



Maryland Transportation Authority

BOARD MEETING

TUESDAY, JUNE 8, 2021

**** OPEN MEETING VIA LIVESTREAMING ****



MARYLAND TRANSPORTATION AUTHORITY BOARD MEETING

JUNE 8, 2021 8:00 AM

This meeting will be livestreamed on the [MDTA Board Meeting Page](#)

NOTE: This is an Open Meeting being conducted via livestreaming. The public is welcomed to watch the meeting at the link listed above. *If you wish to comment on an agenda item please email your name, affiliation, and agenda item to nhenson@mdta.state.md.us no later than 9:00 am on Monday, June 7, 2021. You **MUST** pre-register in order to comment.* Once you have pre-registered you will receive an email with all pertinent information.

AGENDA

OPEN SESSION – 8:00 AM

Call Meeting to Order

Vote to go into Closed Session

- | | | |
|----------------------------|---------------------|---------|
| 1. To Receive Legal Advice | Kim Millender, Esq. | 30 min. |
|----------------------------|---------------------|---------|

Vote to return to Open Session

- | | | |
|--|---------------------|---------|
| 2. <u>Approval</u> – <u>Public-Private Partnership (P3) Resolution No. 21-02</u> – Amending Resolution No. 18-04 designating the Public-Private Partnership (P3) Program a Transportation Facilities Project | Kim Millender, Esq. | 5 min. |
| 3. <u>Contingent Approval</u> – <u>Lease Agreement</u> – Creating a Leasehold Interest between MDTA and MDOT SHA for Phase 1 South: American Legion Bridge I-270 to I-370 for the Public-Private Partnership (P3) Program Subject to Final Approval of the P3 Agreement by the Board of Public Works | John Wedemeyer | 10 min. |
| 4. <u>Contingent Approval</u> – <u>Public-Private Partnership (P3) Developer Selection</u> – Discuss the selection of the Phase 1: American Legion Bridge I-270 to I-70 Developer for the Public-Private Partnership (P3) Program Subject to Final Approval of the Board of Public Works | Jeff Folden | 40 min. |
| 5. <u>Contingent Approval</u> – <u>Public-Private Partnership (P3) Agreement</u> – Approve Phase 1: American Legion Bridge I-270 to I-70 Public-Private Partnership (P3) Agreement Subject to Final Approval of the Maryland Board of Public Works | Deb Sharpless | 60 min. |
| 6. <u>Approval</u> – <u>Legislative Report</u> – Report to the General Assembly – Solicitation for Phase 1: American Legion Bridge I-270 to I-70 Developer for the Public-Private Partnership (P3) Program | Jeff Folden | 10 min. |

Vote to Adjourn Meeting

TAB 1

CLOSED SESSION

VERBAL

TAB 2



Maryland Transportation Authority

Larry Hogan, Governor
Boyd K. Rutherford, Lt. Governor
Gregory Slater, Chairman

Board Members:

| | |
|-----------------------|---------------------------|
| Dontae Carroll | Mario J. Gangemi, P.E. |
| William H. Cox, Jr. | Cynthia D. Penny-Ardinger |
| William C. Ensor, III | Jeffrey S. Rosen |
| W. Lee Gaines, Jr. | John F. von Paris |

James F. Ports, Jr., Executive Director

MEMORANDUM

TO: MDTA Board
FROM: Ms. Kimberly A. Millender, Principal Counsel
SUBJECT: MDTA Board Resolution No. 21-02
DATE: June 8, 2021

PURPOSE OF MEMORANDUM

To request approval from the MDTA Board for draft MDTA Board Resolution No. 21-02, which will amend existing MDTA Board Resolution No. 18-04 regarding the designation of the I-495 and I-270 Private-Public Partnership (P3) Program as a “transportation facilities project.”

SUMMARY

In November of 2018, the MDTA Board adopted Resolution No. 18-04 to designate and classify the P3 Program as a “transportation facilities project” under Title 4 of the Transportation Article. The Resolution specified that the classification was contingent upon the successful execution of a P3 Agreement and the acquisition of the necessary leasehold interest. As the P3 Program has developed through the solicitation process, the decision was made to fulfill the Program in phases resulting in the opportunity for multiple agreements to be executed and the acquisition of the leasehold interest in stages. Resolution No. 21-02 amends the prior MDTA Board Resolution to acknowledge this change in the Program.

RECOMMENDATION

Approve the resolution.

ATTACHMENTS

- MDTA Board Resolution No. 18-04
- MDTA Board Draft Resolution No. 21-02

MARYLAND TRANSPORTATION AUTHORITY
RESOLUTION No. 18-04

**A RESOLUTION TO CLASSIFY THE I-495/I-270 PROJECT AS
A TRANSPORTATION FACILITIES PROJECT UNDER CERTAIN CONDITIONS
AND TO APPROVE THE DRAFT PUBLIC-PRIVATE PARTNERSHIP PRE-
SOLICITATION REPORT**

WHEREAS, the Maryland Transportation Authority, an agency of the State of Maryland (the "MDTA") is authorized and empowered under Section 4-101 through 4-405 of the Transportation Article of the Annotated Code of Maryland (the "Act") to finance, construct, operate, maintain, and repair "transportation facilities projects" (as defined in the Act) to issue revenue bonds and to perform any actions necessary or convenient to carry out the powers granted in the Act; and

WHEREAS, the Maryland Department of Transportation ("MDOT") through The Secretary's Office and the Maryland State Highway Administration has partnered to develop a proposed Public-Private Partnership (a "P3") for the construction of new price managed lanes for Interstate 495 and Interstate 270 to provide additional capacity and congestion relief (the "Project"); and

WHEREAS, it is anticipated that in accordance with COMAR 11.07.06.02 MDTA will partner with MDOT in the P3 for the Project as a Reporting Agency using its resources and tolling authority, which will require MDTA to assume a leasehold interest in the Project, issue revenue bonds, and declare the Project as a Transportation Facilities Project under the Act; and

WHEREAS, as a partner with MDOT in the P3, MDTA desires to provide concurrence and approval of the draft P3 Pre-Solicitation Report pending finalization by the Secretary in accordance with COMAR 11.07.06.07.

NOW, THEREFORE, BE IT RESOLVED BY THE MARYLAND TRANSPORTATION AUTHORITY, as follows:

Section 1. The MDTA hereby confirms its intent to classify the Project as a transportation facilities project pursuant to the Act conditioned upon the successful execution of a P3 Agreement and acquisition of the necessary leasehold interest in the property by the MDTA.

Section 2. The MDTA hereby confirms its intent to provide resources and assistance, including the issuance of revenue bonds, for the Project and to serve as partner for the P3.

Section 3. The MDTA hereby expresses its approval of the draft P3 Pre-Solicitation Report, which will be submitted to the Comptroller, State Treasurer, Senate Budget and Taxation Committee, House Ways and Means Committee, House Appropriations Committee, and Department of Legislative Services for review in accordance with the State Finance and Procurement Article, Section 10A-201(a) of the Annotated Code of Maryland. After expiration of the required review period and consideration of all comments, the P3 Pre-Solicitation Report will be submitted to the Maryland Board of Public Works for approval.

Section 4. This Resolution shall be operative, effective, and valid upon its passage by the MDTA.

Dated: 11/29/18

WITNESS:

MARYLAND TRANSPORTATION AUTHORITY



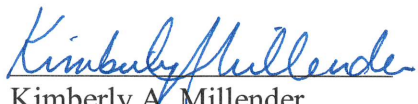
Kevin C. Reigut
Executive Director



Pete K. Rahn
Chairman

JAMES F. PORTS, JR. ACTING CHAIRMAN
FOR PETE RAHN

Approved as to form and
legal sufficiency:



Kimberly A. Millender
Assistant Attorney General

**MARYLAND TRANSPORTATION AUTHORITY
RESOLUTION No. 21-02**

**AN AMENDED RESOLUTION TO CLASSIFY THE TRAFFIC
RELIEF PROGRAM AS A TRANSPORTATION FACILITIES PROJECT
UNDER CERTAIN CONDITIONS**

WHEREAS, the Maryland Transportation Authority, an agency of the State of Maryland (the “MDTA”) is authorized and empowered under Section 4-401 through 4-405 of the Transportation Article of the Annotated Code of Maryland (the “Act”) to finance, construct, operate, maintain, and repair “transportation facilities projects” (as defined in the Act) to issue revenue bonds and to perform any actions necessary or convenient to carry out the powers granted in the Act; and

WHEREAS, the Maryland Department of Transportation (“MDOT”) through The Secretary’s Office and the Maryland State Highway Administration has partnered to develop a Public-Private Partnership (a “P3”) for the construction of new price managed lanes for the I-495 and I-270 P3 Program to provide additional capacity and congestion relief (“the Program”); and

WHEREAS, in accordance with COMAR 11.07.06.02, MDTA has partnered with MDOT for the Program as a Reporting Agency using its resources and tolling authority, which requires MDTA to assume a leasehold interest in the Program, issue revenue bonds, and declare the Program as a Transportation Facilities Project under the Act; and

WHEREAS, in furtherance of the Program goals, MDTA initially classified the Program as a Transportation Facilities Project under MDTA Board Resolution No. 18-04 and approved the draft P3 Pre-Solicitation Report; and

WHEREAS, MDTA now desires to amend the designation of the Program as a Transportation Facilities Project in accordance with the Act.

**NOW, THEREFORE, BE IT RESOLVED BY THE MARYLAND
TRANSPORTATION AUTHORITY**, as follows:

Section 1. The MDTA hereby reaffirms its intent to classify the Program as a Transportation Facilities Project pursuant to the Act conditioned upon the successful execution of one or more agreements and acquisition of the necessary leasehold interests in stages in the Program by the MDTA.

Section 2. The MDTA hereby reaffirms its intent to provide resources and assistance, including the issuance of revenue bonds, for the Program and to serve as a partner for the P3.

Section 3. This Resolution shall be operative, effective, and valid upon its passage by the MDTA Board with the concurrence of the Chairman and shall amend portions of MDTA Board Resolution No. 18-04.

Dated: _____

WITNESS:

MARYLAND TRANSPORTATION AUTHORITY

James F. Ports, Jr.
Executive Director

Gregory Slater
Chairman

Approved as to form and
legal sufficiency:

Kimberly A. Millender
Assistant Attorney General

TAB 3



Maryland Transportation Authority

Larry Hogan, Governor
Boyd K. Rutherford, Lt. Governor
Gregory Slater, Chairman

Board Members:

Dontae Carroll
William H. Cox, Jr.
William C. Ensor, III
W. Lee Gaines, Jr.

Mario J. Gangemi, P.E.
Cynthia D. Penny-Ardinger
Jeffrey S. Rosen
John F. von Paris

James F. Ports, Jr., Executive Director

MEMORANDUM

TO: MDTA Board
FROM: Mr. John F. Wedemeyer, Manager Real Estate Services
SUBJECT: Phase 1 South: American Legion Bridge I-270 to I-370 Lease Agreement between MDTA and MDOT SHA for the Priced Managed Lanes
DATE: June 8, 2021

PURPOSE OF MEMORANDUM

The purpose of this agenda item is to request contingent approval of a lease agreement between the Maryland Transportation Authority (MDTA) and Maryland Department of Transportation State Highway Administration (MDOT SHA) to create a leasehold interest for the priced managed lanes with Phase 1 South: American Legion Bridge I-270 to I-370. The approval of this item is contingent upon the Board of Public Works approval of the Phase 1: American Legion Bridge I-270 to I-70 Public-Private Partnership (P3) Agreement.

SUMMARY

This lease agreement is based on a MDOT SHA Standard Lease Agreement and was previously discussed at the February 25, 2021 MDTA Board Meeting. There are no changes in the document.

Exhibits have been created for this agreement. The Exhibits depict MDOT SHA right of way for the following areas:

1. I-495 from (and including) the American Legion Bridge to the interchange with I-270 near Rockville Pike;
2. I-270 from to the interchange with I-495 near Rockville Pike to the interchange with I-370 (including the I-270 east spur); and
3. the I-270 west spur from the interchange with I-495 near Bradley Boulevard to the interchange with Tuckerman Lane.

The Priced Managed Lanes are depicted between the northbound and southbound travel lanes.

ATTACHMENTS

- Lease Agreement
- Exhibits

**LEASE AGREEMENT
BETWEEN
MARYLAND TRANSPORTATION AUTHORITY
AND
STATE HIGHWAY ADMINISTRATION**

THIS LEASE AGREEMENT (this "Lease") made this _____ day of _____, 20____, by and between the Maryland Transportation Authority ("MDTA"), an agency of the State of Maryland, and the State Highway Administration ("SHA") an agency of the Maryland Department of Transportation ("MDOT"), a principal department of the State of Maryland (collectively, the "Parties").

WHEREAS, in 2017, Governor Larry Hogan announced Maryland's Traffic Relief Plan, the largest component being the I-495 & I-270 Public-Private Partnership Program which will include improvements to over 70 miles of interstate in Maryland (the "P3 Program");

WHEREAS, SHA owns and maintains highways in Maryland upon which the P3 Program will be developed, including: (i) I-495 (Capital Beltway) from the American Legion Bridge over the Potomac River to the Woodrow Wilson Bridge and (ii) I-270 (Dwight D. Eisenhower Memorial Highway) from I-495 to I-70, including the I-270 East Spur and I-270 West Spur;

WHEREAS, under Title 10A of the State Finance and Procurement Article of the Annotated Code of Maryland, MDOT and MDTA are authorized to undertake the solicitation, program management, and delivery of the P3 Program;

WHEREAS, under §4-204 of the Transportation Article of the Annotated Code of Maryland, MDTA is authorized to finance, construct, operate, maintain, and repair "transportation facilities projects" as defined in §4-101 of the Transportation Article of the Annotated Code of Maryland, and to perform any and all actions necessary or convenient to carry out the powers granted by the Transportation Article, including issuing revenue bonds;

WHEREAS, pursuant to MDTA Resolution No. 18-04, as subsequently amended by MDTA Resolution No 21-02, the MDTA Board designated the P3 Program as a "transportation facilities project" as defined in §4-101 of the Transportation Article of the Annotated Code of Maryland subject to certain conditions;

WHEREAS, under §4-312 of the Transportation Article of the Annotated Code of Maryland, MDTA is the only State entity with the authority to set and fix tolls for State transportation facilities; and

WHEREAS, in order to enable MDTA to exercise its tolling authority for certain parts of the P3 Program, MDTA and SHA desire to enter into this Lease.

NOW, THEREFORE, THIS LEASE WITNESSETH: That for and in consideration of the rent hereinafter set forth, and the acceptance and performance of every term, condition and covenant as hereinafter set forth and the mutual covenants and agreements hereinafter contained, the Parties hereto covenant and agree as follows:

ARTICLE I - PREMISES

SHA hereby grants to MDTA a leasehold interest in the premises consisting of the priced managed lanes shown as the "Leased Premises" in Attachment 1 (the "Premises"). The Premises consist of the priced managed lanes on:

1. I-495 from (and including) the American Legion Bridge to the interchange with Old Georgetown Road;
2. I-270 from the interchange with Old Georgetown Road to the interchange with I-370 (including the I-270 east spur); and

3. the I-270 west spur from the interchange with I-495 near Bradley Boulevard to the interchange with I-270 near Tuckerman Lane.

Upon the completion of the final design for any part of the Premises, and prior to the commencement of tolling on such part of the Premises, the Parties agree that they shall amend Attachment 1 to conform to the alignment of the priced managed lanes in the final design.

ARTICLE II - TERM

The term of this Lease shall extend from the date of this Lease until sixty years after the "Effective Date" of the Phase P3 Agreement or such earlier date as the Parties may agree in writing (the "Term").

ARTICLE III - RENT

MDTA covenants and agrees to pay to SHA an annual rent for the Premises in the amount of One Dollar (\$), with rent for the duration of the Term payable in its entirety on the date of this Lease.

ARTICLE IV - TERMINATION

Notwithstanding anything to the contrary contained herein, this Lease, with all its provisions and covenants, shall continue in full force and effect during the Term, with the understanding that the Lease may be subject to early termination at any time by agreement between the Parties.

ARTICLE V – RESPONSIBILITY FOR PREMISES AND REPAIR AND MAINTENANCE

SHA (or certain Section Developers appointed by MDOT and MDTA under Section P3 Agreements) shall be responsible for the construction, operation, security, maintenance, insurance and all related costs and expense of the Premises, except to the extent expressly agreed otherwise by MDTA under the Interagency Agreement with MDOT and SHA dated April 25, 2019 or any other written agreement.

ARTICLE VI - NOTICES

Any notice, request, demand, approval, or consent given or required to be given under this Lease shall be in writing and shall be deemed to have been given when mailed by regular first class mail.

If intended for SHA, notices shall be sent to:

Jeffrey T. Folden, PE, DBIA
Deputy Director
I-95 & I-270 P3 Office
707 North Calvert Street, P-601
Baltimore MD 21202

Copy To:

Olu A. Okunola
Director
Office of Real Estate
707 North Calvert Street
Baltimore MD 21202

If intended for MDTA, notices shall be sent to:

James F. Ports, Jr.

Executive Director
2310 Broening Highway
Baltimore, Maryland 21224

Copy to:

John Wedemeyer
MDTA Real Estate
2310 Broening Highway
Baltimore, Maryland 21224

ARTICLE VII - MISCELLANEOUS

(a) Access and Non-Interference

MDTA shall permit SHA, its agents, representatives, employees, designees and contractors (including any Section Developer or its subcontractors and related entities) to enter all parts of the Premises at any hour during the Term. MDTA shall not interfere with SHA's access to, control and operation of the Premises, nor that of SHA's agents, representatives, employees, designees or contractors (including any Section Developer or its subcontractors and related entities).

(b) SHA's Reservation

This Lease is subject to, and shall not affect, the rights of SHA to perform its ordinary functions and obligations as owner of the Premises and an agency of MDOT, including any permitting functions and the granting of easements or other rights to the Premises. This Lease is subject to any easements or other rights granted by SHA previously or during the Term of the Lease.

(c) Successors and Assigns

This Lease and the covenants and conditions contained herein shall inure to the benefit of and be binding upon SHA, its successors and assigns, and shall be binding upon MDTA, its successors and assigns, and shall inure to the benefit of MDTA and only such assigns of MDTA to whom the assignment of this Lease by MDTA has been consented to by SHA.

(d) Applicable Law

This Lease and all the rights and obligations of the parties hereunder shall be construed in accordance with the laws of the State of Maryland.

(e) Severability

If any term or provision of this Lease shall be invalid or unenforceable, the remainder of this Lease shall not be affected thereby and each term and provision of this Lease shall be valid and enforced to the fullest extent permitted by law.

(f) Modification

This Lease may be amended only by written instrument, executed by both Parties.

(g) Counterpart Signatures

This Lease may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument. Signatures provided by

facsimile or other electronic means, e,g, and not by way of limitation, in Adobe .PDF sent by electronic mail, shall be deemed to be original signatures.

Assistant Attorney General - MDTA

WITNESS:

Secretary

_____(Seal)
Lawrence J. Hogan, Jr.
Governor of Maryland

Approved by the Maryland
Board of Public Works at
its_____/21 meeting as
Item ____ (MDOT Agenda)

_____(Seal)
Peter Franchot
Comptroller of Maryland

_____(Seal)
Nancy K. Kopp
Treasurer of Maryland

Constituting the BOARD OF
PUBLIC WORKS OF MARYLAND

STATE OF MARYLAND – COUNTY OF _____, TO WIT:

BEFORE ME, THE UNDERSIGNED Notary Public of the State of Maryland, in and for the aforesaid County, personally appeared this ____ day of _____, 2021, **Lawrence J. Hogan, Jr.**, known to me or satisfactorily proven to me to be the persons set forth herein, who acknowledged themselves to be, respectively, the Governor of the State of Maryland, the Comptroller of the State of Maryland and the Treasurer of the State of Maryland, and that holding such capacity, being each authorized so to do, each executed the foregoing instrument for the purposes therein contained, by himself or herself in the foregoing capacity.

WITNESS MY HAND AND NOTARIAL SEAL

_____(SEAL)
Notary Public

My Commission Expires: _____

STATE OF MARYLAND – COUNTY OF _____, TO WIT:

BEFORE ME, THE UNDERSIGNED Notary Public of the State of Maryland, in and for the aforesaid County, personally appeared this ____ day of _____, 2021, **Peter Franchot**, known to me or satisfactorily proven to me to be the persons set forth herein, who acknowledged themselves to be, respectively, the Governor of the State of Maryland, the Comptroller of the State of Maryland and the Treasurer of the State of Maryland, and that holding such capacity, being each authorized so to do, each executed the foregoing instrument for the purposes therein contained, by himself or herself in the foregoing capacity.

WITNESS MY HAND AND NOTARIAL SEAL

_____(SEAL)
Notary Public

My Commission Expires: _____

STATE OF MARYLAND – COUNTY OF _____, TO WIT:

BEFORE ME, THE UNDERSIGNED Notary Public of the State of Maryland, in and for the aforesaid County, personally appeared this ____ day of _____, 2021 **Nancy K. Kopp**, known to me or satisfactorily proven to me to be the persons set forth herein, who acknowledged themselves to be, respectively, the Governor of the State of Maryland, the Comptroller of the State of Maryland and the Treasurer of the State of Maryland, and that holding such capacity, being each authorized so to do, each executed the foregoing instrument for the purposes therein contained, by himself or herself in the foregoing capacity.

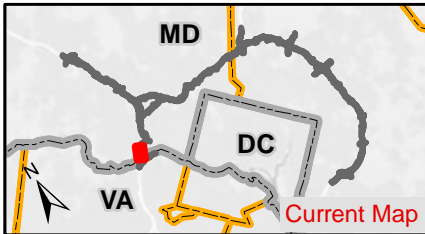
WITNESS MY HAND AND NOTARIAL SEAL

_____(SEAL)
Notary Public

My Commission Expires: _____

Attachment 1
DESCRIPTION OF THE PREMISES

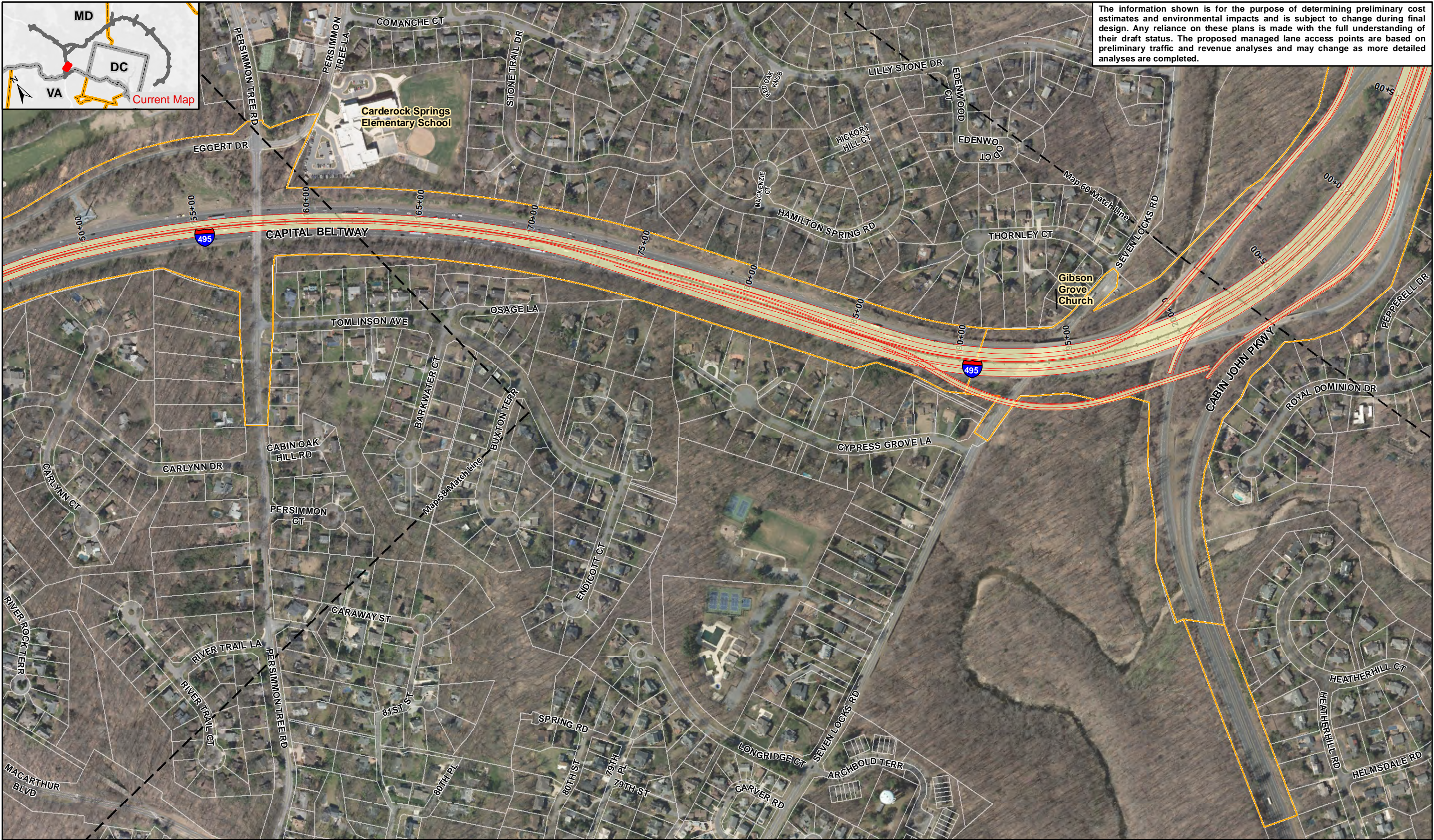
[.pdf of drawings to be inserted]



The information shown is for the purpose of determining preliminary cost estimates and environmental impacts and is subject to change during final design. Any reliance on these plans is made with the full understanding of their draft status. The proposed managed lane access points are based on preliminary traffic and revenue analyses and may change as more detailed analyses are completed.



| | | | | | |
|---|---|-------------------------|--|---|--|
| <ul style="list-style-type: none">— Price Managed Lanes— Leased Premises-- Map Match Line | <ul style="list-style-type: none">— Right-of-Way— Parcel Boundaries— Roadway Baseline | <div>DRAFT</div> | <div><p>1 in = 400 feet</p><p>0 100 200 400 Feet</p></div> | <div>Phase 1 South Lease Lines Alternatives 8, 9, 10, 13B, 13C for I-495</div> | <div>Appendix D Map 58</div> <div></div> |
|---|---|-------------------------|--|---|--|



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— Price Managed Lanes

— Leased Premises

-- Map Match Line

▭ Right-of-Way

▭ Parcel Boundaries

— Roadway Baseline

DRAFT

1 in = 400 feet

0 100 200 400 Feet

Phase 1 South Lease Lines

Alternatives 8, 9, 10, 13B, 13C

for I-495

Appendix D

Map 59

495

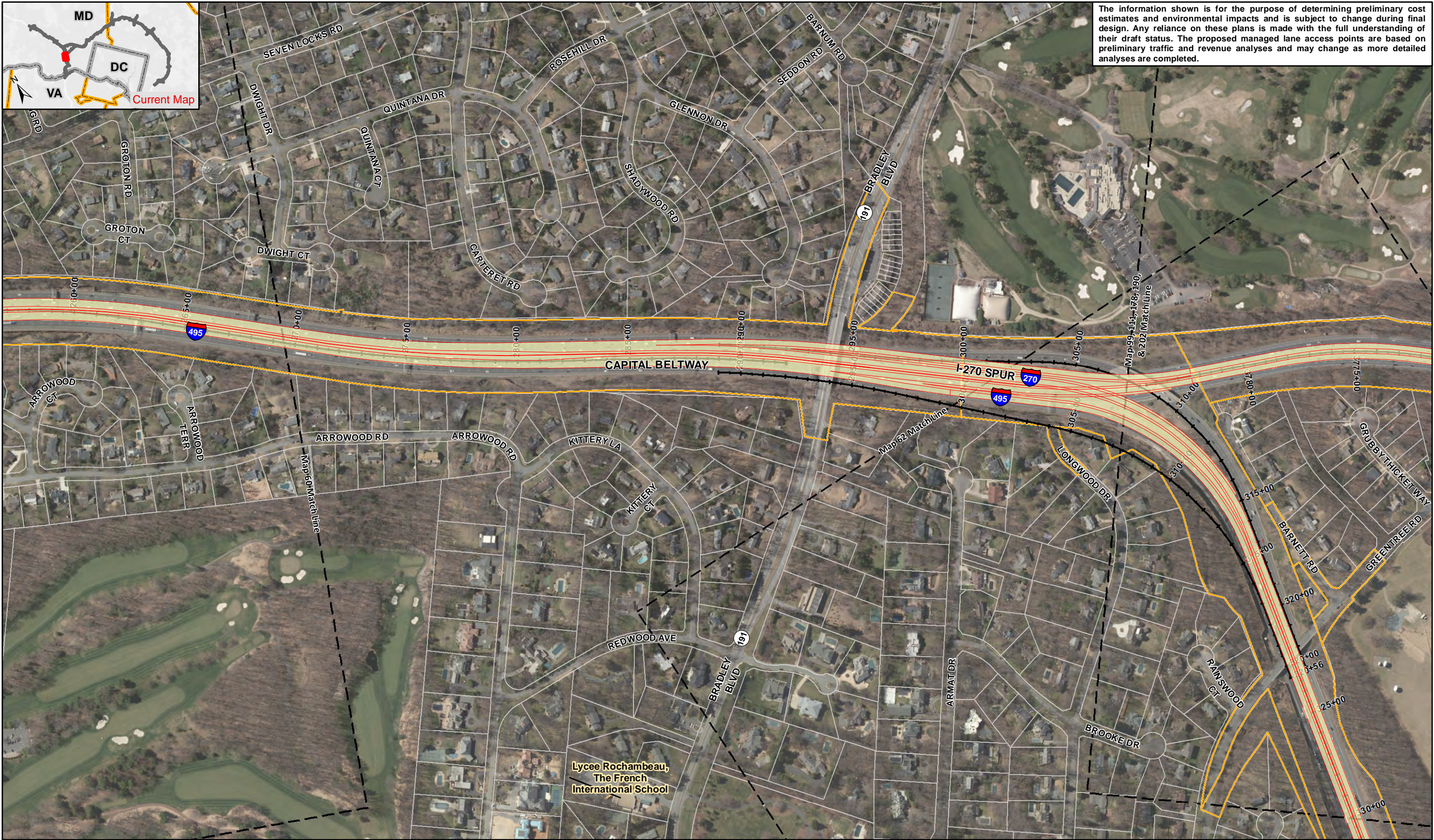
270

MANAGED LANES STUDY



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| | | | | |
|--|-------------------------|--|---|--|
| <ul style="list-style-type: none">Price Managed LanesRight-of-WayLeased PremisesParcel BoundariesMap Match LineRoadway Baseline | <div>DRAFT</div> | <div> 1 in = 400 feet 0 100 200 400 Feet</div> | <div>Phase 1 South Lease Lines Alternatives 8, 9, 10, 13B, 13C for I-495</div> | <div>Appendix D Map 60 MANAGED LANES STUDY</div> |
|--|-------------------------|--|---|--|



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— Price Managed Lanes

— Leased Premises

-- Map Match Line

Right-of-Way

Parcel Boundaries

Roadway Baseline

DRAFT

1 in = 400 feet

0 100 200 400 Feet

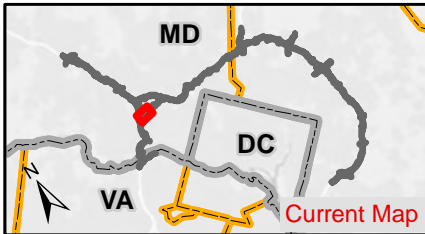
Phase 1 South Lease Lines

Alternatives 8, 9, 10, 13B, 13C

for I-495

Appendix D

Map 61



The information shown is for the purpose of determining preliminary cost estimates and environmental impacts and is subject to change during final design. Any reliance on these plans is made with the full understanding of their draft status. The proposed managed lane access points are based on preliminary traffic and revenue analyses and may change as more detailed analyses are completed.



— Price Managed Lanes

— Leased Premises

-- Map Match Line

▭ Right-of-Way

▭ Parcel Boundaries

— Roadway Baseline

DRAFT

N

1 in = 400 feet

0 100 200 400 Feet

Phase 1 South Lease Lines

Alternatives 8, 9, 10, 13B, 13C

for I-495

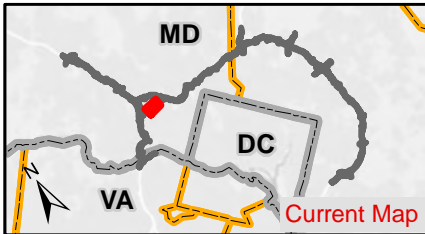
Appendix D

Map 62

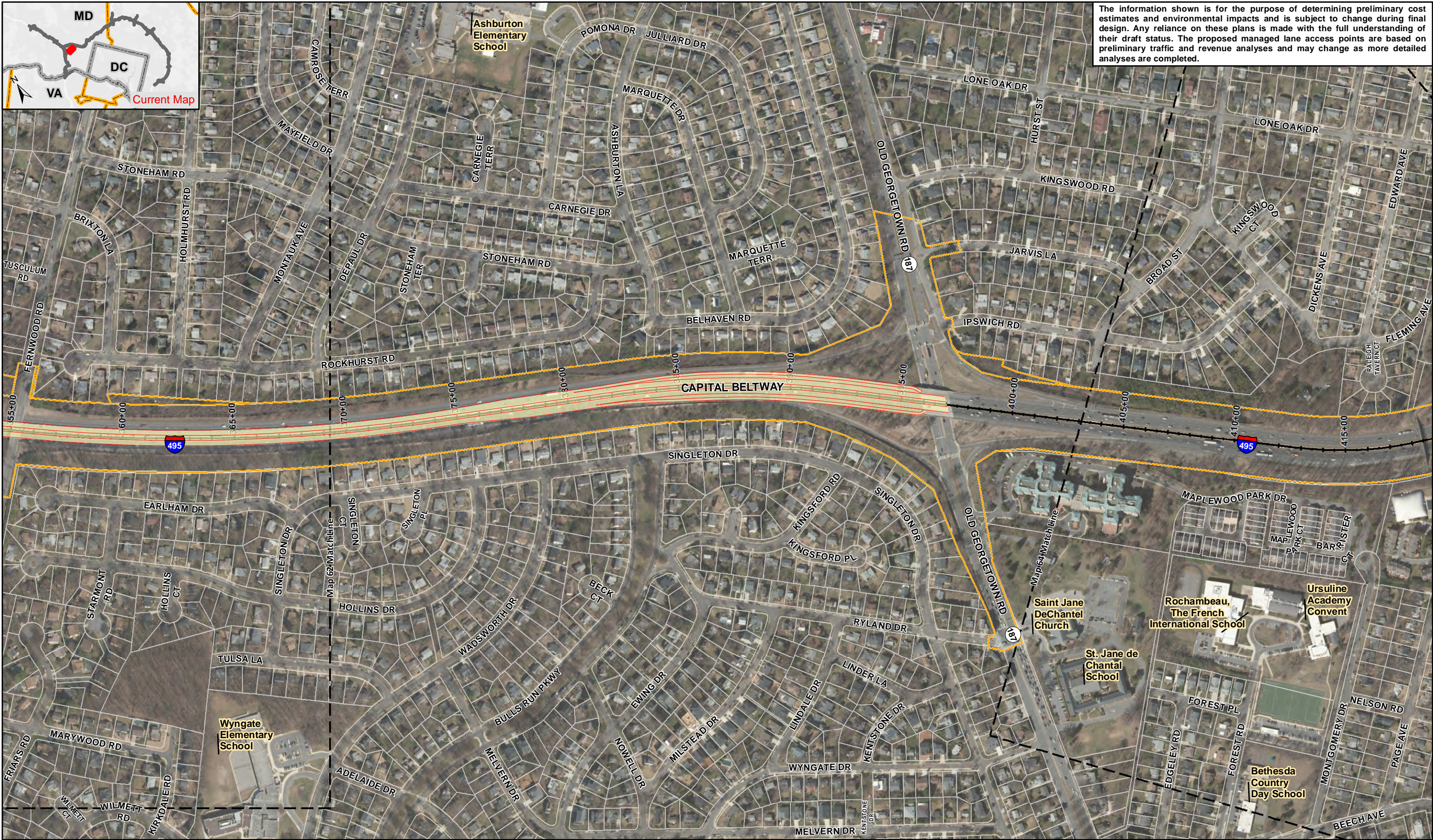
495

270

MANAGED LANES STUDY



The information shown is for the purpose of determining preliminary cost estimates and environmental impacts and is subject to change during final design. Any reliance on these plans is made with the full understanding of their draft status. The proposed managed lane access points are based on preliminary traffic and revenue analyses and may change as more detailed analyses are completed.



— Price Managed Lanes

— Leased Premises

-- Map Match Line

□ Right-of-Way

□ Parcel Boundaries

— Roadway Baseline

DRAFT

N

1 in = 400 feet

0 100 200 400 Feet

Phase 1 South Lease Lines

Alternatives 8, 9, 10, 13B, 13C

for I-495

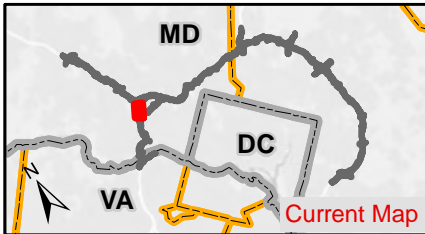
Appendix D

Map 63

495

270

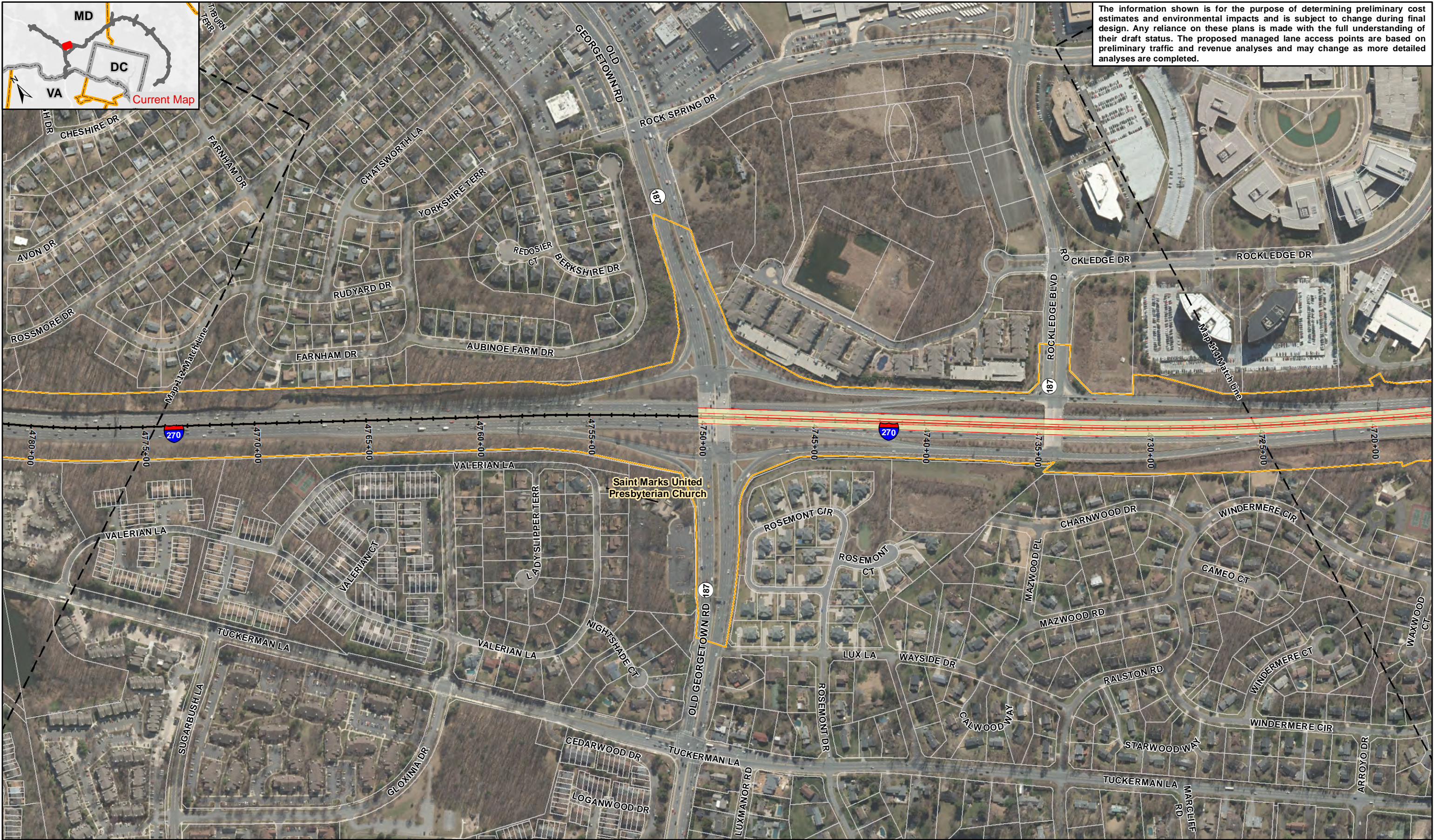
MANAGED LANES STUDY



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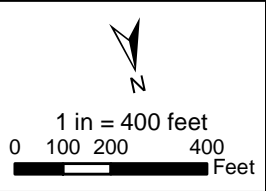


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|--|---|-------------------------|--|---|---|
| <ul style="list-style-type: none">Price Managed LanesLeased PremisesMap Match Line | <ul style="list-style-type: none">Right-of-WayParcel BoundariesRoadway Baseline | <div>DRAFT</div> | <div> 1 in = 400 feet 0 100 200 400 Feet</div> | <div>Phase 1 South Lease Lines Alternative 9 for I-270</div> | <div>Appendix D Map 111</div> <div></div> |
|--|---|-------------------------|--|---|---|



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DRAFT

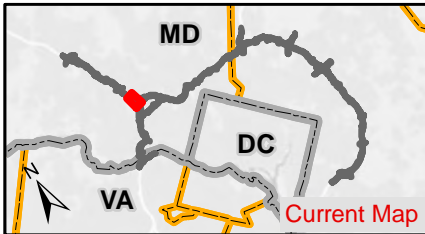


**Phase 1 South
Lease Lines**
Alternative 9
for I-270

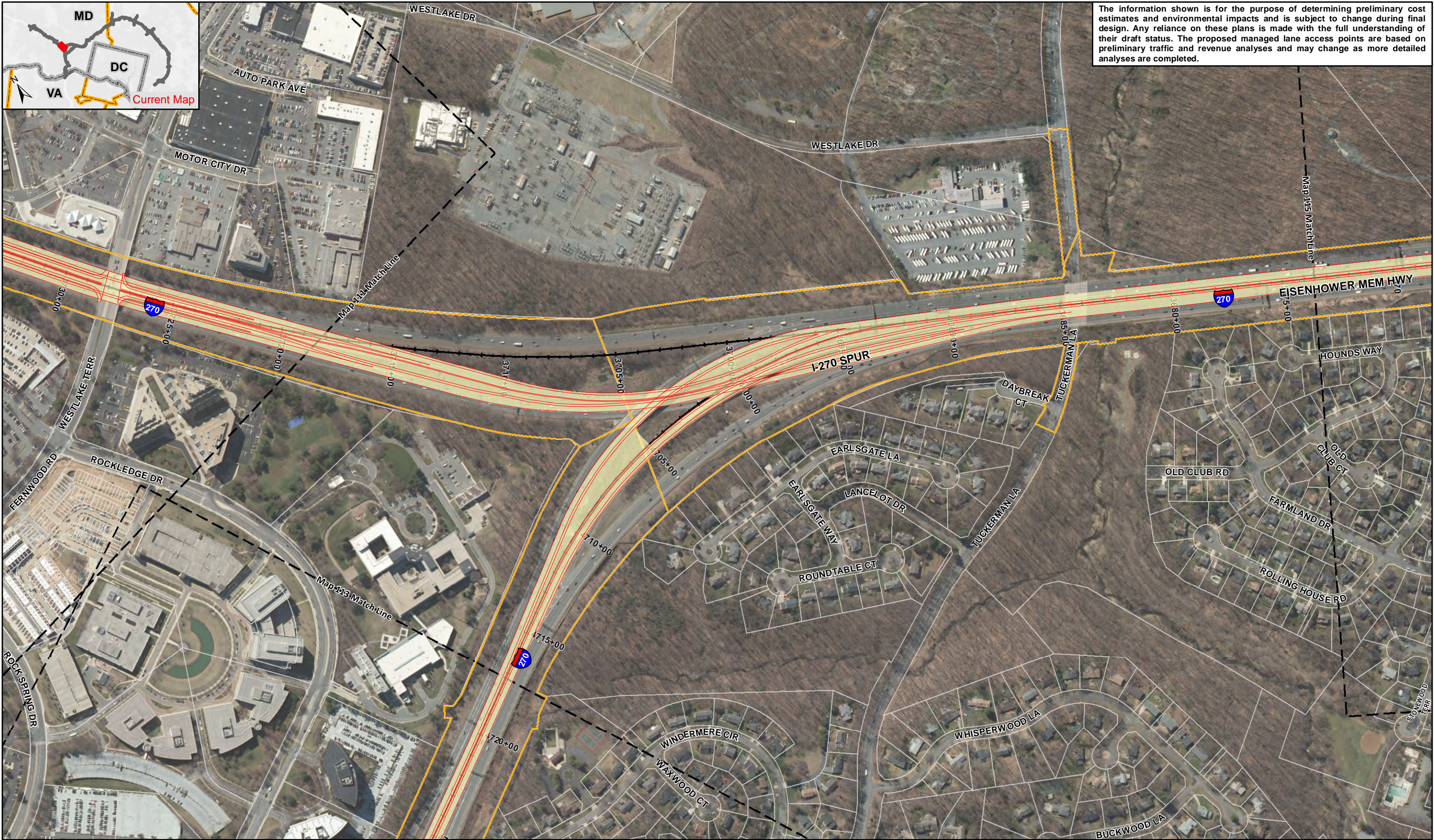
Appendix D
Map 113

495 **270** **MANAGED LANES STUDY**

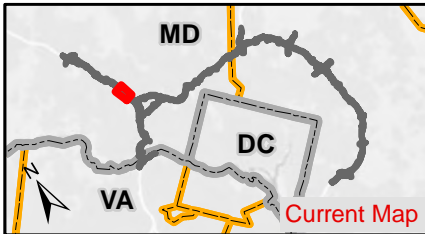
- Price Managed Lanes
- Right-of-Way
- Leased Premises
- Parcel Boundaries
- Map Match Line
- Roadway Baseline



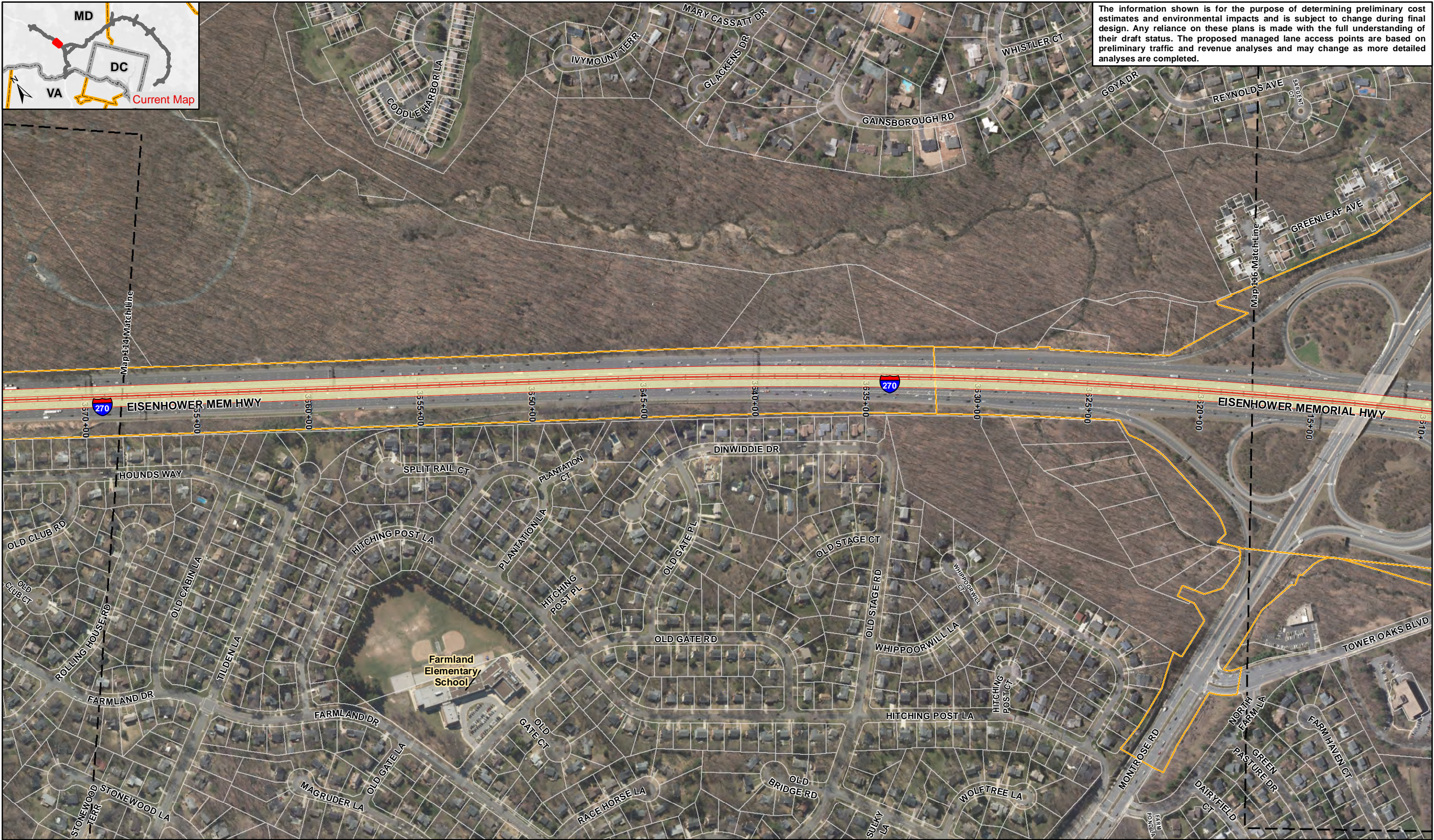
The information shown is for the purpose of determining preliminary cost estimates and environmental impacts and is subject to change during final design. Any reliance on these plans is made with the full understanding of their draft status. The proposed managed lane access points are based on preliminary traffic and revenue analyses and may change as more detailed analyses are completed.



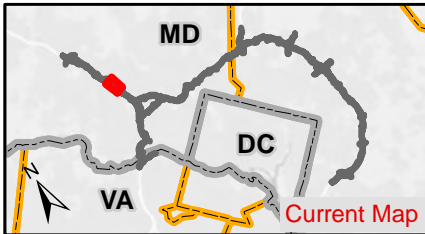
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| <ul style="list-style-type: none">— Price Managed Lanes— Leased Premises-- Map Match Line | <ul style="list-style-type: none">— Right-of-Way— Parcel Boundaries— Roadway Baseline | <div>DRAFT</div> | <div> 1 in = 400 feet 0 100 200 400 Feet</div> | <div>Phase 1 South Lease Lines Alternative 9 for I-270</div> | <div>Appendix D Map 114</div> <div></div> |
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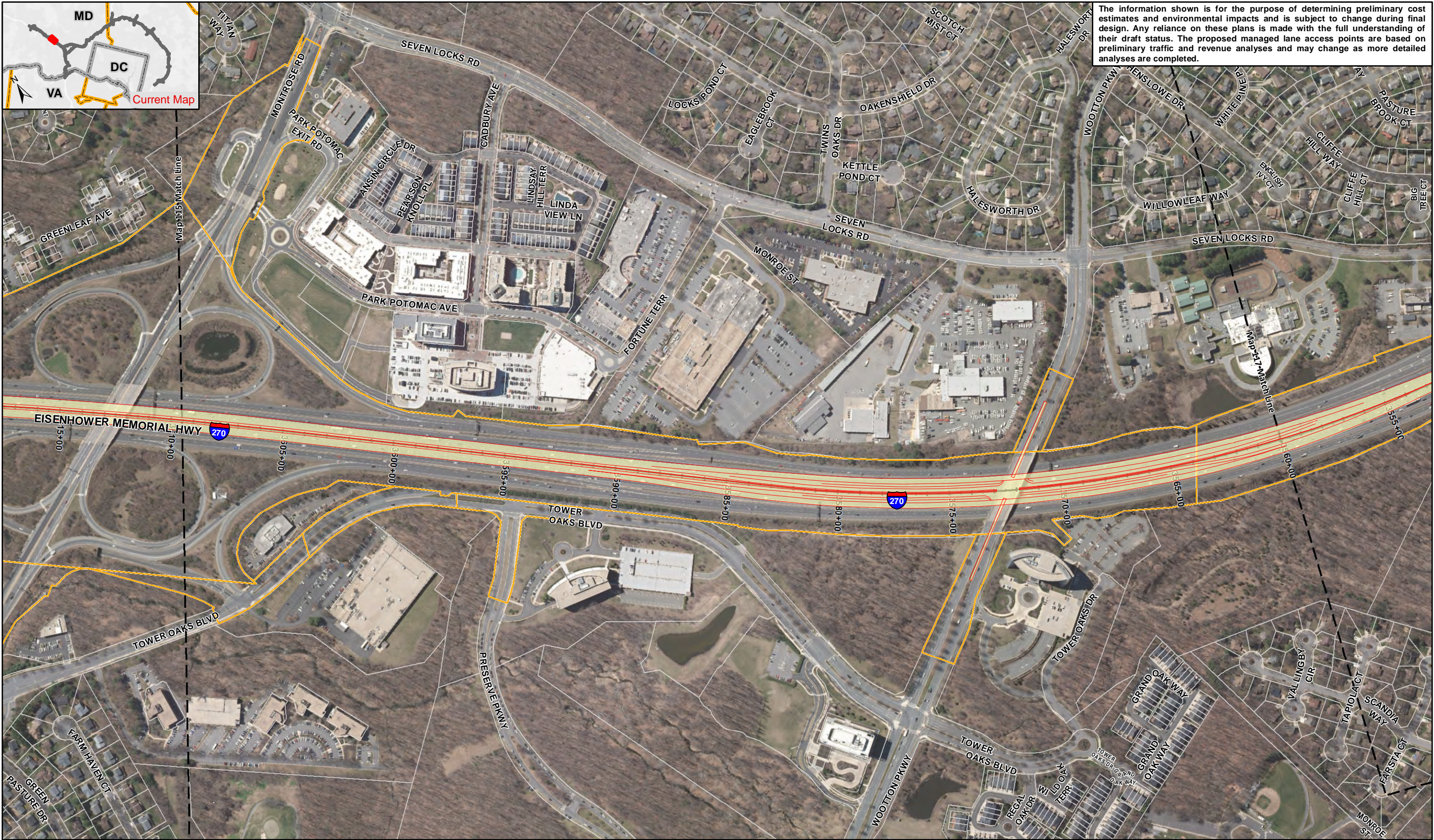
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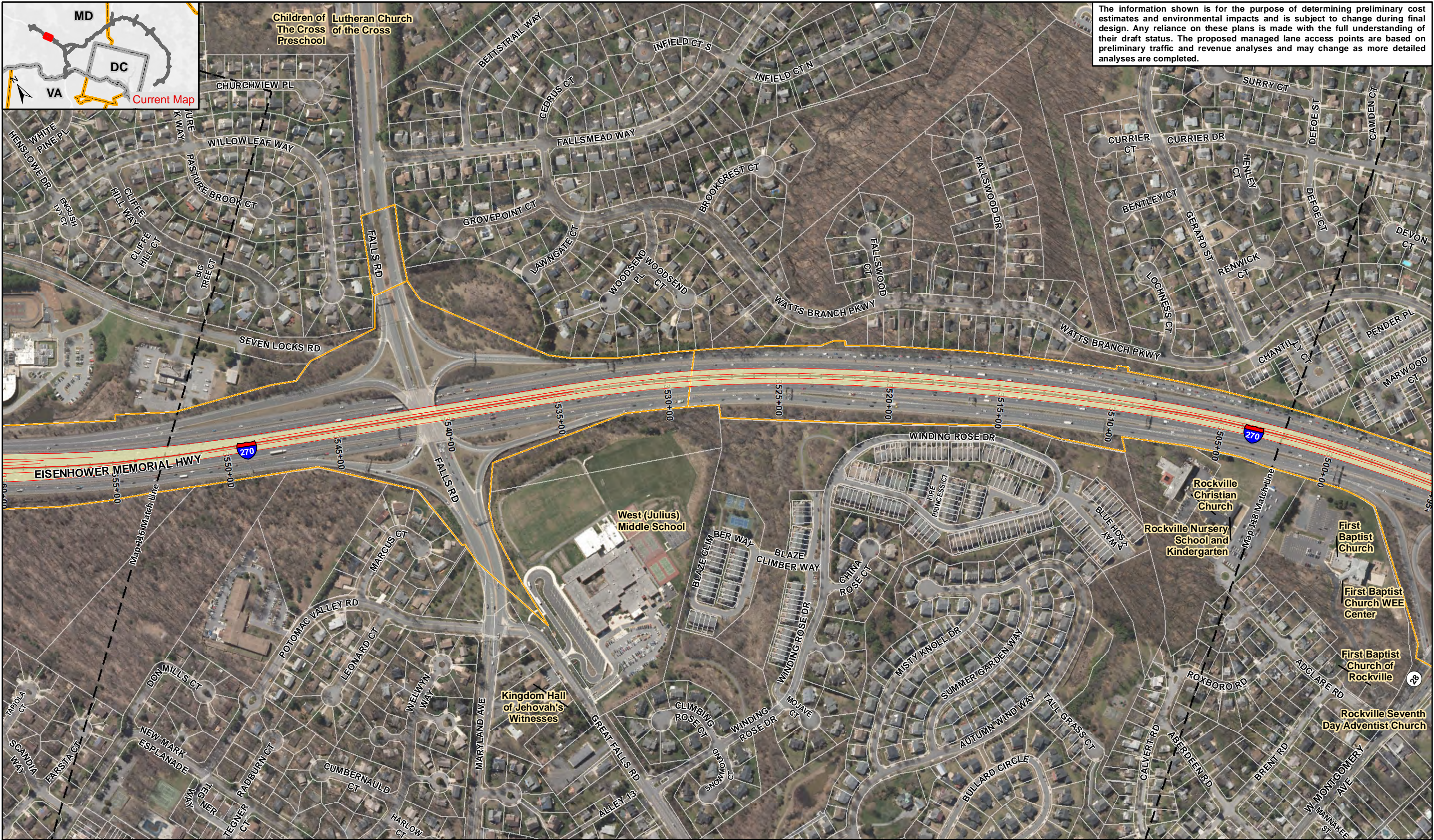
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| <ul style="list-style-type: none">Price Managed LanesLeased PremisesMap Match Line | <ul style="list-style-type: none">Right-of-WayParcel BoundariesRoadway Baseline | <div>DRAFT</div> | <div> 1 in = 400 feet 0 100 200 400 Feet</div> | <div>Phase 1 South Lease Lines Alternative 9 for I-270</div> | <div>Appendix D Map 115</div> <div></div> |
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The information shown is for the purpose of determining preliminary cost estimates and environmental impacts and is subject to change during final design. Any reliance on these plans is made with the full understanding of their draft status. The proposed managed lane access points are based on preliminary traffic and revenue analyses and may change as more detailed analyses are completed.

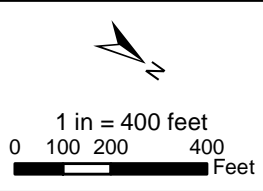


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| <ul style="list-style-type: none">— Price Managed Lanes— Leased Premises-- Map Match Line | <ul style="list-style-type: none">— Right-of-Way— Parcel Boundaries— Roadway Baseline | <div>DRAFT</div> | <div><p>1 in = 400 feet</p><p>0 100 200 400 Feet</p></div> | <div>Phase 1 South Lease Lines Alternative 9 for I-270</div> | <div>Appendix D Map 116</div> <div></div> |
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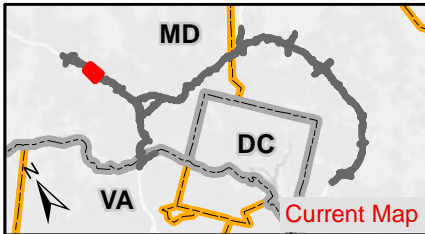
DRAFT



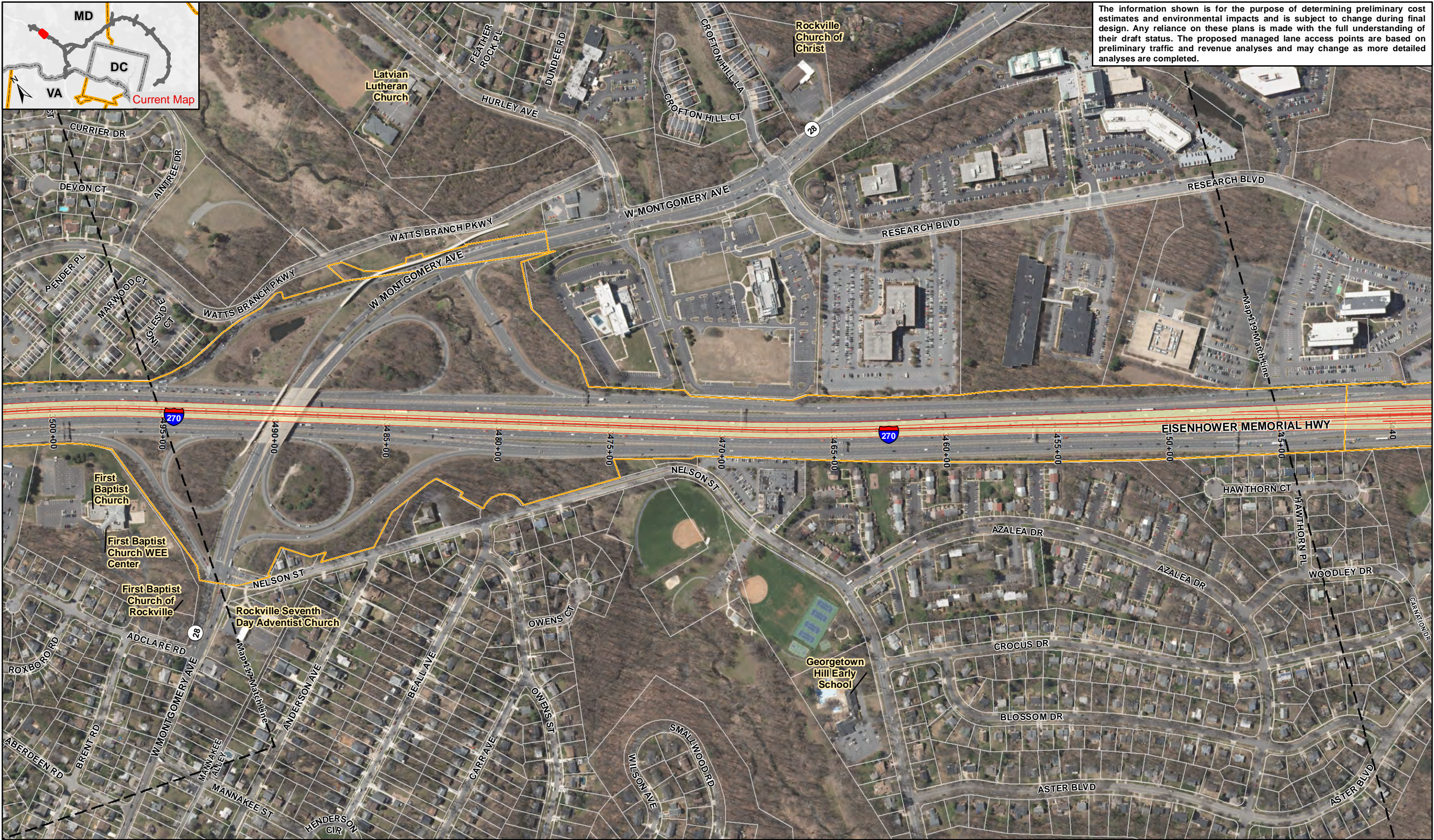
**Phase 1 South
Lease Lines**

**Alternative 9
for I-270**

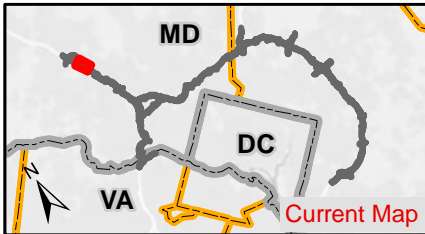
Appendix D
Map 117



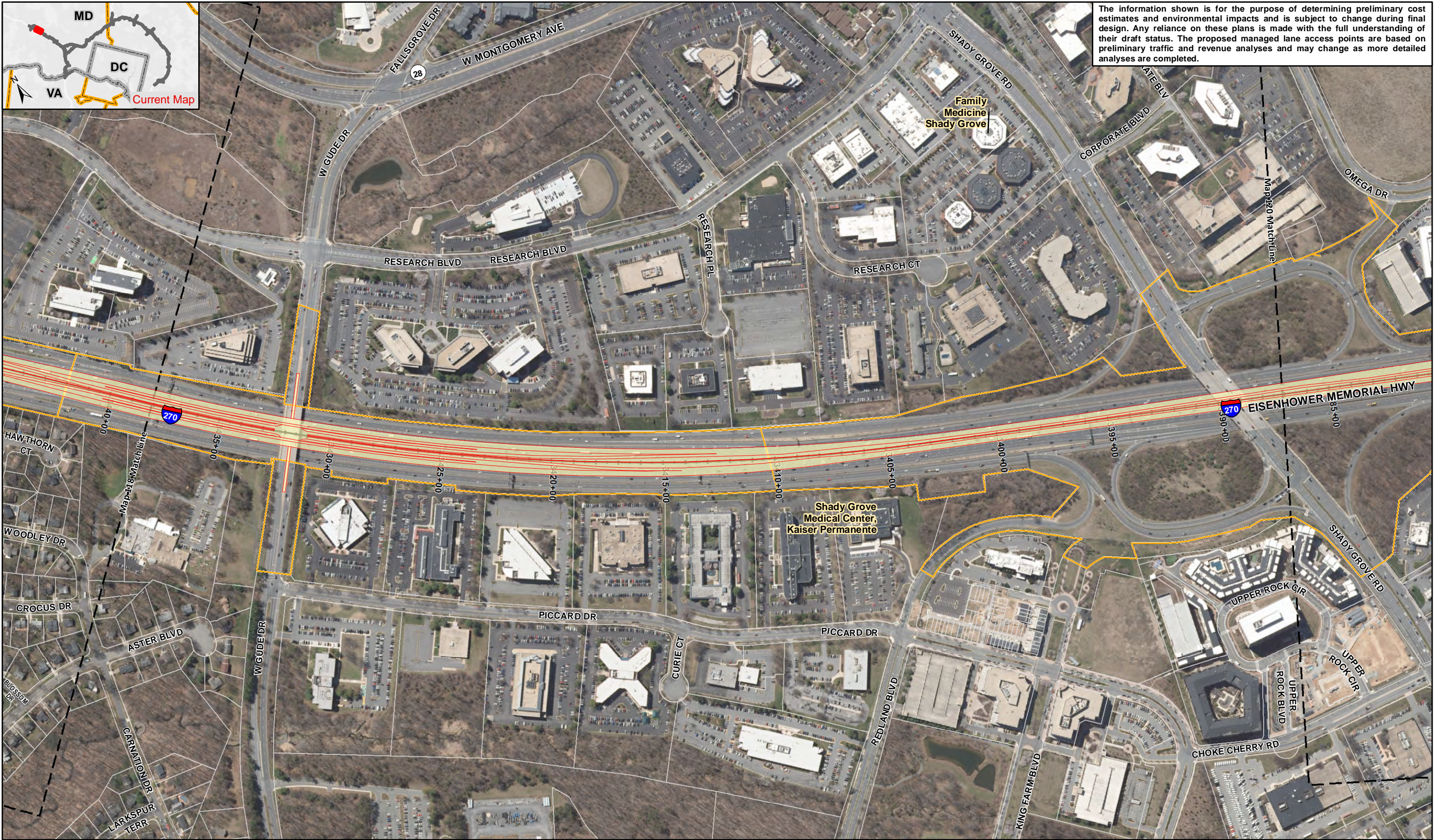
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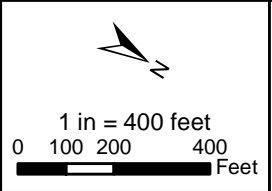
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| <ul style="list-style-type: none">Price Managed LanesLeased PremisesMap Match Line | <ul style="list-style-type: none">Right-of-WayParcel BoundariesRoadway Baseline | <div>DRAFT</div> | <div>1 in = 400 feet 0 100 200 400 Feet</div> | <div>Phase 1 South Lease Lines Alternative 9 for I-270</div> | <div>Appendix D Map 118</div> <div></div> |
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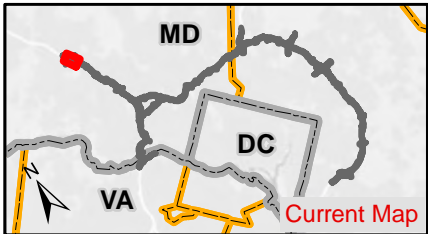


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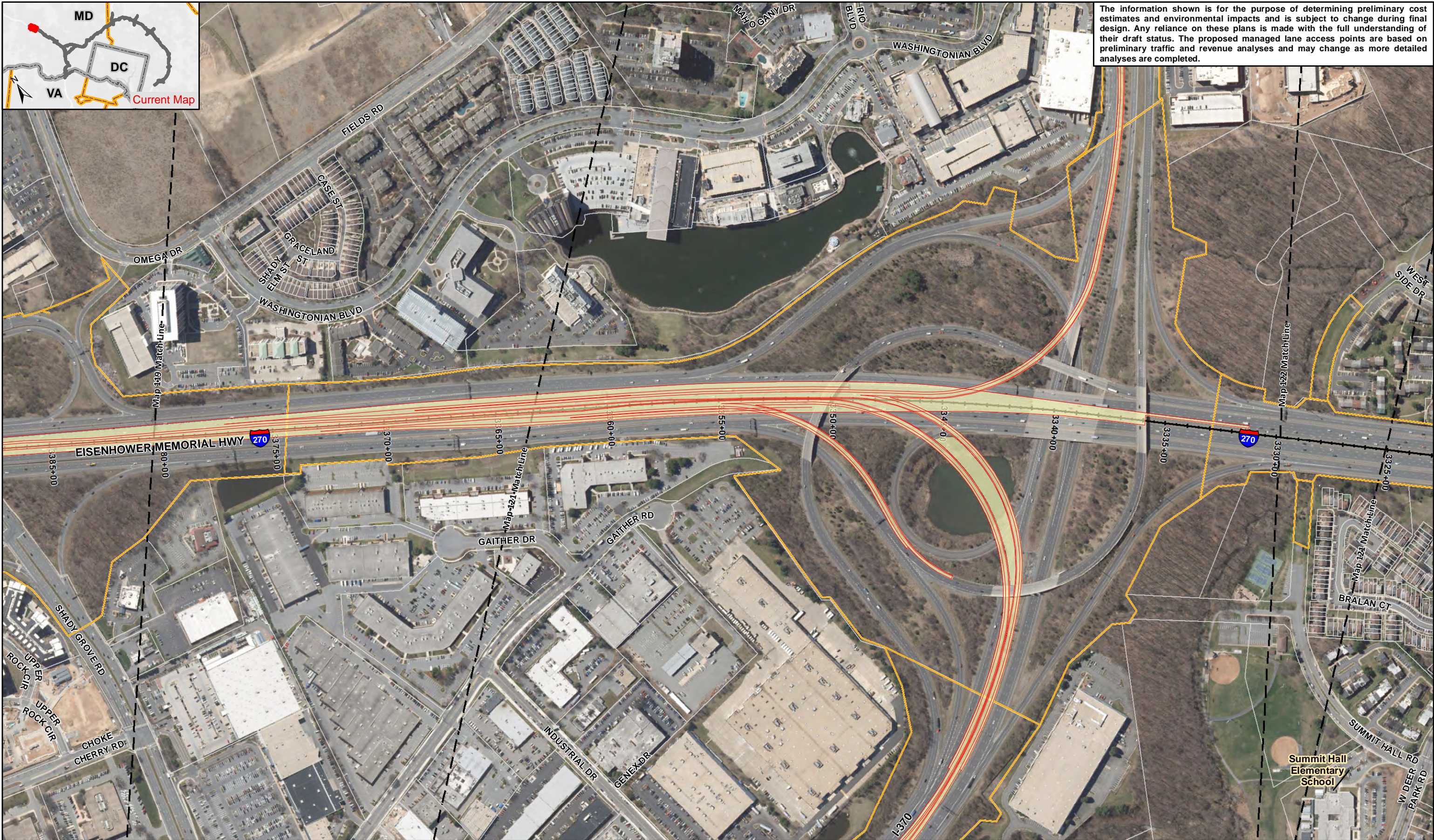


**Phase 1 South
Lease Lines**
Alternative 9
for I-270

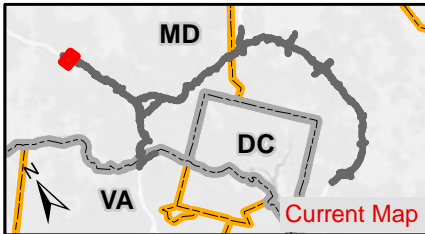




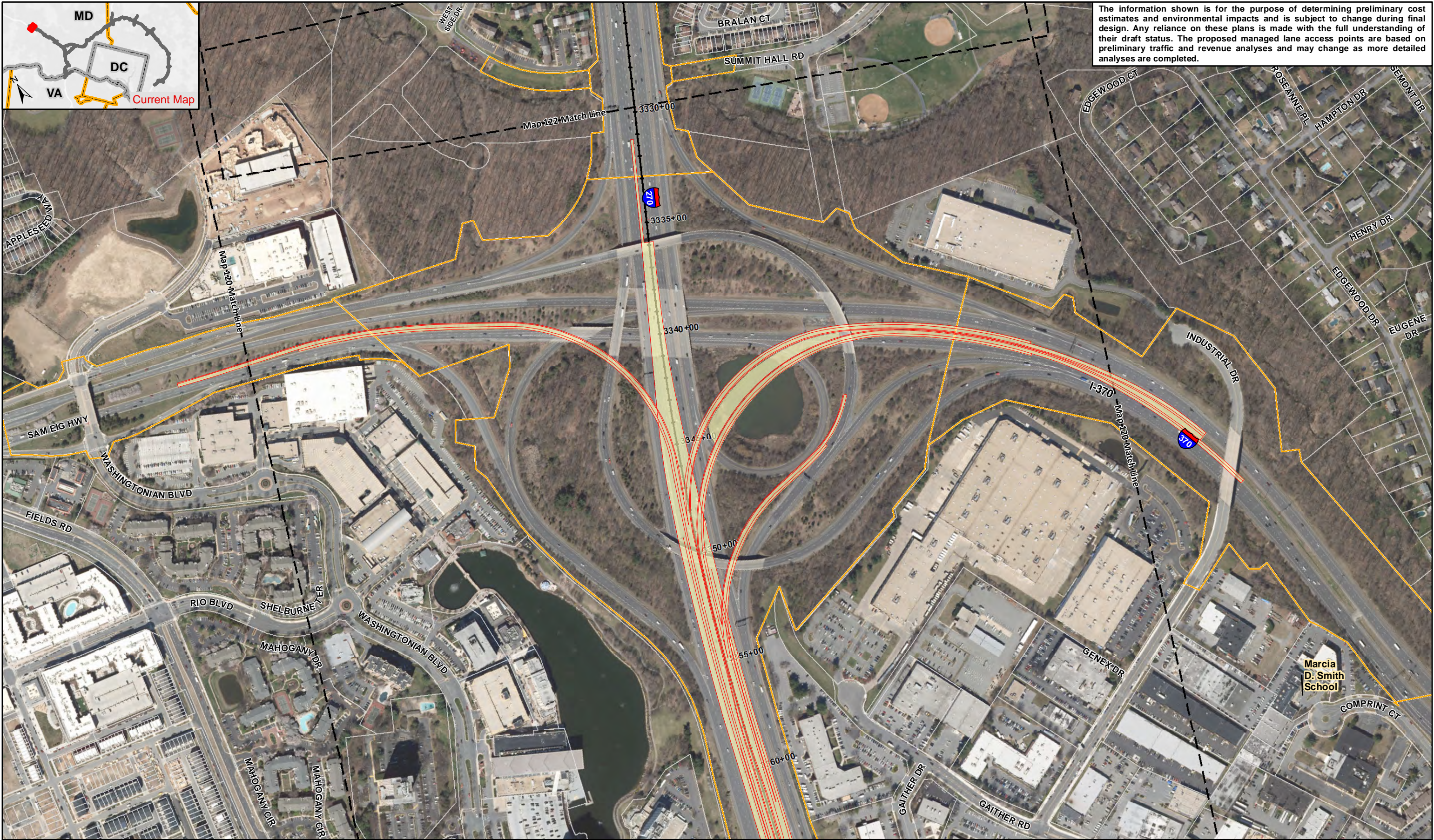
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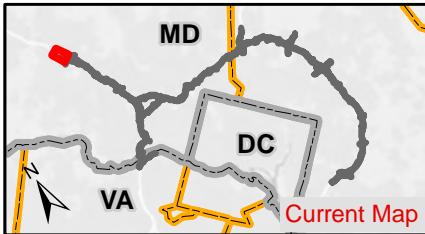
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| <ul style="list-style-type: none">— Price Managed Lanes— Leased Premises-- Map Match Line | <ul style="list-style-type: none">— Right-of-Way— Parcel Boundaries— Roadway Baseline | <div>DRAFT</div> | <div> 1 in = 400 feet 0 100 200 400 Feet</div> | <div>Phase 1 South Lease Lines Alternative 9 for I-270</div> | <div>Appendix D Map 120</div> <div> MANAGED LANES STUDY</div> |
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| <ul style="list-style-type: none">Price Managed LanesLeased PremisesMap Match Line | <ul style="list-style-type: none">Right-of-WayParcel BoundariesRoadway Baseline | <div>DRAFT</div> | <div> 1 in = 400 feet 0 100 200 400 Feet</div> | <div>Phase 1 South Lease Lines Alternative 9 for I-270</div> | <div>Appendix D Map 121</div> <div></div> |
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-- Map Match Line + Roadway Baseline

Right-of-Way

Parcel Boundaries

DRAFT

1 in = 400 feet

0 100 200 400 Feet

Phase 1 South Lease Lines

Alternative 9

for I-270

Appendix D

Map 122

495 270

MANAGED LANES STUDY

TAB 4



Maryland Transportation Authority

Larry Hogan, Governor
Boyd K. Rutherford, Lt. Governor
Gregory Slater, Chairman

Board Members:

Dontae Carroll
William H. Cox, Jr.
William C. Ensor, III
W. Lee Gaines, Jr.

Mario J. Gangemi, P.E.
Cynthia D. Penny-Ardinger
Jeffrey S. Rosen
John F. von Paris

James F. Ports, Jr., Executive Director

MEMORANDUM

TO: MDTA Board
PRESENTED BY: Mr. Jeff Folden, MDOT SHA, I-495 & I-270 P3 Program Deputy Director
SUBJECT: American Legion Bridge I-270 to I-70 Relief Plan Phase 1 Developer Approval
DATE: June 8, 2021

PURPOSE OF MEMORANDUM

To seek contingent approval from the Maryland Transportation Authority (MDTA) Board on the selected Phase Developer for the Phase Public-Private Partnership (P3) Agreement for Phase 1 of the I-495 & I-270 P3 Program, American Legion Bridge I-270 to I-70 Relief Plan.

SUMMARY

The Maryland Department of Transportation (MDOT) and MDTA completed the solicitation for Phase 1 of the P3 Program, American Legion Bridge I-270 to I-70 Relief Plan. The selected Phase Developer, who will be responsible for overseeing the predevelopment work for Phase 1, is Accelerate Maryland Partners LLC (AMP).

The selection of the Phase Developer is the culmination of a year-long competitive process of extensive collaborative dialogue with the proposers designed to ensure a true partnership, harness the innovation of the private sector and meet the goals of the program to provide congestion relief, and an innovative approach to minimize impacts. This process included issuing a Request for Qualifications on February 7, 2020, short-listing four teams on July 17, 2020, and a 6-month Request for Proposals (RFP) process.

This solicitation for the Phase 1 P3 Agreement for predevelopment work was conducted in a sound and thorough manner. All Proposers were treated fairly and equitably. The evaluation was conducted in accordance with the requirements of the RFP. At the conclusion of the evaluation, the ratings of the three Proposers were as follows in the table below.

| Overall Ratings | | |
|--|-------------------------|------------------------|
| Proposer | Technical Rating | Financial Score |
| Capital Express Mobility Partners LLC (CEMP) | Good+ | 665 |
| Accelerate Maryland Partners LLC (AMP) | Good | 1,356 |
| Accelerate Maryland Express Partners (AMEP) | Acceptable | 800 |

It was determined that CEMP's technical proposal with a rating of Good+ was only marginally better than AMP's technical proposal with a rating of Good. CEMP's financial proposal received a score of just 665 out of 1,791 points. AMP's financial proposal received a score of 1,356 points, more than double what CEMP received. Based on the requirements of the RFP, technical and financial proposals were considered approximately equal in weight. MDOT and MDTA determined that AMP's strong technical solution and best financial proposal made it the most advantageous offer to the State. On February 18, 2021, MDOT announced the recommendation of award of the Phase 1 P3 Agreement to AMP.

CEMP filed a protest objecting to the decision to award the Phase P3 Agreement to AMP on March 1, 2021. After a thorough review of the bases of protest raised by CEMP, and after seeking advice from attorneys with the Office of the Attorney General, the Contracting Officer's Final Decision was issued on April 15, 2021. This decision took into account the confidentiality still associated with this solicitation process and addressed each basis of protest while not disclosing confidential information about AMP's proposal. In the Final Decision, it was determined that each basis of protest both fails on the merits and is untimely (or partially untimely). CEMP filed an appeal on April 21, 2021. After a thorough review of the appeal, CEMP offered no new information or analysis to demonstrate any merit to any aspects of CEMP's protest. CEMP has requested a hearing on the appeal, but it has not yet been scheduled.

The Secretary of MDOT concurred in the determination that proceeding with award of the Phase 1 P3 Agreement without delay is necessary to protect substantial State interests. This determination is made in accordance with Instructions to Proposers (ITP) / RFP § 6.10 – "Right to Proceed with Solicitation and Phase 1 P3 Agreement." In § 6.10 MDOT specifically reserved the right to proceed with the solicitation and Phase 1 P3 Agreement "as long as the MDOT Secretary makes a determination that proceeding without delay is necessary to protect substantial State interests."

As set forth in the Contracting Officer's Final Decision, including the facts and procedures referenced therein, CEMP's unsupported allegations do not justify reversing the reasonable and rational decisions of MDOT and MDTA related to the RFP, evaluation of proposals, or recommendation of award to AMP. In essence, CEMP expresses disagreement with the business and technical judgments of MDOT and MDTA, which determined not only the requirements of the State's RFP but also that a Proposer other than CEMP presented the most advantageous offer to the State. CEMP seeks to either have AMP disqualified as a Proposer or to re-open the solicitation under the terms that CEMP desires and which are inconsistent with MDOT's and MDTA's RFP, neither of which are required or recommended.

The contingent approval is an important next step to allow for the start of a 30-day public and legislative review process. The final award of the Phase P3 Agreement to AMP will be contingent on approval by the Maryland Board of Public Works.

Moving forward is necessary to protect substantial State interests in managing risks and meeting our infrastructure needs. We are taking this step after extensive consultation with our advisors. Delaying the predevelopment work would do irreparable harm to the State. Instead, this work will continue as an important investment in continued collaboration with our stakeholders toward delivering a new American Legion Bridge, multi-modal congestion relief, and a host of other important benefits as quickly and cost-effectively as possible.

RECOMMENDATION

To provide contingent approval on the selected Phase Developer for the Phase Public-Private Partnership (P3) Agreement for Phase 1 of the I-495 & I-270 P3 Program, American Legion Bridge I-270 to I-70 Relief Plan.

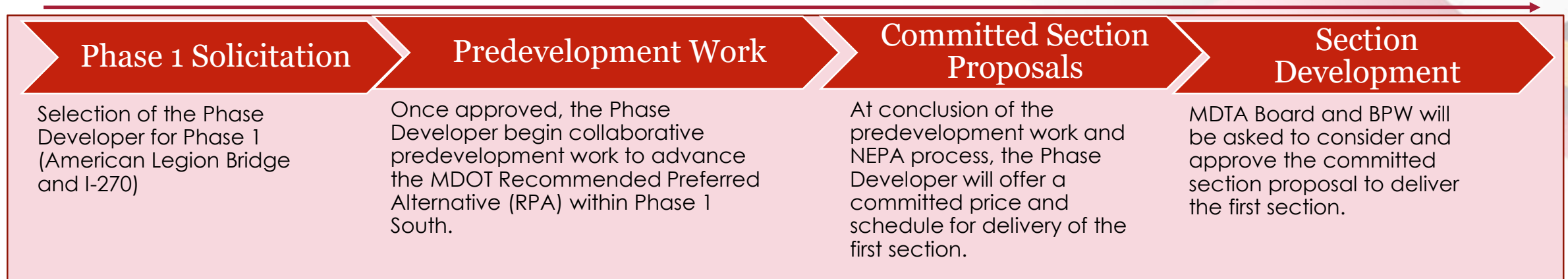
ATTACHMENTS

- P3 Program Phase 1 Developer Selection Presentation
- Contracting Officer's Final Decision

June 8, 2021



PROGRESSIVE P3 APPROACH



- Current P3 Solicitation is for a partner (Phase Developer) to collaborate with MDOT, agency partners and other stakeholders to find way to further avoid and minimize impacts to environmental resources, communities, properties and other features
- Immediate focus of Predevelopment work will be Phase 1 South (American Legion Bridge / I-270 to I-370)
- The Phase Developer will advance design and perform other pre-construction activities to mitigate delivery risk. No contract for final award will be submitted to the BPW until completion of the NEPA process. The Section P3 Agreement for the first section is not expected to go to the MDTA Board or BPW before Summer 2022.
- Collaboration and efficiencies of the approach improve cost certainty and schedule by providing further developed cost and schedule information during preliminary development, mitigating potential of cost overruns and delays and increasing the delivery certainty of all of Phase 1.

