Agreement has been duly authorized, executed, and delivered by the Commission and constitutes a valid and legally binding obligation of the Commission, enforceable against it in accordance with the terms hereof, subject only to applicable bankruptcy, insolvency, and similar laws affecting the enforceability of the rights of creditors generally and to general principles of equity;

(e) there is no action, suit, proceeding, investigation, or litigation pending and served on the Commission which challenges the Commission's authority to execute, deliver or perform, or the validity or enforceability of, this Agreement, or which challenges the authority of the Commission official executing this Agreement, and the Commission has disclosed to the Department any pending and unserved or threatened action, suit, proceeding, investigation, or litigation with respect to such matters of which the Commission is aware; and

(f) the Commission has taken or caused to be taken all requisite action to authorize the execution and delivery of, and the performance of its obligations under this Agreement, and is otherwise in material compliance with all Legal Requirements applicable to the Commission or its activities in connection with this Agreement.

ARTICLE 2.

PROCUREMENT OF THE PROJECT

Section 2.01 General Obligations of the Department

(a) The Department shall procure all work necessary to design and construct the Project, which is generally described in Exhibit 2 (Project Scope), in accordance with (i) any and

all applicable federal, state, and local laws and regulations (including, without limitation, the PPTA) and (ii) all terms and conditions of this Agreement, including, without limitation, the Project Budget, which Project Budget may be amended from time to time by (and only by) mutual written agreement of the Parties.

(b) The Department shall select contractors and contract with contractors in a manner that is consistent in all material respects with the policies, procedures and practices that the Department uses where the Commonwealth or the Department bears the cost of a project. For example, the Department shall use its customary policies, procedures and practices relating to requesting bids/proposals, negotiating/finalizing terms and conditions of contracts (using, where applicable, standard terms/forms).

Section 2.02 Commission Involvement in Procurement Activities

The Department has, and shall continue to, involve the Commission in the procurement of the Project, including by:

(a) providing updates on at least a weekly basis to the Executive Director regarding the status of the procurement process;

(b) providing briefings to the Commission, as requested; *provided* that the Department may conduct such briefings after briefing CTB on the same topics if the Department determines it must make such a briefing to CTB before making the requested briefing to the Commission;

(c) providing the Commission an opportunity to participate in proprietary meetings with each Offeror to discuss commercial terms, technical requirements, alternative technical concepts, or other matters relating to the development of proposals by the Offerors;

(d) providing the Commission an opportunity to provide feedback on the terms of the RFP prior to the deadline set forth in the RFP for the Department to issue addenda or supplements to the RFP;

(e) providing the Commission an opportunity to review proposals, provide input to the Department's evaluation team, and observe the scoring of proposals (on a non-voting basis); and

(f) providing the Commission with the final, complete form of the Comprehensive Agreement (including all exhibits, appendices and attachments thereto) in accordance with Section 4.01 below.

Section 2.03 Cancellation of the Procurement

Pursuant to the terms of the RFP, the Department reserves the right to, among other things, cancel or withdraw the RFP at any time. The Department acknowledges and agrees that, should the Department determine that cancelling or withdrawing the RFP is in its best interests, the Department shall consult with the Commission regarding such determination. If the Commission disagrees with the Department's determination to cancel or withdraw the RFP, the Department and the Commission will resolve the disagreement in accordance with dispute resolution procedures set forth in Article 6 (Dispute Resolution). If the Commission agrees with the Department's

determination to cancel or withdraw the RFP or the Department's action is authorized pursuant to the dispute resolution procedures, then the Department may proceed to cancel or withdraw the RFP after giving prior notice to the Commission.

ARTICLE 3.

PROJECT FUNDING

Section 3.01 General Rights and Obligations of the Commission

(a) Subject to Section 3.01(b) (General Rights and Obligations of the Commission), the limitations as to amounts set forth in Section 3.03 (Maximum Commission Financial Commitment) and Section 3.04 (Maximum Cumulative Compensation Amount Under Comprehensive Agreement), and the limitations set forth in Section 7.02 (Appropriations Requirements), the Commission shall:

(i) Subject to Section 5.02 (Payment Requisitions), reimburse the Department for the payments made by the Department to the Design-Builder under the Comprehensive Agreement in respect of:

- (A) Commission-Funded Design-Build Costs;
- (B) Authorized Commission-Funded Work Order Costs;
- (C) Authorized Commission-Funded Claims Costs;
- (D) No Excuses Incentive Payment; and
- (E) Commission-Funded ROW Costs.

(ii) Subject to Section 3.07 (Administration Costs), satisfy the Commission-Funded Administration Costs; and

(iii) Reimburse the Department for the Unsuccessful Offeror Proposal Payment (which payment shall be paid from the Commission-Supported Contingency Reserve).

(b) Notwithstanding anything to the contrary set forth in this Agreement, the Commission shall not have any obligation to pay or reimburse the Department for any of the following:

(i) any cost or expense, whether budgeted or not, arising from or relating to the South Island Trestle Bridge Replacement Work or Deferred/Preventive Maintenance Work, including, without limitation, (A) compensation payable to the Design-Builder under the Comprehensive Agreement for the performance of such work, (B) amounts payable pursuant to Work Orders or claims arising from or relating to such work under the Comprehensive Agreement, or (C) the Department-Funded Administration Costs;

(ii) any amounts due to the Design-Builder under the Comprehensive Agreement to the extent the payment of such amounts, when combined with any other amounts paid by the Commission under this Agreement (including Administration Costs), would cause the aggregate amount of all the Commission's payments in relation to the Project to exceed the Maximum Commission Financial Commitment, unless and then solely to the extent the Commission expressly agrees under Section 3.09 (Additional Costs; Claims) to pay such amounts;

(iii) any cost or expense arising from or relating to the Early Work in excess of the limitations set forth in Section 3.12 (Early Work Funding);

(iv) any cost or expense arising from or relating to the I-564 Direct Connections unless and then solely to the extent the Commission expressly agrees (A) to the addition of the I-564 Direct Connections to the Design-Builder's scope of work under the Comprehensive Agreement in accordance with Section 4.09 (Optional Work: I-564 Direct Connections; Bridge Repair Option Work) and (B) to fund such cost or expense;

(v) the payment of the No Excuses Incentive Payment unless the Department is in compliance with its obligations set forth in Section 4.07 (No Excuses Incentive Payment);

(vi) any cost or expense arising from or relating to any Work Order or resolution of any claim that was required to be approved by the Commission pursuant to the terms of this Agreement but for which the Department did not receive the Commission's approval prior to the Department's execution of such Work Order; or

(vii) any cost or expense (including, without limitation, any compensation to the Design-Builder) arising out of or resulting from the Department's negligence, willful misconduct, violation of law, or breach of the Comprehensive Agreement or this Agreement (any such negligence, willful misconduct, violation, or breach constituting "Department Fault").

(c) The Commission shall be the sole determinant of the source of the Commission-Controlled Moneys to be provided and allocated to the Project and the amounts of any Commission-Controlled Moneys, if any, to be provided in excess of the Maximum Commission Financial Commitment.

(d) If funding from an additional federal or Commonwealth source is rescinded or otherwise becomes unavailable, the Commission (i) shall not be responsible for any amount in excess of the Maximum Commission Financial Commitment and (ii) may, at its option and in its sole discretion, (A) replace said reduced funding with Commission Controlled-Moneys or (B) request the Department to immediately suspend all work relating to the Project, whereupon the Parties will collaborate and consider the solutions (in order of priority) identified in clauses (i) through (iv) of Section 3.09 (Additional Costs; Claims); *provided* that, if (x) the Commission requests suspension, (y) the funding was not scheduled to be applied to a Department-Funded Design-Build Cost, and (z) the unavailability of the funding does not arise out of or result from Department Fault, the Commission shall be responsible for the costs reasonably incurred in

connection with such suspension. If the reduced funding was scheduled to be applied to a Department-Funded Design-Build Cost, the Department will use its best efforts to replace the reduced funding. If the Commission or the Department does not replace the reduced funding or the Commission does not request the Department to suspend or discontinue work, the Department may reduce the Project scope or take any other actions needed to reduce Project costs.

(e) The Commission-Funded Budget assumes the inclusion of \$345,000,000 of toll-backed debt, and otherwise has been prepared without applying any Applicable Additional Funds. As soon as practicable after any Applicable Additional Funds are made available to the Project, Exhibit 3 (Project Budget) shall be updated by the Parties in a mutually acceptable manner to apply the Applicable Additional Funds to the Commission-Funded Budget by reducing the amount of Commission-Controlled Moneys assumed in the Commission-Funded Budget by an amount equal to the Applicable Additional Funds. The Parties shall undertake such update in good faith with the goal of producing a schedule that fairly accounts for when the Applicable Additional Funds will be available and will reduce the amounts that would otherwise be due from the Commission.

Section 3.02 General Obligations of the Department

(a) The Department shall not use any funds provided by the Commission, including the funds specified in Exhibit 3 (Project Budget), to pay any Project cost if (i) the HRTAC Act does not permit such Project cost to be paid with Commission-Controlled Moneys or (ii) such application of funds is not authorized by the terms of this Agreement.

(b) The Department (i) acknowledges that federal and Commonwealth funds and loans are being solicited or applied for by the Commission and/or the HRTPO for the Project, (ii) agrees to provide the Commission and the HRTPO with such support as may reasonably be requested in connection therewith, and (iii) agrees that if federal and/or Commonwealth funds are or have been awarded or committed to the Project (in addition to Commission Controlled-Moneys), the Department shall (A) take any and all necessary actions to satisfy any conditions to such additional federal and/or Commonwealth funding (provided that such actions are within the control of the Department) and to enforce any commitments made in connection therewith and (B) comply with all applicable federal and Commonwealth funding requirements within the control or purview of the Department.

(c) No later than ninety (90) days after the date on which the Department makes final payment to the Design-Builder, and all claims relating to the Project have been resolved or are barred, in accordance with the Comprehensive Agreement, (i) the Department shall release or return to the Commission any unexpended funds that were to be supplied, or have been supplied, by the Commission, and (ii) the Commission shall not have any further obligations under this Agreement.

(d) The Department shall reimburse the Commission (or, at the direction of the Commission, such other entity as may have provided funds) for all funds provided by the Commission (or on behalf of the Commission) and, to the extent applicable and permitted by law, with interest for the period between the advancement date and the reimbursement date, calculated using the Applicable Rate, that (i) the Department misapplied, used or requisitioned in contravention of the HRTAC Act or any other applicable law, any term or condition of this

Agreement, or any term or condition of the Comprehensive Agreement, or (ii) the Department paid to the Design-Builder or other third party and subsequently recouped.

(e) No later than ninety (90) days following the date on which the Department makes final payment to the Design-Builder pursuant to the Comprehensive Agreement, the Department shall certify to the Commission that that the Department has adhered to all applicable laws and regulations and all requirements of this Agreement.

Section 3.03 Maximum Commission Financial Commitment

(a) Notwithstanding anything to the contrary set forth in this Agreement, the Commission's maximum financial commitment to the Project pursuant to this Agreement (which is subject to Section 7.02 (Appropriations Requirements)), shall not exceed an amount equal to the difference of (i) (A) three billion two-hundred seventeen million dollars (\$3,217,000,000) (as determined in year-of-expenditure dollars) *plus* (B) if the three hundred forty-five million dollars (\$345,000,000) in toll-backed financing contemplated by the Commission's funding plan is received by the Commission, three hundred forty-five million dollars (\$345,000,000), *minus* (ii) the Applicable Award Funds and Excess CTB-Sourced Toll Funds (the difference of (i) and (ii), the "Maximum Commission Financial Commitment"). (For example, (x) if the Commission does not receive the \$345,000,000 in toll-backed financing and does not receive any Applicable Award Funds, the Maximum Commission Financial Commitment would be \$3,217,000,000, (y) if the Commission receives the \$345,000,000 in toll-backed financing, but does not receive any Applicable Award Funds, the Maximum Commission Financial Commitment would be \$3,562,000,000, and (z) if the Commission receives the \$345,000,000 in toll-backed financing and Applicable Award Funds of \$100,000,000 are allocated to the Project, the Maximum Commission Financial Commitment would be \$3,462,000,000.)

(b) Subject to the terms and conditions otherwise set forth in this Agreement, the Maximum Commission Financial Commitment shall be available for the following (and solely the following) purposes (all dollar amounts are year-of-expenditures):

- (i) amounts to pay in accordance with Section 3.01(a) (General Rights and Obligations of the Commission) the costs of designing and constructing the Base Scope, other than (A) the South Island Trestle Bridge Replacement Work and (B) Deferred/Preventive Maintenance Work;
- (ii) Commission-Funded ROW Costs;
- (iii) the No Excuses Incentive Payment, if any, earned by the Design-Builder pursuant to the Comprehensive Agreement, in an amount not to exceed ninety million dollars (\$90,000,000);
- (iv) the Commission's *pro rata* share of the Administration Costs;
- (v) the Commission-Supported Contingency Reserve, as further described in Section 3.08(b) (Availability of Contingency Reserves; Tracking); and

(vi) the Proposal Payment (as defined in the RFP), if any, to be made to the unsuccessful Offeror pursuant to the RFP, in an amount not to exceed four million dollars (\$4,000,000) (the “Unsuccessful Offeror Proposal Payment”).

Section 3.04 Maximum Cumulative Compensation Amount Under Comprehensive Agreement

(a) The Parties acknowledge and agree that the Comprehensive Agreement will set forth a maximum cumulative compensation amount (the “Maximum Cumulative Compensation Amount”) for each month of construction of the Project and that, in any given month, the Design-Builder shall not be entitled to receive payments from the Department in excess of the Maximum Cumulative Compensation Amount for such month, unless otherwise agreed by the Parties.

(b) The Parties further acknowledge and agree that the Maximum Cumulative Compensation Amounts will be aligned with Exhibit 3 (Project Budget) and Exhibit 5, (Estimated Costs and Payout Schedule) to ensure that the Commission will have sufficient cash flows to pay for work performed in a given month up to the difference of (i) the Maximum Cumulative Compensation Amount for such month minus (ii) any Accelerated Payment (defined below) not previously deducted through application of this clause (ii).

(c) In any circumstance where the Department seeks to advance the funding schedule for the Project by exceeding the Maximum Cumulative Compensation Amount in one or more months, the Department shall submit a written request to the Executive Director explaining the Department’s reasons why the acceleration of the funding schedule is in the best interests of the Project. Within seven (7) days of such written request, the Commission will evaluate the request and determine whether to provide any of the accelerated funding (the Commission’s decision will be made by the Chair and Executive Director, if the amount to be provided is less than twenty million dollars (\$20,000,000)). Any funding provided on an accelerated basis shall be an “Accelerated Payment.”

(d) The foregoing shall not prohibit the Department from providing its own funds to pay the costs of work for which the Commission is responsible under this Agreement in excess of the applicable Maximum Cumulative Compensation Amount(s) and from requesting reimbursement from the Commission of the funds advanced (without interest). The Department recognizes that the Commission’s reimbursement to the Department for having advanced any such funds will be dependent upon (i) the Commission’s cash flow position at the time such a request for reimbursement is submitted and (ii) the extent to which the reimbursement of any such advanced funding is otherwise consistent with the terms of this Agreement, including Exhibit 3 (Project Budget) and Exhibit 5 (Estimated Costs and Payout Schedule).

Section 3.05 Commission Cash Flow Estimates; Reporting; Cash Flow Reserve

(a) The Department shall assist the Commission to periodically update its cash flow estimates for the Project, with the objective of keeping such estimates accurate throughout the performance of the Project; *provided* that any such updates shall not reduce the Maximum Cumulative Compensation Amounts for any month as set forth in the Comprehensive Agreement. The Department shall provide all available information reasonably required by the Commission so

as to ensure and facilitate accurate cash flow estimates and accurate updates to those cash flow estimates throughout the construction of the Project; without limiting the foregoing, the Department shall provide the Commission in a timely manner the reports set forth on Exhibit 6 (Reports to be Provided by the Department).

(b) Beginning with the first month following the Department's issuance of LNTP1 and continuing each month thereafter until the Final Completion Date, the Department shall provide the Executive Director with a monthly report that includes the information described in Exhibit 6 (Reports to be Provided by the Department).