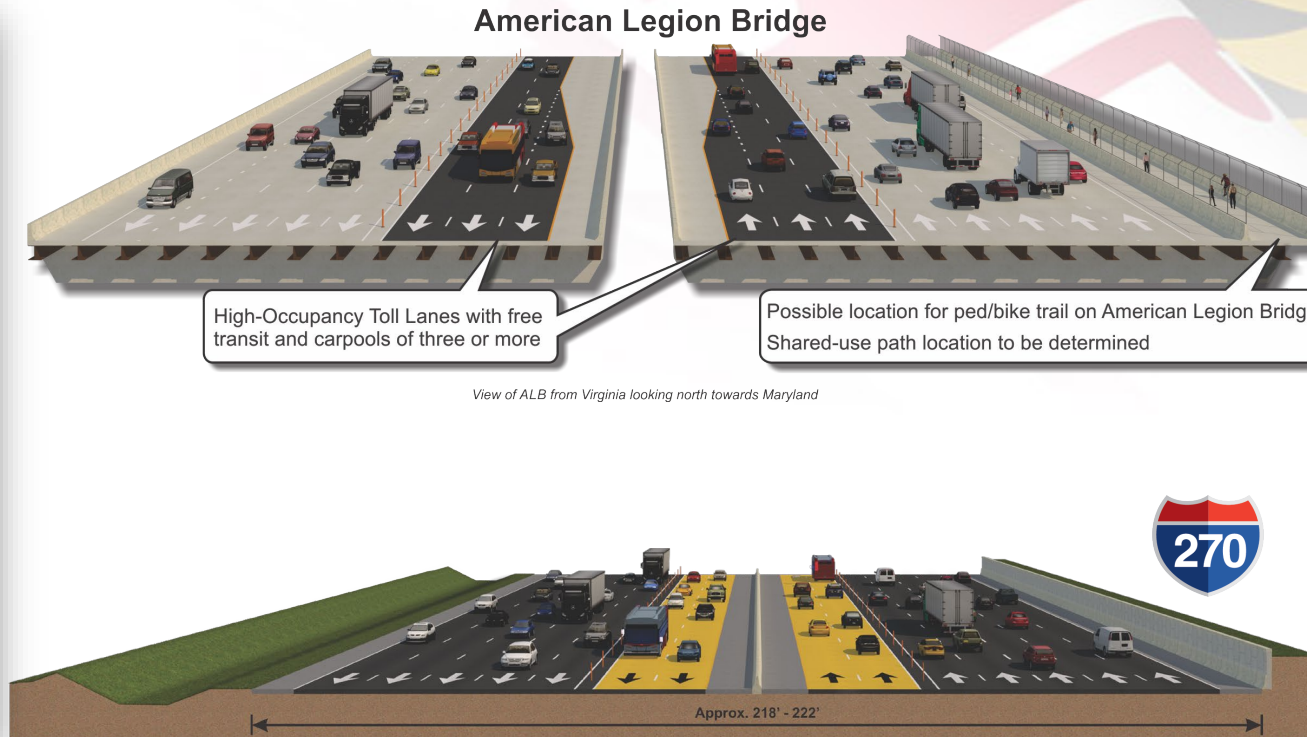
MDOT Recommended Preferred Alternative (RPA)

Two High-Occupancy Toll (HOT) Lanes in each direction

RECOMMENDED PREFERRED ALTERNATIVE: ALTERNATIVE 9 - PHASE 1 SOUTH

2 HOT MANAGED LANES
IN EACH DIRECTION

NO ACTION



SOLICITATION PROCESS

RFQ

- Identified the most highly qualified teams based on Statements of Qualification (SOQ) that included:
 - Key Personnel Skills and Expertise
 - Team Member Firms Experience and Past Performance on Similar Projects
 - Team Members Financial Strength and Capabilities
- Only Shortlisted Proposers identified through the RFQ could participate in the RFP process.
- Maryland Received 4 SOQs and determined all 4 teams who responded were sufficiently qualified and capable to deliver the project and each were shortlisted to respond to the RFP.

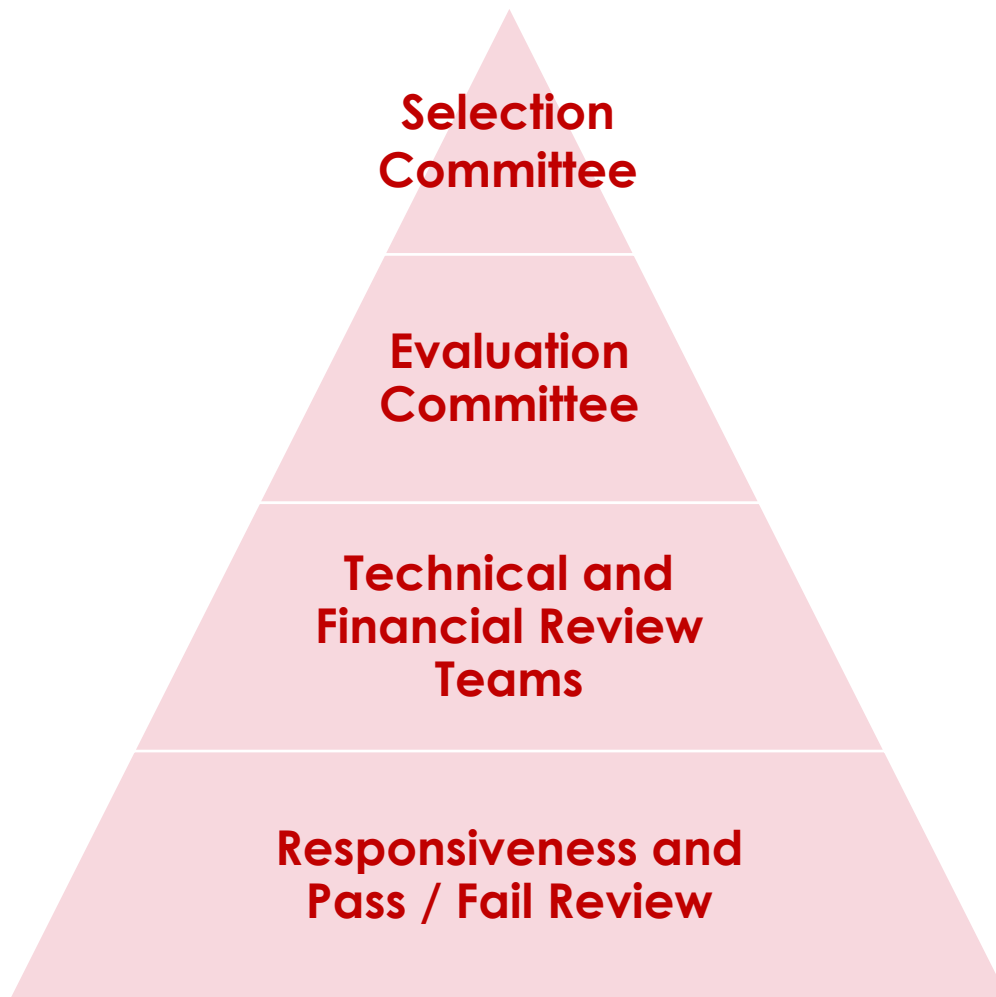
RFP

- **A Draft RFP shared was shared in July that included a draft of the Phase P3 Agreement and Section P3 Agreement Term Sheet**
- **Over 6 months, MDOT/MDTA participated in approximately 30 interactive meetings, fielded over 1,500 written questions, provided clarifications, considered innovative technical solutions, and sought to optimize the commercial terms of the agreement to be acceptable to MDOT/MDTA and the teams.**
- **Because Phase 1 South includes the Maryland and Virginia Capital Beltway Accord to deliver the American Legion Bridge, all shortlisted teams were provided the same key assumptions regarding how the Capital Beltway Accord will be dovetailed with the developer's obligations in the P3 Agreement. MDOT SHA provided these key assumptions to shortlisted teams to ensure a level and fair playing field as the teams developed their proposals.**

PROPOSALS RECEIVED

- Technical Proposals (December 2020) and Financial Proposals (January 2021) were received from three shortlisted teams:
 - Accelerate MarylandExpress Partners
 - Lead Project Developer/Equity: Itinera Infrastructure & Concessions Inc.
 - Lead Contractors: Halmar International LLC and Itinera S.p.A
 - Designers: Atkins North America, Inc. and Gannett Fleming Inc.
 - Accelerate Maryland Partners LLC
 - Lead Project Developer/Equity: Transurban (USA) Operations Inc. and Macquarie Infrastructure Development LLC
 - Lead Contractors: Transurban and Macquarie
 - Designers: Dewberry Engineers Inc. and Stantec Consulting Services Inc.
 - Capital Express Mobility Partners
 - Cintra Global SE and John Laing Investments Limited
 - Ferrovial Agroman US Corp
 - AECOM Technical Services Inc. and HNTB Corporation

EVALUATION PROCESS



- **Selection Committee:** MDOT Secretary, MDTA Executive Director, and MDOT SHA Administrator
- **Evaluation Committee:** Senior leadership representing MDOT, MDOT SHA, and MDTA, supported by Review Team Leaders, community representatives from Montgomery and Frederick counties (advisors), and a FHWA representative (observer).

15 MDOT, MDTA and Outside Experts
300+ Years Combined Experience

6 Full Day Meetings
50+ Hours of Deliberations

- **Technical and Financial Review Teams:** Comprised of subject matter experts in various areas related to the P3 Program goals. Includes a combination of MDOT staff, MDTA staff and consultants and advisors.

40 Multi-Disciplinary Experts
500+ Years Combined Similar Experience

15 Total Meetings
120+ Hours of Deliberations

EVALUATION CRITERIA

TECHNICAL PROPOSAL

Delivery Certainty (Critical):

Partnering, Risk elimination and mitigation, Development Schedule, Quality and Organizational Structure

Minimize Impacts (Significant):

Public and Stakeholder Collaboration, Customer Service, Environmental Compliance and Mitigation, and Overall Sustainability

Maximizing Value to the State (Significant)

Scope of 1st Section with No Maryland Funding, Sound Approach to Predevelopment and to Reach Financial Close

Congestion Relief (Important)

Improve overall mobility and connectivity across all transportation modes incl. transit

Opportunity MDOT/Community Benefits (Important)

Local Workforce Opportunities and Development; Opportunities for Local Unions & Contractors; and Small, Minority, DBE, Veteran Businesses Engagement

ADJECTIVAL RATINGS

Unacceptable

Good +/-

Acceptable +/-

Exceptional +/-

FINANCIAL PROPOSAL (0-1,791 POSSIBLE PTS)

Proposal Equity Internal Rate of Return (0-457 possible pts)

Developer Closing Costs (0-40 possible pts)

Development Rights Payment (0-145 possible pts)

Predevelopment Work Costs (0-100 possible pts)

D&C General Conditions Cost % (0-435 possible pts)

Contractor Markup % (0-585 possible pts)

Renewal Work General Conditions Cost % (0-29 possible pts)

***Technical Proposal and Financial Proposal were approximately equal in determining best value selection**

EVALUATION RESULTS

| Overall Ratings | | |
|--|------------------|-----------------|
| Proposer | Technical Rating | Financial Score |
| Capital Express Mobility Partners LLC ("CEMP") | Good+ | 665 |
| Accelerate Maryland Partners LLC ("AMP") | Good | 1,356 |
| AccelerateMaryland Express Partners | Acceptable | 800 |

WHAT THE STATE IS GETTING

Selection: **Accelerate Maryland Partners LLC**

- Partner with Strong Regional Connections and a Track Record of Success Delivering Managed Lane P3 Projects
- Strong understanding of the project and well-thought-out approaches to manage and mitigate project risks including solutions to further reduce property impacts, reduce potential utility conflicts, and provide environmental stewardship
- Delivery of Phase South (American Legion Bridge / I-270 to I-370) with No Maryland Funding and financial close by Fall 2022
- Proposed Commitments Include Transit Improvements in Montgomery County, a Community Grant program, Vision Zero Investments, No Interest Loan Program for Local Fleet Conversions, and Water Quality enhancements*
- Offered a \$145m Development Rights Payment, estimated \$5m for Vision Zero during construction of Phase 1 South and estimated at least \$300m in transit services for Phase 1 South alone, \$50m in community grants, and \$25m for emerging technologies over the operating term*
- Comprehensive Approach to Local Workforce Development Including Small, Disadvantaged, and Veteran Owned Businesses; Union and Local Contractor involvement and Engagement with Local Community Organizations and Educational Institutions.

*The exact investments would be determined as part of the Section P3 Agreement along with other components to advance final design, construction, financing, operations, and maintenance for 50 years.

NEXT STEPS

- 30-Day Review by the Comptroller, Treasurer and Budget Committees – **June/July 2021**
- Seek BPW Approval of Phase P3 Agreement – **Mid/Late July 2021**
- Execution of Phase P3 Agreement – **Mid/Late July 2021**
- Phase Developer Committed Section Proposal Due – **May 2022**
- Seek MDTA Approval of Section P3 Agreement and Committed Section Proposal – **Spring/Summer 2022**
- Seek BPW Approval of Section P3 Agreement and Committed Section Proposal – **Summer 2022**
- Financial Close – **Fall 2022**

April 15, 2021

Via Overnight Delivery

Douglas F. Gansler, Esq.
Cadwalader, Wickersham & Taft LLP
700 Sixth Street, N.W.
Washington DC 20001

Via Overnight Delivery

Ms. Rebecca Brooks
Project Director and Authorized Representative
Capital Express Mobility Partners, LLC
9600 Great Hills Trail, Suite 250E
Austin TX 78759

RE: Contracting Officer's Final Decision

Protest by Capital Express Mobility Partners, LLC
Instructions to Proposers / Request for Proposals "Phase 1 of the I-495 & I-270 Public-Private Partnership Program Through a Phase Public-Private Partnership Agreement"

Dear Mr. Gansler and Ms. Brooks:

I am responding to your letter dated March 1, 2021 related to the above-referenced instructions to proposers / request for proposals (the "ITP" or the "RFP") issued by the Maryland Transportation Authority ("MDTA") and the Maryland Department of Transportation ("MDOT") (collectively referred to as "MDOT" or the "State") in which Capital Express Mobility Partners, LLC ("CEMP") protests the decision to select Accelerate Maryland Partners, LLC ("AMP") for award of the resulting Phase 1 public-private partnership agreement ("Phase P3 Agreement") as part of the public-private partnership program (the "P3 Program") referenced above. As the Contracting Officer, I have reviewed the issues raised in CEMP's protest letter.

The protest letter from CEMP asserted four main bases of protest. For the reasons set forth in greater detail below, each basis of protest is both untimely (or partially untimely) and fails on the merits. Essentially, CEMP generally failed to submit its allegations by the times required in the RFP. CEMP also alleges improprieties in the RFP, which CEMP was provided significant opportunity to review and comment on prior to the submission of proposals. CEMP is inaccurate on its allegations and objects to the business and technical judgments of MDOT, which determined the requirements of the State's solicitation and that a Proposer other than CEMP presented the most advantageous offer to the State. This letter sets forth my findings on each basis of protest and my final decision.

I. FACTUAL BACKGROUND.

A. The Request for Qualifications.

On February 2, 2020, and in accordance with State Finance and Procurement Article Title 10A of the Annotated Code of Maryland (the “Act”), as well as Chapter 6 of Subtitle 7 of Title 11 of the Code of Maryland Regulations (“COMAR”) and Chapter 17 of Subtitle 1 of Title 11 of COMAR, MDOT issued a Request for Qualifications (“RFQ”) on eMaryland Marketplace Advantage (“eMMA”) seeking Statements of Qualification (“SOQ”) for the selection of qualified Shortlisted Proposers that would later be allowed to compete under the RFP for selection of a Phase Developer for the P3 Program. *See, e.g.*, RFQ § 1.2. Various addenda were issued to the RFQ on eMMA.

RFQ § 1.1 described Phase 1 of the P3 Program as part of Maryland’s traffic relief plan for parts of I-495 and I-270. It described the geographical area as:

Phase 1 of the P3 Program includes improvements to I-495 from the vicinity of the George Washington Memorial Parkway in Virginia, across and including the ALB [American Legion Bridge], to its interchange with I-270 and I-270 from its interchange with I-495 to its interchange with I-70 (“Phase 1”). With respect to Phase 1, I-495 from the vicinity of the George Washington Memorial Parkway to I-270 and I-270 from I-495 to I-370 shall be developed and delivered first.

The overarching goals were congestion relief, minimizing impacts, no net cost to the State, accelerated delivery, and innovation. RFQ § 1.1 at p. 6. *See also* Phase P3 Agreement, Exhibit 6 § 1.2 at p. 1. It was expected that Phase 1 would be developed and delivered by the Phase Developer selected pursuant to the RFP initiated by the RFQ. *Id.* RFQ § 1.3 indicated that “[t]he Phase Developer will be expected to manage the successful preliminary development of Phase 1 consistent with the requirements” of the RFP.

RFQ § 2.1 explained that the State seeks to enter into a Phase P3 Agreement with a Selected Proposer for “predevelopment work” related to the Phase 1 work, to be detailed in the final Phase P3 Agreement to be attached to the final RFP. Once the predevelopment work is completed and a committed section proposal approved, the State will enter into one or more Section P3 Agreements with each Section Developer to perform aspects of the Phase 1 work.

The RFQ included an explanation of the overall solicitation process, allowed potential proposers to ask questions, and required a Statement of Qualifications (SOQ) submission by proposer teams that desire to be selected as Shortlisted Proposers and to proceed to the RFP process. *See* RFQ § 1.5 at pp. 12-13. Throughout the RFQ, the State placed an emphasis on a proposer’s overall team composition. *See, e.g.*, RFQ §§ 6.9, 8.3, 14. The RFQ included a process by which changes could be made to a Shortlisted Proposer’s team. RFQ § 8.9.

RFQ Addendum 8 explained some of the flexibility among team members to serve in more than one role and the anticipated need to subcontract some of the work. It provided, in part:

Each Respondent Team must include an Equity Member, a Designer, a Lead Contractor, and a Lead Project Developer. Any Equity Member or Major Non-Equity Member *may be designated with more than one (1) role within the Respondent Team*. The Lead Contractor, the Designer, and the Lead Project Developer are *not required to have sufficient capacity or appetite to perform all the Section Work for each Section of Phase 1 without forming joint ventures or subcontracting or otherwise teaming with other firms*.

RFQ Addendum 8, § 14.1 (emphasis added). There was no requirement for self-performance of any of the Section Work by the Lead Contractor, the Designer, or the Lead Project Developer and each team member could fill more than one role for the predevelopment work. The responsibility of the Phase Developer under the Section P3 Agreement was to control and/or establish the Section Developer; the Section Developer would be responsible to, among other things, design and construct the price-managed lanes. RFQ § 1.3(b) at pp. 10-11.

The RFQ described the evaluation process and criteria for SOQ submissions. RFQ § 8 at pp. 35-42. It set forth three evaluation criteria, some with sub-criteria, to be addressed by Proposers in their SOQs. These criteria were: 1) Phase Developer Team (Critical); 2) Key Personnel (Significant); and 3) Understanding of Development Approach (Important). RFQ § 8.3-8.5 at pp. 38-40. Each criterion and sub-criterion was categorized as Critical, Significant, or Important, each with different weights. The RFQ explained the SOQ evaluation process, stating that the SOQ would be evaluated as Exceptional, Good, Acceptable, or Unacceptable with pluses and minuses available to further differentiate within Exceptional, Good, and Acceptable ratings. RFQ § 8.2 at pp. 37-38.

Potential or actual proposers were given an opportunity to protest any alleged improprieties in the RFQ. RFQ § 9. No protests related to the RFQ were filed.

Interested proposer teams submitted SOQs. On July 17, 2020, MDOT named four teams as Shortlisted Proposers in a press release. *See* Press Release dated July 17, 2020 (link found at <https://www.mdot.maryland.gov/tso/pages/newsroomdetails.aspx?newsId=532&PageId=38>). This meant that those four teams would move forward in the P3 Program solicitation process and would have an opportunity to submit technical and financial proposals in response to the final RFP. *See* RFQ § 1.4. AMP and CEMP were both named as Shortlisted Proposers. Those two teams were described in the MDOT press release, respectively, as:

Accelerate Maryland Partners LLC

Lead Project Developer / Equity: Transurban (USA) Operations Inc. and Macquarie Infrastructure Developments LLC

Lead Contractor: Archer Western Construction, LLC

Designers: Dewberry Engineers Inc. and Stantec Consulting Services Inc.

Capital Express Mobility Partners

Lead Project Developer / Equity: Cintra Global SE, Meridiam Capital Express, LLC, and John Laing Investments Limited

Lead Contractor: Ferrovial Agroman US Corp.

Designers: AECOM Technical Services, Inc.

Following submission of the SOQs and after being named as Shortlisted Proposers, both CEMP and AMP requested changes to their Proposer teams. MDOT approved these requests.

B. The Instructions to Proposers (“ITP”) / Request for Proposals (“RFP”).

MDOT issued the first draft RFP to Shortlisted Proposers on July 24, 2020. The solicitation process was collaborative. MDOT sought comments and suggestions from the Shortlisted Proposers to assist in developing the final RFP and various attachments thereto, including the Phase P3 Agreement and the Section P3 Agreement terms (collectively referred to, with all exhibits and attachments, as the “RFP”). MDOT issued responses to 1,539 Requests for Clarifications (“RFCs”) submitted by Shortlisted Proposers before issuance of the final RFP. These were questions, suggestions, and requests that Shortlisted Proposers had submitted in response to draft versions of the RFP documents. On December 18, 2020, MDOT issued the final RFP, including final attachments, to Shortlisted Proposers.

The RFP provided that “[t]he Selected Proposer will be expected to manage the successful preliminary development of Phase 1 consistent with the requirements of the RFP” and that the Phase Developer would be “responsible for the predevelopment work.” RFP § 1.3 at p. 8.

A detailed scope of predevelopment work was set forth in the RFP. *See, e.g.*, Phase P3 Agreement, Exhibit 6. To summarize, predevelopment work generally references the phase of a capital project between the origination of the concept and the initiation of the final design and construction of the capital project. It is the period of gathering information, exploring options, eliminating and reducing risks and making decisions around the definition of a capital project. The predevelopment work involves, in large part, developing a financially feasible project in collaboration with all parties and stakeholders. The predevelopment work will develop a project that is bankable, can obtain debt financing, and can reach close of finance, allowing the final design and construction to proceed.

Like the RFQ, the RFP acknowledged that changes to a Proposer's team and/or key personnel could occur after SOQ submission and the naming of Shortlisted Proposer teams. *See* RFP § 1.18. The RFP provided that in order to make such changes, the Proposer needed to submit such information as required by MDOT to demonstrate that "the changed *team* is just as or better qualified than the *team* being replaced, as determined in MDOT's sole judgment." RFP § 1.18(a) at p. 21 (emphasis added).

The RFP defined various entities that compose the Proposer team. RFP Appendix 1 "Definitions." "Lead Contractor" was defined as "the member of the Proposer Team with primary responsibility for work related to design and construction, and other technical development work with respect to the Predevelopment Work, including design management." RFP at p. 81. The RFP did not require the Lead Contractor to self-perform any of the eventual final design and construction work on the future capital project, or Section Work.

The RFP set forth five technical evaluation criteria, all with sub-criteria, to be addressed by Proposers in their technical proposals and, in turn, evaluated by MDOT. Each criterion and sub-criterion was categorized as Critical, Significant, or Important, each with different weights. The technical evaluation criteria were:

- 1) Delivery Certainty (Critical);
- 2) Minimize Impacts (Significant);
- 3) Maximizing Value to the State (Significant);
- 4) Opportunity MDOT/Community Benefits (Important); and
- 5) Congestion Relief (Important).

RFP § 3.2 at pp. 43-47. The RFP explained the technical evaluation process, including informing Shortlisted Proposers that the technical proposal would be evaluated qualitatively as Exceptional, Good, Acceptable, or Unacceptable with plusses and minuses available to further differentiate within Exceptional, Good, and Acceptable ratings. RFP § 4.6 at pp. 57-59.

The RFP, including Form G – Financial Proposal Form, set forth seven financial proposal criteria. RFP § 4.7 at pp. 59-62 & RFP Form G. Each of the financial criteria, with a very brief summary, is set forth below. Complete definitions are set forth in the RFP.

- 1) Proposal Equity IRR. This generally references the internal rate of return for equity invested that the Proposer proposes to receive, reflected as a percentage. *See* RFP § 4.7(a) at pp 59-60, RFP Appendix 1 "Definitions" at p. 84, & RFP Appendix 5 "Financial Proposal Instructions" at pp. 105-06.

2) Developer Closing Fee Percentage. This generally references the maximum closing fees proposed to be paid to a Phase Developer or Section Developer, reflected as a percentage. The developer closing fee is the amount that the developer may be paid at Financial Close to reimburse the developer for certain fees incurred for reaching Financial Close. *See* RFP § 4.7(b) at p. 60, RFP Appendix 1 “Definitions” at p. 79, & RFP Appendix 5 “Financial Proposal Instructions” at p. 106.

3) Development Rights Fees. This generally references the development rights fees proposed to be paid to the State in circumstances described in the Phase P3 Agreement, reflected as a dollar amount. It is the amount to be paid to the State by the developer at the Financial Close for each section of Phase South A in exchange for the right to develop the project and share in the revenue received from tolls. *See* RFP § 4.7(c) at pp. 60-61, RFP Appendix 1 “Definitions” at p. 79, & RFP Appendix 5 “Financial Proposal Instructions” at p. 106.

4) Predevelopment Cost Cap. This generally references the maximum amount of “Allowed Costs” proposed to be reimbursed to the Phase Developer or a Section Developer, reflected as a dollar amount. *See* RFP § 4.7(d) at p. 61, RFP Appendix 1 “Definitions” at p. 83, & RFP Appendix 5 “Financial Proposal Instructions” at pp. 106-07.

5) D&C General Conditions Cost Percentage. This generally references the maximum amount of direct project overhead costs, without contingencies, incurred for supervision and administration of the design and construction work proposed to be applied in the D&C Costing Model, reflected as a percentage. *See* RFP § 4.7(e) at p. 61, RFP Appendix 1 “Definitions” at p. 78, & RFP Appendix 5 “Financial Proposal Instructions” at p. 107. *See also*, Phase P3 Agreement, Exhibit 6 at § 1.20.2 at pp. 29-30.

6) Contractor Markup Percentage. This generally references the maximum amount of contractor (or subcontractor) markup costs, including indirect overhead costs and profit, for the design and construction work proposed to be applied to the D&C Costing Model, reflected as a percentage. *See* RFP § 4.7(f) at p. 61, RFP Appendix 1 “Definitions” at pp. 77-78, & RFP Appendix 5 “Financial Proposal Instructions” at p. 107. *See also*, Phase P3 Agreement, Exhibit 6 at § 1.20.2 at pp. 29-30.

7) Renewal Work General Conditions Cost Percentage. This generally references the maximum amount of direct project overhead costs for Renewal Work (operations and maintenance (“O&M”)) proposed to be applied to the O&M Costing Model, reflected as a percentage. *See* RFP § 4.7(g) at p. 62 & RFP Appendix 1 “Definitions” at p. 85, & RFP Appendix 5 “Financial Proposal Instructions” at pp. 107-08. *See also*, Phase P3 Agreement, Exhibit 6 at § 1.21.2 at pp. 33.

RFP § 4.7 at pp. 59-62. The RFP set forth the point values for all financial criteria. Any Proposer could have determined its own financial proposal score through mathematical calculations based upon what it proposed. Each of the financial criteria had a cap, an amount over which no Proposer was allowed to propose. None of the financial criteria had a floor, an amount under which no Proposer was allowed to propose. The financial proposal criteria, limitations, and points are summarized in the table below.

| RFP Pricing Structure Summary Table | | | |
|---|----------------------|------------------------|------------------------|
| Financial Criteria | Cap / Maximum | Floor / Minimum | Possible Points |
| 1. Proposal Equity IRR | 17.0% | None | 0 – 457* |
| 2. Developer Closing Fee Percentage | 1% | None | 0 - 40 |
| 3. Developmental Rights Fees | \$145,000,000 | None | 0 - 145 |
| 4. Predevelopment Cost Cap | \$100,000,000 | None | 0 - 100 |
| 5. D&C General Conditions Cost Percentage | 14.5% | None | 0 - 435 |
| 6. Contractor Markup Percentage | 19.5% | None | 0 - 585 |
| 7. Renewal Work General Conditions Cost Percentage | 14.5% | None | 0 - 29 |
| | | Total Point Range: | 0 – 1,791 |
| *While there was no minimum limit, the RFP noted that only the maximum possible 457 points would be awarded for proposal values less than or equal to 10.0% | | | |

See RFP § 4.7 at pp. 59-62. Questions were asked during the solicitation process regarding various aspects of the financial proposal. See generally Requests for Clarifications. CEMP noted several of these RFCs related to financial evaluation criteria in its protest. Like the RFQ, the RFP emphasized that all work should be performed at no net cost to the State. RFP § 1.6 at p. 9. See RFP § 2.3 at p. 16.

Shortlisted Proposers were informed that final evaluation of technical and financial proposals would be done using a “trade-off” analysis in order to determine which proposal was “most advantageous to the State.” RFP § 4.10(e) at p. 65. Technical and financial proposals were considered to be approximately equal in weight.¹ *Id.*

Shortlisted Proposers were given an opportunity to protest any alleged improprieties in the RFP. RFP § 6. No protests related to the RFP were filed prior to the submission of proposals. *See* RFP § 6.3(a).

C. Proposal Submission and Evaluation.

Technical proposals were due on December 23, 2020 and financial proposals were due on January 8, 2021. Three of the four Shortlisted Proposers submitted proposals for the predevelopment work. MDOT conducted a comprehensive evaluation process on a fair and uniform basis, as described in the RFP. *See* RFP § 4.

Section 4 of the RFP set forth a series of four general steps in the proposal evaluation process: 1) determination of whether a Proposer is responsible; 2) determination of whether a proposal is responsive, based on a review of the pass/fail criteria; 3) evaluations of the technical and financial proposals; and d) a determination of the Selected Proposer based on “technical and financial judgment and discretion to make a final determination of [the proposal] most advantageous to the State considering all factors set forth” in the RFP. RFP § 4 at pp. 54-64.

MDOT determined that all three Proposer teams were responsible and that their proposals were responsive, meeting each of the pass/fail criteria. Each proposal was then evaluated, consistent with the criteria and methodology set forth in the RFP.

MDOT assembled technical evaluation teams and an Evaluation Committee. RFP § 4.4 at p. 56. Each technical evaluation team was assigned a single technical evaluation criterion to review; namely, Delivery Certainty, Minimize Impacts, Maximizing Value to the State, Opportunity MDOT/Community Benefits, or Congestion Relief. Each technical evaluation team was provided a relevant portion of the technical proposals and limited its review to that evaluation criterion (including sub-criteria). Each technical evaluation team reviewed its assigned criterion, including each sub-criterion, and developed a consensus adjectival rating recommendation for the sub-criteria, as well as a consensus adjectival rating recommendation for the overall evaluation criterion assigned to it based on the weighting set forth in the RFP.

¹ CEMP suggests in its protest that comments attributed to the MDOT Secretary in a Washington Post article somehow indicate that the RFP evaluation process was not followed. Protest at p. 2. CEMP is wrong. The ratings, scores, and overall evaluation of Proposers indicate that the RFP process was followed.

The financial proposals were reviewed by a financial evaluation team, which was separate from the technical evaluation teams. None of the financial proposals exceeded the caps for the financial proposal evaluation criteria set forth in the RFP. The financial review team allocated points to each of the financial criteria based on the defined scoring outlined in the RFP to determine the overall financial score of each Proposer.

Following the work of each technical evaluation team, the Evaluation Committee convened. Each technical evaluation team leader presented the evaluation team's recommendation to the Evaluation Committee. The Evaluation Committee reviewed each evaluation criterion and sub-criterion, including the initial adjectival rating recommendations from each technical evaluation team. The Evaluation Committee considered the evaluation criteria and weightings set forth in the RFP in order to reach consensus adjectival ratings for each criterion and its sub-criteria.

Once the Evaluation Committee completed its review and ratings related to the technical proposals, the financial evaluation team leader presented the financial evaluations and scoring related to each Proposer to the Evaluation Committee. The Evaluation Committee reviewed and discussed the financial proposals and scores. After the review of the financial scores was completed, the Evaluation Committee established the Competitive Range. *See* RFP § 4.10(b) at p. 63. The Evaluation Committee then performed a trade-off analysis, considering each technical and financial proposal from each Proposer, in order to determine the most advantageous Proposal to the State or if further discussions would be needed with the Proposers in the Competitive Range. In performing this aspect of the evaluation, the Evaluation Committee considered the technical and financial proposals to be approximately equal in reaching a determination regarding which proposal was most advantageous to the State when both technical and price proposals were considered. *See* RFP § 4.10(e).

The Evaluation Committee decided further discussions were not needed and made a recommendation for the Selected Proposer to the Selection Committee. The technical and financial ratings presented to the Selection Committee were:

| Overall Ratings | | |
|-------------------------------------|-------------------------|------------------------|
| Proposer | Technical Rating | Financial Score |
| Capital Express Mobility Partners | Good+ | 665 |
| Accelerate Maryland Partners, LLC | Good | 1,356 |
| AccelerateMaryland Express Partners | Acceptable | 800 |

The Evaluation Committee determined that CEMP's technical proposal was marginally superior to AMP's technical proposal. However, AMP's financial proposal scored significantly higher than CEMP's financial proposal. The Evaluation Committee determined that AMP's significantly higher financial proposal score outweighed the marginally higher technical rating of CEMP, making the AMP proposal the most advantageous offer to the State and the overall best value. The recommendation was presented to the Selection Committee, which accepted the Evaluation Committee's recommendation of AMP as the most advantageous and overall best value to the State when both technical and price proposals were considered.

On February 18, 2021, MDOT informed AMP that MDOT had determined its proposal to be the most advantageous to the State and recommended for award of the Phase P3 Agreement, informed CEMP that MDOT had determined that its proposal was not the most advantageous to the State, and also publicly announced the selection of AMP for the predevelopment work. On February 18, 2021, CEMP requested a debriefing. *See* RFP § 6.3(b). A debriefing was held with representatives of the State and CEMP on February 24, 2021. CEMP filed its protest with the Contracting Officer on March 1, 2021, within five days of the debriefing.

II. BASES OF PROTEST.

CEMP protests award to AMP instead of CEMP. It sets forth four general bases for protest, each of which will be discussed below.

CEMP asserts that MDOT chose the wrong Proposer and that MDOT should: 1) disqualify AMP for reasons set forth in its protest; or 2) re-open the solicitation so that CEMP can submit a revised financial proposal and MDOT can conduct a revised evaluation based upon new financial proposals submitted after all scoring totals have been announced.

For the reasons set forth below, there is no merit to any of CEMP's bases of protest. MDOT will not disqualify AMP or re-open the evaluation. MDOT's determination that AMP presented the proposal that was most advantageous to the State was consistent with the requirements of the RFP, as well as MDOT's technical and business judgment. CEMP has failed to demonstrate that MDOT's determination was arbitrary, capricious, unreasonable, or contrary to law, and its protest is denied.

A. CEMP's Assertion: MDOT's Decision to Approve Transurban and Macquarie as Lead Contractors in AMP's Proposer Team Was Arbitrary, Capricious, and Unsupported by Competent Evidence

In its first basis of protest, CEMP generally alleges that MDOT's approval of a change in AMP's Proposer team was arbitrary, capricious, and unsupported by competent evidence. CEMP's protest on this basis is both untimely and fails on the merits.

1. CEMP's Protest on this Basis Is Untimely.

On July 17, 2020, MDOT announced the Shortlisted Teams, which included Archer Western Construction, LLC ("Archer Western") as the Lead Contractor on the AMP Proposer team. On January 8, 2021, MDOT issued a press release that noted that three of the Shortlisted Proposers submitted proposals. MDOT Press Release dated January 8, 2021 (link found at: <https://mdot.maryland.gov/tso/pages/newsroomdetails.aspx?PageId=38&newsId=529>). CEMP and AMP were both named as Proposers. Those two teams were described, respectively, as:

Accelerate Maryland Partners LLC

Lead Project Developer / Equity: Transurban (USA) Operations Inc. and Macquarie Infrastructure Developments LLC

Lead Contractor: Transurban and Macquarie

Designers: Dewberry Engineers Inc. and Stantec Consulting Services Inc.

Capital Express Mobility Partners

Lead Project Developer / Equity: Cintra Global SE and John Laing Investments Limited

Lead Contractor: Ferrovial Agroman US Corp.

Designers: AECOM Technical Services Inc. and HNTB Corporation

By the time of the press release, MDOT had accepted the change to AMP's Proposer team to have Transurban (USA) Operations Inc. ("Transurban") and Macquarie Infrastructure Developments LLC ("Macquarie") act in dual roles as Lead Project Developer/Equity and Lead Contractor. In other words, Transurban and Macquarie replaced Archer Western as the AMP team's Lead Contractor. As of January 8, 2021, MDOT had likewise accepted changes to CEMP's Proposer team to remove one of the originally-named Lead Project Developer/Equity team members (Meridiam Capital Express LLC) and to add HNTB Corporation as a Designer.

Pursuant to the terms of the RFP, a protest objecting to something other than improprieties in the final RFP were required to be "filed not later than five (5) days after the basis for Protest is known or should have been known, whichever is earlier." RFP § 6.3(d). The RFP also required that "a Protest received by the Contracting Officer after the time limits prescribed in this Section 6.3 may not be considered." RFP § 6.3(e).

On January 13, 2021, five days after the January 8, 2021 press release, CEMP sent a letter of inquiry to the Solicitation Manager noting that “[i]n the MDOT press release issued on January 8, 2021, we noticed the change in the composition of the Transurban-Macquarie team, in particular, the removal of Archer-Western Construction as the Lead Contractor. We assume this change was requested and approved as required by the terms of the ITP (including applicable timing requirements for such request).” CEMP requested confirmation that the changed team still complied with the requirements of the RFQ and the RFP. On January 20, 2021, MDOT issued Notice 24 to all Shortlisted Proposers, including CEMP, that, among other things, changes in Proposer team composition “have been, and will continue to be reviewed in compliance with the solicitation documents.”

If CEMP objected to the change in Proposer team members of AMP, it should have filed a protest after learning of the replacement to AMP’s Proposer team, or by no later than January 13, 2021, which was five days after the January 8 press release. Even if CEMP’s protest basis was not known until MDOT issued Notice 24 to all Shortlisted Proposers, its protest should have been filed by no later than January 25, five days after the Notice’s issuance. It failed to do so. Instead, CEMP waited until March 1 to protest the issue of AMP’s Lead Contractor change. CEMP’s March 1 protest on this issue, therefore, is untimely and may not be considered by the Contracting Officer.

2. MDOT Determined, in its Sole Judgment, that Changes to AMP’s Project Team Were Acceptable.

Even if the protest were timely, it would fail on the merits. While under no obligation to consider the merits of an untimely protest, and without waiving any rights of MDOT, the substantive aspect of this basis of protest is addressed below.

As mentioned above, the RFP contemplated that changes to a Proposer’s team and/or key personnel could occur after SOQ submission and shortlisting. *See* RFP § 1.18. The RFP set forth a process by which Proposer team members and individual key personnel could be changed following a written request to make such changes. The RFP provided that to make such changes, the Proposer needed to submit such information as required by MDOT to demonstrate that “the changed *team* is just as or better qualified than the *team* being replaced, as determined in MDOT’s sole judgment.” RFP § 1.18(a) at p. 21 (emphasis added). The emphasis was on the Proposer *team* and not an individual member of the team.

In October 2020, AMP submitted a request to remove Archer Western from its Project team and to substitute Transurban and Macquarie in its place as Lead Contractor. It submitted various documents to support this change request. MDOT, in its sole judgment, determined that the changed AMP Proposer team was as qualified as the original Proposer team and approved of that change in November 2020.

CEMP asserts, without evidence or basis, that MDOT failed to follow the requirements of law, regulations, and the RFP because Transurban and Macquarie could not, in CEMP's view as a disappointed proposer, have been "just as or better qualified" as road infrastructure contractor Archer Western. CEMP suggests that MDOT did not conduct any responsibility determination based upon AMP's substitution of Lead Contractor. CEMP is wrong. CEMP references sections of law and the RFP in making its argument, but it misreads and misunderstands the language in the RFQ, the language in the RFP, and the nature of predevelopment work.

The RFQ made clear that the Proposer team needed to have experience with predevelopment work. RFQ §§ 8, 15, & 15.2 (requiring "Experience with Predevelopment Work"). According to the RFQ, Proposer team members needed experience with, among other things, Comparable P3 and/or Design Build Projects and Toll Road Operations, including the "construction *and/or management* of construction of civil and infrastructure aspects." RFQ § 15.1(b) at p. 55 (emphasis added with italics). Team members also needed experience with Congestion Management Delivery, including "construction *and/or management* of construction approach." RFQ § 15.3(c) at p. 56 (emphasis added with italics). RFQ § 15 "Relevant Development Experience" was consistent with RFQ § 8 "Evaluation Process and Criteria." See RFQ § 8.3-8.5 at pp. 38-40. The RFQ provided that *management* and not just direct construction self-performance was acceptable experience. The relevant experience in RFQ § 15 did not require self-performance of construction work, either directly or indirectly, as evidenced by allowing for "construction *and/or management*" experience. (Emphasis added with italics).

Further, RFQ § 14.1 indicated that the Lead Contractor did not need to have "sufficient capacity or appetite" to perform future Section Work without forming a joint venture, subcontracting, or similar arrangement. The RFQ language is consistent with MDOT's seeking a Proposer *team* to perform *predevelopment* work for a future capital construction project. See, e.g., RFP Appendix 1 "Definitions" at p. 81 (defining Lead Contractor as "the member of the Proposer Team with primary responsibility for work related to design and construction, and other technical development work with respect to the Predevelopment Work, including design management").

CEMP's basis of protest appears to be grounded in its mistaken belief that the Lead Contractor must be responsible for self-performing construction work, either immediately or under a future Section P3 Agreement for the capital construction project that will occur after the predevelopment work and after the capital project is deemed financially viable to move forward. However, the definition of Lead Contractor requires that the designated member of the Proposer Team have "primary responsibility for work related to design and construction, and other technical development work with respect to the Predevelopment Work, including design management." RFP Appendix 1 at p. 81. There are no requirements in the RFP for self-performance by the Lead Contractor of any construction work. See RFQ § 14.1 at p. 51 (noting that the "Lead Contractor, the Designer, and the Lead Project Developer are not required to have sufficient capacity or appetite to perform all of the Section Work for each section of Phase 1 without forming joint ventures or subcontracting or otherwise teaming with other firms.")).

Further, the definition makes clear that the Lead Contractor's work is "with respect to the Predevelopment Work" and the RFP indicates that construction is neither permitted nor anticipated during the predevelopment work phase and prior to execution of a Section P3 Agreement. *See, e.g.*, Phase P3 Agreement § 9.1 at p. 14 (setting forth only limited reasons for the Phase Developer to even enter the Phase 1 Site, with construction not among the reasons).

After shortlisting and prior to proposal submission, MDOT reviewed the change in the AMP Proposer team for the predevelopment work. AMP described its requested changes in writing and provided supporting documentation for all changes, including supporting team and personnel information. Taken as a whole, MDOT approved the new AMP Proposer team prior to the submission of proposals for the predevelopment work and consistent with the terms of the RFQ and the RFP. *See* RFQ §§ 8 & 15; RFP § 1.18. Based on the information submitted, MDOT determined, in its sole judgment, that the AMP Proposer team changes were acceptable and the changed team was just as qualified as the original AMP Proposer team.

In addition, MDOT conducted the responsibility analysis required in § 4.2 of the RFP after the submission of proposals and determined that all three Proposers, including AMP, were responsible. As noted above, this RFP is for predevelopment work, which may eventually result in final design and construction work on a capital project, after various milestones are achieved with the predevelopment work and the capital project is determined to be financially viable. MDOT reviewed the AMP Proposal and determined that the AMP Proposer team, based on their experience with similar projects, their financial integrity, and other relevant factors, had the capacity in all respects to ensure good faith performance of the work, consistent with the RFP and applicable law.

MDOT followed the requirements of the law and solicitation documents in approving the change in Lead Contractor for AMP and determined that the AMP team was responsible. CEMP's protest on this basis is denied.

B. CEMP's Assertion: MDOT's Acceptance of Margins That it Knew Were Commercially Unrealistic and that Violate the Requirements of the RFP Was Arbitrary, Capricious, and Unsupported by Competent Evidence

In its second basis of protest, CEMP generally alleges that MDOT's acceptance of a financial proposal consistent with the requirements of the RFP was arbitrary, capricious, and unsupported by competent evidence. More specifically, CEMP alleges that, according to its calculations based on the released financial scores and certain information disclosed by MDOT, AMP failed to propose "realistic margins" and MDOT's acceptance of AMP's financial proposal was, therefore, arbitrary, capricious, and unsupported by competent evidence. CEMP's protest on this basis is both untimely and fails on the merits.

1. CEMP's Protest on this Basis Is Untimely.

In this basis of protest, CEMP essentially objects to the known and transparent pricing structure set forth in the RFP. *See* RFP § 4.7. *See also*, RFP Pricing Structure Summary Table, above. Based on the mathematical calculations and allocation of points that were disclosed in the RFP, every Proposer knew what its point allocation would be at time of proposal submission. Each Proposer team had to determine how to fund the project and allocate risks among the seven categories of pricing that were scored in the financial proposal. While several questions were asked during the RFP process, no Proposer protested the financial form, the calculations, the points, or the lack of a floor for any of the financial proposal criteria. The financial form and point allocations were all known upon issuance of the final RFP. CEMP now seeks to have MDOT re-open a solicitation after points and some pricing of AMP have been revealed, revise the RFP to comport with the pricing structure that CEMP desires to have in an effort to give its pricing methodology a competitive advantage, and establish a floor for certain financial proposal criteria. Protest at pp. 24-25.

Pursuant to the terms of the RFP, a protest “based upon alleged improprieties in the Final RFP shall be filed no later than ten (10) days prior to the Financial Proposal Due Date” RFP § 6.3(a). The RFP also indicates that “a Protest received by the Contracting Officer after the time limits prescribed in this Section 6.3 may not be considered.” RFP § 6.3(e).

If CEMP sought to object to the RFP pricing and scoring methodology, it was required to file a protest based upon an alleged impropriety in the final RFP and was required to do so no later than 10 days prior to the financial proposal due date of January 8, 2021. It failed to do so. CEMP waited until March 1 to file its protest, making it over two months late and untimely. As a result, the protest may not be considered by the Contracting Officer.

2. AMP's Financial Proposal Complied with the Terms of the RFP.

Even if the protest were timely, it would fail on the merits. While under no obligation to consider the merits of an untimely protest, and without waiving any rights of MDOT, the substantive aspect of this basis of protest is addressed below.

The RFP, including Form G – Financial Proposal Form, set forth seven financial proposal criteria for which a Proposer had to submit an offer, in terms of a percentage or dollars. The RFP set forth the mathematical calculations for point values for all financial criteria. Every Proposer knew in advance of financial proposal submission how to calculate the minimum and maximum scores, as well as its own financial proposal score. Each of the financial criteria had a ceiling. None of the financial criteria had a floor. The criteria, limitations, if any, and points are summarized in the RFP Pricing Structure Summary Table, above.

The financial proposal was created, in part, to allow for the Proposers to have flexibility in managing financial risks and structuring their approach while also including private financing from a variety of sources, including private debt and private equity investments, to meet the goal of no net cost to the State. *See* RFP § 1.6. In the financial proposal, MDOT sought to allocate certain risks to the Proposer team and to know, in advance, what costs would be incurred, including those on an open book basis. For instance, MDOT sought to remove from future negotiation for the fixed price Section P3 Agreement for design and construction, the percentages that formed the D&C General Conditions Cost Percentage and the Contractor Markup Percentage to be used in the D&C Cost Model. The RFP provided flexibility to the Proposer teams to structure funding based upon their various members, investors, and access to capital, while operating within the confines of MDOT's financial proposal methodology.

In speculating about AMP's financial proposal, CEMP focuses on two of the financial criteria; namely, 5 - D&C General Conditions Cost Percentage and 6 - Contractor Markup Percentage. CEMP states that AMP must have set forth percentages below "market rate" percentages and AMP may have even set forth 0% for each of those criteria. *See* Protest at pp. 10-11. In this decision, MDOT confirms that AMP submitted percentages at or below the cap/maximum for each of the referenced criteria and that was acceptable based on the requirements set forth in the RFP. MDOT further confirms that even if all percentages had been 0%, those percentages would likewise have been acceptable based on the clear language of the RFP.

CEMP asserts that it was under the impression that its financial proposal for the D&C General Conditions Cost Percentage and the Contractor Markup Percentage were required to reflect future "real market conditions" related to future capital design and construction work. *See* Protest at p. 17. CEMP further asserts that Proposers were somehow not permitted to potentially lower D&C General Conditions Cost Percentage and Contractor Markup Percentage and, in turn, raise the Proposal Equity IRR to cover the differences actually encountered. Protest at p. 21. CEMP quotes the various mathematical calculations and definitions for the D&C General Conditions Cost Percentage and Contractor Markup Percentage set forth in the RFP to support its post-Proposal argument and post-hoc rationalizations that these criteria were required to reflect "real market conditions." These contentions are mere assumptions by CEMP that proved false.

CEMP also asserts that because RFP Appendix 5, § 2.2 requires that the D&C General Conditions Cost Percentage must cover all items within the D&C General Conditions Cost definition, such as bonds, insurance, mobilization, license, permits, fees, the RFP therefore requires that a percentage value for D&C General Conditions Cost Percentage that is not "market realistic," *i.e.*, one lower than what the market will support, is prohibited. CEMP argues that AMP's Financial Proposal, which must have included values not "market realistic" for D&C General Conditions Cost Percentage and the Contractor Markup Percentage, cannot be in compliance with the RFP. CEMP is wrong.

CEMP points to several RFCs that it contends support its position. One RFC CEMP relies on is RFC #458. The question within RFC #458 requested clarification specifically around two elements within the RFP; the D&C General Conditions Cost Percentage at § 4.7(e), and the Contractor Markup Percentage at § 4.7(f). The Question and Response are as follows:

[Q:] Can you please confirm how Proposers should approach these two elements of the evaluation criteria in the Financial Proposal in the context of a competitive design-build procurement? Specifically, would the Proposer bear all the risk in the event the market comes back with percentages which are higher than those submitted as part of the Financial Proposal?

In addition, how will the potential for upside be assessed as part of the evaluation criteria given the higher likelihood that a design-build procurement process could result in lower percentages than those proposed as part of the Financial Proposal? Will this be upside for the Phase / Section Developer?

[R:] MDOT confirms that the Proposer would bear the risk of D&C general conditions and contractor markup being higher than the amount in the Proposer's Financial Proposal in the context of a competitive D&C contractor procurement. Any cost savings would return to MDOT or be shared with the Phase Developer. The Proposer is being evaluated on this basis as part of the Financial Proposal Evaluation Criteria, so MDOT expects the Proposer's Financial Proposals to assume risk appropriately.

This RFC confirmed that the Proposer would assume any risk associated with market percentages higher than the amount proposed. This made clear, consistent with the RFP, that a financial proposal offering below CEMP's characterization of "free market conditions" or "market realistic" percentages was allowed, acceptable to MDOT, and a risk to be allocated by the Proposer. With this understanding, CEMP – and all Proposers – submitted financial proposals presumably based upon their own pricing methodology plans and their own willingness to assume and allocate risk.

Another RFC CEMP relies on is RFC #939. The Question and Response were as follows:

[Q:] In the process of obtaining competitive market pricing to calculate the Design Build Price, it is stated that “MDOT will have oversight over all competitive solicitations, which may include MDOT's applicable solicitation rules (and any applicable FHWA rules).” In the case of the Phase Developer obtaining market pricing via multiple subcontractor bids or competitive solicitations, what process will MDOT put in place to ensure that the prior fixed Financial Criteria (D&C General Conditions Cost Percentage and Contractor Markup Percentage) flow down and accurately account for the subcontractors’ bids so that the outcome is consistent with what would have been obtained had the Open Book Basis process been used?

[R:] MDOT will review proposals received from a competitive market pricing solicitation for compliance with MDOT's applicable solicitation rules (and any applicable FHWA rules) which compose the “terms and conditions that will apply to the market pricing process” as defined in Exhibit 6 Section 1.20.6. The D&C General Conditions Cost Percentage and Contractor Markup Percentage should flow down to subcontractors’ bids in the aggregate. MDOT will be looking for evidence that these flow downs are correctly reflected in the subcontractors’ bids.

This RFC is consistent with the RFP language and the transparent pricing methodology set forth in the RFP and the financial proposal form. Subcontractor bids that form part of the D&C Cost Model for the future fixed price design and construction work must comply with the D&C General Conditions Cost Percentage and the Contractor Markup Percentage set forth in the Selected Proposer’s financial proposal. This RFC has no effect on subcontract terms between the Selected Proposer and the subcontractor, which may reflect whatever percentages for those items that the private parties negotiate and that the Selected Proposer agrees to pay. The Selected Proposer assumes the risk of variances as an equity risk for any percentages it agrees to pay to a subcontractor that exceeds what was proposed in its financial proposal.

CEMP also relies on RFC #1149, which requested an increase the Contractor Percentage Markup to 25%. MDOT declined that increase and did not change the financial proposal form.

In addition, CEMP relies on RFC #1408. The Question and Response were as follows:

[Q:] If the Phase Developer intends to use the Open Book Basis to support the Design-Build Price, how will MDOT confirm that the Contractor Markups and D&C General Conditions Costs for subcontractors of all tiers are aggregated to ensure that they do not exceed the amounts included in the Phase Developer's proposal? What supporting documentation will be required? If it is discovered that a subcontractor shifted costs to another line-item that should have been properly considered as part of the Contractor Markup or D&C General Conditions Cost, who will bear that risk and extra cost (as between the Phase Developer and MDOT)?

[R:] The D&C General Conditions percentage and the Contractor markup Percentage from the Phase Developer's Financial Proposal will be carried forward and used in the Cost Model for the Section Committed Proposal for each Section of Phase 1. It will be the Phase Developer's responsibility to ensure that these percentages include all relevant costs for the Contractor and all subcontractors.

This RFC again explained that the D&C General Conditions Cost Percentage and the Contractor Markup Percentage set forth in the financial proposal would be used in the D&C Cost Model for fixed price design and construction work. Amounts above the percentages set forth in the financial proposal for the D&C General Conditions Cost Percentage and the Contractor Markup Percentage would be the responsibility of the Proposer.

Finally, CEMP relies on RFC #1532. The Question and Response were as follows:

[Q:] Responses to MDOT RFC ID #939 and #1408 mention that both the D&C General Conditions Cost Percentage and Markup Percentage shall flow down to "all subcontractors' bids" and "all subcontractors" [.] Proposer is concerned with these statements, as our expectation was that both percentages were to be applied over the D&C Cost, and that D&C Cost would include the prices from subcontractors at all further down tiers, other than the Contractor, as quoted by the market at the time of the Committed Section Proposal.

We can understand that the requirement to flow down these percentages to lower tier subcontractors other than the Contractor be applied only to Affiliates to the Contractor, Phase Developer or Section Developer.

1) Please confirm that prices from all the subcontractors and suppliers, but Affiliates, will be considered in the D&C Costing Model as part of the D&C Cost, and therefore the D&C General Conditions Costs Percentage and Markup Percentage will be applied on top of these amounts, deducting the subcontractor mobilization that shall be included in the D&C General Conditions Cost.

If for subcontractors that are Affiliates the requirement is to flow down both percentages, please confirm if these amounts will still be part of the D&C Cost or these amounts will be deducted from their price in the D&C Cost and shall be included into the amounts obtained by applying the percentages to this reduced D&C Cost.

[R:] The Phase Developer shall include all D&C Costs for all self-performed and subcontracted work in the D&C Costing Model. The Phase Developer shall carry forward from its proposal and apply the D&C General Conditions Costs Percentage and Contractor Markup Percentage to the D&C Costs in the D&C Costing Model, and the aggregate D&C General Conditions Costs and Contractor Markup Costs included in the D&C Costing Model (whether incurred by the Section Developer or any subcontractor) may not exceed the D&C General Conditions Costs Percentage and Contractor Markup Percentage, respectively. The next version of the RFP Documents will be amended to clarify this in the definition of D&C General Conditions Costs. The Phase Developer shall be responsible for ensuring the percentages, in part or in whole, are properly carried in its D&C Costing Model. Accordingly, all requirements for participation in the Open Book Basis review shall flow down to subcontractors and major suppliers.

Again, it was explained to Shortlisted Proposers that the D&C General Conditions Cost Percentage and the Contractor Markup Percentage set forth in the financial proposal would be used in the D&C Cost Model for fixed price design and construction work.

Nothing in the RFP or the RFCs prevented any Proposer from using a pricing approach like CEMP suggested in its Protest, which included proposing a Proposal Equity IRR different from that otherwise required to cover differences actually encountered in the future, regardless of whether a financial proposal set forth 0% for the D&C General Conditions Cost Percentage and the Contractor Markup Percentage. MDOT is satisfied that an approach in which any variance above the percentages in the financial proposal would effectively be paid by equity funding that is not repaid by the Project does not erode value to the State nor result in the State subsidizing a Proposer and was not prohibited by the terms of the RFP. MDOT's decision to allow such a financial proposal pricing methodology was reasonable and consistent with the clear language of the RFP.

The RFP, financial proposal form, and allocation of financial points were consistent with the referenced RFCs. CEMP now seeks to have MDOT ignore the financial evaluation scoring system that was at the heart of the RFP and substitute CEMP's chosen scoring methodology, forcing CEMP's preferred methodology on MDOT and all other Proposers. CEMP wants a "re-do" on its financial proposal since it knows it was not the Selected Proposer and it knows the scores of other Proposers, including the amount proposed for certain financial criteria set forth in AMP's winning proposal. Essentially, CEMP disagrees with the transparent and known financial evaluation scoring methodology set forth in the RFP now that it knows it was unsuccessful in the competitive solicitation process. What CEMP desires is inconsistent with MDOT's RFP, the terms of which were not protested, and would be unfair and prejudicial to all other Proposers.

MDOT evaluated proposals according to the evaluation criteria and scoring methodology set forth in the RFP. These actions were reasonable and rational. CEMP's protest on this basis is denied.

3. CEMP's Financial Proposal Contains at Least One Percentage that Is [REDACTED]

CEMP's own financial proposal indicates that its argument regarding "market realistic" percentages must fail. CEMP could not have believed the argument it now makes regarding an alleged RFP requirement of "market realistic" pricing when it submitted its own financial proposal. For financial criterion 7 - Renewal Work General Conditions Cost Percentage, CEMP proposed [REDACTED]. The Renewal Work Conditions General Conditions Percentage criterion is described in RFP § 4.7(e). It contains costs for operations and maintenance work similar to the D&C General Conditions Costs Percentage costs for design and construction work, which CEMP now disingenuously asserts required a "market realistic" percentage to be proposed.

Just like for the D&C General Conditions Percentage, the RFP required that "Proposals shall confirm that the Renewal Work General Conditions Costs Percentage shall cover all items outlined within the definition of Renewal Work General Conditions Costs." Just like the D&C General Conditions Cost Percentage, the Renewal Work General Conditions Cost Percentage was set at a cap/maximum of 14.5%, with no floor. This allowed any Proposer, including CEMP, to submit a percentage of 0% and be compliant with the terms of the RFP.

The Renewal Work General Conditions Costs definition lists a number of items that are included in this criterion. RFP Appendix 1 "Definitions" at p. 85. That definition provides:

"Renewal Work General Conditions Costs" means direct project overhead costs incurred for any subcontract for Renewal Work. For the avoidance of doubt, Renewal Work General Conditions Costs shall include the following items required for subcontracted Renewal Work for each section:


- bonds, all types;
- non-payroll insurance;
- mobilization/demobilization including all O&M preparatory/dissolution operations that include the movement of personnel and equipment to/from the Phase 1 site;
- subsistence (covers any expenses for staff outside of the travel, lodging, relocation, per diem);
- travel;
- lodging;
- per diem;
- project oversight, supervision, and administration;
- vehicles for project oversight, supervision, administration, and management including, but not limited to, registrations, fuel, maintenance, and insurance;
- technology and communications, including, but not limited to, phones, computers, internet connections, radios, and tablets;
- temporary facilities including, but not limited to, rent, security and access control, utilities, office equipment, office expenses, furniture, insurance, and taxes;
- temporary staging areas, fuel depots, laydown areas, and storage yards; and
- miscellaneous including escalations, certifications for staff required for the work, and incidentals.

Considering that the Renewal Work General Conditions Costs Percentage contains similar items as the D&C General Conditions Cost Percentage, under the rationale CEMP posits on p. 17 of its Protest, one would expect that CEMP would find itself compelled to propose a “market realistic” percentage for its Renewal Work General Conditions Costs Percentage. [REDACTED]

On January 13, 2021, MDOT asked CEMP about its [REDACTED] Renewal Work General Conditions Cost Percentage. On January 15, 2021, CEMP clarified that it had proposed a percentage [REDACTED] for that criterion and that those costs were to be paid out of funds that would otherwise be distributed to Equity Members. CEMP stated:

We confirm that the Renewal Work General Conditions Cost Percentage covers all items outlined within the definition of Renewal Works General Conditions Costs.

...



An approach to fund these costs directly by the Equity Member at no cost to the Project or the State was not prohibited by the RFP and was available to all Proposers, including CEMP and AMP, on financial proposal criteria 5, 6, and 7. To the extent that it needed to do so, MDOT sought clarifications from AMP on percentages for financial criteria 5, 6, and 7 that were proposed below the cap/maximum. Based on the clarifications provided and MDOT's review, MDOT is satisfied that this approach ensures that the Proposer team, not the Project or the State, would be responsible for actual cost differences and does not result in the State subsidizing AMP. These determinations were reasonable and rational. CEMP's protest on this basis is denied.

C. CEMP's Assertion: MDOT's Acceptance of AMP's Unrealistic Margins Will Undermine Delivery Certainty and MDOT's Trade-Off Analysis Was Flawed.

In its third basis of protest, CEMP generally, again, alleges that MDOT's acceptance of a financial proposal consistent with the requirements of the RFP was arbitrary, capricious, and unsupported by competent evidence. More specifically, CEMP alleges that AMP's pricing structure will negatively affect the predevelopment work and undermine one of the technical evaluation criteria, Delivery Certainty.

This assertion is again based on the flawed assumption that the amount proposed for financial criteria numbers 5, 6, and 7 must be "market realistic" and reflect the actual future amounts to be paid to subcontractors, including local firms, labor, and DBEs. Protest at p. 22. This is merely a reiteration of CEMP's second basis of protest related to the RFP, financial proposal form, and the allowed pricing structure. For the reasons already stated in this letter related to the second basis of protest, this repeated basis of protest is untimely and fails on the merits.

CEMP's protest also expresses general, unsubstantiated concerns about the trade-off analysis performed by MDOT in making the determination of which Proposer submitted proposals most advantageous to the State. CEMP asserts that, somehow, the trade-off analysis was performed incorrectly. CEMP's assertion is incorrect.


Section 4.10(e) of the RFP "Determination of Selected Proposer" provides, in part:

[O]nce the evaluation of the Predevelopment Work Proposal and the Financial Proposal has been completed, the evaluation committee, using a trade-off analysis between the Predevelopment Work Proposal evaluation and the Financial proposal evaluation, will determine which Proposer's submittal is most advantageous to the State. **When determining which Proposal's submittal is most advantageous to the State, the relative importance of the Predevelopment Work Proposal and the Financial Proposal will be considered approximately equal.** *Award may be made to the Proposer with the higher Financial Proposal score even if its Predevelopment Work Proposal is not the highest rated or to the Proposer with the higher Predevelopment Work Proposal rating even if its Financial Proposal score is not the highest. In performing this trade-off analysis, the evaluation committee will consider the facts and circumstances of the solicitation and utilize its technical and financial judgment and discretion in considering strengths, weaknesses, and deficiencies of each Proposal to determine a recommendation of the Proposal that is most advantageous to the State.* This recommendation will then be presented to the selection committee, who will utilize their technical and financial judgment and discretion to make a final determination of most advantageous to the State considering all factors set forth in this RFP.

(Bold in original. Emphasis added in italics).

MDOT adhered to the terms of the RFP regarding the evaluation of technical proposals and financial proposals, as well as the final determination regarding which Proposer submitted the most advantageous offer to the State when both technical and financial proposals were considered. CEMP had a marginally higher overall predevelopment work technical proposal rating of Good+ compared to AMP's rating of Good. CEMP's financial proposal score was the lowest with 665 out of 1,791 points (approximately 37% of available points) compared to AMP's score of 1,356 out of 1,791 points (approximately 76% of available points). Stated another way, AMP's financial score was 204% higher than CEMP's financial score.

The Evaluation Committee performed a trade-off analysis between the technical proposal evaluation and the financial proposal evaluation of all Proposers, including CEMP and AMP. In performing the trade-off analysis, the Committee recognized that the technical proposals of both CEMP and AMP demonstrated a nearly complete understanding of the P3 Program goals and objectives and that the overall strengths of both technical proposals outweighed any weaknesses.



As required by the RFP, the Evaluation Committee also considered the financial proposals of both CEMP and AMP. Both financial proposals were compliant with the pricing methodology and requirements set forth in the RFP. The Committee was satisfied with all clarifications provided by CEMP and AMP related to their respective proposals, including CEMP's clarification related to its pricing [REDACTED] for Renewal Work General Conditions Cost Percentage. The Evaluation Committee considered each Proposer's approach to its financial proposal. Each Proposer's financial proposal was found to set forth reasonable approaches and to be consistent with the RFP. The Committee concluded that AMP's significantly higher financial proposal score would be expected to provide significantly more financial value for the State in AMP's committed section proposals.

The RFP required that technical and financial proposals were to be given "approximately equal" weight in the final determination regarding which Proposer provided the most advantageous offer to the State. RFP § 4.10(e). The Evaluation Committee considered CEMP's marginally higher-rated technical proposal (Good+) with its much lower-scored financial proposal (665 of out 1,791 points), as well as AMP's marginally lower-rated technical proposal (Good) with its much higher-scored financial proposal (1,356 out of 1,791 points). In giving approximately equal weight to the technical and financial proposals of each Proposer and based upon its business and technical judgment, the Evaluation Committee determined that AMP provided the best value to the State. The Committee did not believe that CEMP's marginally higher technical rating outweighed its much lower financial score and rightfully did not determine CEMP as the best value to the State.

CEMP challenges the trade-off analysis and business and technical judgment utilized by the Evaluation Committee, suggesting that MDOT did not follow the evaluation process in the RFP. MDOT followed the evaluation process in the RFP, performed a reasonable review of the proposals, and performed a reasonable trade-off analysis. CEMP has not produced any evidence to suggest otherwise. CEMP's protest on this basis is denied.

**D. CEMP's Assertion: MDOT's Rating of CEMP's Proposal as Good+ [REDACTED]
[REDACTED] Was Arbitrary, Capricious, and
Unsupported by Competent Evidence.**

CEMP alleges that MDOT's evaluation of CEMP's technical proposal was arbitrary and capricious because CEMP's technical proposal plan [REDACTED]

[REDACTED] was identified as a weakness. CEMP contends that this plan should not have been downgraded on this basis and that its proposal should have received an overall rating of Exceptional instead of Good+. CEMP blames its lack of an Exceptional rating, at least in part, on the lack of a known "preferred alternative" for Phase 1 South until January 27, 2021 due to the timing of the NEPA process. In making its argument, CEMP misunderstands clear language of the RFP and ignores information provided at its debriefing. CEMP's protest on this basis is untimely, at least in part, and fails on the merits.

1. CEMP's Protest on this Basis Is, in part, Untimely.

In this basis of protest, CEMP complains that its proposal was submitted prior to decision regarding which of six known project alternatives was designated as the "preferred alternative" based upon the ongoing National Environmental Policy Act ("NEPA") process being advanced by the State and the Federal Highway Administration. Protest at pp. 23-24. The RFP informed all Shortlisted Proposers that the preferred alternative had not been chosen and the decision was expected by the end of 2020 or early 2021. RFP § 1.12(a) at pp. 12-13. Several RFC questions and responses addressed this issue. *See, e.g.*, RFC # 160, 196, 910, & 913. Each Shortlisted Proposer knew that a preferred alternative might not be named until after the submission of proposals and that the entire limits of Phase South is subject to the same NEPA Record of Decision; therefore, each proposal needed to account for this risk [REDACTED]

Pursuant to the terms of the RFP, a protest "based upon alleged improprieties in the Final RFP shall be filed no later than ten (10) days prior to the Financial Proposal Due Date" RFP § 6.3(a). The RFP also indicates that "a Protest received by the Contracting Officer after the time limits prescribed in this Section 6.3 may not be considered." RFP § 6.3(e). If CEMP sought to object to the lack of a chosen preferred alternative to Phase South, it was required to file a protest based upon an alleged impropriety in the final RFP and was required to do so no later than 10 days prior to the financial proposal due date of January 8, 2021, or by December 29, 2020. It failed to do so. CEMP waited until March 1 to file its protest, making it over two months late and untimely. As a result, the protest may not be considered by the Contracting Officer.

2. CEMP's Protest Expresses Mere Disagreement with MDOT's Technical and Business Judgment.

Even if the protest were timely, it would fail on the merits. While under no obligation to consider the merits of an untimely protest, and without waiving any rights of MDOT, the substantive aspect of this basis of protest is addressed below.

CEMP asserts that MDOT's evaluation of CEMP's technical proposal was arbitrary and capricious because CEMP's technical proposal [REDACTED] [REDACTED] should not have been identified as a weakness for any of the RFP criteria or sub-criteria. Further, CEMP asserts that it should have received a rating of Exceptional instead of Good+ for its proposal. CEMP ignores the plain language of the RFP and ignores (and does not protest) other weaknesses that contributed to its ratings. CEMP's objection that it provided a proposal that is "Exceptional" and not "Good+" constitutes nothing more than disagreement with the technical and business judgment of the MDOT evaluators.

Focusing on the first evaluation criterion, Delivery Certainty, CEMP's rating of [REDACTED] was appropriate based on the definitions of the adjectival ratings defined in RFP § 4.6 and consistently applied by the Evaluation Committee. As CEMP was informed at the debriefing, and as the rating reflects, the Evaluation Committee noted many strengths related to the Delivery Certainty evaluation criterion. [REDACTED]

[REDACTED] See RFP § 3.2(a) at pp. 43-44. [REDACTED]

[REDACTED] Multiple weaknesses were identified for CEMP's Delivery Certainty criterion and for its sub-criteria.

RFP § 3.2(a) provided, in part:

Delivery Certainty - CRITICAL

MDOT is seeking a long-term, collaborative partner with an approach to Predevelopment Work that ensures certainty and efficiency in the delivery of improvements for travelers using Phase 1, *including by maximizing the limits of Phase South to be delivered with the first section.*

(emphasis added with italics). In the RFP, MDOT emphasized the importance of the delivery of Phase South. CEMP made a business decision to propose [REDACTED] [REDACTED] and explained its plan for doing so. The Evaluation Committee did not view CEMP's plan, as set forth in CEMP's technical proposal, as [REDACTED] [REDACTED]

For Section Sequencing and Scheduling for Predevelopment Work (sub-criterion iii), specifically referenced in CEMP's protest, the Evaluation Committee determined, and CEMP was informed at its debriefing, that its technical proposal contained weaknesses in this sub-criterion because it [REDACTED]

[REDACTED]
[REDACTED] Due to weaknesses in its technical proposal, the Committee gave CEMP a rating [REDACTED] for this sub-criterion.

For Organizational Structure (sub-criterion vi), the Evaluation Committee determined, and CEMP was informed at its debriefing, that its technical proposal contained weaknesses in this sub-criterion because [REDACTED]

[REDACTED] Due to weaknesses in its technical proposal, the Evaluation Committee gave CEMP a rating [REDACTED] for this sub-criterion.

With regard to the third evaluation criterion, Maximizing Value to the State, CEMP's rating [REDACTED] was appropriate based on the definitions of the adjectival ratings defined in RFP § 4.6 and consistently applied by the Evaluation Committee. [REDACTED]

[REDACTED]
Multiple additional weaknesses were identified for Maximizing Value to the State criterion and for the other sub-criteria, which CEMP does not object to in its protest.

With respect to the fifth evaluation criterion, Congestion Relief, CEMP's rating [REDACTED] was appropriate based on the definitions of the adjectival ratings defined in RFP § 4.6 and consistently applied by the Evaluation Committee. [REDACTED]

[REDACTED] Multiple additional weaknesses were identified for the Congestion Relief criterion and for the other sub-criteria, which CEMP does not object to in its protest.

In its protest, CEMP cherry-picks certain evaluation criteria and sub-criteria ratings in an effort to support an untimely protest purported to be based upon the lack of a known “preferred alternative” prior to proposal submission, but which is really based upon CEMP’s refusal to accept that MDOT determined its proposal to be Good+, but not Exceptional. In so doing, CEMP refused to acknowledge, omitted reference to, and did not object to other weaknesses in its technical proposal [REDACTED]

[REDACTED] All strengths and weaknesses were taken into account by the Evaluation Committee in determining the technical proposal ratings.

CEMP received an appropriate rating for all criteria and sub-criteria, including the overall rating of its technical proposal of Good+. The process of weighing the technical merits of any proposal is a subjective one which relies on the business discretion and technical judgment of MDOT, including input received from members of the evaluation teams and the Evaluation Committee. This process and MDOT’s determinations were rational and reasonable. Mere disagreement with ratings, without evidence of more than disagreement, is not a reason to disregard language in the RFP, change a rating, overrule the technical and business judgment of the agency, or overturn a competitive solicitation process. CEMP’s protest on this basis is denied.

Douglas F. Gansler, Esq.
Ms. Rebecca Brooks
Page 30

III. CONCLUSION.

For the reasons set forth in this letter, CEMP's protest is denied. This is the final decision of the Contracting Officer. The decision may be appealed to the MDOT Secretary or his designee. If you decide to take such an appeal, you must file written notice of appeal to the Secretary within five days from the date you receive this decision. The name and address of the Secretary's designee for protest appeals is:

R. Earl Lewis, Jr.
Deputy Secretary for Policy, Planning, and Enterprise Services
Maryland Department of Transportation
Harry R. Hughes Department of Transportation Building
7201 Corporate Center Drive
Hanover, MD 21076

Sincerely,



Jeffrey T. Folden, P.E., DBIA
Contracting Officer

cc: Mr. Gregory Slater, Secretary, MDOT
Tim Smith, P.E., Administrator, MDOT State Highway Administration

TAB 5



Maryland Transportation Authority

Larry Hogan, Governor
Boyd K. Rutherford, Lt. Governor
Gregory Slater, Chairman

Board Members:
Dontae Carroll
William H. Cox, Jr.
William C. Ensor, III
W. Lee Gaines, Jr.
Mario J. Gangemi, P.E.
Cynthia D. Penny-Ardinger
Jeffrey S. Rosen
John F. von Paris

James F. Ports, Jr., Executive Director

MEMORANDUM

TO: MDTA Board
FROM: Ms. Deb Sharpless, CPA, Chief Financial Officer, MDTA
Mr. Jeff Folden, I-495 & I-270 P3 Program Deputy Director, SHA
SUBJECT: Phase Public-Private Partnership Agreement for Phase 1 American Legion Bridge I-270
DATE: June 8, 2021

PURPOSE

To request contingent approval of the Phase Public-Private Partnership (P3) Agreement for the I-495 and I-270 P3 Program (P3 Program) for Phase 1 (Phase P3 Agreement), such approval to be subject to final approval by the Maryland Board of Public Works.

The Phase P3 Agreement and other attachments to this summary report were originally presented to the MDTA Board in February, with the exception of the MDTA Notes Term Sheet. Except as identified in this summary report and its attachments, the documents presented in February have not changed. Changes made are all either minor in nature or have been made for the benefit of the State to align the documents with the Selected Proposer's Proposal.

SUMMARY

The Maryland Department of Transportation (MDOT), the Maryland Transportation Authority (MDTA), and the selected proposer (Phase Developer) will execute the Phase P3 Agreement upon approval by the MDTA Board and subsequent approval by the Maryland Board of Public Works. Under the Phase P3 Agreement the Phase Developer shall perform Predevelopment Work (defined below) for the delivery of Phase 1 in sections.

After completion of the Predevelopment Work, MDOT, MDTA, and an entity established by the Phase Developer (Section Developer) will enter into a section P3 agreement (Section P3 Agreement) for the design, construction, financing, operation, and maintenance of the section. Along with the execution of the Section P3 Agreement, MDTA and the Section Developer will enter into (a) the tolling services agreement (Tolling Services Agreement), and (b) the public-private partnership (P3) supplemental trust agreement (P3 Supplemental Trust Agreement) with the trustee.

The analysis below provides a brief overview of the P3 Program and describes the Phase P3 Agreement and the terms of the Section-related documents that are relevant to MDTA. The analysis also highlights key MDTA risks under the Phase P3 Agreement and the Section documents.

ANALYSIS

Background and Overview

MDOT and MDTA have completed the solicitation for the first phase (Phase 1) of the P3 Program and, subject to approval by the MDTA Board, and subsequent approval by the Maryland Board of Public Works, will execute the Phase P3 Agreement with the selected proposer. Phase 1 will include improvements to I-495 from the vicinity of the George Washington Memorial Parkway in Virginia, across and including the American Legion Bridge, to I-270, and I-270 from I-495 to I-70.

The State of Maryland (State), through the P3 Program, is using a multi-step progressive P3, or predevelopment approach, which differs from the previous P3 approaches pursued in the State. In the first step, the selected Phase Developer will collaborate directly with MDOT, MDTA, and State stakeholders – including Montgomery and Frederick County municipalities, property owners, utilities, and public citizens – on the Predevelopment Work (as defined below) for Phase 1. This upfront effort will focus on advancing the preliminary design for Phase 1 by considering stakeholder feedback to further avoid and minimize impacts to environmental resources, communities, properties, utilities, and other features.

Once potential project impacts and risks are further reduced and expectations are clearly defined for a section (Section) of Phase 1, MDOT, MDTA, and the Phase Developer will take the next step of the progressive P3 model: entering into a 50-year agreement for the final design, construction, financing, operation, and maintenance of that Section pursuant to a Section P3 Agreement. Following the completion of the Predevelopment Work under the Phase P3 Agreement for each Section of Phase 1, the Section P3 Agreement for that Section shall be presented to the MDTA Board for approval.

This progressive P3 approach, by advancing preliminary engineering and risk management, will provide more-efficient pricing and better schedule certainty for delivering the 37 miles of Phase 1. While new to the State, progressive P3s have been used to successfully deliver priced managed lanes projects in Virginia for I-95, I-495, and I-395, and in Texas for the North Tarrant Express.

MDTA's involvement in the P3 Program is further set out in the Interagency Agreement (IAA) entered into on April 25, 2019, between MDTA, MDOT, and the MDOT-State Highway Administration (MDOT SHA). Under the IAA, MDTA's responsibilities with respect to the P3 Program include (i) setting, collecting, and enforcing tolls; (ii) coordinating with MDOT SHA in reviewing and approving the P3 Agreements and associated documents; (iii) leasing the premises owned by MDOT SHA as required for each phase of the P3 Program; (iv) establishing a new P3 trust indenture; and (v) issuing the MDTA Notes to the Section Developer. MDTA and MDOT intend to enter into an amendment to the IAA which will update the terms to reflect the progressive P3 approach and add details relating to the P3 trust agreements and MDTA Notes (further described below). The amended IAA will be presented to the MDTA Board for approval prior to execution.

MDOT SHA is primarily responsible for paying any claims due under any P3 Agreement but will have the right to seek reimbursement from MDTA for any claims if such claim arises due to an act, omission, or breach of MDTA.

Phase P3 Agreement

The Phase P3 Agreement will be entered into by MDOT, MDTA, and the Phase Developer. Although MDTA is a party to the Phase P3 Agreement, MDOT will be leading the Predevelopment Work. The Predevelopment Work is the work the Phase Developer is required to perform to ensure financial close is achieved under each Section P3 Agreement of Phase 1. The Predevelopment Work includes partnering and collaborating with MDOT, stakeholders, and governmental entities to mitigate project risk; preparing conceptual designs for each Section; engaging with the community; determining how each Section will be financed; and determining a fixed design-build price, and the operations and maintenance costs for each Section.

Under the Phase P3 Agreement, MDTA will be involved in aspects of the Predevelopment Work that relate to tolling, including (a) reviewing and approving the Phase Developer's proposed Toll Systems Integrator and Toll Systems Operator; and (b) reviewing, negotiating, finalizing, approving, and executing the Section P3 Agreement, Tolling Services Agreement, and P3 Supplemental Trust Agreement relating to each Section of Phase 1. Term sheets for the Tolling Services Agreement, the Section P3 Agreement, P3 Supplemental Trust Agreement are attached to the Phase P3 Agreement; and the technical requirements are set out in Exhibit 6 (Predevelopment Work Requirements) to the Phase P3 Agreement. At the completion of the Predevelopment Work for a Section, MDTA and MDOT will enter into the Section P3 Agreement, Tolling Services Agreement, and the P3 Supplemental Trust Agreement, each of which will be presented to the MDTA Board for approval prior to execution.

Based on the anticipated schedule, MDTA will also complete its toll rate setting process prior to completion of the Predevelopment Work and financial close of each Section.

The Phase Developer will be responsible for funding all of its costs to perform the scope of work required under the Phase P3 Agreement. At financial close of each Section of Phase 1, the Phase Developer will receive reimbursement, subject to a cap, for its eligible predevelopment costs from the Section Developer. The Section Developer will be responsible for acquiring sufficient financing to (a) pay the Phase Developer for its previously incurred costs (up to a cap); (b) pay for the design and construction of its Section; (c) pay financing related costs including interest during construction and funding of other reserves, as required, and (d) purchase the MDTA Notes. The Section Developer will secure its financing based on the future toll revenues it is entitled to receive.

If Phase 1 is cancelled for certain reasons that are not the fault of the Phase Developer, MDOT will be responsible for paying the lower of \$50 million or the documented eligible costs incurred by the Phase Developer for the predevelopment of Phase South up to the time of termination of the Phase P3 Agreement. MDOT would receive and own the work products developed for the Phase. Recognizing the value of the work associated with the American Legion Bridge and corridor, had MDOT performed the work it would have incurred these costs.

An updated term sheet, a term sheet changed pages comparison from the February Board meeting, and Phase P3 Agreement template, as presented in the RFP, along with the defined terms exhibit, are attached. In general, final changes will fall into the following categories: (a) changes to substitute selected proposer's name and related entity information, (b) changes made to provide flexibility to execute the P3 Master Trust Agreement after the Phase P3 Agreement, (c) changes made to align the Phase P3 Agreement with commitments made in the selected proposer's proposal, and (d) other minor changes, such as drafting relating to electronic signatures.

Responsibilities and risks to MDTA under the other exhibits of the Phase P3 Agreement are summarized herein.

Section Specific Agreements

During the Predevelopment Work, the Section P3 Agreement, the Tolling Services Agreement, the P3 Supplemental Trust Agreement, and the technical provisions to the Section P3 Agreement will be negotiated with the Phase Developer based on the term sheets attached to the Phase P3 Agreement. The final Section technical provisions will be based on Exhibit 6 (Predevelopment Work Requirements) to the Phase P3 Agreement. The MDTA Board will be asked to approve each of the Section P3 Agreement, including the technical provisions, the Tolling Services Agreement, and the P3 Supplemental Trust Agreement once agreed amongst the parties and prior to their execution. The first Section P3 Agreement is expected to be entered into in the latter half of calendar year 2022.

(a) Section P3 Agreement

The following description of the Section P3 Agreement is unchanged from the February Board meeting.

After completion of the Predevelopment Work under the Phase P3 Agreement and approval of the Committed Section Proposal and the Section P3 Agreement, MDOT, MDTA, and the Section Developer will enter into the Section P3 Agreement, pursuant to which the Section Developer will be responsible for the design, construction, financing, operation, and maintenance of its Section for a term of 50 years.

Under the Section P3 Agreement, as part of its operation of the Section, the Section Developer will be responsible for setting the toll rates (within the toll rate range, and subject to the toll rate soft cap, approved by the MDTA Board) and operating the tolling equipment on the priced managed lanes in accordance with the Section P3 Agreement and the Tolling Services Agreement.

A term sheet setting out key terms of the Section P3 Agreement was included in the Phase Developer RFP and is attached. This document has not changed since its submission during the February Board meeting.

(b) MDTA Notes

MDTA will establish a new Master Trust Agreement (P3 Master Trust Agreement) for the P3 Program and a P3 Supplemental Trust Agreement for each section of each phase of the P3 Program. At financial

close of each section, the Section Developer will purchase from MDTA limited recourse toll revenue bonds for such section (MDTA Notes) in a private placement pursuant to the P3 Supplemental Trust Agreement. MDTA will pledge to the trustee a security interest in all of the right, title, and interest of MDTA in and to the toll revenues collected from users of the priced managed lanes applicable to that Section, in order to secure the payment of the principal and interest on the MDTA Notes and other amounts due under the P3 Supplemental Trust Agreement. The MDTA Notes shall be non-recourse to MDTA's toll revenues from its other facilities and only toll revenues relating to the P3 Program shall be pledged under the MDTA Notes.

The proceeds of the MDTA Notes shall be used to pay project costs related to the delivery of the applicable section. The total principal amount of the MDTA Notes for Phase 1 South is not expected to exceed \$100 million.

Toll revenues collected with respect to the P3 Program shall be applied in accordance with a flow of funds set out in the P3 Master Trust Agreement and applicable P3 Supplemental Trust Agreement in payment of MDTA's P3 Program costs, trustee costs, principal and interest on the MDTA Notes, a toll payment to the Section Developers, and certain other payments defined therein.