Section 3.06 Development and Procurement Costs

The Department and the Commission have entered into a Standard Project Agreement for the Funding and Administration for the HRCS Preferred Alternative Refinement (UPC 110577) dated March 16, 2017, as amended on December 13, 2018, pursuant to which the Commission agreed to reimburse the Department for up to thirty million dollars (\$30,000,000) in costs incurred with respect to the development and procurement of the Project. Such commitment has been separately fulfilled and does not have any effect on the Maximum Commission Financial Commitment under this Agreement.

Section 3.07 Administration Costs

(a) The Parties shall be responsible for the Administration Costs *pro rata*. For purposes of this Agreement, "Administration Costs" means those costs incurred by the Department following the execution of the Comprehensive Agreement that relate to the administration of the Comprehensive Agreement (other than any compensation or other payments to the Design-Builder pursuant to the Comprehensive Agreement) and are of the type customarily incurred by public owners to administer projects of similar size and scope to the Project, such as, without limitation, the costs described on Exhibit 7 (Examples of Administration Costs). The Department will use best efforts to keep Administration Costs below one hundred twenty-two million dollars (\$122,000,000) in the aggregate (for the avoidance of doubt, costs below such threshold shall be borne ratably). If aggregated Administration Costs exceed one hundred twenty-two million dollars (\$122,000,000), but are less than one hundred thirty-six million dollars (\$136,000,000), the Department will provide written notice and justification to the Commission for the additional Administration Costs (which shall be borne ratably), and such additional Administration Costs shall be paid from the Commission-Supported Contingency Reserve and the Department-Supported Contingency Reserve, as applicable. If Administration Costs exceed one hundred thirty-six million dollars (\$136,000,000) in the aggregate (the "Admin Cost Subcap"), then the Department will be financially responsible for all Administration Costs above the Admin Cost Subcap, *provided that*, the Department may seek, and will be entitled to receive, reimbursement from the Commission for the Commission's ratable share of Administration Costs above the Admin Cost Subcap when the Project has achieved Final Completion and all claims relating to the Project have been resolved or are barred, but only to the extent there is a remaining balance in the Commission-Supported Contingency Reserve. Notwithstanding any other provision of this Agreement, the Administration Costs shall not exceed one hundred fifty million dollars (\$150,000,000) in the aggregate (the "Admin Cost Cap").

(b) Notwithstanding anything to the contrary in Section 3.07(a) (Administrative Costs), the Admin Cost Subcap shall be subject to reduction (and not increase) as follows: if the incurrence by the Department of Administration Costs in excess of one hundred twenty-two million dollars (\$122,000,000) in the aggregate would, after apportioning a ratable share to the Commission, cause the remaining balance of the Commission-Supported Contingency Reserve to fall below the then-applicable Minimum Commission-Supported Contingency Amount, then, for purposes of Section 3.07(a) (Administrative Costs), the ratable share of Administrative Costs in excess of the one hundred twenty-two million dollars (\$122,000,000) threshold that are reimbursable by the Commission shall be limited to those excess costs (the “Covered Excess Costs”) that would not cause the remaining balance of the Commission-Supported Contingency Reserve to fall below the then-applicable Minimum Commission Supported Contingency Amount, and the Admin Cost Subcap will be reduced to an amount equal to the sum of (i) one hundred twenty-two million dollars (\$122,000,000), plus (ii) the quotient determined by dividing (A) the Covered Excess Costs, by (B) the Commission’s *pro rata* share.

Section 3.08 Availability of Contingency Reserves; Tracking

(a) As part of its allocations to the Project for the South Island Trestle Bridge Replacement Work, the Department shall allocate, as a contingency reserve, an amount equal to nine million five hundred seventy-one thousand seven hundred twenty-three dollars (\$9,571,723) (the “Department-Supported Contingency Reserve”), to preserve funding capacity if the costs relating to the South Island Trestle Bridge Replacement Work exceed the costs for that work identified in the Department-Funded Budget.

(b) (i) As part of its allocations to the Project (and a component part of the Maximum Commission Financial Commitment), the Commission shall allocate, as a contingency reserve, an amount equal to three hundred twenty-five million four hundred twenty-eight thousand two hundred seventy-seven dollars (\$325,428,277) (the “Commission-Supported Contingency Reserve”), to preserve funding capacity if the Project costs for which the Commission is responsible under this Agreement (the payment of which is subject to Section 3.01 (General Rights and Obligations of the Commission) and the limitations referenced therein), exceed the costs for that work identified in the Commission-Funded Budget. The Commission-Supported Contingency Reserve shall be allocated initially as follows: (A) one hundred twenty-five million four hundred twenty-eight thousand two hundred seventy-seven dollars (\$125,428,277) from Commission-Controlled Moneys made available by the Commission and (B) two hundred million dollars (\$200,000,000) made available by the Department, pursuant to action by the CTB on March 21, 2019 of its intent to award, on or before July 1, 2019, a SMART SCALE award to the Project in the amount of two hundred million dollars (\$200,000,000) (the “SMART SCALE Funds”) anticipated by Exhibit 3 (Project Budget). Following final action by the CTB to award the SMART SCALE Funds to the Project, the Parties shall allocate the SMART SCALE Funds to the payment of Commission-Funded Design-Build Costs, and the Commission-Controlled Moneys displaced by such allocation will continue to be available as part of the Maximum Commission Financial Commitment, but through the Commission-Supported Contingency Reserve.

(ii) If SMART SCALE Funds are not awarded or the amount awarded is less than the full two hundred million dollars (\$200,000,000), the Department shall make available funds, as and when needed, to replace the SMART SCALE Funds not received (i.e., the

difference), from such other funds lawfully available to the Department for such purpose; the Parties will allocate the replacement funds to the payment of Commission-Funded Design-Build Costs and the Commission-Controlled Moneys displaced by such allocation will continue to be available as part of the Maximum Commission Financial Commitment, but through the Commission-Supported Contingency Reserve.

(c) For the avoidance of doubt, the Department-Supported Contingency Reserve and the Commission-Supported Contingency Reserve are separate, independent reserves and each reserve is available only for the purposes specified in this Agreement for that reserve (and may not be used for any purpose for which the other reserve has been established).

(d) At regular intervals during construction of the Project, including at the expiration of the Scope Validation Period, the Department will reassess in good faith and in consultation with the Commission, taking into account all material information (including, without limitation, any net savings), whether the contingency reserve amounts established pursuant to this Section 3.08 (Availability of Contingency Reserves; Tracking) may be reduced. Within ninety (90) days of determining that the Commission-Supported Contingency Reserve may be reduced, the Department will notify the Commission and the Commission will be entitled to the benefit of the entire reduction in the Commission-Supported Contingency Reserve to the extent permitted by applicable law.

(e) The Department shall maintain an account ledger for each of the Department-Supported Contingency Reserve and the Commission-Supported Contingency Reserve. The beginning balance in each reserve shall be the full amount established under this Agreement. The Department shall reduce the balance maintained with respect to a reserve to account for each payment made out of that reserve under the terms of this Agreement. The Department shall provide the Commission with a monthly report (in such format as the Parties may reasonably agree) identifying, for that month and cumulatively, the adjustments to the balance.

Section 3.09 Additional Costs; Claims

(a) On a quarterly basis, or monthly, if the remaining balance of the Commission-Supported Contingency Reserve is less than the Minimum Commission-Supported Contingency Amount then-required, the Department shall evaluate whether the costs to complete the Project (that are subject to payment by the Commission), when combined with payments that have been made or that are then pending, could reasonably be expected to exceed the Commission-Funded Budget (such that the Commission will have funded its entire Maximum Commission Financial Commitment). Following completion of this analysis, the Department shall promptly notify the Executive Director of the results of its analysis, and if the Department determines that additional unbudgeted costs may be incurred to complete the Project ("Additional Costs"), the notice shall include (w) a description and itemization of the Additional Costs, (x) an explanation of how the Additional Costs arose and the assumptions in the Commission-Funded Budget and Department-Funded Budget, as applicable, regarding such costs, (y) an itemized estimate of the Additional Costs, and (z) if applicable, the certification required by clause (e) below. If the Department notifies the Commission that Additional Costs may be incurred, then, subject to clause (d) below, the Parties will collaborate and consider the following solutions (in order of priority):

- (i) reducing the Project scope, re-engineering, and/or considering value engineering options;
- (ii) re-applying to the Project any Commission-Controlled Moneys that have been supplanted in the Commission-Funded Budget by any Applicable Award Funds;
- (iii) identifying other funding sources; and
- (iv) terminating the Comprehensive Agreement.

(b) The Parties will implement any mutually-agreed solution. If the respective obligations of the Department and the Commission are modified by the mutually-agreed solution, then such modifications shall be set forth in a mutually acceptable amendment to this Agreement. If the Additional Costs can be offset dollar-for-dollar within the Commission-Funded Budget by effecting adjustments to the scope or design of the Project (and the Commission agrees to the option set forth in clause (i) of Section 3.09(a) above), then, subject to the other terms and limitations in this Agreement, such Additional Costs shall be paid from Commission-Controlled Moneys.

(c) The Parties acknowledge and agree that Additional Costs could result from one or more claims made by the Design-Builder pursuant to the Comprehensive Agreement. The Department shall promptly notify the Commission if any such claims are made or the Department receives a notice of intent to file a claim or other written communication from the Design-Builder relating to a claim or contractual dispute that could result in increased contract costs, and whether in each such case the claimed amount is expected to become, or result in, Additional Costs (and the estimate thereof) or is expected to have a material adverse effect on the Commission-Supported Contingency Reserve or the Department-Supported Contingency Reserve (and the estimated effect thereon). The Department shall be responsible to handle all such claims and notices of intent, but the Department may not settle any claim or notice of intent to file a claim and thereafter submit it as an Additional Cost pursuant to Section 3.09(a) (Additional Costs; Claims) unless the settlement has been approved by the Commission.

(d) Notwithstanding anything to the contrary set forth herein, if any Additional Cost (including, without limitation, any Additional Cost relating to a Design-Builder claim described in Section 3.09(c) (Additional Costs; Claims) or other third party claim) either (i) arises out of or relates to the South Island Trestle Bridge Replacement Work or the Deferred/Preventive Maintenance Work, or both; or (ii) arises out of or results from Department Fault, the Department, not the Commission, shall be responsible for such costs.

(e) To the extent that neither item (i) nor item (ii) of Section 3.09(d) above applies to any Additional Cost, then the notice required by Section 3.09(a) above with respect to such Additional Cost shall be accompanied by a certification from the Department that it has determined in good faith that such Additional Cost neither (i) arises out of or relates to the South Island Trestle Bridge Replacement Work or the Deferred/Preventive Maintenance Work, or both, nor (ii) arises out of or results from Department Fault.

Section 3.10 SMART SCALE and other Award Funding

(a) Upon the award of the SMART SCALE Funds referenced in Section 3.08(b) and anticipated by Exhibit 3 (Project Budget) (and for which the CTB has evidenced its intent to award), the SMART SCALE Funds will be allocated to the Commission-Funded Design-Build Costs, but the SMART SCALE Funds will not be factored into the calculation of the Maximum Commission Financial Commitment, nor will payments in respect of such award be counted as funds provided by the Commission against the Maximum Commission Financial Commitment.

(b) If the Project receives any funding in addition to the SMART SCALE award of two hundred million dollars (\$200,000,000) anticipated by Exhibit 3 (Project Budget) from sources not already identified in Exhibit 3 (Project Budget) (e.g., INFRA), such award will reduce on a dollar-for-dollar basis the Commission-Controlled Moneys allocated to the Project or required to be funded by the Commission against the Maximum Commission Financial Commitment, except to the extent the Parties agree the basis or the lawful use of such award is to support or replace funding for any Project cost that is not the Commission's responsibility (such as the South Island Trestle Bridge Replacement Work) or to fund Additional Costs, in which case the Department and the Commission shall work together in good faith to determine how such additional funding should be applied to the Project, taking into consideration the reasons why such additional funding became available, and determine if and to what extent such additional funding should replace funding previously committed to the Project by the Commission and/or the Department pursuant to this Agreement.

Section 3.11 Funding the South Island Trestle Bridge Replacement Work

(a) The Department shall be responsible to (i) pay the costs of designing and constructing the South Island Trestle Bridge Replacement Work, (ii) pay its *pro rata* share of the Administration Costs, and (iii) allocate the Department-Supported Contingency Reserve (such costs, which are set forth on Exhibit 3 (Project Budget) collectively, the "South Island Trestle Bridge Replacement Costs").

(b) The Department shall be solely responsible for paying the South Island Trestle Bridge Replacement Costs. For the avoidance of doubt, the South Island Trestle Bridge Replacement Costs will not be supported by the Commission or the HRTF, or by any toll revenues collected with respect to any facility constructed or improved with funding provided by or from the Commission or the HRTF, including, without limitation, the Project.

(c) The Comprehensive Agreement includes a provision that gives the Department the right, exercisable at any time within one hundred eighty (180) days following execution of the Comprehensive Agreement and without additional consideration, to remove the South Island Trestle Bridge Replacement Work from the Project scope (the "Opt-Out Right").

(d) The Department has identified a funding source for the South Island Trestle Bridge Replacement Work, other than Commission-Controlled Moneys, toll backed financing, or the anticipated SMART SCALE award, and agrees not to exercise the Opt-Out Right.

Section 3.12 Early Work Funding

(a) The Department acknowledges and agrees that, in no event shall the total aggregate amount of compensation paid by the Commission in respect of Early Work exceed two hundred fifty million dollars (\$250,000,000), unless each of the conditions for the additional Early Work funding set forth in Section 5.1.1.4 of the Comprehensive Agreement are satisfied, in which case the total amount of compensation paid by the Commission in respect of Early Work shall be increased by an additional aggregate amount up to but not in excess of seventy-five million dollars (\$75,000,000) (such amount, the “Additional Early Work Funding”). (For the avoidance of doubt, any Additional Early Work Funding provided by the Commission shall reduce dollar-for-dollar the Commission-Funded Design-Build Costs that would otherwise be payable after NTP.)

(b) In the event the Department terminates the Comprehensive Agreement the Department will refund any Additional Early Work Funding actually paid by the Commission toward the Project if (i) the termination occurred prior to the issuance of NTP or (ii) the termination occurred within ninety (90) days of issuing NTP and, at the time NTP was issued, the Department had actual knowledge of the event or circumstance that was the primary reason for termination.

Section 3.13 Proportionality

(a) Whenever this Agreement requires costs, savings, or payments to be shared by the Parties *pro rata*, the portion of such costs, savings, or payments, as applicable, shared by each Party shall be calculated as follows:

(i) the Department’s share will be measured by applying the Department Sharing Percentage; and

(ii) the Commission’s share will be measured by applying a percentage equal to one hundred percent (100%) minus the Department Sharing Percentage.

Section 3.14 Department’s Covenants for Bond-Related Projects

The Department shall comply in all material respects with the Tax Covenants for Bond-Related Projects set forth in Exhibit 14 (Tax Covenants for Bond-Related Projects).

ARTICLE 4.

DELIVERY OF THE PROJECT

Section 4.01 General Obligations of the Department

(a) The Department shall perform or shall cause to be performed in accordance with the Department’s standards for highways, bridges and tunnels (and all applicable federal, state, and local laws and regulations) all design and engineering, all environmental work, and all permitting, right of way acquisition, construction, contract administration, testing services, inspection services, or capital asset acquisitions that may be necessary for completion of the Project.

(b) The Department acknowledges and agrees that it is solely responsible for the development, design, construction, and administration of the Project and all engagements, commitments and agreements with the Design-Builder. All such engagements, commitments and agreements with the Design-Builder shall be integrated into and evidenced by the Comprehensive Agreement. The Department shall enter into the Comprehensive Agreement with the Design-Builder on or before May 15, 2019. The final, complete form of the Comprehensive Agreement (including all exhibits, appendices and attachments thereto) shall reflect a fixed price for the Base Scope (Contract Price) of three billion two hundred ninety-nine million nine hundred ninety-seven thousand two hundred twenty-seven dollars (\$3,299,997,227) and shall be in substantially the form attached hereto as Exhibit 8 (Form of Comprehensive Agreement). Before executing and delivering the Comprehensive Agreement, the Department shall provide the Commission with the final, complete form of the Comprehensive Agreement (including all exhibits, appendices and attachments thereto) and shall identify all modifications to the form attached as Exhibit 8 (Form of Comprehensive Agreement). The Department shall not incorporate any material modification into the final, complete form of the Comprehensive Agreement, or thereafter make any material amendment to the Comprehensive Agreement, except for any Work Order permitted under Section 4.03 (Work Orders Increasing the Contract Price).