A term sheet setting out key terms of the P3 Master Trust Agreement and P3 Supplemental Trust Agreement is attached. This document was not submitted to the MDTA Board in February. The full form P3 Master Trust Agreement is expected to be submitted to the MDTA Board for review and approval in summer 2021. Each P3 Supplemental Trust Agreement shall be presented to the MDTA Board for approval before it is executed, with the first expected in late 2022.

(c) Tolling Services Agreement

The following description of the Tolling Services Agreement is unchanged from the February Board meeting.

After completion of the Predevelopment Work, in addition to entering into the Section P3 Agreement, MDTA and the Section Developer will enter into the Tolling Services Agreement, which will govern the Section Developer's responsibilities with respect to setting and calculating toll rates, and submitting tolling trip data to MDTA and its Customer Service Center (CSC) integrator.

Pursuant to the Tolling Services Agreement, the Section Developer will be required to dynamically set toll rates within the toll rate range set by MDTA (as approved by the MDTA Board) for the purpose of maintaining the free flow of traffic at speeds of 45 mph or greater in the priced managed lanes. The Section Developer will be responsible for correctly collecting and providing all trip data to MDTA. MDTA will be responsible for processing the trip data received from the Section Developer, collecting toll payments from users of the priced managed lanes and applying such proceeds in accordance with the P3 Master Trust Agreement and P3 Supplemental Trust Agreement.

A term sheet setting out key terms of the Tolling Services Agreement is attached. This document has not changed since its submission during the February Board meeting.

(d) Technical Provisions

The following description of Exhibit 6 (Predevelopment Work Requirements) of the Phase P3 Agreement is unchanged from the February Board meeting.

Exhibit 6 (Predevelopment Work Requirements) of the Phase P3 Agreement will serve as the basis for developing and agreeing the technical provisions under the Section P3 Agreement, including the technical requirements related to the design, development, testing, integration, construction, operation, and maintenance of the price managed lanes tolling system. Article 24 focuses on the tolling provisions for the developer to design, test, and implement an Electronic Toll Collection (ETC) system. Article 25.6 outlines the tolling system operations and performance requirements the developer must maintain for the contract term. The design and operation requirements are laid out for the developer to meet or exceed current MDTA facility performance. An extract of Exhibit 6 containing the relevant provisions is attached. This document has not changed since its submission during the February Board meeting.

(e) Key Performance Indicators / Noncompliance Events

The following description of key performance indicators/noncompliance events is unchanged from the February Board meeting.

Included in Exhibit 6 (Predevelopment Work Requirements) of the Phase P3 Agreement are certain key performance indicator elements for the Section Developer's ETC system. Each element is assigned a non-compliance point value and for an instance of non-compliance, points will be calculated, and a monetary value will be assessed until performance compliance is met. These performance elements are in place to ensure accurate system performance to receive trip transaction data from the developer to maintain MDTA's high level of customer service. An extract of Exhibit 6 (Table 25-6 (ID #15) of Article 25) containing the relevant performance measurement requirements is attached. This document has not changed since its submission during the February Board meeting. Furthermore, the Tolling Services Agreement term sheet allows for the stoppage of transaction processing under certain specified events that are likely to cause material customer service issues.

MDTA Obligations and Risks

Under the Phase P3 Agreement, MDTA will be responsible for certain aspects of the Predevelopment Work that relate to tolling as described above, and for reviewing, negotiating, finalizing, approving, and executing the Section P3 Agreement, Tolling Services Agreement, and P3 Supplemental Trust Agreement relating to each Section of Phase 1.

MDTA's key performance obligations arise once the Section P3 Agreement, the Tolling Services Agreement, and the P3 Supplemental Trust Agreement have been signed. The key obligations for MDTA in connection with these obligations are set out below. Breach or failure by MDTA in connection with these obligations may lead to liability for MDTA.

- Failure to collect tolls. MDTA is responsible for toll collection and toll collection enforcement under the terms of the IAA and must exercise the same due diligence in doing so as exercised at

MDTA's existing facilities¹. Note that, although the Section Developer takes traffic risk and leakage risk associated with problems with the image or trip data submitted to MDTA, MDOT takes the risk associated with inability to collect tolls for each valid trip submitted to MDTA. MDOT also takes the benefit of any excess funds above MDTA's operating costs and amounts due to the Section Developer.

- Failure to make or instruct required payment under the P3 Master Trust Agreement or any Supplemental Trust Agreement. MDTA staff plans to present these documents for review and approval of the MDTA Board in summer 2021.
- MDTA Outage. Provisions are established to allow the buffering of transactions by the Section Developer and reprocessing should MDTA have an outage. In the event of an extended outage, the Section Developer may be able to make a claim under the Section P3 Agreement for lost revenue. As noted below, to the extent this is the CSC's fault, then MDTA's liability is limited in the IAA as set out below. See Section 26 of the Tolling Services Agreement term sheet.
- MDTA Refinancing. In accordance with the Section P3 Agreement, MDTA will be required to refinance the MDTA Notes prior to or on the 40th anniversary of closing. If MDTA fails to refinance the MDTA Notes by this date, except to the extent caused by the Section Developer's failure to cooperate in a reasonably timely manner, MDOT will be deemed to terminate Section P3 Agreement and will be liable to the Section Developer for termination compensation.
- As described above, under the IAA, MDTA is responsible for reimbursing any claim for which MDOT SHA is responsible under a P3 Agreement if the claim arises due to an act, omission, or breach of MDTA. However, if such claim is directly caused by a contractor of MDTA breaching a contractual obligation to MDTA, then MDTA's obligation to reimburse MDOT SHA shall be limited to the extent of any recovery by MDTA against such contractor.

ATTACHMENTS

- Phase P3 Agreement Term Sheet – Comparison showing Changed Pages from February
- Phase P3 Agreement Term Sheet - Clean version
- Phase P3 Agreement – Template from RFP
- Extract of Exhibit 6 (Predevelopment Work Requirements) relevant to tolling – Clean version
- Section P3 Agreement Term Sheet (Exhibit 8 to Phase P3 Agreement) – Clean version
- MDTA Notes Term Sheet (Exhibit 3 to Section P3 Agreement Term Sheet) – Clean version
- Tolling Services Agreement Term Sheet (Exhibit 2 to Section P3 Agreement Term Sheet) – Clean version
- Interagency Agreement dated April 25, 2019

¹ Note that the Tolling Services Agreement does not include an obligation on MDTA to collect tolls.

Attachment 1 - Phase P3 Agreement Term Sheet – Comparison showing Changed Pages from February

KEY TERMS OF THE PHASE P3 AGREEMENT

| Key Terms | | |
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| 1. | Parties | <ul style="list-style-type: none"> (a) MDOT; (b) MDTA; and (c) the Phase Developer. |
| 2. | MDOT as agent to MDTA | MDTA has appointed MDOT SHA to act as its agent to the extent described in <u>Section 7.2 (MDOT SHA as MDTA's Agent)</u> . |
| 3. | Term | <p>The Phase P3 Agreement will commence on the Effective Date and will end on the earlier of:</p> <ul style="list-style-type: none"> a) the date Financial Close is achieved for the last Section of the Phase that is subject to the Agreement; b) the date 10 years from the Effective Date (unless extended); and c) the date the Agreement is terminated in accordance with <u>Article 26 (Termination)</u>. <p>The Agreement contains conditions precedent to the Effective Date. See <u>Article 5 (Conditions Precedent to MDOT and MDTA Signing this Agreement)</u>. MDTA Board approval and BPW approval are both conditions precedent to this Agreement.</p> |
| 4. | Scope of Predevelopment Work | <p>The Phase Developer is required to perform predevelopment work for each Section of Phase 1, with the objective of developing a Committed Section Proposal and ultimately signing a Section P3 Agreement for each section of the Phase. Predevelopment work includes:</p> <ul style="list-style-type: none"> (a) partnering and collaborating with MDOT, governmental entities, stakeholders, utilities, and third parties on delivering the Phase and mitigating risk; (b) preparing Conceptual Designs for each Section of the Phase; (c) community engagement; (d) working with MDOT to develop transit service improvements to be delivered with each Section; (e) developing a fixed Design-Build Price for each Section (on an open book basis) for acceptance by MDOT; (f) developing O&M Costs for each Section (on an open book basis) for acceptance by MDOT; and (g) preparing financing plans demonstrating how each Section will be financed (including traffic and revenue forecast). |

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| | | <p>The specific requirements for each of the above examples are set out in further detail in <u>Article 1 of Exhibit 6 (Predevelopment Work Requirements)</u>.</p> <p>In addition, the Phase Developer is required to comply with any additional commitments that it made in its Proposal.</p> |
| 5. | Committed Section Proposal and Negotiation and execution of Section P3 Agreements | <p>The Phase will be divided into two or more Sections.</p> <p>The Phase Developer will be responsible for performing the predevelopment work and submitting a Committed Section Proposal (see below) for each Section under the Phase P3 Agreement.</p> <p>The final design, construction, financing, tolling, operation, maintenance, and handback of a Section will be performed by a Section Developer (an entity controlled and established by the Phase Developer) under a Section P3 Agreement.</p> <p>MDOT will deliver a draft Section P3 Agreement (including Section Technical Provisions), draft Tolling Services Agreement, and MDTA Financing Documents to the Phase Developer within 90 days of the Effective Date of the Phase P3 Agreement. MDOT and the Phase Developer will negotiate in Good Faith to agree the form of the Section P3 Agreement (including Section Technical Provisions), Tolling Services Agreement, and Supplemental Trust Agreement.</p> <p>If, despite good faith efforts, the parties are unable to agree to the form of the Section P3 Agreement, Tolling Services Agreement, or Supplemental Trust Agreement, then the Phase P3 Agreement will be terminated and the Phase Developer will not be entitled to any costs. If the Phase Developer fails to exercise good faith efforts, this will be considered a Phase Developer Default.</p> <p>For each Section, the Phase Developer will submit a Committed Section Proposal that complies with <u>Exhibit 7 (Committed Section Proposal)</u> to MDOT for approval by MDOT and the MDTA Board. A copy of the agreed Section P3 Agreement for the Section will be attached as an exhibit to the Committed Section Proposal.</p> <p>All material parts of the Committed Section Proposal must have been approved by MDOT prior to the formal submission of the Committed Section Proposal, unless otherwise agreed. For example, the fixed Design-Build Price for the Section, the O&M Costs for the Section, and the proposed financing plan included in the Committed Section Proposal will have been pre-agreed between the parties.</p> <p>Each Committed Section Proposal must be "Financially Viable" and remain valid for 240 days. "Financially Viable" means that the Section will be delivered at no net cost to the State. See definition of "Financially Viable" for further detail.</p> |

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| | | If MDOT accepts the Committed Section Proposal, then the proposal (including the proposed Section P3 Agreement) will be subject to approval by the MDTA Board and BPW. |
| 6. | Approval Process of Section P3 Agreement | <p>If MDOT accepts the Committed Section Proposal, then the proposal (including the proposed Section P3 Agreement) will be submitted to the MDTA Board. If MDOT and the MDTA Board accept and approve the Committed Section Proposal then they will commence the process for reviewing and approving the Section P3 Agreement under Title 10A of the State Finance and Procurement Article of the Annotated Code of Maryland.</p> <p>If the MDTA Board or BPW fail to approve a Section P3 Agreement that has previously been approved by MDOT within the prescribed timeframe (180 days from submission of the Committed Section Proposal), then the Phase Developer may be entitled to its Allowed Costs from MDOT for predevelopment work on that Section and any other future Sections still under development, up to the applicable Phase South Termination Cap and Phase North Termination Cap under Section 7.</p> <p>For further details see Section 11.5 (MDOT and MDTA Board Acceptance and Approval of Committed Section Proposal) and Section 11.6 (MDTA Board fail to approve a Committed Section Proposal).</p> |
| 7. | Cost of the Predevelopment Work | <p>The Phase Developer will be performing the Predevelopment Work at risk and will be responsible for funding all of the Predevelopment Work. However, the Phase Developer will be entitled to be reimbursed Allowed Costs in certain circumstances described below. Exhibit 15 (Allowed Costs) sets out what may be considered an "Allowed Cost".</p> <p>At Financial Close, a Section Developer is permitted to reimburse (using the proceeds of the debt and equity financing raised by the Section Developer at Financial Close) the Allowed Costs incurred by the Phase Developer or Section Developer attributable to that Section (or any unreimbursed Allowed Costs from an earlier Section) up to the applicable Predevelopment Cost Cap.</p> <p>For Phase South, the Predevelopment Cost Cap was bid by the Phase Developer and is \$[54,300,000]. For Phase North, the Predevelopment Cost Cap will be agreed by the parties at the same time financial viability for Phase North is determined under Section 141415 below. For further details regarding reimbursements on financial close see Section 11.2 (Permitted Payments to Phase Developer and Section Developer on Financial Close).</p> <p>In certain termination scenarios that are summarized in this term sheet, the Phase Developer may be entitled to be paid its "Allowed Costs" by MDOT up to a cap. For Phase South, an aggregate cap of \$50 million will apply (the "Phase South Termination Cap"). For Phase North, the aggregate cap will be determined by the parties at the same time financial viability for Phase North is determined under Section 141415 below (the "Phase North Termination Cap").</p> |

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| 8. | Steering Committee | MDOT and the Phase Developer will establish a Steering Committee for delivering the Predevelopment Work. See <u>Article 8 (Steering Committee)</u> . The Steering Committee will include representatives of MDOT, MDTA, and the Phase Developer with the goal of ensuring that the Predevelopment Work is progressed in accordance with the Agreement. |
| 9. | NEPA | <p>If NEPA approvals for Phase South do not permit priced managed lanes, then the Agreement will be terminated, and the Phase Developer will be entitled to its Allowed Costs by MDOT for Phase South up to the Phase South Termination Cap (an aggregate cap of \$50 million for Phase South).</p> <p>If NEPA approvals for Phase North do not permit priced managed lanes, the Phase Developer will not be entitled to any Allowed Costs from MDOT for predevelopment work performed with respect to Phase North.</p> <p>The Phase Developer shall support MDOT in accordance with 23 CFR §636.109(b) during the environmental process for Phase North, provided that the scope, cost, and timing of any support is pre-agreed in writing by MDOT.</p> |
| 10. | Interface | The Phase Developer shall assume and manage, or cause the Section Developers to assume and manage, all interface arrangements and risks between the Section Developers of the Phase. |
| 11. | Toll Systems Integrator and Toll Systems Operator | <p>The Phase Developer will be required to obtain MDOT and MDTA's approval for the Toll System Integrator and Toll Systems Operator. The minimum qualifications for the Toll Systems Integrator and Toll Systems Operator are set out in <u>Exhibit 6 (Predevelopment Work Requirements)</u>.</p> <p>The same Toll System Integrator and Toll Systems Operator will be required to be used across the entire Phase unless otherwise agreed by MDOT and MDTA. See <u>Article 20 (Toll Systems Integrator and Toll Systems Operator)</u>.</p> |
| 12. | Development Rights Fee | <p>The Phase Developer's Proposal included a Development Rights Fee for of \$145 million for the exclusive right to develop and implement the Phase under <u>Article 4 (Exclusive Rights and Obligations)</u>.</p> <p>The Phase Developer will provide a letter of credit to secure the payment of its Development Rights Fee.</p> <p>The Development Rights Fee is payable on Financial Close of Phase South A. If Financial Close does not occur by the applicable Predevelopment Milestone Deadline, the Phase Developer will be required to pay the Development Rights Fee.</p> <p>If MDOT terminates the Agreement for a Phase Developer Default prior to Financial Close of each Section in Phase South A, the Phase Developer will be required to pay the Development Rights Fee.</p> |
| 13. | Key Assumptions for Phase South A | Phase South A will be subject to certain Key Assumptions that are set out in <u>Exhibit 18 (Key Assumptions for Phase South A)</u> . |

Commented [Comment1]: Amended based on Selected Proposer's Proposal. The Selected Proposer intends to deliver Phase South as a single section.

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| | | <p>If a Key Assumption is not correct, and the parties agree that it causes:</p> <ul style="list-style-type: none"> a) a decrease to the Available Funds for a Section in Phase South A, such that the Available Funds are less than the Development Rights Fee for that Section; and b) the Phase Developer is not able to submit a Financially Viable Committed Section Proposal for each Section in Phase South A, <p>then either party may terminate the agreement. See <u>Article 12 (Phase South A Key Assumptions)</u>. In this scenario, the Phase Developer would be entitled to reimbursement by MDOT of its Allowed Costs up to the Phase South Termination Cap, and would be released from its obligation to pay any Development Rights Fee.</p> <p>There may also be adjustments to the Development Rights Fee if the parties agree that a Key Assumption is incorrect, it causes a decrease to the Available Funds, and it is not the fault of the Phase Developer.</p> <p>[Certain of the Key Assumptions are expected to change and therefore the Development Rights Fee may be subject to adjustment. For example, since the scope and cost of the Transit Service Improvements was unknown at the time of bid, MDOT included a Key Assumption that the Proposal should not take into account the Transit Service Improvements, but this assumption will change as Transit Service Improvements are developed with the counties].</p> |
| 14. | Section Viability | <p>Phase South B and All Sections in Phase North will be considered "Uncommitted Sections".</p> <p>The Phase Developer will be required to determine the Financial Viability of the Uncommitted Sections.</p> <p>If the Phase Developer determines that one of the Uncommitted Sections is not Financially Viable, then that Section and all other Uncommitted Sections will be removed from the scope of the Agreement. See <u>Article 14 (Section Viability)</u>. In this scenario, the Phase Developer would only be entitled to payment by MDOT of any costs under <u>Section 10.2 (Environmental Process and NEPA Assistance)</u> for assisting MDOT with NEPA, and the Phase Developer's Allowed Costs by MDOT for determining the Financial Viability of the Uncommitted Section up to a cap that is pre-agreed between the parties (a "Viability Cost Cap").</p> |
| 15. | Predevelopment Milestones | <p>Exhibit 5 contains certain Predevelopment Milestones that the Phase Developer will be required to achieve. The Predevelopment Milestone deadline for:</p> <ul style="list-style-type: none"> a) submitting a Committed Section Proposal for the first Section Phase South will be May 27, 2022; and b) achieving Financial Close for the first Section Phase South will be October 31, 2022. |

Commented [Comment2]: Amendment based on Selected Proposer's Proposal. The Phase Developer has committed to deliver all of Phase South as one section. Therefore Phase South B is no longer uncommitted.

Commented [Comment3]: As above - the Selected Proposer will deliver Phase South as one Section.

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| | | <p>"Phase South" means I-495 from the vicinity of the George Washington Memorial Parkway to I-270 and I-270 from I-495 to I-370.</p> <p>See Exhibit 5 (<i>Predevelopment Milestones</i>) for further details.</p> |
| 16. | Relief Events | <p>The agreement sets out certain events the occurrence of which will entitle the Phase Developer to relief if they adversely affect the performance of the Phase Developer's obligations. The specific list of such events are set out in the definition of "Relief Event". Examples include a Force Majeure Event and any Section of the Phase not being designated by the MDTA Board as a "Transportation Facilities Project".</p> <p>The occurrence of a Relief Event which adversely impacts the Predevelopment Work will entitle the Phase Developer to an extension to a Predevelopment Milestone Deadline, relief from compliance with its obligations under the Agreement, and an increase to a Predevelopment Cost Cap. See Article 16 (<i>Relief Event</i>).</p> |
| 17. | Performance Security | <p>Upon termination of the Agreement by MDOT for a Phase Developer Default the Phase Developer must pay \$10 million to MDOT as liquidated damages to compensate MDOT for the costs of re-administering the solicitation of the P3 Program, foregoing alternative opportunities, loss of potential best value to the general public, delay in delivery of the project, and injury to the credibility of MDOT and MDTA. The Phase Developer will be required to provide performance security in the form of a letter of credit in the amount of \$10 million on the Effective Date to secure this payment.</p> |
| 18. | Phase Developer Defaults | <p>Phase Developer Defaults are listed in Section 25.1 (<i>Phase Developer Default</i>).</p> <p>Examples of a Phase Developer Default include:</p> <ul style="list-style-type: none"> (a) failing to submit a compliant Committed Section Proposal for a Section in Phase South-A that is Financially Viable by the applicable Predevelopment Milestone Deadline; (b) abandonment by the Phase Developer; (c) a Section Developer Default has occurred under a Section P3 Agreement and has not been cured within the applicable cure period (if any) under the Section P3 Agreement; (d) failure by the Phase Developer to negotiate in good faith; and (e) breach of any material obligation by the Phase Developer. <p>If a Phase Developer Default occurs and is not cured within a specified cure period, MDOT may terminate the agreement or exercise step in rights to perform any of the Phase Developer's obligations (at Phase Developer's cost).</p> |

Commented [Comment4]: Insertion of Phase South. This has not changed, and is the area that the Selected Proposer will deliver as one Section.

Commented [Comment5]: As above - the Selected Proposer will deliver Phase South as one Section.

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| 19. | Early Termination Categories | <p>The Agreement may be terminated early:</p> <ul style="list-style-type: none"> a) by MDOT for convenience; b) by court ruling; c) by either MDOT or the Phase Developer for loss of Financial Viability caused by a Key Assumption for Phase South A being incorrect; d) by MDOT for a Phase Developer Default that is not cured within a specified cure period; or e) by either MDOT or the Phase Developer if despite good faith efforts, the parties are unable to agree to the form of the Section P3 Agreement, Tolling Services Agreement, or MDTA Financing Documents. |
| 20. | Early Termination Processes and Compensation | <p>The specific processes and compensation amounts for early termination will vary depending on the grounds for early termination.</p> <p>Following (a) a termination by MDOT for convenience by MDOT, (b) a termination by court ruling, or (c) termination for loss of Financial Viability caused by a key assumption being incorrect, the Phase Developer shall be entitled to payment by MDOT of its Allowed Costs up to the Phase South Termination Cap and (if applicable) the Phase North Termination Cap. The Phase Developer would also be released from its obligation to pay any further Development Rights Fees that are not already due and payable.</p> <p>The Phase Developer will not be entitled to any Allowed Costs by MDOT if MDOT terminates the Agreement for a Phase Developer Default, and will be required to pay the Development Rights Fee and \$10 million in liquidated damages.</p> <p>The Phase Developer will not be entitled to any Allowed Costs by MDOT if the Agreement is terminated for the parties failing to agree to the form of the Section P3 Agreement, Tolling Services Agreement, or MDTA Financing Agreement. The Phase Developer will however, be released from its obligation to pay the Development Rights Fee and its performance security.</p> <p>See Article 26 (Termination).</p> |
| 21. | Reduction in Scope of Agreement | <p>Parts of the Phase may be removed from the scope of the Agreement in certain circumstances described below:</p> <ul style="list-style-type: none"> a) Phase North will be removed if NEPA approvals do not permit priced managed lanes for Phase North; b) MDOT may remove Phase North for convenience at any time before commercial close of the first Section of Phase North; |

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| | | <p>c) if an Uncommitted Section is determined to be not Financially Viable, that Section and all other Uncommitted Sections will be removed (See Section 14 above);</p> <p>d) if the MDTA Board or BPW do not approve a Section P3 Agreement that has been approved by MDOT (See Section 6 above) within the specified timeframe, that Section and all other Sections that have not been submitted under a Committed Section Proposal will be removed; and</p> <p>e) if financial close of a Section P3 Agreement does not occur due to MDOT that Section and all other Sections that have not been submitted under a Committed Section Proposal will be removed.</p> <p>With respect to (a) above, the Phase Developer's entitlement to compensation will be limited to the cost pre-agreed by the parties for providing support to MDOT for the NEPA approval process.</p> <p>The Phase Developer shall be entitled to its Allowed Costs by MDOT with respect to any Section that is removed from the scope in the circumstance described in (b) to (e) above, however this will be subject to the applicable Phase South Termination Cap and Phase North Termination Cap. See <u>Article 27 (Reduction in Scope of Agreement)</u>.</p> |
| Other Contractual Provisions | | |
| 22. | Contracting | The Phase Developer may engage subcontractors, but the subcontractors will not relieve the Phase Developer of responsibility under the Agreement. See <u>Article 19 (Key Personnel and Contracting)</u> . |
| 23. | DBE | The DBE goal for the Predevelopment Work is 26%. |
| 24. | Indemnity | The Phase Developer will provide MDOT, MDTA, MDOT SHA, the State, and their respective officers, agents, representatives, and employees with indemnities that are customary for a transaction of this nature. |
| 25. | Change Orders | MDOT may request changes to the Predevelopment Work by delivering a Change Request. The Agreement provides a process for the parties to agree to any changes to the Agreement, and as a result any compensation payable to the Phase Developer, time relief, or increases to the caps. |
| 26. | Intellectual Property | <p>The Phase Developer shall assign all Work Product in the Predevelopment Work (other than Proprietary Intellectual Property) to MDOT upon:</p> <p>a) Financial Close of each Section; and</p> <p>b) on payment of Allowed Costs by MDOT due to an early termination under Section 20 or reduction in scope under Section 21.</p> <p>If the Agreement is terminated for a Phase Developer Default or due to a failure to agree to the form of Agreements, MDOT may elect to purchase the Work Product, up to a maximum amount of \$500,000.</p> |

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| 27. | Change in Ownership | <p>Any change in ownership composition of the Phase Developer must comply with:</p> <ul style="list-style-type: none"> a) the requirements of 10A- 202 of the State Finance and Procurement Article of the Annotated Code of Maryland; and b) any necessary Board of Public Works approvals unless explicitly indicated as pre-approved in <u>Section 32.2 (Pre-Approved Changes in Ownership)</u>. <p>Changes in ownership composition of the Phase Developer will also be subject to the approval of MDOT in accordance with <u>Article 32 (Change in Ownership of Phase Developer)</u>.</p> |
| 28. | Dispute Resolution | <p>The Contract Manager and the Phase Developer Representative will first consult in Good Faith to resolve the Dispute. The Contract Manager will then issue an initial decision.</p> <p>The Phase Developer may appeal the initial decision to the MDOT Secretary. The MDOT Secretary may conduct a hearing. The MDOT Secretary's decision will be the prerequisite to any judicial review with respect to the claim. See <u>Article 33 (Dispute Resolution)</u>.</p> |
| 29. | Governing Law and Jurisdiction | <p>The Phase P3 Agreement will be governed in accordance with the laws of Maryland.</p> |

Attachment 2 - Phase P3 Agreement Term Sheet - Clean version

KEY TERMS OF THE PHASE P3 AGREEMENT

| Key Terms | | |
|-----------|-------------------------------------|---|
| 1. | Parties | <ul style="list-style-type: none"> (a) MDOT; (b) MDTA; and (c) the Phase Developer. |
| 2. | MDOT as agent to MDTA | MDTA has appointed MDOT SHA to act as its agent to the extent described in <u>Section 7.2 (MDOT SHA as MDTA's Agent)</u> . |
| 3. | Term | <p>The Phase P3 Agreement will commence on the Effective Date and will end on the earlier of:</p> <ul style="list-style-type: none"> a) the date Financial Close is achieved for the last Section of the Phase that is subject to the Agreement; b) the date 10 years from the Effective Date (unless extended); and c) the date the Agreement is terminated in accordance with <u>Article 26 (Termination)</u>. <p>The Agreement contains conditions precedent to the Effective Date. See <u>Article 5 (Conditions Precedent to MDOT and MDTA Signing this Agreement)</u>. MDTA Board approval and BPW approval are both conditions precedent to this Agreement.</p> |
| 4. | Scope of Predevelopment Work | <p>The Phase Developer is required to perform predevelopment work for each Section of Phase 1, with the objective of developing a Committed Section Proposal and ultimately signing a Section P3 Agreement for each section of the Phase. Predevelopment work includes:</p> <ul style="list-style-type: none"> (a) partnering and collaborating with MDOT, governmental entities, stakeholders, utilities, and third parties on delivering the Phase and mitigating risk; (b) preparing Conceptual Designs for each Section of the Phase; (c) community engagement; (d) working with MDOT to develop transit service improvements to be delivered with each Section; (e) developing a fixed Design-Build Price for each Section (on an open book basis) for acceptance by MDOT; (f) developing O&M Costs for each Section (on an open book basis) for acceptance by MDOT; and |

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| | | <p>(g) preparing financing plans demonstrating how each Section will be financed (including traffic and revenue forecast).</p> <p>The specific requirements for each of the above examples are set out in further detail in <u>Article 1</u> of <u>Exhibit 6 (Predevelopment Work Requirements)</u>.</p> <p>In addition, the Phase Developer is required to comply with any additional commitments that it made in its Proposal.</p> |
| 5. | <p>Committed Section Proposal and Negotiation and execution of Section P3 Agreements</p> | <p>The Phase will be divided into two or more Sections.</p> <p>The Phase Developer will be responsible for performing the predevelopment work and submitting a Committed Section Proposal (see below) for each Section under the Phase P3 Agreement.</p> <p>The final design, construction, financing, tolling, operation, maintenance, and handback of a Section will be performed by a Section Developer (an entity controlled and established by the Phase Developer) under a Section P3 Agreement.</p> <p>MDOT will deliver a draft Section P3 Agreement (including Section Technical Provisions), draft Tolling Services Agreement, and MDTA Financing Documents to the Phase Developer within 90 days of the Effective Date of the Phase P3 Agreement. MDOT and the Phase Developer will negotiate in Good Faith to agree the form of the Section P3 Agreement (including Section Technical Provisions), Tolling Services Agreement, and Supplemental Trust Agreement.</p> <p>If, despite good faith efforts, the parties are unable to agree to the form of the Section P3 Agreement, Tolling Services Agreement, or Supplemental Trust Agreement, then the Phase P3 Agreement will be terminated and the Phase Developer will not be entitled to any costs. If the Phase Developer fails to exercise good faith efforts, this will be considered a Phase Developer Default.</p> <p>For each Section, the Phase Developer will submit a Committed Section Proposal that complies with <u>Exhibit 7 (Committed Section Proposal)</u> to MDOT for approval by MDOT and the MDTA Board. A copy of the agreed Section P3 Agreement for the Section will be attached as an exhibit to the Committed Section Proposal.</p> <p>All material parts of the Committed Section Proposal must have been approved by MDOT prior to the formal submission of the Committed Section Proposal, unless otherwise agreed. For example, the fixed Design-Build Price for the Section, the O&M Costs for the Section, and the proposed financing plan included in the Committed Section Proposal will have been pre-agreed between the parties.</p> <p>Each Committed Section Proposal must be "Financially Viable" and remain valid for 240 days. "Financially Viable" means that the Section will be delivered at no net cost to the State. See definition of "Financially Viable" for further detail.</p> |

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| | | If MDOT accepts the Committed Section Proposal, then the proposal (including the proposed Section P3 Agreement) will be subject to approval by the MDTA Board and BPW. |
| 6. | Approval Process of Section P3 Agreement | <p>If MDOT accepts the Committed Section Proposal, then the proposal (including the proposed Section P3 Agreement) will be submitted to the MDTA Board. If MDOT and the MDTA Board accept and approve the Committed Section Proposal then they will commence the process for reviewing and approving the Section P3 Agreement under Title 10A of the State Finance and Procurement Article of the Annotated Code of Maryland.</p> <p>If the MDTA Board or BPW fail to approve a Section P3 Agreement that has previously been approved by MDOT within the prescribed timeframe (180 days from submission of the Committed Section Proposal), then the Phase Developer may be entitled to its Allowed Costs from MDOT for predevelopment work on that Section and any other future Sections still under development, up to the applicable Phase South Termination Cap and Phase North Termination Cap under Section 7.</p> <p>For further details see <u>Section 11.5 (MDOT and MDTA Board Acceptance and Approval of Committed Section Proposal)</u> and <u>Section 11.6 (MDTA Board fail to approve a Committed Section Proposal)</u>.</p> |
| 7. | Cost of the Predevelopment Work | <p>The Phase Developer will be performing the Predevelopment Work at risk and will be responsible for funding all of the Predevelopment Work. However, the Phase Developer will be entitled to be reimbursed Allowed Costs in certain circumstances described below. <u>Exhibit 15 (Allowed Costs)</u> sets out what may be considered an "Allowed Cost".</p> <p>At Financial Close, a Section Developer is permitted to reimburse (using the proceeds of the debt and equity financing raised by the Section Developer at Financial Close) the Allowed Costs incurred by the Phase Developer or Section Developer attributable to that Section (or any unreimbursed Allowed Costs from an earlier Section) up to the applicable Predevelopment Cost Cap.</p> <p>For Phase South, the Predevelopment Cost Cap was bid by the Phase Developer and is \$[54,300,000]. For Phase North, the Predevelopment Cost Cap will be agreed by the parties at the same time financial viability for Phase North is determined under Section 15 below. For further details regarding reimbursements on financial close see <u>Section 11.2 (Permitted Payments to Phase Developer and Section Developer on Financial Close)</u>.</p> <p>In certain termination scenarios that are summarized in this term sheet, the Phase Developer may be entitled to be paid its "Allowed Costs" by MDOT up to a cap. For Phase South, an aggregate cap of \$50 million will apply (the "Phase South Termination Cap"). For Phase North, the aggregate cap will be determined by the parties at the same time financial viability for Phase North is determined under Section 15 below (the "Phase North Termination Cap").</p> |
| 8. | Steering Committee | MDOT and the Phase Developer will establish a Steering Committee for delivering the Predevelopment Work. See <u>Article 8 (Steering Committee)</u> . |

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| | | The Steering Committee will include representatives of MDOT, MDTA, and the Phase Developer with the goal of ensuring that the Predevelopment Work is progressed in accordance with the Agreement. |
| 9. | NEPA | <p>If NEPA approvals for Phase South do not permit priced managed lanes, then the Agreement will be terminated, and the Phase Developer will be entitled to its Allowed Costs by MDOT for Phase South up to the Phase South Termination Cap (an aggregate cap of \$50 million for Phase South).</p> <p>If NEPA approvals for Phase North do not permit priced managed lanes, the Phase Developer will not be entitled to any Allowed Costs from MDOT for predevelopment work performed with respect to Phase North.</p> <p>The Phase Developer shall support MDOT in accordance with 23 CFR §636.109(b) during the environmental process for Phase North, provided that the scope, cost, and timing of any support is pre-agreed in writing by MDOT.</p> |
| 10. | Interface | The Phase Developer shall assume and manage, or cause the Section Developers to assume and manage, all interface arrangements and risks between the Section Developers of the Phase. |
| 11. | Toll Systems Integrator and Toll Systems Operator | <p>The Phase Developer will be required to obtain MDOT and MDTA's approval for the Toll System Integrator and Toll Systems Operator. The minimum qualifications for the Toll Systems Integrator and Toll Systems Operator are set out in <u>Exhibit 6 (Predevelopment Work Requirements)</u>.</p> <p>The same Toll System Integrator and Toll Systems Operator will be required to be used across the entire Phase unless otherwise agreed by MDOT and MDTA. See <u>Article 20 (Toll Systems Integrator and Toll Systems Operator)</u>.</p> |
| 12. | Development Rights Fee | <p>The Phase Developer's Proposal included a Development Rights Fee of \$145 million for the exclusive right to develop and implement the Phase under <u>Article 4 (Exclusive Rights and Obligations)</u>.</p> <p>The Phase Developer will provide a letter of credit to secure the payment of its Development Rights Fee.</p> <p>The Development Rights Fee is payable on Financial Close of Phase South A. If Financial Close does not occur by the applicable Predevelopment Milestone Deadline, the Phase Developer will be required to pay the Development Rights Fee.</p> <p>If MDOT terminates the Agreement for a Phase Developer Default prior to Financial Close of Phase South A, the Phase Developer will be required to pay the Development Rights Fee.</p> |
| 13. | Key Assumptions for Phase South A | <p>Phase South A will be subject to certain Key Assumptions that are set out in <u>Exhibit 18 (Key Assumptions for Phase South A)</u>.</p> <p>If a Key Assumption is not correct, and the parties agree that it causes:</p> |

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| | | <p>a) a decrease to the Available Funds for a Section in Phase South A, such that the Available Funds are less than the Development Rights Fee for that Section; and</p> <p>b) the Phase Developer is not able to submit a Financially Viable Committed Section Proposal for each Section in Phase South A,</p> <p>then either party may terminate the agreement. See <u>Article 12 (Phase South A Key Assumptions)</u>. In this scenario, the Phase Developer would be entitled to reimbursement by MDOT of its Allowed Costs up to the Phase South Termination Cap, and would be released from its obligation to pay any Development Rights Fee.</p> <p>There may also be adjustments to the Development Rights Fee if the parties agree that a Key Assumption is incorrect, it causes a decrease to the Available Funds, and it is not the fault of the Phase Developer.</p> <p>[Certain of the Key Assumptions are expected to change and therefore the Development Rights Fee may be subject to adjustment. For example, since the scope and cost of the Transit Service Improvements was unknown at the time of bid, MDOT included a Key Assumption that the Proposal should not take into account the Transit Service Improvements, but this assumption will change as Transit Service Improvements are developed with the counties].</p> |
| 14. | Section Viability | <p>All Sections in Phase North will be considered "Uncommitted Sections".</p> <p>The Phase Developer will be required to determine the Financial Viability of the Uncommitted Sections.</p> <p>If the Phase Developer determines that one of the Uncommitted Sections is not Financially Viable, then that Section and all other Uncommitted Sections will be removed from the scope of the Agreement. See <u>Article 14 (Section Viability)</u>. In this scenario, the Phase Developer would only be entitled to payment by MDOT of any costs under <u>Section 10.2 (Environmental Process and NEPA Assistance)</u> for assisting MDOT with NEPA, and the Phase Developer's Allowed Costs by MDOT for determining the Financial Viability of the Uncommitted Section up to a cap that is pre-agreed between the parties (a "Viability Cost Cap").</p> |
| 15. | Predevelopment Milestones | <p>Exhibit 5 contains certain Predevelopment Milestones that the Phase Developer will be required to achieve. The Predevelopment Milestone deadline for:</p> <ul style="list-style-type: none"> a) submitting a Committed Section Proposal for Phase South will be May 27, 2022; and b) achieving Financial Close for Phase South will be October 31, 2022. <p>"Phase South" means I-495 from the vicinity of the George Washington Memorial Parkway to I-270 and I-270 from I-495 to I-370.</p> |

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| | | See <u>Exhibit 5 (Predevelopment Milestones)</u> for further details. |
| 16. | Relief Events | <p>The agreement sets out certain events the occurrence of which will entitle the Phase Developer to relief if they adversely affect the performance of the Phase Developer's obligations. The specific list of such events are set out in the definition of "Relief Event". Examples include a Force Majeure Event and any Section of the Phase not being designated by the MDTA Board as a "Transportation Facilities Project".</p> <p>The occurrence of a Relief Event which adversely impacts the Predevelopment Work will entitle the Phase Developer to an extension to a Predevelopment Milestone Deadline, relief from compliance with its obligations under the Agreement, and an increase to a Predevelopment Cost Cap. See <u>Article 16 (Relief Event)</u>.</p> |
| 17. | Performance Security | <p>Upon termination of the Agreement by MDOT for a Phase Developer Default the Phase Developer must pay \$10 million to MDOT as liquidated damages to compensate MDOT for the costs of re-administering the solicitation of the P3 Program, foregoing alternative opportunities, loss of potential best value to the general public, delay in delivery of the project, and injury to the credibility of MDOT and MDTA. The Phase Developer will be required to provide performance security in the form of a letter of credit in the amount of \$10 million on the Effective Date to secure this payment.</p> |
| 18. | Phase Developer Defaults | <p>Phase Developer Defaults are listed in <u>Section 25.1 (Phase Developer Default)</u>.</p> <p>Examples of a Phase Developer Default include:</p> <ul style="list-style-type: none"> (a) failing to submit a compliant Committed Section Proposal for Phase South that is Financially Viable by the applicable Predevelopment Milestone Deadline; (b) abandonment by the Phase Developer; (c) a Section Developer Default has occurred under a Section P3 Agreement and has not been cured within the applicable cure period (if any) under the Section P3 Agreement; (d) failure by the Phase Developer to negotiate in good faith; and (e) breach of any material obligation by the Phase Developer. <p>If a Phase Developer Default occurs and is not cured within a specified cure period, MDOT may terminate the agreement or exercise step in rights to perform any of the Phase Developer's obligations (at Phase Developer's cost).</p> |
| 19. | Early Termination Categories | <p>The Agreement may be terminated early:</p> <ul style="list-style-type: none"> a) by MDOT for convenience; |

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| | | <p>b) by court ruling;</p> <p>c) by either MDOT or the Phase Developer for loss of Financial Viability caused by a Key Assumption for Phase South A being incorrect;</p> <p>d) by MDOT for a Phase Developer Default that is not cured within a specified cure period; or</p> <p>e) by either MDOT or the Phase Developer if despite good faith efforts, the parties are unable to agree to the form of the Section P3 Agreement, Tolling Services Agreement, or MDTA Financing Documents.</p> |
| 20. | Early Termination Processes and Compensation | <p>The specific processes and compensation amounts for early termination will vary depending on the grounds for early termination.</p> <p>Following (a) a termination by MDOT for convenience by MDOT, (b) a termination by court ruling, or (c) termination for loss of Financial Viability caused by a key assumption being incorrect, the Phase Developer shall be entitled to payment by MDOT of its Allowed Costs up to the Phase South Termination Cap and (if applicable) the Phase North Termination Cap. The Phase Developer would also be released from its obligation to pay any further Development Rights Fees that are not already due and payable.</p> <p>The Phase Developer will not be entitled to any Allowed Costs by MDOT if MDOT terminates the Agreement for a Phase Developer Default, and will be required to pay the Development Rights Fee and \$10 million in liquidated damages.</p> <p>The Phase Developer will not be entitled to any Allowed Costs by MDOT if the Agreement is terminated for the parties failing to agree to the form of the Section P3 Agreement, Tolling Services Agreement, or MDTA Financing Agreement. The Phase Developer will however, be released from its obligation to pay the Development Rights Fee and its performance security.</p> <p>See <u>Article 26 (Termination)</u>.</p> |
| 21. | Reduction in Scope of Agreement | <p>Parts of the Phase may be removed from the scope of the Agreement in certain circumstances described below:</p> <p>a) Phase North will be removed if NEPA approvals do not permit priced managed lanes for Phase North;</p> <p>b) MDOT may remove Phase North for convenience at any time before commercial close of the first Section of Phase North;</p> <p>c) if an Uncommitted Section is determined to be not Financially Viable, that Section and all other Uncommitted Sections will be removed (See Section 14 above);</p> <p>d) if the MDTA Board or BPW do not approve a Section P3 Agreement that has been approved by MDOT (See Section 6 above) within the</p> |

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| | | <p>specified timeframe, that Section and all other Sections that have not been submitted under a Committed Section Proposal will be removed; and</p> <p>e) if financial close of a Section P3 Agreement does not occur due to MDOT that Section and all other Sections that have not been submitted under a Committed Section Proposal will be removed.</p> <p>With respect to (a) above, the Phase Developer's entitlement to compensation will be limited to the cost pre-agreed by the parties for providing support to MDOT for the NEPA approval process.</p> <p>The Phase Developer shall be entitled to its Allowed Costs by MDOT with respect to any Section that is removed from the scope in the circumstance described in (b) to (e) above, however this will be subject to the applicable Phase South Termination Cap and Phase North Termination Cap. See <u>Article 27 (Reduction in Scope of Agreement)</u>.</p> |
| Other Contractual Provisions | | |
| 22. | Contracting | The Phase Developer may engage subcontractors, but the subcontractors will not relieve the Phase Developer of responsibility under the Agreement. See <u>Article 19 (Key Personnel and Contracting)</u> . |
| 23. | DBE | The DBE goal for the Predevelopment Work is 26%. |
| 24. | Indemnity | The Phase Developer will provide MDOT, MDTA, MDOT SHA, the State, and their respective officers, agents, representatives, and employees with indemnities that are customary for a transaction of this nature. |
| 25. | Change Orders | MDOT may request changes to the Predevelopment Work by delivering a Change Request. The Agreement provides a process for the parties to agree to any changes to the Agreement, and as a result any compensation payable to the Phase Developer, time relief, or increases to the caps. |
| 26. | Intellectual Property | <p>The Phase Developer shall assign all Work Product in the Predevelopment Work (other than Proprietary Intellectual Property) to MDOT upon:</p> <p>a) Financial Close of each Section; and</p> <p>b) on payment of Allowed Costs by MDOT due to an early termination under Section 20 or reduction in scope under Section 21.</p> <p>If the Agreement is terminated for a Phase Developer Default or due to a failure to agree to the form of Agreements, MDOT may elect to purchase the Work Product, up to a maximum amount of \$500,000.</p> |
| 27. | Change in Ownership | <p>Any change in ownership composition of the Phase Developer must comply with:</p> <p>a) the requirements of 10A- 202 of the State Finance and Procurement Article of the Annotated Code of Maryland; and</p> |

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| | | <p>b) any necessary Board of Public Works approvals unless explicitly indicated as pre-approved in <u>Section 32.2 (Pre-Approved Changes in Ownership)</u>.</p> <p>Changes in ownership composition of the Phase Developer will also be subject to the approval of MDOT in accordance with <u>Article 32 (Change in Ownership of Phase Developer)</u>.</p> |
| 28. | Dispute Resolution | <p>The Contract Manager and the Phase Developer Representative will first consult in Good Faith to resolve the Dispute. The Contract Manager will then issue an initial decision.</p> <p>The Phase Developer may appeal the initial decision to the MDOT Secretary. The MDOT Secretary may conduct a hearing. The MDOT Secretary's decision will be the prerequisite to any judicial review with respect to the claim. See <u>Article 33 (Dispute Resolution)</u>.</p> |
| 29. | Governing Law and Jurisdiction | <p>The Phase P3 Agreement will be governed in accordance with the laws of Maryland.</p> |

Volume II

Phase Public-Private Partnership Agreement for the I-495 and I-270 P3 Program

AMONG:

MARYLAND TRANSPORTATION AUTHORITY

AND

MARYLAND DEPARTMENT OF TRANSPORTATION

AND

[PHASE DEVELOPER]

DATED [●], 202[●]

CONTENTS

| ARTICLE | PAGE |
|--|------|
| 1. DEFINITIONS, INTERPRETATION, AND PRECEDENCE..... | 2 |
| 2. REFERENCE INFORMATION DOCUMENTS | 4 |
| 3. EFFECTIVE DATE AND TERM..... | 6 |
| 4. EXCLUSIVE RIGHTS AND OBLIGATIONS | 6 |
| 5. CONDITIONS PRECEDENT TO MDOT AND MDTA SIGNING THIS AGREEMENT..... | 6 |
| 6. REPRESENTATIONS AND WARRANTIES..... | 9 |
| 7. REPRESENTATIVES AND MDOT AS MDTA'S AGENT..... | 13 |
| 8. STEERING COMMITTEE | 13 |
| 9. PHASE SITE ACCESS AND INVESTIGATIONS | 14 |
| 10. PREDEVELOPMENT WORK | 18 |
| 11. SECTION P3 AGREEMENTS AND COMMITTED SECTION PROPOSALS..... | 23 |
| 12. PHASE SOUTH A KEY ASSUMPTIONS | 30 |
| 13. UPFRONT PAYMENT ACCOUNT | 32 |
| 14. SECTION VIABILITY | 32 |
| 15. SCHEDULE OF PERFORMANCE | 34 |
| 16. RELIEF EVENTS | 34 |
| 17. DEVELOPMENT RIGHTS FEES | 37 |
| 18. PERFORMANCE SECURITY..... | 39 |
| 19. KEY PERSONNEL AND CONTRACTING | 41 |
| 20. TOLL SYSTEMS INTEGRATOR AND TOLL SYSTEMS OPERATOR | 54 |
| 21. APPLICABLE LAW AND FEDERAL REQUIREMENTS..... | 55 |
| 22. CHANGE ORDERS | 56 |
| 23. INDEMNITY | 57 |
| 24. INSURANCE | 61 |
| 25. PHASE DEVELOPER DEFAULT AND REMEDIES | 66 |
| 26. TERMINATION | 69 |
| 27. REDUCTION IN SCOPE OF THE AGREEMENT | 74 |
| 28. RECORDS AND AUDIT | 77 |
| 29. INTELLECTUAL PROPERTY | 78 |
| 30. PUBLIC INFORMATION AND RECORDS..... | 82 |
| 31. ASSIGNMENT AND TRANSFER; FUNDAMENTAL CHANGES | 83 |
| 32. CHANGE IN OWNERSHIP OF PHASE DEVELOPER | 84 |
| 33. DISPUTE RESOLUTION | 88 |
| 34. LIABILITIES | 89 |
| 35. GOVERNING LAW AND JURISDICTION..... | 90 |
| 36. OTHER..... | 91 |

EXHIBITS

- 1. DEFINITIONS**
- 2. PHASE DEVELOPER OWNERSHIP**
- 3. INITIAL DESIGNATION OF AUTHORIZED REPRESENTATIVES**
- 4. INTENTIONALLY OMITTED**
- 5. PREDEVELOPMENT MILESTONES AND DEADLINES**
- 6. PREDEVELOPMENT WORK REQUIREMENTS**
- 7. COMMITTED SECTION PROPOSAL**
- 8. SECTION P3 AGREEMENT TERM SHEET**
- 9. PHASE DEVELOPER PROPOSAL**
- 10. REQUIRED INSURANCE FOR PREDEVELOPMENT WORK**
- 11. KEY PERSONNEL FOR PREDEVELOPMENT WORK**
- 12. CONTRACT AFFIDAVIT**
- 13. FORM OF PERFORMANCE SECURITY FOR PREDEVELOPMENT WORK**
- 14. FORM OF DEVELOPMENT RIGHTS FEE SECURITY**
- 15. ALLOWED COSTS**
- 16. FEDERAL AND STATE REQUIREMENTS**
- 17. PREDEVELOPMENT DBE PARTICIPATION PLAN**
- 18. KEY ASSUMPTIONS**

PHASE P3 AGREEMENT

This Phase P3 Agreement (this "**Agreement**") is entered into as of [●], 20[●], by the State of Maryland (the "**State**") acting by and through the Maryland Transportation Authority, an agency of the State ("**MDTA**") and the Maryland Department of Transportation, a principal department of the State including the State Highway Administration ("**MDOT**"), and [●] (the "**Phase Developer**") (each a "**Party**" and together, the "**Parties**").

RECITALS:

- (A) In 2017, Governor Larry Hogan announced Maryland's Traffic Relief Plan (the "**Plan**"). The largest component of the Plan is the I-495 & I-270 Public-Private Partnership Program which will include improvements to over 70 miles of interstate in Maryland including:
 - (1) I-495 from the vicinity of the George Washington Memorial Parkway in Virginia, across and including the American Legion Bridge to the Woodrow Wilson Memorial Bridge; and
 - (2) I-270 from its interchange with I-495 to its interchange with I-70,(together, the "**P3 Program**").
- (B) Under Title 10A of the State Finance and Procurement Article of the Annotated Code of Maryland (the "**Act**"), MDOT and MDTA are authorized to undertake the solicitation, program management, and delivery of the P3 Program.
- (C) Under §4-204 of the Transportation Article of the Annotated Code of Maryland, MDTA is authorized to finance, construct, operate, maintain, and repair "transportation facilities projects" as defined in §4-101 of the Transportation Article of the Annotated Code of Maryland, and to perform any and all actions necessary or convenient to carry out the powers granted by the Transportation Article, including issuing revenue bonds.
- (D) Under §4-312 of the Transportation Article of the Annotated Code of Maryland, MDTA is the only State entity with the authority to set and fix tolls for State transportation facilities.
- (E) MDTA and MDOT have determined that the design, construction, financing, operation, and maintenance of the P3 Program is an authorized undertaking by the Parties under State law.
- (F) The Maryland Department of Transportation State Highway Administration ("**MDOT SHA**") has agreed to serve as agent for MDTA during the solicitation, program management, and delivery of the P3 Program under an Interagency Agreement between MDOT, MDOT SHA and MDTA dated April 25, 2019 (the "**Interagency Agreement**").
- (G) MDOT SHA owns and maintains highways in Maryland upon which the P3 Program will be developed, including: (i) I-495 (Capital Beltway) from the American Legion Bridge over the Potomac River the Woodrow Wilson Bridge and (ii) I-270 (Dwight D. Eisenhower Memorial Highway) from I-495 to I-70, including the I-270 East Spur and I-270 West Spur (the "**Premises**") and MDOT SHA will transfer the Premises to MDTA in accordance with the lease agreements entered into under Article 3 of the Interagency Agreement, as approved by the BPW.
- (H) MDOT will deliver the P3 Program in two or more phases. The first phase of the P3 Program includes improvements to I-495 from the vicinity of the George Washington Memorial Parkway

in Virginia, across and including the American Legion Bridge, to its interchange with I-270 and I-270 from its interchange with I-495 to its interchange with I- 70 (the **"Phase"**).

- (I) The southern part of the Phase (**"Phase South"**) is to be developed and delivered subject to the FHWA Record of Decision for the I-495 and I-270 Managed Lane Study. Phase South includes:
 - (1) I-495 from the vicinity of the George Washington Memorial Parkway to I-270 (**"Phase South A"**); and
 - (2) I-270 from I-495 to I-370 (**"Phase South B"**).
- (J) The balance of the Phase along I-270 from I-370 to I-70 (**"Phase North"**) will be developed and delivered subject to the outcome of an independent NEPA study.
- (K) Phase South and Phase North will each be developed and delivered in one or more Sections. Each Section will be developed and delivered by a Section Developer (a subsidiary of the Phase Developer that is to be formed by the Phase Developer) who will be responsible for the design, construction, financing, operation, and maintenance of the applicable Section.
- (L) On February 7, 2020, MDOT and MDTA issued a Request for Qualifications for the Phase (the **"RFQ"**) and received statements of qualification on or before the due date of May 20, 2020 and shortlisted four proposers.
- (M) On [●], 2020, MDOT and MDTA issued a Request for Proposals for the Phase (the **"RFP"**) to complete Predevelopment Work for the Phase through this Agreement.
- (N) Following receipt and evaluation of the RFP proposals, MDOT selected the Phase Developer as the Selected Proposer to enter into this Agreement in accordance with the terms of the RFP.
- (O) On [●], 2021, the MDTA Board approved this Agreement in accordance with the Act and implementing regulations.
- (P) On [●], 2021, the Board of Public Works approved this Agreement in accordance with the Act and implementing regulations.
- (Q) The Parties desire to set forth the terms to perform the Predevelopment Work.

The PARTIES agree as follows:

1. DEFINITIONS, INTERPRETATION, AND PRECEDENCE

1.1 Definitions

Unless the context otherwise requires, capitalized terms and acronyms used in this Agreement have the meanings given in Exhibit 1 (Definitions) or the Appendix (Abbreviations and Definitions) of Exhibit 6 (Predevelopment Work Requirements).

1.2 Interpretation

- (a) In this Agreement, unless otherwise stated:
 - (i) headings are for convenience only and do not affect interpretation;

- (ii) a reference to any agreement, instrument, or other document is to such agreement, instrument, or other document as amended or supplemented;
 - (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 such other agreement;
 - (iv) subject to Section 1.2(a)(v), a reference to an Article, Section number, Exhibit, schedule, form, or appendix is to the Article, Section number, Exhibit, schedule, form, or appendix contained in or attached to this Agreement;
 - (v) a reference in the main body of this Agreement or Exhibit, to an Article or Section number is to the Article or Section number of this Agreement or that Exhibit (as applicable);
 - (vi) a reference to a Person includes the Person's permitted successors and assigns;
 - (vii) the words "including", "includes", and "include" mean "including, without limitation", "includes, without limitation", and "include, without limitation", respectively; and
 - (viii) an obligation to do something "promptly" means an obligation to do so as soon as the circumstances permit, avoiding any delay.
- (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 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 an 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 that Party preparing this Agreement or the relevant provision.

1.3 **Order of Precedence**

- (a) Except as otherwise expressly provided in this Section 1.3, if there is any conflict, ambiguity, or inconsistency between the provisions of this Agreement (including all Exhibits), the order of precedence will be as follows, from highest to lowest:
 - (i) the main body of this Agreement;
 - (ii) the Exhibits to this Agreement, other than Exhibit 6 (Predevelopment Work Requirements) and Exhibit 9 (Phase Developer Proposal);
 - (iii) Exhibit 6 (Predevelopment Work Requirements); and
 - (iv) Exhibit 9 (Phase Developer Proposal),

in each case, as amended or supplemented in accordance with this Agreement.

- (b) If there is any conflict, ambiguity, or inconsistency between any of the provisions in this Agreement (including all Exhibits), the provision establishing a higher standard of safety, reliability, durability, performance, or service will prevail.
- (c) If the Phase Developer's Proposal includes statements, provisions, concepts, or designs that can reasonably be interpreted as offering to:
 - (i) provide higher (but not lower) quality items than otherwise required by the main body of this Agreement or the other Exhibits to this Agreement; or
 - (ii) perform services or meet standards in addition to or better than those otherwise required,

the Phase Developer's obligations under this Agreement include compliance with all such statements, provisions, concepts, and designs in its Proposal.
- (d) 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 provision of this Agreement with higher priority.
- (e) An amendment to this Agreement or a change order under Article 22 (Change Orders) shall take precedence over the terms it amends.

1.4 **Resolving any Conflict or Ambiguity**

- (a) If any Party becomes aware of any conflict, ambiguity, or inconsistency between the provisions of this Agreement, it must promptly notify the other Parties in writing of the conflict, ambiguity, or inconsistency and its assessment of which provision should prevail in light of the application of the rules in Section 1.3 (Order of Precedence).
- (b) If:
 - (i) any conflict, ambiguity, or inconsistency between the provisions of this Agreement cannot be reconciled; or
 - (ii) the Parties disagree with respect to any conflict, ambiguity, or inconsistency between the provisions of this Agreement,

MDOT will promptly issue a written determination to the other Parties, resolving the conflict, ambiguity, or inconsistency.
- (c) Any determination by MDOT under Section 1.4(b) will not constitute a Relief Event, or a change order under Article 22 (Change Orders), or otherwise entitle the Phase Developer to any extension of time, relief from obligations, or compensation.

2. **REFERENCE INFORMATION DOCUMENTS**

2.1 **Reference Information Documents**

- (a) MDOT has provided and disclosed to the Phase Developer the Reference Information Documents.
- (b) The Reference Information Documents were provided for reference purposes only.

- (c) Except to the extent expressly provided under this Agreement or a Section P3 Agreement, none of the Phase Developer, Section Developers, nor any other Phase Developer-Related Entity is entitled to rely on the Reference Information Documents as accurately describing existing conditions, presenting design, engineering, operating or maintenance solutions, or other directions, means or methods for complying with the requirements of this Agreement, the Section P3 Agreements, Governmental Approvals, or Applicable Law.

2.2 **No Representations, Warranties, or Liability**

The Phase Developer acknowledges that, except to the extent expressly provided in this Agreement or a Section P3 Agreement:

- (a) each of MDOT and MDTA makes no representation or warranty with respect to the completeness, accuracy, or fitness for any purpose of any of the information contained in the Reference Information Documents or that such information conforms with the requirements of this Agreement, any Section P3 Agreement, Governmental Approvals, or Applicable Law; and
- (b) neither MDOT, MDTA nor any of their respective agents, officers, or employees will have any liability to the Phase Developer, any Section Developer, or any other Phase Developer-Related Entity, and neither the Phase Developer nor any Section Developer will be entitled to any extension of time, relief from obligations, or compensation with respect to:
 - (i) any inaccuracy, omission, lack of fitness for any purpose, or inadequacy of any kind whatsoever in the Reference Information Documents;
 - (ii) any failure to make available to the Phase Developer, any Section Developer, or any other Phase Developer-Related Entity any materials, documents, drawings, plans, or other information relating to the Phase as part of the Reference Information Documents; or
 - (iii) any causes of action, claims, or Losses whatsoever suffered by the Phase Developer, any Section Developer, or any other Phase Developer-Related Entity by reason of any use of information contained in, or any action or forbearance in reliance on, the Reference Information Documents.

2.3 **No Reliance**

The Phase Developer acknowledges and confirms that it has not entered into this Agreement on the basis of, and has not relied upon, any statement or representation (whether negligent, innocent, or otherwise), warranty, or other provision (whether oral, written, express, or implied) made or agreed to by MDOT, MDTA, or any of their respective agents or employees, except those expressly repeated or referred to in this Agreement, and the only remedy or remedies available with respect to any misrepresentation or untrue statement made to it will be the remedy or remedies available under this Agreement.

2.4 **No Claims or Relief from Obligations**

- (a) Subject to any express rights that the Phase Developer has under this Agreement, the Phase Developer will not in any way be relieved from any obligation under this Agreement, nor will it be entitled to any claim against MDOT or MDTA on grounds that any Reference Information Documents or other information made available by MDOT or

MDTA, whether obtained from MDOT, MDTA, or otherwise, is incorrect or insufficient and the Phase Developer shall make its own inquiries as to the accuracy and adequacy of the Reference Information Documents or other such information.

- (b) The Phase Developer shall conduct any and all studies, analyses, and investigations as it deems advisable to verify and supplement information in the Reference Information Documents. Subject to any express rights that the Phase Developer has under this Agreement, any use of information in the Reference Information Documents in performing the Predevelopment Work, without verification or supplement, is entirely at the Phase Developer's own risk. If the Phase Developer or anyone on the Phase Developer's behalf uses any of the information in the Reference Information Documents in any way, such use is made on the basis that the Phase Developer, not MDOT or MDTA, has approved and is responsible for that information.

3. **EFFECTIVE DATE AND TERM**

This Agreement will commence on the Effective Date, and will end on the earlier of:

- (a) the date Financial Close is achieved for the last Section of the Phase that is subject to this Agreement;¹
- (b) the date that is 10 years from the Effective Date (unless extended with MDOT and MDTA's written consent, and the BPW approval); or
- (c) the date this Agreement is terminated under Article 26 (Termination).

4. **EXCLUSIVE RIGHTS AND OBLIGATIONS**

- (a) Subject to Section 4(b):
 - (i) MDOT and MDTA grant the Phase Developer an exclusive right to develop and implement the Phase in accordance with the terms of this Agreement; and
 - (ii) MDOT and MDTA shall not entertain proposals from, or negotiate with, any third party regarding the development of the Phase.
- (b) MDOT and MDTA reserve the right to negotiate with any third party with respect to the development of any portion of the Phase that is not subject to a signed Section P3 Agreement at the end of the Term or that is removed from the scope of this Agreement under Article 27 (Reduction in Scope of the Agreement).

5. **CONDITIONS PRECEDENT TO MDOT AND MDTA SIGNING THIS AGREEMENT**

5.1 **Conditions Precedent to MDOT and MDTA Signing this Agreement**

This Agreement shall not be signed by MDOT or MDTA until the following conditions have been satisfied (or waived in writing by MDOT):

- (a) **Phase Developer has Signed this Agreement**

¹ If the Proposal requires this Agreement to extend beyond the predevelopment phase for all Sections and to continue in parallel with the Section P3 Agreements, this provision will be amended accordingly.

The Phase Developer has signed this Agreement and delivered it to MDOT.

(b) **Performance Security**

The Phase Developer has delivered the Performance Security to MDOT.

(c) **Development Rights Fee Security**

The Phase Developer has delivered the Development Rights Fee Security to MDOT.

(d) **MDTA Board Approval**

The MDTA Board has approved this Agreement in accordance with the Act and COMAR §11.07.06.09.

(e) **BPW Approval**

The BPW has approved this Agreement in accordance with the Act.

(f) **Corporate Documents**

The Phase Developer has delivered to MDOT any documents and certificates that MDOT may have reasonably requested with respect to:

- (i) the due organization, valid existence, and good standing of the Phase Developer; and
- (ii) the authorization of the Phase Developer to enter into this Agreement.

(g) **Qualification to do Business**

The Phase Developer has provided MDOT with acceptable evidence that the Phase Developer, Lead Contractor, and Designer:

- (i) are qualified to do business in the State of Maryland and the Commonwealth of Virginia;
- (ii) are registered with the State Department of Assessments and Taxation;
- (iii) are in good standing with the State of Maryland and the Commonwealth of Virginia; and
- (iv) if required by Applicable Law, possess:
 - (A) a Maryland business license obtained from the clerks of the Circuit Court in the county where the business is located; and
 - (B) such licenses as may be required to conduct business in the Commonwealth of Virginia.

(h) **Licensing Requirements**

The Phase Developer has provided MDOT with acceptable evidence that the Phase Developer, Lead Contractor, or Designer is properly licensed to carry out the design, surveying, and layout proposed as part of the Predevelopment Work in compliance with:

- (i) Titles 14 and 15 of the Business Occupations and Professions Article of the Annotated Code of Maryland;
- (ii) Chapters 4 and 11 of the Professions and Occupations Article of the Code of Virginia; and
- (iii) all other Applicable Law.

(i) **Phase Developer Opinions**

The Phase Developer has provided MDOT with acceptable legal opinions customary for a transaction of this nature addressed to MDOT and MDTA, from legal counsel, as to, among other things:

- (i) the organization and existence of the Phase Developer;
- (ii) the due authorization and signing of this Agreement;
- (iii) the enforceability of this Agreement against the Phase Developer; and
- (iv) confirmation that this Agreement does not violate any Applicable Law or any of the Phase Developer's organizational documents.

(j) **Certification Regarding Use of Contract Funds for Lobbying**

The Phase Developer has delivered to MDOT a signed certification in the form attached in Part F of Exhibit 16 (Federal and State Requirements) from:

- (i) the Phase Developer;
- (ii) each Key Participant; and
- (iii) each PD Equity Member.

(k) **Certification Regarding Debarment**

The Phase Developer has delivered to MDOT a signed certification in the form attached in Part G of Exhibit 16 (Federal and State Requirements) from the Phase Developer and each Key Participant.

(l) **Contract Affidavit**

The Phase Developer has delivered to MDOT a signed "Contract Affidavit" from the Phase Developer and each PD Equity Member in the form of Exhibit 12 (Contract Affidavit).

(m) **Insurance Policies**

The Phase Developer has obtained and delivered to MDOT certificates of insurance that satisfy Section 24.2(d) (Verification of Coverage) evidencing that all insurances required under this Agreement are in place as of the Effective Date. The Phase Developer shall

provide actual Insurance Policies and all endorsements to MDOT within 45 days after the Effective Date.

(n) **DBE Documents**

The Phase Developer has provided MDOT with the following in accordance with Section 19.9 (Disadvantaged Business Enterprise):

- (i) a DBE Participation Plan in accordance with Part A of Exhibit 17 (Predevelopment DBE Participation Plan);
- (ii) a list of all Contracts (with Dollar value), for the Predevelopment Work that are anticipated to begin within the first 180 days after the Effective Date; and
- (iii) the DBE Participation Forms (as directed by MDOT) for each Contract awarded as of the Effective Date.

6. **REPRESENTATIONS AND WARRANTIES**

6.1 **Phase Developer Representations and Warranties**

The Phase Developer represents and warrants to MDOT and MDTA that as of the Effective Date:

(a) **Existence and Good Standing**

The Phase Developer is a [●]² duly organized, validly existing, and in good standing under the laws of [●]³.

(b) **Good Standing and Qualification**

The Phase Developer is in good standing and qualified to do business in the State of Maryland and in the Commonwealth of Virginia.

(c) **Power and Authority**

The Phase Developer has the power and authority to sign this Agreement, and to perform its obligations under this Agreement.

(d) **Authorization**

- (i) The signing of this Agreement by the Phase Developer, and the performance of the Phase Developer's obligations under this Agreement, have been duly authorized by all necessary [corporate]/[limited liability company] action of the Phase Developer.
- (ii) Each Person signing this Agreement on behalf of the Phase Developer, has been duly authorized to sign this Agreement on behalf of the Phase Developer.

(e) **Signing**

² The type of legal entity of the Phase Developer to be inserted.

³ The state of formation of the Phase Developer to be inserted.

This Agreement has been duly signed by the Phase Developer.

(f) **Enforceability**

This Agreement constitutes a legal, valid, and binding obligation on the Phase Developer, enforceable against the Phase Developer in accordance with its terms, subject to applicable bankruptcy, insolvency, and similar laws affecting the enforceability of the rights of creditors generally and the general principles of equity.

(g) **No Contravention**

The signing of this Agreement by the Phase Developer, and the performance by the Phase Developer of its obligations under this Agreement, does not conflict with, or result in a default or a violation of:

- (i) the Phase Developer's organizational documents;
- (ii) any other material agreement or instrument to which the Phase Developer is a party or which is binding on the Phase Developer or any of the Phase Developer's assets;
- (iii) any Applicable Law; or
- (iv) any judicial decree.

(h) **No Prohibited Person**

The Phase Developer, each Affiliate of the Phase Developer, and each of their respective directors, officers, and employees, is not a Prohibited Person.

(i) **No Litigation**

There is no action, suit, proceeding, investigation, or litigation pending or, to the knowledge of the Phase Developer or any PD Equity Member, threatened, that:

- (i) could reasonably be expected to have a material adverse effect on the ability of the Phase Developer to perform its obligations under this Agreement;
- (ii) challenges or could adversely impact, the Phase Developer's power and authority to sign this Agreement or to perform its obligations under this Agreement;
- (iii) challenges the validity or enforceability of this Agreement; or
- (iv) challenges the authority of the Phase Developer's representative signing this Agreement.

(j) **Licenses, Skills, and Expertise**

The Phase Developer and the Key Participants have (or will have by the time required), the required authority, qualifications, rights, franchises, license status, privileges, professional ability, skills, and capacity to perform the Predevelopment Work.

(k) **Governmental Approvals**

The Phase Developer and the Key Participants have all Governmental Approvals that are required, as of the Effective Date, to begin the Predevelopment Work, other than MDOT-Provided Approvals. The Phase Developer has no reason to believe that any Governmental Approval required to be obtained by the Phase Developer will not be granted in due course and thereafter remain in effect so as to enable the Predevelopment Work to proceed in accordance with this Agreement.

(l) **Phase Site and Reference Information Documents**

The Phase Developer has, in accordance with Good Industry Practice:

- (i) investigated and reviewed the Reference Information Documents and available public records; and
- (ii) familiarized itself with the Phase Site and the surrounding locations, based on the Reference Information Documents, available public records, and an inspection of the Phase Site to the extent it was permitted access to the Phase Site under the ITP.

(m) **Applicable Law**

The Phase Developer has familiarized itself with the requirements of all Applicable Law and the conditions of any required Governmental Approvals.

(n) **Ownership**

Exhibit 2 (Phase Developer Ownership) accurately describes the legal, beneficial, and equitable ownership of the Phase Developer, and no arrangements are in place that will result in, or are reasonably likely to result in, a Change in Ownership that would require the Phase Developer to provide notice to MDOT under Article 32 (Change in Ownership of Phase Developer).

(o) **No Improper Acts**

The Phase Developer has not employed or retained, and shall not employ or retain, any Person other than employees, agents, attorneys, consultants, and advisors of the Phase Developer or a Phase Developer-Related Entity, to solicit or secure this Agreement, and the Phase Developer has not paid or agreed to pay any Person any fee or any other consideration contingent on the making of this Agreement which would be in violation of Section 19.11 (Sanctions Upon Improper Acts).

(p) **Conflicts of Interest**

As of the Predevelopment Work Proposal Due Date, the Phase Developer disclosed to MDOT in writing all Organizational Conflicts of Interest of the Phase Developer and the Phase Developer-Related Entities that were listed in its Proposal of which the Phase Developer was actually aware. Between the Predevelopment Work Proposal Due Date and the Effective Date:

- (i) the Phase Developer has not obtained knowledge of any additional Organizational Conflicts of Interest of the Phase Developer or the Phase Developer-Related Entities that was not disclosed in its Proposal; and

- (ii) there have been no organizational changes to the Phase Developer or the Phase Developer-Related Entities that were listed in its Proposal, which have not been approved in writing by MDOT.

6.2 **MDOT and MDTA Representations and Warranties**

MDOT and MDTA represent and warrant to the Phase Developer that as of the Effective Date:

(a) **Existence**

- (i) MDTA is an agency of the State, is validly existing in Maryland, and has the requisite authority to carry on its present activities and those proposed under this Agreement.
- (ii) MDOT is a principal department of the State, is validly existing in Maryland, and has the requisite authority to carry on its present activities and those proposed under this Agreement.

(b) **Power and Authority**

Each of MDOT and MDTA has the power and authority to sign this Agreement, and to perform its obligations under this Agreement.

(c) **Authorization**

- (i) The signing of this Agreement by MDOT and MDTA, and the performance of their obligations under this Agreement, have been duly authorized by all necessary action of MDOT and MDTA.
- (ii) Each Person signing this Agreement on behalf of MDOT or MDTA has been duly authorized to sign this Agreement on behalf of MDOT and MDTA, respectively.

(d) **Execution**

This Agreement has been duly signed by MDOT and MDTA.

(e) **Enforceability**

This Agreement constitutes a legal, valid, and binding obligation of MDOT and MDTA, enforceable against each of them in accordance with its terms, subject to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and the general principles of equity.

(f) **No Litigation**

There is no action, suit, proceeding, investigation, or litigation pending or, to MDOT's or MDTA's knowledge threatened, that has reasonable prospects of success, that as of the Effective Date:

- (i) could reasonably be expected to have a material adverse effect on the ability of MDOT or MDTA to perform their material obligations under this Agreement;
- (ii) challenges or could adversely impact, MDOT's or MDTA's power and authority to sign this Agreement or to perform their obligations under this Agreement;

- (iii) challenges the validity or enforceability of this Agreement; or
- (iv) challenges the authority of the MDOT official or the MDTA official signing this Agreement.

(g) **No Contravention**

The signing of this Agreement by MDOT and MDTA, and the performance by MDOT and MDTA of their respective obligations under this Agreement, does not conflict with, or result in a default or a violation of:

- (i) any Applicable Law;
- (ii) any material agreement or instrument to which MDOT or MDTA is a party or which is binding on MDOT or MDTA; or
- (iii) any judicial decree.

7. **REPRESENTATIVES AND MDOT AS MDTA'S AGENT**

7.1 **Representatives**

- (a) MDOT and the Phase Developer shall each designate an individual or individuals who will be authorized to make decisions and bind MDOT and the Phase Developer on matters relating to this Agreement (the **"Contract Manager"** and **"Phase Developer Representative"**, respectively).
- (b) Exhibit 3 (Initial Designation of Authorized Representatives) provides initial designations, which may be changed by a subsequent notice in writing delivered to the other Parties in accordance with Section 36.9 (Notices and Communications).

7.2 **MDOT SHA as MDTA's Agent**

- (a) Under the Interagency Agreement, MDTA has appointed MDOT SHA as its agent for the purposes of carrying out the P3 Program and exercising or performing all of MDTA's rights and obligations under this Agreement (other than the setting and collection of tolls on users and those which, by law, may only be exercised by the MDTA Board or the MDTA Executive Director).
- (b) All rights and obligations of MDTA under this Agreement (other than the setting and collection of tolls on users and those which, by law, may only be exercised by the MDTA Board or the MDTA Executive Director) will be exercised or performed exclusively by MDOT SHA, and any exercise or performance by MDOT SHA will bind MDTA as against the Phase Developer, upon which the Phase Developer will have the right to rely.

8. **STEERING COMMITTEE**

- (a) MDOT and the Phase Developer shall establish a Steering Committee to:
 - (i) ensure that the Predevelopment Work is progressed in accordance with this Agreement;
 - (ii) develop and issue recommendations to MDOT and the Phase Developer regarding issues critical to the success of the Phase; and

- (iii) assist in resolving Disputes if requested under Section 33.1 (Consultation and Initial Decision of Contract Manager).
- (b) The Steering Committee will be comprised of representatives of the Phase Developer, MDOT, and MDTA. MDOT may invite representatives of other agencies to attend and participate in any Steering Committee meeting.
- (c) The Steering Committee will meet monthly throughout the Term, or such other frequency agreed between MDOT and the Phase Developer.
- (d) The Phase Developer shall document all Steering Committee meetings and distribute meeting minutes, including a list of all attendees, to MDOT following each Steering Committee meeting.

9. **PHASE SITE ACCESS AND INVESTIGATIONS**

9.1 **Access to the Phase Site**

- (a) The Phase Developer may access the Phase Site only in accordance with this Article 9.
- (b) The Phase Developer may access the Phase Site to:
 - (i) conduct site investigations as part of the Predevelopment Work in accordance with Section 9.2 (Site Investigations);
 - (ii) perform Remedial Action in accordance with Section 9.4 (Hazardous Materials); and
 - (iii) conduct data studies and investigations for the purposes of obtaining additional traffic and revenue information that the Phase Developer deems necessary, provided the Phase Developer obtains any necessary Governmental Approvals and does not:
 - (A) interrupt or impede traffic flow without proper approvals and implementing safe traffic control measures;
 - (B) stop traffic at cross-streets, intersections, or otherwise to solicit information; or
 - (C) request any vehicle/owner data or information from MDOT prohibited by Applicable Law.

9.2 **Site Investigations**

- (a) The Phase Developer shall seek access to the Phase Site to conduct site investigations as part of the Predevelopment Work ("**Site Investigations**") in accordance with this Section 9.2. The scope of the Site Investigations will be limited to:
 - (i) field exploration and observation;
 - (ii) soil boring and sampling;
 - (iii) surveys;

- (iv) traffic data collection; and
 - (v) any additional data collection mutually agreed to by MDOT and the Phase Developer.
- (b) The Phase Developer shall not commence or conduct Site Investigations unless:
 - (i) it has requested and received approval from MDOT (for proposed Site Investigations within Maryland) or from both MDOT and VDOT (for proposed Site Investigations within the Commonwealth of Virginia), to access the relevant part of the Phase Site for the purpose of conducting those Site Investigations; and
 - (ii) it has obtained any Governmental Approvals that are required to perform those Site Investigations.
- (c) If the Phase Developer requires access to the Phase Site to conduct any Site Investigations, the Phase Developer shall provide written notice to MDOT requesting access to conduct those Site Investigations, no later than two weeks prior to the date on which the Phase Developer wishes to perform the Site Investigations. The notice must specify:
 - (i) the parts of the Phase Site the Phase Developer proposes to access;
 - (ii) the scope of the Site Investigations the Phase Developer proposes to undertake, in accordance with Exhibit 6 (Predevelopment Work Requirements); and
 - (iii) the dates on which the Phase Developer proposes to perform the Site Investigations.
- (d) If the Phase Developer provides proper notice under Section 9.2(c):
 - (i) with respect to any MDOT Controlled Parcels, MDOT shall, within 10 Business Days of receiving the Phase Developer's notice under Section 9.2(c), grant the Phase Developer access to conduct the Site Investigations or give reasons why access cannot be granted and an estimate of when it may be available; and
 - (ii) with respect to any Third Party Parcels MDOT shall use Reasonable Efforts to obtain access for the Phase Developer to conduct the Site Investigations and shall notify the Phase Developer in writing whether or not MDOT has obtained such access and rights to conduct Site Investigations. The Phase Developer acknowledges that:
 - (A) MDOT will not provide access unless MDOT has obtained a right of access from the third party or parties that control access to the applicable Third Party Parcels; and
 - (B) without limiting Section 9.2(d)(ii)(A), in the case of proposed Site Investigations in the Commonwealth of Virginia, any access and Site Investigations will be subject to approval by VDOT.
- (e) The Phase Developer shall obtain and comply with all Governmental Approvals required for performing the Site Investigations.

- (f) The Phase Developer may, by written notice to MDOT, request MDOT's assistance in obtaining any Governmental Approvals required for performing Site Investigations. If requested in accordance with this Section 9.2(f), MDOT will exercise Reasonable Efforts to assist the Phase Developer in obtaining such Governmental Approvals.

9.3 Protection of Property

- (a) The Phase Developer shall preserve and protect all structures, improvements, equipment, and vegetation, on or adjacent to areas where it conducts Site Investigations or conducts any other Predevelopment Work while utilizing and occupying the Phase Site.
- (b) The Phase Developer shall replace or repair, at no cost to MDOT, any damage to structures, improvements, equipment, or vegetation, including those that are the property of a third party, resulting from the failure to comply with the requirements of this Agreement in performing the Predevelopment Work. If the Phase Developer fails or refuses to repair the damage promptly, MDOT may have the necessary services performed at the Phase Developer's sole cost.
- (c) The Phase Developer shall promptly (and in any event within one Business Day of any encounter) notify MDOT of all things of historical, archaeological, paleontological, or scientific interest encountered by the Phase Developer during the performance of the Predevelopment Work. The Phase Developer shall promptly stop any Site Investigation or other Predevelopment Work within the vicinity of the discovery in order to preserve and protect the discovery until its significance can be determined by MDOT. MDOT shall issue instructions to the Phase Developer with respect to the disposition of the discovery and shall reimburse the Phase Developer for its reasonable and proper costs (that would not otherwise have been incurred in performing Predevelopment Work) in complying with such instructions.

9.4 Hazardous Materials

- (a) If the Phase Developer encounters any Pre-Existing Hazardous Materials, or if there is a Hazardous Materials Release, the Phase Developer shall promptly (and in any event within one Business Day) notify MDOT of the Pre-Existing Hazardous Materials or Hazardous Materials Release and its location and, subject to Section 9.4(d), provide MDOT with a reasonable opportunity to inspect the affected areas and locations before taking any Remedial Action.
- (b) If the Phase Developer notifies MDOT of any Pre-Existing Hazardous Materials that it encounters while performing the Predevelopment Work, or a Hazardous Materials Release MDOT shall:
 - (i) notify the Phase Developer of any Remedial Action that MDOT requires the Phase Developer to perform with respect to the Hazardous Materials; and
 - (ii) if MDOT requires the Phase Developer to perform Remedial Action, or the Phase Developer is required by Applicable Law to perform Remedial Action, MDOT shall reimburse the Phase Developer for its reasonable and proper costs (that would not otherwise have been incurred in performing Predevelopment Work) in performing the Remedial Action, except in the case of a Phase Developer Hazardous Materials Release, in which case the Phase Developer will bear all costs and expenses and Section 23.1(d) (Indemnity) will apply.

- (c) The Phase Developer shall:
 - (i) comply with any notice issued by MDOT under Section 9.4(b) to perform Remedial Action;
 - (ii) obtain all Governmental Approvals required for any Remedial Action that it is required to perform;
 - (iii) perform the Remedial Action in accordance with all Applicable Laws and Governmental Approvals; and
 - (iv) in performing the Remedial Action, take such steps and actions as MDOT may require to protect and preserve MDOT's potential claims of contribution and indemnity, statutory or otherwise, against potentially responsible parties.
- (d) If there is a sudden Hazardous Materials Release, the Phase Developer may take the minimum action necessary to stabilize and contain the relevant Hazardous Materials Release without providing MDOT with prior notice under Section 9.4(a) or the opportunity to inspect the relevant areas and locations. If there is a sudden Phase Developer Hazardous Materials Release, the Phase Developer will not be required to provide MDOT with prior notice under Section 9.4(a) or the opportunity to inspect the relevant areas and locations before commencing Remedial Action.
- (e) Nothing in this Section 9.4, prevents or excuses the Phase Developer from complying with Applicable Law, Governmental Approvals, or the requirements of any Governmental Entity, including complying with any requirements to notify a Governmental Entity or other Person upon discovery of Hazardous Materials.

9.5 Generator Status

- (a) As among MDTA, MDOT, and the Phase Developer, the Phase Developer will be deemed the generator under 40 CFR, Part 262 with respect to any Phase Developer Hazardous Materials Release. The Phase Developer will be identified as the generator of the relevant Hazardous Materials on waste manifests and any other documentation submitted to transporters, disposal facilities, or any Governmental Entity.
- (b) With respect to Pre-existing Hazardous Materials or any Hazardous Materials Release other than a Phase Developer Hazardous Materials Release:
 - (i) as among MDTA, MDOT, and the Phase Developer, the Phase Developer will not be deemed the generator under 40 CFR, Part 262;
 - (ii) the Phase Developer will not be designated as the generator on the waste manifest or any other documentation submitted to transporters, disposal facilities, or any Governmental Entity.
 - (iii) if MDOT requires the Phase Developer to take Remedial Action under Section 9.4 (Hazardous Materials), the Phase Developer shall:
 - (A) prepare waste manifests for review and approval by MDOT (prior to the time that the Hazardous Materials are loaded on the transport truck on the Phase Site)

- (B) provide all related forms and approvals required for transportation and disposal of the Hazardous Materials;
 - (C) provide copies of the waste manifests and related forms to MDOT on the date of transport; and
 - (D) provide the final signed manifests and receipt(s) from the receiving/disposal facility to MDOT upon receipt of such documents.
- (c) If MDOT requires the Phase Developer to take Remedial Action under Section 9.4 (Hazardous Materials) with respect to Pre-existing Hazardous Materials or any Hazardous Materials Release other than a Phase Developer Hazardous Materials Release:
 - (i) the Phase Developer shall not transport the relevant Hazardous Materials unless MDOT has received, reviewed, approved, and signed (as required) any waste documentation, and reviewed and signed the manifests; and
 - (ii) the Phase Developer shall give MDOT at least 48 hours' prior notice before transporting the relevant Hazardous Materials.

10. **PREDEVELOPMENT WORK**

10.1 **General Requirements**

- (a) The Phase Developer shall perform the Predevelopment Work in accordance with:
 - (i) Exhibit 6 (Predevelopment Work Requirements);
 - (ii) the Phase Developer's Proposal;
 - (iii) Good Industry Practice;
 - (iv) all Applicable Law;
 - (v) the requirements of all Governmental Approvals; and
 - (vi) all other requirements of this Agreement.
- (b) The Phase Developer shall obtain and maintain all Governmental Approvals (other than MDOT-Provided Approvals) that are required to perform the Predevelopment Work.

10.2 **Environmental Process and NEPA Assistance**

- (a) For the purposes of NEPA, the identification of a preferred alternative for each of Phase South and Phase North is exclusively within the control and decision making authority of MDOT, in conjunction with FHWA as the lead federal agency for NEPA.
- (b) Nothing in this Agreement will limit the discretion that MDOT will exercise in conducting its environmental review and preparing environmental documents for Phase South and Phase North, including the discretion of MDOT and FHWA (as the lead federal agency for NEPA) to choose a no-build alternative.