(c) The Department shall perform its responsibilities in accordance with the terms of the Comprehensive Agreement, applicable law, and in a manner that is consistent in all material respects with the policies, procedures and practices that the Department uses where the Commonwealth or Department bears the cost of a project. Without limiting the foregoing, the Department shall (i) administer and enforce all contracts with contractors, including, without limitation, the Comprehensive Agreement, and (ii) ensure that the Design-Builder maintains the payment and performance security and insurance in the amounts and with the terms and coverages required by the Comprehensive Agreement. Without limiting the foregoing, the Department shall ensure that the Design-Builder names the Commission, its members, officers, employees, agents and the Commission's bond trustee, Wilmington Trust National Association (or its successor as Commission shall identify in writing to the Department) as additional insureds under all insurance policies.

(d) If the Department determines that a delay will more likely than not prevent the timely completion of a material phase of the Project (e.g., preliminary engineering or right-of-way acquisition), or achievement of Substantial Completion by the Substantial Completion Deadline or achievement of Final Completion by the Final Completion Deadline, the Department shall notify the Commission in writing and provide the Commission with such information as the Commission may reasonably request, including information pertaining to potential corrective measures and remedies against the Design-Builder. If the Department and the Commission mutually develop a model notice for such purposes, the Department's notice will follow the format of the model.

(e) The Department acknowledges and agrees that the Department is solely responsible to obtain or cause its contractors to obtain, and shall obtain, all permits, permissions and approvals necessary to design, construct and operate the Project, whether before, upon or following Final Completion, including, but not limited to, all those required by the Department and all local land use permits, zoning approvals, environmental permits, and regulatory approvals.

(f) With respect to the management of the Comprehensive Agreement, the Department acknowledges and agrees that it shall:

- (i) refrain from taking any of the actions set forth in Section 1 of Exhibit 13 (Limitations on Actions under Comprehensive Agreement) without the prior written consent of the Commission, which consent shall not be unreasonably withheld;
- (ii) refrain from taking any of the actions set forth in Section 2 of Exhibit 13 (Limitations on Actions under Comprehensive Agreement) without first consulting the Commission and permitting the Commission a reasonable opportunity to provide input on the advisability of the proposed action, the potential ramifications thereof, and any viable alternatives to the proposed action; and
- (iii) either take or refrain from taking, as applicable, any of the actions set forth in Section 3 of Exhibit 13 (Limitations on Actions under Comprehensive Agreement) upon its receipt of written request from the Commission;

provided that, with respect to any action that is subject to the requirements of this Section 4.01(f), the Commission, acting through the Executive Director, shall have the right to discuss such action directly with the Commissioner.

Section 4.02 Ownership and Use of the Project Following Final Completion

(a) Subject to and consistent with the requirements of Section 7.02 (Appropriations Requirements), upon final payment to the Design-Builder, the Department will own and use the Project for its intended purposes for the duration of the Project's useful life.

(b) Following Final Completion, the Department shall be responsible to operate and maintain the Project at its own cost and expense and without the use of any toll revenues generated by the Project; *provided* that under, and subject to the terms of, the Master Tolling Agreement, the Department may be entitled to use any such toll revenues to pay (i) the costs of collecting and enforcing tolls on the Project (including related back office costs) and (ii) for the installation, operation, and maintenance of the Project's toll collections operating system and equipment.

(c) For the avoidance of doubt, the Commission shall not, under any circumstance, have any responsibility or obligation to operate or maintain the Project, whether before, upon or following Final Completion, to provide funding for roadway operations or maintenance, or to provide funding to correct any defects.

Section 4.03 Work Orders Increasing the Contract Price; Claims

Subject to Section 4.03(f) (Work Orders Increasing the Contract Price; Claims), prior to issuing to the Design-Builder any Work Order increasing the Contract Price, the Department shall coordinate with the Commission and, if required under this Section 4.03 (Work Orders Increasing the Contract Price; Claims), secure the Commission's approval in accordance with the protocols set forth in this Section 4.03 (Work Orders Increasing the Contract Price; Claims). Similarly, subject to Section 4.03(i) (Work Orders Increasing the Contract Price; Claims), prior to resolving any claim, the Department shall coordinate with the Commission and, if required under this

Section 4.03 (Work Orders Increasing the Contract Price; Claims), secure the Commission's approval in accordance with the protocols set forth in this Section 4.03 (Work Orders Increasing the Contract Price; Claims).

(a) With respect to proposed Work Orders arising from any Differing Roadway and Bridge Improvements Scope Issues identified by Design-Builder during the Scope Validation Period, the Department shall have sole authority to execute any such proposed Work Orders up to a total aggregate value of twenty percent (20%) of the Commission-Supported Contingency Reserve; *provided* that, prior to executing a proposed Work Order with a value exceeding twenty million dollars (\$20,000,000) (net increase), the Department shall (x) provide to the Chair and the Executive Director a written briefing report regarding the nature of such proposed Work Order and the basis for the Department's desire to execute it, (y) timely respond to any reasonable requests by the Commission for additional information, and (z) allow the Chair and/or Executive Director (along with the Commission's advisors) a reasonable opportunity to provide input on the proposed Work Order. Should the value of any Work Order arising from any Differing Roadway and Bridge Improvements Scope Issues identified during the Scope Validation Period, when taken together with all other Work Orders arising from issues encountered during the Scope Validation Period, cause the total aggregate value to exceed twenty percent (20%) of the Commission-Supported Contingency Reserve Amount, the Department shall obtain the written approval of Commission in accordance with clause (e) below prior to executing any additional Work Orders arising from any Differing Roadway and Bridge Improvements Scope Issues identified by the Design-Builder during the Scope Validation Period.

(b) With respect to proposed Work Orders arising either (i) from issues other than Differing Roadway and Bridge Improvements Scope Issues identified by the Design-Builder during the Scope Validation Period or (ii) after the Scope Validation Period, the Department shall have sole authority to execute such Work Orders up to a value of twenty million dollars (\$20,000,000) (net increase) per Work Order; *provided* that, prior to executing a proposed Work Order with a value exceeding five million dollars (\$5,000,000) (net increase), the Department shall (x) provide to the Chair and/or the Executive Director a written briefing report regarding the nature of such proposed Work Order and the basis for the Department's desire to execute it, (y) timely respond to any reasonable requests by the Commission for additional information, and (z) allow the Chair and/or Executive Director (along with the Commission's advisors) a reasonable opportunity to provide input on the proposed Work Order. Should the value of any proposed Work Order exceed twenty million dollars (\$20,000,000), the Department shall obtain the written approval of the Commission in accordance with clause (e) below prior to executing such proposed Work Order.

(c) In addition to the requirements of clause (a) and clause (b) above, if the execution of any proposed Work Order would cause the remaining balance of the Commission-Supported Contingency Reserve to fall below the then-applicable Minimum Commission-Supported Contingency Amount (as defined in clause (d) below), then the Department shall obtain the written approval of the Commission in accordance with clause (e) below prior to executing such proposed Work Order.

(d) The “Minimum Commission-Supported Contingency Amount” shall be determined as follows:

(i) for the period between the date on which the Department issues LNTP1 and the date that is ninety (90) days following the expiration of the Scope Validation Period, the Minimum Commission-Supported Contingency Amount shall be equal to eighty percent (80%) of the Commission-Supported Contingency Reserve;

(ii) for the period between the ninety-first (91st) day following the expiration of the Scope Validation Period and the date on which the Department issues NTP, the Minimum Commission-Supported Contingency Amount shall be equal to sixty percent (60%) of the Commission-Supported Contingency Reserve;

(iii) for the period between the Department's issuance of NTP and the date on which the Design-Builder completes tunnel excavation work the Minimum Commission-Supported Contingency Amount shall be equal to fifteen percent (15%) of the Commission-Supported Contingency Reserve;

(iv) for the period between the Design-Builder's completion of the tunnel excavation work and the Final Completion Date, the Minimum Commission-Supported Contingency Amount shall be equal to seven percent (7%) of the Commission-Supported Contingency Reserve; and

(v) for the period between the Final Completion Date and the date on which all claims relating to the Project are resolved, the Minimum Commission-Supported Contingency Amount shall be equal to zero percent (0%) of the Commission-Supported Contingency Reserve.

(e) Whenever written approval from the Commission is required pursuant to this Section 4.03 (Work Orders Increasing the Contract Price; Claims) prior to the Department's execution of a proposed Work Order, the Department's request for such approval will be processed by the Commission in accordance with the following procedures.

(i) Written approval of the Chair and the Executive Director, delivered after obtaining specific authorization from the Commission's governing body, shall be required with respect to any proposed Work Order that either (x) exceeds twenty million dollars (\$20,000,000) or (y) would surpass the aggregate limit set forth in clause (ii) below. The Commission's governing body will meet to consider on the Department's request for approval for any such Work Order within fifteen (15) calendar days of the Department's written request to the Commission for approval.

(ii) Written approval of the Chair and the Executive Director (without the necessity of specific authorization from the Commission's governing body) shall be required with respect to any proposed Work Order with a value equal to or less than twenty million dollars (\$20,000,000) (up to an aggregate limit of fifty million dollars (\$50,000,000) per project year for all such Work Orders, subject only to adjustments as set forth in Section 4.03(e)(iii) below). The Chair and the Executive Director will act on the Department's request for approval of any such Work Order within seven (7) calendar days of Department's written request to Commission for approval.

(iii) With respect to any proposed Work Order requiring the prior approval of Commission's full governing body, if a meeting of the Commission governing body is called within fifteen (15) calendar days of the Department's written request to the Commission for approval but the Commission's governing body is unable to consider the proposed Work Order at the meeting because a quorum is not present or the members present do not have the requisite voting power to act, then, within an additional fifteen (15) days, the Commission's governing body shall call another meeting to consider such proposed Work Order. If the Commission still is unable to consider the proposed Work Order at the meeting within such additional fifteen (15) days, then for that Work Order, the aggregate annual limit of fifty million dollars (\$50,000,000) under Section 4.03(e)(ii) above with respect to decisions by the Chair and the Executive Director shall be deemed to have been increased by an additional fifty million dollars (\$50,000,000) (to an aggregate of one hundred million dollars (\$100,000,000)) and such proposed Work Order shall then be treated as a Work Order that is subject to review and approval by the Chair and the Executive Director under Section 4.03(e)(ii) above provided the value of such proposed Work Order is within the new aggregate limit established pursuant to this Section 4.03(e)(iii).

(iv) With respect to any proposed Work Order requiring the prior approval of the Chair and the Executive Director, if the Chair and the Executive Director do not provide the Department with an approval or rejection of the proposed Work Order within seven (7) calendar days of the Department's request to the Commission for approval, the proposed Work Order will be deemed approved by the Commission.

(v) For any proposed Work Order requiring prior written approval of the Commission, the Department shall (x) provide to the Commission a written briefing report regarding the nature of such proposed Work Order and the basis for the Department's desire to execute it and (y) timely respond to any reasonable requests by the Commission for additional information.

(f) Except as provided in Section 4.03(g), the requirements of this Section 4.03 (Work Orders Increasing the Contract Price; Claims) shall not apply with respect to any Work Order either (i) arising out of or relating to the South Island Trestle Bridge Replacement Work or the Deferred/Preventive Maintenance Work, or both, or (ii) arising out of or resulting from Department Fault. For those Work Orders, however, the Department shall keep the Commission informed in a timely manner when such a Work Order is being considered and of its ultimate disposition, and shall provide the Commission such information concerning such Work Orders as the Commission may reasonably request, including, without limitation: work description; cost and delay implications of the Work Order; and effect on Administration Costs and reserves.

(g) To the extent that Section 4.03(f) above does not apply to a Work Order, then, for each such Work Order, the Department shall provide to the Commission a certification that the Department has determined in good faith that the Work Order neither (i) arises out of or relates to the South Island Trestle Bridge Replacement Work or the Deferred/Preventive Maintenance Work, or both, nor (ii) arises out of or results from Department Fault.

(h) The Department shall promptly notify the Commission if any claim is made or the Department receives a notice of intent to file a claim or other written communication from the Design-Builder relating to a claim or contractual dispute (whether during or after the Scope Validation Period) that could result in increased contract costs, and whether in each such case the claimed amount is expected to have a material adverse effect on the Commission-Supported Contingency Reserve or the Department-Supported Contingency Reserve (and the estimated effect thereon). Any resolution of such claim proposed by the Department shall be subject to clause (a), clause (b) and clause (c) above as if the amount to be paid under the proposed resolution was a proposed Work Order in an equivalent amount.

(i) Except as provided in Section 4.03(j), the requirements of this Section 4.03 (Work Orders Increasing the Contract Price; Claims) shall not apply with respect to any claim either (i) arising out of or relating to the South Island Trestle Bridge Replacement Work or the Deferred/Preventive Maintenance Work, or both, or (ii) arising out of or resulting from Department Fault. For those claims, however, the Department shall keep the Commission informed in a timely manner when such a claim is being considered and of its ultimate disposition, and shall provide the Commission such information concerning such claims as the Commission may reasonably request.

(j) To the extent that Section 4.03(i) above does not apply to a claim, then, for each such claim, the Department shall provide to the Commission a certification that the Department has determined in good faith that the claim neither (i) arises out of or relates to the South Island Trestle Bridge Replacement Work or the Deferred/Preventive Maintenance Work, or both, nor (ii) arises out of or results from Department Fault.

Section 4.04 [Intentionally Omitted.]

Section 4.05 Contract Price Increases from Unit Price Work or Commodities Adjustments

The Comprehensive Agreement contains certain items, which are summarized on Exhibit 9 (Unit Price Work and Commodity Adjustment Items), for which actual corresponding compensation under the Comprehensive Agreement will fluctuate, without a corresponding Work Order, based on, as applicable (and as described on Exhibit 9 (Unit Price Work and Commodity Adjustment Items)), the actual units of work undertaken by the Design-Builder or the pricing of the applicable commodity. For such items, to the extent the cost of such items exceeds the amount estimated in the Design-Builder's price proposal, such excess will be paid out of the Commission-Supported Contingency Reserve or the Department-Supported Contingency Reserve, as applicable. In order to properly account for the effect of such excess costs, with each payment requisition under Section 5.02, the Department shall provide reasonable detail regarding increases resulting from unit pricing or commodities adjustments, including with respect thereto an identification of the aggregate amount invoiced that is payable out of the Commission-Supported Contingency Reserve or the Department-Supported Contingency Reserve. Solely for purposes of this Section 4.05, the Bridge Repair Option Work shall not be treated as unit price work and the payment of the cost of such work shall be in accordance with Section 4.09 (Optional Work: I-564 Direct Connections; Bridge Repair Option Work).

Section 4.06 Changes to Comprehensive Agreement that Reduce Contract Price

(a) With respect to modifications to the Comprehensive Agreement that reduce the Contract Price, (i) the Department will be entitled to any savings arising from reductions in costs relating to the South Island Trestle Bridge Replacement Work and (ii) the Commission will be entitled to any savings arising from reductions in costs relating to work other than the South Island Trestle Bridge Replacement Work. For modifications to the Comprehensive Agreement that reduce the Contract Price, the Parties will meet and confer to arrive at an equitable allocation in accordance with (i) and (ii) above, and if the Parties determine the savings are not reasonably divisible between (i) and (ii) above, the Parties will share such savings *pro rata* unless otherwise mutually agreed. If such a modification results in savings to the Commission, the Commission-Funded Design-Build Costs shall be reduced by the amount thereof (the “Commission-Cost Reduction Amount”).