- (c) Subject to Section 10.2(d), as part of the Predevelopment Work, the Phase Developer shall, in accordance with 23 CFR §636.109(b), support MDOT during the environmental process for Phase North, by:
 - (i) preparing preliminary designs (as defined in 23 CFR §636.103);
 - (ii) to the extent required by MDOT, performing design and engineering activities for the purposes of:
 - (A) defining the Phase North alternatives and completing the NEPA alternative analysis and review process;
 - (B) complying with other related environmental laws and regulations;
 - (C) supporting MDOT coordination, public involvement, permit applications, or the development of mitigation plans; or
 - (D) developing the design of the preferred alternative to a higher level of detail if the lead agencies agree that it is warranted under 23 U.S.C. §139(f)(4)(D); and
 - (iii) providing feedback on cost and revenue assumptions used by MDOT for the NEPA alternative analysis and review process.
- (d) MDOT and FHWA shall retain control and responsibility for the NEPA process for Phase South and Phase North. The Phase Developer shall not perform services (and, if requested by MDOT, may refuse to provide services) that would violate conflict of interest rules under NEPA regarding the preparation, review, revision, and decisions on the scope and content of draft and final environmental review documents.

10.3 **Phase South NTP Contingent Upon NEPA Approval**

- (a) MDOT shall issue a notice to proceed with respect to the Predevelopment Work for Phase South to the Phase Developer promptly after all required NEPA approvals have been issued with respect to Phase South ("**Phase South NTP**").
- (b) Despite Section 10.3(a), the Phase Developer may commence Predevelopment Work for Phase South prior to the issue of the Phase South NTP, subject to complying with Section 10.2(d) (Environmental Process and NEPA Assistance).
- (c) If the NEPA approvals for Phase South do not permit Priced Managed Lanes then:
 - (i) MDOT will not issue the Phase South NTP;
 - (ii) MDOT shall issue a notice under Section 26.1 (Termination for Convenience) terminating this Agreement for convenience;
 - (iii) the Phase Developer will not be entitled to any Allowed Costs for work performed on Phase North; and
 - (iv) MDOT shall pay the Phase Developer an amount equal to the Phase Developer's Allowed Costs that are directly attributable to Phase South and that have not previously been reimbursed, up to the Phase South Termination Cap.

10.4 Phase North NTP Contingent Upon NEPA Approval

- (a) MDOT shall issue a notice to proceed with respect to the Predevelopment Work for Phase North to the Phase Developer promptly after all required NEPA approvals have been issued with respect to Phase North ("**Phase North NTP**").
- (b) Despite Section 10.4(a), the Phase Developer may provide MDOT with any of the support referred to in Section 10.2(c) (Environmental Process and NEPA Assistance), provided that the scope, cost, and timing of payment for any such support is pre-agreed in writing by MDOT. Any costs paid to the Phase Developer in accordance with this Section 10.4(b) will not be subject to the Predevelopment Cost Cap for Phase North or the Phase North Termination Cap.
- (c) If the NEPA approvals for Phase North do not permit Priced Managed Lanes then:
 - (i) MDOT will not issue the Phase North NTP;
 - (ii) unless otherwise agreed by the Phase Developer and MDOT, Phase North will be removed from the scope of this Agreement in accordance with Section 27.1 (NEPA Does Not Permit Priced Managed Lanes For Phase North);
 - (iii) the Phase Developer will not be entitled to any compensation for work performed on Phase North, except for work performed in support of NEPA for Phase North in accordance with Section 10.4(b); and
 - (iv) MDOT shall reimburse the Phase Developer for any support provided to MDOT in accordance with Section 10.4(b).

10.5 Interface Obligations and Risks

The Phase Developer shall assume and manage, or cause the Section Developers to assume and manage, all interface arrangements and risks between the Section Developers of the Phase.

10.6 Reporting of Allowed Costs of Predevelopment Work

- (a) No later than 10 Business Days after the end of each month, the Phase Developer shall provide MDOT with a report detailing:
 - (i) the Allowed Costs that were incurred by the Phase Developer during that month, together with line-item documentation for each discrete cost to support the Allowed Costs incurred;
 - (ii) the aggregate cumulative Allowed Costs that were incurred by the Phase Developer from the Effective Date until the end of that month; and
 - (iii) the Allowed Costs that the Phase Developer anticipates incurring in the following month.
- (b) The first report submitted under Section 10.6(a) after the Effective Date may include Allowed Costs for Predevelopment Work performed prior to the Effective Date.
- (c) The Phase Developer shall, within five Business Days of a request, provide MDOT with any further information or documents that MDOT may reasonably require to substantiate the Allowed Costs contained in the report.

- (d) MDOT may review the reports provided by the Phase Developer under Section 10.6(a) and notify the Phase Developer of any comments or objections to the report. The Phase Developer shall promptly, and in any event within 10 Business Days, update the report to address MDOT's comments or objections.
- (e) Any failure by MDOT to review or comment on a report provided by the Phase Developer under Section 10.6(a) will not limit MDOT's right to object to any claim for Allowed Costs by the Phase Developer at the time those Allowed Costs are payable under this Agreement.
- (f) The Phase Developer will not be entitled to be paid any Allowed Costs that have not been correctly reported under this Section 10.6.

10.7 **Limitation on Right to Rely**

- (a) Except to the extent expressly provided under this Agreement or a Section P3 Agreement, no action or omission by MDOT or MDTA or their respective agents, employees, successors and assigns, with respect to any submittal from the Phase Developer in connection with the Predevelopment Work will:
 - (i) relieve the Phase Developer from the performance of its obligations under this Agreement or a Section Developer from the performance of its obligations under a Section P3 Agreement;
 - (ii) constitute acceptance by MDOT that any Predevelopment Work satisfies the requirements of this Agreement or a Section P3 Agreement; or
 - (iii) prevent MDOT from subsequently raising an objection or comment on a submittal under this Agreement, if the same objection or comment was not made by MDOT on a previous submittal.
- (b) Without limiting the generality of Section 10.7(a), the Phase Developer acknowledges and agrees that:
 - (i) neither MDOT nor MDTA will be responsible for the relevance, completeness, accuracy, adequacy or fitness for any purpose of any design documents developed by the Phase Developer under this Agreement or by a Section Developer under a Section P3 Agreement; and
 - (ii) the Phase Developer and the Section Developers will be solely responsible for their design work, including the adoption or use of any design documents developed by the Phase Developer, the Section Developer, or any other Person. The adoption and use of such design documents will be at the sole risk of the Phase Developer and the Section Developers and neither MDOT nor MDTA will have any liability to the Phase Developer, any Section Developer, or any other Phase Developer-Related Entity with respect to the use of such design documents by the Phase Developer, any Section Developer, or any other Phase Developer-Related Entity,

notwithstanding, any review, comment, exception, objection, rejection, approval, disapproval, acceptance, concurrence, certification of the design documents, or failure to conduct any such activity by MDOT or MDTA under this Agreement, a Section P3 Agreement, or otherwise.

- (c) Any review, comment, exception, objection, rejection, approval, disapproval, acceptance, concurrence, or certification, of any design documents or failure to conduct any such activity by MDOT or MDTA under this Agreement, a Section P3 Agreement, or otherwise:
 - (i) will not be deemed or construed as any kind of warranty, express or implied, by MDOT or MDTA;
 - (ii) will not create or impose upon MDOT or MDTA any duty or obligation toward the Phase Developer, any Section Developer, or any other Phase Developer-Related Entity;
 - (iii) will not relieve the Phase Developer or any Section Developer from liability for, and responsibility to replace nonconforming work and to cure defaults under a Section P3 Agreement;
 - (iv) will not be deemed or construed as any assumption of risk by MDOT or MDTA as to design, construction, equipping, supply, operations, maintenance, performance, or quality of a Section or performance of the Predevelopment Work or work under a Section P3 Agreement; and
 - (v) may not be asserted by the Phase Developer or any Section Developer against MDOT or MDTA as a defense (legal or equitable) to, or as a waiver of, or relief from, obligations of the Phase Developer or any Section Developer to fulfill the requirements of this Agreement or any Section P3 Agreement.

10.8 **IDP Submittals**

- (a) The Phase Developer will have full responsibility for the implementation of each IDP Submittal included within the Phase Developer's Proposal, including the satisfaction of all conditions (if any) attached to MDOT's acceptance of an IDP Submittal and obtaining the approval or consent of any relevant Governmental Entity or third party (including any necessary modifications to the MDOT-Provided Approvals).
- (b) If, with respect to any IDP Submittal included within the Phase Developer's Proposal, the Phase Developer fails to satisfy any of the conditions attached to MDOT's acceptance of that IDP Submittal or obtain the approval or consent of any relevant Governmental Entity or third party (including any necessary modifications to the MDOT-Provided Approvals):
 - (i) the Phase Developer shall perform the Predevelopment Work and submit Committed Section Proposals as if such IDP Submittal had not been included in the Phase Developer's Proposal; and
 - (ii) the Phase Developer will not be entitled to any additional time, relief, or compensation, under this Agreement, including any relief from its obligations to deliver a Committed Section Proposal that is Financially Viable for each Section in Phase South A, or any adjustment to the Development Rights Fee that is payable under this Agreement.

11. SECTION P3 AGREEMENTS AND COMMITTED SECTION PROPOSALS

11.1 Development of Section P3 Agreement and Section Technical Provisions

- (a) Within 90 days of the Effective Date, MDOT shall deliver to the Phase Developer a draft form of Section P3 Agreement (including the Section Technical Provisions).
- (b) To the extent that MDOT delivers a draft form Section P3 Agreement (including Section Technical Provision) under Section 11.1(a), the Phase Developer and MDOT shall, subject to Section 11.13 (Good Faith), negotiate in Good Faith to agree the form of the Section P3 Agreement and Section Technical Provisions for each Section.
- (c) In preparing the draft form of Section P3 Agreement referred to in Section 11.1(a):
 - (i) MDOT shall include the terms included in the Section P3 Agreement Term Sheet. Amendments to the terms of the Section P3 Agreement Term Sheet will be made only to the extent that it is agreed between MDOT and the Phase Developer (each acting reasonably) that such amendments are consistent with matters agreed between MDOT and the Phase Developer during the Phase Developer's performance of the Predevelopment Work; and
 - (ii) with respect to the Section Technical Provisions, MDOT shall include terms that are consistent with Articles 2 to 27 of Exhibit 6 (Predevelopment Work Requirements).
- (d) If, despite both MDOT and the Phase Developer complying with their obligations under Section 11.1(b), MDOT and the Phase Developer are unable to agree the form of the Section P3 Agreement (including Section Technical Provisions) for a Section in accordance with this Section 11.1 by the date falling 60 days prior to the relevant Predevelopment Milestone Deadline for delivering the Committed Section Proposal for that Section, either MDOT or the Phase Developer may terminate this Agreement in accordance with Section 26.4 (Termination for Failure to Agree Form of Agreements).
- (e) If:
 - (i) Phase South is delivered in two or more Sections;
 - (ii) the Phase Developer included in its Proposal a Development Rights Fee equal to zero for each Section of Phase South A; and
 - (iii) the Alternative Equity IRR for any Section within Phase South A is less than the Proposal Equity IRR,

then, the Parties agree that they shall amend the terms of the Section P3 Agreement for each Section within Phase South such that the Section Developers are not required to make any Excess Revenue Payment (that would otherwise have been due under the terms of the relevant Section P3 Agreement) unless the Phase Excess Revenues are greater than zero. The "**Phase Excess Revenue**" shall be calculated using the same method as "Excess Revenue" under the Section P3 Agreement, except that the references to Section Developer Toll Payments, MDTA Notes principal and interest payments, and Refinancing Gains will refer to the aggregate of those amounts across all Sections of Phase South and the references to Base Case Gross Revenues will be replaced by Phase South Base Case Gross Revenues. The "**Phase South Base Case**

Gross Revenues" shall be calculated by aggregating the Base Case Gross Revenue of all Sections within Phase South, and shall be updated each time that a Section within Phase South reaches Financial Close. Capitalized terms used in this paragraph and not defined in this Agreement shall have the meaning given to them in the Section P3 Agreement Term Sheet.

11.2 Permitted Payments to Phase Developer and Section Developer on Financial Close

- (a) For each Section, the Section P3 Agreement and the Initial Base Case Financial Model may permit the Section Developer for that Section to make the following payments (and only the following payments) in connection with achieving Financial Close of that Section:
 - (i) if the Section is in Phase South A, an amount to reimburse, fund, or otherwise pay on behalf of the Phase Developer, the Development Rights Fee (if any) payable by the Phase Developer for that Section under Article 17 (Development Rights Fees) of this Agreement;
 - (ii) subject to Section 11.2(c), an amount to reimburse the Phase Developer and the Section Developer for the Allowed Costs incurred by the Phase Developer or the Section Developer, that are directly attributable to that Section or any other Section that has previously achieved Financial Close, and that have not previously been reimbursed;
 - (iii) subject to Section 11.2(d), cash closing fees payable to Phase Developer-Related Entities in connection with achieving Financial Close of that Section, in an aggregate amount not to exceed the Developer Closing Fee Percentage of [●]⁴ multiplied by the total amount of project financing (including debt and equity) for that Section; and
 - (iv) underwriter fees, Rating Agency fees, upfront fees payable to USDOT for TIFIA loans, upfront fees payable to placement agents, upfront fees payable to banks, and other comparable upfront, arranging, or origination fees payable to Lenders, in each case, in relation to the debt, equity bridge loans, or letters of credit to secure committed equity, for that Section (provided such fees are payable on an arm's-length basis).
- (b) None of the Phase Developer, the Section Developer, or any other Phase Developer-Related Entity will be entitled to receive any arranging, closing, or similar fees (however described), or reimbursement for costs incurred in connection with the Predevelopment Work or Section Work in connection with achieving Financial Close of a Section, other than as provided in Section 11.2(a).
- (c) The maximum aggregate amount of Allowed Costs that may be reimbursed to the Phase Developer and the Section Developer under Section 11.2(a)(ii) shall not exceed the Predevelopment Cost Cap.
- (d) With respect to Phase South, if the aggregate amount of cash closing fees paid to Phase Developer-Related Entities at Financial Close of a Section is less than the aggregate amount of cash closing fees that are permitted to be paid under Section 11.2(a)(iii), the shortfall may be added to the cash closing fees that are permitted under Section

⁴ This will be the Developer Closing Fee Percentage included in the Proposal.

11.2(a)(iii) for one or more subsequent Sections of Phase South until that shortfall has been paid.

11.3 Committed Section Proposal

- (a) For each Section the Phase Developer shall submit a Committed Section Proposal that complies with Exhibit 7 (Committed Section Proposal) to MDOT for approval by MDOT and the MDTA Board. All material parts of the Committed Section Proposal must have been approved by MDOT prior to the formal submission of the Committed Section Proposal, and unless otherwise agreed with MDOT, be consistent with the Phase Developer's Proposal.
- (b) Without limiting the requirements of Exhibit 7 (Committed Section Proposal):
 - (i) each Committed Section Proposal must include the proposed Section P3 Agreement (including the Section Technical Provisions) and the Initial Base Case Financial Model which have been approved by MDOT;
 - (ii) subject to Section 11.3(b)(v), each Committed Section Proposal must be Financially Viable (unless agreed by MDOT in writing);
 - (iii) subject to Section 11.3(b)(v), each Committed Section Proposal for Phase South A must be delivered with evidence satisfactory to MDOT that all Sections of Phase South A will be Financially Viable (unless agreed by MDOT in writing); and
 - (iv) each Committed Section Proposal must be valid for a period of 240 days from the date of its submission to MDOT.
 - (v) If the Phase Developer is unable to submit a Committed Section Proposal for a Section of Phase South (other than the First Section) without assuming Maryland Funding, the Phase Developer may assume in its Committed Section Proposal that the amount of any Upfront Payment or Development Rights Fee paid to MDOT in connection with Financial Close of any previous Section of Phase South is (to the extent that it has not already been used to fund a previous Section) an available source of funding for the relevant Section.

11.4 Regional Transit

- (a) The Parties acknowledge that:
 - (i) MDOT intends to enter into memorandums of understanding with Frederick County and Montgomery County (each a "**Transit MOU**") with respect to the delivery of transit service improvements in conjunction with the P3 Program ("**Transit Service Improvements**");
 - (ii) under Section 1.17 (Transit Service Improvements) of Exhibit 6 (Predevelopment Work Requirements) of this Agreement, the Phase Developer is required to work with MDOT to develop the Transit Service Improvements and ensure they are delivered under the Section P3 Agreements and in accordance with each Transit MOU; and

- (iii) at the time of submitting its Proposal, the form, scope, and cost of the Transit Service Improvements were unknown and accordingly the Proposal did not take into account the cost of the Transit Service Improvements.
- (b) MDOT shall ensure that the cost and scope of the Transit Service Improvements that are to be delivered under a Section P3 Agreement are not of an amount that prevents the Section from being Financially Viable.
- (c) The Committed Section Proposal for a Section will include any Transit Service Improvements that MDOT requires the Phase Developer to include in that Section.

11.5 **MDOT and MDTA Board Acceptance and Approval of Committed Section Proposal**

- (a) MDOT shall notify the Phase Developer whether MDOT accepts the Committed Section Proposal (including the draft Section P3 Agreement).
- (b) The Phase Developer acknowledges that any Committed Section Proposal that has been accepted by MDOT remains subject to:
 - (i) approval by the MDTA Board; and
 - (ii) the review and approval process in the Act.
- (c) MDOT shall notify the Phase Developer whether the MDTA Board approves the Committed Section Proposal (including the Section P3 Agreement).
- (d) If MDOT and the MDTA Board accept and approve the Committed Section Proposal (including the Section P3 Agreement), MDOT and MDTA shall commence the Section P3 Agreement review and approval process in accordance with the Act.

11.6 **MDTA Board Fail to Approve A Committed Section Proposal**

- (a) If MDOT notifies the Phase Developer in accordance with Section 11.5(c) (MDOT and MDTA Board Acceptance and Approval of Committed Section Proposal) that the MDTA Board does not approve a Committed Section Proposal (including the draft Section P3 Agreement) for the First Section that has been accepted by MDOT within 180 days from submission of the Committed Section Proposal to MDOT (or such longer period as the Parties may agree), MDOT shall issue a notice to terminate this Agreement in accordance with Section 26.1 (Termination for Convenience), unless otherwise agreed by MDOT and the Phase Developer.
- (b) Subject to Section 11.6(c), if the MDTA Board rejects or otherwise does not approve a Committed Section Proposal (including the draft Section P3 Agreement) for any Section (other than the First Section) that has been accepted by MDOT within 180 days from submission of the Committed Section Proposal to MDOT (or such longer period as the Parties may agree), the Section and all other Sections that have not been submitted to MDOT under a Committed Section Proposal will be removed from the scope of this Agreement in accordance with Section 27.4 (MDTA Board Does Not Approve A Committed Section Proposal), unless otherwise agreed by MDOT and the Phase Developer.
- (c) If:

- (i) the MDTA Board rejects or indicates that it will not approve a Committed Section Proposal that has been accepted by MDOT; and
- (ii) the Parties agree that changes may be made to the Committed Section Proposal to address any concerns or objections by the MDTA Board,

then the Parties may agree to submit a revised Committed Section Proposal to the MDTA Board under Section 11.6(b).

11.7 **BPW Fails to Approve Section P3 Agreement**

- (a) Each Section P3 Agreement will be subject to the approval of the BPW.
- (b) If requested by MDOT, the Phase Developer shall cause the Section Developer to sign the Section P3 Agreement before the BPW approves the agreement and shall provide any other information or documents that MDOT may reasonably require to obtain BPW approval.
- (c) Subject to Section 11.7(e), if the BPW rejects or otherwise does not approve a Section P3 Agreement for the First Section that has been accepted by MDOT and the MDTA Board under Section 11.5 (MDOT and MDTA Board Acceptance and Approval of Committed Section Proposal) within 180 days from submission of the Committed Section Proposal to MDOT (or such longer period as the Parties may agree), MDOT shall issue a notice to terminate this Agreement in accordance with Section 26.1 (Termination for Convenience), unless otherwise agreed by MDOT and the Phase Developer.
- (d) Subject to Section 11.7(e), if the BPW rejects or otherwise does not approve a Section P3 Agreement for any Section (other than the First Section) that has been accepted by MDOT and the MDTA Board under Section 11.5 (MDOT and MDTA Board Acceptance and Approval of Committed Section Proposal) within 180 days from submission of the Committed Section Proposal to MDOT (or such longer period as the Parties may agree), the Section and all other Sections that have not been submitted to MDOT under a Committed Section Proposal will be removed from the scope of this Agreement in accordance with Section 27.5 (BPW Does Not Approve An Approved Section P3 Agreement), unless otherwise agreed by MDOT and the Phase Developer.
- (e) If:
 - (i) the BPW rejects or indicates that it will not approve a Section P3 Agreement that has been accepted by MDOT and the MDTA Board under Section 11.5 (MDOT and MDTA Board Acceptance and Approval of Committed Section Proposal); and
 - (ii) the Parties agree that changes may be made to the Section P3 Agreement to address any concerns or objections from the BPW,

then the Parties may agree to submit a revised Section P3 Agreement to the BPW for approval under Section 11.7(d).

11.8 **Entry into a Section P3 Agreement**

If the BPW approves a Section P3 Agreement, the Phase Developer shall, within 90 days of that approval cause the Section Developer to:

- (a) sign the Section P3 Agreement (unless already signed by the Section Developer in accordance with Section 11.7(b) (BPW Fails to Approve Section P3 Agreement)); and
- (b) deliver the signed Section P3 Agreement to MDOT for signing by MDOT and MDTA.

11.9 **Failure to Achieve Financial Close under Section P3 Agreement Due to MDOT or MDTA**

If:

- (a) MDOT or MDTA fail to sign a Section P3 Agreement that has been approved by the BPW and signed and delivered by the Section Developer under Section 11.8 (Entry into a Section P3 Agreement) within 30 days of satisfaction of all conditions precedent to MDOT and MDTA signing the Section P3 Agreement; or
- (b) a Section Developer validly terminates a Section P3 Agreement on the basis that it was unable to achieve Financial Close of that Section P3 Agreement, solely due to MDOT or MDTA failing to satisfy the conditions precedent to Financial Close for which MDOT and MDTA are responsible under the Section P3 Agreement,

then unless otherwise agreed by MDOT and the Phase Developer (i) the Section and all other Sections that have not been submitted to MDOT under a Committed Section Proposal will be removed from the scope of this Agreement in accordance with Section 27.6 (Failure to Achieve Financial Close Under a Section P3 Agreement Due to MDOT or MDTA) and (ii) the Phase Developer will be released from its obligation to pay any Development Rights Fees with respect to such Sections.

11.10 **Equity Interests in Section Developer**

At Commercial Close of each Section, the Phase Developer shall hold at least 51% of the equity interest in the Section Developer of that Section.

11.11 **Development of Tolling Services Agreement**

- (a) Within 90 days of the Effective Date, MDOT and MDTA shall deliver to the Phase Developer a draft form of Tolling Services Agreement.
- (b) To the extent that MDOT and MDTA deliver a draft form Tolling Services Agreement under Section 11.11(a), the Phase Developer, MDOT, and MDTA shall, subject to Section 11.13 (Good Faith) negotiate in Good Faith to agree the form of the Tolling Services Agreement for each Section.
- (c) In preparing the draft form of Tolling Services Agreement referred to in Section 11.11(a), MDOT shall include the terms included in the Tolling Services Agreement Term Sheet. Amendments to the terms of the Tolling Services Agreement Term Sheet will be made only to the extent that it is agreed between MDOT, MDTA, and the Phase Developer (each acting reasonably) that such amendments are consistent with matters agreed between MDOT, MDTA, and the Phase Developer during the Phase Developer's performance of the Predevelopment Work.
- (d) If, despite MDOT, MDTA, and the Phase Developer complying with their obligations under Section 11.11(b), the Parties are unable to agree to the form of the Tolling Services Agreement for a Section in accordance with this Section 11.11 by the same time that MDOT and the Phase Developer are required to have agreed to the form of the Section

P3 Agreement and Section Technical Provisions for the Section under Section 11.1(d) (Development of Section P3 Agreement and Section Technical Provisions), then either MDOT or the Phase Developer may terminate this Agreement in accordance with Section 26.4 (Termination for Failure to Agree Form of Agreements).

11.12 Development of MDTA Financing Documents

- (a) Within 90 days of the Effective Date, MDOT and MDTA shall deliver to the Phase Developer a draft form of the MDTA Financing Documents.
- (b) To the extent that MDOT and MDTA deliver the draft MDTA Financing Documents under Section 11.12(a), the Phase Developer, MDOT, and MDTA shall, subject to Section 11.13 (Good Faith), negotiate in Good Faith to agree the form of the MDTA Financing Documents to which the Section Developer will be a party.
- (c) In preparing the draft form of the MDTA Financing Documents referred to in Section 11.12(a), MDOT and MDTA shall include the terms included in the MDTA Notes Term Sheet. Amendments to the terms of the MDTA Notes Term Sheet will be made only to the extent that it is agreed between MDOT, MDTA, and the Phase Developer (each acting reasonably) that such amendments are consistent with matters agreed between MDOT, MDTA and the Phase Developer during the Phase Developer's performance of the Predevelopment Work.
- (d) If, despite MDOT, MDTA, and the Phase Developer complying with their obligations under Section 11.12(b), the Parties are unable to agree to the form of the MDTA Financing Documents to which the Section Developer will be a party in accordance with this Section 11.12 by the same time that MDOT and the Phase Developer are required to have agreed to the form of the Section P3 Agreement and Section Technical Provisions for the Section under Section 11.1(d) (Development of Section P3 Agreement and Section Technical Provisions), then either MDOT or the Phase Developer may terminate this Agreement in accordance with Section 26.4 (Termination for Failure to Agree Form of Agreements).

11.13 Good Faith

For the purposes of Section 11.1 (Development of Section P3 Agreement and Section Technical Provisions), Section 11.11 (Development of Tolling Services Agreement), and Section 11.12 (Development of MDTA Financing Documents), a party will not be acting in Good Faith if:

- (a) it insists on including provisions in the Section P3 Agreement, the Section Technical Provisions, the Tolling Services Agreement, or the MDTA Financing Documents that, unless otherwise agreed by MDOT and the Phase Developer in accordance with Section 11.1(c) (Development of Section P3 Agreement and Section Technical Provisions), Section 11.11(c) (Development of Tolling Services Agreement), or Section 11.12(c) (Development of MDTA Financing Documents):
 - (i) are inconsistent with the terms or commercial intent of the Section P3 Agreement Term Sheet, the Tolling Services Agreement Term Sheet, the MDTA Notes Term Sheet, or Exhibit 6 (Predevelopment Work Requirements);
 - (ii) preclude the delivery of an accepted IDP Submittal; or

- (iii) are otherwise materially inconsistent with the terms generally accepted on comparable managed lane P3 projects in the United States unless proposed to address unique aspects of the P3 Program; or
- (b) in the case of the Phase Developer only, it refuses to accept, or seeks to negotiate changes to, proposed terms of the Section P3 Agreement, the Section Technical Provisions, the Tolling Services Agreement, or the MDTA Financing Documents on the basis that those terms are inconsistent with assumptions (other than the Key Assumptions) that it made when either:
 - (i) sizing the Development Rights Fee included in its Proposal; or
 - (ii) determining that the relevant Section was Financially Viable.

12. **PHASE SOUTH A KEY ASSUMPTIONS**

12.1 **Phase Developer Proposal**

MDOT acknowledges that as part of the RFP it required the Phase Developer to use the Key Assumptions to prepare those elements of its Proposal relating to Phase South A.

12.2 **Key Assumptions for Phase South A Prove To Be Incorrect**

- (a) If a Key Assumption for Phase South A proves to be incorrect, MDOT and the Phase Developer shall work together in Good Faith in accordance with the terms of this Section 12.2, to determine the impact of the Key Assumption not being correct under this Agreement.
- (b) If the Phase Developer or MDOT become aware that a Key Assumption is incorrect, it shall promptly notify the other party that the Key Assumption is not correct and identify how the Key Assumption is incorrect. If the other party does not agree that the Key Assumption is incorrect, then the matter will be referred to the Dispute Resolution Procedures under Article 33 (Dispute Resolution).
- (c) If it is agreed or determined that a Key Assumption is incorrect under Section 12.2(b), the Phase Developer shall provide MDOT with details of the impact that it projects, if any, that the Key Assumption not being correct will have, on its own (and without taking into account any other changes to information available to the Phase Developer), on:
 - (i) the ability of the Phase Developer to submit a compliant Committed Section Proposal for each Section of Phase South A that is Financially Viable; and
 - (ii) the Available Funds,

together with all supporting information that MDOT may reasonably request (including an update to the most recent draft of the Financing Plan and financial model submitted under Section 1.22 (Financing Workstream) of Exhibit 6 (Predevelopment Work Requirements)).
- (d) Following receipt of the information provided by the Phase Developer under Section 12.2(c), MDOT and the Phase Developer shall negotiate in Good Faith to agree on whether or not the Key Assumption being incorrect arose as a result of any act or

omission of the Phase Developer and the impact that the Key Assumption not being correct will have on:

- (i) the ability of the Phase Developer to submit a compliant Committed Section Proposal for the relevant Section in Phase South A that is Financially Viable; and
 - (ii) the Available Funds for the relevant Section of Phase South A.
- (e) If MDOT and the Phase Developer are unable to agree on whether or not the cause of the Key Assumption being incorrect arose as a result of any act or omission of the Phase Developer, or the impact that a Key Assumption not being correct will have on the Available Funds for the relevant Section, then the dispute will be referred to the Dispute Resolution Procedures.
- (f) MDOT and the Phase Developer shall endeavor to reach an agreement or determination with respect to whether a Key Assumption is incorrect, its impact, and whether the cause of the Key Assumption not being correct arose as a result of any act or omission of the Phase Developer no later than 3 months after MDOT or the Phase Developer notifies the other that a Key Assumption is incorrect under Section 12.2(b).
- (g) If it is agreed or determined that:
- (i) a Key Assumption is incorrect under Section 12.2(b) (whether or not it is due to MDOT), and the Key Assumption being incorrect, on its own causes the following with respect to a Section in Phase South A:
 - (A) for a Section in Phase South A with a Development Rights Fee greater than zero, a decrease to the Available Funds for that Section such that the Available Funds for that Section are less than the Development Rights Fee for that Section; and
 - (B) for all Sections in Phase South A, the Phase Developer to be unable to submit a compliant Financially Viable Committed Section Proposal for that Section; and
 - (ii) the cause of the Key Assumption being incorrect did not arise as a result of any act or omission of the Phase Developer,
- then:
- (iii) a Phase Developer Default under Section 25.1(b) (Phase Developer Default) will not have occurred; and
 - (iv) either MDOT or the Phase Developer may terminate this Agreement under Section 26.5 (Termination for Loss of Financial Viability Caused by A Key Assumption That Is Incorrect).
- (h) If the Development Rights Fee for a Section in Phase South A is greater than zero, then to the extent that it is agreed or determined that:
- (i) a Key Assumption is incorrect under Section 12.2(b) (whether or not it is due to MDOT), and the Key Assumption being incorrect directly results, on its own, in a decrease to the Available Funds for that Section; and

- (ii) the relevant Key Assumption being incorrect did not arise as a result of any act or omission of the Phase Developer,

then the Development Rights Fee for that Section will be reduced by the same amount as the reduction in the Available Funds.

13. **UPFRONT PAYMENT ACCOUNT**

13.1 **Establishment of Upfront Payment Account**

Prior to the Effective Date, an account will be established and held by the Trustee under the terms of the MDTA Master Trust Agreement into which the:

- (a) Development Rights Fees that are payable under this Agreement; and
 - (b) any Upfront Payments that may be payable under the Section P3 Agreements,
- will be paid (the "**Upfront Payment Account**").

13.2 **Payments into Upfront Payment Account**

- (a) MDTA shall instruct the Trustee to deposit all Development Rights Fees that it receives from or on behalf of the Phase Developer (including where those payments are received by drawing on the Development Rights Fee Security) into the Upfront Payment Account.
- (b) MDTA shall instruct the Trustee to deposit all Upfront Payments that are paid by Section Developers on Financial Close of a Section into the Upfront Payment Account.

14. **SECTION VIABILITY**

- (a) The requirements in this Article 14 apply to:
 - (i) all Sections in Phase South B; and
 - (ii) all Sections in Phase North,(together, the "**Uncommitted Sections**").
- (b) For each Uncommitted Section the Phase Developer shall provide to MDOT:
 - (i) a detailed description of the scope of work that the Phase Developer will perform to determine the Financial Viability of that Uncommitted Section;
 - (ii) a schedule to complete the Financial Viability scope of work for the Uncommitted Section within the time required under Section 14(d)(i); and
 - (iii) a breakdown of costs that will be incurred by the Phase Developer in performing the work described in Section 14(b)(i).
- (c) For each Uncommitted Section, the Phase Developer shall provide MDOT with the information described in Section 14(b) no later than:
 - (i) with respect to the first Section of Phase North, 30 days from the Phase North NTP; or

- (ii) with respect to all other Uncommitted Sections, 30 days from the previous Section achieving Financial Close.
- (d) Within 5 Business Days of MDOT receiving the information under Section 14(b), MDOT and the Phase Developer shall commence meeting in Good Faith to agree:
 - (i) the scope of work that the Phase Developer will perform to determine the Financial Viability of the Uncommitted Section and the schedule for completing the work (which shall be no longer than three months from the date that the Phase Developer and MDOT agree to the scope of work under this Section 14(d)(i), or such longer time period as agreed between MDOT and the Phase Developer); and
 - (ii) the cap on Allowed Costs that the Phase Developer will be entitled to receive for performing the work described in Section 14(d)(i) in the event that the Section is not Financially Viable ("**Viability Cost Cap**"); and
 - (iii) for Phase North:
 - (A) a Predevelopment Cost Cap for all of Phase North;
 - (B) a Phase North Termination Cap for all of Phase North; and
 - (C) the deadlines for submitting complete and compliant Committed Section Proposals for the Sections in Phase North (these deadlines will be added to Exhibit 5 (Predevelopment Milestones and Deadlines) and will become Predevelopment Milestone Deadlines).
- (e) If the Phase Developer and MDOT are unable to agree to the matters in Section 14(d) within 45 Business Days, then unless MDOT and the Phase Developer otherwise agree, that Section and all other Uncommitted Sections will be removed from the scope of this Agreement in accordance with Section 27.3 (Financial Viability of an Uncommitted Section).
- (f) The Phase Developer shall complete all of the work described in Section 14(d)(i) and provide MDOT with its findings within the time periods agreed under Section 14(d)(i). If the Phase Developer performs all of the required work and determines that the Section is not Financially Viable, the Phase Developer shall provide MDOT with all ancillary and supporting documents used to support this determination.
- (g) If the Phase Developer fails to comply with the requirements of this Article 14, then MDOT may declare a Phase Developer Default under Section 25.1(u) (Phase Developer Default) and MDOT may:
 - (i) terminate this Agreement for a Phase Developer Default in accordance with Section 26.2 (Termination for Phase Developer Default); and
 - (ii) draw on the Performance Security in accordance with Section 18.3 (Rights to Draw on the Performance Security).
- (h) If the Phase Developer performs all of the work in accordance with Section 14(d)(i) and the Phase Developer's findings demonstrate that the Section will not be Financially Viable, then:

- (i) MDOT shall pay the Phase Developer its Allowed Costs for performing the work in Section 14(d)(i), up to the applicable Viability Cost Cap; and
- (ii) unless otherwise agreed, that Section and all other Uncommitted Sections will be removed from the scope of this Agreement in accordance with Section 27.3 (Financial Viability of an Uncommitted Section).

15. **SCHEDULE OF PERFORMANCE**

- (a) The Phase Developer shall perform the Predevelopment Work:
 - (i) in accordance with the Predevelopment Work Schedule; and
 - (ii) so as to achieve each Predevelopment Milestone by the applicable Predevelopment Milestone Deadline.
- (b) If a Financial Close Deadline is extended under a Section P3 Agreement, then the corresponding Predevelopment Milestone Deadline to which the achievement of Financial Close relates, will be extended by the same number of days as granted by MDOT under the Section P3 Agreement.

16. **RELIEF EVENTS**

16.1 **Entitlement to Claim**

- (a) If a Relief Event directly causes or is reasonably likely to directly cause the Phase Developer to fail to achieve a Predevelopment Milestone by the applicable Predevelopment Milestone Deadline or to fail to comply with any of its other obligations under this Agreement, the Phase Developer may claim one or more of the following in accordance with this Article 16:
 - (i) an extension to the Predevelopment Milestone Deadline;
 - (ii) relief from compliance with its obligations under this Agreement; or
 - (iii) an increase to a Predevelopment Cost Cap.
- (b) The Phase Developer will not be entitled to claim an extension of time or increase to any Predevelopment Cost Caps under this Article 16 in respect of any period of time that there is a concurrent delay. Delays will be considered concurrent where there is a delay caused by a Relief Event, but for the same period of delay, the Phase Developer or any Phase Developer-Related Entity has caused or otherwise suffered a delay in the performance of the Predevelopment Work and such delay does not itself arise from a Relief Event.
- (c) The Phase Developer will not be entitled to claim a Relief Event under this Agreement for an extension to a Predevelopment Milestone Deadline regarding the achievement of Financial Close, once the Section has achieved Commercial Close under the applicable Section P3 Agreement.

16.2 Notices and Information to be Provided

- (a) The Phase Developer shall comply with the procedures in this Section 16.2 to claim an extension to a Predevelopment Milestone Deadline, relief from its obligations, or an increase to any Predevelopment Cost Caps with respect to a Relief Event.
- (b) The Phase Developer shall submit a notice that complies with Section 16.2(c) ("**Relief Event Notice**") no later than 10 Business Days after the date that the Phase Developer first became aware that the relevant Relief Event had occurred and would have the effect that is the subject of the Phase Developer's claim.
- (c) A Relief Event Notice must include:
 - (i) a statement that it is a Relief Event Notice issued under this Section 16.2;
 - (ii) full details of the relevant Relief Event (as available to the Phase Developer having made due inquiry), including its date and time of occurrence or inception;
 - (iii) full details of any extension of time, relief from any of its obligations, or increase to any Predevelopment Cost Cap claimed under this Article 16 (including details of any immediate relief required while the Relief Event is continuing);
 - (iv) with respect to a claim for an extension to a Predevelopment Milestone Deadline under Section 16.1(a)(i) (Entitlement to Claim), the Phase Developer's Good Faith analysis of how the relevant Relief Event was the direct cause or is reasonably likely to be the direct cause of a delay in achieving a Predevelopment Milestone by the applicable Predevelopment Milestone Deadline;
 - (v) with respect to a claim for relief from its obligations under Section 16.1(a)(ii) (Entitlement to Claim), the Phase Developer's Good Faith analysis of the adverse impact of the Relief Event on the Phase Developer's ability to perform its obligations under this Agreement;
 - (vi) with respect to a claim for an increase to a Predevelopment Cost Cap, the Phase Developer's Good Faith analysis of the additional Allowed Costs that it will incur as a result of the Relief Event and that would not be incurred had the Relief Event not occurred; and
 - (vii) the actions that the Phase Developer has taken and will take to mitigate the effect of the Relief Event in accordance with Section 16.3 (Mitigation).
- (d) If the Relief Event (or its effects) are continuing, the Phase Developer shall:
 - (i) submit an updated Relief Event Notice every 20 Business Days until the Relief Event has ended; and
 - (ii) within 10 Business Days of the Relief Event ending, submit a final Relief Event Notice.
- (e) Within 10 Business Days of receiving a request from MDOT, the Phase Developer shall provide MDOT with any clarifying or additional information requested by MDOT with respect to its Relief Event Notice.

16.3 Mitigation

- (a) The Phase Developer shall use Reasonable Efforts to mitigate the delay and any other consequences of any Relief Event that is the subject of a Relief Event Notice.
- (b) If the Phase Developer fails to comply with its obligations under Section 16.3(a), the Phase Developer will not be entitled to an extension of time or relief from its obligations.

16.4 Failure to Provide Required Notice or Information

If any notice or information is not provided to MDOT in accordance with Section 16.2 (Notices and Information to be Provided), the Phase Developer will not be entitled to any extension of time or relief from its obligations and will have irrevocably waived and released any claim with respect to the alleged Relief Event.

16.5 Burden of Proof

The Phase Developer bears the burden of proving both the occurrence of a Relief Event and the resulting direct and adverse impacts of the Relief Event on the Phase Developer.

16.6 Grant of relief for Relief Events

- (a) Within 30 Business Days (or such longer period as MDOT reasonably requires and notifies to the Phase Developer, having regard to the complexity of the claim) after receipt of a Relief Event Notice together with any other information provided under Section 16.2(e) (Notices and Information to be Provided), MDOT will notify the Phase Developer of MDOT's determination as to the Phase Developer's entitlement to any extension of time, increase to a Predevelopment Cost Cap, or other relief under this Article 16. If MDOT does not issue a determination within such time period, the claim will be deemed rejected.

- (b) Within 10 Business Days of:

- (i) the Phase Developer receiving a notice of MDOT's determination under Section 16.6(a); or
- (ii) a deemed rejection under Section 16.6(a),

the Phase Developer shall notify MDOT in writing of whether it accepts or disputes the determination made by MDOT. If the Phase Developer does not dispute MDOT's determination within 10 Business Days, the Phase Developer will be deemed to have accepted the determination.

- (c) If the Phase Developer disputes MDOT's determination or deemed rejection under Section 16.6(b), then the matter will be resolved in accordance with the Dispute Resolution Procedures under Article 33 (Dispute Resolution).
- (d) If the Phase Developer accepts or is deemed to have accepted MDOT's determination or deemed rejection under Section 16.6(b), the Phase Developer will have irrevocably waived and released any claim with respect to the alleged Relief Event.

16.7 Sole Remedy

Without prejudice to the Phase Developer's right to bring a claim for damages for a breach of contract by MDOT constituting a Relief Event under paragraph (c) of the definition of Relief

Event, the Phase Developer's sole remedy in relation to any Relief Event will be the operation of this Article 16.

17. **DEVELOPMENT RIGHTS FEES**

17.1 **Development Rights Fees**

- (a) The Phase Developer shall pay the Development Rights Fees to the Trustee in accordance with this Article 17 for the exclusive right to develop and implement the Phase under Article 4 (Exclusive Rights and Obligations). MDTA shall instruct the Trustee to deposit the Development Rights Fees into the Upfront Payment Account.
- (b) The Development Rights Fees for each Section in Phase South A are as follows:⁵

| Section No. | Limits | Development Rights Fee |
|-------------|--------------|------------------------|
| 1 | | |
| [2] | | |
| | Total | [Sum of above] |

17.2 **Payment of the Development Rights Fees**

Subject to Section 17.3 (Payment of the Development Rights Fee Upon Failure to Achieve Financial Close of the First Section) and Section 17.6 (Development Rights Fee Security), the Phase Developer shall pay the Development Rights Fee for each Section in Phase South A to the Trustee on or before Financial Close for that Section.

17.3 **Payment of the Development Rights Fee Upon Failure to Achieve Financial Close of the First Section**

If Financial Close for the First Section does not occur by the applicable Predevelopment Milestone Deadline in Exhibit 5 (Predevelopment Milestones and Deadlines), the Phase Developer shall pay to the Trustee the Development Rights Fee for the First Section to the Trustee as if Financial Close had been achieved under Section 17.2 (Payment of the Development Rights Fees). The Phase Developer shall pay that Development Rights Fee no later than two Business Days after the applicable Predevelopment Milestone Deadline in Exhibit 5 (Predevelopment Milestones and Deadlines).

17.4 **Payment of the Development Rights Fees by Predevelopment Milestone Deadline for Phase South**

If Financial Close for all Sections of Phase South A does not occur by the applicable Predevelopment Milestone Deadline in Exhibit 5 (Predevelopment Milestones and Deadlines), the Phase Developer shall pay to the Trustee the Development Rights Fees that have not already been paid to the Trustee under this Article 17 (Development Rights Fees). The Phase Developer

⁵ The number of Sections for Phase South A, together with the limits of those Sections and the Development Rights Fees for those Sections, will be taken from the Phase Developer's Proposal.

shall pay such Development Rights Fees no later than two Business Days after the applicable Predevelopment Milestone Deadline in Exhibit 5 (Predevelopment Milestones and Deadlines).

17.5 **Payment of the Development Rights Fee on Termination**

If MDOT terminates this Agreement for a Phase Developer Default under Section 26.2 (Termination for Phase Developer Default), the Phase Developer shall pay to the Trustee the Development Rights Fees that have not already been paid to the Trustee under this Article 17 (Development Rights Fees). This amount shall be due and payable to the Trustee on the date the Phase Developer receives an MDOT Termination Notice.

17.6 **Development Rights Fee Security**

- (a) On or before the Effective Date, the Phase Developer shall deliver to MDOT a letter of credit that complies with Section 17.6(b) as security for its obligation to pay the Development Rights Fees ("**Development Rights Fee Security**").
- (b) The Development Rights Fee Security must satisfy all of the following requirements:
 - (i) be an irrevocable standby letter of credit in the form of Exhibit 14 (Form of Development Rights Fee Security) or such other form acceptable to MDOT in its sole discretion;
 - (ii) be in an amount equal to the aggregate of the Development Rights Fees payable under this Agreement;
 - (iii) be issued by an Eligible Security Issuer;
 - (iv) be payable immediately on demand, conditioned only on written presentation from MDOT to the issuer of the Development Rights Fee Security;
 - (v) if it has an expiration date, it must provide for automatic renewal unless the issuer provides notice to MDOT to the contrary no later than 30 days prior to the expiration date;
 - (vi) allow for multiple draws; and
 - (vii) name the Trustee as the sole beneficiary.
- (c) After payment of any Development Rights Fee to the Trustee in accordance with this Article 17, or any reduction of the Development Rights Fee in accordance with Section 12.2 (Key Assumptions for Phase South A Prove to be Incorrect), the Phase Developer may deliver a substitute Development Rights Fee Security to MDOT that complies with the requirements of this Article 17 in an amount equal to the aggregate of the balance of the Development Rights Fees payable under this Agreement.

17.7 **Obligation to Issue a Substitute Development Rights Fee Security**

- (a) If the financial institution issuing the Development Rights Fee Security ceases to be an Eligible Security Issuer, the Phase Developer shall deliver a substitute Development Rights Fee Security that complies with Section 17.6(b) (Development Rights Fee Security) issued by another financial institution that is an Eligible Security Issuer no later than 15 Business Days after the date that the prior financial institution ceased to be an Eligible Security Issuer.

- (b) If the Development Rights Fee Security has an expiration date (beyond which the Development Rights Fee Security may not be renewed), the Phase Developer shall deliver to MDOT a substitute Development Rights Fee Security that complies with Section 17.6(b) (Development Rights Fee Security) no later than 30 days prior to the expiration date of the then current Development Rights Fee Security.

17.8 **Rights to Draw on the Development Rights Fee Security**

MDOT may draw on the Development Rights Fee Security (by issuing appropriate instructions to the Trustee) without prior notice to the Phase Developer in each of the following circumstances:

- (a) if the Phase Developer fails to pay a Development Rights Fee when due; or
- (b) if Section 17.7(a) or Section 17.7(b) (Obligation to Issue a Substitute Development Rights Fee Security) applies, the Phase Developer fails to deliver a substitute Development Rights Fee Security that complies with Section 17.6(b) (Development Rights Fee Security) within the period required under Section 17.7 (Obligation to Issue a Substitute Development Rights Fee Security).

17.9 **Return of Development Rights Fee Security**

MDOT shall return the Development Rights Fee Security to the Phase Developer within 15 days of the earlier of:

- (a) expiration of this Agreement under Section 3(a) (Effective Date and Term) or Section 3(b) (Effective Date and Term);
- (b) termination of this Agreement under Section 26.1 (Termination for Convenience), Section 26.3 (Termination by Court Ruling), Section 26.4 (Termination for Failure to Agree Form of Agreements) (subject to Section 26.4(c) (Termination for Failure to Agree Form of Agreements)), or Section 26.5 (Termination for Loss of Financial Viability Caused by A Key Assumption That Is Incorrect); or
- (c) the payment of the Development Rights Fee for the final Section of Phase South A.

18. **PERFORMANCE SECURITY**

18.1 **Provision and Form of Performance Security**

- (a) On or before the Effective Date, the Phase Developer shall provide MDOT with a letter of credit that complies with Section 18.1(b) as security for its payment obligation under Section 26.2(c) (Termination for Phase Developer Default) ("**Performance Security**").
- (b) The Performance Security must satisfy all of the following requirements:
 - (i) be an irrevocable standby letter of credit in the form of Exhibit 13 (Form of Performance Security for Predevelopment Work) or such other form acceptable to MDOT in its sole discretion;
 - (ii) be in an aggregate amount equal to \$10 million;
 - (iii) be issued by an Eligible Security Issuer;

- (iv) be payable immediately on demand, conditioned only on written presentation from MDOT to the issuer of the Performance Security;
- (v) if it has an expiration date, it must provide for automatic renewal unless the issuer provides notice to MDOT to the contrary no later than 30 days prior to the expiration date;
- (vi) allow for multiple draws; and
- (vii) name MDOT as the sole beneficiary.

18.2 **Obligation to Issue a Substitute Performance Security**

- (a) If the financial institution issuing the Performance Security ceases to be an Eligible Security Issuer, the Phase Developer shall deliver a substitute Performance Security that complies with Section 18.1(b) (Provision and Form of Performance Security) issued by another financial institution that is an Eligible Security Issuer no later than 15 Business Days after the date that the prior financial institution ceased to be an Eligible Security Issuer.
- (b) If the Performance Security has an expiration date (beyond which the Performance Security may not be renewed), the Phase Developer shall deliver to MDOT a substitute Performance Security that complies with Section 18.1(b) (Provision and Form of Performance Security) no later than 30 days prior to the expiration date of the then current Performance Security.

18.3 **Rights to Draw on the Performance Security**

MDOT may draw on the Performance Security in its entirety without prior notice to the Phase Developer in each of the following circumstances:

- (a) the Phase Developer fails to pay MDOT \$10 million in liquidated damages upon termination of this Agreement for a Phase Developer Default in accordance with Section 26.2(c) (Termination for Phase Developer Default); or
- (b) if Section 18.2(a) or Section 18.2(b) (Obligation to Issue a Substitute Performance Security) applies, the Phase Developer fails to deliver to MDOT a substitute Performance Security that complies with Section 18.1(b) (Provision and Form of Performance Security) within the period required by Section 18.2 (Obligation to Issue a Substitute Performance Security).

18.4 **Return of Performance Security**

MDOT shall return the Performance Security to the Phase Developer within 15 days of the earlier of:

- (a) expiration of this Agreement under Section 3(a) (Effective Date and Term) or Section 3(b) (Effective Date and Term); or
- (b) termination of this Agreement under Section 26.1 (Termination for Convenience), Section 26.3 (Termination by Court Ruling), Section 26.4 (Termination for Failure to Agree Form of Agreements) (subject to Section 26.4(c) (Termination for Failure to Agree

Form of Agreements)), or Section 26.5 (Termination for Loss of Financial Viability Caused by A Key Assumption That Is Incorrect).

19. KEY PERSONNEL AND CONTRACTING

19.1 Key Personnel

- (a) The Phase Developer shall retain, employ, and utilize the individuals listed in Exhibit 11 (Key Personnel for Predevelopment Work) to hold the following Key Personnel positions:
 - (i) Phase Developer Project Manager;
 - (ii) Construction Project Manager;
 - (iii) Design Project Manager; and
 - (iv) Lead Finance Manager.
- (b) The Phase Developer shall not change or substitute any Key Personnel except:
 - (i) due to retirement, death, disability, incapacity, or voluntary or involuntary termination of employment;
 - (ii) if MDOT directs the Phase Developer to remove the Key Personnel in accordance with Section 19.1(f) or Section 19.2 (Removal or Replacement of Phase Developer-Related Entity Personnel); or
 - (iii) with MDOT's prior approval in writing under Section 19.1(c).
- (c) The Phase Developer shall ensure that no individual carries out Predevelopment Work as a Key Personnel unless the individual has been approved in writing by MDOT in accordance with this Section 19.1.
- (d) If the Phase Developer proposes to change, or is required to change, an individual in a Key Personnel position in accordance with Section 19.1(c), the Phase Developer shall provide MDOT with any information that MDOT may require to demonstrate that the Phase Developer's proposed individual has qualifications, capability, and experience that are equal to or better than those of the individual being replaced.
- (e) MDOT will have the right to:
 - (i) review the qualifications, capability, and experience of each individual proposed by the Phase Developer to hold a Key Personnel position; and
 - (ii) approve or reject the appointment of each individual to each Key Personnel position prior to the individual commencing any Predevelopment Work in the Key Personnel capacity (such approval not to be unreasonably withheld, delayed or conditioned). It will be reasonable for MDOT to reject a proposed substitute if that individual does not possess the qualifications, capability, and experience that are equal to or better than those of the individual being replaced.
- (f) If MDOT approves the appointment of an individual under Section 19.1(e)(ii), MDOT may require that the individual is appointed for a trial period of up to 60 days. At any time during that trial period, MDOT may require the Phase Developer to remove the individual

from that position, in which case the Phase Developer shall repeat the process in Section 19.1(c).

- (g) If MDOT rejects a proposed substitute Key Personnel, the Phase Developer shall repeat the process in Section 19.1(c) until MDOT has approved the proposed substitute Key Personnel.
- (h) The Phase Developer shall cause each Key Personnel to dedicate the full amount of time necessary for the proper prosecution and performance of the Predevelopment Work.
- (i) The Phase Developer shall provide MDOT with office addresses, cell phone numbers, and email addresses for each Key Personnel. MDOT may contact any Key Personnel 24 hours per day, seven days a week.
- (j) The Phase Developer shall ensure that the Phase Developer Project Manager supervises, directs, and has overall responsibility for, the Predevelopment Work in accordance with this Agreement.

19.2 Removal or Replacement of Phase Developer-Related Entity Personnel

- (a) MDOT may by notice in writing require the removal or replacement of any personnel (at any level) of a Phase Developer-Related Entity assigned to the performance of the Predevelopment Work, if MDOT reasonably considers that the removal or replacement is necessary and in the best interests of the Phase.
- (b) If MDOT requires the removal or replacement of any personnel of a Phase Developer-Related Entity under Section 19.2(a), the Phase Developer shall ensure that the personnel to be removed or replaced immediately ceases the performance of Predevelopment Work at no cost or expense to MDOT.
- (c) The Phase Developer shall ensure that any personnel who is removed or replaced under this Section 19.2 is not re-employed again for the Phase.

19.3 Key Participants

- (a) The Phase Developer shall retain, employ, and utilize the Key Participants.
- (b) The Phase Developer shall not:
 - (i) substitute a Key Participant; or
 - (ii) add an additional Key Participant,without MDOT's prior written consent (which shall not be unreasonably withheld or delayed).
- (c) Without limiting the matters that MDOT may consider when deciding whether to provide consent under Section 19.3(b), it will be reasonable for MDOT to withhold its consent to a substitute Key Participant if:
 - (i) the Phase Developer fails to demonstrate that the proposed substitute has qualifications, capabilities, and experience that are equal to or better than those of the Key Participant that is being replaced; or

- (ii) MDOT determines that the substitute would adversely affect the capacity of the Phase Developer to perform fully the requirements of this Agreement.

19.4 **Subcontracting**

- (a) Nothing contained in this Agreement will create any contractual relationship between MDOT or MDTA, and any Contractor.
- (b) No Contract entered into by any Phase Developer-Related Entity will impose any obligation or liability upon MDOT, MDTA, or any other MDOT-Related Entity to any Contractor or any of its employees.
- (c) The retention of Contractors by the Phase Developer will not relieve the Phase Developer of its obligations under this Agreement, and the Phase Developer will at all times be fully responsible under this Agreement for the acts and omissions of all Contractors performing the Predevelopment Work in relation to the Phase as if they were the acts and omissions of the Phase Developer.
- (d) The Phase Developer shall retain, or shall cause to be retained, only Contractors that are qualified, experienced, and capable of performing the portion of the Predevelopment Work assigned to them. The Phase Developer shall require that each Contractor obtains and maintains at all times during the performance of the assigned Predevelopment Work, all licenses, certifications, registrations, permits, approvals and insurances required by Applicable Law and all Governmental Approvals in respect of the work being performed by such Contractor.

19.5 **Prompt Payment**

- (a) Subject to Section 19.5(c), the Phase Developer shall:
 - (i) make prompt payment of undisputed amounts to Contractors with whom it has privity of contract; and
 - (ii) require all Contractors to make prompt payment of undisputed amounts to lower-tier Contractors with whom they have privity of contract.
- (b) The Phase Developer shall insert in all Contracts to which the Phase Developer is a party a requirement for the Contractor to:
 - (i) pay all undisputed amounts to lower-tier Contractors (with whom they have privity of contract) within 10 days of receiving payment for work that is satisfactorily performed by such lower-tier Contractors; and
 - (ii) require lower-tier Contractors to insert the same provision in each subcontract at all tiers.
- (c) The Phase Developer acknowledges that any lower-tier Contractor that does not receive prompt payment may have the right to request a remedy in accordance with COMAR §21.10.08.
- (d) Within 10 days of the Phase Developer receiving payment of any Allowed Costs or any other payment from MDOT allocable to work performed by a Contractor with whom it

has privity of contract, the Phase Developer shall make the corresponding payment to such Contractor (to the extent not previously paid).

- (e) The Phase Developer shall not withhold retainage from Contractors with whom it has privity of contract (and shall require that Contractors do not withhold retainage from lower-tier Contractors).

19.6 **Labor Standards**

- (a) In performing the Predevelopment Work, the Phase Developer shall comply, and shall require all Contractors to comply with all Applicable Laws regarding labor, occupational safety, and health.
- (b) To the extent any Predevelopment Work is carried out in the Commonwealth of Virginia, the Phase Developer shall comply, and shall require all applicable Contractors to comply, with the Commonwealth of Virginia's labor and occupational safety and health laws.
- (c) All individuals performing the Predevelopment Work must be qualified, experienced, competent, and skilled in performing the Predevelopment Work assigned to them under this Agreement.
- (d) If an individual employed by the Phase Developer or any Contractor:
 - (i) lacks the qualifications, skill, competence, experience, licensing, certification, registration, permit, approval, bond, or insurance, for performing the relevant aspect of the Predevelopment Work; or
 - (ii) is not performing the relevant aspect of the Predevelopment Work in a proper, safe, and skillful manner,

the Phase Developer shall, or shall cause the relevant Contractor to, remove that individual from performing the Predevelopment Work.

- (e) An individual removed from performing the Predevelopment Work under Section 19.6(d), may not be re-employed to perform any portion of the Predevelopment Work. The Phase Developer will not be entitled to make any claim as a result of such removal.
- (f) If, after notice and reasonable opportunity to cure, the Phase Developer:
 - (i) fails take action as required by Section 19.6(d); or
 - (ii) fails to ensure that qualified, skilled, competent, experienced, licensed, certified, registered, permitted, and approved personnel are furnished for the proper performance of the Predevelopment Work,

then, MDOT may suspend the affected portion of the Predevelopment Work by delivering to the Phase Developer notice of such suspension.

- (g) Any suspension under Section 19.6(f) will in no way relieve the Phase Developer of any obligation contained in this Agreement, or entitle the Phase Developer to make any claim under this Agreement.

19.7 Ethical Standards

- (a) Within 90 days after the Effective Date, the Phase Developer shall adopt written policies establishing ethical standards of conduct for all Phase Developer-Related Entities, including the Phase Developer's supervisory and management personnel, in dealing with MDOT and in employment relations. The Phase Developer shall deliver the policies to MDOT upon MDOT's request.
- (b) The Phase Developer shall ensure that the policies provided under Section 19.7(a), include standards of ethical conduct concerning:
 - (i) compliance with restrictions applicable to federal grantees, Maryland State agencies, public contracts, public officials and employees, and former public officials and employees, in accordance with the Maryland Public Ethics Law, Title 5 of the General Provisions Article of the Annotated Code of Maryland, and Title 14 of the Election Law Article of the Annotated Code of Maryland with respect to prohibitions on political contributions by the Phase Developer;
 - (ii) the protection of employees of the Phase Developer-Related Entities from unethical practices in the selection, use, hiring, compensation, or other terms of employment, or in firing, promotion, and termination of employees;
 - (iii) the protection of employees of the Phase Developer-Related Entities from retaliatory actions (including discharge, demotion, suspension, threat, harassment, pay reduction, or other discrimination in the terms of employment) in response to reporting of illegal (including the making of a false claim), unethical, or unsafe actions or failures to act by any Phase Developer-Related Entity;
 - (iv) restrictions on directors, members, officers, or supervisory or management personnel of any Phase Developer-Related Entity engaging in any transaction or activity, including receiving or offering a financial incentive, benefit, loan or other financial interest, that is, or to a reasonable person appears to be, in conflict with or incompatible with the proper discharge of duties or independence of judgment or action in the performance of duties, or adverse to the interests of the Phase or employees;
 - (v) restrictions on use of office or job position for a purpose that is, or would to a reasonable person appear to be, primarily for the private benefit of a director, member, officer, or supervisory or management person, rather than primarily for the benefit of the Phase Developer or the Phase, or primarily to achieve a private gain or an exemption from duty or responsibility for a director, member, officer, or supervisory or management person; and
 - (vi) restrictions on directors, members, officers, or employees of any Phase Developer-Related Entity performing any of the Predevelopment Work if the performance of such Predevelopment Work would be prohibited under MDOT's conflict of interest rules and policies.
- (c) The Phase Developer shall cause its directors, members, officers, supervisory and management personnel, and require those of all other Phase Developer-Related Entities, to adhere to and enforce the adopted policies on ethical standards of conduct. The Phase Developer shall establish reasonable systems and procedures to promote and monitor compliance with these policies.

- (d) No official or employee of the State of Maryland or any unit of the State of Maryland whose duties as such official or employee include matters relating to or affecting the subject matter of this Agreement may, while holding such position or so employed, be or become an employee of any Phase Developer-Related Entity or have a financial interest in any Phase Developer-Related Entity.

19.8 Non-discrimination and Equal Opportunity

(a) Compliance with State Non-Discrimination Law and Regulations

The Phase Developer, its assignees, and its successors in interest, agree as follows:

- (i) not to discriminate in any manner against any employee or applicant for employment because of race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, gender identity, or disability unrelated in nature and extent so as to reasonably preclude the performance of such employment;
- (ii) to include a provision similar to Section 19.8(a)(i) in each Contract, and require the provision to be included in all lower-tier Contracts (other than standard form contracts for commercial supplies or raw materials that are not subject to negotiation); and
- (iii) to post and to cause Contractors to post notices setting forth the substance of Section 19.8(a)(i) in conspicuous places that is available to employees and applicants for employment.

(b) Sanctions

- (i) In the event of noncompliance with the nondiscrimination provisions under Section 19.8(a) (Compliance with State Non-Discrimination Law and Regulations), MDOT will impose such sanctions as it may determine to be appropriate including:
 - (A) where applicable, withholding payment of Allowed Costs to the Phase Developer until the Phase Developer-Related Entity complies; or
 - (B) declaring a Phase Developer Default under Section 25.1(q) (Phase Developer Default).
- (ii) MDOT will provide notice regarding any breach of Section 19.8(a) (Compliance with State Non-Discrimination Law and Regulations) and allow the Phase Developer five Business Days to cure the breach before taking any action under this Section 19.8(b).

(c) Nondiscrimination Clause

- (i) As a condition of entering into this Agreement, the Phase Developer represents and warrants that it will comply with the State's Commercial Nondiscrimination Policy under Title 19 of the State Finance and Procurement Article of the Annotated Code of Maryland.
- (ii) In complying with Section 19.1(b)(i), the Phase Developer shall not discriminate on the basis of race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, or on the basis of disability or other unlawful forms of

discrimination in the solicitation, selection, hiring, or commercial treatment of subcontractors, vendors, suppliers, or commercial customers, nor shall the Phase Developer retaliate against any person for reporting instances of such discrimination.

- (iii) The Phase Developer shall provide equal opportunity for subcontractors, vendors, and suppliers to participate in all of its public sector and private sector subcontracting and supply opportunities, provided that nothing contained in this Section 19.8(c) shall prohibit or limit otherwise lawful efforts to remedy the effects of marketplace discrimination that have occurred or are occurring in the marketplace.
- (iv) The Phase Developer understands and agrees that a material violation of this Section 19.8(c) shall be considered a material breach of this Agreement and may result in termination of this Agreement, disqualification from participating in State contracts, and other sanctions.
- (v) This Section 19.8(c) is not enforceable by or for the benefit of, and creates no obligation to, any third party.

(d) **Investigations**

- (i) As a condition of entering into this Agreement, upon the request of the Commission on Civil Rights, or any Federal agency, and only after the filing of a complaint against the Phase Developer under Title 19 of the State Finance and Procurement Article, as amended from time to time, the Phase Developer agrees to provide to the State within 60 days after the request, a truthful and complete list of the names of all subcontractors, vendors, and suppliers that the Phase Developer has used in the past four years on any of its contracts that were undertaken within the State of Maryland, including the total Dollar amount paid by the contractor on each subcontract or supply contract.
- (ii) The Phase Developer agrees to cooperate in any investigation conducted by the State in accordance with the State's Commercial Nondiscrimination Policy under Title 19 of the State Finance and Procurement Article of the Annotated Code of Maryland, to provide any documents relevant to any investigation that is requested by the State.
- (iii) The Phase Developer understands and agrees that a violation of this Section 19.8(d) shall be considered a material breach of this Agreement and may result in termination of this Agreement, disqualification from participating in State contracts, and other sanctions.

(e) **Compliance with Federal Law**

- (i) The Phase Developer assures and represents to MDOT and MDTA that it is conforming to the provisions of the Civil Rights Act of 1964 and §202 of Executive Order 11246 of the President of the United States of America as amended by Executive Order 11375, as applicable.
- (ii) The Phase Developer shall comply with all applicable federal laws and regulations pertaining to nondiscrimination in employment, including the requirements specified in Exhibit 16 (Federal and State Requirements).

(f) **Affirmative Action and Equal Employment Opportunity Requirements**

To the extent applicable to the Predevelopment Work, the Phase Developer shall comply with MDOT's affirmative action requirements and all applicable equal employment opportunity requirements, and shall require its Contractors to comply with such requirements. Such requirements shall apply to the entire Phase and all of the Predevelopment Work.

19.9 **Disadvantaged Business Enterprises**

(a) **General Requirements**

- (i) The spirit and intent of the State of Maryland is to afford small, disadvantaged, minority, and women-owned businesses the opportunity to perform viable and meaningful services in a teaming effort. It is the desire of the State to maximize notice, and the opportunity to participate in the solicitation process, to a diverse and broad range of small, disadvantaged, minority, and women-owned businesses.
- (ii) The governing statutes, regulations, and program requirements are 49 CFR Part 26 and the MDOT-SHA DBE Program Manual.
- (iii) In accordance with 49 CFR §26.13, the Phase Developer, sub recipient, or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Agreement. The Phase Developer shall carry out the applicable requirements of 49 CFR, Part 26 in the award and administration of DOT-assisted contracts. Failure by the Phase Developer to carry out these requirements is a material breach of this Agreement, which may result in termination of this Agreement, or such other remedy as MDOT deems appropriate which may include disqualifying the Phase Developer from future bidding as non-responsible. The requirements of this Section 19.9(a)(iii) shall be included in all Contracts.
- (iv) The Phase Developer shall support and actively participate in various meetings, as directed by MDOT, including workgroups, advisory groups, USDOT Office of Small and Disadvantaged Business Utilization "Bonding Education Program" and local business leadership councils.
- (v) The DBE participation goal for the Predevelopment Work is 26%.
- (vi) The Phase Developer shall make Good Faith Efforts to achieve the DBE participation goal.
- (vii) The Phase Developer shall comply with the following:
 - (A) only MDOT certified DBEs can be used to achieve the DBE participation goal;
 - (B) on or before the Effective Date, the Phase Developer shall provide to MDOT the following:
 - (aa) a DBE Participation Plan in accordance with Exhibit 17 (Predevelopment DBE Participation Plan);

- (bb) a list of all Contracts (with Dollar value), for the Predevelopment Work that are anticipated to begin within the first 180 days after the Effective Date; and
 - (cc) the DBE Participation Forms (as directed by MDOT) for each Contract awarded as of the Effective Date;
- (C) beginning 90 days after the Effective Date and on a quarterly basis thereafter, the Phase Developer shall submit:
 - (aa) an updated list of Contracts, including the Dollar value, for the Predevelopment Work that are anticipated to begin within the next 180 day period;
 - (bb) DBE Participation Forms, as directed by MDOT, for the Contracts awarded since the last submission of the DBE Participation Forms;
 - (cc) an updated DBE Participation Schedule for approval by MDOT;
 - (dd) completed DBE forms as requested by MDOT for the DBE firms that are anticipated to commence Predevelopment Work within the next 180 day period; and
 - (ee) any other forms or information MDOT requests related to the total Dollar value of the awarded Contracts and total commitments to DBE firms;
- (D) where the Phase Developer is unable to meet the DBE goal established by MDOT (and the Phase Developer did not obtain a waiver from MDOT under Form H-7 of the RFP), the Phase Developer shall submit to MDOT documentation of the Phase Developer's Good Faith Efforts to meet the DBE goal. If MDOT is satisfied that the Phase Developer has exercised Good Faith Efforts, MDOT will work with the Phase Developer to establish an improvement plan as part of the DBE Participation Plan, or notify the Phase Developer under Section 19.9(d)(iv) (Compliance).
- (viii) If MDOT determines that the Phase Developer:
 - (A) failed to submit the documentation required by this Agreement;
 - (B) failed to exercise Good Faith Efforts to meet the DBE goal; or
 - (C) failed to adhere to the improvement plan established under Section 19.9(a)(vii)(D) (General Requirements),

then MDOT, in consultation with MDOT OEO, and upon review by the Maryland Office of the Attorney General, may make a determination that the Phase Developer is non-compliant, and take appropriate action against the Phase Developer in accordance with Section 19.9(d)(iv) (Compliance).

(b) **Third-Tier and Lower-Tier Contracting**

- (i) The Phase Developer must obtain MDOT approval for all third-tier and lower-tier contracting arrangements before using the third-tier or lower-tier contracting arrangement to achieve the DBE participation goal.
 - (ii) The following conditions must be met before MDOT may approve a third-tier or lower-tier contracting arrangement for meeting the DBE goal:
 - (A) the Phase Developer has submitted an approval request to MDOT regarding the use of third-tier or lower-tier contracting arrangement; and
 - (B) before awarding the contract, MDOT must be reasonably satisfied, through the DBE Participation Schedule and the DBE Participation Plan, that the third-tier or lower-tier contract is a necessary component of achieving the DBE goal.
 - (ii) The Phase Developer shall provide all records of any approved third-tier or lower-tier Contract to MDOT upon request.
- (c) **DBE Participation Report**
- (i) As part of the Monthly Progress Report, the Phase Developer shall submit a DBE Participation Report which shall:
 - (A) include an updated list of all Contractors;
 - (B) identify the DBE firms, and if requested, the non-DBE firms performing the Predevelopment Work;
 - (C) identify the type of work being performed by each DBE firm;
 - (D) include the results of all procurements completed in the previous month, including those procured competitively and by other means;
 - (E) provide the total number of Contractors and the total Dollar value of all Contracts awarded to date;
 - (F) provide the total number of Contracts awarded to DBE firms and the total value of Contracts awarded to DBE firms to date;
 - (G) provide the percentage of completion of the Predevelopment Work as a whole and the percentage of completion for each DBE Contract; and
 - (H) for each Contract provide the following:
 - (aa) the original Contract amount;
 - (bb) the value of any modifications to date; and
 - (cc) payments made to date.
 - (ii) Suppliers do not need to be included in the DBE Participation Report unless they are a DBE firm, but the Phase Developer must retain records of all non-DBE Supplier contracts and subcontracts.

- (iii) The Phase Developer shall provide information to MDOT no later than March 1 and November 1 each year for the duration of the Term to assist MDOT with the submission of DBE Uniform Reports to FHWA.

(d) **Compliance**

- (i) Upon request by MDOT, the Phase Developer shall report to MDOT regarding compliance with the DBE requirements for the purposes of MDOT's monitoring.
- (ii) The compliance process includes monitoring payments and performing onsite reviews to verify that the certified DBE firms listed in the DBE Participation Schedule are actually performing the work and receiving compensation in accordance with that schedule.
- (iii) The Phase Developer shall:
 - (A) as part of the Monthly Progress Report, beginning the first month after the Effective Date, submit to MDOT a monthly DBE Payment Report in the form provided by MDOT, for each certified DBE firm. The report must include:
 - (aa) a list of all invoices submitted by each certified DBE firm during the reporting period;
 - (bb) all invoices paid by the Phase Developer to the certified DBE firms during the reporting period; and
 - (cc) a list of unpaid invoices over 30 days old received from a certified DBE firm, and the reason the payment has not been made;
 - (B) include in its agreements with its certified DBE firms a requirement that the certified DBE firms submit by 10 Business Days following the prior months end, to the MDOT OEO (or its designee) the monthly Subcontractor DBE Payment Report in the form provided by MDOT. The report must include:
 - (aa) all invoices submitted to the Phase Developer during the reporting period;
 - (bb) all payments received from the Phase Developer in the preceding 30 days; and
 - (cc) a listing of unpaid Contractor invoices over 30 days old, and the reason payment has not been made;
 - (C) provide right-of-entry at reasonable times as requested by MDOT to enable MDOT's representatives to verify compliance with DBE participation requirements, including inspecting any relevant matter, conducting periodic reviews, reviewing records, visiting jobsites, and interviewing Contractors and workers; and
 - (D) maintain and retain all records concerning DBE participation and make them available for MDOT's inspection for five years following the end of the Term. Subcontract agreements documenting the Predevelopment Work

performed by all certified DBE firms must be retained by the Phase Developer and furnished to MDOT upon request.

- (iv) If MDOT determines that the Phase Developer has failed to comply with its DBE requirements under this Section 19.9, then MDOT:
 - (A) will notify the Phase Developer of its findings and specify what corrective actions are required; and
 - (B) the Phase Developer shall initiate the corrective actions within 10 Business Days of the Phase Developer's notice and complete the corrective action within the time specified by MDOT.
- (v) If MDOT determines that noncompliance with DBE program requirements exist and that the Phase Developer has failed or refused to take the corrective action required by MDOT under Section 19.9(d)(iv), then MDOT, in its capacity as a governmental body charged with enforcing the DBE program, may impose sanctions on the Phase Developer, including:
 - (A) suspending the Predevelopment Work until the noncompliance is remedied;
 - (B) terminating this Agreement for Phase Developer Default;
 - (C) referring the matter to the Maryland Office of the Attorney General for appropriate action; and
 - (D) using any other compliance mechanism available at law.

(e) **Cancellation of DBE Contracts**

- (i) The Phase Developer shall not cancel or terminate any Contract with a DBE firm except with MDOT's prior written consent.
- (ii) The Phase Developer shall provide written notice of its request to cancel or terminate the DBE Contract and comply with the applicable requirements and provisions of 49 CFR §26.53 and the MDOT-SHA DBE Program Manual.
- (iii) MDOT will respond to the request from the Phase Developer to cancel or terminate the DBE within 10 Business Days.

(f) **DBE Participation Plan**

The Phase Developer shall comply with the requirements of the DBE Participation Plan in Exhibit 17 (Predevelopment DBE Participation Plan) and shall not amend the plan without the prior written consent of MDOT.

(g) **Contract Provisions**

The Phase Developer shall:

- (i) include provisions to implement the requirements of this Section 19.9 in every applicable Contract to which it is a party (including purchase orders and task orders for the Predevelopment Work); and

- (ii) ensure that the requirements of this Section 19.9 be included in all applicable Contracts at lower tiers (including purchase orders and task orders for Predevelopment Work), so that such provisions will be binding upon each applicable Contractor.

(h) **Minority Business Enterprise**

In the event that no federal funds are used to finance the Predevelopment Work, MDOT reserves the right to establish Minority Business Enterprise goals under Title 14, subtitle 3 of the State Finance and Procurement Article of the Annotated Code of Maryland, to the extent it is practicable and legally permissible to do so.

19.10 Prevailing Wages for Predevelopment Work

- (a) To the extent applicable, the Phase Developer shall pay or cause to be paid to all applicable workers employed by it or its Contractors performing the Predevelopment Work no less than the prevailing rates of wages, as provided in the statutes and regulations applicable to public work contracts, including §17-201 et seq. of the State Finance and Procurement Article of the Annotated Code of Maryland, COMAR §21.11.11, and the Davis Bacon Act as provided in Exhibit 16 (Federal and State Requirements).
- (b) It is the Phase Developer's sole responsibility to determine the wage rates required to be paid. If rates of wages and benefits change while this Agreement is in effect, then the Phase Developer shall bear the cost of such changes and shall have no right to a claim against MDOT on account of such changes. Without limiting the foregoing, no claim will be allowed which is based upon the Phase Developer's lack of knowledge or a misunderstanding of any such requirements.
- (c) If it is found that any individual employed by the Phase Developer or a Contractor has been or is being paid a rate of wages less than the rate of wages required to be paid under this Agreement, MDOT may declare a Phase Developer Default under Section 25.1(q) (Phase Developer Default).

19.11 Sanctions Upon Improper Acts

- (a) MDOT may declare a Phase Developer Default under Section 25.1(q) (Phase Developer Default) if:
 - (i) the Phase Developer, any Phase Developer-Related Entity, or any of their officers, partners, principals, or employees, is convicted of a crime arising out of, relating to, or resulting from, the procurement of work to be done or payment to be made under this Agreement;
 - (ii) the Phase Developer:
 - (A) is debarred under §16-202 or §16-203 of the State Finance and Procurement Article of the Annotated Code of Maryland; or
 - (B) may be debarred because any of the circumstances under §16-202 or §16-203 of the State Finance and Procurement Article of the Annotated Code of Maryland have occurred;

- (iii) the Phase Developer is included on a list of persons suspended or debarred under COMAR §21.08.01;
 - (iv) the Phase Developer is debarred under COMAR §21.08.03 or may be debarred because any of the circumstances under COMAR §21.08.03 have occurred; or
 - (v) the Phase Developer, any Phase Developer-Related Entity, or any of their officers, partners, principals, or employees, violates §11-205 or §11-205.1 of the State Finance and Procurement Article of the Annotated Code of Maryland.
- (b) The Phase Developer shall deliver to MDOT, by January 31 of each year during the Term, updated affidavits in the form of Exhibit 12 (Contract Affidavit) from the Phase Developer and each PD Equity Member.

20. **TOLL SYSTEMS INTEGRATOR AND TOLL SYSTEMS OPERATOR**

20.1 **Toll Systems Integrator**

- (a) The Phase Developer shall engage or shall cause the Section Developers to engage the same Toll Systems Integrator for each Section of the Phase.
- (b) The Phase Developer shall not engage and shall ensure that a Section Developer does not engage a Toll Systems Integrator unless it has been approved by MDOT and MDTA in writing under this Section 20.1.
- (c) Prior to submitting a Committed Section Proposal for the First Section, the Phase Developer shall submit to MDOT, for MDOT and MDTA approval, details of the proposed Toll Systems Integrator, together with supporting documents and information demonstrating that the proposed Toll Systems Integrator meets the applicable requirements of Exhibit 6 (Predevelopment Work Requirements) and any other information that may be required by MDOT or MDTA.
- (d) MDOT and MDTA place great importance on the customer's experience and service. When approving the Toll Systems Integrator, emphasis will be placed on ensuring the appropriate customer is charged an accurate toll rate for vehicle classification, the transaction is complete (trip construction), and the vehicle and transaction data is accurately transmitted to MDTA's back office integrator.
- (e) Within 30 days of receiving details of the Phase Developer's proposed Toll Systems Integrator and all supporting documents and information, MDOT and MDTA shall provide the Phase Developer with written notice:
 - (i) approving the Toll Systems Integrator; or
 - (ii) rejecting the proposed Toll Systems Integrator and providing comments as to why MDOT and MDTA's approval was not granted.
- (f) Once a Toll Systems Integrator has been approved by MDOT and MDTA in accordance with this Section 20.1, the Phase Developer shall not change or substitute, and shall ensure that the Section Developers do not change or substitute, the Toll Systems Integrator without the prior written consent of MDOT and MDTA.

20.2 Toll Systems Operator

- (a) The Phase Developer shall engage or shall cause the Section Developers to engage the same Toll Systems Operator for each Section of the Phase and shall ensure that at all times when there are two or more Section P3 Agreements in effect, the same Toll Systems Operator is engaged to provide the tolling operations for the Sections covered by those Section P3 Agreements. The Toll Systems Operator may be the same entity as the Toll Systems Integrator.
- (b) The Phase Developer shall ensure that a Toll Systems Operator is not engaged by the Phase Developer or a Section Developer unless it has been approved by MDOT and MDTA in writing under this Section 20.2.
- (c) Prior to submitting a Committed Section Proposal for the First Section, the Phase Developer shall submit to MDOT, for MDOT and MDTA approval, details of the proposed Toll Systems Operator together with supporting documents and information demonstrating that the proposed Toll Systems Operator meets the applicable requirements of Exhibit 6 (Predevelopment Work Requirements) and any other information that may be required by MDOT or MDTA.
- (d) MDOT and MDTA place great importance on the customer's experience and service. When approving the Toll Systems Operator, emphasis will be placed on ensuring the appropriate customer is charged an accurate toll rate for the vehicle classification, the transaction is complete (trip construction), and the vehicle and transaction data is accurately transmitted to MDTA's back office integrator.
- (e) Within 30 days of receiving details of the Phase Developer's proposed Toll Systems Operator and all supporting documents and information, MDOT and MDTA shall provide the Phase Developer with written notice:
 - (i) approving the Toll Systems Operator; or
 - (ii) rejecting the proposed Toll Systems Operator and providing comments as to why MDOT's approval was not granted.
- (f) Once a Toll Systems Operator has been approved by MDOT and MDTA in accordance with this Section 20.2, the Phase Developer shall not change or substitute, and shall ensure that the Section Developers do not change or substitute, the Toll Systems Operator without the prior written consent of MDOT and MDTA.

21. APPLICABLE LAW AND FEDERAL REQUIREMENTS

21.1 General

The Phase Developer shall at all times in carrying out the Predevelopment Work comply, and require its Contractors to comply, with all Applicable Law and Governmental Approvals.

21.2 Federal Requirements

Without limiting Section 21.1 (General), the Phase Developer shall comply with, and require its Contractors to comply with, all federal requirements applicable to transportation projects that receive federal credit or funds, including the requirements stated in Exhibit 16 (Federal and State Requirements).

21.3 **Assistance with Reporting Requirements**

The Phase Developer shall provide all assistance reasonably requested by MDOT in connection with any reporting requirements that MDOT or MDTA must comply with under any Applicable Law.

21.4 **Conflicting Provisions**

If there is any conflict between:

- (a) any applicable federal requirements or Applicable Law; and
- (b) the other requirements of this Agreement,

the federal requirements and Applicable Law will prevail and take precedence over any such conflicting provisions.

21.5 **Certification Regarding Use of Contract Funds for Lobbying**

The Phase Developer shall ensure that all Contracts (including lower-tier subcontracts) that exceed \$100,000 include the language of the certification in Part F of Exhibit 16 (Federal and State Requirements).

22. **CHANGE ORDERS**

- (a) MDOT may, at any time, propose a change to the Predevelopment Work by delivering a written notice (an "**MDOT Change Request**") to the Phase Developer setting out MDOT's proposed change to the Predevelopment Work.
- (b) MDOT shall not deliver an MDOT Change Request that:
 - (i) requires the Predevelopment Work to be performed in a way that violates Applicable Law;
 - (ii) causes any Governmental Approval then in full force and effect to be revoked;
 - (iii) adversely effects the health and safety of any Person; or
 - (iv) materially and adversely changes the nature of the Phase or any Section as a whole.
- (c) Promptly, and in any event within five Business Days following receipt of an MDOT Change Request, MDOT and the Phase Developer shall meet to discuss and seek to agree to:
 - (i) any compensation payable to the Phase Developer for the change to the Predevelopment Work;
 - (ii) any change to a Predevelopment Cost Cap, the Phase South Termination Cap or the Phase North Termination Cap; and
 - (iii) any time relief necessary as a consequence of the change.

- (d) The Parties shall enter into an amendment to this Agreement to reflect the change to the Predevelopment Work and such other terms that are agreed to in accordance with Section 22(c).
- (e) The Phase Developer shall not suspend performance of the Predevelopment Work during the negotiation of any change order under this Article 22, unless expressly provided otherwise in accordance with the terms of this Agreement.

23. **INDEMNITY**

23.1 **Indemnity**

Subject to Section 23.2 (Limitations on Indemnification Obligations), the Phase Developer shall indemnify, hold harmless, and subject to Section 23.6 (Conduct of Third Party Claims), defend the Indemnified Parties from and against:

- (1) all Losses in relation to loss of or damage to real or personal property owned by or in the possession of an Indemnified Party;
- (2) all Losses in relation to personal injury or death of any officers, agents, representatives, or employees of any MDOT-Related Entity; and
- (3) all Losses in relation to Third Party Claims,

in each case, arising out of, relating to, or resulting from:

- (a) any act, omission, negligence, or misconduct of any Phase Developer-Related Entity in the manner or method of performing the Predevelopment Work satisfactorily or failure to perform the Predevelopment Work, including any breach, alleged breach, or violation of the Phase Developer's obligations under this Agreement;
- (b) the failure or alleged failure by a Phase Developer-Related Entity to comply with any Governmental Approval or Applicable Law relating to the performance of the Predevelopment Work;
- (c) any alleged infringement or other allegedly improper appropriation or use of:
 - (i) Intellectual Property (including State Intellectual Property) by a Phase Developer-Related Entity; or
 - (ii) Intellectual Property (excluding State Intellectual Property) by an Indemnified Party,

in performing the Predevelopment Work, or arising out of, relating to, or resulting from any use in connection with the Phase of methods, processes, design, information, or other items furnished or communicated to an Indemnified Party under this Agreement. This indemnity shall not apply to any infringement resulting from an Indemnified Party's failure to comply with specific written instructions regarding the use of Intellectual Property provided to MDOT by the Phase Developer that are consistent with the Phase Developer's obligation to convey and license the Intellectual Property under the Agreement;

- (d) any Phase Developer Hazardous Materials Release;

- (e) any fines or penalties imposed on MDOT or MDTA by a Governmental Entity arising out of, relating to, or resulting from the Phase Developer's breach or failure to comply with applicable requirements of this Agreement;
- (f) any claims by any Governmental Entity claiming taxes based on gross receipts, purchases or sales, the use of any property or income of any Phase Developer-Related Entity with respect to any payment for the Predevelopment Work made to or earned by the Phase Developer-Related Entity under this Agreement; and
- (g) any inverse condemnation, trespass, nuisance, or similar taking of or harm to real property by reason of:
 - (i) the failure of any Phase Developer-Related Entity to comply with Good Industry Practice, requirements of this Agreement, or an approved plan under this Agreement in connection with the performance of the Predevelopment Work;
 - (ii) the willful misconduct or negligence of any Phase Developer-Related Entity in connection with the performance of the Predevelopment Work; or
 - (iii) the unauthorized physical entry onto or encroachment upon another's property by any Phase Developer-Related Entity in connection with the performance of the Predevelopment Work.