(b) The Commission-Cost Reduction Amount shall be available to pay the cost of the Required Work, if any, in accordance with Section 4.09(b) (Optional Work: I-564 Direct Connections; Bridge Repair Option Work). If all or any portion of the Commission-Cost Reduction Amount remains following the use of such funds to pay the cost of Required Work the Commission-Supported Contingency Reserve will be increased by the amount of any remaining Commission-Cost Reduction Amount. For the avoidance of doubt, neither (i) the use of the Commission-Cost Reduction Amount to pay the cost of Required Work nor (ii) any increase to the Commission-Supported Contingency Reserve funded using the Commission-Cost Reduction Amount shall result in an increase to the Maximum Commission Financial Commitment.

Section 4.07 No Excuses Incentive Payment

(a) The Department shall include in the Comprehensive Agreement a mechanism by which the Design-Builder may earn a no excuses incentive payment for the early achievement of Substantial Completion (the “No Excuses Incentive Payment”) in an amount not to exceed ninety million dollars (\$90,000,000). The amount of the No Excuses Incentive Payment shall decline, progressively to zero dollars (\$0) over a five-month period during which the Design-Builder may achieve Substantial Completion, with no incentive payable if Substantial Completion is achieved on or after September 1, 2025.

(b) Notwithstanding any potential adjustments to the Contract Times under the Comprehensive Agreement to which the Design-Builder may be entitled, the deadlines relating to the calculation and payment of the No Excuses Incentive Payment shall not be adjusted for any cause, reason, or circumstance whatsoever, except upon the mutual agreement of the Department and the Commission. The Department shall not pay the No Excuses Incentive Payment (and the Commission shall not be liable therefor under Section 3.01(a)) unless all applicable conditions under the Comprehensive Agreement, including, without limitation, the Design-Builder’s release of all claims relating to the Project in accordance with the terms thereof, have been satisfied in full.

Section 4.08 Delay Liquidated Damages and Other Damages and Recoveries

(a) The Department shall include in the Comprehensive Agreement a liquidated damages regime whereby the Design-Builder is assessed liquidated damages if (i) Substantial Completion is not achieved by the Substantial Completion Deadline or (ii) Final Completion is not achieved by the Final Completion Deadline (such liquidated damages, the “Delay Liquidated Damages”).

(b) In the administration or enforcement of the Comprehensive Agreement, the Department may also receive certain other damages payments, insurance proceeds or recoveries from third parties, including, without limitation, payments from guarantors, sureties or insurers (collectively, “Other Damages and Recoveries”).

(c) Unless otherwise agreed by the Parties, the Delay Liquidated Damages paid by the Design-Builder to the Department and any Other Damages and Recoveries received by the Department will be shared by the Parties *pro rata*.

Section 4.09 Optional Work: I-564 Direct Connections; Bridge Repair Option Work

(a) Pursuant to the RFP, the Department has solicited pricing for the design and construction of the I-564 Direct Connections, as further described in Exhibit 2 (Project Scope), as a discrete line item in the price proposals submitted by the Offerors. Under the Comprehensive Agreement, the I-564 Direct Connections work shall be an option and shall not be added to the scope of work to be performed by the Design-Builder unless mutually-agreed by the Parties (and subject to the identification of a funding mechanism for the I-564 Direct Connections).

(b) Under the Comprehensive Agreement, the Bridge Repair Option Work shall be an option and shall not be added to the scope of work to be performed by the Design-Builder unless and until that work is addressed in the manner described in this Section 4.09(b).

(i) The Department shall give the Commission not less than thirty (30) days’ notice of the Department’s intent to exercise the option. Promptly following the Commission’s receipt of such notice, the parties shall meet to review the scope of the Bridge Repair Option Work and to mutually determine, acting reasonably, which components, if any, of the Bridge Repair Option Work constitute Deferred/Preventive Maintenance Work and which components, if any, of the Bridge Repair Option Work constitute work that is required to be completed in order to achieve Final Completion in accordance with the standards and specifications applicable to the Project and is not otherwise Deferred/Preventive Maintenance Work (such work required to achieve Final Completion, the “Required Work”).

(ii) The Department shall be entitled to add to the scope of work to be performed by the Design-Builder, via Work Order, the Bridge Repair Option Work that the parties determine constitutes Required Work and the cost of such work shall be funded in accordance with clause (iii) below. The Department shall be entitled to add to the scope of work to be performed by the Design-Builder, via Work Order, the Bridge Repair Option Work that the parties determine constitutes Deferred/Preventive Maintenance Work if and

only to the extent the Department assumes responsibility to pay the costs of such work from funds other than Commission-Controlled Moneys. For the avoidance of doubt, the Commission shall not be responsible in any manner for any costs associated with any Deferred/Preventive Maintenance Work; instead, all such costs shall be the sole responsibility of the Department.

(iii) The cost of the Required Work shall be funded as follows:

(A) *first*, from the savings, if any, to the Department arising from reductions in costs relating to the South Island Trestle Bridge Replacement Work pursuant to Section 4.06(a) (Changes to Comprehensive Agreement that Reduce Contract Price);

(B) *second*, to the extent the funds described in clause (A) above are not sufficient to pay the cost of the Required Work, from the savings, if any, to the Commission arising from reductions in costs relating to work other than South Island Trestle Bridge Replacement Work pursuant to Section 4.06(a) (Changes to Comprehensive Agreement that Reduce Contract Price); and

(C) *third*, to the extent the funds described in clause (A) and clause (B) are not sufficient to pay the cost of the Required Work, by the Department; *provided*, that upon Final Completion, the Department shall be entitled to request reimbursement of such costs in accordance with clause (iv) below.

(iv) If (x) the Project achieves Final Completion, (y) all claims relating to the Project have been resolved or are barred, and (z) the Commission has satisfied all of its payment obligations under this Agreement, expressly including all of its obligations under Section 3.01(a) (General Rights and Obligations of the Commission) and Section 3.07 (Administration Costs), there is still a remaining balance in the Commission-Supported Contingency Reserve, the Department may request reimbursement from the Commission of the amounts paid by the Department to the Design-Builder for the Required Work in accordance with Section 4.09(b)(iii)(C) (Optional Work: I-564 Direct Connections; Bridge Repair Option Work), not to exceed the remaining balance in the Commission-Supported Contingency Reserve. Upon receipt of such request, the parties will meet and confer in good faith to confirm that the Department is entitled to request reimbursement pursuant to the preceding sentence. In connection therewith, the Department shall deliver such certifications as the Commission may reasonably request. If (and to the extent) the Commission determines, in its reasonable discretion, that the reimbursement request has been properly made (and, for the avoidance of doubt, does not exceed the remaining balance in the Commission-Supported Contingency Reserve), the Commission will reimburse the Department the amount properly requested.

Section 4.10 Books and Records

(a) The Department shall maintain all original conceptual drawings and renderings, architectural and engineering plans, site plans, inspection records, testing records, and as-built

drawings for the Project for the time periods required by the Virginia Public Records Act and any other applicable records retention laws or regulations.

(b) The Department shall maintain complete and accurate financial records relating to the Project for all time periods as may be required by the Virginia Public Records Act and by all other applicable Commonwealth or federal records retention laws or regulations.

(c) The Department shall provide the Commission with electronic copies of (i) all monthly reports prepared by Design-Builder and submitted to the Department pursuant to the Comprehensive Agreement and (ii) upon the request of the Commission, copies of any investigation or inspection reports that the Department may have produced in connection with a review of the Design-Builder's books and records.

(d) The Department acknowledges and agrees that the Commission shall, upon reasonable notice, be afforded access to the Design-Builder's Books and Records in accordance with Section 7.5 (*Record Maintenance and Retention of Records*) of the Comprehensive Agreement.

(e) The Commission shall, upon making final payment to the Department for the Project, retain copies of all contracts, financial records, design, construction, and as-built Project drawings and plans, if any, developed pursuant to or in association with the Project for the time periods required by the Virginia Public Records Act and as may be required by other applicable records retention laws and regulations.

Section 4.11 Commission Interest in Project Assets

(a) The Department agrees to use the real property and appurtenances and fixtures thereto, capital assets, equipment and all other transportation facilities that are part of the Project and funded by the Commission under this Agreement ("Assets") for the designated transportation purposes of the Project and in accordance with applicable law throughout the useful life of each such Asset. If the Department intends to sell, convey, or dispose any Asset funded with the Commission funds or intends to use any Asset for a purpose inconsistent with this Agreement, the Department shall notify the Executive Director in writing of any such intent before further action is taken by the Department in furtherance thereof. Upon receiving notification from the Department, the Executive Director shall notify the Commission's governing body of the Department's intended action(s). The Parties shall, thereafter, meet and confer to discuss what measures need to be taken regarding the Department's proposed sale, conveyance, disposition, or use of any such Asset(s) so as to ensure compliance with all applicable requirements of the HRTAC Act (without limiting the foregoing, the Department acknowledges that under the HRTAC Act and applicable law, the Commission is vested with the right to impose and collect tolls on facilities constructed by the Commission). All recommendations, proposed remedial actions developed by the Parties' designated representatives, and/or any proposed sale, conveyance or disposal of any Asset agreed upon during the meet and confer process shall be formally presented to the Commission and the Commissioner for their respective approval. Notwithstanding anything to the contrary in this Agreement, the Department acknowledges and agrees that (i) any concession agreement or similar arrangement related to or impacting the Project (or any part thereof) in any manner will be implemented only upon the parties' mutual agreement and (ii) the Commission

shall be entitled to withhold its approval for such a concession agreement or similar arrangement, whether initiated or to be implemented in accordance with the PPTA or otherwise, for any reason whatsoever as may be determined in the Commission's sole discretion, including but not limited to any other arrangement that would reasonably be expected to cause any of the Commission's outstanding bonds to be treated as taxable bonds or private activity bonds.

(b) If the Willoughby Spit Staging Area is acquired for the Project, then, promptly following the achievement of Final Completion, the Department shall ensure that all equipment is removed from the Willoughby Spit Staging Area (and that any other effects of the use are eliminated) and shall convey such property to the Commission at no further cost and expense to the Commission, unless the Commission otherwise directs.

Section 4.12 Early Termination of Comprehensive Agreement

(a) If the Department determines that termination of the Comprehensive Agreement is in the best interests of the Department and the Commission, the Department shall consult with the Commission regarding such determination. If the Commission disagrees with the Department's determination, the Parties shall resolve such disagreement in accordance with the dispute resolution procedures set forth in Article 6 (Dispute Resolution). If the Commission agrees with the Department's determination or the Department's termination of the Comprehensive Agreement is otherwise authorized through the dispute resolution procedures, then the Department may proceed to terminate the Comprehensive Agreement.

(b) The Department shall not finalize any settlement with the Design-Builder relating to a termination of the Comprehensive Agreement for the Department's convenience without the Commission's prior approval of any such settlement. Unless the Parties otherwise agree, each Party shall be responsible for paying its share of any such settlement on a *pro rata* basis.

(c) The Department shall terminate the Comprehensive Agreement upon the written request of the Commission if such request is due to any of the following circumstances:

(i) The Department has the right to terminate the Comprehensive Agreement for cause pursuant to Section 11.2 of Exhibit 1 to the Comprehensive Agreement (*General Conditions of Contract Between Department and Design-Builder*) but the Department has failed to exercise such right, and such failure is reasonably expected to have a material adverse effect on the Commission, following consultation between the Commission and the Department regarding the reasons, if any, for the Department's failure to exercise such right.

(ii) The Commission determines in good faith that (A) either (1) the Commission has suffered a material adverse change in its ability to satisfy its obligations under this Agreement or (2) the Commission's funding plan for the Project is unsustainable, and (B) it is in the best interests of the Commission that the Department terminate the Comprehensive Agreement for convenience pursuant to Article 8 of the Comprehensive Agreement; *provided* the Department shall have no obligation to terminate the Comprehensive Agreement pursuant to this Section 4.12(c)(ii) if and only if the

Department assumes responsibility to pay the cost of the Project using funding sources other than Commission-Controlled Moneys.

(iii) (A) The Department fails or refuses either to (1) enforce any of its material rights under the Comprehensive Agreement or (2) require compliance by the Successful Offeror of any of its material obligations thereunder, in either case, despite repeated Commission requests to the Department that it do so; (B) such failure or refusal of the Department is reasonably expected to have a material adverse effect on the Commission; and (C) the Commission determines in good faith that it is in the Commission's best interests that the Department terminate the Comprehensive Agreement for convenience pursuant to Article 8 of the Comprehensive Agreement. The Department shall have sixty (60) days following the written request of the Commission to terminate the Comprehensive Agreement to remedy such failure before the Department's duty to terminate the Comprehensive Agreement is effective.

(iv) The Commission determines, following the parties inability to reach agreement on the Master Tolling Agreement (i) on or before the later of (a) October 31, 2019, or (b) the Design-Builder's achievement of the LNTP1 Completion Milestone under the Comprehensive Agreement, or (ii) by April 30, 2020 without regard to the Design-Builder's achievement of the LNTP1 Completion Milestone under the Comprehensive Agreement, that it is in its interest to terminate the Comprehensive Agreement; *provided* that the Commission shall be responsible for all Project costs through the date of termination and all reasonable costs incurred by the Department pursuant to the terms of the Comprehensive Agreement to terminate the Comprehensive Agreement.

(d) If, upon terminating the Comprehensive Agreement, the Department takes possession of any materials, equipment (including, for the avoidance of doubt, the tunnel boring machine), scaffolds, tools, appliance, or other assets, the Department shall hold such assets in trust for the benefit of the Commission and the Department will liquidate such assets in such manner as the Parties may reasonably agree.

ARTICLE 5.

ADMINISTRATION OF THE AGREEMENT

Section 5.01 Program Coordinators

Each Party shall assign a person to serve as its program coordinator (the "Program Coordinator") for the Project, who will be responsible for review of the Project on behalf of it for purposes of ensuring the Project is being undertaken in compliance with this Agreement. Unless a different person is assigned, the Department's Senior Representative shall serve as its Program Coordinator, and the Commission's Executive Director shall serve as its Program Coordinator. The Commission's Program Coordinator will be responsible for overseeing, managing, reviewing, and processing, in consultation with the Executive Director and the CFO (assuming other persons are serving in those capacities), all payment requisitions submitted by the Department for the Project. The Commission's Program Coordinator will have no independent authority to direct

changes or make additions, modifications, or revisions to the scope of the Project or the Exhibit 3 (Project Budget).

Section 5.02 Payment Requisitions

Subject to Section 3.03 (Maximum Commission Financial Commitment) and Section 3.04 (Maximum Cumulative Compensation Amount Under Comprehensive Agreement):

(a) Design-Build Requisitions

(i) Upon the Department's receipt of each request for payment from the Design-Builder (each a "DB Payment Request"), the Department shall provide to the Executive Director such DB Payment Request along with a request for payment in the form set forth in Exhibit 10 (Form of Payment Requisition – Design-Build) (each, a "Department DB Payment Request"). The Department DB Payment Request will request the entire amount shown in the DB Payment Request for which the Commission may be responsible under this Agreement (the "Initial DB Commission Payment Amount"), and set forth the date by which the Department will make payment to the Design-Builder, which date shall be no earlier than five (5) Business Days following the Executive Director's receipt of the Department DB Payment Request. On or before the date that is three (3) Business Days prior to the date on which the Department will make payment to the Design-Builder, the Commission shall pay to the Department the Initial DB Commission Payment Amount.

(ii) Prior to and after its receipt of the Initial DB Commission Payment Amount, the Department shall review in detail the DB Payment Request consistent with its standard practices, procedures, and protocols for review of a request for payment. After review, the Department will pay to the Design-Builder any compensation due to the Design-Builder under the terms of the Comprehensive Agreement, consistent with the Department's detailed review of the corresponding DB Payment Request. Thereafter, the Department shall provide to the Commission for each payment made by the Department to the Design-Builder (i) detailed summaries of actual project costs incurred with supporting documentation as determined by the Commission and (ii) a certification in the form of Exhibit 11 (Form of Payment Certification – Design-Build).

(iii) If the Initial DB Commission Payment Amount is greater than the amount actually forwarded by the Department to the Design-Builder covering costs for which the Commission is responsible under this Agreement for any given Department DB Payment Request, the Department shall notify the Commission in writing and such additional amount shall be credited to the Commission for the purposes of the next-occurring Department DB Payment Request (and may be used by the Commission to offset its payment of the Initial DB Commission Payment Amount corresponding to such next-occurring Department DB Payment Request) or refunded to the Commission if there is no such next-occurring Department DB Payment Request.

(b) Administration Cost Requisitions

(i) The Department shall provide to the Executive Director requests for payment of Administration Costs in the form set forth in Exhibit 12 (Form of Payment

Requisition – Administration Costs) (each, a “Department Admin Payment Request”) that include (i) the Commission’s standard payment requisition(s), containing detailed summaries of actual Administration Costs incurred with supporting documentation as determined by the Commission and (ii) certifications that all Administration Costs were incurred in the performance of work for the Project as authorized by this Agreement.

(ii) The Commission shall route to the Program Coordinator all Department Admin Payment Requests and the summaries of actual costs submitted to the Commission for the Project. After submission to the Commission, the Program Coordinator will conduct an initial review of all payment requisitions and supporting documentation for the Project in order to determine the submission’s compliance with the terms of this Agreement. The Program Coordinator will then make a recommendation to the CFO, if different than the Executive Director, and the Executive Director whether to authorize payment, refuse payment, or seek additional information from the Department. If the payment requisition is sufficient as submitted, the undisputed portion of the payment will be made within fifteen (15) days of receipt. If the payment requisition is, in the Commission’s reasonable judgment, deemed insufficient or is otherwise disputed, within ten (10) days of receipt, the Program Coordinator will notify the Department in writing and set forth the reasons why the payment requisition was declined or why and what specific additional information is needed in order to authorize the payment request. The Commission will make payment of all undisputed amounts within fifteen (15) days of the date on which the Commission determines that the Department has corrected all deficiencies or inaccuracies to the Commission’s reasonable satisfaction.

(c) The Commission shall not, under any circumstances, be required to authorize payment for any work performed by or on behalf of the Department, including any Administrative Costs, that are not in conformity with the requirements of the HRTAC Act or this Agreement.

(d) The Commission shall route all of the Department’s accelerated or supplemental requests for funding from the Commission under Section 3.04 (Maximum Cumulative Compensation Amount Under Comprehensive Agreement) and Section 3.09 (Additional Costs; Claims) to the Executive Director.

(e) The Commission acknowledges and agrees that if, as a result of either the Commission’s review of any payment requisition or any Commission compliance review, the Commission staff determines that the Department is required under Section 3.02(d) (General Obligations of the Department) to reimburse funds to the Commission, the Commission staff will promptly advise the Executive Director, who in turn will advise the Department in writing. The Department will thereafter have thirty (30) days to respond in writing to the Commission’s initial findings. If the Commission makes a final determination that the Department is required under Section 3.02(d) (General Obligations of the Department) to reimburse funds to the Commission, the Parties shall engage in dispute resolution as provided in Article 6 (Dispute Resolution). Pending final resolution of the matter, the Commission will withhold further funding on the Project. Nothing herein shall, however, be construed as denying, restricting or limiting the pursuit of either Party’s legal rights or available legal remedies.

Section 5.03 Periodic Compliance Reviews

Upon advance notice to the Department, the Commission shall have the right to conduct periodic compliance reviews of the Project so as to assess whether the work being performed likely remains within the scope of this Agreement, the HRTAC Act, and other applicable law. Such compliance reviews may include review of the Department's financial records for the Project and on-Project site inspections. The Department shall provide such assistance with on-Project site inspections as the Commission may reasonably request.

ARTICLE 6.

DISPUTE RESOLUTION

Section 6.01 Disputes under the Agreement

(a) The Parties agree to use reasonable efforts to promptly resolve any dispute under this Agreement pursuant to this Section 6.01 (Disputes under the Agreement).

(b) If any dispute arises in relation to any aspect of this Agreement, the Parties shall consult in good faith in an attempt to come to an agreement. If the dispute cannot be resolved through such consultation, then, upon the request of either Party, the Chair and the Commissioner shall meet as soon as possible, but in no event later than sixty (60) days after such request is made, to attempt to resolve such dispute. Prior to any meeting(s) between the Chair and the Commissioner, the Parties will exchange relevant information that will assist the Parties in resolving the dispute or disagreement. If the Chair and the Commissioner determine that the dispute cannot be resolved to the mutual satisfaction of both Parties within sixty (60) days after their consultation and attempt to come to an agreement (or such other period as they may mutually agree), despite their good faith efforts, then either Party may file a legal action pursuant to Section 6.01(c) (Disputes under the Agreement) below.

(c) All litigation between the Parties arising out of or pertaining to this Agreement shall be filed, heard, and decided in either the Circuit Court for the City of Richmond, Virginia, Division I or the Circuit Court for the City of Chesapeake, Virginia, which courts will have exclusive jurisdiction and venue. Satisfaction of the procedures set forth in this Section 6.01 (Disputes under the Agreement) shall be a condition precedent to instituting a legal action in court except with respect to legal action seeking injunctive or equitable relief on an emergency basis.

(d) Pending final resolution of any dispute (except with respect to disputes regarding the cause for terminating this Agreement or arising under Section 3.02(d) (General Obligations of the Department)), the Parties will continue to fulfill their respective obligations under this Agreement.

(e) Neither Party will seek or accept an award of attorneys' fees or costs incurred in connection with the resolution of a dispute pursuant to the provisions of this Section 6.01 (Disputes under the Agreement).

(f) THE PARTIES HEREBY KNOWINGLY, IRREVOCABLY, VOLUNTARILY AND INTENTIONALLY WAIVE ANY RIGHTS THAT ANY MAY HAVE TO A TRIAL BY

JURY WITH RESPECT TO ANY ACTION, PROCEEDING, COUNTERCLAIM OR DEFENSE BASED ON THIS AGREEMENT, OR ARISING OUT OF, UNDER OR IN ANY CONNECTION WITH THIS AGREEMENT, OR WITH RESPECT TO ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER ORAL OR WRITTEN) OR ACTIONS OF ANY PARTY HERETO RELATING TO THIS AGREEMENT. THIS PROVISION IS A MATERIAL INDUCEMENT FOR ALL PARTIES ENTERING INTO THIS AGREEMENT. THIS PROVISION APPLIES ONLY TO SUITS BETWEEN THE PARTIES ARISING OUT OF OR RELATED TO THE AGREEMENT AND DOES NOT APPLY TO THIRD-PARTY CLAIMS OR SUITS. Each of the Parties (i) certifies that no representative, agent, attorney or any other Person has represented, expressly or otherwise, that such other Person would not, in the event of any suit, action or proceedings relating to this Agreement, seek to enforce the foregoing waiver and (ii) acknowledges that it has been induced to enter into this Agreement by, among other things, the mutual waivers and certifications in this Section 6.01(f).

Section 6.02 Disputes under the Comprehensive Agreement

If, under the Comprehensive Agreement, the Department and Design-Builder engage in dispute resolution, (a) any and all terms of any settlement of that dispute (whether arising prior to or after the initiation of litigation) shall be subject to Commission approval if any such terms (i) would result in any Additional Cost, in which case the procedures in Section 3.09(c) (Additional Costs; Claims) shall apply, or (ii) would require Commission approval under Section 4.03 (Work Orders Increasing the Contract Price), if treated as a Work Order or claim, as applicable, under Section 4.03 those Sections, and (b) responsibility for the Department's financial obligations pursuant to such settlement shall be apportioned between the Commission and the Department in a manner consistent with how the responsibility for such costs is determined pursuant to Section 3.09(c) (Additional Costs; Claims), or Section 4.03 (Work Orders Increasing the Contract Price), as applicable. If, under the Comprehensive Agreement, any dispute between the Department and the Design-Builder proceeds to litigation, the Department shall provide the Commission with regular updates regarding such litigation. The Commission shall abide by any non-appealable, final judgment rendered as a result of any such litigation and be responsible for any amounts awarded to the Design-Builder pursuant to such non-appealable, final judgment to the extent consistent with the Commission's responsibilities to pay Project costs in accordance with this Agreement. Notwithstanding anything in this Section 6.02 to the contrary, under no circumstances shall the Commission be responsible for any damages awarded to the Design-Builder or any other party if such damages arise out of or result from the Department's negligence, willful misconduct, violation of law, or breach of contract.

ARTICLE 7.

MISCELLANEOUS

Section 7.01 Term; Termination

(a) This Agreement shall be effective upon: (i) the adoption, execution and delivery of this Agreement by both Parties and (ii) the execution and delivery of the Comprehensive Agreement by the Department and the Design-Builder and the satisfaction of any conditions to the effectiveness of the Comprehensive Agreement. This Agreement shall expire ninety (90) days after

the date on which the Department makes final payment to the Design-Builder and all claims relating to the Project have been resolved or are barred in accordance with the Comprehensive Agreement if this Agreement is not terminated earlier in accordance with its terms.

(b) The Department may terminate this Agreement, for cause, in the event of a material breach by the Commission of this Agreement. If so terminated, the Commission shall pay for all Project costs incurred in accordance with the terms of this Agreement through the date of termination and all reasonable costs incurred by the Department pursuant to the terms of the Comprehensive Agreement to terminate the Comprehensive Agreement. The Virginia General Assembly's failure to appropriate funds to the Commission as described in Section 7.02 (Appropriations Requirements) of this Agreement and/or repeal or amendment of the legislation establishing the HRTF or the Commission's powers shall not be considered material breaches of this Agreement by the Commission if such failure to appropriate or such repeal or amendment eliminates funds that under the Commission's funding plan were scheduled to be used for the Project or renders the Commission without legal authority to provide any of that funding for the Project. Before initiating any proceedings to terminate under this Section 7.01 (Term; Termination), the Department shall give the Commission sixty (60) days' written notice of any claimed material breach of this Agreement and the reasons for termination; thereby allowing the Commission an opportunity to investigate and a reasonable opportunity to cure (within such 60-day period or within a reasonable time thereafter) any such alleged breach.

(c) The Commission may terminate this Agreement, for cause, resulting from the Department's material breach of this Agreement. If so terminated, the Department shall refund to the Commission all funds the Commission provided to the Department for the Project and, to the extent permitted by law, with interest at the Applicable Rate. The Commission will provide the Department with sixty (60) days' written notice that the Commission is exercising its rights to terminate this Agreement and the reasons for termination. Prior to termination, if the Department has substantially completed the Project or a portion that is severable (meaning it is subject to independent use), the Department may request that the Commission excuse the Department from refunding funds paid in respect of the substantially completed Project or portion, and the Commission may, in its sole discretion, excuse the Department from refunding all or a portion of the funds the Commission provided to the Department for the substantially completed Project or portion thereof. No such request to be excused from refunding will be allowed where the Department is liable for negligence, willful misconduct, violation of law, or breach of the Comprehensive Agreement or this Agreement.

(d) Upon termination, the Department will release or return to the Commission all unexpended Commission funds and, to the extent permitted by law, with interest at the Applicable Rate, no later than sixty (60) days after the date of termination.

(e) The following provisions shall survive the expiration or early termination of this Agreement: (i) Section 3.02(a) (General Obligations of the Department); (ii) Section 3.02(c) (General Obligations of the Department); (iii) Section 3.02(d) (General Obligations of the Department); (iv) Section 3.02(e)(iii) (General Obligations of the Department); (v) Section 4.01(e) (General Obligations of the Department); (vi) Section 4.02 (Ownership and Use of the Project Following Final Completion); (vii) Section 4.10 (Books and Records); (viii) Section 4.11 (Commission Interest in Project Assets); (ix) Section 4.12(d) (Early Termination of

Comprehensive Agreement); (x) Section 5.02(e) (Payment Requisitions); (xi) Section 5.03 (Periodic Compliance Reviews); (xii) Article 6 (Dispute Resolution); and (xiii) Article 7 (Miscellaneous) (with the exception of Section 7.08 (Engagement of Counsel)).

Section 7.02 Appropriations Requirements

(a) Nothing herein shall require or obligate the Commission to commit or obligate funds to the Project beyond those funds that have been duly authorized and appropriated by its governing body for the Project.

(b) The Parties acknowledge that all funding provided by the Commission pursuant to the HRTAC Act is subject to appropriation by the Virginia General Assembly. The Parties further acknowledge that: (i) the moneys allocated to the HRTF pursuant to applicable provisions of the Code of Virginia and any other moneys that the General Assembly appropriates for deposit into the HRTF are subject to appropriation by the General Assembly and (ii) the Commission's obligations under this Agreement are subject to such moneys being appropriated to the HRTF by the General Assembly.

(c) The Parties agree that the Department's obligations under this Agreement are subject to funds being appropriated by the General Assembly and allocated by the CTB and otherwise legally available to the Department for the Project.

(d) Should the Department be required to provide additional funds in order to proceed or complete the funding necessary for the Project, the Department shall certify to the Commission that such additional funds have been allocated and authorized by the CTB and/or appropriated by the Virginia General Assembly as may be applicable or have been obtained through another independent, lawful source.

Section 7.03 Commitments Relating to Master Tolling Agreement

The Department hereby reaffirms its commitments made in the January 22, 2019 Letter, and further commits to work in good faith with the Commission to finalize the Master Tolling Agreement. The parties will use their best efforts and use all reasonable means to reach agreement on the Master Tolling Agreement on or before October 31, 2019.

Section 7.04 Federal Credit Assistance for Project

The Department shall provide reasonable assistance to the Commission in the Commission's pursuit of federal credit assistance for the Project from the United States Department of Transportation.

Section 7.05 Assignment

This Agreement shall not be assigned by either Party unless express written consent is given by the other Party.

Section 7.06 Notices

All notices under this Agreement shall be in writing and forwarded to the other party by U.S. mail, care of the following authorized representatives:

If to the Commission:

Hampton Roads Transportation Accountability Commission
723 Woodlake Drive
Chesapeake, Virginia 23320
Attention: Executive Director and Chairman

With copies to (which shall not constitute notice):

The office of record of the Commission's general counsel

If to the Department:

Virginia Department of Transportation
1401 East Broad Street
Richmond, Virginia 23219
Attention: Commissioner of Highways

With copies to (which shall not constitute notice):

Office of the Attorney General
202 North 9th Street
Richmond, Virginia 23219
Attention: Transportation Section Chief

Section 7.07 Modification or Amendment

(a) This Agreement may not be modified or amended, except pursuant a written agreement that is duly authorized, executed and delivered by both Parties.

(b) The Department acknowledges that the Commission's funding plan is supported by bond financing. The Department and the Commission will work in good faith to adopt such amendments to this Agreement as may be necessary and desirable in connection with any bond offering, including, without limitation, tax covenants based on the form of amendment and tax covenants set forth in Exhibit 14 (Form of Amendment and Tax Covenants). The Department further acknowledges that implementing such amendments, when applicable, will be a condition precedent to the Commission's consummation of any such bond financing.

Section 7.08 Engagement of Counsel

If, in connection with the work, the Department engages outside legal counsel approved by the Office of the Attorney General (as opposed to utilizing the services of the Office of the

Attorney General), the Department will give the Commission notice of the engagement so as to ensure that no conflict of interest may arise from any such representation.

Section 7.09 No Personal Liability or Creation of Third Party Rights

This Agreement shall not be construed as creating any personal liability on the part of any officer, member, employee, or agent of either of the Parties. No provision of this Agreement shall inure to the benefit of, or be enforceable by, any third party, including any creditor of either Party.

Section 7.10 No Agency

- (a) The Department represents that it is not acting as a partner or agent of Commission.
- (b) Nothing in this Agreement shall be construed as making any Party a partner or agent of any other Party.

Section 7.11 Governing Law

This Agreement is governed by the laws of the Commonwealth of Virginia, without regard to conflict of law principles.

Section 7.12 Sovereign Immunity

This Agreement shall not be construed as a waiver of either Party's sovereign immunity rights.

Section 7.13 Counterparts

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

[SIGNATURE PAGE(S) TO FOLLOW]

IN WITNESS WHEREOF, the Parties, intending to be legally bound, have executed this Project Agreement for Funding and Administration for the I-64 Hampton Roads Bridge-Tunnel Expansion Project as of the date first written above.