23.2 Limitations on Indemnification Obligations

(a) Exclusions

The Phase Developer shall not be responsible or be obligated to indemnify, hold harmless, or defend the Indemnified Parties with respect to any Losses under Section 23.1 (Indemnity) to the extent it arises as a direct result of:

- (i) a Relief Event; or
- (ii) a violation of Applicable Law or a Governmental Approval by an Indemnified Party.

(b) Insured losses

With respect to any loss or damage of the type covered by the insurance required to be provided under this Agreement or otherwise obtained by the Phase Developer for the Phase, the Phase Developer's indemnity obligations shall not extend to any loss, damage, or expense arising out of, relating to, or resulting from the sole negligence, or willful misconduct of, an Indemnified Party, or its agents, servants, or independent contractors who are directly responsible to such Indemnified Party.

(c) Uninsured losses

- (i) With respect to any loss or damage which is not of the type covered by the insurance required to be provided under this Agreement, or is not otherwise obtained by the Phase Developer for the Phase, the Phase Developer's indemnity obligation will not extend to any loss, damage, or cost to the extent that such loss, damage, or cost was caused by:

- (A) the breach by MDOT or MDTA of any of their obligations to the Phase Developer under this Agreement; or

(B) the sole negligence, or willful misconduct of the relevant Indemnified Party or its agents, servants, or independent contractors who are directly responsible to such Indemnified Party.

(ii) The Phase Developer's indemnity obligations shall not include the payment of punitive damages except to the extent that punitive damages are assessed as the result of culpable conduct by the Phase Developer.

(d) **Claims by employees**

In claims by an employee of the Phase Developer or a Contractor, anyone directly or indirectly employed by the Phase Developer or a Contractor, or anyone for whose acts the Phase Developer or a Contractor may be liable, the indemnification obligation under this Article 23 shall not be limited on the amount, or type of damages, compensation, or benefits payable, by or for the Phase Developer or a Contractor under workmen's compensation, disability benefit, or other employee benefit laws; provided that this Section 23.2(d) will not be construed as a waiver in favor of any employee by the Phase Developer, or any Contractor of any limitation of liability afforded by such laws.

(e) **Reliance on the Phase Developer's performance**

The Phase Developer acknowledges and agrees that it is the Phase Developer's obligation to cause the Predevelopment Work to be performed in accordance with this Agreement, and that the Indemnified Parties are fully entitled to rely on the Phase Developer's performance of this obligation.

23.3 Indemnities by Contractors

The Phase Developer shall ensure that each Contract includes indemnity provisions appropriate to the scope of the Predevelopment Work to be performed by the Contractor, naming the Indemnified Parties as indemnitees.

23.4 Limitation on Indemnity

The indemnities under this Article 23, shall not limit any other indemnity by the Phase Developer under this Agreement.

23.5 Notice of claims by third parties

The Phase Developer shall:

- (a) promptly notify MDOT in writing of any injury to persons, damage to property, or other occurrence covered by the indemnities in this Article 23; and
- (b) subject to legally recognized privilege, promptly provide MDOT copies of all factual reports and factual portions of any other reports given to the Phase Developer's insurance carrier or carriers.

23.6 Conduct of Third Party Claims

- (a) Where MDOT or MDTA is entitled to make a claim under this Agreement against the Phase Developer in relation to a Third Party Claim, MDOT or MDTA shall give notice of the relevant claim to the Phase Developer, setting out the full particulars of the claim and whether or not the defense is tendered to the Phase Developer.

- (b) The Phase Developer acknowledges that:
 - (i) the Maryland Office of the Attorney General is required by law to represent and defend MDOT, MDTA and the State and may appoint counsel approved by the Maryland Office of the Attorney General to act in their stead; and
 - (ii) certain other Indemnified Parties may have similar statutory representation obligations and rights.

As a result, MDOT and the Indemnified Parties may elect to conduct their own defense at any time but may also agree to allow defense to be conducted in whole, in part, in conjunction with, or from time to time, by counsel appointed by the Phase Developer or its insurer.

- (c) Subject to Section 23.6(b), if the insurer under any applicable Insurance Policy accepts the tender of defense, MDOT and the Phase Developer agree to cooperate in the defense proffered by the Insurance Policy. If no insurer under potentially applicable Insurance Policies provides defense, then Section 23.6(d) will apply.
- (d) Subject to Section 23.6(b), if the defense is tendered to the Phase Developer, then within 30 days after receipt of the tender, the Phase Developer shall notify each relevant Indemnified Party whether it has tendered the matter to an insurer, and, if not tendered to an insurer or if the insurer has rejected the tender, shall deliver a notice stating that the Phase Developer:
 - (i) accepts the tender of defense and confirms that the claim is subject to full indemnification without any "reservation of rights" to deny or disclaim full indemnification;
 - (ii) accepts the tender of defense but with a "reservation of rights" in whole or in part; or
 - (iii) rejects the tender of defense based on a determination that it is not required to indemnify against the claim under the terms of this Agreement.
- (e) Subject to Section 23.6(b), if the Phase Developer accepts the tender of defense under Sections 23.6(d)(i) or 23.6(d)(ii), the Phase Developer shall have the right to select legal counsel for the Indemnified Party, subject to reasonable approval by the Indemnified Party, and the Phase Developer shall otherwise direct the defense of such claim, and bear the fees and costs of defending and settling such claim. MDOT shall be kept informed of the status of any claim covered by such insurance and the Phase Developer shall seek MDOT's consent to any settlement terms and conditions.
- (f) Subject to Section 23.6(b), if the Phase Developer responds to the tender of defense as specified in Section 23.6(d)(iii), the Indemnified Party may select its own legal counsel and otherwise control the defense of such claim, including settlement.
- (g) Despite Sections 23.6(d)(i) or 23.6(d)(ii), any Indemnified Party (regardless of whether it is entitled to conduct its own defense under Section 23.6(b)), may assume its own defense at any time by delivering to the Phase Developer notice of such election and the reasons therefor.

- (h) If an Indemnified Party elects to conduct its own defense of a claim for which it is entitled to indemnification under this Section 23.6, the Phase Developer shall reimburse on a current basis all reasonable costs and expenses the Indemnified Party incurs in investigating and defending such claim. If the Indemnified Party is entitled to and elects to conduct its own defense, then:
 - (i) in the case of a defense that otherwise would be conducted under Section 23.6(d)(i), the Indemnified Party may settle or compromise the claim with the Phase Developer and each of the Phase Developer's relevant insurer(s)' prior written consent, which, in each case, shall not be unreasonably withheld or delayed;
 - (ii) in the case of a defense that otherwise would be conducted under Section 23.6(d)(ii), the Indemnified Party and the Phase Developer shall consult with each other on a regular basis to determine whether settlement is appropriate and, subject to the rights of any insurer providing coverage for the claim under a policy required under this Agreement, the Indemnified Party may settle or compromise the claim with the Phase Developer's prior written consent without prejudice to the Indemnified Party's rights to be indemnified by the Phase Developer; and
 - (iii) in the case of a defense conducted under Section 23.6(d)(iii), the Indemnified Party may, subject to the rights of any insurer providing coverage for the claim under a policy required under this Agreement, settle or compromise the claim without the Phase Developer's prior written consent and without prejudice to its rights to be indemnified by the Phase Developer.
- (i) A refusal of, or failure to accept, a tender of defense, as well as any Dispute relating to assumption of control of defense by an Indemnified Party under Section 23.6(g), will be resolved according to the Dispute Resolution Procedures. The Phase Developer may contest an indemnification claim and pursue, through the Dispute Resolution Procedures, recovery of defense and indemnity payments it has made to or on behalf of the Indemnified Party.

24. **INSURANCE**

24.1 **Insurance Policies and Coverage**

The Phase Developer shall obtain and maintain, or cause to be obtained or maintained, the Insurance Policies in accordance with this Article 24 and Exhibit 10 (Required Insurance for Predevelopment Work).

24.2 **General Insurance Requirements**

(a) **Insurers**

The Phase Developer shall cause all Insurance Policies to be obtained from insurers:

- (i) that at the time coverage commences have a current financial strength and financial size category rating of not less than "A -" (excellent or above) according to A.M. Best's Financial Strength Rating and "VIII" or better according to A.M. Best's Financial Size Rating, except as approved in writing by MDOT in its discretion; and

- (ii) that are authorized to do business in the State of Maryland and the Commonwealth of Virginia.

(b) **No Recourse for Premiums, Deductibles, and Self-Insured Retentions**

Except as otherwise expressly provided in this Agreement:

- (i) the Phase Developer or its Contractors shall be responsible for paying all premiums, deductibles, and self-insurance retentions with respect to the Insurance Policies; and
- (ii) neither MDOT, MDTA, nor any other Indemnified Party will have any liability for premiums, deductibles, self-insured retentions, or claim amounts in excess of the required coverage, or other amounts, with respect to the Insurance Policies.

(c) **Primary Coverage**

The Phase Developer shall ensure that:

- (i) each Insurance Policy provides that the coverage is primary and non-contributory with respect to all named and additional insureds and loss payees as their interests may appear, except for coverage that by its nature cannot be written as primary; and
- (ii) any insurance or self-insurance beyond that specified in this Agreement that is maintained by an insured or any such additional insured must be in excess of such insurance and must not contribute with it.

(d) **Verification of Coverage**

- (i) Each time the Phase Developer is required to initially obtain or cause to be obtained an Insurance Policy, and not less than 10 Business Days before the expiration date of each Insurance Policy, the Phase Developer shall deliver to MDOT a written certificate(s) of insurance (which, in the case of an expiring Insurance Policy, provides evidence of renewal coverage after such expiration). Each certificate of insurance must:
 - (A) be on the most recent ACORD form consistent with the required coverage;
 - (B) state the identity of all insurers, named insureds, and additional insureds, and state the type and limits of coverage;
 - (C) where applicable, include as attachments all additional insured endorsements; and
 - (D) be signed by the agent or broker.
- (ii) Within 10 Business Days of receiving a request from MDOT, the Phase Developer must deliver to MDOT:
 - (A) a true and complete copy of each Insurance Policy or modification, or renewal or replacement Insurance Policy and all endorsements accompanied by a letter from the agent or broker placing the insurance certifying that the same is a true and complete copy thereof; and

- (B) evidence, acceptable to MDOT (acting reasonably), that all premiums then due have been paid in full.

(iii) If the Phase Developer:

- (A) fails or refuses to obtain or maintain in force the Insurance Policies; or
- (B) does not provide MDOT with proof of coverage within five Business Days after MDOT requests such proof;

MDOT may, upon five Business Days' written notice to the Phase Developer, without prejudice to any other available remedy and without further inquiry as to whether such insurance is actually in force, obtain such an Insurance Policy.

- (iv) The Phase Developer shall reimburse MDOT for the cost MDOT incurs in obtaining any Insurance Policy under Section 24.2(d)(iii) within 30 days of receiving an invoice from MDOT with respect to such costs.
- (v) MDOT may, without obligation or liability, suspend all or any portion of the Predevelopment Work during any time that any proofs of coverage required by this Article 24 have not been provided.

(e) **Contractor Insurance Requirements**

- (i) The Phase Developer shall cause all Contractors to obtain (before commencing any Predevelopment Work) and maintain all insurance that is required by Section 2 of Exhibit 10 (Required Insurance of Predevelopment Work), to the extent that such Contractor is not covered by the Phase Developer provided insurance.
- (ii) The Phase Developer shall cause the Contractors to include MDOT and the Indemnified Parties as additional insureds as required under Exhibit 10 (Required Insurance of Predevelopment Work).

(f) **Endorsements and Waivers**

- (i) The Phase Developer shall ensure that all Insurance Policies contain, or are endorsed to comply with, the following:
 - (A) each policy must be endorsed to state that coverage cannot be canceled, voided, or materially reduced in coverage or in limits (except with respect to payments under the policy which by their nature erode or deplete the limits of such policy) by the insurer except after 30 days' prior written notice (or 10 Business Days' notice for non-payment of premium) by certified mail with a return receipt requested, or by email with a hard copy to follow. Such endorsement must not include any limitation of liability of the insurer for failure to provide such notice; and
 - (B) unless specified otherwise in Exhibit 10 (Required Insurance for Predevelopment Work), each policy must provide coverage on an "occurrence" basis and not a "claims made" basis.

(ii) The Phase Developer shall cause all Insurance Policies (other than workers' compensation and professional liability policies) contain, or are endorsed to comply with, the following:

- (A) any failure on the part of a named insured to comply with reporting provisions or other conditions of the policies, any breach of warranty, any action or inaction of a named insured or others, or any change in ownership of all or any portion of the Phase Developer's Interest will not affect coverage provided to the other named insureds or additional insureds (and their respective members, directors, officers, employees, agents, and Phase consultants);
- (B) the commercial general liability insurance and excess liability insurance must apply separately to each named insured and additional insured against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability;
- (C) endorsements adding additional insured coverage for MDOT and each Indemnified Party shall, for commercial general liability insurance, be evidenced by the CG 20 10 04 13 and CG 20 37 04 13 forms, or equivalent (to ensure coverage for both operations and completed operations), and, with regard to all required insurance coverages, must contain no additional limitations, conditions, restrictions or exceptions to coverage beyond those that apply under such policy generally;
- (D) each liability policy obtained by the Phase Developer must contain the following endorsement:

"The insurer(s) shall not, without obtaining the express advance written permission from the Maryland Transportation Authority (MDTA) and the Maryland Department of Transportation (MDOT), raise any defense involving in any way the jurisdiction of a tribunal over the person of MDTA or MDOT, the immunity of MDTA or MDOT, or any of their officers, agents or employees, the governmental nature of MDTA or MDOT, or the provisions of any statutes respecting suits against MDTA or MDOT."
- (E) the commercial general liability policy must cover liability arising out of the acts or omissions of the Phase Developer's employees and employees of Contractors engaged in the Predevelopment Work on the terms and to the extent the Phase Developer or relevant Contractor is provided coverage under such liability policy; and
- (F) any automobile liability insurance policy must be endorsed as required to include Motor Carrier Act Endorsement-Hazardous Materials Clean-up (MCS-90) for those Contractors who will at any time transport Hazardous Materials.

(g) **Policies with insureds in addition to the Phase Developer**

Except with respect to professional errors and omissions Insurance Policies, all Insurance Policies that are required to insure other entities in addition to the Phase Developer shall comply with the following provisions:

- (i) each Insurance Policy must contain a separation of insureds provisions such that the Insurance Policy is written or endorsed so that:
 - (A) no acts or omissions of an insured shall cancel or diminish coverage of any other insureds; and
 - (B) insurance will apply separately to each named insured, except with respect to the erosion of the specified limits of the insurer's liability.
 - (ii) Without limiting Section 24.2(g)(i), all endorsements adding additional named insureds to required Insurance Policies must:
 - (A) contain no limitations, conditions, restrictions, or exceptions to coverage other than those that apply to all other named insureds, including the first named insured, under the Insurance Policy; and
 - (B) state that the interests and protections of each named insured will not be affected by any misrepresentation, act, or omission of another named insured or any breach by another named insured of any provision in the policy which would otherwise result in forfeiture, reduction, or limitation of coverage.
- (h) **Waivers of Subrogation**
- (i) Each Insurance Policy shall include a clause or endorsement denying the insurer any rights of subrogation or recovery against MDOT and MDTA to the extent such rights have been waived by the insured before the occurrence of injury or loss.
 - (ii) The Phase Developer waives any rights of subrogation or recovery against MDOT and MDTA for injury or loss due to hazards covered or which should be covered by the Insurance Policies, to the extent of the injury or loss covered or to have been covered, and further, any deductible or retention will be deemed to be insurance coverage.
 - (iii) The Phase Developer shall require all Contractors and their respective insurance carriers to provide similar waivers in writing in accordance with this Section 24.2(h).

(i) **Support of Indemnification**

The insurance coverage the Phase Developer is required to provide under this Agreement will support but is not intended to limit the Phase Developer's indemnification obligations under this Agreement.

24.3 Notices

- (a) The Phase Developer shall provide MDOT with written notice of any claim in excess of \$100,000 made by the Phase Developer or any other party under any insurance obtained in connection with the Phase within 30 days of submitting the notice of claim to the insurer.

- (b) The Phase Developer shall provide MDOT with written notice of the cancellation of any Insurance Policy (due to non-payment of premium) at least 10 Business Days before cancellation, and include the date of such expiration.
- (c) The Phase Developer shall provide MDOT with written notice of the cancellation of any Insurance Policy (for any reason other than non-payment of premium) at least 30 days before cancellation, and include the date of such expiration.
- (d) Notices given under this Section 24.3, shall be by certified mail with return receipt requested, or by email with hard copy to follow.

25. **PHASE DEVELOPER DEFAULT AND REMEDIES**

25.1 **Phase Developer Default**

The occurrence of any of the following will constitute a **"Phase Developer Default"**:

- (a) the Phase Developer fails to promptly commence performance of the Predevelopment Work within 30 days of Phase South NTP being granted under Section 10.3 (Phase South NTP Contingent Upon NEPA Approval);
- (b) subject to Section 12.2(g) (Key Assumptions for Phase South A Prove to be Incorrect), the Phase Developer fails to submit a compliant Committed Section Proposal for a Section in Phase South A that is Financially Viable by the applicable Predevelopment Milestone Deadline (unless otherwise agreed by MDOT in writing under the terms of this Agreement);
- (c) the Phase Developer fails to achieve any other Predevelopment Milestone by the applicable Predevelopment Milestone Deadline, or, unless Section 11.9 (Failure to Achieve Financial Close under Section P3 Agreement Due to MDOT or MDTA) applies, any Section Developer fails to achieve Financial Close of its Section by the Financial Close Deadline for such Section;
- (d) the Phase Developer fails to pay an amount owing to a Contractor on the date due for such payment, except to the extent that the Phase Developer is disputing such payment in Good Faith;
- (e) a Prohibited Change in Ownership occurs;
- (f) the Phase Developer fails to comply with the restrictions regarding assignment and transfer under Article 31 (Assignment and Transfer; Fundamental Changes);
- (g) an Insolvency Event arises with respect to the Phase Developer;
- (h) an Insolvency Event arises with respect to a Key Participant, unless that Key Participant is replaced in accordance with Section 19.3 (Key Participants) within 60 days of the Insolvency Event arising;
- (i) any representation or warranty made by the Phase Developer in this Agreement or any certificate, schedule, report, instrument, or other document delivered to MDOT under this Agreement is false or materially misleading or inaccurate when made, or omits material information when made (except with respect to any projections made by the Phase Developer in any such certificate, report, instrument or other document);

- (j) the Phase Developer fails to comply with any Governmental Approval or Applicable Law in any material respect;
- (k) the Phase Developer fails to obtain, provide, and maintain the Insurance Policies or Performance Security;
- (l) a Section Developer Default has occurred under a Section P3 Agreement and has not been cured within the applicable cure period (if any) under the Section P3 Agreement;
- (m) the Abandonment of the Phase by the Phase Developer;
- (n) after exhaustion of all rights of appeal:
 - (i) there occurs any suspension or debarment (distinguished from ineligibility due to lack of financial qualifications), or there goes into effect an agreement for voluntary exclusion, of the Phase Developer, a Key Participant, or any affiliate of the Phase Developer (as "affiliate" is defined in 2 CFR §180.905 or successor regulation of similar import) from bidding, proposing, or contracting with any Federal or State department or agency, unless the Person that is subject to the suspension, debarment, or agreement for voluntary exclusion is a Key Participant and such Person is replaced in accordance with Section 19.3 (Key Participants) of this Agreement within 60 days of the suspension, debarment, or agreement for voluntary exclusion; or
 - (ii) the Phase Developer, a Key Participant, or any of their respective officers, directors, or Administering Employees have been convicted of, or plead guilty or nolo contendere to, a violation of Applicable Law for fraud, conspiracy, collusion, bribery, perjury, or material misrepresentation, as a result in whole or in part of activities relating to any project in the United States, and such failure continues without cure for a period of 90 days following the date MDOT delivers to the Phase Developer written notice thereof.

With respect to Section 25.1(n)(ii), if the offending Person is a Key Participant or an officer, director, or Administering Employee of a Key Participant, cure may be effected by the Phase Developer replacing the Key Participant in accordance with Section 19.3 (Key Participants) of this Agreement within the 90 day cure period referred to in Section 25.1(n)(ii);

- (o) the Phase Developer, its Key Personnel, or its Key Participants no longer hold any license or certificate that the Phase Developer, Key Personnel, or Key Participant is required to hold to perform the Predevelopment Work for which they were proposed to perform;
- (p) the Phase Developer fails to obtain MDOT approval prior to a change to a Key Personnel or Key Participant under Article 19 (Key Personnel and Contracting);
- (q) the Phase Developer fails to comply with the requirements in Section 19.8(a) (Compliance with State Non-Discrimination Law and Regulations), or Section 19.10 (Prevailing Wages for Predevelopment Work), or Section 19.11 (Sanctions Upon Improper Acts) applies;
- (r) the Phase Developer fails to comply with the DBE program requirements under Section 19.9(d)(v) (Disadvantaged Business Enterprises);

- (s) the Phase Developer fails to comply with the requirements of Article 14 (Section Viability);
- (t) the Phase Developer fails to negotiate in Good Faith in accordance with Section 11.1 (Development of Section P3 Agreement and Section Technical Provisions) to agree the form of the Section P3 Agreement (including the Section Technical Provisions), Section 11.11 (Development of Tolling Services Agreement) to agree the form of Tolling Services Agreement, or Section 11.12 (Development of MDTA Financing Documents) to agree the form of the MDTA Financing Documents; or
- (u) the Phase Developer breaches any other material obligation of the Agreement.

25.2 **Phase Developer Default Notice and Cure Periods**

- (a) MDOT may provide written notice ("**Phase Developer Default Notice**") to the Phase Developer upon the occurrence of a Phase Developer Default.
- (b) Upon receipt of a Phase Developer Default Notice, the Phase Developer shall have the following cure periods:
 - (i) for a Phase Developer Default under Section 25.1(u) (Material Breach):
 - (A) a period of 30 days after the Phase Developer receives the Phase Developer Default Notice; or
 - (B) if, despite the Phase Developer's commencement of meaningful steps to cure immediately after receiving the Phase Developer Default Notice, the Phase Developer Default cannot be cured within such 30 day period, the Phase Developer may request an additional period of time, up to a maximum cure period of 120 days, provided it has demonstrated to MDOT's reasonable satisfaction that such additional period is reasonably necessary to cure the Phase Developer Default under Section 25.1(u) (Material Breach);
 - (ii) for a Phase Developer Default under Section 25.1(a) (Commencement of Predevelopment Work), Section 25.1(i) (Representations and Warranties), Section 25.1(j) (Governmental Approvals), Section 25.1(m) (Abandonment), and Section 25.1(r) (DBE Compliance) a period of 30 days after the Phase Developer receives the Phase Developer Default Notice;
 - (iii) for a Phase Developer Default under Section 25.1(o) (Licenses and Certificates), 25.1(d) (Payment Default), Section 25.1(q) (Breach of Regulations), and Section 25.1(s) (Section Viability) a period of 15 days after the Phase Developer receives the Phase Developer Default Notice;
 - (iv) for a Phase Developer Default under Section 25.1(k) (Insurance Policies) and Section 25.1(p) (Key Personnel and Key Participants), a period of five Business Days after the Phase Developer receives the Phase Developer Default Notice; and
 - (v) for a Phase Developer Default under Section 25.1(b) (Committed Section Proposal), Section 25.1(c) (Predevelopment Milestones and Failure to Achieve Financial Close), Section 25.1(e) (Prohibited Change in Ownership), Section 25.1(f) (Assignment), Section 25.1(g) (Insolvency), Section 25.1(h) (Key Participant Insolvency), 25.1(l) (Default of Section P3 Agreement), Section

25.1(n) (Suspension and Debarment), and Section 25.1(t) (Good Faith) there is no cure period.

- (c) A Phase Developer Default under Section 25.1(i) (Representations and Warranties) will be regarded as cured when the adverse effects of such Phase Developer Default are cured.

25.3 Remedies for Phase Developer Default

Upon the occurrence of a Phase Developer Default, and expiration without cure of any applicable cure period under Section 25.2 (Phase Developer Notice and Cure Periods), MDOT may exercise the following rights without further notice and without waiving or releasing the Phase Developer from any obligations:

- (a) MDOT may terminate this Agreement under Section 26.2 (Termination for Phase Developer Default) and draw on the Performance Security;
- (b) MDOT may exercise its rights under Section 25.4 (MDOT Step-in Rights); and
- (c) MDOT may exercise all other rights and remedies provided by law or equity and such rights and remedies as are otherwise available under this Agreement.

25.4 MDOT Step-in Rights

- (a) If a Phase Developer Default (other than a Phase Developer Default under Section 25.1(l) (Section Developer Default) occurs, and the Phase Developer has not fully cured the Phase Developer Default by the expiration of the applicable cure period (if any), MDOT may perform all or any portion of the Phase Developer's obligations that are:
 - (i) the subject of the Phase Developer Default; or
 - (ii) the subject of any other existing breach for which the Phase Developer has received prior notice from MDOT, and that the Phase Developer is not using diligent efforts to cure.
- (b) The Phase Developer shall reimburse MDOT on demand for any costs that are incurred by MDOT in performing the Phase Developer's obligations under Section 25.4(a).

26. TERMINATION

26.1 Termination for Convenience

- (a) MDOT may, in its sole discretion, terminate this Agreement without cause at any time before the last day of the Term in accordance with Section 26.1(c).
- (b) If MDOT terminates a Section P3 Agreement for convenience prior to Financial Close of that Section P3 Agreement, MDOT shall terminate this Agreement for convenience under this Section 26.1, and, unless otherwise agreed by MDOT and the Phase Developer, MDOT shall terminate all other Section P3 Agreements that have not achieved Financial Close for convenience.
- (c) If MDOT wishes to terminate this Agreement under this Section 26.1, it shall deliver a Termination For Convenience Notice to the Phase Developer stating:

- (i) that MDOT is terminating this Agreement under this Section 26.1; and
 - (ii) that this Agreement will terminate on the date specified in the Termination For Convenience Notice.
- (d) If this Agreement is terminated under this Section 26.1, then:
- (i) MDOT shall pay the Phase Developer an amount equal to:
 - (A) subject to Section 26.1(e), the Allowed Costs incurred by the Phase Developer or any Section Developer that are directly attributable to any Section in Phase South and that have not previously been reimbursed and that are not recoverable under any Section P3 Agreement, up to the Predevelopment Cost Cap for Phase South; and
 - (B) subject to Section 26.1(f), the Allowed Costs incurred by the Phase Developer or any Section Developer that are directly attributable to any Section in Phase North and that have not previously been reimbursed and that are not recoverable under any Section P3 Agreement, up to the Predevelopment Cost Cap for Phase North;
 - (ii) the Phase Developer will be released from its obligation to pay any Development Rights Fees that are not already due and payable; and
 - (iii) MDOT shall return to the Phase Developer the Development Rights Fee Security and Performance Security.
- (e) The maximum aggregate amount payable under Section 26.1(d)(i)(A) and under all Section P3 Agreements relating to Sections in Phase South that have not achieved Financial Close and that are also terminated for convenience will be the Phase South Termination Cap.
- (f) The maximum aggregate amount payable under Section 26.1(d)(i)(B) and under all Section P3 Agreements relating to Sections in Phase North that have not achieved Financial Close and that are also terminated for convenience will be the Phase North Termination Cap.

26.2 Termination for Phase Developer Default

- (a) If a Phase Developer Default occurs and the Phase Developer Default has no cure period or has not been cured within the relevant cure period under Section 25.2 (Phase Developer Default Notice and Cure Periods) MDOT may terminate this Agreement by delivering a termination notice to the Phase Developer ("**MDOT Termination Notice**").
- (b) An MDOT Termination Notice:
 - (i) shall specify the Phase Developer Default that has occurred entitling MDOT to terminate the Agreement; and
 - (ii) will terminate the Agreement on the date the Phase Developer receives the MDOT Termination Notice.
- (c) If this Agreement is terminated in accordance with Section 26.2(a), the Phase Developer shall pay \$10 million to MDOT and acknowledges and agrees that this amount is in the

nature of liquidated damages (and not a penalty), represents a genuine and reasonable estimate of the loss that will be suffered by MDOT, and is fair and reasonable to compensate MDOT for losses it will suffer as a result of such termination, including:

- (i) additional costs of administering or re-administering the solicitation of the Phase and the P3 Program;
 - (ii) the cost of foregoing alternative opportunities and loss of potential best value to the general public;
 - (iii) delay to the delivery of the Phase and P3 Program, including loss of use, enjoyment, and benefit of the Phase for MDOT, MDTA, and the general public; and
 - (iv) injury to the credibility and reputation of MDOT and MDTA among policy makers and the general public.
- (d) If it is finally determined under the Dispute Resolution Procedures that MDOT was not entitled to terminate this Agreement under this Section 26.2, this Agreement will be deemed to have been terminated by MDOT for convenience under Section 26.1 (Termination for Convenience) and Sections 26.1(d) and 26.1(e) (Termination for Convenience) will apply.

26.3 Termination by Court Ruling

- (a) This Agreement will automatically terminate upon the occurrence of either of the following:
- (i) the issuance of a final, non-appealable order by a court of competent jurisdiction to the effect that this Agreement is void, unenforceable, or impossible to perform in its entirety; or
 - (ii) the issuance of a final, non-appealable order by a court of competent jurisdiction upholding the binding effect on the Phase Developer or MDOT of a change in law that causes impossibility of either performance of a fundamental obligation or exercise of a fundamental right by the Phase Developer or MDOT under this Agreement.
- (b) If this Agreement is terminated under Section 26.3(a)(i), and the Agreement is void, unenforceable, or impossible to perform by reason of the Phase Developer's acts, omissions, negligence, willful misconduct, fraud, or breach of warranty or representation, then the Agreement will be deemed to be terminated due to a Phase Developer Default under Section 26.2 (Termination for Phase Developer Default).
- (c) If this Agreement is terminated under Section 26.3(a) and Section 26.3(b) does not apply then:
- (i) MDOT shall pay the Phase Developer an amount equal to:
 - (A) subject to Section 26.3(d), the Allowed Costs incurred by the Phase Developer or any Section Developer that are directly attributable to any Section in Phase South and that have not previously been reimbursed and

that are not recoverable under any Section P3 Agreement, up to the Predevelopment Cost Cap for Phase South; and

- (B) subject to Section 26.3(e), the Allowed Costs incurred by the Phase Developer or any Section Developer that are directly attributable to any Section in Phase North and that have not previously been reimbursed and that are not recoverable under any Section P3 Agreement, up to the Predevelopment Cost Cap for Phase North;
- (ii) the Phase Developer will be released from its obligation to pay any Development Rights Fees that are not already due and payable; and
- (iii) MDOT shall return to the Phase Developer the Development Rights Fee Security and Performance Security.
- (d) The maximum aggregate amount payable under Section 26.3(c)(i)(A) and under all Section P3 Agreements relating to Sections in Phase South that have not achieved Financial Close and that are also terminated by court ruling will be the Phase South Termination Cap.
- (e) The maximum aggregate amount payable under Section 26.3(c)(i)(B) and under all Section P3 Agreements relating to Sections in Phase North that have not achieved Financial Close and that are also terminated by court ruling will be the Phase North Termination Cap.

26.4 **Termination for Failure to Agree Form of Agreements**

- (a) If despite MDOT and the Phase Developer negotiating in Good Faith, MDOT and the Phase Developer are unable to agree to:
 - (i) the form of the Section P3 Agreement (including the Section Technical Provisions) in accordance with Section 11.1 (Development of Section P3 Agreement and Section Technical Provisions);
 - (ii) the form of the Tolling Services Agreement in accordance with Section 11.11 (Development of Tolling Services Agreement); or
 - (iii) the form of the MDTA Financing Documents to which the Section Developer will be a party in accordance with Section 11.12 (Development of MDTA Financing Documents),in each case by the time MDOT and the Phase Developer are required to have agreed to the form of the Section P3 Agreement (including Section Technical Provisions) for the Section under Section 11.1(d) (Development of Section P3 Agreement and Section Technical Provisions), then either MDOT or the Phase Developer may, by delivering a written notice to the other, terminate this Agreement with immediate effect.
- (b) Subject to Section 26.4(c), if this Agreement is terminated in accordance with Section 26.4(a):
 - (i) the Phase Developer will not be entitled to any Allowed Costs not previously reimbursed;

- (ii) the Phase Developer will be released from its obligation to pay any Development Rights Fees that are not already due and payable; and
 - (iii) MDOT shall return to the Phase Developer the Development Rights Fee Security and Performance Security.
- (c) If the Phase Developer issues a notice to terminate this Agreement under Section 26.4(a) and MDOT believes that the Phase Developer failed to negotiate in Good Faith as required by Section 11.1 (Development of Section P3 Agreement and Section Technical Provisions), Section 11.11 (Development of Tolling Services Agreement), or Section 11.12 (Development of MDTA Financing Documents), then MDOT may refer the matter to Dispute resolution under Article 33 (Dispute Resolution). If it is finally determined that the Phase Developer negotiated in Good Faith and was entitled to terminate this Agreement under Section 26.4(a), then Section 26.4(b) will apply and MDOT shall return the Development Rights Fee Security and Performance Security to the Phase Developer within 15 days of that final determination. If it is determined that the Phase Developer was not entitled to terminate this Agreement under Section 26.4(a) because it failed to negotiate in Good Faith as required by Section 11.1 (Development of Section P3 Agreement and Section Technical Provisions), Section 11.11 (Development of Tolling Services Agreement), or Section 11.12 (Development of MDTA Financing Documents), then Section 26.4(b) will not apply and this Agreement will be deemed to have been terminated for a Phase Developer Default under Section 25.1(t) (Failure to Negotiate in Good Faith).

26.5 Termination for Loss of Financial Viability Caused by A Key Assumption That Is Incorrect

- (a) If Section 12.2(g) (Key Assumptions for Phase South A Prove to be Incorrect) applies, then either MDOT or the Phase Developer may, by delivering a written notice to the other, terminate this Agreement with immediate effect.
- (b) If this Agreement is terminated in accordance with Section 26.5(a):
 - (i) MDOT shall pay the Phase Developer an amount equal to the Phase Developer's Allowed Costs not previously reimbursed, up to the Phase South Termination Cap;
 - (ii) the Phase Developer will be released from its obligation to pay any Development Rights Fees that are not already due and payable; and
 - (iii) MDOT shall return to the Phase Developer the Development Rights Fee Security and Performance Security.

26.6 Exclusive Termination Rights

This Article 26 contains the entire and exclusive rights of MDOT and the Phase Developer to terminate this Agreement, and any and all other rights to terminate under Applicable Law are waived to the maximum extent permitted by Applicable Law.

27. **REDUCTION IN SCOPE OF THE AGREEMENT**

27.1 **NEPA Does Not Permit Priced Managed Lanes For Phase North**

- (a) MDOT shall, by notice to the Phase Developer, remove Phase North in its entirety from the scope of this Agreement if the NEPA approvals for Phase North do not permit Priced Managed Lanes in accordance with Section 10.4(c)(ii) (Phase North NTP Contingent Upon NEPA Approval).
- (b) If Phase North is removed from the scope of this Agreement under Section 27.1(a), MDOT shall pay the Phase Developer an amount in accordance with Section 10.4(c)(iv) (Phase North NTP Contingent Upon NEPA Approval).

27.2 **MDOT Right to Remove Phase North At Any Time For Convenience**

- (a) MDOT may, by notice to the Phase Developer, remove Phase North from the scope of this Agreement at any time for convenience prior to Commercial Close of the first Section of Phase North.
- (b) If Phase North is removed from the scope of this Agreement under Section 27.2(a):
 - (i) MDOT shall pay the Phase Developer an amount in accordance with Section 10.4(c)(iv) (Phase North NTP Contingent Upon NEPA Approval);
 - (ii) if applicable, MDOT shall pay the Phase Developer its Allowed Costs for performing work to determine the Financial Viability of a Section or Sections in Phase North, up to the applicable Viability Cost Cap in accordance with Article 14 (Section Viability); and
 - (iii) if applicable, MDOT shall pay the Phase Developer its Allowed Costs not previously reimbursed, that are directly attributable to the Predevelopment Work performed for each Section of Phase North for which Financial Viability has been established, up to the Phase North Termination Cap.

27.3 **Financial Viability of an Uncommitted Section**

- (a) If:
 - (i) Section 14(e) (Section Viability) applies; or
 - (ii) an Uncommitted Section is determined to be not Financially Viable under Section 14(h) (Section Viability),

MDOT shall, by notice to the Phase Developer, remove that Uncommitted Section and all other Uncommitted Sections from the scope of this Agreement.

- (b) If one or more Uncommitted Sections are removed from the scope of this Agreement under Section 27.3(a)(i) then MDOT shall pay the Phase Developer any costs under Section 10.2 (Environmental Process and NEPA Assistance).
- (c) If one or more Uncommitted Sections are removed from the scope of this Agreement under Section 27.3(a)(ii):

- (i) MDOT shall pay the Phase Developer its Allowed Costs for performing work to determine the Financial Viability of those Uncommitted Sections, up to the applicable Viability Cost Caps under Article 14 (Section Viability); and
- (ii) MDOT shall pay the Phase Developer any costs under Section 10.2 (Environmental Process and NEPA Assistance).

27.4 **MDTA Board Does Not Approve A Committed Section Proposal**

- (a) If the MDTA Board fails to approve a Committed Section Proposal for any Section (other than the First Section) that has been approved by MDOT within the time specified in Section 11.6 (MDTA Board Fail to Approve a Committed Section Proposal), MDOT shall (unless otherwise agreed by MDOT and the Phase Developer under Section 11.6(b) (MDTA Board Fail To Approve A Committed Section Proposal)), by notice to the Phase Developer, remove that Section and all other Sections that have not been submitted to MDOT under a Committed Section Proposal from the scope of this Agreement.
- (b) If one or more Sections are removed from the scope of this Agreement in accordance with Section 27.4(a):
 - (i) MDOT shall pay the Phase Developer an amount equal to:
 - (A) subject to Section 27.4(c), the Allowed Costs incurred by the Phase Developer or any Section Developer that are directly attributable to any Section in Phase South and that have not previously been reimbursed and that are not recoverable under any Section P3 Agreement, up to the Predevelopment Cost Cap for Phase South; and
 - (B) subject to Section 27.4(d), the Allowed Costs incurred by the Phase Developer or any Section Developer that are directly attributable to any Section in Phase North and that have not previously been reimbursed and that are not recoverable under any Section P3 Agreement, up to the Predevelopment Cost Cap for Phase North; and
 - (ii) the Phase Developer will be released from its obligation to pay any Development Rights Fees that are not already due and payable and MDOT shall return the Development Rights Fee Security to the Phase Developer.
- (c) The maximum aggregate amount payable under Section 27.4(b)(i)(A) for Phase South will be the Phase South Termination Cap.
- (d) The maximum aggregate amount payable under Section 27.4(b)(i)(B) for Phase North will be the Phase North Termination Cap.

27.5 **BPW Does Not Approve An Approved Section P3 Agreement**

- (a) If the BPW fails to approve a Section P3 Agreement for any Section (other than the First Section) that has been approved by MDOT within the time specified in Section 11.7 (BPW Fails to Approve Section P3 Agreement), MDOT shall (unless otherwise agreed by MDOT and the Phase Developer under Section 11.7(c) (BPW Fails to Approve Section P3 Agreement)), by notice to the Phase Developer, remove that Section and all other Sections that have not been submitted to MDOT under a Committed Section Proposal from the scope of this Agreement.

- (b) If one or more Sections are removed from the scope of this Agreement in accordance with Section 27.5(a):
 - (i) MDOT shall pay the Phase Developer an amount equal to:
 - (A) subject to Section 27.5(c), the Allowed Costs incurred by the Phase Developer or any Section Developer that are directly attributable to any Section in Phase South and that have not previously been reimbursed and that are not recoverable under any Section P3 Agreement, up to the Predevelopment Cost Cap for Phase South; and
 - (B) subject to Section 27.5(d), the Allowed Costs incurred by the Phase Developer or any Section Developer that are directly attributable to any Section in Phase North and that have not previously been reimbursed and that are not recoverable under any Section P3 Agreement, up to the Predevelopment Cost Cap for Phase North; and
 - (ii) the Phase Developer will be released from its obligation to pay any Development Rights Fees that are not already due and payable and MDOT shall return the Development Rights Fee Security to the Phase Developer.
- (c) The maximum aggregate amount payable under Section 27.5(b)(i)(A) for Phase South will be the Phase South Termination Cap.
- (d) The maximum aggregate amount payable under Section 27.5(b)(i)(B) for Phase North will be the Phase North Termination Cap.

27.6 Failure to Achieve Financial Close under a Section P3 Agreement Due to MDOT or MDTA

- (a) If Section 11.9 (Failure to Achieve Financial Close under Section P3 Agreement Due to MDOT or MDTA) applies, MDOT shall, by notice to the Phase Developer, remove that Section and all other Sections that have not been submitted to MDOT under a Committed Section Proposal from the scope of this Agreement.
- (b) If one or more Sections are removed from the scope of this Agreement in accordance with Section 27.6(a):
 - (i) MDOT shall pay the Phase Developer an amount equal to:
 - (A) subject to Section 27.6(c), the Allowed Costs incurred by the Phase Developer or any Section Developer that are directly attributable to any Section in Phase South and that have not previously been reimbursed and that are not recoverable under any Section P3 Agreement, up to the Predevelopment Cost Cap for Phase South; and
 - (B) subject to Section 27.6(d), the Allowed Costs incurred by the Phase Developer or any Section Developer that are directly attributable to any Section in Phase North and that have not previously been reimbursed and that are not recoverable under any Section P3 Agreement, up to the Predevelopment Cost Cap for Phase North; and

- (ii) the Phase Developer will be released from its obligation to pay any Development Rights Fees that are not already due and payable and MDOT shall return the Development Rights Fee Security to the Phase Developer.
- (c) The maximum aggregate amount payable under Section 27.6(b)(i)(A) and under all Section P3 Agreements relating to Sections in Phase South that are terminated for failure to achieve Financial Close will be the Phase South Termination Cap.
- (d) The maximum aggregate amount payable under Section 27.6(b)(i)(B) and under all Section P3 Agreements relating to Sections in Phase North that are terminated for failure to achieve Financial Close will be the Phase North Termination Cap.

28. RECORDS AND AUDIT

28.1 Maintenance and Inspection of Records

- (a) The Phase Developer shall:
 - (i) keep and maintain all its books, records, and documents relating to the Phase, the Phase Site or the Predevelopment Work, including copies of all original documents delivered to MDOT, in accordance with the applicable provisions of this Agreement and in accordance with Good Industry Practice; and
 - (ii) notify MDOT where such books, records, and documents are kept.
- (b) The Phase Developer shall make all of its books, records, and documents available for inspection by MDOT at all times during normal business hours, without charge. MDOT may conduct any such inspection upon two Business Days' prior written notice, or unannounced and without prior notice where there is Good Faith suspicion of fraud or criminal activity. When conducting any inspection, MDOT may make extracts and take notes.
- (c) The Phase Developer shall provide copies of its books, records, and documents to MDOT as and when reasonably requested by MDOT.
- (d) The Phase Developer shall:
 - (i) retain all of its books, records, and documents for five years following the end of the Term; and
 - (ii) retain all of its books, records, and documents it produces or receives regarding the Phase for five years following the end of the Term.

If any provision of this Agreement or Applicable Law specifies any longer time period for retention of particular records, such time period will prevail.

- (e) Despite Section 28.1(d), all records that relate to Disputes being processed or actions brought under the Dispute procedures must be retained and made available until any later date that such Disputes and actions are finally resolved.

28.2 Audits

- (a) In addition to any other specific audit rights that MDOT may have under this Agreement, MDOT will have such rights to review and audit the Phase Developer, its Contractors,

and their respective Books and Records as MDOT deems necessary for the purposes of verifying compliance with this Agreement, Applicable Law, and Governmental Approvals.

- (b) The Phase Developer represents and warrants the completeness and accuracy in all material respects of all information it or its agents provides in connection with any audit by MDOT, and shall use Reasonable Efforts to cause all Contractors to warrant the completeness and accuracy in all material respects of all information such Contractors provide in connection with such audits.
- (c) The Phase Developer shall (and shall ensure that any Contractor will) include appropriate terms in each Contract in order to provide MDOT with access and audit rights in accordance with the terms of this Article 28.
- (d) Nothing in this Agreement shall in any way limit the constitutional and statutory powers, duties, and rights of elected State officials, including the independent rights of the Maryland Legislative Auditor, in carrying out his or her legal authority. The Phase Developer understands and acknowledges that:
 - (i) the Maryland Legislative Auditor may conduct an audit or investigation of any entity receiving funds from the State directly under this Agreement or indirectly through a Contract;
 - (ii) any acceptance of funds directly under this Agreement or indirectly through a Contract acts as acceptance of the authority of the Maryland Legislative Auditor, under the direction of the legislative audit committee, to conduct an audit or investigation in connection with those funds; and
 - (iii) an entity that is the subject of an audit or investigation must provide the Maryland Legislative Auditor with access to any information such auditor considers relevant to the investigation or audit.

28.3 **Inquiries from the State Legislature**

The Phase Developer shall support MDOT in responding to any inquiries from the State legislature regarding the Phase, including by providing MDOT with any necessary information that MDOT requires to respond to those inquiries.

29. **INTELLECTUAL PROPERTY**

29.1 **Ownership of Work Product**

- (a) All Work Product which is prepared or procured by or on behalf of MDOT or MDTA or its contractors (other than the Phase Developer), whether before or after the Effective Date, will be and will remain the exclusive property of MDOT or MDTA, notwithstanding any copies of the Work Product provided to the Phase Developer.
- (b) Subject to Section 29.2 (Assignment of Work Product on Payment of Allowed Costs or Financial Close) and Section 29.3 (MDOT Option to Purchase Work Product) all Work Product prepared by or on behalf of the Phase Developer will remain exclusively the property of the Phase Developer, notwithstanding any copies of the Work Product provided to MDOT.

29.2 Assignment of Work Product on Payment of Allowed Costs or Financial Close

- (a) If this Agreement is terminated under Section 26.1 (Termination for Convenience), Section 26.3 (Termination by Court Ruling), or Section 26.5 (Termination for Loss of Financial Viability Caused by A Key Assumption That Is Incorrect), then with effect from the payment of the Allowed Costs that are payable under Section 26.1 (Termination for Convenience), Section 26.3 (Termination by Court Ruling), or Section 26.5 (Termination for Loss of Financial Viability Caused by A Key Assumption That Is Incorrect), with respect to such termination, the Phase Developer (on behalf of the Phase Developer and all Phase Developer-Related Entities) shall:
 - (i) irrevocably assign to MDOT all rights, title, and interest in and to all of the Phase Developer's Work Product other than:
 - (A) Proprietary Intellectual Property; and
 - (B) Work Product that has already been assigned to MDOT for a Section under the terms of this Agreement; and
 - (ii) deliver a copy of all of the Phase Developer's Work Product that is assigned to MDOT under Section 29.2(a)(i).
- (b) If a Section is removed from the scope of this Agreement under Article 27 (Reduction In Scope of the Agreement), then with effect from the payment of the Allowed Costs that are payable under Article 27 (Reduction In Scope of the Agreement) with respect to such removal, the Phase Developer (on behalf of the Phase Developer and all Phase Developer-Related Entities) shall:
 - (i) irrevocably assign to MDOT all rights, title, and interest in and to all of the Phase Developer's Work Product that relates to that Section (other than Proprietary Intellectual Property; and
 - (ii) deliver a copy of all of the Phase Developer's Work Product (other than Proprietary Intellectual Property) that relates to that Section.
- (c) Upon Financial Close of a Section, the Phase Developer (on behalf of the Phase Developer and all Phase Developer-Related Entities) shall:
 - (i) irrevocably assign to MDOT all rights, title, and interest in and to all of the Phase Developer's Work Product that relates to that Section (other than Proprietary Intellectual Property); and
 - (ii) deliver a copy of all the Phase Developer's Work Product (other than Proprietary Intellectual Property) that relates to that Section.

29.3 MDOT Option to Purchase Work Product

- (a) If this Agreement is terminated under Section 26.2 (Termination for Phase Developer Default), or Section 26.4 (Termination for Failure to Agree Form of Agreements) the Phase Developer grants to MDOT an irrevocable option to purchase all of the Phase Developer's Work Product other than:
 - (i) Proprietary Intellectual Property; and

- (ii) Work Product that has already been assigned to MDOT under the terms of this Agreement.
- (b) MDOT may exercise the option under Section 29.3(a) by delivering written notice to the Phase Developer at the same time as, or within 30 days of, issuing the MDOT Termination Notice.
- (c) If MDOT exercises its option under Section 29.3(a):
 - (i) MDOT shall pay to the Phase Developer an amount equal to the Phase Developer's Allowed Costs not previously reimbursed, up to a maximum amount of \$500,000 (regardless of the value of the Work Product that is being transferred to MDOT); and
 - (ii) with effect from the payment under Section 29.3(a), the Phase Developer (on behalf of the Phase Developer and all Phase Developer-Related Entities) shall:
 - (A) irrevocably assign to MDOT all rights, title, and interest in and to all of the Phase Developer's Work Product (other than Proprietary Intellectual Property); and
 - (B) deliver a copy of all the Phase Developer's Work Product (other than Proprietary Intellectual Property).

29.4 **Phase Developer Non-Proprietary Intellectual Property**

- (a) The Phase Developer (on behalf of itself and each Phase Developer-Related Entity) hereby grants to MDOT and MDTA a nonexclusive, sublicensable, transferrable (subject to Section 29.4(b)), royalty-free, irrevocable, worldwide, fully paid up license under the Intellectual Property of the Phase Developer and all Phase Developer-Related Entities (excluding Proprietary Intellectual Property) to use, reproduce, modify, adapt, disclose, and sublicense the same to other Persons engaged by or on behalf of MDOT and MDTA (directly or indirectly) solely in connection with the Phase during the Term.
- (b) The right of MDOT and MDTA to transfer the license under Section 29.4(a) will be limited to any Governmental Entity that succeeds to the power and authority of MDOT or MDTA generally or with respect to the whole or part of the Phase.

29.5 **Phase Developer Proprietary Intellectual Property**

- (a) All Proprietary Intellectual Property will remain exclusively the property of the Phase Developer or Phase Developer-Related Entity.
- (b) The Phase Developer (on behalf of itself and each Phase Developer-Related Entity) hereby grants to MDOT and MDTA a nonexclusive, sublicensable, transferrable (subject to Section 29.5(c)), royalty-free, irrevocable, worldwide, fully paid up license under the Proprietary Intellectual Property to use, reproduce, modify, adapt, disclose, and sublicense the same to other Persons engaged by or on behalf of MDOT and MDTA (directly or in directly) solely:
 - (i) in connection with the Predevelopment Work during the Term; and

- (ii) to the extent necessary for MDOT to use any Work Product assigned to MDOT under Section 29.2 (Assignment of Work Product on Payment of Allowed Costs or Financial Close), and Section 29.3 (MDOT Option to Purchase Work Product).
- (c) The right of MDOT and MDTA to transfer the license under Section 29.5(b) will be limited to any Governmental Entity that succeeds to the power and authority of MDOT or MDTA generally or with respect to the whole or part of the Phase.
- (d) MDOT and MDTA may not sell any Proprietary Intellectual Property or, subject to Section 29.5(b), use, reproduce, modify, adapt, or disclose, or allow any party to use, reproduce, modify, adapt, or disclose, any Proprietary Intellectual Property for any purpose other than as described in Section 29.5(b).
- (e) The Phase Developer grants MDOT and MDTA the right, and will cause each Phase Developer-Related Entity to grant MDOT and MDTA the right, to purchase a perpetual, nonexclusive, sublicensable, transferable (subject to Section 29.5(c)), irrevocable, worldwide, fully paid up license to use the Proprietary Intellectual Property on other roads (tolled or un-tolled) owned and operated by MDOT, MDTA, or any other State agency on commercially reasonable terms.

29.6 Further assurance

The Phase Developer shall execute, and shall cause the Phase Developer-Related Entities to execute, such further documents and to do such further acts as may be necessary or reasonably required by MDOT to perfect, register, or enforce MDOT and MDTA's ownership or rights of any Work Product that is to be assigned or licensed to MDOT under this Article 29 (Intellectual Property).

29.7 State Intellectual Property

- (a) All State Intellectual Property will remain exclusively the property of MDOT or MDTA.
- (b) MDOT hereby grants to the Phase Developer a revocable, non-exclusive, non-transferable, non-sub-licensable (without MDOT's prior written consent) license to use the State Intellectual Property, solely in connection with the performance of the Predevelopment Work during the Term. This license will automatically terminate upon the expiration or early termination of this Agreement.
- (c) The Phase Developer may not sell any State Intellectual Property, or subject to Section 29.7(b), use, reproduce, modify, adapt, or disclose, or allow any party to use, reproduce, modify, adapt, or disclose, any State Intellectual Property for any purpose other than the performance of the Predevelopment Work for the Term.
- (d) If the Phase Developer or any Phase Developer-Related Entity creates or develops any improvements, modifications, enhancements, or derivative works to or of the State Intellectual Property, the Phase Developer shall promptly notify MDOT in writing and provide to MDOT all data, sketches, charts, calculations, plans, drawings, layouts, depictions, specifications, manuals, electronic files, artwork, correspondence and other documents, information and other work product, and other related materials that disclose such State Intellectual Property related to such improvements, modifications, enhancements, or derivative works. Any and all such improvements, modifications, enhancements, or derivative works created or developed by the Phase Developer or any

Phase Developer-Related Entity are, and will be deemed, State Intellectual Property under this Agreement.

30. **PUBLIC INFORMATION AND RECORDS**

- (a) The Phase Developer acknowledges and agrees that all submittals, records, documents, drawings, plans, specifications and other materials in MDOT's or MDTA's possession, including any Books and Records submitted by the Phase Developer to MDOT or MDTA, may be considered public records subject to inspection under the Maryland Public Information Act, Title 4 of the General Provisions Article of the Annotated Code of Maryland ("**PIA**").
- (b) The Phase Developer may designate conspicuously any documents that it believes contain trade secrets, confidential commercial information, confidential financial information or any other information that would be exempted from inspection in response to an application to inspect public records under the PIA by placing "CONFIDENTIAL" in the header or footer of such page or record affected. Any such designation shall be accompanied by a concise statement of reasons supporting the claim including the specific law that authorizes the exemption from inspection under the PIA.
- (c) If an application is made under the PIA or other Applicable Law to inspect Books and Records that have been designated by the Phase Developer as "CONFIDENTIAL", MDOT or MDTA may notify the Phase Developer of the application. If so notified, the Phase Developer shall notify MDOT whether it consents to the disclosure or asserts a basis for non-disclosure and claimed exception under the PIA or other Applicable Law within the time period specified in the notice issued by MDOT or MDTA (if any) and before the deadlines for disclosure under the PIA and other Applicable Law.
- (d) The Phase Developer acknowledges and agrees that:
 - (i) MDOT and MDTA will not be liable for any failure to notify the Phase Developer of an application to inspect Books and Records under Section 30(c);
 - (ii) MDOT and MDTA will have no responsibility or liability for any failure of the Phase Developer to respond or to respond timely to any notification by MDOT or MDTA under Section 30(c) and MDOT and MDTA will not be required to wait for a response before making a disclosure or otherwise taking action under the PIA or other Applicable Law;
 - (iii) MDOT and MDTA will not be obligated to adopt or support any assertion by the Phase Developer under Section 30(c) as to the basis for non-disclosure and claimed exception under the PIA or other Applicable Law; and
 - (iv) MDOT and MDTA will not be responsible and will have no liability to the Phase Developer or any other party as a result of disclosing any Books and Records, including Books and Records marked "CONFIDENTIAL", in response to an application for inspection under the PIA or other Applicable Law.
- (e) Nothing contained in this Article 30 will be taken to modify or amend requirements and obligations imposed on MDOT or MDTA by the PIA or other Applicable Law. If there is any conflict between the provisions of the PIA or other Applicable Laws and this Agreement, the provisions of the PIA, or other Applicable Laws will control to the extent of that conflict.

- (f) MDOT and MDTA will not advise the Phase Developer as to the nature or content of documents entitled to protection from disclosure under the PIA or other Applicable Law, or as to the interpretation of such laws. The Phase Developer shall contact its own legal counsel concerning the effect of Applicable Law to the Phase Developer's Books and Records and actions to be taken to preserve confidentiality.
- (g) In any proceedings or litigation concerning the disclosure of any Books and Records to third parties, MDOT and MDTA's sole involvement will be as stakeholders retaining the material until otherwise ordered by a court or other authority having jurisdiction, unless MDOT or MDTA decides to intervene or participate in the litigation in such manner as it deems necessary or desirable. The Phase Developer will be responsible for prosecuting or defending any such proceedings or litigation, acting on its own behalf, at its sole expense and risk.
- (h) The Phase Developer shall indemnify and hold harmless the Indemnified Parties from and against any and all claims, causes of action, suits, legal or administrative proceedings, damages, losses, liabilities, response costs, costs and expenses, including any injury to or death of persons or damage to or loss of property (including damage to utility facilities), and including attorneys' and expert witness fees and costs, arising out of, relating to, or resulting from MDOT or MDTA's refusal to disclose any material that the Phase Developer has designated as containing trade secrets, confidential commercial information, confidential financial information or any other information that would be exempted from inspection in response to an application to inspect public records under the PIA.

31. **ASSIGNMENT AND TRANSFER; FUNDAMENTAL CHANGES**

31.1 **Assignment by the Phase Developer**

The Phase Developer shall not assign, transfer, pledge, mortgage, or otherwise encumber any of its rights or obligations under this Agreement without the prior written consent of MDOT and MDTA. It is acknowledged that under certain circumstances the approval of BPW may also be required.

31.2 **Assignment by MDOT or MDTA**

MDOT or MDTA may, upon the prior written notice to the Phase Developer, but without the Phase Developer's consent, transfer and assign all or any portion of its rights, title and interests in and to this Agreement, the Phase, the Phase Site, the Development Rights Fee, and the Performance Security to any Governmental Entity that:

- (a) succeeds to the governmental powers and authority of MDOT or MDTA; and
- (b) if the assigning party is MDOT, has sources of funding to perform the payment obligations of MDOT under this Agreement that are at least as adequate and secure as MDOT's at the time of the assignment.

31.3 **Change of Organization or Name**

- (a) The Phase Developer shall not change the legal form of its organization without providing prior written notice to MDOT.

- (b) If the Phase Developer changes its name, the Phase Developer shall promptly (and in any event within 10 Business Days of such change) provide MDOT and MDTA with written notice of such name change and appropriate supporting documentation.

32. **CHANGE IN OWNERSHIP OF PHASE DEVELOPER**

32.1 **Compliance with the Act**

The Phase Developer shall provide all information and complete all actions required by MDOT or MDTA to enable MDOT and MDTA to comply with the Act in connection with any proposed Change in Ownership.

32.2 **Pre-Approved Changes in Ownership**

- (a) The Parties acknowledge that, without prejudice to the other provisions under this Article 32 regarding notices and approval from MDOT or MDTA, Changes in Ownership of the type specified in Section 32.2(b) have been pre-approved by the Board of Public Works for the purposes of §10A-202(e) of the State Finance and Procurement Article of the Annotated Code of Maryland.
- (b) **"Pre-Approved Change in Ownership"** means each of the following:
 - (i) a bona fide upstream business reorganization, consolidation, or other transfer in equity of a parent entity with an interest in the Phase Developer where the transferor and transferee are under the same ultimate parent organization with ultimate power to direct or control or cause the direction or control of the management of the Phase Developer and so long as there occurs no change in such entity as part of such reorganization, consolidation, or other transfer in equity;
 - (ii) a transfer of interests:
 - (A) between managed funds that are under common ownership or control; or
 - (B) between the general partner, manager, or the parent company of such general partner or manager, and any managed funds under common ownership or control with such general partner or manager (or parent company of such general partner or manager),so long as there occurs no change in the entity or entities with ultimate power to direct or control, or cause the direction or control, of the management of the Phase Developer;
 - (iii) a Change in Ownership due solely to bona fide open market transactions in securities effected on a recognized public stock exchange, including transactions involving an initial public offering; and
 - (iv) the exercise of minority veto or minority voting rights that are exercised under Applicable Law, or that are exercised under the Phase Developer's organizational documents (or under related member, shareholder, or similar agreements (where MDOT has received copies of such agreements)).

32.3 Restrictions on Change in Ownership

- (a) Except for any Changes in Ownership described in Section 32.2(b)(iii) (Pre-Approved Changes in Ownership), the Phase Developer shall not voluntarily or involuntarily effect or allow any Change in Ownership unless the requirements in Section 32.3(a)(i) or Section 32.3(a)(ii) below have been satisfied:
 - (i) if the Change in Ownership is subject to §10A-202 of the State Finance and Procurement Article of the Annotated Code of Maryland:
 - (A) the Change in Ownership has been approved in writing by MDOT (in its absolute discretion) in accordance with Section 32.5 (MDOT Approval), and complies with any conditions that may be imposed by MDOT in connection with that approval; and
 - (B) the requirements of Section 32.6 (Changes in Ownership that are Subject to the Act) have been satisfied; or
 - (ii) if the Change in Ownership is not subject to §10A-202 of the State Finance and Procurement Article of the Annotated Code of Maryland, the Change in Ownership has been approved in writing by MDOT (in its absolute discretion), in accordance with Section 32.5 (MDOT Approval), and complies with any conditions that may be imposed by MDOT in connection with that approval.
- (b) Notwithstanding any other provision of this Agreement to the contrary, any Change in Ownership that does not change the percentage of the issued share capital or membership interests in the Phase Developer owned (directly or indirectly) by each PD Equity Member:
 - (i) will not constitute a change in the ownership composition of the Phase Developer for the purposes of §10A-202(e) of the State Finance and Procurement Article of the Annotated Code of Maryland; and
 - (ii) will not be subject to the approval by MDOT under Section 32.5 (MDOT Approval).

32.4 Notifications of Proposed Changes in Ownership

- (a) The Phase Developer shall provide MDOT with:
 - (i) at least 45 days' prior written notice of any proposed Change in Ownership that is not subject to §10A-202 of the State Finance and Procurement Article of the Annotated Code of Maryland; and
 - (ii) at least 90 days' prior written notice of any proposed Change in Ownership that is subject to §10A-202 of the State Finance and Procurement Article of the Annotated Code of Maryland.
- (b) Each Notice of Proposed Change in Ownership must:
 - (i) identify whether or not the Change in Ownership is subject to §10A-202 of the State Finance and Procurement Article of the Annotated Code of Maryland and attach all supporting information necessary to demonstrate whether or not the

Change in Ownership is subject to §10A-202 of the State Finance and Procurement Article of the Annotated Code of Maryland;

- (ii) identify whether the proposed Change in Ownership is a Pre-Approved Change in Ownership and, if applicable, attach all supporting information necessary to demonstrate that it is a Pre-Approved Change in Ownership; and
- (iii) provide any information that MDOT may reasonably require in connection with its approval under Section 32.5 (MDOT Approval).
- (c) For any proposed Change in Ownership that is subject to §10A-202 of the State Finance and Procurement Article of the Annotated Code of Maryland and that is not a Pre-Approved Change in Ownership, the Phase Developer shall provide to MDOT, promptly upon request, all information and documentation as the Board of Public Works and MDOT may request in connection with the Board of Public Works determination of whether to approve such Change in Ownership.
- (d) Except for any Changes in Ownership described in Section 32.2(b)(iii) (Pre-Approved Changes in Ownership), the Phase Developer shall notify MDOT in writing that a Change in Ownership has been completed no later than 10 Business Days after it has been completed.

32.5 MDOT Approval

- (a) Within 30 days of receiving a complete Notice of Proposed Change in Ownership, MDOT shall notify the Phase Developer whether or not MDOT approves of the proposed Change in Ownership including, where applicable, whether MDOT and MDTA have made a responsibility determination under the Act in accordance with Section 32.5(d).
- (b) MDOT may approve (and include any conditions to its approval) or withhold its approval to the proposed Change in Ownership under Section 32.5(a) in its absolute discretion.
- (c) The Phase Developer acknowledges that if the proposed Change in Ownership is subject to §10A-202 of the State Finance and Procurement Article of the Annotated Code of Maryland:
 - (i) MDOT may approve the proposed Change in Ownership only if MDOT and MDTA have made a responsibility determination under §10A-202(e) of the State Finance and Procurement Article of the Annotated Code of Maryland; and
 - (ii) MDOT's approval of the proposed Change in Ownership will be subject to Section 32.6 (Changes in Ownership that are Subject to the Act).
- (d) In the case of any proposed Change in Ownership that is subject to §10A-202 of the State Finance and Procurement Article of the Annotated Code of Maryland, MDOT will not approve the proposed Change in Ownership unless MDOT and MDTA make a responsibility determination under §10A-202(e) of the State Finance and Procurement Article of the Annotated Code of Maryland.

32.6 **Changes in Ownership that are Subject to the Act**

- (a) The Phase Developer acknowledges and agrees that for any proposed Change in Ownership that is subject to §10A-202 of the State Finance and Procurement Article of the Annotated Code of Maryland:
 - (i) MDOT and MDTA are required to provide 45 days' advance notice of the proposed Change in Ownership to the Senate Budget and Taxation Committee, the House Committee on Ways and Means and the House Appropriations Committee; and
 - (ii) such Change in Ownership may not be effected unless:
 - (A) MDOT and MDTA have made a responsibility determination under the State Finance and Procurement Article of the Annotated Code of Maryland;
 - (B) the 45-day notice period referred to in Section 32.6(a)(i) has expired; and
 - (C) the Board of Public Works has approved the Change in Ownership.
- (b) If the Phase Developer delivers a complete Notice of Proposed Change in Ownership that is subject to §10A-202 of the State Finance and Procurement Article of the Annotated Code of Maryland the following will apply:
 - (i) if MDOT notifies the Phase Developer that it has not approved the proposed Change in Ownership under Section 32.5 (MDOT Approval), the Phase Developer shall ensure that the Change in Ownership does not take effect and MDOT will not be required to notify the Senate Budget and Taxation Committee, the House Committee on Ways and Means, the House Appropriations Committee, or the Board of Public Works of the proposed Change in Ownership; or
 - (ii) if MDOT notifies the Phase Developer that MDOT and MDTA have made a responsibility determination and that MDOT has approved the proposed Change in Ownership under Section 32.5 (MDOT Approval), MDOT will notify the Senate Budget and Taxation Committee, the House Committee on Ways and Means, and the House Appropriations Committee of the proposed Change in Ownership (in order to start the 45 day advance notice period under the Act) and, except in the case of a Pre-Approved Change in Ownership, will submit the proposed Change in Ownership to the Board of Public Works for approval; and
 - (iii) upon the Board of Public Works determining whether to approve or reject the proposed Change in Ownership, MDOT will notify the Phase Developer of that determination.

32.7 **Costs**

The Phase Developer shall reimburse MDOT and MDTA for all reasonable out-of-pocket expenses (including reasonable and proper fees of consultants and legal counsel) incurred by MDOT and MDTA in connection with their review of any proposed Change in Ownership within 30 days of receiving an invoice from MDOT or MDTA with respect to their respective costs.

33. **DISPUTE RESOLUTION**

33.1 **Consultation and Initial Decision of Contract Manager**

- (a) Disputes shall follow the Dispute Resolution Procedures set forth in this Article 33 (Dispute Resolution).
- (b) The Contract Manager and the Phase Developer Representative shall first consult in Good Faith in an attempt to promptly resolve the Dispute.
- (c) As part of their Good Faith consultation, the Contract Manager and the Phase Developer Representative may agree to confer with the Steering Committee to assist in resolving the Dispute.
- (d) If after 30 days of a Dispute being referred to the Dispute Resolution Procedures the Dispute is not resolved by the Parties through the means set forth in Section 33.1(b) and Section 33.1(c), then, the Contract Manager shall issue a written decision to the Phase Developer regarding the Dispute ("**Initial Decision**") within 15 days.
- (e) The Initial Decision will be provided to the Phase Developer by email, with a hard copy delivered by certified mail, return receipt requested, or by any other method that provides evidence of receipt.

33.2 **Appeal of Initial Decision**

- (a) The MDOT Secretary may delegate the responsibilities under this Section 33.2 to a designee.
- (b) The Phase Developer may appeal an Initial Decision by submitting a written notice of appeal ("**Notice of Appeal**") to the MDOT Secretary (or designee), with a copy to the Contract Manager, within 15 days of receiving notice of the Initial Decision.
- (c) If the Phase Developer does not file a Notice of Appeal within 15 days of receiving the Initial Decision, the Phase Developer will be deemed to have accepted the Initial Decision and will have irrevocably waived and released any Claim with respect to the matter that is the subject of the Dispute and any Notice of Appeal filed after the 15 day period will be dismissed.
- (d) A Notice of Appeal must include:
 - (i) an explanation of the Dispute, including relevant facts and reference to all relevant contract provisions;
 - (ii) all pertinent data and correspondence relating to the Dispute;
 - (iii) a copy of the Initial Decision; and
 - (iv) a simple, concise and direct statement of the basis of the appeal (including the amount of the Claim or relief requested and all supporting documentation).
- (e) Within 30 days of receiving a Notice of Appeal, the MDOT Secretary (or designee) may request that the Phase Developer produce additional material, including documents, books, or other tangible records or information, in support of the Notice of Appeal. Within 15 days after receipt of such a request, the Phase Developer shall produce the additional

material and information requested or identify grounds for not producing the information or documents.

- (f) The Phase Developer and the Contract Manager will be afforded an opportunity to be heard and to offer evidence in support of their respective positions regarding the Dispute. Within 45 days of receiving a Notice of Appeal, or if Section 33.2(e) applies, within 30 days of receiving all additional information requested under Section 33.2(e), the MDOT Secretary (or designee) will determine and notify the Phase Developer and Contract Manager of the procedural rules (and timings) for any hearing and for written submissions (the "**Procedural Rules**"). The Procedural Rules shall provide for the last day of any hearings and receipt of last written submissions to be no later than 6 months after the date of the Procedural Rules.
- (g) The hearing before the MDOT Secretary (or designee) shall be recorded and transcribed.
- (h) The MDOT Secretary (or designee) will make a record of all matters relating to the appeal, including:
 - (i) the nature of the Dispute;
 - (ii) the Initial Decision;
 - (iii) all documentary evidence received by the MDOT Secretary (or designee);
 - (iv) the written transcript, if any, of a hearing;
 - (v) the final decision of the MDOT Secretary (or designee); and
 - (vi) any other documentation in the custody of MDOT relevant to the appeal.
- (i) The MDOT Secretary (or designee) will issue a written decision to the Phase Developer and Contract Manager within 60 days from the last date of the hearing, or receipt of the last written submission, whichever is later.
- (j) The decision by the MDOT Secretary (or designee) will be deemed the final decision of MDOT and is a prerequisite to any petition for judicial review filed in court of any Dispute by the Phase Developer against MDOT or MDTA. Within 30 days after receipt of the final decision of the MDOT Secretary (or designee), the Phase Developer may seek judicial review in any court of competent jurisdiction in the State.
- (k) To the extent provided by Applicable Law, a Party may seek specific performance of any obligation under this Agreement or injunctive relief.

34. **LIABILITIES**

34.1 **Consequential Losses**

- (a) Except as otherwise expressly provided in this Agreement, no Party will have the right to claim damages, including punitive and incidental damages, against another Party for a breach of this Agreement, in tort, or on any other basis whatsoever, to the extent that any loss claimed by a Party is for Indirect Losses.
- (b) The Parties agree that the limitation in Section 34.1(a) will not apply to or limit a Party's right to recover from another Party:

- (i) any Losses (excluding defense costs) to the extent that they are either covered by the proceeds of insurance carried by the relevant Party or are required to be insured against under Article 24 (Insurance), or to the extent the Phase Developer is deemed to have self-insured the Loss under Article 24 (Insurance);
- (ii) Losses arising out of fraud, criminal conduct, willful misconduct, gross negligence, or bad faith on the part of the relevant Party;
- (iii) amounts payable by the Phase Developer to MDOT or MDTA under an indemnity in this Agreement; or
- (iv) interest, late charges, fees, transaction fees and charges, penalties, and similar charges that this Agreement expressly states are due from the relevant Party.

34.2 No Double Recovery

Despite any other provisions of this Agreement to the contrary, no Party will be entitled to recover compensation or make a claim under this Agreement with respect to any Loss that it has incurred to the extent that it has already been compensated with respect to that Loss under this Agreement or otherwise.

35. GOVERNING LAW AND JURISDICTION

35.1 Governing Law

This Agreement will be governed by and construed in accordance with the laws of the State of Maryland.

35.2 Submission to Jurisdiction

The Phase Developer consents to the jurisdiction of any court in the State of Maryland, waiving any claim or defense that such forum is not convenient or proper. The Phase Developer agrees that any such court shall have *in personam* jurisdiction over it, and consents to service of process in any manner authorized by Applicable Law.

35.3 Waiver of Jury Trial

The parties 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 this agreement and does not apply to third party claims or suits by or on behalf of the parties for phase property. Each of the Parties (a) 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 (b) acknowledge that it has been induced to enter into this Agreement by, among other things, the mutual waivers and certifications in this Section 35.3.

36. **OTHER**

36.1 **Amendments**

This Agreement can only be amended or replaced by a written instrument duly executed by the Parties.

36.2 **Waiver**

- (a) No waiver of any obligation, term, condition, or other provision of this Agreement will be valid unless in writing and signed by the waiving Party.
- (b) No Party's waiver of any breach or failure to enforce any of the obligations, terms, conditions, or other provisions of this Agreement at any time will in any way limit or waive that Party's right to subsequently enforce, or compel strict compliance with every obligation, term, condition, or other provision of this Agreement, despite any course of dealing or custom of the trade (other than the waived breach or failure in accordance with the terms of such waiver).
- (c) If the Parties make and implement any interpretation of this Agreement without documenting such interpretation by an instrument in writing signed by all Parties, such interpretation and implementation will not be binding in the event of any future Disputes.

36.3 **Independent Contractor; No Agent, Joint Venture, or Partnership**

- (a) The Phase Developer is an independent contractor, and nothing contained in this Agreement will be construed as constituting any relationship with MDOT or MDTA other than that of developer of the Phase and independent contractor.
- (b) The Parties agree that:
 - (i) nothing in this Agreement is intended or will be construed to create any partnership, joint venture, agency, landlord-tenant, lessor-lessee of real property, optionor-optionee, vendor-purchaser, mortgagor-mortgagee, or similar relationship between MDOT, MDTA, and the Phase Developer; and
 - (ii) in no event will any Party take a position in any tax return, insurance application or questionnaire, financial statement, financial report, regulatory filing, securities filing, loan document, or other writing of any kind that any such relationship exists.
- (c) While the term "public-private partnership" may be used on occasion to refer to contractual relationships of the type created by this Agreement, the Parties do not express any intention to form or hold themselves out in law or in practice as a partnership, joint venture, or similar relationship, to share net profits or net losses, or to give MDOT or MDTA control or joint control over the Phase Developer's financial decisions or discretionary actions concerning the Phase and the Predevelopment Work.
- (d) In no event will the relationship between MDOT, MDTA, and the Phase Developer be construed as creating any relationship whatsoever between MDOT or MDTA and the Phase Developer's employees.
- (e) Neither the Phase Developer nor any of its employees is or shall be deemed to be an employee of MDOT or MDTA.

- (f) Except as otherwise expressly provided in this Agreement, the Phase Developer has sole authority and responsibility to employ, discharge, and otherwise control its employees and has complete and sole responsibility as a principal for its agents, for all Contractors and for all other Persons that the Phase Developer or any Contractor hires to perform or assist in performing the Predevelopment Work.

36.4 **No Personal Liability**

No officer, agent, representative, or employee of MDOT or any MDOT-Related Entity will be personally liable under any provision of this Agreement, or because of the execution or attempted execution of this Agreement, or because of any breach of this Agreement.

36.5 **Taxes**

The Phase Developer is solely responsible for the payment of taxes accrued or arising out of the performance of its obligations under this Agreement.

36.6 **Successors and Assigns**

This Agreement is binding upon and will inure to the benefit of MDOT, MDTA, and the Phase Developer and their respective successors and permitted assigns.

36.7 **Survival**

All provisions which by their inherent character should survive expiration or early termination of this Agreement, will survive the expiration or early termination of this Agreement, including Article 6 (Representations and Warranties); Article 23 (Indemnity) and any other indemnities in this Agreement; the express obligations of the Parties following the date of termination; any obligations to pay amounts under this Agreement; Article 28 (Records and Audit); Article 29 (Intellectual Property); Article 33 (Dispute Resolution); and this Article 36.

36.8 **Limitation on Third Party Beneficiaries**

Nothing contained in this Agreement is intended or will be construed as creating or conferring any rights, benefits, or remedies upon, or creating any obligations of the Parties toward, any Person not a party to this Agreement, except rights expressly contained in this Agreement.

36.9 **Notices and Communications**

- (a) Notices under this Agreement must be in writing and:
 - (i) delivered personally;
 - (ii) sent by certified mail, return receipt requested;
 - (iii) sent by a recognized overnight mail or courier service, with delivery receipt requested; or
 - (iv) sent by email communication followed by a hard copy.
- (b) Notices under Section 36.9(a) shall be sent to the following addresses (or to such other address as may from time to time be specified in writing by such Person):
 - (i) If to the Phase Developer:

[●]

Attn: []

Tel: []

Email: []

(ii) If to MDOT:

[●]

Attn: I-495 & I-270 P3 Program Director

Tel: []

Email: []

- (c) Any notice sent personally will be deemed delivered upon receipt, if sent by mail or courier service will be deemed delivered on the date of receipt or on the date receipt at the appropriate address is refused, as shown on the records of the US Postal Service, courier service, or other Person making the delivery, and if sent by email communication will be deemed delivered on the date of receipt as shown on the received email transmission (provided the hard copy is also delivered under Section 36.9(a)). All notices (including by email communication) delivered after **4:00 p.m. Baltimore time** will be deemed delivered on the first Business Day following delivery.

36.10 **Integration of this Agreement**

The Parties agree and expressly intend that this Agreement (including all Exhibits) constitute a single, integrated agreement whose terms are interdependent and non-divisible, such that, among other things, no part of this Agreement could be separated from any other part for the purposes of assumption or rejection under §365 of Title 11 of the United States Bankruptcy Code.

36.11 **Entire Agreement**

This Agreement contains the entire understanding of the Parties with respect to the subject matter of this Agreement and supersedes all prior agreements, understandings, statements, representations, and negotiations between the Parties with respect to their subject matter.

36.12 **Severability**

- (a) If any section, provision, Article, or part of this Agreement is ruled invalid (including due to a change in law) by a court having proper jurisdiction, the Parties shall:
- (i) promptly (and in any event within 10 Business Days) after such ruling, meet and negotiate a substitute for such section, provision, Article, or part, which will, to the greatest extent legally permissible, effect the original intent of the Parties, including any adjustment to MDOT's compensation to the Phase Developer's account for any change in the Predevelopment Work resulting from such invalidated portion; and

- (ii) if necessary or desirable, apply to the court or other decision maker which declared such invalidity for an interpretation of the invalidated portion to guide the negotiations.
- (b) The invalidity or unenforceability of any section, provision, Article, or part will not affect the validity or enforceability of the balance of this Agreement, which will be construed and enforced as if this Agreement did not contain such invalid or unenforceable section, provision, Article, or part.

36.13 Counterparts

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

36.14 Payments and Appropriations

- (a) Except as otherwise expressly provided in this Agreement, payments due to any Party will be due and payable by the Party responsible for payment no later than 30 days following receipt of an invoice and supporting documentation.
- (b) Each Party will be entitled to deduct, offset, or withhold from any amounts due from one Party to another Party any amounts then due and owing from such other Party.
- (c) Except as otherwise expressly provided in this Agreement, no Party is required to pay amounts due that are being contested in Good Faith in accordance with the Dispute Resolution Procedures in Article 33 (Dispute Resolution).
- (d) The Phase Developer acknowledges and agrees that each of MDOT and MDTA have entered into the Interagency Agreement, under which MDOT has agreed with MDTA to be responsible to the Phase Developer for all financial liability arising from claims by the Phase Developer under the Agreement against MDTA and MDOT.
- (e) Without prejudice to any rights of MDOT against MDTA under the Interagency Agreement (which rights the Phase Developer expressly acknowledges and agrees it is not a third party beneficiary of):
 - (i) to the extent that the resolution of any Claim of the Phase Developer against MDTA or MDOT under this Agreement, including all Disputes, entitles the Phase Developer, whether as a result of an agreement among such Person(s) or through the Dispute Resolution Procedure or otherwise, to recover any sum of money from MDTA or MDOT, such recovery shall be expressly limited to such amounts as may be appropriated by the Maryland General Assembly to MDOT, as more particularly described in Section 36.14(c);
 - (ii) MDTA will have no liability to the Phase Developer in respect of any Claim under this Agreement, and any liability of MDOT to the Phase Developer in furtherance of this Section 36.14 will be expressly subject to Section 36.14(f) in all respects; and
 - (iii) no judgment obtained by the Phase Developer in respect of any Claim may be enforced by the Phase Developer against MDTA or any of MDTA's assets and by its execution of this Agreement, the Phase Developer consents to the dismissal with prejudice of any such action seeking enforcement.

- (f) All amounts payable by MDOT under this Agreement are subject to appropriations by the Maryland General Assembly in accordance with and to the extent required by Applicable Law. The obligation of MDOT to make payments under this Agreement, including the obligation of MDOT to make payments in respect of amounts owing as a result of the act or omission of MDTA under Section 36.14(d), does not constitute an indebtedness of the State within the meaning or application of any constitutional provision or limitation and does not constitute a pledge of the faith, credit, or taxing power of the State or any political subdivision thereof (including MDOT and MDTA) within the meaning or application of any constitutional provision or limitation. Furthermore, MDOT has no taxing power, and the Phase Developer has no right to have taxes levied or to compel appropriations by the Maryland General Assembly for any payment owing under this Agreement.

EXHIBIT 1

DEFINITIONS

Capitalized terms and acronyms used in this Agreement have the meanings given in this Exhibit 1 (Definitions).

"Abandonment" means to abandon all or a material part of the Phase, which abandonment will be deemed to have occurred if:

- (a) the Phase Developer demonstrates through statements, acts, or omissions an intent not to continue (for any reason other than a Relief Event that materially interferes with its ability to continue) to perform the Predevelopment Work; or
- (b) no significant Predevelopment Work on the Phase as shown on the Predevelopment Work Schedule (taking into account any Relief Event) is performed for a continuous period of more than 60 days.

"ACORD" means the Association for Cooperative Operations and Research Development.

"Act" means Title 10A of the State Finance and Procurement Article of the Annotated Code of Maryland.

"Additional Properties" means any property or property rights not provided for as MDOT-Provided Parcels, including those necessary to accommodate necessary permanent and temporary rights, as well as laydown, staging, temporary drainage, and other construction methods in connection with the construction or rehabilitation of the Phase.

"Additional TCAs" means Additional Properties that are not Permanent Additional Properties.

"Administering Employees" means employees of the Phase Developer whose work related to the Phase has not been completed and that are involved in the administration of federal or State funds.

"Affiliate" means, in relation to any Person, any entity which, directly or indirectly, through one or more intermediaries:

- (a) has a 10 percent or more voting or economic interest in such Person; or
- (b) Controls, is Controlled by, or is under common Control with such Person.

"Agreement" means this agreement (including all its Exhibits).

"Allowed Costs" means in respect of a Section, the Phase Developer's or Section Developer's documented reasonable internal direct costs and third party direct costs incurred in performing the Predevelopment Work or Section Work for that Section prior to Financial Close of that Section (including any fees incurred with respect to providing the Performance Security or the Development Rights Fee Security) that are permitted as Allowed Costs under Exhibit 15 (Allowed Costs).

"Alternative Equity IRR" means the nominal pre-tax internal rate of return on Section Equity Investment (on a cash-on-cash basis) over the full term of a Section P3 Agreement, calculated using the Initial Base Case Financial Model and assuming that there are no Refinancings (including Exempt Refinancings), or Mandatory Equity Sales, as the discount rate that, when applied to the Distributions gives a net present value equal to the net present value of the Section Equity Investment. For the purposes of this definition, the phrase cash-on-cash basis means, with respect to the calculation of a

financial return, the calculation of such financial return on the basis of cash actually received in relation to cash actually invested (as opposed to cash committed).

"Applicable Law" means any statute, law code, regulation, ordinance, rule, common law, judgment, judicial or administrative order, decree, directive, or other requirement having the force of law or other governmental restriction (including those resulting from the initiative or referendum process) or any similar form of decision of or determination by, or any interpretation or administration of any of the foregoing by, any Governmental Entity which is applicable to the Phase, the Predevelopment Work, or any relevant Person whether taking effect before or after the date of this Agreement. Applicable Law excludes Governmental Approvals.

"Assumptions Book" means the data book provided by the Section Developer under Section 1.6(j) (Initial Base Case Financial Model Assumptions Book) of Exhibit 7 (Committed Section Proposal).

"Available Funds" means the aggregate funds available at Financial Close of each Section of Phase South A to pay the Development Rights Fee and Upfront Payment for each Section.

"Bank Debt Financing" has the meaning given to that term in Section 1.2 (Financial Institutions Providing Debt Financing) of Exhibit 7 (Committed Section Proposal).

"Benchmark Interest Rate" means the publicly-documented interest rates of each maturity included in the following indices:

- (a) [the U.S. Spot Treasury Yield;
- (b) the Municipal Market Benchmark (supplied by Thomson Reuters);
- (c) the State and Local Government Series index provided by the U.S. Treasury; and
- (d) the Overnight Index Swap Yield.]⁶

The Benchmark Interest Rates do not include any additional credit spread, margin, or fee components.

"Board of Public Works" or "BPW" means the State of Maryland Board of Public Works.

"Bond Financing" has the meaning given to that term in Section 1.2 (Financial Institutions Providing Debt Financing) of Exhibit 7 (Committed Section Proposal).

"Books and Records" means any and all documents, books, records, papers, or other information of any Phase Developer-Related Entity or Affiliate relating to the Phase, including:

- (a) all design and construction documents, and all operations and maintenance documents (including drawings, specifications, submittals, Contracts, subcontracts, invoices, schedules, meeting minutes, budgets, forecasts, and change orders);
- (b) all budgets, certificates, claims, correspondence, data (including test data), documents, expert analyses, facts, files, information, investigations, materials, notices, plans, projections, proposals, records, reports, requests, samples, schedules, settlements, statements, studies, surveys, tests, test results, vehicular traffic information analyzed, categorized, characterized,

⁶ To be updated based on the Benchmark Interest Rates selected by the Phase Developer.

created, collected, generated, maintained, processed, produced, prepared, provided, recorded, stored, or used by the Phase Developer or its Contractors in connection with the Phase; and

- (c) with respect to all of the above, any information that is stored electronically or on computer-related media.

For the purposes of the requirements of this Agreement to maintain Books and Records, the term "Books and Records" includes documents or information that are subject to the attorney-client privilege, but for the purposes of the requirements under this Agreement to provide access to Books and Records, the term specifically excludes documents or information that are subject to the attorney-client privilege and other legally recognized privilege under Applicable Law that are identified in a privilege log.

"Business Day" means any day that is not a Saturday, a Sunday, a State of Maryland public holiday, or a federal public holiday.

"Capital Costs" means all costs related to design, construction, reimbursed Predevelopment Costs, Developer Closing Fees, right of way, MDTA Notes purchase, Upfront Payment, and Development Rights Fee for the Section.

"CFR" means the Code of Federal Regulations.

"Change in Ownership" means:

- (a) any sale, transfer, assignment, mortgage, encumbrance, conveyance, or disposal of any legal, beneficial, or equitable interest in any or all of the shares or membership interests in the Phase Developer or any PD Related Entity;
- (b) any change in the direct or indirect control over:
 - (i) the voting rights conferred on the shares or membership interests of the Phase Developer or any PD Related Entity;
 - (ii) the right to appoint or remove directors of the Phase Developer or any PD Related Entity;
 - (iii) the right to receive dividends or distributions of the Phase Developer or any PD Related Entity;
 - (iv) the direction or control of the management of the Phase Developer, any PD Related Entity, or the Phase; or
- (c) any other arrangements that have or may have the same effect as paragraph (a) or paragraph (b) of this definition.

"Claim" means a written demand or assertion by the Phase Developer seeking, as a legal right, the payment of money, extension of time, or other relief, under or relating to this Agreement or a particular interpretation of the terms of this Agreement.

"COMAR" means the Code of Maryland Regulations.

"Commercial Close" means the date that the applicable Section P3 Agreement is signed by all of the parties.

"Committed Section Proposal" means the proposal described in Section 11.3 (Committed Section Proposal).

"Contract" means any contract, subcontract, or other form of agreement to perform any part of the Predevelopment Work or provide any materials, equipment, or supplies for any part of the Predevelopment Work, or any such agreement, supplement, or amendment at a lower tier, between a Contractor and its lower-tier Contractor or a Supplier and its lower-tier Supplier, at all tiers.

"Contractor" means:

- (a) any Person (other than MDOT and MDTA), with whom the Phase Developer has entered into a contract to perform any part of the Predevelopment Work or provide any materials, equipment, or supplies for the Predevelopment Work, on behalf of the Phase Developer; and
- (b) any other Person with whom any contractor has further subcontracted any part of the Predevelopment Work, at all tiers.

"Contractor Markup Cost" is defined in Appendix A of Exhibit 6 (Predevelopment Work Requirements).

"Contractor Markup Percentage" is defined in Appendix A of Exhibit 6 (Predevelopment Work Requirements).

"Contract Manager" has the meaning given to the term in Section 7.1(a) (Representatives), and the initial Contract Manager is the individual identified as such as Exhibit 3 (Initial Designation of Representatives).

"Control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract, or otherwise.

"CPI-U" means the All Items Consumer Price Index for All Urban Consumers (CPI-U) in Washington (BLS Series ID CUURS35ASA0) as published by the Bureau of Labor Statistics using a reference year of 1982-84 that equals 100.0 or, if such index in its present form becomes unavailable, such similar index as may be agreed by the Parties, acting reasonably. If such index is revised so that the base year differs from that set forth above, the Inflation Index shall be converted in accordance with the conversion factor published by the United States Department of Labor, Bureau of Labor Statistics. If the Bureau of Labor Statistics otherwise alters its method of calculating such index, the Parties shall mutually determine appropriate adjustments in the affected index.

"CSP Equity Member" means, for each Section, the parties that will contribute shareholder equity to the Section Developer as part of the financing plan for that Section, and will include the PD Equity Members.

"D&C Contract" has the meaning given to that term under the applicable Section P3 Agreement.

"D&C Contract Member" means, if the D&C Contractor is a limited liability company, partnership, or joint venture, each member or partner (as applicable) of the D&C Contractor.

"D&C Contractor" means the contractor identified as the "D&C Contractor" in a Committed Section Proposal.

"D&C General Conditions Cost Percentage" is defined in Appendix A of Exhibit 6 (Predevelopment Work Requirements).

"D&C General Conditions Costs" is defined in Appendix A of Exhibit 6 (Predevelopment Work Requirements).

"Data Room" means the electronic data room created and operated by MDOT on the project control suite (PCS) to give Proposers access to the Reference Information Documents.

"Day" or **"day"** means a calendar day.

"DBE" means those firms identified with Disadvantaged Business Enterprise certification by MDOT's Office of Minority Business Enterprise.

"DBE Participation Form" means those forms provided by MDOT to the Phase Developer relating to compliance with Section 19.9 (Disadvantaged Business Enterprises).

"DBE Participation Plan" means the plan in Part B of Exhibit 17 (Predevelopment DBE Participation Plan).

"DBE Participation Schedule" means the "DBE Participation Schedule" submitted as part of the Proposal and updated in accordance with the terms of this Agreement.

"DBE Payment Report" means the report described in Section 19.9(d)(iii)(A) (Compliance).

"Debarment Regulations" means:

- (a) Federal Executive Order no. 12549 (February 18, 1986);
- (b) Federal Executive Order no. 12689 (August 16, 1989);
- (c) 31 U.S.C. §6101 note (Section 2455, Pub. L. 103 -355, 108 Stat. 3327);
- (d) 2 CFR Part 180 "OMB Guidelines to Agencies On Governmentwide Debarment and Suspension (Nonprocurement)";
- (e) §16-202 and §16-203 of the State Finance and Procurement Article of the Annotated Code of Maryland; and
- (f) COMAR §21.08.03.

"Deferred Section Equity Amounts" means any amount of unfunded equity that:

- (a) is committed to a Section Developer as of Financial Close (including commitments to provide a Section Equity Investment or Section Equity Member Debt); and
- (b) is shown in the Section's base case financial model to be utilized prior to final completion of the Section.

"Designer" means [●]⁷.

"Developer Closing Fee(s)" means the cash closing fees payable to the Phase Developer-Related Entity for a Section under Section 11.2(a)(iii) (Permitted Payments to Phase Developer and Section Developer on Financial Close).

"Developer Closing Fee Percentage" means [●]⁸.

⁷ This will be the entity that the Phase Developer submits as its designer in its SOQ.

⁸ This will be the percentage that the Phase Developer submits as its Developer Closing Fee Percentage in its Proposal.

"Development Rights Fee" means for each Section in Phase South A the amount specified in Section 17.1(b) (Development Rights Fees), as may be adjusted in accordance with Section 12.2 (Key Assumptions for Phase South A Prove To Be Incorrect).

"Development Rights Fee Security" has the meaning given to that term in Section 17.6 (Development Rights Fee Security).

"Dispute" means any dispute between MDOT or MDTA and the Phase Developer concerning their respective rights and obligations under this Agreement, including with respect to any claim, alleged breach, or failure to perform, and any remedy.

"Dispute Resolution Procedures" means the procedures for resolving disputes in Article 33 (Dispute Resolution).

"Distributions" means, whether in cash or in kind, any:

- (a) dividend or other distribution with respect to share capital;
- (b) reduction of capital, redemption, or purchase of shares or any other reorganization or variation to share capital;
- (c) payments made by the Section Developer under the Section Equity Member Funding Agreement (whether of principal, interest, breakage costs, or otherwise);
- (d) payment, loan, contractual arrangement, or transfer of assets or rights directly to the extent that, in each case, it was put in place after Financial Close and was neither in the ordinary course of business nor on reasonable commercial terms; or
- (e) receipt of any other benefit which is not received in the ordinary course of business and not on reasonable commercial terms.

"Dollars" means U.S. dollars.

"Effective Date" means the date that MDOT and MDTA sign this Agreement following the satisfaction or waiver of the conditions in Section 5.1 (Conditions Precedent to MDOT and MDTA Signing this Agreement).

"Eligible Security Issuer" means:

- (a) with respect to a letter of credit, an approved bank, or financial institution by the Maryland State Treasurer's Office with a long-term, unsecured debt ratings of not less than "A/A2" from one of the major national rating agencies (Fitch Ratings, Moody's Investor Service and Standard & Poor's Ratings Group); and
- (b) with respect to a demand guarantee or any surety bond, an entity meeting the requirements of Applicable Law, licensed or authorized to do business in the State rated at least A by Standard and Poor's and "A" (excellent or above) according to A.M. Best's Financial Strength Rating and XII or better according to A.M. Best's Financial Size Rating,

that in each case is not an Affiliate of the Phase Developer.

"Environment" means air, soils, surface waters (including wetlands), groundwater, land, parkland, stream sediments, surface or subsurface strata, biological resources including endangered, threatened

and sensitive species, natural systems including ecosystems, and cultural, historic, archaeological, and paleontological resources.

"Equity IRR" means the nominal pre-tax internal rate of return on Section Equity Investment (on a cash-on-cash basis) over the full term of the Section P3 Agreement, calculated using the Initial Base Case Financial Model, as the discount rate that, when applied to the Distributions gives a net present value equal to the net present value of the Section Equity Investment. For the purposes of this definition, the phrase cash-on-cash basis means, with respect to the calculation of a financial return, the calculation of such financial return on the basis of cash actually received in relation to cash actually invested (as opposed to cash committed).

"Equity Member Letter" means the letter provided in accordance with Section 1.3 (Details of Equity Source and Equity Member Letters) of Exhibit 7 (Committed Section Proposal).

"Exempt Refinancing" has the meaning given to that term in the Section P3 Agreement Term Sheet.

"FEIS" means Final Environmental Impact Statement for the I-495 and I-270 Managed Lane Study.

"FHWA" means the United States Department of Transportation Federal Highway Administration.

"Finance Documents" means the funding agreements and security documents in connection with a Section.

"Financial Close" means the date on which all of the conditions precedent to financial close under the Section P3 Agreement have been satisfied or otherwise waived in accordance with the Section P3 Agreement.

"Financial Close Deadline" means, for each Section, the deadline by which the Section Developer is obligated to achieve Financial Close for that Section under the applicable Section P3 Agreement.

"Financial Proposal" means the proposal submitted by the Phase Developer in accordance with Appendix 5 (Financial Proposal Instructions) of the Instructions to Proposers.

"Financially Viable" means with respect to a Section, that the Section may be designed, constructed, financed, operated, and maintained, assuming the following:

- (a) no Maryland Funding is necessary to finance the Section, and no payments are necessary from the Upfront Payment Account (unless agreed in writing by MDOT (in its sole discretion) or as expressly permitted under Section 11.3(b)(v) (Committed Section Proposal));
- (b) the Section will deliver an Alternative Equity IRR that is not less than the Proposal Equity IRR (unless otherwise agreed by the Phase Developer);
- (c) all Allowed Costs for the Section are reimbursed to the Phase Developer and the Section Developer at Financial Close of the Section to the maximum amount allowable under this Agreement;
- (d) all cash closing fees in connection with achieving Financial Close of the Section are reimbursed to the Phase Developer in accordance with Section 11.2(a)(iii) (Permitted Payments to Phase Developer and Section Developer on Financial Close);
- (e) the Contractor Markup Costs for the Section are derived from the Contractor Markup Percentage in the Financial Proposal;

- (f) the D&C General Conditions Costs for the Section are derived from the D&C General Conditions Cost Percentage in the Financial Proposal; and
- (g) the Renewal Work General Conditions Costs for the Section are derived from the Renewal Work General Conditions Cost Percentage in the Financial Proposal.

"Financing Plan" means the plan described in Section 1.22.1 (Financing Plan) of Exhibit 6 (Predevelopment Work Requirements).

"First Section" means the first section of Phase South that must be delivered in accordance with this Agreement and that must include the American Legion Bridge.

"Force Majeure Event" means the occurrence of any of the following events after the date of this Agreement that directly causes either Party (the **"Affected Party"**) to be unable to comply with all or a material part of its obligations under this Agreement:

- (a) war, civil war, invasion, violent act of foreign enemy, or armed conflict;
- (b) nuclear, chemical, or biological contamination unless the source or cause of the contamination is brought to or near the Phase Site by the Phase Developer or a Phase Developer-Related Entity, or is a result of any breach of the Phase Developer of the terms of this Agreement;
- (c) ionizing radiation unless the source or cause of the ionizing radiation is brought to or near the Phase Site by the Phase Developer or a Phase Developer-Related Entity, or is as a result of any breach by the Phase Developer of the terms of this Agreement; or
- (d) an act of Terrorism.

"GAAP" means the Generally Accepted Accounting Principles in the respective country in effect from time to time.

"Good Faith" means the observance of reasonable commercial standards of fair dealing in a given trade or business.

"Good Faith Efforts" has the meaning given to that term in 49 CFR Part 26 and 49 CFR Part 26 Appendix A.

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

"Governmental Approval" means all approvals, permits (including lane closure permits), permissions, consents, licenses, certificates (including sales tax exemption certificates), and authorizations (whether statutory or otherwise) which are required from time to time in connection with the Phase (including MDOT-Provided Approvals) to be issued by any Governmental Entity.

"Governmental Entity" means the government of the United States of America, the State, the Commonwealth of Virginia, the cities and counties within the State, the cities and counties within the Commonwealth of Virginia, and any other agency, or subdivision of any of the foregoing, including any

federal, state, or municipal government, and any court, agency, special district, commission, or other authority exercising executive, legislative, judicial, regulatory, administrative, or taxing functions of, or pertaining to, the government of the United States of America, the State, the Commonwealth of Virginia, the cities or counties within the State, or the cities or counties within the Commonwealth of Virginia. "Governmental Entity" includes MDOT and MDTA acting in a regulatory or administrative capacity but does not include MDOT or MDTA acting in their capacity as Parties to this Agreement.

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

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

"I-270 East Spur" has the meaning given to that term in Exhibit 6 (Predevelopment Work Requirements).

"I-270 West Spur" has the meaning given to that term in Exhibit 6 (Predevelopment Work Requirements).

"IDP Submittal" has the meaning given to that term in Section 2.7(e) of the Instructions to Proposers.

"IFRS" means the International Financial Reporting Standards.

"Indemnified Parties" means MDOT, the MDOT-Related Entities, and their respective officers, agents, representatives, and employees.

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

"Initial Base Case Financial Model" means the tool described in Section 1.6 (Initial Base Case Financial Model) of Exhibit 7 (Committed Section Proposal) that a Section Developer shall use to support the Committed Section Proposal.

"Initial Base Case Traffic Projections" means the equity case of the traffic and revenue forecast provided within the investment grade report in Section 1.8 (Traffic and Revenue Report) of Exhibit 7 (Committed Section Proposal).

"Initial Baseline Schedule" means the schedule for the Section Work of a Section P3 Agreement developed in accordance with the Section Technical Provisions.

"Initial Decision" has the meaning given to that term in Section 33.1 (Consultation and Initial Decision of Contract Manager).

"Initial Upfront Payment" has the meaning given to that term in Section 1.15 (Initial Upfront Payment) of Exhibit 7 (Committed Section Proposal).

"Insolvency Event" means:

- (a) the Phase Developer commences a voluntary case seeking liquidation, reorganization, or other relief with respect to the Phase Developer or the Phase Developer's debts under any U.S. or foreign bankruptcy, insolvency, or other similar law; seeking the appointment of a trustee, receiver, liquidator, custodian, or other similar official of its, or any substantial part of its, assets; becomes insolvent, or generally does not pay its debts as they become due; provides notice of its inability to pay its debts; makes an assignment for the benefit of creditors; or takes any action to authorize any of the foregoing;
- (b) an involuntary case is commenced against the Phase Developer seeking liquidation, reorganization, dissolution, winding up, a composition or arrangement with creditors, a readjustment of debts or other relief with respect to such the Phase Developer or the Phase Developer's debts under any U.S. or foreign bankruptcy, insolvency, or other similar law; seeking the appointment of a trustee, receiver, liquidator, custodian, or other similar official of it or any substantial part of its assets; seeking the issuance of a writ of attachment, execution, or similar process; or seeking like relief, and such involuntary case shall not be contested by it in Good Faith or shall remain undismissed and unstayed for a period of 60 days;
- (c) in any voluntary or involuntary case seeking liquidation, reorganization, or other relief with respect to the Phase Developer or its debts under any U.S. or foreign bankruptcy, insolvency, or other similar law, this Agreement, is rejected, including a rejection under Title 11 U.S.C. §365 or any successor statute; or
- (d) any voluntary or involuntary case or other act or event described in paragraphs (a) or (b) occurs (and in the case of an involuntary case is not contested in Good Faith or remains undismissed and unstayed for a period of 60 days) with respect to:
 - (i) any PD Equity Member, partner, or joint venture member of the Phase Developer (unless said Person has fully met all financial obligations owing to the Phase Developer in the form of a committed investment and payments or transfers of money or property previously made to or for the benefit of the Phase Developer are not subject to §544, §547, §548, or §550 of the Bankruptcy Code, or any similar Applicable Law respecting the avoidance or recovery of preferences or fraudulent transfers, including any applicable enactment of the Uniform Fraudulent Transfer Act); or
 - (ii) any PD Equity Member, partner, or joint venture member of the Phase Developer for whom transfer of ownership or management authority would constitute a Change in Ownership.

"Insurance Policies" means the insurance policies the Phase Developer is required to carry or ensure are carried under Article 24 (Insurance) and Exhibit 10 (Required Insurance for Predevelopment Work).

"Intellectual Property" means any and all patents, trademarks, service marks, copyright, data and database rights, moral rights, rights in a design, know-how, trade secrets, confidential information, and all or any other intellectual or industrial property rights whether or not registered or capable of registration and whether subsisting in the United States or any other part of the world together with all or any goodwill relating or attached thereto which is created, brought into existence, acquired, used, or intended to be used for the purposes of carrying out the Predevelopment Work, developing the Work Product, or otherwise for the purposes of this Agreement.

"Key Assumptions" means each of the key assumptions for Phase South A contained in Exhibit 18 (Key Assumptions for Phase South A).

"Key Contractor" means the D&C Contractor, O&M Contractor, Toll Systems Integrator, and Toll Systems Operator under a Section P3 Agreement.

"Key Participants" means the Designer, Lead Contractor, and Lead Project Developer.

"Lead Contractor" means [●].⁹

"Lead Project Developer" means [●].¹⁰

"Lead Underwriter" means the underwriter for any bond financing for a Section.

"Lender" means any Person that:

- (a) provides Section Debt, together with their successors and assigns; or
- (b) is appointed by any Person referred to in paragraph (a) as its agents, or trustee in connection with the Section Debt.

"Limit of Disturbance" means a boundary established during the NEPA process representing the maximum extent of impact to be created by the Section Work.

"Loss" means any loss, damages, injury, liability, obligation, cost, response, expense, fee (including attorney and expert witness fees and expenses incurred in connection with the enforcement of this Agreement), charge, judgment, penalty, or fine. Losses include injury to or death of Persons, damage or loss of property, and harm or damage to natural resources.

"Mandatory Equity Sale" means the mandatory sale of equity in the Section Developer as described in Section 70 of the Section P3 Agreement Term Sheet.

"Maryland Funding" means any Maryland state or local funding, whether received directly, via federal aid, or otherwise. "Maryland Funding" does not include the use of TIFIA or PABs financing.

"MBE" means those firms identified with Minority Business Enterprise certification by MDOT's Office of Minority Business Enterprise.

"MDOT" means the Maryland Department of Transportation, including MDOT SHA.

"MDOT Change Request" has the meaning given to that term in Section 22(a) (Change Orders).

"MDOT Controlled Parcels" means those parcels of the Phase Site that MDOT owns or has established a right of access to.

"MDOT Deliverables" means:

- (a) the issuance of all final NEPA approvals for Phase South A;
- (b) a copy of the agreement entered into between MDOT and VDOT relating to the construction of new facilities (and tolling of certain lanes) between the George Washington Memorial Parkway (VA) and River Road (MD);

⁹ This will be based on the Phase Developer's proposal team and will be populated before the agreement is signed.

¹⁰ This will be based on the Phase Developer's proposal team and will be populated before the agreement is signed.

- (c) a copy of each memorandum of understanding entered into between MDOT and Frederick County and Montgomery County, respectively, with respect to the delivery of transit service improvements in conjunction with the P3 Program; and
- (d) conclusion by MDTA of the statutory toll rate setting process for Phase South and the conclusion of all other actions necessary to determine toll rates that may be applied to vehicles using the Priced Managed Lanes in Phase South.

"MDOT OEO" means the MDOT Office of Equal Opportunity.

"MDOT-Provided Approvals" means:

- (a) environmental decision documents approved under NEPA covering the limits of the Phase (such as any applicable FEIS and ROD);
- (b) USACE permit under §404 of the Clean Water Act and accompanying Section 401 Water Quality Certification; and
- (c) designation of the Phase (or the P3 Program) by the MDTA Board as a "transportation facilities project" for the purposes of Title 4 of the Transportation Article of the Annotated Code of Maryland.

"MDOT-Provided Parcel" has the meaning given to that term in the Section P3 Agreement Term Sheet.

"MDOT-Related Entity" means:

- (a) MDTA;
- (b) MDOT (including MDOT SHA); and
- (c) the State.

"MDOT SHA" means the Maryland Department of Transportation State Highway Administration.

"MDOT Termination Notice" has the meaning given to that term in Section 26.2 (Termination for Phase Developer Default).

"MDTA" means the Maryland Transportation Authority.

"MDTA Board" means the Chairman and members of the Maryland Transportation Authority Board.

"MDTA Executive Director" means the individual appointed by the MDTA Board to serve as the chief executive officer to manage the day-to-day operations of the MDTA and exercise those powers not otherwise specifically reserved to the Board.

"MDTA Financing Documents" has the meaning given to this term in the Section P3 Agreement Term Sheet.

"MDTA Master Trust Agreement" means the trust agreement relating to the issuance by MDTA of notes relating to the P3 Program under which the Upfront Payment Account shall be established.

"MDTA Notes" has the meaning given to that term in the Section P3 Agreement Term Sheet.

"MDTA Notes Outstanding Principal Amount" has the meaning given to that term in the Section P3 Agreement Term Sheet.

"MDTA Notes Term Sheet" means the "MDTA Notes Term Sheet" attached as Exhibit 3 to the Section P3 Agreement Term Sheet at Exhibit 8 (Section P3 Agreement Term Sheet).

"Member" has the meaning given to that term in Section 1.4 (Financial Strength of Members) of Exhibit 7 (Committed Section Proposal).

"Monthly Progress Report" means the report submitted under Section 1.3.7 (Reporting on Progress of Predevelopment Work) of Exhibit 6 (Predevelopment Work Requirements).

"NEPA" means the National Environmental Policy Act.

"Notice of Appeal" has the meaning given to that term in Section 33.2 (Appeal of Initial Decision).

"Notice of Proposed Change in Ownership" means the notice provided to MDOT regarding a Change in Ownership in Section 32.4(a) (Notification of Proposed Changes in Ownership).

"O&M Contractor" has the meaning given to that term in the Section P3 Agreement.

"Organizational Conflict of Interest" has the meaning given to that term in the RFP.

"P3 Program" has the meaning given to that term in Recital (A).

"Party" means MDOT, MDTA, or the Phase Developer, as the context may require, and **"Parties"** means MDOT, MDTA, or the Phase Developer, as the context may require, collectively.

"PD Equity Member" means each Person that was identified as an "Equity Member" or "Guarantor" in the SOQ.

"PD Related Entity" means each of [●]¹¹

"Performance Security" means the security provided in accordance with Article 18 (Performance Security).

"Performing Subcontractor" has the meaning given to that term in Section 1.2(a)(iv) of Exhibit 15 (Allowed Costs).

"Permanent Additional Properties" means Additional Properties that are permanently needed to construct or maintain the Phase.

"Permanent ROW" means the permanent right of way for the Phase provided as part of the MDOT-Provided Parcels together with the Permanent Additional Properties.

"Person" means an individual, a general or limited partnership, a joint venture, a corporation, a limited liability company, a trust, an unincorporated organization, or a governmental authority.

"Phase" is defined in paragraph (H) of the Recitals.

¹¹ This will list each entity in the ultimate ownership structure between the Phase Developer and each PD Equity Member (not including the Phase Developer or the PD Equity Members)

"Phase Developer Default" has the meaning given to that term in Section 25.1 (Phase Developer Default).

"Phase Developer Default Notice" has the meaning given to that term in Section 25.2(a) (Phase Developer Default Notice and Cure Periods).

"Phase Developer Hazardous Materials Release" means any Hazardous Materials Release:

- (a) involving any Hazardous Materials arranged to be brought onto the Phase Site or any other location by any Phase Developer-Related Entity, regardless of cause;
- (b) to the extent attributable to the breach of any Applicable Law, Governmental Approval, or this Agreement (including any acts or omissions that are not in accordance with Good Industry Practice), negligence, or willful misconduct by any Phase Developer-Related Entity; or
- (c) without prejudice to the generality of paragraph (b), to the extent attributable to the use, containment, storage, management, handling, transport, and disposal of any Hazardous Materials by any Phase Developer-Related Entity in breach of any Applicable Law, Governmental Approval, or this Agreement.

"Phase Developer-Related Entity" means:

- (a) the Phase Developer;
- (b) the PD Equity Members;
- (c) each PD Related Entity;
- (d) each Section Developer;
- (e) the Contractors;
- (f) any other Persons performing any of the Predevelopment Work for or on behalf of the Phase Developer;
- (g) any other Persons for whom the Phase Developer may be legally or contractually responsible; and
- (h) the employees, agents, officers, directors, representatives, consultants, successors, and assigns of any of the foregoing.

"Phase Developer's Interest" means all right, title, and interest of the Phase Developer in, to, or derived from this Agreement.

"Phase North" is defined in paragraph (J) of the Recitals.

"Phase North NTP" means the notice to proceed with respect to undertaking Predevelopment Work for Phase North issued by MDOT to the Phase Developer in accordance with Section 10.4(a) (Phase North NTP Contingent Upon NEPA Approval).

"Phase North Termination Cap" means:

- (a) the amount agreed under Section 14(d)(iii) (Section Viability); or

(b) before such amount is agreed, zero.

"Phase Site" means the geographical area reasonably expected to be a part of the "Site" (as that term is defined in the Section P3 Agreement Term Sheet) for each Section of the Phase.

"Phase South" is defined in paragraph (I) of the Recitals.

"Phase South A" is defined in paragraph (I) of the Recitals.

"Phase South B" is defined in paragraph (I) of the Recitals.

"Phase South NTP" has the meaning given to that term in Section 10.3(a) (Phase South NTP Contingent Upon NEPA Approval)

"Phase South Termination Cap" means \$[•]¹².

"PIA" is defined in Section 30(a) (Public Information and Records).

"Placement Agent" means a private placement agent for the Section.

"Pre-Approved Change in Ownership" has the meaning given to that term in Section 32.2(b) (Pre-Approved Changes in Ownership).

"Pre-existing Hazardous Materials" means Hazardous Materials that exist in, on, or under the Phase Site (except each Additional TCA) prior to the date the Phase Developer gains access to the relevant portion of the Phase Site, including those that manifest themselves after that date.

"Predevelopment Cost Cap" means:

- (a) with respect to Phase South, the initial Predevelopment Cost Cap for Phase South being [•]¹³, less:
 - (i) any amounts reimbursed to the Phase Developer and Section Developers for Allowed Costs incurred by the Phase Developer or a Section Developer in connection with Financial Close of Sections in Phase South; less
 - (ii) any amounts that have previously been reimbursed to the Phase Developer or Section Developer by MDOT for Allowed Costs that are directly attributable to Phase South; and
- (b) with respect to Phase North, the initial Predevelopment Cost Cap for Phase North as determined in accordance with Section 14(d)(iii), less:
 - (i) any amounts reimbursed to the Phase Developer and Section Developers for Allowed Costs incurred by the Phase Developer or a Section Developer in connection with Financial Close of Sections in Phase North; less
 - (ii) any amounts that have previously been reimbursed to the Phase Developer or Section Developer by MDOT that are directly attributable to Phase North.

¹² This will be the lesser of (a) the Predevelopment Cost Cap for Phase South that was included in the Proposal, and (b) \$50,000,000.

¹³ This will be the Predevelopment Cost Cap for Phase South included in the Proposal.

"Predevelopment Milestone" means the predevelopment milestones in Exhibit 5 (Predevelopment Milestones and Deadlines).

"Predevelopment Milestone Deadline" means the predevelopment milestone deadlines in Exhibit 5 (Predevelopment Milestones and Deadlines), as such deadline may be extended by MDOT in accordance with the terms of this Agreement.

"Predevelopment Work" means in respect of a Section, all Work required to be performed or provided by the Phase Developer prior to Commercial Close of that Section.

"Predevelopment Work Proposal Due Date" has the meaning given to that term in the Instructions to Proposers.

"Predevelopment Work Schedule" means the schedule for the Predevelopment Work described in Section 1.4.1 (The Predevelopment Work Schedule) of Exhibit 6 (Predevelopment Work Requirements).

"Premises" is defined in paragraph (G) of the Recitals.

"Priced Managed Lanes" means the toll lanes and the associated entry and exit ramps within the Permanent ROW that are separated from the adjacent general purpose lanes.

"Prohibited Change in Ownership" means:

- (a) any Change in Ownership occurs in breach of Article 32 (Change in Ownership of Phase Developer); or
- (b) any Change in Ownership occurs that involves the transfer of any shares or membership interests to a Prohibited Person.

"Prohibited Person" means any Person who is:

- (a) debarred, proposed for debarment with a final determination still pending, suspended, declared ineligible, or voluntarily excluded (as such terms are defined in any of the Debarment Regulations) from participating in procurement or non-procurement transactions with the federal or state government or any department, agency, or instrumentality of the federal or state government under any of the Debarment Regulations;
- (b) indicted, convicted, or had a civil or administrative judgment rendered against such Person for any of the offenses listed in any of the Debarment Regulations and no event has occurred and no condition exists that is likely to result in the debarment or suspension of such Person from contracting with the federal or State government or any department, agency, or instrumentality of the federal or State government;
- (c) listed on the "Lists of Parties Excluded from Federal Procurement and Non-procurement Programs" issued by the U.S. General Services Administration;
- (d) located within, or doing business or operating from, a country or other territory subject to a general embargo administered by the United States Office of Foreign Assets Contract ("**OFAC**");
- (e) designated on the OFAC list of "Specially Designated Nationals";
- (f) otherwise targeted under economic or financial sanctions administered by the United Nations, OFAC, or any other U.S. federal economic sanctions authority or any divestment or sanctions program of the State;

- (g) a banking institution chartered or licensed in a jurisdiction against which the United States Secretary of the Treasury has imposed special measures under §311 of the USA PATRIOT Act;
- (h) located within or is operation from a jurisdiction that has been designated as non-cooperative with international anti-money laundering principles by the Financial Action Task Force on Money Laundering;
- (i) a financial institution against which the United States Secretary of the Treasury has imposed special measures under §311 of the USA PATRIOT Act;
- (j) a senior foreign political figure or a prohibited foreign shell bank within the meaning of 31 CFR §1010.605; or
- (k) any Person with whom MDOT or MDTA is engaged in litigation relating to the performance of a contract or business practices, unless MDOT or MDTA has first waived (in MDOT or MDTA's absolute discretion) the prohibition on a transfer to such Person during the continuance of the relevant litigation, by written notice to the transferring equity holder, with a copy to the Phase Developer.

"Proposal" means the proposal and commitments made by the Phase Developer, that are contained in Exhibit 9 (Phase Developer Proposal).

"Proposal Equity IRR" means [●].¹⁴

"Proposer" means each firm or team of firms that was shortlisted in accordance with the RFQ and invited to submit a proposal to MDOT in response to the RFQ, including any changes approved in writing by MDOT.

"Proprietary Intellectual Property" means:

- (a) Intellectual Property that is patented or copyrighted by any Phase Developer-Related Entity under Applicable Law, or
- (b) if not patented or copyrighted, Intellectual Property of a Phase Developer-Related Entity that is created, held, and managed as a trade secret and protected as a trade secret under Applicable Law, or confidential proprietary information of a Phase Developer-Related Entity,

but does not include Intellectual Property that is specifically created for the Phase.

"Rating Agency" means any credit rating agency registered with the Securities and Exchange Commission as a nationally recognized statistical rating organization.

"Reasonable Efforts" means all those steps (if any) in the power of the relevant Party that are capable of producing the desired result, being steps which a prudent, determined, and commercially reasonable Person desiring to achieve that result would take. Reasonable Efforts does not mean that, subject to its other express obligations under this Agreement, the relevant Party is required to expend funds, except for those necessary to meet the reasonable costs reasonably incidental or ancillary to the steps to be taken by the relevant Party (including its reasonable travel expenses, correspondence costs, and general overhead expenses).

¹⁴ This will be the Alternative Equity IRR populated based on the Proposal.

"Reference Information Documents" means all written information that is published by MDOT or MDTA on their websites or that is provided to the Phase Developer or any Phase Developer-Related Entity by MDOT, MDTA, or any of any of their employees, agents, officers, directors, or representatives or consultants prior to the date of this Agreement, including:

- (a) the RFP;
- (b) all contents of the Data Room; and
- (c) information provided on the MDOT website.

"Refinancing" has the meaning given to that term in the Section P3 Agreement Term Sheet.

"Relief Event" means:

- (a) any Force Majeure Event;
- (b) the issuance of any preliminary or permanent injunction or temporary restraining order or other similar order, legal restraint, or prohibition by a Governmental Entity of competent jurisdiction under Applicable Law that prohibits the performance of a material part of the Predevelopment Work under this Agreement or materially and adversely affects a Party's performance under this Agreement;
- (c) MDOT's failure to perform or observe any of its obligations under this Agreement;
- (d) MDOT unreasonably withholds or delays its response or approval of any submission made to it by the Phase Developer during the performance of the Predevelopment Work;
- (e) MDOT's failure to provide any of the MDOT Deliverables to the Phase Developer by October 31, 2021;
- (f) any Section of the Phase is not designated by the MDTA Board as part of a "transportation facilities project" for the purpose of Title 4 of the Maryland Code before execution of the Section P3 Agreement by all relevant parties for that Section;
- (g) following the issuance of the NEPA approval covering any applicable part of the Phase, such approval is subject to legal challenge or litigation which prevents any Section from achieving Financial Close by the applicable Predevelopment Milestone Deadline;
- (h) the MDTA Board fails to approve a Committed Section Proposal within 90 days of the Phase Developer submitting a Committed Section Proposal to MDOT that is accepted by MDOT; or
- (i) the BPW fails to approve a Section P3 Agreement within 150 days of the Phase Developer submitting a Committed Section Proposal to MDOT, that is accepted by MDOT and approved by the MDTA Board,

except, in each case, to the extent attributable to any breach of this Agreement, Applicable Law, or any Governmental Approval by, or any negligent act or negligent omission of, a Phase Developer-Related Entity.

"Remedial Action" means remediation or removal of Hazardous Materials under Section 9.4 (Hazardous Materials).

"Renewal Work General Conditions Cost Percentage" is defined in Appendix A of Exhibit 6 (Predevelopment Work Requirements).

"Renewal Work General Conditions Costs" is defined in Appendix A of Exhibit 6 (Predevelopment Work Requirements).

"Request for Proposals" or **"RFP"** is defined in paragraph (M) of the Recitals.

"Request for Qualifications" or **"RFQ"** is defined in paragraph (L) of the Recitals.

"Responsibility Determination" has the meaning given to that term in §10A-101 of the State Finance and Procurement Article of the Annotated Code of Maryland.

"ROD" means the FHWA Record of Decision for the I-495 and I-270 Managed Lane Study and any other relevant FHWA Records of Decision that may be issued during the Term.

"Scheduled Substantial Completion Date" has the meaning given to that term in the Section P3 Agreement.

"Section" means each portion of the Phase as determined under Article 1 (Scope of Predevelopment Work) of Exhibit 6 (Predevelopment Work Requirements).

"Section Construction Project Manager" means the "Construction Project Manager" as defined under the applicable Section P3 Agreement.

"Section D&C Work" means all work related to the design and construction of a Section under a Section P3 Agreement.

"Section Debt" means all of the outstanding obligations from time to time under the Finance Documents for a Section.

"Section Design Project Manager" means the "Design Project Manager" as defined under the applicable Section P3 Agreement.

"Section Developer" means the entity that enters into a Section P3 Agreement with MDOT and MDTA.

"Section Developer Default" means a default by a Section Developer under a Section P3 Agreement that:

- (a) occurs prior to Substantial Completion; and
- (b) gives MDOT a right to terminate the Section P3 Agreement if not remedied within an applicable cure period.

"Section Equity Investment" means:

- (a) any form of direct investment by Section Equity Members, including the purchase of newly issued equity shares or other equity interests in or the provision of Section Equity Member Debt to the Section Developer; and
- (b) any payment under, or draws on, any instrument guaranteeing the provision of Deferred Section Equity Amounts, including but not limited to any draws by or on behalf of the Section Developer of any letter(s) of credit issued by or for the account of a Section Equity Member with respect to such committed amounts.

The Developer Closing Fee(s) are separate and distinct from Section Equity Investment and are not netted off to derive Section Equity Investment.

"Section Equity Member" means each Person that directly holds or will directly hold an equity interest (legal or beneficial) in the applicable Section Developer.

"Section Equity Member Debt" means any obligations created, issued, or incurred by a Section Developer for borrowed money that:

- (a) is owned by a Section Equity Member, Section Related Entity, Section Qualified Investor, any Affiliate of a Section Equity Member, or an Affiliate of the Section Developer; and
- (b) is subordinated in priority of payment and security to all Section Debt held by Persons who are not Section Equity Members, other than any mezzanine debt that is provided by a party referred to in paragraph (a) on an arm's length basis.

"Section Equity Member Funding Agreement" means any loan agreement, credit agreement, or other similar finance agreement or subordination agreement providing for or evidencing Section Equity Member Debt.

"Section Key Personnel" means the "Key Personnel" as defined under the applicable Section P3 Agreement.

"Section O&M Work" means the "O&M Work" as that term is defined in the Section P3 Agreement Term Sheet.

"Section P3 Agreement" means the public-private partnership agreement that is used to deliver the design, construction, finance, operation, and maintenance works for a Section.

"Section P3 Agreement Term Sheet" means the term sheet for the Section P3 Agreement in Exhibit 8 (Section P3 Agreement Term Sheet).

"Section Proposal Equity IRR" means the Alternative Equity IRR submitted in the applicable Committed Section Proposal.

"Section Qualified Investor" means, for each Section, each CSP Equity Member (and any guarantor thereof) approved under a Committed Section Proposal for that Section.

"Section Related Entity" means, for each Section, each entity in the ultimate ownership structure between the Section Developer and each Qualified Investor (not including the Section Developer or the Qualified Investors).

"Section Schedule" means a work record showing planned start and finish dates for all Section Work to be performed under a Section P3 Agreement, and showing the logic used in the sequence of construction.

"Section Technical Provisions" means the technical provisions attached as an exhibit to a Section P3 Agreement.

"Section Work" means, in respect of a Section, all Work, services and obligations to be performed or provided by a Section Developer under a Section P3 Agreement.

"Selected Proposer" means the Proposer selected by MDOT to enter into this Agreement.

"Service Line" means:

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

"Site Investigations" has the meaning given to that term in Section 9.2(a) (Site Investigations).

"State" means the State of Maryland.

"State Intellectual Property" means all Work Product that is the property of MDOT and MDTA.

"Steering Committee" means the committee established in accordance with Article 8 (Steering Committee).

"Subcontractor DBE Payment Report" means the report described in Section 19.9(d)(iii)(B) (Compliance).

"Substantial Completion" means the satisfaction of all conditions to substantial completion to be set out in each Section P3 Agreement.

"Substantial Completion Date" means the date Substantial Completion has been achieved for the applicable Section.

"Supplier" means any Person not performing work at or on the Phase Site which supplies machinery, equipment, materials, hardware, software, systems, or any other appurtenance to the Phase to the Phase Developer or to any Contractor in connection with the performance of the Predevelopment Work. Persons who merely transport, pick up, deliver, or carry materials, personnel, parts, or equipment or any other items or Persons to or from a Phase Site will not be deemed to be performing Predevelopment Work at the Phase Site, and will not be deemed to be a Supplier.

"Term" means the term of this Agreement as determined under Article 3 (Effective Date and Term).

"Termination For Convenience Notice" means a notice of termination provided under Section 26.1 (Termination for Convenience).

"Terrorism" means activities against Persons or property of any nature:

- (a) that involve the following or preparation for the following:
 - (i) use or threat of force or violence; or
 - (ii) commission or threat of an act that interferes with or disrupts an electronic, communication, information, or mechanical system; and
- (b) when one or both of the following applies:
 - (i) it appears that the intent is to intimidate or coerce MDOT, MDTA, or a Governmental Entity, or the civilian population or any segment of the civilian population, or to disrupt any segment of the economy;

- (ii) it appears that the intent is to intimidate or coerce MDOT, MDTA, or a Governmental Entity, or to further political, ideological, religious, social, or economic objectives, or to express (or express opposition to) a philosophy or ideology; and
- (c) that are criminally defined as terrorism for purposes of Maryland, federal, or international Applicable Law.

"Third Party Claim" means any claim, dispute, disagreement, cause of action, demand, suit, action, investigation, or administrative proceeding brought by a Person that is not an Indemnified Party or the Phase Developer with respect to damages, injuries, liabilities, obligations, losses, costs, penalties, fines, or expenses (including attorney and expert witness fees and expenses) sustained or incurred by such Person.

"Third Party Parcels" means those parcels of the Phase Site that are owned by a third party and that MDOT does not have an established right of access to (including those that are owned or controlled by VDOT).

"TIFIA" means the Transportation Infrastructure Finance and Innovation Act of 1998, codified at 23 U.S.C. §§.601 et seq., as amended from time to time.

"Tolling Services Agreement Term Sheet" means the "Tolling Services Agreement Term Sheet" attached as Exhibit 2 to the Section P3 Agreement Term Sheet at Exhibit 8 (Section P3 Agreement Term Sheet).

"Toll Systems Integrator" means the entity with primary responsibility for the design, construction, integration, and testing of the toll system for a Section.

"Toll Systems Operator" means the entity with primary responsibility for the operation of the toll system for the Phase.

"Transit MOU" has the meaning given to that term in Section 11.4(a)(i) (Regional Transit).

"Transit Service Improvements" has the meaning given to that term in Section 11.4(a)(i) (Regional Transit).

"Trustee" means the trustee appointed under the MDTA Master Trust Agreement.

"Uncommitted Section" has the meaning given to that term in Section 14(a) (Section Viability).

"Upfront Payment" has the meaning given to that term in the Section P3 Agreement.

"Upfront Payment Account" means the account of that name described in Section 13.1 (Establishment of Upfront Payment Account).

"U.S.C." means the Code of Laws of the United States of America.

"US GAAP" means the Generally Accepted Accounting Principles in the US as in effect from time to time.

"Utility" means a privately, publicly, or cooperatively owned line, facility, or system for transmitting or distributing communications, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, a combined stormwater and sanitary system, or other similar commodities, including wireless telecommunications, television transmission signals, and publicly owned fire and police signal systems, which directly or indirectly serve the public. The term Utility excludes:

- (a) streetlights and traffic signals; and
- (b) intelligent transportation systems and intelligent vehicle highway system facilities.

The necessary appurtenances to each Utility facility will be considered part of such Utility. Any Service Line connecting directly to a Utility will be considered an appurtenance to that Utility, regardless of the ownership of such Service Line.

"Utility Owner" means the owner or operator of any Utility (including both privately held and publicly held entities, cooperative Utilities, municipalities, and other governmental agencies).

"Viability Cost Cap" has the meaning given to that term in Section 14(d)(ii) (Section Viability).

"VDOT" means the Virginia Department of Transportation, its agents, designees, successors, and assigns.

"WMATA" means the Washington Metropolitan Area Transit Authority.

"Work" means all predevelopment, design, construction, financing, traffic and revenue, maintenance, renewal, operations, and all other work, services, and obligations to be performed and provided in connection with the Phase under Exhibit 6 (Predevelopment Work Requirements), the other requirements of this Agreement, and each Section P3 Agreement.

"Work Product" means all Intellectual Property, data, information, documentation, work product, and other related materials produced, prepared, or obtained for the Phase and the P3 Program, including all submittals and other materials (including design documents), data, sketches, charts, calculations, plans, drawings, layouts, depictions, specifications, manuals, electronic files, artwork, records, film, tape, articles, memoranda, correspondence, and other documents acquired or brought into existence or used in relation to the foregoing and arising in connection with the Predevelopment Work.

Attachment 4 - Extract of Exhibit 6 (Predevelopment Work Requirements) relevant to tolling – Clean version

Exhibit 6 Tolling requirements summary.

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1.2 Phase Wide Objectives

In 2017, Governor Larry Hogan announced Maryland's Traffic Relief Plan. The I-495 & I-270 Public-Private Partnership Program (the "**P3 Program**"), the largest component of Maryland's Traffic Relief Plan, will be developed and delivered pursuant to the following overarching goals:

- Congestion Relief;
- Minimize Impacts;
- No Net Cost to State;
- Accelerated Delivery; and
- Shockingly Innovative.

The Phase Developer shall ensure that the Work is delivered on a consistent and coordinated basis across the Phase, in order to:

- (a) ensure exceptional service to the public across all Sections and minimize customer service issues from Users of the Priced Managed Lanes ("**PMLs**");
- (b) ensure tolling system interoperability across the Phase and the capability for the Section Developers to deliver consolidated Trip data for Trips across the Sections within Phase;
- (c) allow for simple and efficient interfacing with MDOT and MDTA for all Sections;
- (d) streamline MDOT's contract administration across all Section P3 Agreements;
- (e) streamline environmental permit acquisition and ensure coverage and compliance;
- (f) deliver the Work to reduce MDOT's potential for exposure to risk; and
- (g) ensure that Work is delivered in the most efficient and advantageous basis.

(together the "**Phase Wide Objectives**").

The Phase Developer shall, in collaboration with MDOT, develop an approach and contractual structures to manage and deliver the Phase Wide Objectives.

1.19 Tolling

The Phase Developer is responsible for all tolling Work needed to deliver the Phase (other than those functions being retained by MDTA under the Section P3 Agreement and Tolling Services Agreement ("**TSA**")), including design, construction, coordination and providing a Toll Systems Integrator and Toll Systems Operator. Specific requirements for tolling Work are in the Technical Provisions.

Develop an approach to tolling for the Work and include it in the Conceptual Design for review by MDOT and MDTA. Included with the Conceptual Design shall be:

- (a) the draft Concept of Operations ("**ConOps**") for the tolling system;
- (b) additional internal business rules to be used for tolling operations; and

(c) the Phase Developer's Plan for providing image review and consolidated Toll Transactions and Trip data to MDTA.

The Phase Developer shall include in the Section Schedule all MDTA approvals of the tolling system, including design submissions, construction submissions, integration and testing. Provide sufficient time for review and approval, including the requirement for multiple submissions if needed.

4.6 Public Education and Awareness Program

During the Predevelopment Work, the Phase Developer shall begin a public education process that targets key Stakeholders, advocates, community leaders, media and the public. The public education effort shall incorporate both traditional and non-traditional marketing approaches to increase awareness of the P3 Program. Education efforts shall include:

- maximizing public awareness of the P3 Program and the benefits of PMLs;
- educating travelers on how PMLs function and how to use them;
- communicating information about the schedule and the Toll Rate setting process;
- identifying effective training and educational approaches including developing strategies messaging appropriate to reach specific audiences; and
- evaluating the effectiveness of training and modifying the education program based on
- feedback from Stakeholders and other evaluations to provide the most effective education program.

A minimum of 180 days prior to Final Completion, the Section Developer shall implement with MDOT a public facing marketing campaign (the "**Public Education and Awareness Program**") as part of the Public Outreach and Engagement Plan for the Section. The purpose of the Public Education and Awareness Program is to communicate to daily commuters and other potential Users how the PMLs function, the benefits of using them, differences between using a Transponder and an Imaged-Based Transaction and the option to use the GPLs or take transit. The marketing campaign shall include specific tactics for communication with Stakeholders including print and broadcast media advertising, digital and social media as well as other appropriate means.

The Public Education and Awareness Program must include:

- the schedule for opening of the PMLs to traffic;
- educational materials to inform travelers about signing and tolling information on the PMLs;
- so motorists understand on-road sources of information to facilitate choice;
- maps, charts, or diagrams depicting entrances to and exits from the PMLs;
- education materials on MDTA resources including websites and phone applications;
- instructions on how to obtain a Transponder;
- education about how dynamic pricing is used in the PMLs;
- information on requirements to use the PMLs, including
 - the proper use of a Transponder;
 - HOV lane eligibility;
 - switchable Transponder requirements to declare HOV eligibility;
 - non-HOV options including Transponder use and as pre-registered video; and
- coordination with MDOT and MDTA on education program content and strategy.

The Section Developer shall maintain the Public Education and Awareness Program throughout the term of the Section P3 Agreement. Continuing public education and awareness activities shall include at a minimum:

- updates to developed content that was originally implemented;
- changes in managed lane technology use, operational policies;
- continued marketing of the facility including E-ZPass® and other Transponders; and
- additional content developed in coordination with MDOT and MDTA.

19.7.2 Managed Lanes Traffic and Toll Operations Center

Provide a traffic operations center to accommodate equipment and personnel for the traffic management operation of the Section. The Phase Developer may provide its own ATMS or use the CHART ATMS software as described in Exhibit 6 Article 19 (*Intelligent Transportation Systems*) Section 19.7.1 (*Advanced Transportation Management System Option*) and Exhibit 6 Article 19 (*Intelligent Transportation Systems*) Section 19.7.3 (*PMLs Operation within MDOT CHART ATMS*). For the traffic operations center, the Section Developer shall:

- provide a traffic operations center to monitor traffic, respond to incidents, and perform all other duties as required under the Phase P3 Agreement;
- obtain all permits and other approvals as required by Applicable Law, for the construction and occupancy of the traffic operations center;
- locate the traffic operations center in Maryland and within proximity to the Phase;
- provide a toll operations center located in the United States, where staff responsible tolling operations will be located, and tolling operations performed (the toll operations center may be co-located with the traffic operations center);
- integrate traffic and toll operations support services with MDOT's existing back office operations at Handback, or any early termination of the Section P3 Agreement, and ensure compatibility with MDOT's current system at that time or relocate to the appropriate MDOT tolling and traffic operations office, respectively, at that time;
- comply with MDOT's physical security requirements for all facilities;
- appropriately staff the traffic operations center whether operating on the existing CHART ATMS or separate platform as necessary;
- operate the ATMS 24 hours a day 7 days a week; and
- develop standard operating procedures for traffic and tolling operations across all Sections within the Phase.

The Phase Developer shall not rely on MDOT SHA CHART personnel resources (i.e. CHART traffic operations center managers and highway operation technicians as defined in the Chart Traffic Management Center Operations Standard Operating Procedures) for operation of the PMLs.

19.7.3 PMLs Operation within MDOT CHART ATMS

In the event the Phase Developer elects to operate as a separate Traffic Operations Center within MDOT CHART, the Phase Developer will be required to develop ATMS components/systems separately to control PMLs applications proprietary to the Phase Developer, not supported by the MDOT CHARTS ATMS, or not critical to data, view, and control sharing. As an example, the Phase Developer would be responsible for developing a variable Toll Rate algorithm which the MDOT CHART system cannot provide. The Phase Developer is also responsible for developing an application to interface the variable rate tolling algorithm with the MDOT CHART ATMS so Toll Rates can be displayed on DMS signs integrated in the MDOT CHART ATMS, if the Phase Developer so chooses. There is an existing interface within MDOT CHART supporting the publishing of Toll Rates to MDOT CHART on 10 minute intervals

for display on DMS. The interface supports current MDTA needs. Should the Phase Developer choose to use this interface, all costs and Work required for modifications to support multiple publishers would be the responsibility of the Phase Developer.

Access to certain aspects of MDOT CHART's system will be restricted (e.g., ITS devices or system unrelated to the PMLs ITS system). Likewise, MDOT CHART's access to certain aspects of the PMLs ITS system will also be restricted (e.g., MDOT CHART will not have access to the Phase Developer's variable Toll Rate system).

The MDOT CHART ATMS software is open-source code, and no license is required.

The MDOT CHART ATMS uses arbitration queues to arbitrate the usage of a device by maintaining a prioritized message queue for the associated device. As messages are requested to be displayed or broadcast on a specific device, they are assigned priorities based on a predefined message priority scheme. Coordinate with MDOT CHART to determine the arbitration queue bucket for PML systems operated through the MDOT CHART ATMS.

A yearly transaction fee shall be paid to MDOT to cover the cost of additional state resources required for MDOT CHART to develop, integrate, maintain, upgrade, and troubleshoot the Phase Developer's PMLs ITS systems within the MDOT CHART ATMS. This yearly transaction fee will be negotiated between the Phase Developer and MDOT based on the scale of the Phase Developer's PMLs systems.

MDOT CHART will be responsible for upgrading and developing software or drivers within the MDOT CHART ATMS to support the proposed PMLs ITS systems. This will include support to initially integrate the proposed systems into the MDOT CHART ATMS and to support future upgrades of the systems. Coordinate with MDOT CHART to determine the detailed MDOT CHART ATMS software requirements and a schedule for initial implementation and future upgrades. MDOT CHART will be responsible for coordinating with the Phase Developer and providing the schedule of proposed system maintenance (updates to the MDOT CHART ATMS software, drivers, and security patches) so the Phase Developer can understand and address any required modifications to the Phase Developer's systems and devices.

MDOT CHART typically performs system maintenance on weekdays during the midday period (10 AM to 2 PM). System maintenance typically lasts 2 to 4 hours, and during this time, there is no automation within the MDOT CHART ATMS; however, manual changes and control can still be made, such as moving a camera.

Current MDOT CHART ATMS system architecture may be obtained by contacting the MDOT CHART Systems Administrator.

21.7 Uninterruptible Power Supplies and Back-up Power Generation

Use uninterruptible power supplies or backup power generation as required to maintain safety for the traveling public and to keep devices and systems functional **including the Electronic Toll and Traffic Management System ("ETTM System")** in the event of a power failure.

Article 24. Electronic Toll Collection Infrastructure

24.1 Scope

Phase Developer shall design, develop, fabricate, test, integrate, deploy, construct, operate, maintain, and upgrade to maintain an ETCS supporting all electronic tolling on the PMLs in accordance with the requirements of these Technical Provisions and the applicable requirements of the TSA.

The SMP (see Exhibit 6 Article 3 (*Management and Administration of the Work*) Section 3.1 (*Section Management Plan*)) shall set forth an approach, procedures, and methods for the management of the ETCS. The ETCS design shall be included as part of Phase Developer design documents in accordance with the provision of this Exhibit 6 Article 24 (*Electronic Toll Collection Infrastructure*). Phase Developer shall demonstrate the ETCS design is capable of serving 20% above the maximum traffic volumes expected.

The ETCS shall accurately detect and classify according to the vehicle classification and occupancy, as outlined in the TSA or the Business Rules (as applicable). All vehicles using the PMLs shall be calculated and assigned tolls due for the use of the PMLs based on the vehicle classification and the Base Toll Rate determined according to the TSA and (if applicable) the Business Rules and do so without impeding traffic flow of vehicles using the PMLs facility.

The ETCS shall document and provide proof of use of the PMLs and corresponding toll for all Users, prevent data and images from being tampered with after the fact, protect User privacy, and ensure the traceability of all operations necessary for the accurate generation of proof of passage and toll calculation by Toll Transaction, by Tolling Point, and by Trip.

Over the life cycle of the project, whenever significant upgrades or system life-cycle replacements are performed, the design documents shall be updated and submitted, and the implementation of upgrades coordinated with MDOT and MDTA.

The requirements presented herein for the ETCS are based on current tolling applications within the State. The ETCS shall accommodate alternate and future approaches for ETCS infrastructure and operations, meeting the performance requirements, be compatible with other Maryland tolling facility enhancements and subject to acceptance by MDOT and MDTA. The Section Developer shall carry out upgrades to the ETCS on a regular basis throughout the term of the Section P3 Agreement to implement establish a review of new toll component technology, standards/ best market best practices for toll roads in the US, carry out technology reviews and hold discussions with MDOT/MDTA every 3 years. For any recommendation to include new technology to the manage lanes, the Developer shall prepare a report subject to review and acceptance by MDOT/MDTA.

24.2 Tolling Strategy

24.2.1 Tolling Strategy Requirements

The Phase Developer shall develop a tolling strategy to accommodate:

- ensuring MDTA receives a single Trip for any set of Toll Transactions within the Phase, which includes identifying the parts and value of the Trip that were undertaken within each Section;
- imposing congestion pricing, which may include dynamic tolling with potential Toll Rate changes at frequent intervals, to maintain free-flow conditions of traffic within the limitations specified in the Agreement;
- adopting a variable Toll Rate algorithm;
- using variable Toll Rate notification signage to ensure timely motorist notifications that comply with federal and state requirements and provide sufficient information for motorist choice;
- preparing a Phase-wide ConOps;
- using discount or toll-free User periods to incentivize motorist use; and effectively enforcing HOV lane restrictions, as applicable, and coordination with law enforcement.

24.2.2 Tolling Strategy Plan

The Phase Developer shall develop and submit for review a Tolling Strategy Plan for the Work. The Tolling Strategy Plan shall include:

- the steps, processes, and structures to be undertaken and established to ensure compatibility of tolling operations:
 - across all of the Phase;
 - with adjoining phases;
 - with existing MDTA tolling operations and protocols; and
 - with any Maryland or Virginia facilities;
- details of the ETCS to be designed, constructed, tested and implemented on the PMLs;
- a description of the interaction with MDTA and MDOT CHART;
- a narrative describing the Phase-wide ConOps of the Price Managed Lanes, including:
 - the framing and creation of Toll Transactions;
 - vehicle classification;
 - lane operations; and
 - accuracy and reliability measures;
- an approach to minimizing traffic impacts while conducting the maintenance and repair of ETCS Elements;
- a description of the disposition of Toll Transactions from creation to hand-off to MDTA, including how only Valid Trips will be transmitted to MDTA;
- a proposed method for the monthly reconciliation and settlement of Toll Revenue between the Section Developers and MDTA;
- a description of the image review and Trip building processes, including functionality, experienced accuracy and relevant performance indicators used on other projects;
- ongoing quality assurance and quality certification required to maintain high levels of accuracy and reliability;
- the approach to system upgrades, equipment, and system life cycles and incorporation of technology improvements over the term of the Section P3 Agreement;
- a proposed regime for performance assessments and reporting in relation to the PMLs; and
- a description of the system reporting and Toll Transaction data that will be available to MDTA, including data necessary to support MDTA's customer service operations.

24.3 Design Requirements

The ETCS, including but not limited to toll equipment, host and gantry servers, dynamic pricing equipment, equipment cabinets, communications systems, gantries and signs, power supply, supporting conduits, splice vaults, pull boxes, junction boxes, and wiring shall be designed and constructed in accordance with the requirements of this Exhibit 6 Article 24 (*Electronic Toll Collection Infrastructure*) and all applicable standards, including Tolling Points located along the managed lane main travel lanes or direct connect ramps. Design of interfaces and Tolling Points shall be coordinated across all Sections within each Phase.

The SMP shall set forth the Phase Developer's approach, procedures, and methods for the implementation of the ETCS supporting tolling on the PMLs. Phase Developer shall specifically identify in the SMP how the performance requirements of this Exhibit 6 Article 24 (*Electronic Toll Collection Infrastructure*) and the TSA are met along with state and federal standards. Proposed deviations from the tolling requirements shall be addressed in accordance with the requirements of Exhibit 6 Article 2 (*Technical Provisions*) Section 2.2 (*Standards, References, and Specifications*).

24.4 ETCS Operational Requirements

Phase Developer shall determine the components of the ETCS needed to satisfy the ETCS functional requirements set forth in these Technical Provisions. The ETCS equipment and infrastructure shall provide for safe and secure access to all ETCS components for maintenance and repairs without disruption to the GP Lanes. Additional operational requirements are identified in Exhibit 6 Article 25 (*Operations and Maintenance*).

24.5 ETCS Performance Requirements

The ETCS performance requirements are identified in Exhibit 6 Article 25 (*Operations and Maintenance*).

24.6 Staffing

Provide a Tolling Lead who oversees the coordination of the design and construction of the tolling system. Together with the Toll Systems Integrator, the Tolling Lead delivers a functional system. The Tolling Lead shall have the following qualifications:

- a minimum of 10 years of experience with tolling systems design and construction;
- demonstrated past experience with all electronic open road tolling design and installation;
- and
- preferably experience with MDTA and MDOT CHART.

The Tolling Lead position must be filled for the term of the Section P3 Agreement; the Person holding such position is expected to be on-site in the Section Office and be committed full time. Qualifications shall be subject to review and acceptance by MDOT and MDTA. If a replacement is needed to fill the position, the qualifications for the replacement shall be submitted and are subject to review and acceptance by MDOT and MDTA.

24.7 Toll Systems Integrator and Toll Systems Operator

Provide a Toll Systems Integrator who is responsible for integrating, testing, and commissioning all the individual Elements of the ETCS and the portions of the ITS impacting tolling. Together with the ITS/Tolling Lead, the Toll Systems Integrator delivers a functional system. Provide a Toll Systems Operator who is responsible for the day-to-day implementation of the ETTM System, integration of the ETTM System with other systems as applicable roadside tolling services, and performance of the responsibilities outlined in the TSA including the development of Toll Transaction data.

24.7.1 Minimum Qualifications

The Toll Systems Integrator and Toll Systems Operator must satisfy all of the applicable minimum qualifications subject to review and acceptance by MDOT and MDTA.

An entity proposed as the Toll Systems Integrator or Toll Systems Operator will not be required to satisfy those qualifications that do not correspond to the Work that entity would perform as Toll Systems Integrator or Toll Systems Operator. For example, a Toll Systems Integrator or Toll Systems Operator only being proposed for image review services will not be required to satisfy requirements for toll lane design.

The Toll Systems Integrator and Toll Systems Operator must satisfy the minimum qualifications below by:

- having at least 3 currently operational clients using toll lanes designed and built by the Toll Systems Integrator or Toll Systems Operator. For each client:
 - the lanes must be multilane all electronic tolling type (or multilane open road tolling);
 - the lanes must accept time-division multiplexing protocol as at least one of the supported protocols; and
 - the lanes must use the same design as proposed for the Phase;
- having designed and maintained at least 20 all electronic tolling type toll lanes and 8 Tolling Points within the United States;
- having at least 2 currently operational clients where the Toll Systems Integrator or Toll Systems Operator is performing Trip building. For each client:
 - must demonstrate current ability to assemble Trips from multiple Tolling Points (minimum 3 Tolling Points) for a Mainline toll road;
 - the client must respond to a direct reference questionnaire from MDOT on behalf of MDTA;
 - the response must confirm use of the Toll Systems Integrator or Toll Systems Operator's Trip building systems and processes; and
 - the response must indicate successful, accurate, and reliable Trip building;
- having at least 2 currently operational clients where the Toll Systems Integrator or Toll Systems Operator is performing image review services:
 - in the United States;
 - using multi-state plate identification;
 - identifying plate types;
 - if not performing all 50 states identification and plate type, must demonstrate an ability to extend to all 50 states, including plate type identification;
- the clients must respond to a direct reference questionnaire from MDOT on behalf of MDTA and the response must:
 - confirm use of the Toll Systems Integrator or Toll Systems Operator's image review systems and services; and
 - Indicate successful, accurate, and reliable image review; and
- having at least 1 operational client where the Toll Systems Integrator or Toll Systems Operator is performing both Trip building and image review.

The Toll Systems Integrator will be required for the Construction Work as needed to comply with the Section Developer's ITS and tolling system testing Plans.

24.7.2 Proposal for Toll Systems Integrator and Toll Systems Operator

The Phase Developer shall submit a proposal to engage its preferred Toll Systems Integrator and Toll Systems Operator subject to review and acceptance by MDOT and MDTA in accordance with Article 20 (*Toll Systems Integrator and Toll Systems Operator*) of the Agreement. The Toll Systems Operator may be the same entity as the Toll Systems Integrator.

Any proposal under Article 20 (*Toll Systems Integrator and Toll Systems Operator*) of the Agreement must include:

- the identity of the preferred Toll Systems Integrator and Toll Systems Operator and detail the work that each of them will perform;
- confirmation that the Toll Systems Integrator and Toll Systems Operator satisfy the minimum qualifications requirements in Exhibit 6 Article 24 (*Electronic Toll Collection Infrastructure*) Section 24.7.1 (*Minimum Qualifications*) together with sufficient documentation to demonstrate those requirements have been satisfied;
- relevant experience of each proposed entity in the planning, design, construction, testing, documentation, installation, integration, implementation, maintenance, and operation of an ETTM System;
- past experience and present contracts of each proposed entity for toll facilities of a similar size, complexity, and nature as the Phase;
- with respect to the experience referred to above, provide details of the system hardware and software utilized, facilities management, system operations, system maintenance, and any other appropriate information related to the development, implementation, and operation of the programs;

- with respect to the experience referred to above, provide details of the client and contact information necessary to enable MDOT and MDTA to verify the asserted experience;
- documented experienced accuracy, Performance Measures and reliability from each proposed entity's current projects; and
- such other relevant information as MDOT and MDTA may require of the Phase Developer.

The Phase Developer shall ensure that all referenced clients of the proposed Toll Systems Integrator and Toll Systems Operator respond to a direct reference questionnaire from MDOT to confirm the assertion of the proposed entity's experience as necessary.

24.8 Testing and Commissioning

Phase Developer's commissioning agent shall conduct ETCS concept validation testing and formal on-site system acceptance testing as per the ETCS Testing Plan. Before testing activities begin, the test Plan is to be submitted by the Section Developer as a component of the SMP.

Testing activities for ETCS shall demonstrate the ETCS meets the performance requirements defined in this Exhibit 6 Article 24 (Electronic Toll Collection Infrastructure) and the TSA. Prior to any testing, Phase Developer shall provide 30 days' notice to MDOT and MDTA of the time and location(s) for any testing. Testing shall be conducted by the IQF to evaluate system compliance with MDOT and MDTA being given the option to observe all tests. The IQF shall provide quality assurance review of all testing.

Phase Developer shall be required to demonstrate during the ETCS Demonstration Period the ETCS reliably meets the performance requirements as defined in this Exhibit 6 Article 24 (Electronic Toll Collection Infrastructure) and the TSA under operating conditions for a sustained period.

24.8.1 Testing Program for ETCS

Section Developer shall conduct both concept validation testing and on-site system integration testing. The objectives of the testing activities for ETCS are:

- to verify the proper functioning of the equipment and of the systems and sub-systems, as described in the design documents;
- to demonstrate the equipment, systems, and sub-systems meet the performance, and reliability requirements as set out in the TSA, and Exhibit 6 Article 25 (Operations and Maintenance) along with this Exhibit 6 Article 24 (Electronic Toll Collection Infrastructure); and
- to demonstrate the mechanisms for the exchange of information between the Parties and between Phase Developer and any third party (e.g., law enforcement authorities, etc.) function properly.

Concept validation testing shall be completed to demonstrate the proposed equipment meets the ETCS performance requirements in a controlled environment.

For all proposed system Elements meeting concept validation testing criteria, on-site system acceptance testing shall be completed to demonstrate:

- the entire system, equipment, and facilities are ready for commencement of operations;
- the equipment meets performance requirements with vehicles traveling at all speeds including a full range of vehicle types;
- the equipment meets performance requirements when used in a wide range of lighting and weather conditions;
- all external interfaces operate properly; and
- all aspects of Toll Transaction collection and transmission meet performance requirements.

Prepare an ETCS Testing Plan for concept validation testing and on-site system acceptance testing, including:

- an introduction stating the purpose of the document, any supporting documents attached and points of contact for the Work;
- a description of how the testing program is used in conjunction with the Quality Management System;
- the testing process and methodology including:
 - Testing Plan objectives;
 - testing methods;
 - assumptions:
 - source documents;
 - environmental needs;
 - training needs; and
 - qualifications of testers;
- problem identification and resolution;
- test script;
- pass/fail criteria;
- issue tracking and use of a traceability matrix;
- the disposition of signed scripts and ETCS final acceptance signature sheet;
- an estimated schedule for testing and locations;
- ETCS final acceptance sign off (when all scripts are accepted); and
- application of the Quality Management System to the testing program.

24.8.2 Interface for ETCS Services

Phase Developer shall notify MDTA in writing at least 24 months prior to the anticipated date of Substantial Completion of the completion of the first operable portion of the ETCS (or future upgrades/new system deployments) in order for MDTA to prepare to perform its ETCS Services. Phase Developer shall accompany such notice with a Work Plan, including a schedule, for MDTA to perform MDTA system interface Work and testing in accordance with such Work Plan. Upon MDTA's receipt of such notice, Phase Developer and MDTA shall cooperate with each other in order to prepare for the system interface work and testing and subsequent operations of the PMLs.

24.8.3 Demonstration Period for ETCS

The objectives of the ETCS demonstration period are the same as those set forth for the testing program for ETCS, but the ETCS demonstration period will be carried out while the PMLs are in normal operating conditions.

The ETCS demonstration period shall be initiated at the time of Substantial Completion for each Section. The Phase Developer's commissioning agent shall monitor the system during the demonstration period.

In order to successfully complete the ETCS demonstration period, the ETCS shall meet the performance requirements in this Exhibit 6 Article 24 (Electronic Toll Collection Infrastructure) and the TSA for the duration of the ETCS demonstration period.

The ETCS demonstration period for the first operable portion of the ETCS (or Tolling Point of a Section where testing can occur) achieving Substantial Completion shall be a minimum of 60 consecutive days. If the initial ETCS does not function as required during the demonstration period, the testing will be considered unsuccessful and the period shall be extended until such time as the performance requirements have been met but not longer than a consecutive 90 day period. If at the end of 90 days the ETCS is still not functioning as required, the ETCS shall be repaired, replaced or otherwise modified. Following repair, a new testing regime shall be conducted, and the demonstration period shall start anew. This process shall be repeated as many times as need until the ETCS is complete, functioning as intended, and is acceptable to MDOT and MDTA.

A report on the demonstration period shall be provided to MDOT and MDTA.

24.9 ETCS Design

Deliverable content will be developed in coordination between the Phase Developer and MDOT and MDTA. The following outlines general expectations of MDOT and MDTA.

24.9.1 Preliminary ETCS Design

If not completed as part of the Predevelopment Work, preliminary ETCS design shall be prepared as a Preliminary Section Design Activity. Preliminary ETCS design shall include at a minimum:

- a ConOps, prepared in conformance with the Institute of Electrical and Electronics Engineers Standard P1362 V3.2, and ANSI/American Institute of Aeronautics and Astronautics Standard G-043-1992 Guide for the Preparation of Operational Concept Documents; and
- a presentation of the overview and architecture for the ETCS to include:
 - the general physical layout (including Tolling Points, Toll Rate Signs and ITS device locations);
 - Tolling Point functionalities, configuration, and equipment;
 - host computer functionalities, configuration, and equipment;
 - Toll Transaction consolidation;
 - communication and interface with MDTA and adjacent Phase, Section, and state tolling providers; and
 - maintenance and support.

Perform necessary Work for the ITS architecture and system engineering in compliance with FHWA Rule 940.

24.9.2 ETCS Design Deliverables

ETCS Design Deliverables shall present at a minimum the following:

- lane configurations;
- Tolling Points configuration;
- Tolling Point locations;
- traffic monitoring station locations;
- curative maintenance management system equipment and locations;
- roadside system and technology;
- Toll Rate Sign locations and details;
- a description of the Toll Rate-setting approach and how it is communicated to all devices;
- equipment installation locations;
- a performance specification traceability matrix;
- network design;
- system hardware and software;
- technical interface with existing MDOT or MDTA systems;
- technologies to be used for enforcement;
- performance reporting and auditing tools; and
- product cut sheets for all ETCS equipment and communications gear.

All roadside ETCS components, including Tolling Points and Toll Rate Signs, shall be developed in conformance with other requirements described in other portions of this Exhibit 6 (Predevelopment Work Activities).

24.9.3 Concept Validation Testing

The Section Developer shall provide MDTA with certified documentation demonstrating successful completion of concept validation testing, including interoperability requirements within 15 days of passing the testing.

24.9.4 Substantial Completion

The Section Developer shall submit documentation to MDOT and MDTA demonstrating successful completion of on-site system acceptance testing as a condition for achieving Substantial Completion of a Section in accordance with the Section P3 Agreement.

24.10 ETCS Reporting Requirements

The Section Developer shall prepare a monthly report describing the ETCS activities and performance, traffic volumes, speeds, and revenue figures as described herein. Section Developer shall submit a template of each monthly activity report to MDOT and MDTA no less than 30 days prior to Substantial Completion. Phase Developer shall submit a report for each calendar month to MDOT and MDTA no later than 5 Business Days after the end of the month.

Tolling data must be submitted to MDTA on a consolidated basis across the entire Phase. Trip data for any vehicle traveling on the PMLs in multiple Sections of the Phase as part of a continuous period of travel within the PMLs in the same direction shall be consolidated into a single Trip before it is submitted to MDTA in accordance with the TSA.

24.10.1 ETCS Daily Check Report

Perform daily monitoring and checking of the ETCS for compliance with Performance Requirements. Provide MDOT with a copy of this report.

24.10.2 ETCS Activity Monthly Report

From Substantial Completion to the end of the term of the Section P3 Agreement, the ETCS Activity Monthly Report shall be submitted to MDOT and MDTA and include:

- a detailed discussion of all instances of Noncompliance Events occurring in the month pertaining to the ETCS performance, as required by Exhibit 6 Article 25 (Operations and Maintenance), describing the Element name and reference number, the commencement time, duration, entity who identified such events first, details regarding the cure of such Noncompliance Events including the steps taken and the time it took to cure, applicable cure period, the reasons why the prescribed performance goals were not met, the status of such events as of the end of the month, Noncompliance Points incurred by Phase Developer if any associated with each such ETCS Noncompliance Event, and the changes (if any) made to the Phase Developer's operations based upon such events;
- detailed calculations of Noncompliance Points associated with ETCS Noncompliance Events incurred by Phase Developer and accrued for the past month and total balance for the past 365 days and liquidated damages assessed, including details of each assessment; and
- a summary of monthly ETCS maintenance activities, support activities for applications and databases, and technology enhancements if any.

24.10.3 Traffic and Revenue Monthly Reports

From Substantial Completion to the end of the term of the Section P3 Agreement, for the current month, the Traffic and Revenue Monthly Report shall be submitted to MDOT and MDTA and include:

- a listing of the dynamic Toll Rates used for the current month and the previous three months;

- the schedule of all toll discounts to Users, if any, for the current month and the previous three months;
- traffic counts on the PMLs for the current month and the previous 14 months, with such traffic counts performed at the same specific locations each month (at a minimum covering one location per Tolling Point in each direction);
- a detailed presentation and explanation of any suspension of tolls in accordance with the Section P3 Agreement, including the following information on all such events:
 - the nature, location, direction, if applicable, date, and time (rounded to the nearest minute) of the suspense of tolls; and
 - a description of the impact (location, magnitude, and duration) on the traffic on the PMLs and GP Lanes;
- a detailed presentation and explanation of any Noncompliance Event, to the extent such Noncompliance Event affected traffic on the PMLs and GPLs, including the following information on all such events:
 - the nature, location, direction, if applicable, date, and time (rounded to the nearest minute) of the detection of each Noncompliance Event;
 - the name of the Person or the agency having identified the event;
 - description of the impact (location, magnitude, and duration) on the traffic on the PMLs and GPLs; and
 - the date and time (rounded to the nearest minute) of the cure of the Noncompliance Event and return to normal traffic flow.

The monthly report package shall be delivered to MDOT and MDTA within 5 Business Days of the end of the month.

The Section Developer shall maintain indicative averages (which may include historical or other relevant information) for a minimum of the previous 180 days (or such lesser period if less than 180 days since tolling operations commenced), broken out by Tolling Point and direction during a minimum of every hour during non-AM or PM peak periods and every half hour during AM and PM peak periods of Base Toll Rates on the Priced Managed Lanes or as otherwise approved by MDTA, and the applicable Tolling Points, Classifications Multipliers, and [Image-Based Transaction premiums]. The Section Developer will make this information available, to any member of the public, on a website[, through a telephonic request and upon request at the Section Developer's offices during reasonable business hours, by facsimile copy without charge or by mailing a copy if the written request is accompanied by a self-addressed stamped envelope].

24.10.4 Traffic and Revenue Annual Reports

On an annual basis, Phase Developer shall create a Traffic and Revenue Annual Report to be submitted to MDOT and MDTA. Annual reports shall be delivered to MDOT and MDTA no later than July 30th of any year. Phase Developer's Traffic and Revenue Annual Report shall contain:

- a summary of all Traffic and Revenue Monthly Reports and ETCS Activity Monthly Reports from the preceding 12-month period;
- a statement of all adjustments to the Traffic and Revenue Monthly Reports and ETCS Activity Monthly Reports from the preceding 12-month period (if any);
- a calculation of the average annual daily traffic on the PMLs, on the GPLs, and for all lanes in the same highway location as the traffic counts reported monthly;
- a calculation of the average annual daily traffic for the preceding 12-month period; and
- a summary of the information requested by MDOT or MDTA (corrected if necessary) by month during the preceding 12-month period (if any).

24.10.5 HOV Declaration Monthly Report

From the toll facility opening date of revenue service until the end of the term of the Section P3 Agreement, for the current month, the HOV Declaration Report shall be submitted to MDOT and MDTA and include the following:

- location of each Toll Transactions (Tolling Point and lane number);
- the HOV status;
- the Transponder number; and
- Toll Transactions date and time stamp.

24.11 Deliverables

Table 24-1 - ETCS Submittals

| DELIVERABLE/SUBMITTAL | REQUIRED TIMING |
|--|---|
| Tolling Lead qualifications | With the Committed Section Proposal |
| Toll Systems Integrator and Toll Systems Operator proposal | Submittal in compliance with the timing set out in the <u>Phase P3 Agreement Article 20 (Toll System Integrator and Toll System Operator)</u> . |
| Tolling Strategy Plan | In accordance with the Phase Developer's Schedule for the pertinent portion of the Work |
| ETCS Testing Plan | Before installation of tolling equipment |
| ConOps | As part of the Predevelopment Work or as a Preliminary Section Design Activity |
| Preliminary Design | As part of the Predevelopment Work or as a Preliminary Section Design Activity |
| Concept validation testing results | 15 days after test completion |
| ETCS Activity Monthly Report | Monthly from Substantial Completion |
| Traffic and Revenue Monthly Reports | Monthly from Substantial Completion |
| Traffic and Revenue Annual Reports | Yearly from Substantial Completion |
| HOV Declaration Monthly Report | Monthly from Substantial Completion |
| O&M manuals | Following Substantial Completion |
| As-Builts Drawings | Following Substantial Completion |

Article 25 Operations and Maintenance

25.1 Scope

[Developer shall] Monitor all PMLs open for **Toll Revenue**, operate and maintain for 24 hours per day, seven days per week with the appropriate staff levels for these hours of operation to achieve or exceed the O&M Performance Requirements and provide superior customer service in accordance with the Section P3 Agreement. **Ensure the communication of Toll Rates to Users and accurate Toll Transactions for the associated vehicle.**

The requirements presented herein for O&M are based on current practices used within the US. The Section Developer's O&M Plan shall accommodate alternate and future approaches for O&M but must meet the O&M Performance Requirements; **must be compatible with other Maryland tolling facility enhancements**; and will be subject to acceptance by MDOT and MDTA.

25.2.3.2 Operating Period

- During the Operating Period, MDOT and its subcontractors are responsible for the following:
- MDOT GPLs and ROW outside the O&M Limits;
- **Tolling Back-Office Systems for Toll Transaction processing;**
- MDOT traffic signals and traffic signal timing;
- maintenance and operations of MDOT ITS equipment; and
- MDOT responsibilities for shared elements.

25.3.2 Operations and Maintenance Plan

Prepare and submit the O&M Plan as a component of the SMP.

Table 25-1 O&M Plan Components

| OPERATIONS AND MAINTENANCE PLAN COMPONENTS |
|---|
| D&C O&M Plan |
| O&M Shared Responsibility Protocols |
| Regulated Substances Plan |
| O&M SaMP |
| O&M QMP |
| Renewal Work Schedule |
| RWP |
| Vegetation Management Plan |
| Storm Water Management Program Plan |
| Maintenance of Traffic Plan |
| Communications and Outreach Plan |
| Emergency Response Plan |
| Incident Management Plan |
| Operations Plan |
| ETCS, ITS and Tolling O&M Plan |
| Snow and Ice Control Plan |

The ETCS, ITS, and Tolling O&M Plan shall include maintenance staffing and administration, dispatch procedures, communication requirements, support from outside maintenance services (for example, computer manufacturers), final maintenance equipment list, and other details as may be appropriate. Include specific maintenance processes and procedures to be used to successfully manage, staff, and conduct ETCS, ITS, and tolling maintenance in order to achieve or exceed the performance standards.

25.3.3.2 Tolling Manager

Provide a Tolling Manager to be responsible for operations necessary for tolling, tolling system and Toll Transactions. The Tolling Manager shall have the following qualifications:

- a minimum of 10 years' experience with tolling systems operations;
- demonstrated past experience with all electronic open road tolling operations; and
- preferably experience with MDTA and MDOT CHART.

The Tolling Manager position must be filled for the duration of the term of the Section P3 Agreement; the Person holding such position is expected to be on-site in the Section Office and be committed full time starting at least one year prior to the commencement of the Section O&M Work.

25.6.1 ETCS Operations

The following ETCS functional requirements shall be followed for each and every vehicle using the PML, whether equipped with a Transponder or not, the ETCS shall at a minimum:

- provide all electronic tolling service to vehicles on the PML;
- detect vehicles;
- read Transponders (if equipped);
- capture an image of the front and rear of each vehicle showing the license plate image, readable to determine plate number, state of origin, and plate type;
- handle multiple Transponder reads within a vehicle by defaulting to a single Transponder as determined in accordance with the TSA and (if applicable) the Business Rules;
- receive Transponder status files from the MDTA Customer Service Center ("**CSC**") including full status files daily and incremental updates throughout the day and complete distribution from the files(s) to the lane level system in 15 minutes or less;
- maintain Transponder-reader equipment utilizing Multi-Protocol Reader technology sufficient for a minimum of three protocols with protocol reading priority capabilities to be set during Final Design under the direction of MDTA;
- provide real-time Transponder passage notifications to the CSC via the intermediate notification ICD (to support short message service ("**SMS**")/text and push notifications to Users);
- inform corridor motorists in real-time of the applicable Toll Rates, including the suspension of tolls, using Toll Rate Signs before they use the PML;
- classify vehicles per the vehicle classification;
- identify occupancy declaration;
- tolerate old Transponder data files during periods of lost communication;
- detect and prevent duplicate Toll Transactions from being sent to MDTA;
- transmit completed Trips and all associated data to MDTA within the time limits established;
- construct an accurate Trip with Toll Rate, location, lane, date and time information, vehicle class, Transponder or plate information as applicable;
- create a proof of passage by Tolling Point in accordance with applicable requirements;
- generate accurate Toll Transactions, for both Tolling Point and Trip, and maintain proper records of such Toll Transactions and supporting information resulting in the creation of each Toll Transactions;
- allow a configurable time window between each consecutive Tolling Point to associate individual Toll Transactions into a single Trip;

- transmit accurate and certified Trip data to MDTA host server;
- create buffered Toll Transactions and ability to hold locally for an extended period of time in the event of a transmission disruption;
- communicate and interface to ITS/traffic management systems as needed along the PMLs and GPL corridors;
- maintain a database of all the displayed Toll Rates by Tolling Point, direction, date and time of day to provide historical toll value in the case of component failure, system audit, or dispute resolution accessible by CSC staff as needed;
- accurately calculate the toll for the use of the PML and assigned as applicable pursuant to the TSA;
- display the Toll Rate for the PML in accordance with Exhibit 6 Article 19 (*Intelligent Transportation Systems*);
- publish Toll Rates to MDOT CHART using current ICD and modify only if required for functionality and as accepted by MDOT;
- collect audit data by means of a Digital Video Auditing System with data and event logger attached to monitoring cameras and indexed to the Toll Transactions;
- provide access to view and download Digital Video Auditing System video clips as necessary for customer service;
- exchange audit and reconciliation files per the applicable file specification;
- provide traffic counts sufficient to verify and audit the performance of the ETCS;
- provide accurate accounting in US dollars and according to State rules and regulations, and US GAAP;
- manage and store all data transfers among the ETCS functions and between ETCS and MDTA;
- measure key performance indicators, metrics and monitor ETCS performance;
- provide preventative and curative maintenance management systems;
- implement a monitoring tool to monitor and manage equipment and systems that are compatible with MDTA's existing monitoring tool protocols;
- monitor, track, and control quality of ETCS maintenance performed; and
- produce and provide to MDOT and MDTA in an acceptable format, all reports in accordance with Exhibit 6 Article 25 (*Operations and Maintenance*) Section 25.3.8 (*O&M Reports*).

ETCS performance and functional requirements are further defined in this Exhibit 6 Article 25 (*Operations and Maintenance*) and in Exhibit 6 Article 24 (*Electronic Toll Collection Infrastructure*).