HAMPTON ROADS TRANSPORTATION ACCOUNTABILITY COMMISSION,
a body politic and a political subdivision of the Commonwealth of Virginia

By: _____
Name: _____
Title: _____

VIRGINIA DEPARTMENT OF TRANSPORTATION,
an agency of the Commonwealth of Virginia

By: _____
Stephen C. Brich, P.E.
Commissioner of Highways

EXHIBIT 1

DEFINITIONS

All capitalized terms used herein but not otherwise defined herein shall have the respective meanings given to such terms in that certain Comprehensive Agreement Relating to the I-64 Hampton Roads Bridge-Tunnel Expansion Project dated as of [●], by and between the Department and the Design-Builder, as amended. In addition, the following terms used in this Agreement shall have the following meanings:

“Accelerated Payment” is defined in Section 3.04(c) (Maximum Cumulative Compensation Amount Under Comprehensive Agreement).

“Additional Costs” is defined in Section 3.09(a) (Additional Costs; Claims).

“Additional Early Work Funding” is defined in Section 3.12(a) (Early Work Funding).

“Admin Cost Cap” is defined in Section 3.07(a) (Administration Costs).

“Admin Cost Subcap” is defined in Section 3.07(a) (Administration Costs).

“Administration Costs” is defined in Section 3.07(a) (Administration Costs).

“Agreement” means the Project Agreement for Funding and Administration for the I-64 Hampton Roads Bridge-Tunnel Expansion Project, dated as of [●], and all exhibits and schedules thereto, as supplemented or further amended from time to time.

“Applicable Additional Funds” means, collectively, Applicable Award Funds and CTB- Sourced Toll Funds.

“Applicable Award Funds” means funding for the Project from sources not already identified in the “Sources” table in Exhibit 3 (Project Budget), except to the extent the Parties agree the basis or the lawful use of such award is to support or replace funding for any Project cost that is not the Commission’s responsibility (such as the South Island Trestle Bridge Replacement Work or the Deferred/Preventive Maintenance Work) or to fund Additional Costs.

“Applicable Rate” means, with respect to an applicable measurement period, the interest rate that would have been earned by the Commission on the subject funds during such period if they had been invested in the Virginia Local Government Investment Pool.

“Assets” is defined in Section 4.11 (Commission Interest in Project Assets).

“Authorized Commission-Funded Work Order Costs” means costs covered by a Work Order to the Comprehensive Agreement that increases the Contract Price, provided that such Work Order (i) is not the Department’s responsibility under Section 4.03(f) (Work Orders Increasing the Contract Price), and (ii) is authorized by the Department in accordance with, and subject to, the

provisions of Section 4.03 (Work Orders Increasing the Contract Price), or is approved by the Commission in accordance with the provisions of such Sections.

“Authorized Commission-Funded Claims Costs” means those costs covered by a settlement of a claim under the Comprehensive Agreement that increases the Contract Price (and is not otherwise covered by a Work Order); *provided* that such settlement (i) is not the Department’s responsibility under Section 4.03(f)(Work Orders Increasing the Contract Price), and (ii) is approved by the Commission in accordance with Section 4.03(h)(Work Orders Increasing the Contract Price) (and clauses (a), (b) and (c), of Section 4.03), as applicable.

“Base Scope” is defined in Exhibit 2 (Project Scope).

“Bridge Repair Option Work” means the work referred to as Bridge Repair Work in the Comprehensive Agreement and shown in Exhibit 18 (*Bridge Repair Work Quantities and Unit Costs*) thereto.

“Chair” means the chair of the Commission.

“Chief Financial Officer” or **“CFO”** means the chief financial officer of the Commission, if different than the Executive Director.

“Commission” means the Hampton Roads Transportation Accountability Commission.

“Commission-Controlled Moneys” has the meaning given in the fourth recital.

“Commission-Cost Reduction Amount” is defined in Section 4.06(a) (Changes to Comprehensive Agreement that Reduce Contract Price).

“Commission-Funded Administration Costs” means the Commission’s *pro rata* share of the Administration Costs.

“Commission-Funded Budget” means the three billion five hundred fifty-three million four hundred sixty-nine thousand five hundred eighty-one dollars (\$3,553,469,581) shown in Exhibit 3 (Project Budget), which estimates those costs for which the Commission is responsible under this Agreement, and which the Parties anticipate may be reduced in accordance with Section 3.01(e). (For the avoidance of doubt, the figure above assumes three hundred forty-five million dollars (\$345,000,000) in toll-backed financing contemplated by the Commission’s funding plan is received by the Commission; if such amount is not received by the Commission, the inclusion of such amount in the Commission-Funded Budget shall not be deemed or construed to increase the Maximum Commission Financial Commitment.)

“Commission-Funded Design-Build Costs” means the costs scheduled to be paid to the Design-Builder under the Comprehensive Agreement in respect of the Contract Price, excluding the South Island Trestle Bridge Replacement Costs. For the avoidance of doubt, the Commission-Funded Design-Build Costs budgeted in Exhibit 3 (Project Budget), before giving effect to any

adjustments required pursuant to Section 3.10, total three billion two hundred four million five hundred sixty-nine thousand two hundred fifty-one dollars (\$3,204,569,251).

“Commission-Funded ROW Costs” means up to fifteen million dollars (\$15,000,000) of Right-of-Way Costs. For the avoidance of doubt, any such costs in excess of fifteen million dollars (\$15,000,000) shall be treated as Additional Costs.

“Commission-Supported Contingency Reserve” is defined in Section 3.08(b)(ii) (Availability of Contingency Reserves; Tracking).

“Commissioner” means the Commissioner of Highways for the Commonwealth.

“Commonwealth” means the Commonwealth of Virginia.

“Commonwealth Transportation Board” or **“CTB”** means a board of the Commonwealth affiliated with the Department.

“Comprehensive Agreement” means that certain Comprehensive Agreement Relating to the I-64 Hampton Roads Bridge-Tunnel Expansion Project dated as of [●], by and between the Department and the Design-Builder, as amended consistent with its terms and the terms of this Agreement.

“Contract Price” is defined in Section 4.01(b) (General Obligations of the Department).

“Covered Excess Costs” is defined in Section 3.07(b) (Administration Costs).

“CTB-Sourced Toll Funds” means, if the CTB, Treasury Board or other Commonwealth issuer is the agreed issuer of any toll-backed financing under the terms of the Master Tolling Agreement, the proceeds of such financing that, under the terms of the Master Tolling Agreement, are to be applied to pay costs under the Project Budget (which costs, for the avoidance of doubt, exclude costs that are the responsibility of the Department).

“DB Payment Request” is defined in Section 5.02(a)(i) (Payment Requisitions).

“Deferred/Preventive Maintenance Work” means any of the Bridge Repair Option Work performed by the Design-Builder under the Comprehensive Agreement that is performed for purposes other than those necessary to achieve Final Completion in accordance with any Legal Requirement applicable to the Project but otherwise inapplicable to existing structures which make up the I-64 Hampton Roads Bridge-Tunnel facility as it exists as of the date of this Agreement (each such Legal Requirement an **“Increased Capacity Standard”**). Deferred/Preventive Maintenance Work shall include, by way of example and not limitation, Bridge Repair Option Work that is performed for the purpose of (i) rehabilitating or repairing an existing structure that has become deficient or in need of improvement and, absent the Project, such rehabilitation or repair would be the responsibility of the Department through its State of Good Repair or other programs, or (ii) minimizing or reducing future maintenance costs and efforts relating to such structure. A Legal Requirement shall be considered an Increased Capacity Standard if it is a Legal

Requirement that must be complied with by the Design-Builder in constructing or improving a structure necessary to support increased capacity.

“Delay Liquidated Damages” is defined in Section 4.08 (Delay Liquidated Damages and Other Damages and Recoveries).

“Department” means the Virginia Department of Transportation.

“Department Admin Payment Requests” is defined in Section 5.02 (Payment Requisitions).

“Department DB Payment Requests” is defined in Section 5.02(a)(i) (Payment Requisitions).

“Department Fault” is defined in Section 3.01(b)(vii) (General Rights and Obligations of the Commission).

“Department-Funded Administration Costs” means the Department’s *pro rata* share of the Administration Costs.

“Department-Funded Budget” the one hundred eight million five hundred twenty-seven thousand six hundred forty-six dollars (\$108,527,646) shown in Exhibit 3 (Project Budget), which estimates those costs (excluding costs relating to the exercise of any option) for which the Department is responsible under this Agreement in respect of the South Island Trestle Bridge Replacement Work.

“Department-Funded Design-Build Cost” means the costs scheduled to be paid to the Design-Builder under the Comprehensive Agreement in respect of the South Island Trestle Bridge Replacement Costs. For the avoidance of doubt, the Department-Funded Design-Build Costs budgeted in Exhibit 3 (Project Budget) total ninety-five million four hundred twenty-seven thousand nine hundred seventy-six dollars (\$95,427,976).

“Department Highways” has the meaning given in the fifth recital.

“Department Sharing Percentage” means 2.89%, which percentage will be reestablished by mutual agreement of the Parties to reflect the addition or deduction of work under the Comprehensive Agreement.

“Department-Supported Contingency Reserve” is defined in Section 3.08(a) (Availability of Contingency Reserves; Tracking).

“Department’s Senior Representative” means [____].

“Design-Builder” means the Department’s counterparty to the Comprehensive Agreement.

“Early Work” has the meaning given in the Comprehensive Agreement.

“Excess CTB-Sourced Toll Funds” the CTB-Sourced Toll Funds, but only to the extent they exceed the three hundred forty-five million dollars (\$345,000,000).

“Executive Director” means the executive director of the Commission.

“Guidelines” means the Department’s 2017 PPTA Implementation Manual and Guidelines.

“HRTAC Act” means Va. Code §§ 33.2-2600 *et seq.*

“HRTPO” means the Hampton Roads Transportation Planning Organization.

“Hampton Roads Transportation Fund” or **“HRTF”** has the meaning given in the first recital.

“I-564 Direct Connections” is defined in Exhibit 2 (Project Scope).

“Initial DB Commission Payment Amount” is defined in Section 5.02(a)(i) (Payment Requisitions).

“January 22, 2019 Letter” has the meaning given in the seventeenth recital.

“Legal Requirements” has the meaning given in the Comprehensive Agreement.

“Master Tolling Agreement” has the meaning given in the sixteenth recital.

“Maximum Commission Financial Commitment” is defined in Section 3.03(a) (Maximum Commission Financial Commitment).

“Maximum Cumulative Compensation Amount” is defined in Section 3.04(a) (Maximum Cumulative Compensation Amount Under Comprehensive Agreement).

“Memorandum of Agreement” or **“MOA”** has the meaning given in the sixth recital.

“Minimum Commission-Supported Contingency Amount” means, at any given time during the term of this Agreement, the amount calculated in accordance with Section 4.03(d) (Work Orders Increasing Contract Price).

“No Excuses Incentive Payment” is defined in Section 4.07(a) (No Excuses Incentive Payment).

“Offeror” has the meaning given in the twelfth recital.

“Opt-Out Right” is defined in Section 3.11(c) (Funding for the South Island Trestle Bridge Replacement Work).

“Other Damages and Recoveries” is defined in Section 4.08(b) (Delay Liquidated Damages and Other Damages and Recoveries).

“**Party**” or “**Parties**” has the meaning given in the Preamble.

“**PPTA**” means the Public-Private Transportation Act of 1995, as amended (Va. Code §§ 33.2-1800 *et seq.*).

“**Program Coordinator**” is defined in Section 5.01 (Program Coordinators).

“**Project**” has the meaning given in the eighth recital.

“**Project Budget**” means the sum of the (i) Commission-Funded Budget, and (ii) the SMART SCALE Funds or other funds under Section 3.08(b)(ii), and (iii) Department-Funded Budget, reflected in Exhibit 3 (Project Budget), and as may be amended from time to time in accordance with Section 2.01 (General Obligations of the Department).

“**Request for Proposals**” or “**RFP**” means that certain Request for Proposals for the Project issued by the Department dated as of September 27, 2018, as amended by Addendum No. 1 dated November 28, 2018, Addendum No. 2 dated December 14, 2018, Addendum No. 3 dated December 19, 2018, the Statement of Clarification Relating to Final RFP Addendum No. 3 dated January 8, 2019, and Statement of Clarification Relating to Final RFP Addendum No. 3 dated January 10, 2019.

“**Required Work**” is defined in Section 4.09 (Optional Work: I-564 Direct Connections; Bridge Repair Option Work).

“**Right-of-Way Costs**” means amounts paid or payable to a property owner for the acquisition of real property and real property rights (including any and all easements) needed for facets of the Project that are Commission-Funded Design-Build Costs, (including fees and the Department’s reasonable and documented internal and external costs associated with such acquisition).

“**SMART SCALE**” means the statewide prioritization process developed pursuant to Va. Code § 33.2-214.1 for the use of funds with respect to projects funded by the CTB.

“**SMART SCALE Funds**” is defined in Section 3.08(b)(i) (Availability of Contingency Reserves; Tracking).

“**South Island Trestle Bridge Replacement Costs**” is defined in Section 3.11(a) (Funding the South Island Trestle Bridge Replacement Work).

“**South Island Trestle Bridge Replacement Work**” is defined in Exhibit 2 (Project Scope).

“**Successful Offeror**” has the meaning given in the fourteenth recital.

“**Unsuccessful Offeror Proposal Payment**” is defined in Section 3.03(b)(vi) (Maximum Commission Financial Commitment).

EXHIBIT 2

PROJECT SCOPE

1. Base Scope

The base scope (“Base Scope”) of the Project consists of the design and construction of the following improvements on I-64 beginning west of Settlers Landing Road in Hampton (Exit 267) and ending at I-564 in Norfolk (Exit 276) pursuant to the terms of the Comprehensive Agreement:

- (a) across the water, a new bridge-tunnel crossing approximately 3.5 miles long and generally parallel to the existing Hampton Roads Bridge-Tunnel, which new bridge-tunnel will have two new tunnels that provide four lanes of capacity for eastbound traffic and allow four lanes of capacity to be dedicated to westbound traffic (the new bridge-tunnel crossing described above excludes the South Island Trestle Bridge Replacement Work described below);
- (b) the construction of new marine approach bridges to carry westbound I-64 across the water between Norfolk and the south island of the Hampton Roads Bridge-Tunnel, including the demolition (with removal and disposal) of the existing marine approach bridges between Norfolk and such south island (the “South Island Trestle Bridge Replacement Work”); and
- (c) on land, a new third lane to I-64 in each direction, with a roadway section sufficient to accommodate a part-time median shoulder lane.

When completed, the Project corridor will include one or more lanes designated as high-occupancy toll lanes.

2. Scope Options

As part of the RFP, the Department will require that each Offeror shall develop as part of its Proposal a technical solution to provide direct connections (eastbound and westbound) from the new high-occupancy toll lanes to be developed as part of the Base Scope to I-564 in order to promote efficient traffic flow at interfaces with adjoining regional transportation network elements (the “I-564 Direct Connections”).

The I-564 Direct Connections are not part of the Base Scope but may be added to the scope of the Project following execution of the Comprehensive Agreement pursuant to the terms of this Agreement.

In addition, the Bridge Repair Option Work is not in the Base Scope but may be added to the scope of the Project following execution of the Comprehensive Agreement pursuant to the terms of this Agreement.

EXHIBIT 3

PROJECT BUDGET

Sources		Uses		
Source	Amount \$	Expenditure	Project Budget	Commission-Funded Budget**** Plus \$200M SMART SCALE Funds or Other Funds under Sec. 3.08(b)(ii) of PAFA
		Comprehensive Agreement (Fixed Price)	\$ 3,299,997,227	South Island Trestle Bridge Replacement Costs (Department- Funded Budget)
HRTAC (HRTF Debt and Cash)*	\$ 3,208,469,581			
Toll-Backed Bond Proceeds **	345,000,000			
VDOT - Department-Funded Budget	108,527,646			
VDOT - SMART SCALE Funds***	200,000,000			
Total Sources	\$ 3,861,997,227	Comprehensive Agreement (Fixed Price)	\$ 3,299,997,227	\$ 3,204,569,251 \$ 95,427,976
		Owner Costs		
		Administration Costs	122,000,000	118,472,054 3,527,946
		Right-of-Way	15,000,000	15,000,000 -
		No Excuses Incentive	90,000,000	90,000,000 -
		Contingency Reserves (Includes \$4M Stipend)	335,000,000	325,428,277 9,571,723
		Total Owner Costs	562,000,000	548,900,330 13,099,670
		Total Estimated Project Costs	\$ 3,861,997,227	\$ 3,753,469,581 \$ 108,527,646

* Subject to reduction to the extent replaced by Project Savings, Applicable Award Funds, and Excess CTB-Sourced Toll Funds.

** Subject to increase by Excess CTB-Sourced Toll Funds; for clarity, any such increase will not increase the Maximum Commission Financial Commitment.

***Amount pending CTB award June 2019; Intent to award provided by CTB on March 21, 2019; Risk of award assumed by VDOT

****Commission-Funded Budget itself is \$3,553,469,581

EXHIBIT 4

OFFICIAL AUTHORIZING DOCUMENTS

[To be attached]

EXHIBIT 5

ESTIMATED COSTS AND PAYOUT SCHEDULE

Item	Phase	Cost (DB or Owner)	FY19 (July 2018 - June 2019)			FY20 (July 2019 - June 2020)			FY21 (July 2020 - June 2021)			FY22 (July 2021 - June 2022)			FY23 (July 2022 - June 2023)			FY24 (July 2023 - June 2024)			FY25 (July 2024 - June 2025)			FY26 (July 2025 - June 2026)								
			Total Estimated Costs			HRTAC (HRTF Debt and Cash) plus \$345M Toll-Backed Bond Proceeds plus \$200M SMART			HRTAC (HRTF Debt and Cash) plus \$345M Toll-Backed Bond Proceeds plus \$200M SMART			HRTAC (HRTF Debt and Cash) plus \$345M Toll-Backed Bond Proceeds plus \$200M SMART			HRTAC (HRTF Debt and Cash) plus \$345M Toll-Backed Bond Proceeds plus \$200M SMART			HRTAC (HRTF Debt and Cash) plus \$345M Toll-Backed Bond Proceeds plus \$200M SMART			HRTAC (HRTF Debt and Cash) plus \$345M Toll-Backed Bond Proceeds plus \$200M SMART											
			SCALE/VDOT **	VDOT	Total	SCALE/VDOT **	VDOT	Total	SCALE/VDOT **	VDOT	Total	SCALE/VDOT **	VDOT	Total	SCALE/VDOT **	VDOT	Total	SCALE/VDOT **	VDOT	Total	SCALE/VDOT **	VDOT	Total	SCALE/VDOT **	VDOT	Total						
Administration Costs (PE & CEI)	PE	Owner	\$ 118,472,054	\$ 3,527,946	\$ 122,000,000	\$ 5,923,603	\$ 176,397	\$ 6,100,000	\$ 20,140,249	\$ 599,751	\$ 20,740,000	\$ 23,694,411	\$ 705,589	\$ 24,400,000	\$ 23,694,411	\$ 705,589	\$ 24,400,000	\$ 17,770,808	\$ 529,192	\$ 18,300,000	\$ 17,770,808	\$ 529,192	\$ 18,300,000	\$ 7,108,323	\$ 211,677	\$ 7,320,000	\$ 2,369,441	\$ 70,559	\$ 2,440,000			
Right of Way	RW	Owner	15,000,000		15,000,000	15,000,000		15,000,000	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-			
Comprehensive Agreement (Fixed Price) Excluding South Island Trestle Bridge Replacement Work *	CN	DB	3,204,569,251		3,204,569,251	54,756,990		195,243,010		195,243,010	1,076,175,698		1,076,175,698	657,026,122		657,026,122	495,010,086		495,010,086	478,828,395		478,828,395	478,828,395		247,528,950		-	-	-	-		
Comprehensive Agreement (Fixed Price) Construction of South Island Trestle Bridge Replacement Work *	CN	DB	-	95,427,976	95,427,976	-	-	-	-	-	12,000,000		12,000,000	35,000,000		35,000,000	35,000,000		35,000,000		35,000,000	13,427,976		13,427,976	-	-	-	-	-	-		
No Excuses Incentive Contingency Reserves	CN	Owner	90,000,000		90,000,000	325,428,277	9,571,723	335,000,000	-	-	150,000,000	-	150,000,000	29,124,232	1,203,637	30,327,869	32,882,834	3,510,609	36,393,443	32,882,833	3,510,609	36,393,442	35,046,575	1,346,868	36,393,443	90,000,000	36,393,442	-	9,098,361	-	9,098,361	
Total	CN	Owner	\$ 3,753,469,581	\$ 108,527,646	\$ 3,861,997,227	\$ 75,680,593	\$ 176,397	\$ 75,856,990	\$ 365,383,259	\$ 599,751	\$ 365,983,010	\$ 1,128,994,340	\$ 13,905,227	\$ 1,142,903,567	\$ 713,603,367	\$ 39,216,198	\$ 752,819,565	\$ 545,663,727	\$ 39,039,801	\$ 584,703,528	\$ 531,645,778	\$ 15,304,036	\$ 546,949,814	\$ 381,030,715	\$ 211,677	\$ 381,242,392	\$ 381,030,715	\$ 211,677	\$ 381,242,392	\$ 11,467,802	\$ 70,559	\$ 11,538,361
						FY23			FY24			FY25			FY26																	
Item	Phase	Cost (DB or Owner)	Total Estimated Costs			HRTAC (HRTF Debt and Cash) plus \$345M Toll-Backed Bond Proceeds plus \$200M SMART			HRTAC (HRTF Debt and Cash) plus \$345M Toll-Backed Bond Proceeds plus \$200M SMART			HRTAC (HRTF Debt and Cash) plus \$345M Toll-Backed Bond Proceeds plus \$200M SMART			HRTAC (HRTF Debt and Cash) plus \$345M Toll-Backed Bond Proceeds plus \$200M SMART			HRTAC (HRTF Debt and Cash) plus \$345M Toll-Backed Bond Proceeds plus \$200M SMART			HRTAC (HRTF Debt and Cash) plus \$345M Toll-Backed Bond Proceeds plus \$200M SMART											
			SCALE/VDOT **	VDOT	Total	SCALE/VDOT **	VDOT	Total	SCALE/VDOT **	VDOT	Total	SCALE/VDOT **	VDOT	Total	SCALE/VDOT **	VDOT	Total	SCALE/VDOT **	VDOT	Total	SCALE/VDOT **	VDOT	Total	SCALE/VDOT **	VDOT	Total						
			Administration Costs (PE & CEI)	PE	Owner	\$ 17,770,808	\$ 529,192	\$ 18,300,000	\$ 17,770,808	\$ 529,192	\$ 18,300,000	\$ 7,108,323	\$ 211,677	\$ 7,320,000	\$ 2,369,441	\$ 70,559	\$ 2,440,000	-	-	-	-	-	-	-	-	-	-	-	-	-		
Right of Way	RW	Owner	-	-	-	495,010,086		495,010,086	478,828,395		478,828,395	247,528,950		247,528,950	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-			
Comprehensive Agreement (Fixed Price) Excluding South Island Trestle Bridge Replacement Work *	CN	DB	-	-	-	35,000,000		35,000,000	13,427,976		13,427,976	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-				
Comprehensive Agreement (Fixed Price) Construction of South Island Trestle Bridge Replacement Work *	CN	DB	-	-	-	35,000,000		35,000,000	13,427,976		13,427,976	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-				
No Excuses Incentive Contingency Reserves	CN	Owner	-	-	-	32,882,833	3,510,609	36,393,442	35,046,575	1,346,868	36,393,443	90,000,000		90,000,000	36,393,442	9,098,361	-	-	9,098,361		-	-	-	-	-	-	-	-	-			
Total	CN	Owner	\$ 545,663,727	\$ 39,039,801	\$ 584,703,528	\$ 531,645,778	\$ 15,304,036	\$ 546,949,814	\$ 381,030,715	\$ 211,677	\$ 381,242,392	\$ 11,467,802	\$ 70,559	\$ 11,538,361	\$ 531,645,778	\$ 15,304,036	\$ 546,949,814	\$ 381,030,715	\$ 211,677	\$ 381,242,392	\$ 11,467,802	\$ 70,559	\$ 11,538,361	\$ 531,645,778	\$ 15,304,036	\$ 546,949,814	\$ 381,030,715	\$ 211,677	\$ 381,242,392			

* Combined line items equal the Comprehensive Agreement (Fixed Price) Value of \$3,299,997,227.

** HRTAC (HRTF Debt and Cash) may be supplanted by Applicable Award Funds and Excess CTB-Sourced Toll Funds.

Bridge Repair Option Work (option) CN \$ 76,755,591.00

I-564 Direct Connections (option) CN \$ 121,323,786.00

EXHIBIT 6

REPORTS TO BE PROVIDED BY THE DEPARTMENT

1. Monthly Project Expenditure Report

The monthly project expenditure report will list, by category of expense (*e.g.*, engineering, right-of-way acquisition, utility relocations, construction): (i) information regarding expenditures to date against the Project Budget, both monthly and for the life of the project, and a statement of the percent completed and (ii) such other information as the Department customarily provides with monthly expenditure reports

2. Monthly Project Report

The monthly project report will include: (i) an overview of progress on major project tasks; (b) information regarding the Project Budget (such as, the baseline planned forecast, any approved changes thereto, the monthly expenditures, the cumulative expenditures, and the cumulative forecasted expenditures); (c) future key tasks; and (d) significant issues.

EXHIBIT 7

EXAMPLES OF ADMINISTRATION COSTS

1. preliminary engineering costs (to the extent necessary following selection of a Successful Offeror)
2. construction engineering and inspection costs

EXHIBIT 8

FORM OF COMPREHENSIVE AGREEMENT

[To be attached]

EXHIBIT 9

UNIT PRICE WORK AND COMMODITY ADJUSTMENT ITEMS

Section 1. Unit Price Work

- A. The installation of sound barrier walls as further described in Section 5.3.9 (*Noise Mitigation*) of Exhibit 2 (*Technical Requirements*) to the Comprehensive Agreement
- B. The Bridge Repair Option Work; *provided*, that if the Bridge Repair Option Work is added to the scope of work to be performed by the Design-Builder, the cost of such work will be paid in accordance with Section 4.09 (*Optional Work: I-564 Direct Connections; Bridge Repair Option Work*) of this Agreement

Section 2. Commodity Adjustment Items

- A. Asphalt, as further described in Exhibit 9 (*Price Adjustment for Asphalt*) to the Comprehensive Agreement
- B. Fuel, as further described in Exhibit 10 (*Price Adjustment for Fuel*) to the Comprehensive Agreement
- C. Steel, as further described in Exhibit 11 (*Price Adjustment for Steel*) to the Comprehensive Agreement

EXHIBIT 10

FORM OF PAYMENT REQUISITION – DESIGN-BUILD

I-64 Hampton Roads Bridge Tunnel Expansion Project

Commission Project Number: _____

Draw Request Number: _____

Date: _____, 20____

Hampton Roads Transportation Accountability Commission

723 Woodlake Drive

Chesapeake, VA 23320

Attention _____, Program Coordinator:

This requisition is submitted in connection with the Project Agreement for Funding and Administration for the I-64 Hampton Roads Bridge Tunnel Expansion Project dated _____, 20____ (the "Agreement") between the Hampton Roads Transportation Accountability Commission (the "Commission") and the Virginia Department of Transportation (the "Department"). The Department hereby requests \$ _____ of Commission funds, as the Initial DB Commission Payment Amount, payable not later than [____], 20[____] in accordance with Section 5.02 of the Agreement.

VIRGINIA DEPARTMENT OF TRANSPORTATION

By: _____

Name: _____

Title: _____

Recommended For Payment

By: _____

Name: _____

Title: HRTAC Program Coordinator

DETAILED PAYGO REQUEST

Draw Request Number: _____

Request Date: _____

HRTAC Project Number: _____

Project Title: _____

Cost Category	Column B- HRTAC Approved Project Costs	Column C- Total PayGo Requests Previously Received	Column D- PayGo Requisition Amount this Period	Column E - Remaining PAYGO Project Budget (Calculation)
Project Starting Balance	\$ -			\$ -
Design Work	\$ -	\$ -	\$ -	\$ -
Engineering	-	-	-	\$ -
Environmental Work	-	-	-	\$ -
Right-of-Way Acquisition	-	-	-	\$ -
Construction	-	-	-	\$ -
Contract Administration	-	-	-	\$ -
Testing Services	-	-	-	\$ -
Inspection Services	-	-	-	\$ -
Capital Asset Acquisitions	-	-	-	\$ -
Other (please explain)	-	-	-	\$ -
TOTALS	\$ -	\$ -	\$ -	\$ -

LISTING OF ATTACHED INVOICES

Column A - Vendor/Contractor Name	Column B- Item Number	Column C - Invoice Number	Column D - Cost Category	Column E - Amount
	1			\$ -
	2			-
	3			-
	4			-
	5			-
	6			-
	7			-
	8			-
	9			-
	10			-
	11			-
	12			-

Requisition Amount		\$	-
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Instructions

1. Column B-Please list approved PayGo Project Cost per category.
2. Column C-Please list Total PayGo Amounts per Category Previously Reimbursed by HRTAC
3. Column D- Please list invoice amounts summarized by Category from the Listing of Attached Invoices
4. Column E - Is a calculation of the Remaining PAYGO Budget per Category

Instructions-Listing of Attached Invoices: (please list each invoice separately)

1. Column A- Please list the name as it appears on the Invoice
2. Column B- Please manually number the invoices attached with the corresponding Item number in this schedule.
3. Column C- Please list the invoice number as it appears on the Invoice
4. Column D- Please list the appropriate Cost Category based on the Project Category breakout above
5. Column E- Please enter the dollar amount listed on the invoice.
6. The calculated Requisition Amount should equal the total in Column E in the Schedule above.

EXHIBIT 11

FORM OF PAYMENT CERTIFICATION – DESIGN-BUILD

I-64 Hampton Roads Bridge Tunnel Expansion Project

Commission Project Number: _____

Draw Request Number: _____

Date: _____, 20____

Hampton Roads Transportation Accountability Commission
723 Woodlake Drive
Chesapeake, VA 23320

Attention _____, Program Coordinator:

This certification is submitted in connection with the Project Agreement for Funding and Administration for the I-64 Hampton Roads Bridge Tunnel Expansion Project dated _____, 20____ (the "Agreement") between the Hampton Roads Transportation Accountability Commission (the "Commission") and the Virginia Department of Transportation (the "Department"). Capitalized terms used in this certification and not otherwise defined herein have the meanings set forth in the Agreement.

On [●], 20[●], the Commission paid \$[●] as the as the Initial Commission Payment Amount relating to invoice number [●], in accordance with Section 5.02 of the Agreement. After a detailed review, the Department has determined that \$[●] was properly payable by the Commission under the terms of the Agreement in respect of invoice number [●], and forwarded such payment to the Design-Builder under the terms of the Comprehensive Agreement. Accordingly, \$[●] shall be credited to the Commission for the purposes of the next-occurring Department DB Payment Request.

The undersigned certifies (i) the amounts forwarded by the Department to the Design-Builder relating to invoice number [●] were applied solely and exclusively for the payment or the reimbursement of the Department's costs of the project services described and set forth in Exhibits 2 and 3 of the Agreement, (ii) the Department is responsible for payment to vendors/contractors, (iii) the Department is not in breach or default with respect to any of its obligations under the Agreement, (iv) the representations and warranties made by the Department in the Agreement are true and correct as of the date of this certification, and (v) to the knowledge of the Department, no condition exists under the Agreement that would allow the Commission to withhold the amounts forwarded. Also included are copies of each invoice relating to the items which this certification covers.