25.6.1.1 Vehicle detection, identification, and classification

The ETCS shall detect and classify according to the vehicle classification in the TSA, all vehicles traveling in the PML; identify in which lane the vehicle traveled through each Tolling Point, including those within the shoulders or straddling a lane and shoulder, without degradation or interference; and produce the data necessary to accurately calculate the Trip Toll. Vehicles meeting the definition of Exempt Vehicles shall be filtered out by the Section Developer and not forwarded to MDTA for processing.

25.6.1.2 Toll Transactions

Provide the necessary Toll Transactions data as required to correctly process each Trip sent to MDTA for posting. Valid Trip elements can be found in the TSA. The Section Developer shall work with MDTA to adopt detailed ICD requirements to correctly process each Toll Transaction to be sent to MDTA. Detailed ICD requirements to be developed by the Toll Systems Integrator using the high-level ICD provided in the TSA as a basis.

The Section Developer shall record the time for each Toll Transaction within a millisecond and agree with the MDOT wide area network master clock.

The ETCS shall have the capability to calculate Toll Rates dynamically in real-time in the PML to meet the requirements set out in the TSA and (if applicable) the Business Rules.

The ETCS shall assign the toll due based in accordance with the term of the TSA and (if applicable) the Business Rules.

The system shall support human audit and manual amendments to Toll Transactions.

The assigned toll to the vehicle using the PML shall be according to the requirements set out in the TSA and (if applicable) the Business Rules.

The ETCS shall not create Toll Transactions for vehicles traveling in the GP Lanes, whether equipped with a Transponder or not.

For all Toll Transactions, the ETCS shall include the license plate data as part of the Toll Transaction message.

The ETCS shall include machine-read images and license plate identification information in the Toll Transaction message, including license plate type, alphanumeric characters, optical character recognition confidence level value, and jurisdiction of origin.

The ETCS shall maintain a record of all applicable Toll Rates (to the millisecond), to serve as evidence of applicable rate at time of passage for vehicles. The ETCS shall maintain a record of all Toll Transactions and Trips for a minimum of 90 days. This information shall be available to MDTA within 24 hours.

The ETCS shall have the capacity to buffer transactions for 90 days and the ability to resend transactions to MDTA if requested.

The ETCS shall digitally store VMS video clips associated with Toll Transactions, and video of each toll price displayed on the toll pricing signs for a period of 90 days. The archived video shall be accessible to MDTA for investigation, auditing, and customer service purposes.

The ETCS shall create a Trip from the collected Toll Transactions of each vehicle traveling along the PMLs in the Phase in accordance with the TSA and (if applicable) the Business Rules.

ETCS shall host a web-accessible tool that allows MDTA CSC staff to research Toll Rates, detailed Toll Transaction data, and other applicable data to aid in User dispute/inquiry resolution.

25.6.1.3 Image Capture

For every vehicle passing through a Tolling Point, the system shall capture license plate images and correctly associate them with the corresponding Toll Transaction data.

The tolling system shall imbed audit data on every image, including, at a minimum: Tolling Point, lane, data, time, Toll Rate, and image number.

Audit data is imbedded on every image not only for Image-Based Transaction purposes but also for human reviews to detect an issue with a specific camera in the tolling system.

The system shall create an area of interest image from the image used to determine the license plate data showing an enlarged view of the license plate with license plate data clearly readable to the unaided eye.

For all Toll Transactions, the system shall capture, at a minimum, images of the vehicle's front and rear license plate and rear of the vehicle along with an image containing the complete vehicle profile. The captured images shall display clearly (as required to meet statutory requirements) without the need for image enhancements, the information needed to process the Toll Transaction as required to meet performance specifications as outlined in the ICD, the TSA and the Technical Requirements.

The following components, at a minimum, shall be included with the image capture practices to comply with MDTA processing of Trips and violations:

- at each Tolling Point, a front and rear image shall be captured of the vehicle;

- the Toll Transaction time of the first Tolling Point in the Trip shall be the entrance time and used for the entry timestamp;
 - the Toll Transactions time of the last Tolling Point in the Trip shall be the exit time and used for the exit timestamp;
 - after Trip building, the best image from the last Tolling Point (front or rear) in the Trip is used as the image identified for notice of toll due ("**NOTD**") and region of interest ("**ROI**"), unless it is corrupted;
 - if the last Tolling Point images are corrupted, the next to last Tolling Point in the Trip images shall be used. If that is corrupted, the usable image from the Tolling Point closest to the end of the Trip shall be used;
 - time stamps cannot be changed/edited after being embedded on the images;
 - all images from all Tolling Points related to the Trip shall be sent to MDTA and associated to the Toll Transaction pursuant to the ICD and the TSA;
 - image file names must follow the ICD requirements;
 - the ROI (license plate) from the image identified for NOTD is cropped and provided as a separate image;
 - all images, except the ROI, shall have the image timestamp applied at the respective Tolling Point in lane camera along the top of the image. The timestamp identifies the date, time of day to the millisecond, the Tolling Point identification, and lane identification;
 - all images, except the ROI, shall have the entry timestamp, and exit timestamp applied to them along the bottom of the image after Trip building;
 - if any image adjustments are performed to make an image easier to read, the adjusted image shall be sent to MDTA;
 - images shall be human readable to validate license plate number, license plate type, and state as per compliance with the performance requirements listed in this Exhibit 6 Article 25 (Operations and Maintenance);
 - timestamps shall not interfere with reading the license plate information;
 - the date, time and location embedded on the images for entry/exit data shall be consistent with the dates, times and locations as reported within the Trip data;
 - for single-Tolling Point Trips, the entry and exit times shall be the same;
 - for multi-Tolling Point Trips all available images from all Tolling Points of the Trip shall be transferred to MDTA, including both front/rear images and their respective ROIs; and
- evidence package shall contain all images, including those which are sent with the uniform transaction message, as well as the remaining images which are sent via a batch process.

25.6.1.4 Video Monitoring System

The ETCS shall include a Video Monitoring System ("**VMS**") that records color video at a minimum rate of 10 frames per second of every toll lane and Tolling Point allowing for the visual identification of vehicle size and number of axles at all times of the day and under all environmental conditions. Authorized MDTA users shall be able to:

- view real-time and recorded VMS video and video clips from up to 50 workstations concurrently; and
- search quickly by various query criteria, including:
 - lane number;
 - specific time and time range;
 - location;
 - Tolling Point;
 - class mismatch; and
 - any combination of these parameters.

The ETCS shall associate a segment of VMS video with every Toll Transaction. The segment of VMS video associated with the Toll Transaction shall start 5 seconds before the Toll Transaction occurs and end 5

seconds after the Toll Transaction occurs. During viewing of any VMS video include the associated Tolling Point/lane controller Toll Transaction/event messages in a viewable format, synchronized to the video clip. Allow authorized users to record and store video clips and embed the date, time (to 1/100 of a second), Tolling Point, and lane at the bottom of the images so that it is visible when images are played back.

The VMS subsystem and ETCS host shall be synchronized within 1/100 of a second.

25.6.1.5 Interoperability

The ETCS shall meet MDTA Interoperability and compatibility standards, requirements, and protocols as outlined in the TSA.

25.6.1.6 High Occupancy Vehicle Enforcement

Enforcement of HOV status shall be carried out only by authorized law enforcement authorities.

Provide to such law enforcement authority all declaration data sufficient and necessary for legal enforcement, including vehicle classification, date and time of entry, location of entry, and vehicle identification and occupancy data (per vehicle classification), and any other information as may be required by such law enforcement authority.

To the extent the Section Developer provides enforcement zones, such enforcement zones shall consist of an area for occupancy enforcement technology and a parking area for at least one law enforcement vehicle. The enforcement zone shall be designed in accordance with the AASHTO *Guidance for High Occupancy Vehicle Facilities*.

The ETCS shall communicate vehicle occupancy declaration data to law enforcement personnel. The data shall be adequate and sufficient to enable law enforcement personnel to distinguish between vehicles declared as HOV and non-HOV.

The ETCS may use a variety of methods to communicate vehicle occupancy declaration data to law enforcement personnel. Such methods should be commercially reasonable and Good Industry Practice, such as:

- the use of beacon lights located at the enforcement zone, to indicate previous User declaration actions;
- the use of personal digital devices or similar technology by enforcement personnel to receive User declaration data from the ETCS;
- the use of an automated occupancy detection system; and
- manual, visual enforcement at the declaration zones.

25.6.1.7 Security, Protection, and Monitoring

Exercise caution, due diligence, and utilize best industry practices to protect the ETCS against natural disasters, data and equipment tampering, and sabotage. Develop and implement a DRP and procedures for maintaining service continuity in the event of a catastrophe or disaster impacting the ETCS, in order to prevent or minimize any service interruption. Comply with and adhere to the State Information Technology Security Policy and standards where applicable. These policies may be revised from time to time and the Section Developer shall comply with all such revisions.

The ETCS must log all database, file, and software application access and attempted access. Ensure duplicate data and image storage at a physically and geographically separate site is in accordance with applicable data security standards. Provide protection of data containing personally identifiable information which may contain elements such as an individual's driver's license number, social security number, license plate number, location, financial, tax or health records in accordance with state and federal policies. Any such

personally identifiable information shall not be transmitted outside of the US. Supply means of auditing all ETCS data and records, directly produced by the ETCS. Although it is not initially anticipated that data covered by Payment Card Industry Data Security Standard ("PCIDSS") would be handled within the Section Developer's tolling systems, if at any time during the term of the Section P3 Agreement such PCIDSS impacted data is handled, the Section Developer shall follow, apply, and implement the relevant PCIDSS requirements.

The ETCS shall, at a minimum:

- track Incidents affecting tolling from occurrence to resolution;
- monitor the tolling Work from request to completion;
- track system performance; and
- provide integrated data/anti-virus protection for all the Section Developer roadside ETCS host, plaza, and facility computers.

25.6.1.8 Customer Service

The primary customer service shall be carried out by parties other than the Section Developer, primarily MDTA. Providing superior customer service is a priority for the MDTA and shall likewise be a priority of the Section Developer. The Section Developer shall arrange for and provide all Toll Transaction data sufficient and necessary for MDTA to proceed with financial clearing of all certified Trips, to respond to general User inquiries, and at a minimum, the information described as part of a properly formatted Trip in accordance with Exhibit 6 Article 24 (Electronic Toll Collection Infrastructure).

25.6.1.9 ETCS Performance Requirements

The ETCS performance requirements set forth in Exhibit 6 Article 25 (Operations and Maintenance) Table 25-6 (Operating Period Performance) ID #15 shall apply at all times and throughout a vehicle speed range from stop-and-go traffic to highway free-flow speeds. ETCS performance requirements shall apply to all vehicles whether they are traveling closely together or far apart at all speeds.

For the purpose of assessing the license plate image readability and reliability success rate as presented in Exhibit 6 Article 25 (Operations and Maintenance) Table 25-6 (Operating Period Performance) ID #15, ineligible vehicles shall be those for which an obtained license plate image cannot be reliably read by the human eye due to one or more of the following conditions:

- the vehicle either has no license plate, or it is not mounted in the legally required position;
- the license plate is covered by dirt or snow rendering it unreadable;
- the license plate is willfully obstructed by Users by a film or other means;
- the license plate is damaged, bent or broken rendering it unreadable;
- the license plate is blocked by an object carried by the vehicle (such as a plate frame, overhanging cargo, bicycle rack or a trailer towing ball); or
- the license plate is blocked by something in the lane, such as a Person or another vehicle.

Ineligible vehicles shall not be calculated in the success rate. ETCS and any Trip building systems shall be fully auditable allowing authorized users to audit all system actions.

25.6.1.10 ETCS Performance Monitoring, Auditing, and Reporting

General requirements for ETCS performance monitoring, auditing, and reporting include:

- deploying technical means to record, monitor, track, and audit the ETCS performance;

- producing database extracts, analyses, and syntheses for verifying ETCS performance upon MDTA's request; and
- supplying MDTA with secure access via VPN or similar technology, to facilitate system monitoring and perform Toll Transaction research.

Additional reporting requirements are included in Exhibit 6 Article 24 (Electronic Toll Collection Infrastructure) Section 24.10 (ETCS Reporting Requirements).

The Section Developer shall be responsible for Trip accuracy and completeness, and the ETCS must have the capability to flag lane transactions for possible audit where there is a discrepancy between the classification data from the vehicle classification system and the Transponder.

Business continuity activities may include, but not be limited to:

- resending upon request or holding Toll Transactions and Trips at no cost to MDOT due to MDTA CSC issues, maintenance activities or testing activities;
- making backups of all software and configuration of the ETCS;
- maintaining a daily backup of all new and changed data held on the ETCS;
- providing media used for the daily backup to a secure, off-site location within 24 hours (or other mutually agreed to timeframe);
- maintaining storage of a minimum 90 days of the data backups in a secure off-site location;
- verifying that the daily backups and stored data are retrievable and usable; and
- ensuring backups do not affect any ETCS functional requirements.

25.6.1.11 Independent Development/Test Environment

The ETCS shall include an independent development/testing environment that is mirrored to the Toll production database that includes all of the functionality of the ETCS and is able to mirror all or a definable portion of the production database.

25.10 Maintenance Management Information System

Use a computerized GIS based MMIS database for all maintenance activities based on Released for construction documents and Renewal Work and in accordance with Exhibit 6 Article 27 (Data Management for MDOT Systems). The MMIS database shall include all Elements to be maintained including **ETCS, ITS and tolling systems** and shall include for each Asset a description of the item/equipment, location, tag number, equipment nameplate data (model number, serial number, size, etc.).

The MMIS shall, at a minimum:

...

- automatically generate and track work orders for preventative maintenance, corrective maintenance, and Emergency maintenance. Work orders are to be completed and closed out by the Toll Systems Operator;
- support the generation of ad-hoc work orders by authorized users. Work orders are to be completed and closed out by the Toll Systems Operator;

...

| TABLE 25-5 ASSET O&M RESPONSIBILITY MATRIX | | |
|---|-----------------------------|--------------------------------------|
| MAINTENANCE ACTIVITY DURING OPERATING PERIOD | MDOT/AHJ O&M RESPONSIBILITY | SECTION DEVELOPER O&M RESPONSIBILITY |
| O&M of PMLs | | X |
| O&M of GPLs | X | |
| Tolling Back-Office Systems | X | |
| Tolling | | |
| All equipment (devices, poles, cabinets, cables, manholes, power feeds, etc.) for GPLs regardless of location | X | |
| Tolling equipment unique to PMLs under separate metering | | X |

| TABLE 25-6 Operating Period Performance | | | | | | | | | | | | | |
|---|--|--|---|----------------------|--|--|------------|------------------|------------------|----------------------|------------------|------------------|----------------------------------|
| 15.) ETTM System and Electrical | | | | | | | | | | | | | |
| ID # | Element | Performance Requirement | Inspection and Measurement Method | Inspection Frequency | Performance Measurement Record | Description of Noncompliance Event | Mitigation | Temporary Repair | Permanent Repair | Recurrence Intervals | | | Applicable Non-compliance Points |
| | | | | | | | | | | Mitigation | Temporary Repair | Permanent Repair | |
| 15.1 | Usable Image-Based Transactions | 99.0% of all Image-Based Transactions submitted to MDTA shall include readable images and complete and correct information in the lane transaction message | Section Developer report submission and MDTA report | Daily/ monthly | ETCS Daily Check Report and ETCS Activity Monthly Report | < 99% of Toll Transactions sent have readable images or correct information. | 12 hours | 24 hours | 36 hours | 12 hours | 24 hours | 36 hours | 3 |
| 15.2 | License Plate Attributes (See Note 9 following this table) | 99.5% of all license plate attributes for Imaged-Based Transactions (characters, state, plate type, etc.) be reported accurately to MDTA in accordance with Maryland Department of Motor Vehicles rules | MDTA report | Daily/ monthly | ETCS Daily Check Report and ETCS Activity Monthly Report | <99.5% of Image-Based Transactions are accurately submitted to MDTA. | 8 hours | 16 hours | 1 day | 8 hours | 16 hours | 1 day | 4 |
| 15.3 | Trip processing (See Note 10 following this table) | All Trips completed and submitted to MDTA within 96 hours. | Section Developer report submission | Daily/ monthly | ETCS Daily Check Report and ETCS Activity Monthly Report | <100% of completed Trips submitted to MDTA within 96 hours | 24 hours | N/A | 1 day | 24 hours | N/A | 1 day | 5 |
| 15.4 | Trip/Toll Transaction accuracy (See Note 9 following this table) | Trips/ Toll Transactions shall be 100% accurate 99.5% of the time. Trips/Toll Transactions shall provide all accurate data needed to process. Toll Transaction data provided shall be accurate for the Section Developer to create single Trips across the Phase for each User. Split Trips created or duplicate Trips created and sent over for processing shall be also classified as non-compliant. | MDTA report | Daily/ Monthly | ETCS Activity Monthly Report | <99.5% of Trips/Toll Transactions are 100% accurate. | 24 hours | N/A | 1 day | 24 hours | N/A | 1 day | 5 |
| 15.5 | ETCS Synchronization | All ETCS Elements shall be synchronized to within 1/100 of a second and the ETCS host shall be synchronized to the MDOT wide area network master clock to within 1/1,000 of a second | Section Developer shall demonstrate that all components of the ETCS are to be synchronized to the ETCS host and that the ETCS host is synchronized to the MDOT wide area network master clock | Monthly | ETCS Daily Check Reports for previous 30 days | ETCS Elements are synchronized to >1/100 of a second or ETCS Host synchronized to MDOT wide area network master clock >1/1,000 of a second | 24 hours | N/A | 48 hours | 24 hours | N/A | 48 hours | 1 |

| | | | | | | | | | | | | | |
|-------|--|---|---|-----------------------|--|---|----------|----------|----------|----------|----------|----------|---|
| 15.6 | Transponder file processing | Initiate processing of Transponder status files, including incremental files, received from MDTA within 5 minutes and complete distribution of Transponder status files including incremental files to lanes within 15 minutes | The time for the ETCS to process Transponder status files received from MDTA shall be measured and reported by the Section Developer's maintenance system. | Daily/ Monthly Report | ETCS Daily Check Reports for previous 30 days and MDOT and MDTA observations | Initiate processing of Transponder status files, including incremental files, received from MDTA greater than 5 minutes or complete distribution of Transponder status files including incremental files to lanes greater than 15 minutes | N/A | N/A | 6 Hours | N/A | N/A | 6 Hours | 1 |
| 15.7 | AVI read accuracy | Correctly read and write to 99.8% of all Transponders, measured in each lane, for all accepted Transponder protocols, at any vehicular speed up to 100 mph (write functions are only needed for time-division multiplexing feedback Transponders) | Section Developer statistical analysis submission of AVI Toll Transactions shall be conducted across multiple toll lanes to verify read/write accuracy. Test scripts to test this function shall be developed by the Section Developer and as accepted by MDOT and MDTA | Monthly Report | Factory acceptance testing/ testing/ certification/ recertification reports and MDOT and MDTA observations | Correctly read and write < 99.8% of all Transponders, measured in each lane, for all accepted Transponder protocols, at any vehicular speed up to 100 mph | 12 hours | 24 hours | 36 hours | 12 hours | 24 hours | 36 hours | 5 |
| 15.8 | Immediate Messaging | Send all Transponder reads with plaza/ lane/ date/ time to the text/SMS interface within 2 minutes (as near real time as possible). | Section Developer report submission of text/SMS interface confirmation | Daily/ monthly report | Daily/monthly reports and MDOT and MDTA observations | Failure to send Transponder reads to the text/SMS interface within allowable time frame | 6 hours | 12 hours | 36 hours | 6 hours | 12 hours | 36 hours | 3 |
| 15.9 | Image association (See Note 9 following this table) | 100% of images shall be associated with the correct Toll Transaction | A statistically significant sampling of Toll Transactions shall be reviewed to verify images are correctly associated with Toll Transactions upon User concern. Test scripts to test this function shall be developed by the Section Developer and as accepted by MDOT and MDTA | Monthly | ETCS Daily Check Reports for previous 30 days MDOT and MDTA observations | < 100% of images associated with correct Toll Transaction. | 24 hours | N/A | 1 day | 24 hours | N/A | 1 day | 5 |
| 15.10 | ETCS vehicle classification accuracy (See Note 9 following this table) | ≥ 99.8% of 2-axle vehicles shall be classified correctly and ≥ 98% of 3+ axle vehicles shall be classified correctly | A Section Developer statistical analysis of Toll Transactions shall be reviewed to verify classification accuracy. | Daily/ monthly report | ETCS Activity Monthly Report and MDOT and MDTA observations | < 99.8% of 2-axle vehicles shall be classified correctly and <98% of 3+ axle vehicles shall be classified correctly. | 24 hours | N/A | 1 day | 24 hours | N/A | 1 day | 5 |

| | | | | | | | | | | | | | |
|-------|---|--|--|---------------------------|---|--|------------|------------|----------|------------|------------|----------|---|
| 15.11 | Toll Rate accuracy (See Note 9 following this table) | Toll Rate data submitted to MDTA shall be 100% accurate 99.5% of the time. Toll Rate data shall provide all accurate information needed to process Trips and support User inquiries. | A Section Developer statistical analysis of Toll Rate data shall be reviewed to verify accuracy | Daily/ monthly report | ETCS Daily Check Report and ETCS Activity Monthly Report and MDOT and MDTA observations | <99.5% of Toll Rate data submitted to MDTA is 100% accurate. | 24 hours | N/A | 1 day | 24 hours | N/A | 1 day | 5 |
| 15.12 | Report generation | Reports for immediate (same day) use will be generated and the results returned within 180 seconds. The response time will be calculated by measuring the time between the Submittal of the report request and the time when the report results are available. Reports shall include those needed for auditing, User inquiries and non-compliance events. | The Section Developer shall measure the average report generation times and include these statistics in their monthly operations reports. In the event that MDTA Users experience delays in running reports during production, the issue will be reported to the Toll Systems Operator for investigation and mitigation. | As observed by MDTA Users | Database metrics or timing of actual report execution | > 180 seconds to have requested results available. | 24 hours | 72 hours | 5 days | N/A | N/A | 5 days | 2 |
| 15.13 | System response time (web accessible reporting tool) | ≤ 2 seconds for 99.5% of all User actions. The system shall respond to MDTA User inputs within 2 seconds. System response includes the system completing an action requested by a User, including log-on/log-off, navigating between screens, toggling functions, processing data inputs, and other routine processes that may be carried out by MDTA Users. This shall not include report generation. | MDTA observation of the system will also be used to identify if the system responsiveness is greater than the requirement. | As observed by MDTA Users | Time of actual actions requested by Users. | > 2 seconds for 99.5% or less of all User actions | 24 hours | 48 hours | 3 days | N/A | N/A | 3 days | 1 |
| 15.14 | MDOT CHART Interface | Publish Toll Rates successfully and on time to the MDOT CHART interface 99.95% of the time. | Section Developer report submission | Monthly | Interface success/failure report log. | Any failure to publish the rates, or negative acknowledgement of the attempted publishing. | 30 minutes | 30 minutes | 1 day | 30 minutes | 30 minutes | 1 day | 5 |
| 15.15 | Toll Rate dynamic message sign (“DMS”) | Toll Rate DMS and DMS audit camera must be operating and displaying the correct information 99.95% of the time, | Section Developer report submission | Daily/ monthly | ETCS MMIS Activity Monthly Report | < 99.95% | 8 hours | N/A | 12 hours | 8 hours | N/A | 12 hours | 5 |
| 15.16 | Dynamic pricing system (“DPS”) | DPS with all of its devices, software, applications and processes properly functioning and successfully communicating with in-lane systems 99.95% of the time. | Section Developer report submission | Daily/ monthly | ETCS MMIS Activity Monthly Report | < 99.95% | 6 hours | 12 hours | 24 hours | 6 hours | 12 hours | 24 hours | 5 |

| | | | | | | | | | | | | | |
|-------|---|---|---|-----------------|---|---------|----------|----------|----------|----------|----------|----------|---|
| 15.17 | ITS – traffic data transmission | 100% of required traffic data is transmitted to the DPS for processing in time to be used in calculations 99.5% of the time. | Section Developer report submission | Daily/ Monthly | ETCS MMIS Activity Monthly Report | < 99.5% | 6 hours | 12 hours | 24 hours | 6 hours | 12 hours | 24 hours | 4 |
| 15.18 | HOV transactions (See Note 9 following this table) | 99.95% of correctly declared HOV 3+ Trips/Toll Transactions must not be submitted to MDTA. | Section Developer report submission | Monthly | ETCS Activity Monthly Report | >0.05% | 24 hours | 36 hours | 3 days | 24 hours | 36 hours | 3 days | 5 |
| 15.19 | Price Managed Lane Federal Minimum Average Speed Standard | Maintain compliance with the Federal Minimum Average Speed Standard. This event will not constitute a Non-compliance Event if the Toll Rate is set to the Toll Rate Range Maximum at the time the event occurs. | This requirement applies monthly when the PMLs are in compliance with the Federal Minimum Average Speed Standard, OR every seven days when the Lanes are not in compliance with the Federal Minimum Average Speed Standard. | Weekly/ monthly | ETCS Activity Monthly Report | < 45mph | 24 hours | 36 hours | 3 days | 24 hours | 36 hours | 3 days | 3 |
| 15.20 | Traveler information DMS | Traveler information DMS and DMS audit cameras must be operating and displaying the correct messages 99% of the time. | Section Developer report submission | Monthly | O&M Monthly Report | <99% | 24 hours | 48 hours | 5 days | 24 hours | 48 hours | 3 days | 3 |
| 15.21 | VDS | VDS must be operating and collecting accurate traffic data 99.5% of the time. | Section Developer report submission | Monthly | O&M Monthly Report | <99.5% | 24 hours | 48 hours | 5 days | 24 hours | 48 hours | 3 days | 3 |
| 15.22 | VDS data transmission to MDOT in real time | 100% of the collected VDS data must be transmitted to MDOT. | Section Developer weekly data reports and MDOT observations. | Weekly | Weekly data reports for the previous 4 week and MDOT observations | <100% | 4 hours | 8 hours | 24 hours | 4 hours | 8 hours | 2 days | 3 |
| 15.23 | VDS data accuracy | ≥ 99.9% of all vehicles are accurately classified and counted and vehicle speeds are accurately measured. | Section Developer report submission | Monthly | O&M Monthly Report | <99.9% | 24 hours | 48 hours | 5 days | 12 hours | 24 hours | 3 days | 3 |

| | | | | | | | | | | | | | |
|-------|------------------------------------|---|-------------------------------------|-----------|---|--|---|------------|----------|---|------------|----------|---|
| 15.24 | CCTV system | The CCTV system must be operating (where PTZ is present, operating includes that the PTZ functions are working) and transmitting video to all required agencies/applications > 99% of time. | Section Developer report submission | Monthly | O&M Monthly Report | <99% | 24 hours | 48 hours | 5 days | 12 hours | 24 hours | 3 days | 3 |
| 15.25 | ITS routine maintenance | Conduct routine Inspections, testing, and maintenance in accordance with the equipment manufacturer's recommendations and industry practice. | Section Developer report submission | Monthly | O&M Monthly Report | Missed routine Inspection, testing, or maintenance. | 2 weeks | N/A | 4 weeks | 1 week | N/A | 2 weeks | 1 |
| 15.26 | All other ITS systems | Maintain other ITS system operation greater than 95% of the time. | Section Developer report submission | Monthly | O&M Monthly Report | <95% | 12 hours | 24 hours | 48 hours | 6 hours | 12 hours | 24 hours | 1 |
| 15.27 | ITS Emergency repair | Maintenance staff must arrive on site to repair issue | Self-reporting | As needed | Section Developer's maintenance staff shall arrive at the site of the ITS Emergency within 30 minutes during the period of 5:00 a.m. to 9:00 p.m., Monday through Friday, and within one hour at all other times, once Section Developer detects or is notified of the ITS Emergency maintenance related system failure | Section Developer staff does not arrive at site within allowable timeframe | 30 minutes/ 1 hour as per performance measurement record | 10 minutes | N/A | 30 minutes/ 1 hour as per performance measurement record | 10 minutes | N/A | 3 |
| 15.28 | Non-scheduled ITS Maintenance Work | Maintenance staff must arrive on site to repair issues | Self-reporting | As needed | Section Developer's maintenance staff shall arrive at the Work site within 24 hours once Section Developer detects or is notified of the non-scheduled maintenance related system failure. | Section Developer staff does not arrive at site within allowable timeframe | 24 hours | 1 hour | N/A | 24 hours | 1 hour | N/A | 2 |

Article 26. Handback

| Table 26-2 Residual Life | | | | | |
|--------------------------|-------------|---------------------|---|---|---|
| ASSET CATEGORY | DESCRIPTION | DESIGN LIFE (YEARS) | RESIDUAL LIFE (YEARS)/PERFORMANCE REQUIREMENT | HANDBACK EVALUATION TASKS | EVALUATION CRITERIA AT HANDBACK |
| Tolling | ETCS | 10 | 4 | Review and test system functionalities, including roadside toll collection equipment, Priced Managed Lane Toll Transactions transferred to MDTA back-office system and speed monitoring equipment in the managed lanes. | Verify that all performance requirements are met by the tolling system. |

Attachment 5 - Section P3 Agreement Term Sheet (Exhibit 8 to Phase P3 Agreement) – Clean version

KEY TERMS OF THE SECTION P3 AGREEMENT FOR PHASE 1 OF THE P3 PROGRAM

The State of Maryland ("**State**") acting by and through the Maryland Transportation Authority, an agency of the State ("**MDTA**") and the Maryland Department of Transportation ("**MDOT**"), a principal department of the State, intends to develop and deliver certain improvements as part of Maryland's Traffic Relief Plan along I-495 and I-270 through a public-private partnership program ("**P3 Program**").

The P3 Program is intended to be delivered through the solicitation of two or more phase developers (each a "**Phase Developer**"). The first solicitation of the P3 Program includes I-495 from the vicinity of the George Washington Memorial Parkway in Virginia, across and including the American Legion Bridge, to its interchange with I-270, and I-270 from its interchange with I-495 to its interchange with I-70 ("**Phase 1**").

Phase 1 may be divided into two or more sections as agreed by MDOT under the terms of the Phase P3 Agreement (each a "**Section**").

Promptly following MDOT's acceptance and the State of Maryland Board of Public Works' ("**BPW**") approval of a Committed Section Proposal and the agreement for a Section of Phase 1, MDOT and MDTA will enter into an agreement for such Section with the Section Developer ("**Section P3 Agreement**").

Below is a description of the indicative key terms that will be contained in each Section P3 Agreement for Phase 1.

Section-specific variations will be introduced for each Section as appropriate, but the terms and conditions described below are generally anticipated to apply across all Section P3 Agreements entered into for the P3 Program. Notwithstanding the foregoing, MDOT and MDTA reserve every right at any time during the solicitation, in their sole discretion, to modify, add to, remove from, or otherwise revise the terms set forth below, and no person will have any right to make a claim or commence any dispute against MDOT or MDTA with respect to any such modification, addition, removal, or other revision.

Capitalized terms used in this term sheet are defined in Exhibit 1.

| Part A – Preliminary | | |
|-----------------------------|----------------------------|---|
| 1. | Parties | a) MDOT; b) MDTA; and c) an entity controlled and established by the Phase Developer (the " Section Developer ") |
| 2. | Scope of Work | The Section Developer is required to perform the final design, construction, financing, tolling, operation, maintenance, and handback of the relevant Section of Phase 1. Each Section P3 Agreement will contain a detailed description of the scope of work and technical provisions for its delivery. MDTA will retain responsibility for certain tolling related services, including toll collection processing, account administration, toll violations processing, and back office support for the Section. All roadside and related equipment will be designed, supplied, installed, constructed, tested, commissioned, operated, and maintained by the Section Developer. |
| 3. | Predevelopment Work | The Parties acknowledge that prior to the execution of the Section P3 Agreement the Phase Developer shall perform Predevelopment Work (as defined in the Phase P3 Agreement) |

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| | | <p>in collaboration with MDOT in accordance with the Phase P3 Agreement. The Predevelopment Work will inform the Section Work (as defined in the Phase P3 Agreement) and, to the extent risks are addressed by Relief Events or Compensation Events in this term sheet, the risk allocation under the Section P3 Agreement. Without limiting the scope of the Predevelopment Work (including the terms of Exhibit 6 (<i>Predevelopment Work Requirements</i>) of the Phase P3 Agreement), the Predevelopment Work includes the following:</p> <ul style="list-style-type: none"> a) The further investigation of existing utilities, geotechnical conditions, hazardous materials, endangered species, and archaeological remains present at the Setting Date Site. To the extent that a Compensation Event is included in this term sheet, the results of these investigations shall inform the baseline used for permitted claims with respect to "unknown" site conditions. The Phase Developer and MDOT shall agree to the limits of the Setting Date Site in which these investigations shall focus. b) Progress design and work with MDOT to identify and agree any additional right-of-way that will be needed, progress discussions with landowners, and advance property acquisition to the extent permitted by law and in accordance with the Uniform Act. c) Minimize risk of delays by advancing discussions and conducting design reviews with utilities and third parties. Take steps to avoid and minimize the risk of utility owner caused delay. d) Engage with government agencies that will be required to issue permits with respect to the Section and focus on permits and approvals with long lead times to avoid permitting delays. <p>The scope of Predevelopment Work is more fully described in Exhibit 6 (<i>Predevelopment Work Requirements</i>) of the Phase P3 Agreement. Certain details of the Predevelopment Work shall be determined in collaboration between the Phase Developer and MDOT, and MDOT must have reviewed and accepted the applicable Predevelopment Work performed by the Phase Developer prior to the delivery of a Committed Section Proposal with respect to the Section.</p> |
| 4. | Term | The term of the Section P3 Agreement will be 50 years from the Commercial Closing Date (the " Term "). |
| 5. | Representations and Warranties | The Section Developer, MDOT, and MDTA will make representations and warranties to each other that are customary for transactions of this type. The representations and warranties will be made on the Commercial Closing Date and repeated on the Financial Closing Date. |
| 6. | Designation of Representatives | <p>MDOT and the Section Developer shall each designate an individual who will be authorized to make certain decisions on behalf of the Parties.</p> <p>MDTA has appointed MDOT SHA to act as its agent as described in Section 1.4 of the ITP.</p> |
| Part B – Site and Other General Requirements | | |

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| 7. | Right of Way | <p>MDOT shall grant to the Section Developer a permit to perform the Work on the Site, subject to the requirements of the Section P3 Agreement. MDOT and MDTA will not grant the Section Developer any leasehold or other real property interest in the Site.</p> <p>MDOT shall provide the Section Developer with access to each MDOT Provided Parcel, which may include both permanent parcels for the Section and Temporary Construction Areas, in accordance with an access schedule agreed prior to execution of the Section P3 Agreement. MDOT may enter into Third Party MOUs with governmental entities with respect to the acquisition of certain MDOT Provided Parcels, and any amounts due by MDOT under these Third Party MOUs (including the cost of performing any mitigation, site improvements, modifications, and any other ongoing obligations required to facilitate the conveyance of the parcel or property interest to MDOT) shall be payable at the Section Developer's sole cost and expense.</p> <p>The Section Developer, at its sole cost and expense, will be responsible for the acquisition of, or for causing the acquisition of, any property or property rights not provided for as MDOT Provided Parcels, including those necessary to accommodate necessary permanent and temporary rights, as well as laydown, staging, temporary drainage, and other construction methods in connection with the repair, renewal, operation, or maintenance of the Section ("Additional Properties"). The Phase Developer shall work with MDOT to identify and agree on any Additional Properties that will be needed in order to advance the site acquisition process as part of the Predevelopment Work, as further described in <u>Section 3</u> above and the Phase P3 Agreement.</p> <p>The Section Developer will be required to use its best efforts to minimize the need for the acquisition of Additional Properties. Additional Properties that need to be acquired from private landowners ("Privately Owned Additional Properties") will be treated differently from Additional Properties that need to be acquired from landowners that are governmental entities ("Publicly Owned Additional Properties"), as further described below and in the Section P3 Agreement.</p> <p>If any Privately Owned Additional Properties are needed, the Section Developer shall use its best efforts to acquire Privately Owned Additional Properties. If, in relation to Privately Owned Additional Properties that are permanently needed to construct or maintain the Section, the Section Developer is unable to reach a settlement with any private landowner, then MDOT SHA shall proceed with any necessary condemnation proceedings in accordance with the technical provisions and to the extent permitted by applicable law and in accordance with the Uniform Act. The cost of any Privately Owned Additional Property acquired using condemnation shall be paid by the Section Developer, as further described in Article 8 (<i>Right-of-Way</i>) of Exhibit 6 (<i>Predevelopment Work Requirements</i>) of the Phase P3 Agreement.</p> |
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| | | <p>If any Publicly Owned Additional Properties are needed, MDOT shall use reasonable efforts to negotiate with any governmental entities to acquire such Publicly Owned Additional Properties to the extent permitted by applicable law and in accordance with the Uniform Act. The cost of any Publicly Owned Additional Property acquired by MDOT shall be paid by the Section Developer, as further described in Article 8 (<i>Right-of-Way</i>) of Exhibit 6 (<i>Predevelopment Work Requirements</i>) of the Phase P3 Agreement.</p> <p>The Section Developer shall comply with the Uniform Act with respect to Privately Owned Additional Properties and, if applicable, Publicly Owned Additional Properties. MDOT SHA shall be responsible to FHWA for providing oversight to the Section Developer and ensuring that compliance with the Uniform Act is properly documented, provided that this does not create an obligation for the benefit of the Section Developer.</p> <p>The Section Developer will solely bear the risk of any time and cost impacts to the Work related to the acquisition of Additional Properties including risk associated with delays or impediments to MDOT acquiring such Additional Properties (except to the extent that MDOT fails to comply with its obligation to pursue the acquisition or condemnation, when necessary and appropriate, of Additional Properties in accordance with the Section P3 Agreement).</p> |
| 8. | Surrounding Infrastructure and Adjacent P3 Program Developer Coordination¹ | <p>The Section Developer shall coordinate with MDTA's and MDOT's other contractors and third parties (including any VDOT contractors) who have access rights to the Site or perform activities adjacent to the Site. Any contractors of MDTA or MDOT that need to access the Site shall be required to: (i) provide reasonable prior notice to the Section Developer, (ii) not unreasonably interfere with the Section Developer's performance of the Work, and (iii) comply with the Section Developer's reasonable site access and work, health, and safety policies and procedures.</p> <p>The Section Developer, at its sole cost and expense, shall coordinate with any adjacent section developer and (if applicable) phase developer of any adjacent section of the P3 Program (each an "Adjacent P3 Program Developer") (including any adjacent section of Phase 1 or any adjacent part of another phase) to minimize the disruption of any Adjacent P3 Program Developer's construction, operation, and maintenance of its applicable part of Phase 1 or the P3 Program. The Section Developer shall ensure that any part of the Section that meets an adjacent section or phase is designed and constructed to enable viable, logical, safe termination points that do not preclude tie in by an Adjacent P3 Program Developer. Except to the extent expressly covered by any Compensation Event or Relief Event, the Section</p> |

¹ **NTD:** During predevelopment MDOT and the Phase Developer shall further discuss, on a Section specific basis, risk that interfacing projects may significantly delay the Section. If a risk of significant delays exists due to that specific third party's action or inaction that are not within the control of the Section Developer or any Section Developer-Related Entity, MDOT remains open to discussing appropriate remedies for the Section Developer in the Section P3 Agreement.

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| | | <p>Developer bears the full risk for both: (i) any impacts to the Section arising from its duty to coordinate with any Adjacent P3 Program Developer or any interference or failure to coordinate by an Adjacent P3 Program Developer, and (ii) any impacts to the Adjacent P3 Program Developer's project arising from the Section Developer's breach under the Section P3 Agreement or negligence or misconduct of any Section Developer-Related Entity.</p> <p>The Section Developer shall indemnify, hold harmless, and, subject to approval by the relevant Indemnified Parties, defend each of the Indemnified Parties for any third party claims asserted by any Adjacent P3 Program Developer to the extent such third party claims arise from the Section Developer's failure to comply with its obligations under the Section P3 Agreement, including the Section Developer's obligation to coordinate with any Adjacent P3 Program Developer, or arise from negligence or misconduct of any Section Developer-Related Entity.</p> |
| 9. | Governmental Approvals | <p>MDOT shall obtain all initial MDOT-Provided Approvals for the Section (and provide copies to the Section Developer) by the Commercial Closing Date. The "MDOT-Provided Approvals" are:</p> <ul style="list-style-type: none"> a) environmental decision documents approved under NEPA covering the limits of the applicable Section; b) USACE permit under Section 404 of the Clean Water Act and accompanying Section 401 Water Quality Certification with respect to the Section; c) designation of the Section (or the P3 Program) by the MDTA Board as a "transportation facilities project" for the purposes of Title 4 of the Transportation Article of the Annotated Code of Maryland; and d) National Park Service special use permits for Maryland and (if applicable) Virginia. <p>The Section Developer will be solely responsible for obtaining all governmental approvals (other than MDOT-Provided Approvals) or modifying MDOT-Provided Approvals as necessary, including any changes in the MDOT-Provided Approvals resulting from differences between the Section Developer's design and that which was used to obtain any MDOT-Provided Approval. The Section Developer must ensure that the Work and its design complies with any MDOT-Provided Approvals and any modifications required to the MDOT-Provided Approvals shall be entirely the risk and responsibility of the Section Developer. MDOT shall provide reasonable assistance to the Section Developer in relation to any application for a governmental approval.</p> <p>The Phase Developer shall initiate certain aspects of the permit approval process as part of the Predevelopment Work, as described in <u>Section 3</u> above.</p> |
| 10. | Wetland and Stream Mitigation | <p>In support of MDOT's application for the Section 404 permit from the Army Corps of Engineers relating to the parts of Phase 1 covered by the I-495 & I-270 Managed Lanes Study (MLS), MDOT is preparing designs for the creation of wetland and stream mitigation credits. MDOT shall make available to the Phase Developer wetland and stream mitigation credits from these designs and within the same watersheds as the Section</p> |

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| | | <p>for use to mitigate the impacts of the Work on the following basis:</p> <ul style="list-style-type: none"> a) MDOT shall make available wetland/stream mitigation credits from public sites provided that the Section Developer shall be responsible (at its sole cost) for performing the remaining mitigation work including completion of the design and construction, warranty work, and monitoring and maintenance, as further described in Article 5 (<i>Environmental Management</i>) of Exhibit 6 (<i>Predevelopment Work Requirements</i>) of the Phase P3 Agreement; b) MDOT shall make available wetland/stream mitigation credits relating to private sites to be paid for separately by MDOT. <p>MDOT expect to make payments due under paragraph (b) with proceeds of the MDTA Notes.</p> <p>MDOT has provided Proposers with information regarding the wetland/stream mitigation credits that are available in connection with Phase 1 South (including scope of work to be performed by the Section Developer with respect to the public sites and the amounts payable with respect to private site credits) in Section 5.5.10 (<i>Waters of the US and Wetlands Mitigation</i>) of Exhibit 6 (<i>Predevelopment Work Requirements</i>) of the Phase P3 Agreement.</p> <p>Only the actual quantity of constructed mitigation credits can be used to compensate for impacts created from the Work. Changes or deviations between the mitigation credits required in connection with the Work and the credits presented in the MDOT design being used for the Joint Permit Application for the Section 404 permit are the responsibility of the Section Developer to resolve in compliance with applicable law and procedures of wetland and stream mitigation.</p> <p>MDOT is developing a mechanism to incentivize the Section Developer to reduce wetland, stream, and other potential environmental impacts below a defined baseline. Further details will be provided in the full form of the Section P3 Agreement.</p> |
| 11. | Utilities and Third Parties | <p>MDOT shall endeavor to enter into Utility Framework Agreements with Utility Owners with a Utility located in Phase 1 prior to execution of the Phase P3 Agreement. It is anticipated that more detailed Utility Agreements addressing the Utility Adjustments that may be necessary in the Section shall be entered into once the Phase Developer has been selected.</p> <p>MDOT shall endeavor to enter into Third Party MOUs with certain third parties with an interest in Phase 1 South prior to execution of the Phase P3 Agreement. These third parties will include counties, cities, planning commissions, and park services.</p> <p>The Phase Developer shall advance discussions with the Utility Owners and the third parties as part of the Predevelopment Work, as described in <u>Section 3</u> above.</p> |

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| | | <p>The Section Developer will be responsible for coordinating all Utility Adjustments and ensuring that all Utility Adjustment Work and Third Party Work comply with the Section P3 Agreement, all applicable laws, any applicable Utility Framework Agreement or Third Party MOU (which will be provided by MDOT), and any Utility Agreement.</p> <p>The Section Developer will be responsible for all costs of Utility Adjustment Work and Third Party Work unless otherwise agreed under any Utility Framework Agreement, Utility Agreement, or Third Party MOU, or a Compensation Event applies. The Section Developer may be responsible for performing certain of the Utility Adjustment Work, and to the extent that it performs any Utility Adjustment Work, it shall, if directed by MDOT, be required to provide (or require its relevant Contractor performing the work to provide) a warranty with respect to such work directly in favor of the relevant Utility Owner.</p> |
| 12. | Hazardous Materials | <p>Pre-Existing Hazardous Materials</p> <p>The Section P3 Agreement will allocate liability associated with the management and removal of Hazardous Materials as between MDOT and the Section Developer. The Phase Developer shall carry out site investigations with respect to pre-existing Hazardous Materials as part of the Predevelopment Work, as described in <u>Section 3</u> above.</p> <p>The Section Developer shall be deemed the generator with respect to any Section Developer Hazardous Materials Release. The Section Developer shall not be deemed the generator for Hazardous Materials resulting from Pre-existing Hazardous Materials or a Hazardous Materials Release other than a Section Developer Hazardous Materials Release.²</p> <p>Hazardous Materials Release</p> <p>The Section Developer will be responsible for the management, treatment, handling, storage, monitoring, remediation (including obtaining any governmental approval), removal, transport, and disposal of:</p> <ul style="list-style-type: none"> a) prior to Substantial Completion, any Hazardous Materials that are encountered in, under, or on the Site or which migrate from the Site; and b) after Substantial Completion, any Hazardous Materials that are encountered in, under, or on, or which migrate from, the Priced Managed Lanes and other parts of the Site under the control of or maintained by the Section Developer. <p>MDOT will have customary rights to inspect areas of suspected Hazardous Material contamination or to direct remediation action or otherwise step-in and perform remedial action.</p> <p>MDOT shall reimburse the Section Developer's reasonable costs incurred in connection with the remediation of Hazardous Materials Release to the extent such Hazardous</p> |

² **NTD:** Generator status subject to further discussion at full documentation of the Section P3 Agreement.

| | | Materials Release does not constitute a Section Developer Hazardous Materials Release. MDOT will not be liable for lost Toll Revenues except to the extent the Hazardous Materials Release is caused by an MDOT-Related Entity. | | | | | | | | | | | | | | | | | | | | |
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| | Part C – Design and Construction | | | | | | | | | | | | | | | | | | | | | |
| 13. | Design & Construction – General Obligations | The Section Developer shall perform the D&C Work in accordance with: <ul style="list-style-type: none">a) good industry practice;b) all applicable laws;c) the requirements of all governmental approvals;d) all requirements of the Section P3 Agreement;e) the technical provisions and all schedules and plans accepted by MDOT in accordance with the technical provisions;f) the Section Developer's technical proposal; andg) with respect to the Construction Work, the released for construction plans and specifications. | | | | | | | | | | | | | | | | | | | | |
| 14. | Nonconforming and Defective Work; General Purpose Lanes Warranty | <p>The Section Developer shall correct all nonconforming Work and Defects.</p> <p>With respect to any D&C Work performed on the General Purpose Lanes and other Non-Maintained Facilities, the Section Developer shall provide to MDOT a two-year warranty on customary terms and conditions and will be liable to MDOT for GP Latent Defects for 10 years from Substantial Completion (or, with respect to an Interim Completion Element, from Interim Completion).</p> | | | | | | | | | | | | | | | | | | | | |
| 15. | Lane Closure Liquidated Damages | <p>The Section Developer may only close General Purpose Lanes in order to perform D&C Work and O&M Work in accordance with procedures and timeframes to be specified in the Section P3 Agreement. If the Section Developer closes the lanes outside of the times that lane closure is permitted by MDOT or exceeds the permitted closure times, the Section Developer shall pay MDOT liquidated damages in accordance with the below schedule, subject to CPI indexation.</p> <table><tr><th colspan="4">Lane Closure Liquidated Damages</th></tr><tr><th></th><th colspan="3">Liquidated Damage (\$ per minute, per lane)</th></tr><tr><td>Elapsed Time (min)</td><td>I-495, I-270, I-370, George Washington Memorial Parkway and All Ramps</td><td>Shady Grove Road, MD 28, Montrose Road, MD 187, MD 190, MD 189 Democracy Boulevard</td><td>All Other Roads</td></tr><tr><td>0-5, or any portion thereof</td><td>\$3,500</td><td>\$2,000</td><td>\$1,000</td></tr><tr><td>Every additional minute or portion thereof after the initial 5 minutes stated above</td><td>\$3,500 per each additional minute after initial 5 minutes</td><td>\$2,000 per each additional minute after initial 5 minutes</td><td>\$1,000 per each additional minute after initial 5 minutes</td></tr></table> | Lane Closure Liquidated Damages | | | | | Liquidated Damage (\$ per minute, per lane) | | | Elapsed Time (min) | I-495, I-270, I-370, George Washington Memorial Parkway and All Ramps | Shady Grove Road, MD 28, Montrose Road, MD 187, MD 190, MD 189 Democracy Boulevard | All Other Roads | 0-5, or any portion thereof | \$3,500 | \$2,000 | \$1,000 | Every additional minute or portion thereof after the initial 5 minutes stated above | \$3,500 per each additional minute after initial 5 minutes | \$2,000 per each additional minute after initial 5 minutes | \$1,000 per each additional minute after initial 5 minutes |
| Lane Closure Liquidated Damages | | | | | | | | | | | | | | | | | | | | | | |
| | Liquidated Damage (\$ per minute, per lane) | | | | | | | | | | | | | | | | | | | | | |
| Elapsed Time (min) | I-495, I-270, I-370, George Washington Memorial Parkway and All Ramps | Shady Grove Road, MD 28, Montrose Road, MD 187, MD 190, MD 189 Democracy Boulevard | All Other Roads | | | | | | | | | | | | | | | | | | | |
| 0-5, or any portion thereof | \$3,500 | \$2,000 | \$1,000 | | | | | | | | | | | | | | | | | | | |
| Every additional minute or portion thereof after the initial 5 minutes stated above | \$3,500 per each additional minute after initial 5 minutes | \$2,000 per each additional minute after initial 5 minutes | \$1,000 per each additional minute after initial 5 minutes | | | | | | | | | | | | | | | | | | | |
| 16. | Interim Completion of Elements | <p>Prior to the signing of the Section P3 Agreement, the Phase Developer or MDOT may propose designation of certain Non-Maintained Facilities as Interim Completion Elements. Such designations shall be subject to agreement between MDOT and the Phase Developer.</p> <p>The Section Developer will have the right to handover the Interim Completion Element to MDOT before the Substantial</p> | | | | | | | | | | | | | | | | | | | | |

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| | | <p>Completion Date, subject to satisfaction of certain Interim Completion Conditions. Following handover, the Section Developer will cease to be responsible for O&M Work on the Interim Completion Element.</p> <p>Interim Completion Conditions may include:</p> <ul style="list-style-type: none"> a) completion of Design Work and Construction Work with respect to relevant Interim Completion Element; b) completion of Utility Adjustment Work relevant to the Interim Completion Element; c) completion of demobilization from relevant parts of the Site; d) submission of all required Submittals; e) submission of certification as required to any governmental entity; f) satisfaction of all conditions of governmental approvals relating to Design Work or Construction Work; g) non-existence or cure of noncompliance events; h) completion and delivery of progress reports and project schedules; i) non-existence or cure of any Section Developer Default; and j) approval by FHWA related to the Interim Completion Element. |
| 17. | Substantial Completion | <p>Upon the achievement of Substantial Completion, the Section Developer will be entitled to commence tolling in the manner described in the Tolling Services Agreement Term Sheet and the Operating Period will begin.</p> <p>The conditions to achievement of Substantial Completion will be customary for similar projects.</p> <p>The Section Developer will be required to achieve Substantial Completion by the Substantial Completion Long Stop Date, which will be 365 days after the scheduled Substantial Completion date.</p> |
| 18. | Final Completion | <p>The Section Developer will be required to achieve Final Completion by the scheduled Final Completion date.</p> <p>The conditions to achievement of Final Completion will be customary for similar projects.</p> |
| 19. | Delay Liquidated Damages | <p>If the Section Developer fails to achieve Substantial Completion or Final Completion by the scheduled Substantial Completion date or scheduled Final Completion date, the Section Developer shall pay liquidated damages to MDOT. The liquidated damages will be in an amount equal to the projected MDOT contract administration costs and third party advisor costs incurred by MDOT due to the extended period of D&C Work.</p> <p>Approximate amount of the delay liquidated damages is \$39,300/day for failure to achieve Substantial Completion and \$17,900/day for failure to achieve Final Completion.</p> |
| Part D – Operation and Maintenance | | |
| 20. | General Obligations | <p>The Section Developer shall carry out O&M Work in accordance with:</p> <ul style="list-style-type: none"> a) good industry practice; |

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| | | <p>b) all applicable laws;</p> <p>c) the requirements of all governmental approvals;</p> <p>d) the technical provisions and all other requirements of the Section P3 Agreement (including all schedules and plans accepted by MDOT in accordance with the technical provisions); and</p> <p>e) the Section Developer's technical proposal.</p> <p>Following the Substantial Completion Date (or, with respect to an Interim Completion Element, the Interim Completion Date), the Section Developer will only be responsible for O&M Work on the maintained facilities (meaning the Priced Managed Lanes and certain other facilities) and will hand over responsibility for operation and maintenance of the General Purpose Lanes and certain other facilities described in Exhibit 6 (<i>Predevelopment Work Requirements</i>) of the Phase P3 Agreement (the "Non-Maintained Facilities") to MDOT, the counties, or certain other entities. In the event that MDOT undertakes certain renewal work on Shared Assets that are within the O&M Limits (each as defined in Exhibit 6 (<i>Predevelopment Work Requirements</i>) of the Phase P3 Agreement), the Section Developer shall reimburse MDOT for the Section Developer's portion of the renewal work as described in Sections 25.2.4 (<i>Shared Operations and Maintenance Responsibilities</i>) and 25.3.14 (<i>Shared O&M Protocols</i>) of Exhibit 6 (<i>Predevelopment Work Requirements</i>) of the Phase P3 Agreement. MDOT shall perform the operation and maintenance of the Shared Assets to the same standard as it operates and maintains equivalent assets on other State highways.</p> |
| 21. | Utility Accommodation | The Section Developer will provide reasonable and customary assistance to MDOT and MDTA with respect to Utility permit applications submitted after the Substantial Completion Date. |
| 22. | Incident Response Services | The Section Developer will be responsible for providing, at the Section Developer's cost and expense, incident response services and courtesy patrol services in the Priced Managed Lanes. |
| 23. | Basic Policing and Toll Enforcement | <p>MDOT will coordinate with the Maryland State Police to provide basic policing services, including traffic patrol and traffic law enforcement services, on the Priced Managed Lanes in Maryland at a level of service equivalent to that provided on other HOV facilities in the State. MDOT will not have any responsibility or liability to the Section Developer resulting from or otherwise relating to a failure of the Maryland State Police to provide such policing services, or any other acts of omissions of the Maryland State Police with respect to such services.</p> <p>The Section Developer may request that MDOT engage the Maryland State Police for additional toll violation enforcement services or enhanced levels of police services for traffic control in Maryland. Upon receipt of such request MDOT shall use reasonable efforts to engage the Maryland State Police on reasonable terms and for a scope of additional service to be agreed with the Section Developer. The Section Developer shall reimburse MDOT for all costs and expenses incurred by MDOT in its engagement of the Maryland State Police.</p> |

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| 24. | Handback Obligations | The Section Developer shall hand back the Section to MDOT in accordance with the handback requirements set out in Exhibit 6 (<i>Predevelopment Work Requirements</i>) of the Phase P3 Agreement. The technical provisions will specify the residual life requirements that each Section element must meet at the end of the Handback Period. Beginning five years prior to the end of the Term, the Section Developer, MDOT, and MDTA shall conduct annual inspections to assess the condition of each Section element and agree to a plan of Work to be undertaken by the Section Developer to satisfy the handback requirements. The Section Developer may, at its own expense, engage a suitably qualified independent third party approved by MDOT to perform the inspection and assessment process. |
| 25. | Handback Reserve Account | <p>Prior to the Handback Period, the Section Developer shall create and fund a handback reserve account in which MDOT and MDTA will have a first priority security interest. The handback reserve account may be funded in cash or by posting a letter of credit meeting the requirements of the Section P3 Agreement. The amount to be deposited into the handback reserve account (or the amount of the letter of credit that must be posted) will be initially determined and subsequently adjusted based on the results of the annual inspections conducted during the last five years of the Term. If the Section Developer fails to fund the handback reserve account in the required amount, then MDOT may elect to redirect Toll Revenues to the handback reserve account in the amount of any shortfall.</p> <p>The Section Developer may only withdraw funds upon approval by MDOT and MDTA and only to pay for renewal work that was taken into account in the calculation of the required balance of the handback reserve account.</p> <p>At the end of the Term, MDOT or MDTA may withdraw funds from the handback reserve account or draw upon the letter of credit in the amount required to undertake any renewal work. The balance will be paid to the Section Developer.</p> |
| Part E – Contracting and Key Personnel | | |
| 26. | Subcontracting | The Section Developer will retain only Contractors that are qualified, experienced, and capable of performing the Work in accordance with the terms of the Section P3 Agreement. The retention of Contractors will not relieve the Section Developer of its obligations and will not create any contractual relationship with, or impose any obligation on, MDOT or MDTA. |
| 27. | Prompt Payment to Contractors; No Retainage | <p>The Section Developer shall make prompt payment of undisputed amounts to its Contractors with whom it has privity of contract, and shall require all Contractors to make prompt payment of undisputed amounts to lower-tier Contractors with whom they have privity of contract.</p> <p>The Section Developer shall insert in all contracts to which the Section Developer is a party a requirement for the Contractor to pay all undisputed amounts due to lower-tier Contractors within 10 days of receiving payment for Work satisfactorily performed by such lower-tier Contractors; and</p> |

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| | | <p>shall require lower-tier Contractors to insert the same provision in each subcontract at all tiers.</p> <p>Notwithstanding that MDOT and MDTA shall not be making payments to the Section Developer with respect to the D&C Work, (i) in relation to D&C Work, the D&C Contractor will not be permitted to withhold retainage in excess of 5% of the amount otherwise owing from Contractors with whom it has privity of contract and (ii) in relation to all other Work, the Section Developer will not be permitted to withhold retainage in excess of 5% of the amount otherwise owing from Contractors with whom it has privity of contract. If the D&C Contractor or the Section Developer elects to withhold such retainage from a Contractor with whom it has privity of contract, that Contractor shall have the further right to withhold retainage from its Contractors with whom it has privity of contract, not to exceed the amount withheld by the D&C Contractor or the Section Developer (as applicable), and each Contractor from whom retainage is withheld shall have the right to withhold retainage from its lower tier Contractors, not to exceed the amount withheld from the upper tier Contractor.</p> |
| 28. | Key Personnel | The Section Developer and any Key Contractor shall appoint and retain the key personnel throughout the Term, subject to customary procedures for their replacement from time to time as may be approved by MDOT. |
| 29. | Applicable Law; Non-Discrimination; Equal Employment Opportunity³ | <p>The Section Developer, its Contractors, and its assignees will be required at all times to comply with all applicable State and federal laws, shall not discriminate, and shall include non-discrimination provisions in their contracts.</p> <p>The Section Developer shall comply with the Civil Rights Act and MDOT's affirmative action requirements and equal employment opportunity requirements.</p> |
| 30. | DBE and MBE Requirements | <p>MDOT anticipates establishing DBE participation goals for the D&C Work.</p> <p>MDOT anticipates establishing MBE participation goals/subgoals for the O&M Work.</p> <p>The Section P3 Agreement will include customary protections for DBE and MBE firms, as well as customary monitoring and reporting regimes. Further details regarding the participation goals are provided in Section 1.20 of the ITP.</p> <p>The Section Developer will be required to perform certain obligations in connection with the Opportunity MDOT program, details of which are provided in Section 1.9 of the ITP.</p> |
| 31. | Prevailing Wages | The Section Developer shall pay or cause to be paid to all applicable workers employed to perform the Construction Work not less than the prevailing rates of wages, as provided in the applicable statutes and regulations, including §§17-201 et seq. of the State Finance and Procurement Article of the Annotated Code of Maryland, COMAR §21.11.11, and the |

³ **NTD:** The Section Developer will be required to comply with on-the-job training requirements for the Work, including an OJT Manual that will be provided once approved by FHWA.

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| | | Davis Bacon Act, and will bear the risk of any change in the wage or benefit requirements. |
| 32. | Community Benefits | The Section Developer will be required to comply with certain community benefit requirements to be developed in collaboration by MDOT and the Phase Developer, including integration of the local trades and unions, including but not limited to the affected local community and the MBE/DBE community along the P3 Program corridor. |
| Part F – Noncompliance | | |
| 33. | Noncompliance Events | <p>The Section P3 Agreement will include performance requirements and define events that constitute noncompliance events during both the D&C Period and the Operating Period, including applicable mitigation, temporary repair, and permanent repair periods, noncompliance points, and corresponding liquidated damages.</p> <p>The noncompliance events that will be applicable to the Section are set forth in Tables 25-6 (<i>Operating Period Performance</i>) and 25-7 (<i>D&C Period Performance</i>) in Exhibit 6 (<i>Predevelopment Work Requirements</i>) of the Phase P3 Agreement. Each noncompliance point will have a value of \$8,000 in liquidated damages payable to MDOT. This value is based on an assumed capex value for the Section of \$1 billion, and may be subject to adjustment based on the actual capex value of the Section.</p> <p>If the accumulated noncompliance points exceed certain thresholds set forth in the Section P3 Agreement, MDOT will have the right to increase monitoring of the Section Developer's performance and require the Section Developer to prepare a remedial plan, in each case at the Section Developer's cost and expense.</p> <p>If the accumulated noncompliance points exceed certain higher thresholds set forth in the Section P3 Agreement, a Section Developer Default will occur and MDOT will have the right to terminate the Section P3 Agreement.</p> |
| Part G – Delays and Supervening Events | | |
| 34. | Notice of Delays | Within 10 business days of becoming aware that there will be a delay in achieving any scheduled Interim Completion of an Interim Completion Element, the scheduled Substantial Completion date, or the scheduled Final Completion date, the Section Developer shall notify MDOT and provide any information relating to the delay reasonably requested by MDOT. |
| 35. | Compensation Events and Relief Events | <p>To the extent a Compensation Event or a Relief Event directly causes an adverse cost or schedule impact on the Section Developer, the Section Developer may claim an extension to applicable deadlines for performance or relief from compliance with its obligations. Notice of such claim must be provided within 30 days after the date the Section Developer first became aware (or should reasonably have become aware) that the relevant Compensation Event or Relief Event had occurred.</p> <p>If such adverse impact is caused by a Compensation Event, the Section Developer may also claim compensation which places the Section Developer in a "no better/no worse"</p> |

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| | | <p>position, as compared to immediately prior to the occurrence of the Compensation Event.</p> <p>The Section P3 Agreement will include "Compensation Events" addressing the following matters, among others:</p> <ul style="list-style-type: none"> a) breach of the Section P3 Agreement by MDOT or MDTA (including a failure by MDOT to provide the Section Developer with access to each MDOT Provided Parcel in accordance with the access schedule agreed under <u>Section 7 (Right of Way)</u>); b) violation of law by MDOT or MDTA; c) Discriminatory Change in Law; d) suspension of the Work (except as permitted by <u>Section 38</u> below) or suspension of tolls in the Priced Managed Lanes (except as permitted by <u>Section 38.A</u> below); e) issuance of directive letters; f) physical damage to the Work caused by other MDOT capital works projects [or VDOT capital works projects]⁴ in the immediate vicinity of the Section (excluding work undertaken by a Section Developer-Related Entity); g) MDOT's or MDTA's exercise of step-in rights except in cases of Section Developer's breach; h) the discovery of any Unknown Utility during the carrying out of the Construction Work; i) the discovery of any Unknown Hazardous Environmental Conditions during the carrying out of the Construction Work; j) the discovery of any Unknown Endangered Species during the carrying out of the Construction Work; k) the discovery of any Unknown Archaeological Remains during the carrying out of the Construction Work; l) issuance of injunctions or restraining orders relating to the Section or the P3 Program that prohibits the performance of a material part of the Work under the Section P3 Agreement or materially and adversely affects a Party's performance under the Section P3 Agreement; m) release of Hazardous Materials caused by an MDOT-Related Entity; n) signing by MDOT or MDTA of new or amended Utility Framework Agreement, Utility Agreement, or Third Party MOU on terms different to the Setting Date MOUs, except to the extent caused by a change to the design made by the Section Developer after the Setting Date (and "Setting Date MOUs" means (i) the MOUs or agreements executed by MDOT or MDTA and the relevant utility/third party and made available to the Phase Developer prior to the Setting Date and (ii) Utility Framework Agreement, Utility Agreement, or Third Party MOU in a form that has not yet been executed at the Setting Date but that has been agreed as between MDOT and the Phase |
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⁴ **NTD:** References to Virginia will only be included in the Section P3 Agreement for the Section that includes American Legion Bridge.

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| | | <p>Developer as the form of MOU or agreement that the Phase Developer will base its pricing on at the Setting Date);</p> <ul style="list-style-type: none"> o) construction or expansion of a Competing Facility as defined in <u>Section 37</u> below; p) an extended Force Majeure Event, to the extent MDOT elects to treat it as a Compensation Event in lieu of termination; q) with respect to the 495 NEXT Project, breach by the 495 NEXT Developer or VDOT of certain defined interface obligations set forth in the Section P3 Agreement; r) any suspension, termination, amendment, or variation to the terms and conditions of any MDOT-Provided Approval, except to the extent that such suspension, termination, amendment, or variation results from failure of any Section Developer-Related Entity to locate or design the Section or carry out the Work in accordance with the relevant MDOT-Provided Approval (including any differences between the Section Developer's design and the design used for the MDOT-Provided Approvals); s) an MDTA Outage occurs that constitutes a Compensation Event in accordance with Section 26 (<i>System Faults and Failures</i>) of the Tolling Services Agreement Term Sheet; and t) changes are made to any of the toll rate setting terms that constitute a Compensation Event in accordance with Section 36 (<i>Change Orders</i>) of the Tolling Services Agreement Term Sheet, <p>except, in each case, to the extent attributable to any breach of the Section P3 Agreement, applicable law, or any governmental approval by, or negligent act or negligent omission of, a Section Developer-Related Entity and subject to such other limitations and conditions as will be set forth in the Section P3 Agreement.</p> <p>The Section P3 Agreement will include "Relief Events" addressing the following matters, among others:</p> <ul style="list-style-type: none"> a) any Changes in Law other than Discriminatory Changes in Law; b) Force Majeure Events (as defined in <u>Section 40</u>); c) floods in excess of the Base Flood, fires, explosions, earthquakes causing ground acceleration in excess of AASHTO design standards, tornadoes, named windstorms, and ensuing storm surges; d) riot or civil commotion; e) blockade or embargo; f) strikes or labor unrest affecting the construction industry generally; g) a failure by a Utility Owner to comply with its obligations under its Utility Framework Agreement or Utility Agreement or to cooperate with the Section Developer in relation to a Utility Adjustment where, in each case, such failure continues for a period of [●]⁵ days or more after the Section Developer has issued |
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⁵ **NTD:** This will be agreed during the Predevelopment Work.

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| | | <p>a request for assistance and continues to satisfy certain conditions to assistance under the Section P3 Agreement;</p> <p>h) a delay in obtaining any Major Governmental Approval due to delays in receiving responses from the relevant permitting agency that exceed the applicable Major Governmental Approval Period to the extent that such delay is beyond the reasonable control of any Section Developer-Related Entity;</p> <p>i) Pandemic Event; and</p> <p>j) the release of Hazardous Materials onto the Site that is not caused by a Section Developer-Related Entity, except, in each case, to the extent attributable to any breach of the Section P3 Agreement, applicable law, or any governmental approval by, or negligent act or negligent omission of, a Section Developer-Related Entity and subject to such other limitations and conditions as will be set forth in the Section P3 Agreement.</p> |
| 36. | Mitigation and Burden of Proof | <p>The Section Developer will be required to use reasonable efforts to mitigate delays and other consequences of a Compensation Event or Relief Event, and will have the burden of proving the occurrence of any Compensation Event or Relief Event and its resulting impacts and demonstrating its efforts to mitigate such impacts.</p> <p>The Section Developer's right to relief in respect of any Compensation Event or Relief Event will be subject to a demonstration of the cost and schedule impact associated with the claimed event in accordance with the terms of the Section P3 Agreement.</p> |
| 37. | Competing Facilities | <p>The Section Developer will not have any rights to relief, including to prohibit or interfere, with respect to MDOT's or MDTA's rights to plan, finance, develop, operate, maintain, toll or not toll, repair, improve, modify, upgrade, reconstruct, rehabilitate, restore, renew, or replace any transportation facilities.</p> <p>MDOT's or MDTA's construction or expansion of a Competing Facility will, however, constitute a Compensation Event for which relief is available as described above.</p> <p>"Competing Facilities" means additional traffic lanes to be a part of I-495 or I-270 constructed or created on property within or immediately adjacent to the Section's Permanent ROW during the Term, provided, additional traffic lanes do not include the use of auxiliary lanes for any of their intended uses or the construction or operation and use of new auxiliary lanes for any of their intended uses, the use of the shoulder between auxiliary lanes as an additional travel lane for incident management, maintenance, and construction activities, or any new or expanded capacity added to roads adjacent to, in the vicinity of, or intersecting with the Section.</p> <p>For the purpose of this <u>Section 37</u>, "auxiliary lane" means any portion of the roadway adjoining the traveled way for speed change, turning, weaving, truck climbing, maneuvering of entering and leaving traffic, and other purposes supplementary to through-traffic movement, so long as the auxiliary lane is limited to no more than two consecutive interchanges and is</p> |

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| | | <p>less than two-miles in total length between adjacent interchanges.</p> <p>MDOT reserves the right to include in the full form Section P3 Agreement additional carve outs to the definition of Competing Facility to allow MDOT to add additional capacity if certain traffic, revenue, or other triggers are met and subject to certain conditions to be agreed (and provided that, such right shall not have such a material effect on the Section to cause the Section to cease to be Financially Viable (as defined in the Phase P3 Agreement) or to cause the Phase Developer to be unable to pay the Development Rights Fee (as defined in the Phase P3 Agreement) for such Section).</p> <p>Nothing in the Section P3 Agreement will require MDOT to compensate the Section Developer for any Competing Facility that arises as a direct result of infrastructure improvements that are already in the State's Capital Improvement Program or Consolidated Transportation Program planning documents at the time the Section P3 Agreement is signed.</p> <p>MDOT will also have the right, without compensating the Section Developer, to implement certain enhancements to the General Purpose Lanes to accommodate vehicle operation technology enhancements (including for connected/autonomous vehicles) during the Term, provided that the enhancements must be within the footprint of the Permanent ROW, [and such enhancements may include restriping that adds lanes within the Permanent ROW] ⁶. The timing and parameters of this right will be set forth in the Section P3 Agreement.</p> |
| 38. | Suspension of Work | <p>MDOT may at any time suspend, in whole or in part, the D&C Work or the O&M Work by written order to the Section Developer. Any suspension of the Work by MDOT will constitute a Compensation Event except where the suspension order is made in response to (i) any Section Developer breach that constitutes failure to handle archaeological resources or Hazardous Materials or would have a material adverse effect on the Section, (ii) unsafe conditions caused by any breach, act, or omission of the Section Developer or any Section Developer-Related Entity, (iii) failure to provide required insurance coverage or performance security, (iv) failure to comply with a directive letter or change order, (v) failure to remove unqualified individuals or failure to ensure that qualified personnel are furnished for the Work, (vi) noncompliance with DBE or MBE program requirements, or (vii) violation by any Section Developer-Related Entity of any governmental approval. This paragraph does not apply to the suspension of tolling, which is addressed in <u>Section 38.A</u> below.</p> |
| 38.A | Suspension of Tolling | <p>MDOT may order the immediate suspension of tolling on any or all portions of the Section that are designated for immediate use as an emergency mass evacuation route or as a route to respond to a disaster proclaimed by the Governor of Maryland or his or her designee.</p> |

⁶ **NTD:** MDOT is willing to consider certain triggers or conditions that would have to be met before restriping or additional capacity could be added. To be further discussed during the predevelopment phase.

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| | | <p>MDOT may order the diversion of traffic onto the Priced Managed Lanes and order the immediate temporary suspension of tolling on the Priced Managed Lanes in the direction(s) of the diversion, if the Priced Managed Lanes are designated for immediate use as the alternate route for the diversion of such traffic from another State Highway or the General Purpose Lanes temporarily closed to all lanes in one or both directions due to: (i) an emergency declared under law by MDOT or any other governmental entity; (ii) a significant incident involving one or more casualties requiring hospitalization or treatment by a medical professional or a fatality on the affected State Highway or General Purpose Lanes from which such traffic is diverted; or (iii) a significant incident that causes the affected State Highway or General Purpose Lanes to be closed for a period of time projected to be for greater than three hours.</p> <p>If MDOT receives an order, request, notice, or demand from federal authorities, MDOT may order the Section Developer to close the Priced Managed Lanes to the public for such period of time as may be necessary for secret service, national security, and homeland security purposes.</p> <p>MDOT will have no liability to the Section Developer for the loss of Toll Revenues or the increase in costs and expenses attributable to any suspension of tolling permitted under this <u>Section 38.A</u> provided that such order is applied in an indiscriminatory manner and lifted promptly.</p> |
| 39. | Section Developer Financing of Section Developer Damages | <p>If requested by MDOT, the Section Developer shall use commercially reasonable efforts to obtain financing for a portion or the full amount of the financial impact of a Compensation Event unless the Section Developer demonstrates that such financing will diminish the value of the Section.</p> |
| 40. | Force Majeure Events | <p>"Force Majeure Event" means the occurrence of any of the following events after the date of the Section P3 Agreement that directly causes either MDOT or the Section Developer (the "Affected Party") to be unable to comply with all or a material part of its obligations under the Section P3 Agreement:</p> <ul style="list-style-type: none"> a) war, civil war, invasion, violent act of foreign enemy or armed conflict, or an act of terrorism; or b) nuclear, chemical, or biological contamination or ionizing radiation unless the source or cause of the contamination is brought to or near the Site by the Section Developer or a Section Developer-Related Entity, or is a result of any breach by the Section Developer of the terms of the Section P3 Agreement. <p>Generally, neither Party may bring a claim for a breach of obligations under the Section P3 Agreement by the other Party or incur any liability to the other Party for any losses or damages incurred by that other Party if a Force Majeure Event occurs and the Affected Party is prevented from carrying out its obligations by that Force Majeure Event.</p> |

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| | | <p>After a Force Majeure Event occurs, the Parties must consult on appropriate terms to mitigate its effects and facilitate the continued performance of the Section P3 Agreement.</p> <p>If:</p> <ul style="list-style-type: none"> a) as a result of a Force Majeure Event, the Affected Party is unable to comply with any of its material obligations under the Section P3 Agreement for a continuous period of more than 180 days; and b) within such 180 day period, each acting in good faith, the Parties are unable to agree on appropriate terms to mitigate the effects of the Force Majeure Event and facilitate the continued performance of the Section P3 Agreement, <p>either Party may deliver notice to the other Party that it wishes to terminate the Section P3 Agreement for an extended Force Majeure Event.</p> <p>If the Section P3 Agreement is terminated by either Party for an extended Force Majeure Event, then the Section Developer will be entitled to termination compensation as more particularly described in <u>Section 63</u>.</p> <p>MDOT will have the right to over-rule an election by the Section Developer to terminate the Section P3 Agreement following an extended Force Majeure Event, in which case the relevant Force Majeure Event will be treated as a Compensation Event.</p> |
| 41. | Change in Law | The Section Developer shall at all times perform the Work in accordance with applicable law, including after any Change in Law. |
| 42. | Change Orders | The Section P3 Agreement will contain customary provisions governing the right of MDOT to issue change orders and directive letters, as well as the right of the Section Developer to propose changes. |
| Part H – Indemnities, Insurance and Reinstatement, Performance and Payment Security | | |
| 43. | Indemnity from Section Developer | <p>The Section Developer shall indemnify, hold harmless, and, subject to approval by the relevant Indemnified Party, defend each of the Indemnified Parties from and against (a) all liability for losses in relation to loss of or damage to real or personal property owned by or in the possession of an Indemnified Party; (b) all losses in relation to personal injury or death of any officers, agents, representatives, or employees of any MDOT-Related Entity; and (c) all losses in relation to third party claims, in each case, arising out of, relating to, or resulting from the Section Developer's design, construction, operation, or maintenance of the Project or the Section Developer's performance or non-performance of the Section Developer's obligations under the Section P3 Agreement.</p> <p>Such indemnity will expressly extend to liability for losses arising from third party claims arising out of (i) the Section Developer's Work, where the claim is from an owner or occupier of an Additional Property and (ii) the interface of the Section Developer with other MDOT contractors carrying out work on, in, or near the Site.</p> |

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| | | <p>The Section P3 Agreement shall include a customary indemnity with respect to Hazardous Materials and intellectual property infringement.</p> <p>The Section P3 Agreement will include customary exclusions from the Section Developer's indemnity obligations.</p> |
| 44. | Insurance | <p>The Section Developer and its Contractors shall, at their sole cost and expense, procure and maintain insurance policies that comply with the minimum requirements established in the Section P3 Agreement for the provision of the Work throughout the Term.</p> |
| 45. | Uninsurable Risks and Unavailable Insurance Terms | <p>If MDOT and the Section Developer agree that a risk is an Uninsurable Risk (and not due to any fault of the Section Developer), MDOT and the Section Developer shall consider in good faith alternative insurance packages and programs that provide coverage as comparable as is possible under then-existing insurance market conditions.</p> <p>If after negotiating in good faith MDOT and the Section Developer cannot agree on how to manage an Uninsurable Risk and such Uninsurable Risk is not caused by the actions, breaches, or omissions of the Section Developer or a Contractor, then MDOT and the Section Developer shall appoint an insurance expert panel to review and confirm the insurance requirements of the Section P3 Agreement and the market for such insurance, and recommend the amount and type of insurance that is available on commercially reasonable terms (and at insurance premiums that contractors on comparable infrastructure projects in North America are generally prepared to pay) to be obtained by the Section Developer in lieu of that which was required. The Section Developer will be required to obtain such recommended insurance, and will at all times remain responsible for the cost of such recommended insurance and at risk for any loss to the Section.</p> <p>The Section Developer must make ongoing best efforts to ascertain whether an Uninsurable Risk has become insurable and if so, to obtain the relevant insurance as soon as reasonably practicable.</p> <p>If MDOT and the Section Developer agree that an insurance term is an unavailable term and that its unavailability is not caused by the actions, breaches, omissions, or defaults of the Section Developer or a Contractor, the Section Developer's obligations with respect to that term are waived for so long as it remains unavailable.</p> <p>The Section Developer must make ongoing best efforts to ascertain whether an insurance term is no longer an unavailable term, and if so, to obtain the relevant insurance term as soon as reasonably practicable.</p> <p>If an alternative or replacement term or condition of insurance is available to the Section Developer in the worldwide insurance and reinsurance market with reputable insurers of good standing which, if included in the relevant insurance policy, would fully or partially address the Section</p> |

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| | | Developer's inability to maintain or obtain insurance including an unavailable term, at a cost which contractors on similar sized civil engineering projects in North America are (at such time) generally prepared to pay, the Section Developer shall maintain or ensure the maintenance of insurance including such alternative or replacement term or condition. |
| 46. | Performance and Payment Security | <p>On or before the Financial Closing Date, the Section Developer shall furnish, or cause the D&C Contractor to furnish, the following:</p> <ul style="list-style-type: none"> a) a performance bond in the form to be set out in the Section P3 Agreement in an amount equal to 100% of the total value of D&C Work (the "Performance Bond"); and b) a payment bond in the form to be set out in the Section P3 Agreement in an amount equal to 100% of the total value of D&C Work (the "Payment Bond").⁷ <p>Each of the Performance Bond and the Payment Bond must be issued by a surety or an insurance company authorized to issue bonds in the State that is rated in the top two categories by two of the three nationally recognized rating agencies or at least "A-" or better and "Class X" or better according to A.M. Best's Financing Strength Rating and Financial Size Category. In addition any surety or insurance company issuing such bonds must be listed on the current U.S. Treasury Listing of Certified Companies and the limit of the bond written by such surety or insurance company on any one project must not exceed the approved Underwriting Limitation on the U.S. Treasury list.</p> <p>Each of the Performance Bond and the Payment Bond will name MDOT, MDTA, and the collateral agent as additional obligees, and further provide that each of the Performance Bond and the Payment Bond may be transferred by the Section Developer to MDOT, MDTA, or the collateral agent, as beneficiary, with rights to draw upon or exercise other remedies if MDOT, MDTA, or the collateral agent succeeds to the position of the Section Developer under the Section P3 Agreement.</p> <p>In all contracts with respect to the D&C Work entered into by the Section Developer, the Section Developer shall require its Contractors and suppliers to waive any right to seek a mechanic's lien against the Section or the Site in consideration for the Section Developer's provision of the Payment Bond.</p> <p>The Section Developer shall maintain, or cause the D&C Contractor to maintain, each of the Performance Bond and the Payment Bond until the expiry of the GP Defect Remedy Period (subject to step-downs as may be set forth in the Section P3 Agreement).</p> <p>If the Section Developer is required under the terms of the Finance Documents to provide or ensure that a Key</p> |

⁷ **Note to Proposers:** MDOT may consider lower amounts for the Payment Bond and the Performance Bond during the predevelopment phase if a benefit of doing so can be demonstrated to MDOT.