VIRGINIA DEPARTMENT OF TRANSPORTATION

By: _____

Name: _____

Title: _____

EXHIBIT 12

FORM OF PAYMENT REQUISITION – ADMINISTRATION COSTS

I-64 Hampton Roads Bridge Tunnel Expansion Project

Commission Project Number: _____

Draw Request Number: _____

Date: _____, 20____

Hampton Roads Transportation Accountability Commission

723 Woodlake Drive

Chesapeake, VA 23320

Attention _____, Program Coordinator:

This requisition is submitted in connection with the Project Agreement for Funding and Administration for the I-64 Hampton Roads Bridge Tunnel Expansion Project dated _____, 20____ (the "Agreement") between the Hampton Roads Transportation Accountability Commission (the "Commission") and the Virginia Department of Transportation (the "Department"). The Department hereby requests \$ _____ of Commission funds, to pay the costs of the Administration Costs in accordance with the Agreement. Also included are copies of each invoice relating to the items for which this requisition is requested.

The undersigned certifies (i) the amounts included within this requisition will be applied solely and exclusively for the payment or the reimbursement of the Department's costs of Administration Costs that were incurred in the performance of work for the Project as authorized by the Agreement, (ii) the Department is responsible for payment to vendors/contractors, (iii) the Department is not in breach or default with respect to any of its obligations under the Agreement, (iv) the representations and warranties made by the Department in the Agreement are true and correct as of the date of this requisition, and (v) to the knowledge of the Department, no condition exists under the Agreement that would allow the Commission to withhold the requested advance.

VIRGINIA DEPARTMENT OF TRANSPORTATION

By: _____

Name: _____

Title: _____

Recommended For Payment

By: _____

Name: _____

Title: HRTAC Program Coordinator

DETAILED PAYGO REQUEST

Draw Request Number: _____

Request Date: _____

HRTAC Project Number: _____

Project Title: _____

Cost Category	Column B- HRTAC Approved Project Costs	Column C- Total PayGo Requests Previously Received	Column D- PayGo Requisition Amount this Period	Column E - Remaining PAYGO Project Budget (Calculation)
Project Starting Balance	\$ -			\$ -
Design Work	\$ -	\$ -	\$ -	\$ -
Engineering	-	-	-	\$ -
Environmental Work	-	-	-	\$ -
Right-of-Way Acquisition	-	-	-	\$ -
Construction	-	-	-	\$ -
Contract Administration	-	-	-	\$ -
Testing Services	-	-	-	\$ -
Inspection Services	-	-	-	\$ -
Capital Asset Acquisitions	-	-	-	\$ -
Other (please explain)	-	-	-	\$ -
TOTALS	\$ -	\$ -	\$ -	\$ -

LISTING OF ATTACHED INVOICES

Column A - Vendor/Contractor Name	Column B- Item Number	Column C - Invoice Number	Column D - Cost Category	Column E - Amount
	1			\$ -
	2			-
	3			-
	4			-
	5			-
	6			-
	7			-
	8			-
	9			-
	10			-
	11			-
	12			-

Requisition Amount		\$	-
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Instructions

1. Column B-Please list approved PayGo Project Cost per category.
2. Column C-Please list Total PayGo Amounts per Category Previously Reimbursed by HRTAC
3. Column D- Please list invoice amounts summarized by Category from the Listing of Attached Invoices
4. Column E - Is a calculation of the Remaining PAYGO Budget per Category

Instructions-Listing of Attached Invoices: (please list each invoice separately)

1. Column A- Please list the name as it appears on the Invoice
2. Column B- Please manually number the invoices attached with the corresponding Item number in this schedule.
3. Column C- Please list the invoice number as it appears on the Invoice
4. Column D- Please list the appropriate Cost Category based on the Project Category breakout above
5. Column E- Please enter the dollar amount listed on the invoice.
6. The calculated Requisition Amount should equal the total in Column E in the Schedule above.

EXHIBIT 13

LIMITATION ON ACTIONS UNDER COMPREHENSIVE AGREEMENT

Section 1. Actions Requiring Prior Written Consent of Commission

- A. The Department's approval of the Design-Builder's acquisition of Additional Right-of-Way pursuant to Section 2.1.6 (*General*) of Exhibit 1 (*General Conditions of Contract*) to the Comprehensive Agreement

Section 2. Actions Requiring Consultation with the Commission

- A. The Department's waiver of any conditions to the issuance of NTP pursuant to Section 5.1.2 (Notice to Proceed) of the Comprehensive Agreement
- B. With respect to Section 5.1.3.2 (Delays to Notice to Proceed) of the Comprehensive Agreement, the Department's: (i) determination not to issue NTP on or before the Extended NTP Delay Date; (ii) agreement on a revised Contract Price, Substantial Completion Deadline, or Final Completion Deadline; or (iii) delivery of an Extended NTP Delay Termination notice pursuant to subdivision (c) thereof
- C. The Department's waiver of any conditions to Substantial Completion pursuant to Section 6.7.7 (Substantial Completion) of the Comprehensive Agreement
- D. The Department's exercise of discretion in relation to minor deliverables and retained amounts pursuant to Section 6.8.5 (Final Completion) of the Comprehensive Agreement
- E. The Department's exercise of discretion to make partial payments pursuant to Section 8.8 (Termination for Convenience) of the Comprehensive Agreement
- F. The Department's (i) determination that remaining Guarantor(s) can sufficiently guarantee the Design-Builder's obligations or (ii) acceptance of a replacement Guarantee with a reputable counterparty, pursuant to Section 11.2.1.11 (Department's Right to Perform and Terminate for Cause) of Exhibit 1 (General Conditions of Contract) to the Comprehensive Agreement
- G. With respect to Exhibit 5 (Early Work Scope Document) to the Comprehensive Agreement, the Department's exercise of discretion pursuant to (i) the second paragraph of Section 2 and (iii) subsection 3(C) thereof
- H. With respect to Exhibit 9 (Price Adjustment for Asphalt), the Department's exercise of discretion pursuant to the last sentence of the second paragraph thereof
- I. With respect to Exhibit 17 (Dispute Resolution Board), the Department's appointment of members of the DRB or execution of the DRB Agreement pursuant to Section 2.2 thereof

- J. With respect to any Guarantee, the Department's discretion pursuant to Section 1.3.15 thereof
- K. With respect to any Guarantee, the Department's exercise of rights pursuant to Section 1.4.3

Section 3. Actions Department is to Take or Refrain from Taking Upon Request of Commission

- A. The Department's enforcement of the Commission's right to access the Design-Builder's books and records pursuant to Section 7.5 (*Record Maintenance and Retention of Records*) of the Comprehensive Agreement

EXHIBIT 14

TAX COVENANTS FOR BOND FUNDED PROJECTS

1. (A) the Department shall not permit the “Proceeds” of any “Commission Bonds” or any “Financed Property” to be used in any manner that would result in either: (1) 5% or more of such proceeds being considered as having been used in any trade or business carried on by any person other than a governmental unit as provided in Section 141(b) of the “Code;” (2) 5% or more of such Proceeds being used with respect to any “output facility” (other than a facility for the furnishing of water) within the meaning of Section 141(b)(4) of the Code; (3) 5% or more of such Proceeds being considered as having been used directly or indirectly to make or finance loans to any person other than a governmental unit, as provided in Section 141(c) of the Code; or (4) more than an aggregate of \$15,000,000 of Proceeds of any single Commission Bond issue being considered as having been used in any trade or business, any output facility or to make or finance loans as described in (1), (2) or (3) above; *provided, however*, that if the Commission and the Department receive an opinion of nationally recognized bond counsel concluding that such use or action will not affect the exclusion of interest on the Commission Bonds from gross income of the holders thereof for federal tax purposes under existing law, the Department need not comply with such restrictions.

(B) Notwithstanding the foregoing, the Department and THE Commission agree that the provisions herein shall not apply to Proceeds of Commission Bonds derived from “qualified bonds” (as defined in Section 141(e) of the Code (or any successor provisions thereto or regulations thereunder)) THE Commission may from time to time issue. In the event any such “qualified bonds” are issued by THE Commission, the Department agrees that it will not permit Proceeds of Commission Bond derived from such “qualified bonds” to be used in a manner that fails to comply with the provisions of Section 141(e) and 142(a) of the Code (or any successor provisions thereto or regulations thereunder). The provisions of this subparagraph (B) shall not negate any provision in the Agreement or other agreement between THE Commission and the Department that requires mutual consent of the parties or Commission approval of a concession arrangement in respect of the Project.

2. the Department agrees not to requisition or spend the proceeds of any THE Commission Bond for any cost of the Project not constituting a “Capital Expenditure.”

3. Except as may be described in writing to the Commission, the Department neither has on the date of this Agreement nor expects to have after this date any funds that are restricted, segregated, legally required or otherwise intended to be used, directly or indirectly, for the purposes for which the Department is receiving or may receive Proceeds of Commission Bonds.

4. The Department acknowledges that it may have to provide detailed information about the investment of the amount of any requisition unless (i) payments are remitted directly by the Commission to the contractors/vendors, or (ii) the Department remits payment to the contractors/vendors within five banking days after the date on which the Commission advances the amount of the requisition. The Commission may request the detailed information in order to compute the rebate liability to the U.S. Treasury on the Commission’s bonds or other debt financing pursuant to Section 148 of the Code. In addition, the Department shall provide the

Commission with any further information reasonably requested by the Commission from time to time concerning the matters described in this Exhibit 14.

5. The following terms have the meanings assigned to them below whenever they are used in this Exhibit 14.

“Capital Expenditure” means any cost of a type that is properly chargeable to capital account (or would be so chargeable with (or but for) a proper election or the application of the definition of “placed in service” under Treas. Reg. § 1.150-2(c)) under general federal income tax principles, determined at the time the expenditure is paid.

“Code” means the Internal Revenue Code of 1986, as amended.

“Financed Property” means any property financed in whole or in part by any allocation of Commission Bond Proceeds.

“Commission Bond” means any Commission bond or other debt instrument that is a “tax-exempt bond” or a “tax-advantaged bond” (as defined in Treasury Regulations Section 1.150-1(a)).

“Proceeds” means the sale proceeds of any Commission Bond, together with the investment earnings on such proceeds, to the extent allocated to the Project.

Agenda Item 5B
Action Item

To: **Chair Hipple and the other members of HRTAC**

From: **Kevin B. Page, Executive Director**

Date: **March 28, 2019**

Re: **Resolution to Preserve Flexibility to Reimburse Expenditures on I-64 Hampton Roads Bridge Tunnel Expansion Project, with Proceeds of a Bond Issue**

Recommendation:

The Commission is asked to adopt a “Resolution of Official Intent for Allocation of Bond Proceeds to Reimburse HRTAC Expenditures on I-64 Hampton Roads Bridge Tunnel Expansion Project,” which is attached hereto as Attachment 5B, in order to preserve the option to reimburse itself for the costs of such project from proceeds of a future bond issue.

Background:

The Commission may adopt a written “official intent” to preserve its flexibility under bond regulations to advance funds for current project expenses and later reimburse those advances out of proceeds of a future tax-exempt bond issue. An “official intent” resolution must set forth a general description of the applicable projects and the maximum principal amount of bonds expected to be applied to reimburse project costs. By adopting such resolution at this time, the Commission will preserve the option to allocate bond proceeds to expenditures made on the project, if they were spent no earlier than 60 days before the date of the resolution, and if the Bonds are issued no later than 3 years after the first expenditure being reimbursed. Adopting the “official intent” resolution does not obligate the Commission to use bonds instead of pay-go for the project.

Fiscal Impact:

There is no immediate fiscal impact in relation to this Action Item.

Suggested Motion:

Motion is to adopt Resolution 2019-02, the “Resolution of Official Intent for Allocation of Bond Proceeds to Reimburse HRTAC Expenditures on the I-64 Hampton Roads Bridge Tunnel Expansion Project.”





HRTAC RESOLUTION 2019-02

RESOLUTION OF OFFICIAL INTENT FOR ALLOCATION OF BOND PROCEEDS TO REIMBURSE HRTAC EXPENDITURES ON I-64 HAMPTON ROADS BRIDGE-TUNNEL EXPANSION PROJECT

WHEREAS, in accordance with its statutory powers and purposes, the Hampton Roads Transportation Accountability Commission (the “Commission”) has resolved and agreed to pay portions of the costs incurred by the Virginia Department of Transportation (“VDOT”) in the acquisition, construction and completion of the I-64 Hampton Roads Bridge-Tunnel Expansion Project, as generally described in the Project Agreement for Funding and Administration between the Commission and the Virginia Department of Transportation approved by the Commission on the date hereof and as set forth in further detail on Exhibit A attached hereto (collectively, the “Project”);

WHEREAS, plans for the Project have proceeded and it is expected that the Commission will cause funds under its control to be advanced to pay expenditures related to the Project (each, an “Expenditure” and, collectively, the “Expenditures”) prior to such time as the Commission may be prepared to issue one or more series of tax-exempt bonds (“Bonds”) to finance transportation projects within Planning District 23 generally;

WHEREAS, the Commission intends for a portion of the proceeds of a future issue of Bonds to be available to reimburse the Commission for the payment of Expenditures; and

WHEREAS, Section 1.150-2 of the Treasury Regulations, promulgated under the Internal Revenue Code of 1986, as amended (the “Code”), provides that to allocate proceeds of Bonds to reimbursement of Expenditures paid in advance of an issue of Bonds, the Commission must declare its official intent to allocate proceeds of Bonds to reimbursement of Expenditures;

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE HAMPTON ROADS TRANSPORTATION ACCOUNTABILITY COMMISSION:

I. The Commission intends to issue Bonds in a future period and allocate a portion of the proceeds thereof, in a maximum principal amount of \$3,562,000,000, to the reimbursement of Expenditures.

II. Each Expenditure to be reimbursed with Bond proceeds was or shall be either (a) of a type properly chargeable to a capital account under general federal income tax principles (determined in each case as of the date of such Expenditure), or (b) a cost of issuance with respect to the Bonds.

III. The Commission intends to make a reimbursement allocation, which is a written allocation by the Commission that evidences the Commission’s use of proceeds of the Bonds to reimburse Expenditures, no later than 18 months after the later of (a) the date on which the first



Expenditure for the Project was paid, or (b) the date the Project is placed in service or abandoned, but in no event more than three (3) years after the date on which the first Expenditure was paid with respect to the Project.

IV. The Commission intends that the adoption of this resolution shall confirm the "official intent" of the Commission within the meaning of Treasury Regulations Section 1.150-2 to reimburse Expenditures paid not earlier than sixty (60) days prior to the date of adoption of this resolution and not later than the date of the final allocation described in paragraph 3 above.

V. This resolution shall take effect immediately upon its adoption.

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The undersigned hereby certify that this is a true and correct copy of a resolution duly adopted at a meeting of the Hampton Roads Transportation Accountability Commission held on March 28, 2019.

Chair, Hampton Roads Transportation
Accountability Commission

Vice Chair, Hampton Roads Transportation
Accountability Commission



EXHIBIT A

Project Description

1. **Base Scope**

The base scope (“Base Scope”) of the Project consists of the design and construction of the following improvements on I-64, beginning west of Settlers Landing Road in Hampton (Exit 267) and ending at I-564 in Norfolk (Exit 276):

- A. across the water, a new bridge-tunnel crossing approximately 3.5 miles long and generally parallel to the existing Hampton Roads Bridge-Tunnel, which new bridge-tunnel will have one or two new tunnels that provide four lanes of capacity for eastbound traffic and allow four lanes of capacity to be dedicated to westbound traffic (the new bridge-tunnel crossing described above excludes the South Island Trestle Bridge Replacement Work described below);
1. the construction of new marine approach bridges to carry westbound I-64 across the water between Norfolk and the south island of the Hampton Roads Bridge-Tunnel, including the demolition (with removal and disposal) of the existing marine approach bridges between Norfolk and such south island (the “South Island Trestle Bridge Replacement Work”); and
2. on land, a new third lane to I-64 in each direction, with a roadway section sufficient to accommodate a part-time median shoulder lane.

When completed, the Project corridor will include one or more lanes designated as high-occupancy toll lanes.

2. **Additional Scope**

A potential additional scope of the Project consists of a technical solution to provide direct connections (eastbound and westbound) from the new high-occupancy toll lanes to be developed as part of the Base Scope to I-564 in order to promote efficient traffic flow at interfaces with adjoining regional transportation network elements (the “I-564 Direct Connections”).