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| | | <p>Contractor provides any performance security, including any performance bond, letter of credit, cash collateral, or parent guarantee put in place to secure obligations of a Contractor under a contract, the Section Developer shall:</p> <ul style="list-style-type: none"> a) with respect to any performance bond, ensure that MDOT and MDTA are named as an additional obligee (on terms reasonably acceptable to MDOT and MDTA); and b) deliver to MDOT and MDTA a copy of any such performance security promptly upon obtaining it. |
| | Part I – Principal Section Developer Documents, Financing, Refinancing, Financial Model, Tolling | |
| 47. | Key Contracts | <p>The Section Developer shall not permit any termination (except for default of a Key Contractor), amendment to, or material departure from a Key Contract, except with MDOT's prior approval, if the proposed course of action may reasonably be expected to have a material adverse effect on the ability of the Section Developer to perform its obligations under the Section P3 Agreement.</p> <p>The Section Developer shall not permit any substitution, replacement, or assignment of any Key Contractor except with MDOT's prior approval (subject to certain carve outs to be included in the Section P3 Agreement).</p> |
| 48. | Financing | <p>Without prejudice to the Phase Developer's obligations under the Phase P3 Agreement, the Section Developer is responsible for financing the Section at its own cost and risk without recourse to MDOT, MDTA, or the State. The repayment of any debt or equity arranged by the Section Developer to finance the Section will be the sole responsibility of the Section Developer. MDOT and MDTA will be required to provide disclosure (if required) and customary legal opinions and certifications related thereto in connection with a bond offering.</p> <p>All Section Debt or other obligations issued or incurred by a Section Developer-Related Entity in connection with the Section P3 Agreement or the Section must be issued or incurred only in the name of a Section Developer-Related Entity.</p> <p>Subject to the lenders direct agreement, MDOT and MDTA will not have any obligation to any Lender under the Section Documents.</p> |
| 49. | Changes to the Interest Rate, Design-Build Price, and Predevelopment Costs | <p>The Section P3 Agreement will contain a mechanism allowing an adjustment to the Upfront Payment resulting from:</p> <ul style="list-style-type: none"> a) changes in the benchmark interest rates and credit spreads occurring between the submission of the Committed Section Proposal and the Financial Closing Date with respect to bank, bond, or TIFIA financings, in each case on terms and conditions customary for similar transactions; b) extraordinary changes in the cost of performing the D&C Work evidenced by changes in a construction price index occurring between (i) 240 days after the submission of the Committed Section Proposal and (ii) the Financial Closing Date, if such delay to the |

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| | | <p>Financial Closing Date is caused by MDOT or MDTA; and</p> <p>c) changes to Allowed Costs to reflect actual costs approved by MDOT that were incurred between the submission of the Committed Section Proposal and the Financial Closing Date provided that the total Allowed Costs reimbursed on Financial Close do not exceed the Predevelopment Cost Cap.</p> <p>The above changes will be made to the Initial Base Case Financial Model and the resulting, adjusted financial model will be the Base Case Financial Model.</p> |
| 50. | Upfront Payment | On the Financial Closing Date, the Section Developer shall pay to MDOT an amount to be set forth in the Section P3 Agreement (the " Upfront Payment "). The amount of the Upfront Payment may be adjusted to account for the financial risk sharing, all as described in <u>Section 49</u> . |
| 51. | Development Rights Fee relating to the Section | On the Financial Closing Date, the Section Developer shall advance funds to the Phase Developer in the amount of the applicable installment of the Development Rights Fee (as defined in the Phase P3 Agreement) due under the Phase P3 Agreement and shall cause the Phase Developer to pay the applicable installment of the Development Rights Fee in accordance with the Phase P3 Agreement. |
| 52. | Regional Transit Improvements | <p>Specific transit service improvements developed in coordination with Frederick and Montgomery counties and MDOT under the terms of memoranda of understanding will be provided as part of the Section P3 Agreement. This will ensure these regional transit service improvements are provided at defined and predictable times.</p> <p>The scope and terms of the transit service improvements to be included in the Section P3 Agreement will be determined following execution of the Phase P3 Agreement. The scope of the transit service improvements will not exceed an amount that would cause the Section to be undeliverable without Maryland Funding (as defined in the Phase P3 Agreement).</p> |
| 53. | Excess Revenue Payments | <p>Annually throughout the Term, as partial compensation for MDOT's and MDTA's grant of rights to the Section Developer under the Section P3 Agreement, the Section Developer shall make payments to MDOT in amounts equal to 50% of Excess Revenue calculated for that period ("Excess Revenue Payments").</p> <p>To the extent that the restricted payment conditions included in the TIFIA loan agreement have not been met, Excess Revenue Payments shall be held in the designated distribution lock-up account and released once the TIFIA loan agreement restricted payment conditions have been met. Amounts in the designated distribution lock-up account will be available for insufficiencies in higher priority levels of the revenue account waterfall. Any shortfall will be paid to MDOT when available for distribution.</p> <p>With respect to any Section within Phase South A only, if both (i) the Phase Developer included in its proposal a Development Rights Fee equal to zero for each Section of Phase South A, and (ii) the Alternative Equity IRR for such</p> |

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| | | <p>Section is less than the Proposal Equity IRR, the Base Case Gross Revenue applicable for the purpose of calculating Excess Revenue shall be adjusted as follows. The Base Case Financial Model (as adjusted in accordance with <u>Section 49</u> above) shall be re-solved by increasing gross toll revenue (by the same percentage each year of operations), holding all other inputs static, such that the Alternative Equity IRR equals the Proposal Equity IRR, and the resulting gross toll revenue will be the Base Case Gross Revenue for the purpose of calculating Excess Revenue. This adjustment to the Base Case Gross Revenue for the purpose of calculating Excess Revenue shall not be included in a Section P3 Agreement for a Section within Phase South A if either or both of the following apply: (i) the Phase Developer included in its proposal a Development Rights Fee greater than zero for any Section in Phase South A or (ii) the Alternative Equity IRR for such Section is equal to or greater than the Proposal Equity IRR.</p> <p>The terms Development Rights Fee, Alternative Equity IRR, and Proposal Equity IRR have the meaning set out in the Phase P3 Agreement.</p> |
| 54. | Refinancing | <p>With certain limited exceptions, the Section Developer may not enter into any Qualifying Refinancing without obtaining MDOT's prior written consent.</p> <p>Any Refinancing Gain arising from a Qualifying Refinancing will be included in the calculation of Excess Revenue.</p> <p>Upon the reasonable request of the Section Developer, MDOT and MDTA shall provide reasonable assistance to the Section Developer in undertaking:</p> <ul style="list-style-type: none"> a) any Exempt Refinancing or Notifiable Refinancing; or b) any Qualifying Refinancing with respect to which MDOT has provided its prior written consent. |
| 55. | MDTA Note Purchase by Section Developer | <p>MDTA and the Section Developer shall enter into MDTA Financing Documents based on the terms set out in the MDTA Notes Term Sheet. At Financial Close for the Section, the Section Developer shall purchase the MDTA Notes using equity provided by its shareholders and debt raised from the Section Developer's Lenders. The principal amount of the MDTA Notes at Financial Close will vary for each Section. The total value of the MDTA Notes for Phase 1 South is not expected to exceed \$100m. The proceeds of the MDTA Notes shall be used for eligible project costs (including those referred to in <u>Section 10</u>).</p> |
| 56. | MDTA Refinancing | <p>At any time from and including the 10th anniversary of the Commercial Closing Date and prior to the 40th anniversary of the Commercial Closing Date, MDTA may optionally redeem the MDTA Notes and issue new MDTA notes in a private placement to the Section Developer on substantially the same terms as the original MDTA Notes, under which the then-outstanding debt under the original MDTA Notes will be refinanced, with the final maturity date thereunder being the last day of the Term (such refinancing, the "MDTA Refinancing"). If MDTA fails to close the MDTA Refinancing on or prior to the 40th anniversary of the Commercial Closing Date (except to the extent caused by the Section Developer's failure to cooperate in a reasonably timely manner), MDOT</p> |

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| | | <p>will be deemed to terminate the Section P3 Agreement for convenience.</p> <p>The Section Developer shall cooperate with the MDTA Refinancing and shall apply all amounts outstanding under the MDTA Notes to purchase the new MDTA Notes issued pursuant to the MDTA Refinancing.</p> |
| 57. | Tolling | <p>MDTA shall apply toll revenue as set out in the MDTA Financing Documents.</p> <p>None of MDOT and MDTA or the State will provide a revenue guarantee to the Section Developer, nor will the revenues from any other project (including other phases or sections of the P3 Program) be used by MDTA to make payments of principal and interest on the MDTA Notes or Section Developer Toll Payments to the Section Developer.</p> |
| 58. | Toll Rates | Toll revenue shall be payable to the Section Developer in accordance with the terms of the MDTA Notes as set out in the MDTA Notes Term Sheet. |
| 59. | Tolling Services Agreement | Each Section Developer and MDTA will enter into a Tolling Services Agreement in the form attached to the Section P3 Agreement based on the terms set out in the Tolling Services Agreement Term Sheet. |
| 59.A | Other Revenue | The Section Developer shall not (without the prior written approval of MDOT) engage in, or permit the Section to be used for, any business or revenue generating activity, other than the generation of Toll Revenue in accordance with the Tolling Services Agreement, the MDTA Notes, and the Section P3 Agreement; provided that MDOT may be willing to negotiate specific exceptions during the predevelopment period. |
| Part J – Termination and Step-In | | |
| 60. | Termination for Convenience | <p>MDOT may terminate the Section P3 Agreement for convenience upon the provision of 30 days written notice to the Section Developer.</p> <p>If MDOT terminates the Section P3 Agreement for convenience prior to the Financial Closing Date, the Phase P3 Agreement will obligate MDOT to also terminate for convenience the Phase P3 Agreement and, unless otherwise agreed by MDOT and the Phase Developer, any other Section P3 Agreement that has not reached Financial Close. With respect to the termination of the Section P3 Agreement for convenience prior to the Financial Closing Date, MDOT will pay to the Section Developer an amount equal to the Allowed Costs that the Section Developer would have been permitted to recover at Financial Close, provided that the aggregate amount payable by MDOT under the Phase P3 Agreement, the Section P3 Agreement, and all other "Section P3 Agreements" that have not reached Financial Close and are terminated for convenience shall be subject to the Phase South Termination Cap or the Phase North Termination Cap, each as defined in the Phase P3 Agreement (as applicable) (the "Pre-Financial Close Termination Sum").</p> <p>If MDOT terminates for convenience on or after the Financial Closing Date, MDOT shall pay compensation to the Section Developer in an amount equal to the MDOT Termination Sum.</p> |

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| | | <p>The "MDOT Termination Sum" will be calculated as follows:</p> <ul style="list-style-type: none"> a) fair market value of the share capital or other equity interests in the Section Developer and any outstanding Section Equity Member Debt (as determined by an independent appraiser); plus b) Lenders' Liabilities; plus c) subcontractor/employee breakage costs; minus d) principal amount outstanding under the MDTA Notes; minus e) account balances; minus f) insurance proceeds; minus g) deferred equity amounts; minus h) any liquidated damages not paid by the Section Developer. |
| 61. | Termination for MDOT Default | <p>The occurrence of any one or more of the following will constitute an "MDOT Default":</p> <ul style="list-style-type: none"> a) MDOT or MDTA fails to make any payment due to the Section Developer under the Section P3 Agreement or the MDTA Financing Documents when due (subject to all applicable cure periods), except to the extent such payment is subject to a good faith dispute; b) any representation or warranty made by MDOT or MDTA under the Section P3 Agreement or by MDTA under the MDTA Financing Documents is materially false, misleading, or inaccurate; c) MDOT or MDTA fails to perform any of its obligations under the Section P3 Agreement, which substantially frustrates or renders it substantially impossible for the Section Developer to perform its obligations under the Section P3 Agreement for a continuous period to be set forth in the Section P3 Agreement; d) MDOT, MDTA, or any other governmental entity confiscates, sequesters, condemns, or appropriates the whole or any material part of the Section, or the whole or any material part of the Section Developer's interest, excluding the exercise of a right set out in the Section P3 Agreement; or e) termination, revocation, or suspension of the designation of the Section as a "transportation facilities project" for the purposes of Title 4 of the Transportation Article of the Annotated Code of Maryland. <p>MDOT's or MDTA's failure to cure an MDOT Default within the applicable cure period will entitle the Section Developer to terminate the Section P3 Agreement upon 30 days' written notice.</p> <p>If the Section Developer terminates the Section P3 Agreement for an MDOT Default, it will be entitled to the MDOT Termination Sum (set out in Section 60).</p> |
| 62. | Termination for Section Developer Default | <p>If a Section Developer Default occurs and the Section Developer fails to cure within the applicable cure period or fails to comply with the terms of a remedial plan, then MDOT may terminate the Section P3 Agreement upon 30 days' written notice.</p> |

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| | | <p>Upon a termination for Section Developer Default, the Section Developer will be entitled to the Section Developer Default (D&C Period) Termination Sum if termination is prior to Substantial Completion or Section Developer Default (Operating Period) Termination Sum if termination is on or after Substantial Completion.</p> <p>The "Section Developer Default (D&C Period) Termination Sum" will be equal to:</p> <ul style="list-style-type: none"> a) the lower of (i) the D&C contract price minus the cost to complete the D&C Work and (ii) Lenders' Liabilities minus account balances minus insurance proceeds; minus b) the principal amount outstanding under the MDTA Notes; plus c) any amounts payable as compensation with respect to D&C Work relating to Compensation Events agreed between the Parties which remains unpaid; minus d) any liquidated damages not paid by the Section Developer. <p>The "Section Developer Default (Operating Period) Termination Sum" will be equal to:</p> <ul style="list-style-type: none"> a) the lower of (i) the fair market value of the Section Developer's interest in the Section P3 Agreement (as determined by an independent appraiser) and (ii) 80% of Lenders' Liabilities; minus b) the principal amount outstanding under the MDTA Notes; minus c) the cost to bring the Section into and maintain future compliance with the Section P3 Agreement; minus d) account balances; minus e) insurance proceeds; minus f) deferred equity amounts; minus g) any liquidated damages not yet paid by the Section Developer; plus h) the balance of the handback reserve account (if any); plus i) any amounts payable as compensation relating to Compensation Events agreed between the Parties which remains unpaid. <p>If it is finally determined under the dispute resolution procedures that MDOT was not entitled to terminate for a Section Developer Default, MDOT shall pay compensation to the Section Developer in the amount equal to the MDOT Termination Sum.</p> |
| 63. | Termination for Extended Force Majeure | <p>If either Party terminates the Section P3 Agreement in accordance with <u>Section 40</u>, the Section Developer will be entitled to the No Fault Termination Sum.</p> <p>The "No Fault Termination Sum" will be equal to:</p> <ul style="list-style-type: none"> a) return of outstanding equity investment or Section Equity Member Debt (principal only less distributions or any payments made to the Section Equity Members); plus b) Lenders' Liabilities; plus c) subcontractor/employee breakage costs; minus d) account balances; minus |

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| | | <ul style="list-style-type: none"> e) insurance proceeds; minus f) any liquidated damages not yet paid by the Section Developer; plus g) any amounts payable as compensation relating to Compensation Events agreed between the Parties which remains unpaid; minus h) the principal amount outstanding under the MDTA Notes. |
| 64. | Termination by Court Ruling | <p>The Section P3 Agreement may be terminated by the issuance of a final, non-appealable order by a court of competent jurisdiction:</p> <ul style="list-style-type: none"> a) to the effect that either the Section P3 Agreement or the MDTA Financing Documents are void, unenforceable, or impossible to perform in its entirety; or b) upholding the binding effect on the Section Developer, MDOT, or MDTA of a Change in Law that causes impossibility of either performance of a fundamental obligation or exercise of a fundamental right by the Section Developer, MDOT, or MDTA under the Section P3 Agreement or the MDTA Financing Documents. <p>If the Section P3 Agreement is terminated under <u>clause (a)</u> above, and the Section P3 Agreement is void, unenforceable, or impossible to perform by reason of the Section Developer's acts, omissions, negligence, willful misconduct, fraud, or breach of warranty or representation, then the Section P3 Agreement will be deemed to be terminated due to a Section Developer Default under <u>Section 62</u>.</p> <p>If the Section P3 Agreement is terminated under this <u>Section 64</u> and the above paragraph does not apply, then, the Section Developer will be entitled to the No Fault Termination Sum (set out in <u>Section 63</u>).</p> |
| 65. | Termination for Failure to Achieve Financial Close | <p>MDOT or the Section Developer may terminate the Section P3 Agreement if Financial Close does not occur by the Financial Close deadline and such failure is solely due to MDOT or MDTA failing to satisfy the conditions precedent to Financial Close for which MDOT and MDTA are responsible under the Section P3 Agreement.</p> <p>The Financial Close deadline shall be the earlier of (i) the last day of the validity period of the Committed Section Proposal for that Section, and (ii) the applicable Predevelopment Milestone Deadline for Financial Close of the Section set out in the Phase P3 Agreement, provided that the Financial Close deadline may be extended if the NEPA approval for the Section is subject to legal challenge or litigation which prevents any Section from achieving Financial Close by the Financial Close deadline.</p> <p>If MDOT or the Section Developer terminates the Section P3 Agreement pursuant to the above, MDOT will pay the Phase Developer the Pre-Financial Close Termination Sum.</p> <p>On the Commercial Closing Date, the Section Developer shall deliver to MDOT an irrevocable standby letter of credit or demand guarantees in the aggregate amount of \$10 million</p> |

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| | | (the " Closing Security "). If any of the Section Developer's conditions precedent are not satisfied or waived by the Financial Close deadline, MDOT may: (A) draw and retain the full amount of the Closing Security, and (B) terminate the Section P3 Agreement and may have recourse against the Phase Developer as set out in the Phase P3 Agreement. Under the Phase P3 Agreement, MDOT may terminate the Phase P3 Agreement and draw upon the Development Rights Fee Security (if applicable) and the Performance Security (each as defined in the Phase P3 Agreement). |
| 66. | MDOT Step-In | <p>If MDOT reasonably believes that it needs to take action in connection with the Work because:</p> <ul style="list-style-type: none"> a) an emergency has arisen; b) a Section Developer Default has occurred and has not been cured within the relevant cure period (if any); or c) the Section Developer has failed to meet any safety standard or comply with any safety compliance order within a reasonable period of time under the circumstances, <p>MDOT may upon written notice (which is not required in the case of an emergency) step in, subject to the lenders direct agreement. The Section Developer shall reimburse MDOT for all reasonable costs and expenses incurred by MDOT in the exercise of its step-in rights resulting from a Section Developer breach of the Section P3 Agreement.</p> |
| Part K – Miscellaneous | | |
| 67. | Intellectual Property | Customary provisions dealing with intellectual property rights will be included in the Section P3 Agreement. |
| 68. | Assignment and Transfer; Fundamental Changes | <p>Except to the extent permitted in the lenders direct agreement, the Section Developer shall not assign, transfer, pledge, mortgage, or otherwise encumber any of its rights or obligations under the Section P3 Agreement without MDOT's written consent and, under certain circumstances, the approval of BPW.</p> <p>MDOT or MDTA may, upon 10 days' prior notice but without the Section Developer's consent, transfer and assign their respective interests in the Section to another governmental entity that (i) succeeds to the governmental powers and authority of MDOT or MDTA and (ii) if the assigning party is MDOT, has sources of funding to perform the payment obligations of MDOT under the Section P3 Agreement that are at least as adequate and secure as MDOT's at the time of the assignment. MDOT or MDTA may also transfer and assign their respective interests in the Section to any other party with the Section Developer's prior written consent.</p> |
| 69. | Change in Ownership | <p>The Section Developer shall not effect or permit to occur any Change in Ownership unless:</p> <ul style="list-style-type: none"> a) the Change in Ownership has been approved in writing by MDOT in accordance with the Section P3 Agreement and complies with any conditions that may be imposed by MDOT in connection with that approval; and b) if the Change in Ownership is subject to §10A-202 of the State Finance and Procurement Article of the Annotated Code of Maryland, additional conditions set out in the Section P3 Agreement have been satisfied. These conditions include that MDOT and MDTA have |

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| | | <p>made a responsibility determination under §10A of the State Finance and Procurement Article of the Annotated Code of Maryland, the required 45-day notice period has expired, and BPW has approved the Change in Ownership).</p> <p>The Section P3 Agreement will include Pre-Approved Changes in Ownership (which will have each been pre-approved by the BPW for the purposes of §10A-202(e) of the State Finance and Procurement Article of the Annotated Code of Maryland).</p> <p>With respect to <u>clause (a)</u> above:</p> <ul style="list-style-type: none"> (i) if the Change in Ownership occurs during the applicable Lock-Up Period, then MDOT may approve (and include any conditions to its approval) or withhold its approval to the proposed Change in Ownership in its absolute discretion; and (ii) if the Change in Ownership occurs after the applicable Lock-Up Period, then MDOT will act reasonably in determining whether to approve (and include any conditions to its approval) or withhold its approval to the proposed Change in Ownership. <p>If a Change in Ownership (excluding a Pre-Approved Change in Ownership) occurs during the Lock-Up Period or during the Mandatory Equity Sale Period, then MDOT will be entitled to payment of an amount equal to 50% of the difference between the sale price of the equity interests subject to the Change in Ownership and the amounts paid to the Section Developer by way of equity contribution for the equity subject to the Change in Ownership (less any amounts previously paid to MDOT in accordance with the prior sale of equity).</p> <p>The "Lock-Up Period" means the period beginning on the Commercial Closing Date and ending on (i) the third anniversary of Substantial Completion or (ii) if the relevant Change in Ownership would cause (A) the Phase Developer to cease holding at least a 51% of the equity ownership in the Section Developer or (B) the initial equity investors in the Phase Developer to cease holding a controlling interest in the Phase Developer, the third anniversary of substantial completion of the final Section of the Phase.</p> <p>The "Mandatory Equity Sale Period" means the period beginning on the third anniversary of Substantial Completion and ending on the earlier to occur of (i) the occurrence of the mandatory equity sale in accordance with <u>Section 70</u>, and (ii) the 10th anniversary of Substantial Completion.</p> <p>Notwithstanding any other provision of the Section P3 Agreement to the contrary, any Change in Ownership that does not change the percentage of the issued share capital or membership interests in the Section Developer owned (directly or indirectly) by each Qualified Investor (i) will not constitute a change in the ownership composition of the Section Developer for the purposes of §10A-202(e) of the State Finance and Procurement Article of the Annotated Code of Maryland, and (ii) will not be subject to the pre-approval of MDOT.</p> |
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| | | <p>A Change in Ownership which is undertaken in breach of the Section P3 Agreement will constitute a "Prohibited Change in Ownership", which will constitute a Section Developer Default.</p> |
| 70. | Mandatory Sale of Equity in the Section Developer | <p>At any time during the Mandatory Equity Sale Period, MDOT may give notice and require the Section Developer to undertake a competitive, arms-length sale of 18% of the equity interests in the Section Developer. The equity interest subject to the mandatory sale: (i) is not required to carry typical minority shareholder rights and (ii) is not required to be a pro-rata sale by each Section Equity Member, provided that, at all times prior to the third anniversary of substantial completion of the final Section of the Phase, the mandatory sale must not cause either (A) the Phase Developer to cease holding at least a 51% of the equity ownership in the Section Developer or (B) the initial equity investors in the Phase Developer to cease holding a controlling interest in the Phase Developer. This right shall only be exercisable by MDOT once. MDOT will be entitled to payment of an amount equal to 50% of the difference between the sale price and the net present value of 18% of all equity distributions included in the Base Case Financial Model from the date of sale to the end of the Term, discounted back to the closing date of the sale at the Base Case Post-Tax Equity IRR (less any amounts previously paid to MDOT in accordance with any prior sale of equity). To the extent the payment to MDOT is not deductible for tax purposes, the payment to MDOT will be adjusted accordingly.</p> <p>MDOT's right to require the sale of equity will be subject to the approval provisions included in any relevant TIFIA loan agreement.</p> <p>On receipt of notice from MDOT described in the first paragraph of this <u>Section 70</u>, the Section Developer may notify MDOT and elect, at its sole option and expense, to undertake an appraisal of the fair market value of 18% of the equity interests in the Section Developer by an independent appraiser in lieu of a sale. The fair market value shall be consistent with the approach applicable to termination for convenience while accounting for the non-controlling nature of the level of equity interest being appraised. Upon finalization of the valuation, the Section Developer shall pay to MDOT within 180 days, 50% of the difference between the appraised value of the equity interests in the Section Developer and the net present value of 18% of all equity distributions included in the Base Case Financial Model from the date of sale to the end of the Term, discounted back to the closing date of the sale at the Base Case Post-Tax Equity IRR (less any amounts previously paid to MDOT in accordance with any prior sale of equity).</p> <p>Under no circumstances will the election to pursue a sale of equity result in a payment being due from MDOT or MDTA to the Section Developer.</p> <p>A Change in Ownership occurring under this <u>Section 70</u> will be subject to all approvals referred to in <u>Section 69</u>.</p> |
| 71. | Governing Law and Jurisdiction | <p>The Section P3 Agreement will be governed in accordance with the laws of the State of Maryland.</p> |

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| | | The Section Developer will consent to the jurisdiction of any court in the State of Maryland. |
| 72. | Federal Requirements | The Section Developer shall comply with, and require its Contractors to comply with, all federal requirements applicable to the Section under law, including federal requirements applicable to transportation projects that receive federal credit or funds. FHWA Buy America requirements at 23 CFR §635.410 are applicable to the Section. |
| 73. | Other | Customary provisions will be included in the Section P3 Agreement with respect to record keeping and audits, confidentiality and public disclosure, sole remedy and waiver of consequential damages, dispute resolution, amendments, waivers, independent contractor status, agency, personal liability, taxes, successors and assigns, survival, limitation on third party beneficiaries, notices, integration and severability, and counterparts. |
| 74. | Appropriations | <p>All claims of the Section Developer against MDOT or MDTA under the Section P3 Agreement will be payable solely from (x) the toll revenues collected from users of the Section or (y) such amounts as may be appropriated by the Maryland General Assembly to MDOT from time to time.</p> <p>The Section Developer will have no claim against any asset of MDTA (except to the extent set out in the MDTA Notes), and the Section Developer will waive any right to enforce a judgment holding MDTA liable against any such asset of MDTA.</p> <p>All amounts payable by MDOT to the Section Developer under the Section P3 Agreement or any other Section Document will be subject to appropriations by the Maryland General Assembly in accordance with and to the extent required under applicable law. MDOT will have customary obligations to seek appropriations sufficient to pay when due any amounts owed to the Section Developer under the Section P3 Agreement.</p> |

Exhibit 1 – Defined Terms

"Abandon" means to abandon all or a material part of the Section, which abandonment will be deemed to have occurred if:

- a) the Section Developer demonstrates through statements, acts, or omissions an intent not to continue (for any reason other than a Compensation Event or Relief Event that materially interferes with its ability to continue) to design, construct, operate, or maintain all or a material part of the Section, including any written repudiation of the Section P3 Agreement; or
- b) no significant Work (taking into account the Section schedule, if applicable, and any Compensation Event or Relief Event) on the Section is performed for a continuous period of more than 60 days.

"Additional Properties" is defined in Section 7, and includes Privately Owned Additional Properties and Publicly Owned Additional Properties.

"Additional TCAs" means Additional Properties that are not Permanent Additional Properties.

"Adjacent P3 Program Developer" is defined in Section 8.

"Affected Party" is defined in Section 40.

"Affiliate" means, in relation to any Person, any entity which, directly or indirectly, through one or more intermediaries:

- a) has a 10 percent or more voting or economic interest in such Person; or
- b) Controls, is Controlled by, or is under common Control with such Person.

"Allowed Costs" means Allowed Costs as defined in the Phase P3 Agreement.

"Associated Company" means with respect to a relevant company, a company which is a subsidiary, a holding company, or a company that is a subsidiary of the ultimate holding company of that relevant company, and in the case of the Section Developer, includes each of the Section Equity Members.

"Base Case Financial Model" means the financial model at Financial Close, as adjusted from the Initial Base Case Financial Model in accordance with Section 49 (and subsequently updated from time to time in accordance with the terms of the Section P3 Agreement).

"Base Case Gross Revenue" means the Section Developer Toll Payments and MDTA Notes principal and interest for the applicable period, included in the Base Case Financial Model at Financial Close, or, if applicable, adjusted in accordance with Section 53.

"Base Case Post-Tax Equity IRR" means the Post-Tax Equity IRR included in the Base Case Financial Model as of the Financial Closing Date, which is equal to [•]⁸.

"Base Flood" means a 25-year storm event as defined by National Oceanic and Atmospheric Administration (NOAA) for the NOAA data gathering location that is nearest the Site.

"Board of Public Works" or **"BPW"** is defined in the introductory paragraphs.

"CERCLA" means the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. §§ 9601-9675).

"Change in Law" means the introduction or repeal (in whole or in part) of, the amendment, alteration, or modification to, or the change in interpretation of (in each case including, to the extent applicable,

⁸ To be populated upon Financial Close from the Base Case Financial Model.

by retroactive effect), any applicable laws, standards, practices, or guidelines issued or published by any governmental entity that occur at any time after the Setting Date and that are either:

- a) binding on the Section Developer; or
- b) if not binding on the Section Developer, both (i) typically complied with in the construction or relevant maintenance industries and (ii) necessary in order to comply with good industry practice or the provisions of the Section P3 Agreement.

"Change in Ownership" means:

- a) any sale, transfer, assignment, mortgage, encumbrance, conveyance, or disposal of any legal, beneficial, or equitable interest in any or all of the shares or membership interests in the Section Developer or any Related Entity;
- b) any change in the direct or indirect control over:
 - 1. the voting rights conferred on the shares or membership interests of the Section Developer or any Related Entity;
 - 2. the right to appoint or remove directors of the Section Developer or any Related Entity;
 - 3. the right to receive dividends or distributions of the Section Developer or any Related Entity;
 - 4. the direction or control of the management of the Section Developer, any Related Entity, or the Section; or
- c) any other arrangements that have or may have the same effect as clause (a) or clause (b) of this definition.

"Closing Security" is defined in Section 65.

"Commercial Closing Date" means the date that the Section P3 Agreement is signed by all of the Parties.

"Committed Section Proposal" means the proposal and commitments submitted by the Phase Developer or the Section Developer under the Phase P3 Agreement with respect to the Section.

"Compensation Event" is defined in Section 35.

"Competing Facilities" is defined in Section 37.

"Construction Work" means all Work related to the construction of the Section carried out prior to Final Completion.

"Contractor" means:

- a) any Person (other than MDOT and MDTA) with whom the Section Developer has entered into a contract to perform any part of the Work or provide any materials, equipment, or supplies for the Work, on behalf of the Section Developer; and
- b) any other Person with whom any Contractor has further subcontracted any part of the Work, at all tiers.

The term "Contractor" includes each Key Contractor.

"Control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract, or otherwise.

"DBE" means those firms identified with Disadvantaged Business Enterprise certification by MDOT's Office of Minority Business Enterprise.

"D&C Contract" means the agreement entered into between the Section Developer and the D&C Contractor for third party management, direction, supervision, or performance of all of the D&C Work.

"D&C Contractor" means [●]⁹, and its permitted successors and assigns.

"D&C Period" means the period commencing on the Commercial Closing Date and ending on Final Completion.

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

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

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

"Design Work" means all Work related to the design, redesign, engineering, or architecture for the Section carried out prior to Final Completion.

"Discriminatory Change in Law" means a Change in Law that is the adoption of any State law [or law of the Commonwealth of Virginia]¹⁰ or any change in any State law [or law of the Commonwealth of Virginia] or in the interpretation or application of any State law [or law of the Commonwealth of Virginia] that:

- a) is principally directed at and the effect of which is principally borne by the Section, the Section Developer, or operators of private toll roads in the State [or the Commonwealth of Virginia], except where such State law [or law of the Commonwealth of Virginia] or change in State law [or law of the Commonwealth of Virginia] or in interpretation or application (i) is in response, in whole or in part, to any failure to perform or breach of the Section P3 Agreement or other Section P3 Agreement, violation of law or Governmental Approval, culpable act, omission, or negligence on the part of any Section Developer-Related Entity or (ii) is otherwise permitted under the Section P3 Agreement;
- b) permits vehicles other than Permitted Vehicles to travel on the Priced Managed Lanes; or
- c) permits vehicles then paying tolls to travel on the Priced Managed Lanes at reduced tolls or without tolls,

except that none of the following will be a Discriminatory Change in Law:

- a) the development and operation of any existing or new mode of transportation (including a road, street, highway, or mass transit facility) that results in the reduction of toll revenues or in the number of vehicles using the Priced Managed Lanes;
- b) the development and operation of any other transportation facilities that do not constitute a Competing Facility;
- c) any changes in taxes of general application;
- d) the exercise by the State of its police powers;
- e) any safety compliance order issued under the Section P3 Agreement;
- f) changes to the multiplier applied to the Effective Rate (as defined in the Tolling Services Agreement Term Sheet) for non-transponder transaction, changes to any associated fees or penalties applicable to non-transponder transactions, or changes to fees and charges associated with non-payment or late payment of any toll or any other tolling violations; or
- g) any Change in Law suspending tolling to the extent that MDOT would be permitted to suspend tolling without it constituting a Compensation Event in accordance with Section 38.A above.

"Early Termination Date" means the effective date of termination of the Section P3 Agreement for any reason prior to the end of the Term.

⁹ **Note to Proposers:** To be identified in the Committed Section Proposal.

¹⁰ **NTD:** References to Virginia will only be included in the Section P3 Agreement for the Section that includes American Legion Bridge.

"Excess Revenue" means the lower of:

- a) the amount equal to:
 - 1. total Section Developer Toll Payments in the current fiscal year; plus
 - 2. total MDTA Notes principal and interest payments in the current fiscal year; plus
 - 3. total Refinancing Gains in the current fiscal year; less
 - 4. total Base Case Gross Revenue for the current fiscal year; and
- b) the amount equal to:
 - 1. cumulative sum of all Section Developer Toll Payments from the Commercial Closing Date through and including the current fiscal year; plus
 - 2. cumulative sum of all MDTA Notes principal and interest payments from the Commercial Closing Date through and including the current fiscal year; plus
 - 3. cumulative sum of all Refinancing Gains received from the Commercial Closing Date through and including the current fiscal year; less
 - 4. cumulative sum of all Base Case Gross Revenue from the Commercial Closing Date through and including the current fiscal year.

In no circumstances shall Excess Revenue be less than zero.

"Excess Revenue Payment" is defined in Section 53.

"Exempt Refinancing" means:

- a) any amendment, modification, or supplement to any finance document which does not provide a financial benefit to the Section Developer;
- b) the exercise by a Lender of rights, waivers, consents, and similar actions in the ordinary course of day-to-day loan administration and supervision, in each case, which do not provide a financial benefit to the Section Developer;
- c) any of the following acts by a Lender:
 - 1. the syndication in the ordinary course of business of any of such Lender's rights and interests in the Finance Documents;
 - 2. the sale of a participation, assignment, or other transfer by such Lender of any of its rights or interests, with respect to the Finance Documents, in favor of any other Lender or any investor; or
 - 3. the grant by such Lender of any other form of benefit or interest in either the Finance Documents or the revenues or assets of the Section Developer, whether by way of security or otherwise, in favor of any other Lender or any investor;
- d) any amendment or supplement to any Finance Documents in connection with the funding of a change in the scope of work proposed by MDOT;
- e) a re-set of an interest rate (excluding margin) under the express terms of any Finance Documents; or
- f) any sale of any equity interests in the Section Developer by a Section Equity Member or securitization of the existing rights or interests attaching to any equity interests in the Section Developer or its direct, 100% Section Equity Member, if any.

"Exempt Vehicles" is defined in the Tolling Services Agreement Term Sheet.

"FEIS" means Final Environmental Impact Statement for the I-495 and I-270 Managed Lane Study.

"FHWA" means the United States Department of Transportation Federal Highway Administration.

"Final Completion" means satisfaction of all of the conditions to final completion set out in the Section P3 Agreement.

"Finance Documents" means the Funding Agreements and Security Documents.

"Financial Close" means the satisfaction or waiver of all conditions precedent to the initial disbursement to the Section Developer or utilization by the Section Developer of Section Debt proceeds or the effectiveness of the Lenders' commitments under the Finance Documents (other than any condition as to the occurrence of the Financial Closing Date under the Section P3 Agreement).

"Financial Closing Date" means the date on which all of the conditions precedent to Financial Close set forth in the Section P3 Agreement have been satisfied or otherwise waived in accordance with the Section P3 Agreement.

"Force Majeure Event" is defined in Section 40.

"Funding Agreements" means the documents identified in the Section P3 Agreement, together with any other document designated by the Parties (acting jointly) as a Funding Agreement relating exclusively to the financing of the Section. The Section Equity Member Funding Agreements will not be classified as "Funding Agreements" for the purposes of the Section P3 Agreement.

"General Purpose Lanes" means the general purpose traffic lanes (in either or both directions) that are separated from the adjacent Priced Managed Lanes within the Section. All lanes on the Site will be considered General Purpose Lanes at all times until Substantial Completion.

"GP Defect Remedy Period" means the period commencing on the Substantial Completion Date (or, with respect to an Interim Completion Element, the applicable Interim Completion Date) and ending on the second anniversary of the Substantial Completion Date (or, with respect to an Interim Completion Element, the applicable Interim Completion Date); provided, that the GP Defect Remedy Period will be extended for an additional 12 months from the date of repair or replacement with respect to any Defect that is corrected during the final year of the initial GP Defect Remedy Period.

"GP Latent Defect" means a Defect in the Non-Maintained Facilities that could not reasonably be identified by a competent person acting in accordance with good industry practice prior to the expiry of the GP Defect Remedy Period.

"Handback Period" means the period beginning on the date that is five years before the scheduled end of the Term and ending on the termination date.

"Hazardous Environmental Condition" means the presence of any Hazardous Materials on, in, under, or about a Site at concentrations or in quantities that are required to be removed or remediated by any applicable law or in accordance with the requirements of the Section P3 Agreement, any governmental entity, or any governmental approval.

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

"Hazardous Materials Release" means any spill, leak, emission, release, discharge, injection, escape, leaching, dumping, or disposal of Hazardous Materials into the soil, air, surface water, groundwater, or environment, including any exacerbation of an existing release or condition of Hazardous Materials contamination.

"HOV" is defined in the Tolling Services Agreement Term Sheet.

"Indemnified Parties" means MDOT, MDTA, the MDOT-Related Entities, and their respective officers, agents, representatives, and employees.

"Independent Quality Firm" means the independent quality firm(s) selected by the Section Developer with the approval of MDOT to serve in such capacity.

"Initial Base Case Financial Model" means the financial model submitted with the Committed Section Proposal that is accepted and approved as part of the MDOT, MDTA, and BPW processes for the Section.

"Interim Completion" means, in relation to any Interim Completion Element, the satisfaction of all the Interim Completion Conditions for such Interim Completion Element.

"Interim Completion Conditions" means those conditions set out in Section 16.

"Interim Completion Date" means the date that Interim Completion has been achieved for any Interim Completion Element.

"Interim Completion Element" means an element identified in the Committed Section Proposal as an Interim Completion Element.

"IQF Contract" means the agreement between the Section Developer and the Independent Quality Firm.

"ITP" means the Instructions to Proposers in the RFP.

"Key Contract" means:

- a) the D&C Contract;
- b) to the extent the O&M Work is not self-performed by the Section Developer, each O&M Contract;
- c) the Toll Systems Integration Contract;
- d) the Toll Systems Operation Contract;
- e) the IQF Contract; and
- f) any guarantee, performance or payment security, or any other support provided with respect to the obligations of a Key Contractor under any of the foregoing (including the D&C guarantees).

"Key Contractor" means:

- a) the D&C Contractor;
- b) the O&M Contractor (if any);
- c) the Toll Systems Integrator;
- d) the Toll Systems Operator; and
- e) the Independent Quality Firm.

"Lender" means any Person that:

- a) provides Section Debt, together with their successors and assigns; or
- b) is appointed by any Person referred to in clause (a) as its agent or trustee in connection with the Section Debt.

"Lenders' Liabilities" means, at the relevant time, the aggregate of (without double-counting):

- a) all principal, interest (including default interest under the Finance Documents, but with respect to default interest, only to the extent that it arises as a result of MDOT making any payment later than the date that it is due under the Section P3 Agreement or any other default by MDOT under the Section P3 Agreement), banking fees, and premiums on financial insurance policies, costs and expenses, and other amounts properly incurred owing or outstanding to the Lenders by the Section Developer under the Finance Documents on the Early Termination Date, including any prepayment costs, make-whole amounts, and breakage costs; plus
- b) hedging liabilities; minus
- c) hedging receipts.

"Lock-Up Period" is defined in Section 69.

"Major Governmental Approval" means:

- a) MDOT SHA Plan Review Division and Maryland Department of the Environment (MDE) permits and approvals as described in Article 13 (*Drainage, Stormwater Management, & Erosion and Sediment Control*) of Exhibit 6 (*Predevelopment Work Requirements*) of the Phase P3 Agreement;
- b) Maryland National Capital Park and Planning Commission approvals;
- c) Department of Natural Resources forest conservation permits and approvals as described in Article 5 (*Environmental Management*) of Exhibit 6 (*Predevelopment Work Requirements*) of the Phase P3 Agreement;
- d) Federal Emergency Management Agency CLOMR and LOMR approvals as described in Article 5 (*Environmental Management*) of Exhibit 6 (*Predevelopment Work Requirements*) of the Phase P3 Agreement.

"Major Governmental Approval Period" means *[the time periods for responses from the permitting agency with respect to any Major Governmental Approval specified in the Section P3 Agreement to be agreed during the Predevelopment Work. Any Submittal provided by the Section Developer in relation to such Major Governmental Approval must be complete and compliant for the relevant approval period to commence].*

"Mandatory Equity Sale Period" is defined in Section 69.

"MBE" means those firms identified with Minority Business Enterprise certification by MDOT's Office of Minority Business Enterprise.

"MDOT" is defined in the introductory paragraphs.

"MDOT Default" is defined in Section 61.

"MDOT-Provided Approval" is defined in Section 9.

"MDOT Provided Parcel" means a parcel which MDOT is required to provide the Section Developer with access to as set out in an Exhibit to the Section P3 Agreement. Rights in the MDOT Provided Parcels are either presently owned by MDOT or shall be acquired by MDOT, at the Section Developer's sole cost and expense. All MDOT Provided Parcels for Phase South that are not presently owned by MDOT have been identified in a reference information document released with the RFP.

"MDOT-Related Entity" means:

- a) MDOT, including MDOT SHA;
- b) MDTA;
- c) [VDOT] ¹¹;
- d) other entities as may be specified in the Section P3 Agreement; and
- e) the State.

"MDOT SHA" means Maryland Department of Transportation State Highway Administration, a modal administration of MDOT.

"MDOT Termination Sum" is defined in Section 60.

"MDTA" is defined in the introductory paragraphs.

¹¹ **NTD:** References to Virginia will only be included in the Section P3 Agreement for the Section that includes American Legion Bridge.

"MDTA Board" means the Chairman and members of the Maryland Transportation Authority Board.

"MDTA Financing Documents" means the MDTA Master Trust Agreement, the Section Supplemental Trust Agreement, and the MDTA Notes.

"MDTA Master Trust Agreement" means that certain trust agreement relating to the issuance by MDTA of notes relating to the P3 Program, including the MDTA Notes issued to the Section Developer under the Section Supplemental Trust Agreement relating to the Section.

"MDTA Notes" means the Section 1 Notes, as defined in the MDTA Notes Term Sheet.

"MDTA Notes Outstanding Principal Amount" means the principal amount outstanding under the MDTA Notes on the Early Termination Date.

"MDTA Notes Term Sheet" means the MDTA Notes Term Sheet attached as Exhibit 3.

"MDTA Outage" is defined in the Tolling Services Agreement Term Sheet.

"MDTA Refinancing" is defined in Section 56.

"NEPA" means the National Environmental Policy Act of 1969.

"No-Fault Termination Sum" is defined in Section 63.

"Non-Maintained Facilities" is defined in Section 20.

"Notifiable Refinancing" means any proposed refinancing that is neither:

- a) a Qualifying Refinancing; nor
- b) a refinancing falling into the description set out in clause (b) or clause (c) of the definition of Exempt Refinancing.

"O&M Contract" means any agreement entered into by the Section Developer for third party management, direction, supervision, or performance of all of the O&M Work or any significant portion of the O&M Work with a contract value in excess of an amount to be specified in the Section P3 Agreement. There may be more than one O&M Contract concurrently in effect.

"O&M Contractor" means [●], or any Person entering into a Contract with the Section Developer to perform any part of the O&M Work.¹²

"O&M Work" means all routine maintenance, renewal work, and operations. Commencing on the Substantial Completion Date, "O&M Work" will also include all activities and obligations of the Section Developer relating to tolling of the Priced Managed Lanes.

"Operating Period" means the period starting on the Substantial Completion Date plus one day and ending on the date of termination of the Section P3 Agreement.

"P3 Program" is defined in the introductory paragraphs.

"Pandemic Event" means an epidemic in the State of Maryland or (if applicable) the Commonwealth of Virginia or a pandemic directly affecting the State of Maryland or (if applicable) the Commonwealth of Virginia which, in each case:

¹² **Note to Proposers:** To be identified in the Committed Section Proposal.

- a) is the subject of a federal travel advisory or restriction or an emergency declaration or other order regarding public conduct in response to such epidemic or pandemic issued by the State of Maryland or (if applicable) the Commonwealth of Virginia; and
- b) has resulted in a quarantine of, or in legal restrictions on travel to, from, or within the Site or an area within 50 miles of any part of the Site or legal restrictions on the performance of the Work at the Site or an area within 50 miles of any part of the Site.

"Party" means MDOT, MDTA, or the Section Developer, as the context may require, and **"Parties"** means MDOT, MDTA, or the Section Developer, as the context may require, collectively.

"Payment Bond" is defined in Section 46.

"Performance Bond" is defined in Section 46.

"Permanent Additional Properties" means Additional Properties that are permanently needed to construct or maintain the Section.

"Permanent ROW" means the permanent right-of-way for the Section provided as part of the MDOT Provided Parcels together with the Permanent Additional Properties.

"Permitted Vehicles" means (a) vehicles with two axles or more including motorcycles, (b) transit vehicles, commuter buses, and school buses, and (c) Exempt Vehicles.

"Person" means an individual, a general or limited partnership, a joint venture, a corporation, a limited liability company, a trust, an unincorporated organization, or a governmental authority.

"Phase 1" is defined in the introductory paragraphs.

"Phase 1 North" means I-270 from I-370 to I-70.

"Phase 1 South" means I-495 from the vicinity of the George Washington Memorial Parkway to I-270 and I-270 from I-495 to I-370.

"Phase Developer" is defined in the introductory paragraphs.

"Phase P3 Agreement" means the Phase P3 Agreement that will be entered into among the Phase Developer, MDOT, and MDTA.

"Phase South A" means I-495 from the vicinity of the George Washington Memorial Parkway to I-270.

"Post-Tax Equity IRR" means the nominal post-tax internal rate of return on equity investment (on a cash-on-cash basis) over the full Term calculated using the Base Case Financial Model, as the discount rate that, when applied to the distributions gives a net present value equal to the net present value of the equity investment.

"Pre-Approved Change in Ownership" means each of the following:

- a) the grant of security in favor of the Lenders over or in relation to any share or membership interest in the Section Developer under a security document, in strict compliance with any requirements of the Section P3 Agreement;
- b) the exercise of any Lender remedy under the lenders direct agreement, including (i) a transfer of custody and control of the Section or the Section Developer to a step-in entity, (ii) a transfer to a substitute approved by MDOT, or (iii) foreclosure;
- c) a bona fide upstream business reorganization, consolidation, or other transfer in equity of a parent entity with an interest in the Section Developer where the transferor and transferee are under the same ultimate parent organization with ultimate power to direct or control or cause

- the direction or control of the management of the Section Developer and so long as there occurs no change in such entity as part of such reorganization, consolidation, or other transfer in equity;
- d) a transfer of interests between managed funds that are under common ownership or control, or between the general partner, manager, or the parent company of such general partner or manager, and any managed funds under common ownership or control with such general partner or manager (or parent company of such general partner or manager), so long as there occurs no change in the entity or entities with ultimate power to direct or control or cause the direction or control of the management of the Section Developer;
 - e) a Change in Ownership due solely to bona fide open market transactions in securities effected on a recognized public stock exchange, including transactions involving an initial public offering; and
 - f) the exercise of minority veto or minority voting rights that are exercised under applicable law, or that are exercised under the Section Developer's organizational documents (or under related member, shareholder, or similar agreements (where MDOT has received copies of such agreements)).

"Pre-existing Hazardous Materials" means Hazardous Materials that exist in, on, or under the Site (except each Additional TCA) prior to the date on which the Section Developer gains access to a relevant portion of the Site, including those that manifest themselves after that date.

"Pre-Financial Close Termination Sum" is defined in Section 60.

"Predevelopment Cost Cap" means [●], as may be adjusted in accordance with the Phase P3 Agreement.¹³

"Predevelopment Work" means Predevelopment Work as defined in the Phase P3 Agreement.

"Priced Managed Lanes" means the toll lanes and the associated entry and exit ramps within the Permanent ROW that are separated from the adjacent General Purpose Lanes, and the use of which is restricted under the Section P3 Agreement.

"Privately Owned Additional Properties" is defined in Section 7.

"Prohibited Change in Ownership" is defined in Section 69.

"Proposer" means each firm or team of firms that was shortlisted in accordance with the RFQ and invited to submit a proposal to MDOT in response to the RFQ.

"Publicly Owned Additional Properties" is defined in Section 7.

"Qualified Investor" means [●].¹⁴

"Qualifying Refinancing" means any Refinancing that will give rise to a Refinancing Gain greater than zero that is not an Exempt Refinancing.

"Refinancing" means:

- a) any amendment, novation, supplement, or replacement of any Finance Document;
- b) the issuance by the Section Developer of any indebtedness in addition to the initial Section Debt, secured or unsecured;
- c) the exercise of any right, or the grant of any waiver or consent, under any Finance Document;

¹³ To be populated based on the predevelopment cost cap included in the Phase P3 Agreement.

¹⁴ Qualified Investor definition will list each Committed Section Proposal Equity Member (and any guarantor thereof) approved under a Committed Section Proposal for the Section.

- d) the disposition of any rights or interests in, or the creation of any rights of participation with respect to, any Finance Document or the creation or granting of any other form of benefit or interest in either a Finance Document or the contracts, revenues, or assets of the Section Developer whether by way of security or otherwise; or
- e) any other arrangement put in place by the Section Developer or another Person which has an effect which is similar to any of clause (a) to (d) or which has the effect of limiting the Section Developer's or any Associated Company's ability to carry out any of clause (a) to (d).

"Refinancing Gain" means an amount equal to the greater of zero and $\{(A-B)-C\}$, where:

- A = the net present value using the Base Case Post-Tax Equity IRR as the discounting rate of the distributions projected immediately prior to the refinancing (taking into account the effect of the refinancing (including any breakage costs of the existing project financing or refinancing as well as reasonable transaction costs incurred in arranging the planned refinancing) and using the Base Case Financial Model as updated (including as to the performance of the Section up to the date of the refinancing) so as to be current immediately prior to the refinancing) to be made over the remaining term of the Section P3 Agreement following the refinancing;
- B = the net present value using the Base Case Post-Tax Equity IRR as the discounting rate of the distributions projected immediately prior to the refinancing (but without taking into account the effect of the refinancing and using the Base Case Financial Model as updated (including as to the performance of the Section up to the date of the refinancing) so as to be current immediately prior to the refinancing) to be made over the remaining term of the Section P3 Agreement following the refinancing; and
- C = any adjustment required to raise the pre-refinancing Post-Tax Equity IRR to the Base Case Post-Tax Equity IRR (if the pre-refinancing Post-Tax Equity IRR is lower than the Base Case Post-Tax Equity IRR, the adjustment is calculated as the amount that, if received by equity members at the estimated date of the refinancing, would increase the pre-refinancing Post-Tax Equity IRR to be the same as the Base Case Post-Tax Equity IRR).

"Related Entity" means [●].¹⁵

"Relief Event" is defined in Section 35.

"RFP" means the Request for Proposals with respect to Phase 1 of the P3 Program.

"RFQ" means the Request for Qualifications for Phase 1 issued by MDOT and MDTA on February 7, 2020.

"Section" is defined in the introductory paragraphs.

"Section Debt" means all outstanding obligations from time to time under the Finance Documents.

"Section Developer" is defined in Section 1.

"Section Developer Default" means the occurrence of any of the following:

- a) the Section Developer Abandons the Section;
- b) the Section Developer fails to achieve Substantial Completion by the Substantial Completion Long Stop Date;
- c) a Prohibited Change in Ownership occurs;
- d) the Section Developer fails to comply with restrictions on assignment, transfer, and fundamental changes;
- e) an insolvency event arises with respect to the Section Developer;

¹⁵ Related Entity definition will list each entity in the ultimate ownership structure between the Section Developer and each Qualified Investor (not including the Section Developer or the Qualified Investors).

- f) during the D&C Period, an insolvency event arises with respect to the D&C Contractor, any D&C Contractor member, or any D&C guarantor, unless replaced by a reputable counterparty reasonably acceptable to MDOT (or MDOT is reasonably satisfied the work can be completed by the remaining entities);
- g) an insolvency event arises with respect to the O&M Contractor, unless replaced by a reputable counterparty reasonably acceptable to MDOT (or MDOT is reasonably satisfied the work can be completed by the remaining entities);
- h) the D&C Contract is terminated (other than non-default termination on its scheduled termination date), unless the Section Developer has entered into a replacement contract with a reputable counterparty reasonably acceptable to MDOT within a specified period, or such longer period as agreed with MDOT;
- i) an O&M Contract is terminated (other than non-default termination on its scheduled termination date), unless the Section Developer has entered into a replacement contract with a reputable counterparty reasonably acceptable to MDOT within a specified period, or such longer period as agreed with MDOT (or MDOT is reasonably satisfied the work can be completed by the Section Developer);
- j) the Section Developer fails to pay any amount due to MDOT or MDTA, except to the extent such payment is subject to a good faith dispute;
- k) the Section Developer fails to deposit funds in the handback reserve account or fails to deliver to MDOT a handback letter of credit in accordance with the Section P3 Agreement (except to the extent that the amount thereof is subject to a good faith dispute);
- l) any representation or warranty made by the Section Developer in the Section P3 Agreement or any certificate, schedule, report, instrument, or other document delivered under the Section P3 Agreement is materially false or misleading or inaccurate;
- m) the Section Developer fails to materially comply with any governmental approval or applicable law;
- n) the Section Developer fails to promptly comply with any written suspension of Work order issued in accordance with the terms of the Section P3 Agreement;
- o) the cumulative number of noncompliance points (excluding any noncompliance points caused by any Relief Event or Compensation Event) exceeds thresholds to be specified in the Section P3 Agreement;
- p) the Section Developer fails to obtain, provide, and maintain the required insurance policies and the performance security;
- q) a persistent closure occurs, subject to exclusions for the extent to which any persistent closure is caused by any Relief Event or Compensation Event to be set out in the Section P3 Agreement;
- r) after exhaustion of all rights of appeal:
 - 1. there occurs any suspension or debarment (distinguished from ineligibility due to lack of financial qualifications), or there goes into effect an agreement for voluntary exclusion, of the Section Developer, any affiliate of the Section Developer, the D&C Contractor, or the O&M Contractor (if any) whose work is not completed, from bidding, proposing, or contracting with any federal or State department or agency (unless the person subject to the suspension, debarment, or agreement for voluntary exclusion is the D&C Contractor or the O&M Contractor, and such person is replaced in accordance with the agreement within a specified period); or
 - 2. the Section Developer, the D&C Contractor, or the O&M Contractor (if any) who have ongoing Work, or any of their respective officers, directors, or administering employees have been convicted of, or plead guilty or nolo contendere to, a violation of applicable law for fraud, conspiracy, collusion, bribery, perjury, or material misrepresentation, as a result in whole or in part of activities relating to any project in the United States, and such failure continues without cure for a specified period (provided that (A) if the offending person is an officer, director, or employee of the D&C Contractor or the O&M Contractor, cure may be effected by replacing the D&C Contractor or the O&M Contractor in accordance with the agreement within a specified period and (B) if the offending person is the D&C Contractor or the O&M Contractor, cure may be effected by replacing such person in accordance with the agreement within a specified period).
- s) a persistent breach by the Section Developer occurs;

- t) the Section Developer fails to cooperate in a reasonably timely manner in connection with the MDTA Refinancing or fails to execute the documents required to implement the MDTA Refinancing;
- u) the Section Developer fails to comply with non-discrimination or prevailing wages provisions or certain sanctions for improper acts set forth in the Section P3 Agreement apply;
- v) the Section Developer fails to comply with DBE or MBE program requirements;
- w) the Section Developer fails to complete a Qualifying Refinancing or mandatory sale of equity interest as required by MDOT under Section 70;
- x) without limiting the foregoing, the Section Developer breaches any other material obligation under the Section P3 Agreement, other than:
 - 1. a breach for which a noncompliance point was or could have been assessed; or
 - 2. a breach that arises as a direct result of the occurrence of a Compensation Event or Relief Event.

"Section Developer Default (D&C Period) Termination Sum" is defined in Section 62.

"Section Developer Default (Operating Period) Termination Sum" is defined in Section 62.

"Section Developer Hazardous Materials Release" means any Hazardous Materials Release:

- a) involving any Hazardous Materials arranged to be brought onto the Site or any other location by any Section Developer-Related Entity, regardless of cause;
- b) to the extent attributable to the breach of any applicable law, governmental approval, or the Section P3 Agreement (including any acts or omissions that are not in accordance with good industry practice), negligence, or willful misconduct by any Section Developer-Related Entity; or
- c) without prejudice to the generality of clause (b), to the extent attributable to the use, containment, storage, management, handling, transport, and disposal of any Hazardous Materials by any Section Developer-Related Entity in breach of any of the requirements of the Section P3 Agreement or any applicable law or governmental approval.

"Section Developer-Related Entity" means:

- a) the Section Developer;
- b) the Phase Developer;
- c) any section developer for any other section of the P3 Program that is under common control with the Section Developer, and any Person described in paragraphs (d) – (h) of this definition as it applies to such other section developer;
- d) the Section Equity Members;
- e) the Contractors (including suppliers);
- f) any other Person performing any of the Work for or on behalf of the Section Developer;
- g) any other Person for whom the Section Developer may be legally or contractually responsible; and
- h) the employees, agents, officers, directors, representatives, consultants, successors, and assigns of any of the foregoing.

"Section Developer Toll Payment" means the Section 1 Developer Toll Payment, as defined in the MDTA Notes Term Sheet.

"Section Documents" means the Section P3 Agreement, the Tolling Services Agreement, the Key Contracts, the D&C Contractor direct agreement, the MDTA Financing Documents, and the Finance Documents.

"Section Equity Member" means each Person that directly holds an equity interest (legal or beneficial) in the Section Developer, including, on the Commercial Closing Date, the Phase Developer.

"Section Equity Member Debt" means any obligations created, issued, or incurred by a Section Developer for borrowed money that:

- a) is owned by a Section Equity Member, Related Entity, Qualified Investor, any Affiliate of a Section Equity Member, or an Affiliate of the Section Developer; and
- b) is subordinated in priority of payment and security to all Section Debt held by Persons who are not Section Equity Members, other than any mezzanine debt that is provided by a party referred to in clause (a) on an arm's length basis.

"Section Equity Member Funding Agreements" means any loan agreement, credit agreement, or other similar finance agreement or subordination agreement providing for or evidencing Section Equity Member Debt.

"Section P3 Agreement" is defined in the introductory paragraphs.

"Section Supplemental Trust Agreement" means the supplemental trust agreement relating to this Section dated on or about the Financial Closing Date and supplementing the MDTA Master Trust Agreement.

"Security Documents" means the documents identified in the Section P3 Agreement, together with any other document designated by the Parties (acting jointly) as a Security Document.

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

"Setting Date" means a fixed date in advance of the submission date of a Committed Section Proposal by the Phase Developer under the terms of the Phase P3 Agreement.

"Setting Date MOU" is defined in Section 35.

"Setting Date Site" means the area upon which, at the Setting Date, the Section Developer anticipates will be used for the permanent construction of the Section. The Setting Date Site shall be agreed between the Phase Developer and MDOT prior to the Setting Date. The Phase Developer is required to focus its existing site condition due diligence and predevelopment work on the Setting Date Site.

"Site" means, collectively, the Permanent ROW, each Temporary Construction Area prior to the applicable TCA Expiry Date, and each Additional TCA.

"State" is defined in the introductory paragraphs.

"State Highway" means a travel way for vehicular traffic that is included in the State or federal highway system in Maryland.

"Submittal" means any document, work product, or other written or electronic product or item required under the technical provisions to be delivered or submitted to MDOT for approval, acceptance, review, comment, or otherwise.

"Substantial Completion" means satisfaction of all the conditions to substantial completion to be set out in the Section P3 Agreement.

"Substantial Completion Date" means the date that Substantial Completion has been achieved for the Section.

"Substantial Completion Long Stop Date" means the date that is 12 months after the scheduled Substantial Completion date, as such date may be extended in accordance with the Section P3 Agreement.

"TCA Expiry Date" means, for each Temporary Construction Area, the date after which access to such Temporary Construction Area is no longer available to the Section Developer, as set forth in the RFP.

"Temporary Construction Area" means those temporary construction areas that are provided as part of the MDOT Provided Parcels and will be identified under the Section P3 Agreement for which the Section Developer will be granted access for activities not part of the permanent Work.

"Term" is defined in Section 4.

"Third Party MOU" means each memorandum of understanding between MDOT and various third parties in relation to the Section.

"Third Party Work" means all efforts and costs necessary to accomplish the Work required under the Third Party MOU, including all coordination, design, design review, permitting, construction, inspection, and maintenance of records, whether provided by the Section Developer or by the applicable third party.

"TIFIA" means the Transportation Infrastructure Finance and Innovation Act of 1998, codified at 23 U.S.C. §§601 et seq., as amended and as it may be amended from time to time.

"Toll Revenue" means all amounts payable to the Section Developer pursuant to the terms of the MDTA Notes.

"Toll Systems Integration Contract" means the contract under which the Toll Systems Integrator is appointed as responsible for performing the design, construction, integration, and testing of the toll systems for the Section.

"Toll Systems Integrator" means [●]¹⁶, and its permitted successors and assigns.

"Toll Systems Operation Contract" means the contract under which the Toll Systems Operator is appointed as responsible for performing the operation of the toll systems for the Section.

"Toll Systems Operator" means [●]¹⁷, and its permitted successors and assigns.

"Tolling Services Agreement" means an agreement between MDTA and the Section Developer for certain tolling related services for the Section.

"Tolling Services Agreement Term Sheet" means the Tolling Services Agreement Term Sheet attached as Exhibit 2.

"Uniform Act" means Public Law 91-646, the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended.

"Uninsurable Risk" means a risk for which:

- a) insurance is not available to the Section Developer with respect to the Section in the worldwide insurance or reinsurance markets on the terms required in the Section P3 Agreement with reputable insurers of good standing; or
- b) the insurance premium payable for insuring that risk on the terms required in the Section P3 Agreement is at such level that the risk is not generally being insured against in the worldwide

¹⁶ **Note to Proposers:** To be identified in the Committed Section Proposal (subject to pre-approval and requirements set out in Exhibit 6 of the Phase P3 Agreement).

¹⁷ **Note to Proposers:** To be identified in the Committed Section Proposal (subject to pre-approval and requirements set out in Exhibit 6 of the Phase P3 Agreement).

insurance or reinsurance markets with reputable insurers of good standing by contractors in relation to comparable infrastructure projects in North America.

"Unknown Archaeological Remains" means any archaeological remains discovered within the Setting Date Site that, as of the Setting Date, were neither:

- a) known to the Section Developer or the Phase Developer; nor
- b) reasonably capable of being identified by an appropriately qualified and experienced contractor or engineer exercising due care and skill and good industry practice, including through review and analysis of (i) the reference information documents, (ii) any publicly available information, (iii) any access to the Setting Date Site granted or available prior to the Setting Date, or (iv) the complete and proper performance by the Phase Developer of the Predevelopment Work relevant to the Section in accordance with the Phase P3 Agreement.

Archaeological remains that the Section Developer would have known about but for errors or omissions in the performance of the Predevelopment Work, or the incomplete performance of the Predevelopment Work as required under the Phase P3 Agreement will not be considered Unknown Archaeological Remains.

"Unknown Endangered Species" means any endangered species discovered within the Setting Date Site, the temporary, continual, or habitual presence of which, as of the Setting Date, was neither:

- a) known to the Section Developer or the Phase Developer; nor
- b) reasonably expected to be found temporarily, continually, or habitually at the Site based on review and analysis of (i) the reference information documents, (ii) any publicly available information, (iii) any access to the Setting Date Site granted or available prior to the Setting Date, or (iv) the complete and proper performance by the Phase Developer of the Predevelopment Work relevant to the Section in accordance with the Phase P3 Agreement.

Endangered species that the Section Developer would have known about but for errors or omissions in the performance of the Predevelopment Work, or the incomplete performance of the Predevelopment Work as required under the Phase P3 Agreement will not be considered Unknown Endangered Species.

"Unknown Hazardous Environmental Condition" means any Hazardous Environmental Condition that existed on any part of the Setting Date Site on or prior to the Setting Date, excluding any Hazardous Environmental Condition:

- a) on any site identified in the FEIS or any other document released to the public pursuant to NEPA as being a site on which a Hazardous Material may be encountered;
- b) that was known to the Section Developer or the Phase Developer at the Setting Date; or
- c) that could reasonably have been identified or discovered prior to the Setting Date by an appropriately qualified and experienced contractor or engineer exercising due care and skill and good industry practice based on (i) the reference information documents, (ii) any publicly available information, (iii) any access to the Setting Date Site granted or available prior to the Setting Date, or (iv) the complete and proper performance by the Phase Developer of the Predevelopment Work relevant to the Section in accordance with the Phase P3 Agreement.

Hazardous Environmental Conditions that the Section Developer would have known about but for errors or omissions in the performance of the Predevelopment Work, or the incomplete performance of the Predevelopment Work as required under the Phase P3 Agreement will not be considered Unknown Hazardous Environmental Conditions. "Unknown Hazardous Environmental Condition" does not include contaminated soil or other materials which do not constitute a Hazardous Environmental Condition but for which the Section Developer may incur additional testing, handling, and disposal costs due to the presence of such contamination or other materials.

"Unknown Utility" means any Utility present within the Setting Date Site that was not identified or was materially incorrectly shown, identified, or described in the reference information documents, in each case excluding any Utility that:

- a) was known to the Section Developer or the Phase Developer at the Setting Date;
- b) was installed on a part of the Setting Date Site after right of entry was granted to the Section Developer in relation to the relevant part of the Setting Date Site in accordance with the terms of the Section P3 Agreement;
- c) is a Service Line; or

- d) could reasonably have been identified or discovered prior to the Setting Date by an appropriately qualified and experienced contractor or engineer exercising due care and skill and good industry practice, including through (i) review and analysis of the reference information documents, (ii) review and analysis of any publicly available information, (iii) any access to the Setting Date Site granted or available prior to the Setting Date, or (iv) the complete and proper performance by the Phase Developer of the Predevelopment Work relevant to the Section in accordance with the Phase P3 Agreement,

and, provided that, (A) inaccuracies in the location of an underground Utility indicated in the reference information documents will be considered Unknown Utilities only if the Utility's actual centerline location is more than three feet distant from the horizontal centerline location shown in the reference information document, without regard to vertical location and (B) Utilities that the Section Developer would have known about but for errors or omissions in the performance of the Predevelopment Work, or the incomplete performance of the Predevelopment Work as required under the Phase P3 Agreement, will not be considered Unknown Utilities.

"Upfront Payment" is defined in Section 50.

"USACE" means the United States Army Corps of Engineers.

"Utility" means a privately, publicly, or cooperatively owned line, facility, or system for transmitting or distributing communications, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, a combined stormwater and sanitary system, or other similar commodities, including wireless telecommunications, television transmission signals, and publicly owned fire and police signal systems, which directly or indirectly serve the public. The term Utility excludes (a) streetlights and traffic signals and (b) ITS (intelligent transportation systems) and IVHS (intelligent vehicle highway systems) facilities. The necessary appurtenances to each Utility facility will be considered part of such Utility. Without limitation, any Service Line connecting directly to a Utility will be considered an appurtenance to that Utility, regardless of the ownership of such Service Line.

"Utility Adjustment" means each relocation (temporary or permanent), abandonment, protection in place, removal (of previously abandoned Utilities as well as of newly abandoned Utilities), replacement, reinstallation, or modification of existing Utilities necessary to accommodate construction, operation, maintenance, or use of the Section or the Work. The term Utility Adjustment will not refer to any of the work associated with facilities owned by any railroad. The Utility Adjustment Work for each crossing of the Permanent ROW by a Utility that crosses the Permanent ROW more than once will be considered a separate Utility Adjustment. For any Utility installed longitudinally within the Permanent ROW, the Utility Adjustment Work for each continuous segment of that Utility located within the Permanent ROW will be considered a separate Utility Adjustment.

"Utility Adjustment Work" means all efforts and costs necessary to accomplish the required Utility Adjustments during the D&C Period, including all coordination, design, design review, permitting, construction, inspection, and maintenance of records, whether provided by the Section Developer or by the Utility Owners.

"Utility Agreement" means each utility agreement entered into with a Utility Owner relating to Utility Adjustment Work within the Section.

"Utility Framework Agreement" means each framework agreement between MDOT and any Utility Owner in relation to the P3 Program.

"Utility Owner" means the owner or operator of any Utility (including both privately held and publicly held entities, cooperative Utilities, and municipalities and other governmental agencies).

"VDOT" means the Virginia Department of Transportation.

"Work" means the Design Work, Construction Work, and the O&M Work, and all other work, services, and obligations required to be performed and provided by the Section Developer under the Section P3 Agreement.

Exhibit 2 – Tolling Services Agreement Term Sheet

[To be attached]

Exhibit 3 – MDTA Notes Term Sheet

[To be attached]

Attachment 6 - MDTA Notes Term Sheet (Exhibit 3 to Section P3 Agreement Term Sheet) – Clean version

EXHIBIT 3

MDTA NOTES TERM SHEET¹

This non-binding term sheet sets forth the material terms and conditions that are expected to be included in the MDTA Master Trust Agreement ("**MDTA Master Trust Agreement**") and the Supplement Trust Agreement for the first section ("**Section 1**") of Phase 1 (the "**Section 1 Supplemental Trust Agreement**") for the I-495 and I-270 P3 Program (the "**P3 Program**"). Each subsequent Section of Phase 1 is expected to have its own supplemental trust agreement on the same terms as the Section 1 Supplemental Trust Agreement. All terms not defined in this term sheet shall have the meanings given them in the Section P3 Agreement Term Sheet.

| Part A – MDTA Master Trust Agreement | | |
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| 1. | Parties | The Parties to the MDTA Master Trust Agreement will be: (a) The Maryland Transportation Authority, an agency of the State of Maryland (" MDTA "); and (b) The Bank of New York Mellon (the " Trustee "). |
| 2. | Trustee | The Trustee shall be appointed on behalf of the Noteholders (as defined in Section 3) and Section Developers. The Trustee's appointment shall be subject to standard provisions relating to duties, limitations, and indemnities. The Trustee shall also be appointed as trustee for the Section 1 Supplemental Trust Agreement and any future supplemental trust agreement supplementing the MDTA Master Trust Agreement (each a " Supplemental Trust Agreement "). |
| 3. | Noteholders | The Section 1 Noteholder and the holder of any notes issued pursuant to any Supplemental Trust Agreement (the " Noteholders "). Substantially the same form of supplemental trust agreement shall be entered into with the Noteholders and Section Developers for each Section of Phase 1 and of any subsequent sections of future phases of the P3 Program. |
| 4. | Upfront Payment Account | The Trustee shall create an upfront payment account (the " Upfront Payment Account "). Any development rights fees paid by any Phase Developer under any Phase P3 Agreement or any Upfront Payment paid by any Section Developer under any Section P3 Agreement, with respect to any phase or section of the P3 Program shall be credited to the Upfront Payment Account. MDTA shall (upon direction from MDOT) direct the Trustee to make payments from the Upfront Payment Account. The amount on deposit in the Upfront Payment Account shall not be available to satisfy claims of the Noteholders or the Section Developers. The funds may be used (i) to pay costs of the P3 Program, including (A) a subsidy payment for other sections, (B) any claims under the Section P3 Agreement, (C) MDOT costs associated with the P3 Program, and (D) funding the Operating Reserve Account; (ii) following substantial completion of all sections of the |

¹ NTD: This term sheet shall be attached as Exhibit 3 to the Section P3 Agreement Term Sheet.

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| | | last phase of the P3 Program, to pay costs of the Traffic Relief Plan (including costs associated with the construction of the Baltimore-Washington Parkway); and (iii) following substantial completion of all elements of the Traffic Relief Plan, as MDOT may elect (subject to any applicable law). |
| 5. | P3 Program Notes are Limited Recourse Obligations | Neither the State nor any political subdivision of the State, MDOT, nor MDTA shall be obligated to pay any of the notes issued under any Supplemental Trust Agreement (the " P3 Program Notes ") or the interest thereon except as provided for in the MDTA Master Trust Agreement or the Supplemental Trust Agreements, and neither the faith and credit nor the taxing power of the State, any political subdivision of the State, MDOT, or MDTA is pledged to the payment of the P3 Program Notes or the interest thereon. The issuance of the P3 Program Notes shall not directly or indirectly or contingently obligate the State or any political subdivision of the State to levy or to pledge any form of taxation whatever therefor or to make any appropriation for their payment. MDTA has no taxing powers. |
| 6. | P3 Program Account | <p>MDTA shall maintain an account for the purpose of collection of all toll revenue relating to the P3 Program (the "P3 Program Account"). The P3 Program Account is not a trust account and is not held by the Trustee.</p> <p>MDTA shall credit all toll revenues received with respect to the P3 Program (including the Section 1 Toll Revenues (as defined in Section 13)) into the P3 Program Account at a frequency consistent with MDTA's typical funds payment operations.</p> <p>On the 18th day of each month (or if such day is not a business day, on the preceding business day), MDTA shall apply funds in the P3 Program Account as follows:</p> <p><i>First:</i> in payment of MDTA's back office and collection costs and expenses incurred in relation to the P3 Program during the preceding month;</p> <p><i>Second:</i> all principal and interest that shall be due and payable under the P3 Program Notes on the next payment date to the relevant Section's P3 Program Notes debt service payment account under (and as defined in) the applicable Supplemental Trust Agreement; and</p> <p><i>Third:</i> all remaining toll revenues received with respect to the P3 Program relating to trips that occurred during (or prior to) the preceding month <i>excluding</i> any P3 Program ETC Away Collections (less any amounts transferred pursuant to <i>First</i> and <i>Second</i> above), to the Operating Reserve Account.</p> <p>On the last day of each month (or if such day is not a business day, on the preceding business day), MDTA shall transfer from the P3 Program Account to the Operating Reserve Account an amount equal to all P3 Program ETC Away Collections relating to trips that occurred during (or prior to) the preceding month.</p> |

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| | | <p>"P3 Program ETC Away Collections" shall mean the toll revenues received by MDTA with respect to the P3 Program relating to any transponder transactions associated with Transponders that are issued by an interoperable toll account provider or an <i>E-ZPass®</i> member other than MDTA.</p> |
| 7. | Operating Reserve Account | <p>The Trustee shall create an operating reserve account (the "Operating Reserve Account") and shall segregate the funds and investment earnings thereon from the funds and investment earnings for all other accounts.</p> <p>MDTA shall make payments into the Operating Reserve Account in accordance with Section 6 (P3 Program Account) above. MDTA shall direct the Trustee to make payments of amounts held in the Operating Reserve Account accordance with the MDTA Master Trust Agreement, the Section 1 Supplemental Trust Agreement and any other supplemental agreement, or as otherwise directed by MDOT.</p> |
| 8. | Rate Covenant Shortfall | <p>MDTA shall, on an annual basis (on the anniversary of Substantial Completion of the first section of Phase 1), determine the Rate Covenant Shortfall (as defined below) for each of the next 12 months.</p> <p>If there is projected to be a Rate Covenant Shortfall in any of the next 12 months, MDTA shall promptly, in consultation with MDOT, determine if there are any administrative or operational changes that can be made by MDTA to eliminate the Rate Covenant Shortfall within 12 months.</p> <p>Following such determination MDTA shall either:</p> <p>(a) if it is determined by MDTA that there are administrative or operational changes that will eliminate the Rate Covenant Shortfall as described above, then MDTA shall promptly implement such changes so that, within 12 months of the determination that a Rate Covenant Shortfall exists, the Rate Covenant Shortfall for each of the subsequent 12 months is eliminated; or</p> <p>(b) if it is determined by MDTA that there are not administrative or operational changes that will eliminate the Rate Covenant Shortfall as described above, then MDTA staff shall, within three months of determination that a Rate Covenant Shortfall exists (or such longer period as may be necessary to comply with any applicable law) and in consultation with MDOT Secretary and Chief Financial Officer, present to the MDTA Board for consideration a toll proposal to commence the toll rate setting process as set forth in §4-312 of the Enabling Legislation. The toll proposal shall include changes necessary, to fix, revise, charge, and collect the tolls in the P3 Program (such action may include, without limitation, increasing tolls, changing regulations including revising any relevant citation fees, the multiplier applicable to non-transponder transactions and any associated fees/penalties applicable to non-transponder transactions, or making changes to fees and charges associated with non-payment or late payment of any toll or</p> |

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| | | <p>tolling violations) so that, within 12 months of the commencement of actions in accordance with this paragraph (b), the Rate Covenant Shortfall for each of the subsequent 12 months is eliminated. MDTA shall promptly implement any changes approved by the MDTA Board.</p> <p>Nothing in this Section 8 shall require MDTA to (i) take any action which is not in accordance with applicable law, rule, and regulation; or (ii) take any action that would constitute a Compensation Event (as defined in the applicable P3 Program Section P3 Agreement) or could lead to the Section Developer having a claim under the applicable P3 Program Section P3 Agreement.</p> <p>"Rate Covenant Shortfall" means, for any month:</p> <p>(i) all amounts projected to be payable from the Operating Reserve Account to all Section Developers of all sections of all phases of the P3 Program during such month and all principal and interest that shall be due and payable to all Noteholders under any notes issued pursuant to each supplemental trust agreement as calculated by MDTA; <i>minus</i></p> <p>(ii) projected toll revenues collected across all sections of all phases of the P3 Program during such month (including all payments of tolls received via E-ZPass or other transponder transaction, all payments of tolls received via any means other than transponder transactions, all video toll premiums, account service charges, late fees, penalties, or other amounts arising out of or relating to the payment of tolls by users of all sections of all phases of the P3 Program) less MDTA's projected costs and expenses payable from the P3 Program Account with respect to such month,</p> <p>provided that only sections that have been in operation for at least 24 months following substantial completion of such sections shall be included in such calculation; provided further, if the Rate Covenant Shortfall for any month is less than zero it shall be deemed to be zero for such month. Projections for (i) and (ii) above shall use the current best estimate of toll revenues and prior twelve-month historical observations for establishing assumptions of the distribution of payment method, vehicle classification and in-state vs. out-of-state vehicles. Reasonable adjustments shall be made to these assumptions to account for changes in collections.</p> |
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| Part B – Section 1 Supplemental Trust Agreement | | |
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| 9. | Parties | <p>The Parties to the Section 1 Supplemental Trust Agreement will be:</p> <ul style="list-style-type: none"> (a) The Maryland Transportation Authority, an agency of the State of Maryland ("MDTA"); (b) The Bank of New York Mellon (the "Trustee"); and (c) [●] as section noteholder (the "Section 1 Noteholder") and as section developer (the "Section 1 Developer") who shall be the Section Developer under the Section P3 Agreement for Section 1. |
| 10. | Purchase of Section 1 Notes | At financial close for Section 1, MDTA will issue and sell to the Section 1 Noteholder and the Section 1 Noteholder will purchase from MDTA, the Section 1 Notes in the principal amount specified in the Section 1 Supplemental Trust Agreement. The proceeds shall be deposited by MDTA into the Section 1 Note Proceeds Account (as defined below). |
| 11. | Terms of Section 1 Notes | <p>[●] notes in the amount of \$[●]² will be issued by MDTA on financial close of Section 1 at a fixed interest rate (the "Section 1 Notes"). MDTA may issue the Section 1 Notes at a premium.</p> <p>Term: The term of the notes shall be 40 years from the date of financial close of the Section P3 Agreement for Section 1. MDTA will have the option to redeem the Section 1 Notes commencing 10 years from the date of the Section P3 Agreement for Section 1.</p> <p>Interest rate: Fixed rate of [●]% per annum. Interest shall accrue from the date falling 3 months after the Substantial Completion Date for Section 1 and shall be payable monthly on the Section 1 Toll Payment Date (defined below). The yields on the Section 1 Notes are expected to be reflective of 30-year US Treasury yields at the time of issuance.</p> <p>Amortization: Principal on the Section 1 Notes shall be repaid monthly on each Section 1 Toll Payment Date such that total monthly debt service (principal plus interest) equals \$[●] commencing on the date falling [6/7] years from the date of [Section P3 Agreement]/[financial close] for Section 1.</p> <p>Interest on the Section 1 Notes is expected to be taxable to the extent provided under applicable federal and State law.</p> |
| 12. | Early Prepayment | Section 1 Notes shall only be subject to early prepayment (i) as referenced in Section 11 above ³ and (ii) upon termination of the Section P3 Agreement for Section 1. |

² **NTD:** The total principal amount of the MDTA Notes for Phase 1 South is not expected to exceed \$100 million.

³ **NTD:** See Section 56 of the Section P3 Agreement Term Sheet which sets out MDTA's right to redeem the Section 1 Notes and the consequences of any decision not to refinance.

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| 13. | Pledge of Section 1 Toll Revenues | <p>MDTA shall pledge to the Trustee in order to secure the payment of the principal, interest, and all other amounts due by MDTA under the Section 1 Notes and the Section 1 Supplemental Trust Agreement, for the benefit of the Section 1 Noteholder and Section 1 Developer, a security interest in all of the right, title, and interest of MDTA in and to the Section 1 Toll Revenues (the "Section 1 Trust Estate").</p> <p>"Section 1 Toll Revenues" means all revenues collected from Users of Priced Managed Lanes in Section 1 with respect to the Priced Managed Lanes in Section 1, including all payments of tolls received via <i>E-ZPass</i>® or other types of Transponders, all payments of tolls received via any means other than Transponders, all video toll premiums, account service charges, late fees, penalties, or other amounts arising out of or relating to the payment of tolls by Users of the Priced Managed Lanes in Section 1.</p> <p>"Transponders" has the meaning set out in the Tolling Services Agreement Term Sheet.</p> <p>"User(s)" has the meaning set out in the Tolling Services Agreement Term Sheet.</p> |
| 14. | Section 1 Notes are Limited Recourse Obligations | <p>Neither the State nor any political subdivision of the State, MDOT, nor MDTA shall be obligated to pay the Section 1 Notes or the interest thereon except as provided for in the MDTA Master Trust Agreement or the Section 1 Supplemental Trust Agreement, and neither the faith and credit nor the taxing power of the State, any political subdivision of the State, MDOT, or MDTA is pledged to the payment of the P3 Program Notes or the interest thereon. The issuance of the P3 Program Notes shall not directly or indirectly or contingently obligate the State or any political subdivision of the State to levy or to pledge any form of taxation whatever therefor or to make any appropriation for their payment. MDTA has no taxing powers.</p> |
| 15. | Establishment of Section 1 Note Proceeds Account | <p>The Trustee shall create a Section 1 note proceeds account (the "Section 1 Note Proceeds Account") and shall segregate the funds and investment earnings thereon from the funds and investment earnings for all other reserve subaccounts. The amount on deposit in the Section 1 Note Proceeds Account shall be held by the Trustee only for the benefit of MDTA, and shall not be available to satisfy claims of Noteholders or the Section Developer.</p> <p>The Section 1 Note Proceeds Account shall be funded with the proceeds from the sale of the Section 1 Notes upon financial close for Section 1, net of issuance expenses. MDTA shall (upon direction from MDOT) direct the Trustee to make payments from the Section 1 Note Proceeds Account from time to time during the term of the Section 1 Supplemental Trust Agreement to pay (i) upfront Trustee fees and Trustee fees incurred in relation to Section 1 prior to Substantial Completion of Section 1; (ii) <i>[use of funds to pay eligible project costs related to Section 1 to be determined during the Predevelopment</i></p> |

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| | | <p>Work for Section 1]; and (iii) any other costs as determined by MDTA.</p> |
| 16. | Section 1 Debt Service Payment Account | <p>The Trustee shall create a Section 1 Debt Service Payment Account (the "Section 1 Debt Service Payment Account") and shall segregate the funds and investment earnings thereon from the funds and investment earnings for all other accounts.</p> <p>MDTA shall make payments into the Section 1 Debt Service Payment Account in accordance with Section 6 (P3 Program Account) above. Amounts held in the Section 1 Debt Service Payment Account shall be applied in payment of principal and interest due under the Section 1 Notes in accordance with Section 17 below.</p> |
| 17. | Payments to the Noteholder and Section 1 Developer | <p>On each Section 1 Toll Payment Date (defined below), MDTA shall direct the Trustee to make the following payments:</p> <ul style="list-style-type: none"> a) Payment from the Operating Reserve Account of an amount equal to all fees and other amounts due to the Trustee in connection with the Section 1 Supplemental Trust Agreement, the Master Trust Agreement and all other supplemental trust agreement. b) Payment from the Section 1 Debt Service Payment Account to the Section 1 Noteholder of the amount of principal and interest due to the Section 1 Noteholder on such date, provided that the amount of such payment obligation shall be capped at the amount available in the Section 1 Debt Service Payment Account (the "Section 1 Notes P&I Payment"). In the event that there are insufficient funds in the Section 1 Debt Service Payment Account to pay the scheduled Section 1 Notes P&I Payment on any Section 1 Toll Payment Date, the unpaid amount of the scheduled Section 1 Notes P&I Payment shall be due on the next Section 1 Toll Payment Date that sufficient funds are available. c) Payment from the Operating Reserve Account, to the Section 1 Developer the Section 1 Developer Toll Payment (defined below). <p>The payments due under clause (b) and (c) above are absolute payment obligations of MDTA payable from the Section 1 Trust Estate and due to the Section 1 Noteholder and Section 1 Developer, as applicable, on each Section 1 Toll Payment Date. MDTA will satisfy such payment obligations by directing the Trustee to make such payments from the Section 1 Debt Service Payment Account or the Operating Reserve Account (as applicable). Non-payment of principal and interest on the Section 1 Notes will be a MDOT Default under the Section P3 Agreement (subject to a customary cure period), unless such non-payment is caused by a shortfall in funds in the Section 1 Debt Service Payment</p> |

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| | | <p>Account. Non-payment of the Section 1 Developer Toll Payment will be a MDOT Default under the Section P3 Agreement (subject to a customary cure period), and an insufficiency of funds in the Operating Reserve Account shall not excuse MDTA from the performance of such payment obligation.</p> <p>"Section 1 Developer Toll Payment" means, on any Section 1 Toll Payment Date, an amount equal to:</p> <ol style="list-style-type: none"> 1) the aggregate of all Trip Tolls (as defined and calculated in accordance with the Tolling Services Agreement Term Sheet) with respect to each Valid Trip submitted to MDTA during the previous calendar month⁴; <i>less</i> 2) the Transaction Fee (as defined in the Tolling Services Agreement Term Sheet) charged by MDTA for each Trip submitted to MDTA in accordance with the Tolling Services Agreement Term Sheet; <i>less</i> 3) the scheduled Section 1 Notes P&I Payment due on such date; <i>less</i> 4) any amounts that MDTA is permitted to claw-back under Section 34 (Clawback) of the Tolling Services Agreement Term Sheet, provided that if the Section Developer Toll Payment for any month is less than zero it shall be deemed to be zero for such month. <p>The Section 1 Noteholder will have no right to receive video surcharges, account fees, fines, penalties, or other amounts from Users of Section 1.</p> <p>"Section 1 Toll Payment Date" means the 20th day of each month, commencing from the first full calendar month to occur after tolling commencement for Section 1.</p> <p>"Valid Trip" is defined in the Tolling Services Agreement Term Sheet.</p> |
| 18. | Section 1 Noteholder Representations & Warranties | <p>The Section 1 Noteholder makes the following representations upon which MDTA and the Trustee may rely:</p> <ol style="list-style-type: none"> (a) it is (i) a "qualified institutional buyer" as that term is defined in Rule 144A under the Securities Act of 1933, as amended (the "Securities Act") or (ii) an "accredited investor" within the meaning of Rule 501(a) (<i>Accredited investor</i>) of Regulation D (<i>Rules Governing the Limited Offer and Sale of Securities without Registration under the Securities Act of 1933</i>) ("Regulation D")⁵; |

⁴ NTD: The Trip Toll is calculated based on the transponder rates and does not vary if a Trip is processed as a non-transponder transaction or otherwise subject to surcharges or any citations. "Trip Tolls" is not the same as "Section 1 Toll Revenue."

⁵ NTD: As a condition precedent to close under the Section P3 Agreement for Section 1 (or as a CP under the Section 1 Supplemental Trust Agreement), the Section 1 Developer shall have provided MDTA with all evidence that MDTA requires in order to verify that the Developer is an "qualified institutional buyer" or "accredited investor" (as defined above).

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| | | <p>(b) it is purchasing the Section 1 Notes for its own account and not with a view to the distribution thereof;</p> <p>(c) in connection with any permitted transfer of any Section 1 Notes, it will not engage in any form of general solicitation or general advertising within the meaning of Rule 502(c) under the Securities Act with respect to such transfer of Section 1 Notes;</p> <p>(d) it understands and acknowledges that (i) the Section 1 Notes have not been registered under the Securities Act or any other applicable securities law and that the Section 1 Notes are being offered for sale in transactions not requiring registration under the Securities Act pursuant to Section 4(a)(2) thereof, (ii) in addition to any other restrictions on the resale of the Section 1 Notes, the Section 1 Notes may be resold only if an exemption from registration is available, except under circumstances where such an exemption is not required by law, and (iii) MDTA is not required to register the Section 1 Notes;</p> <p>(e) it acknowledges that it has either been supplied with or been given access to information, including a term sheet outlining material information, which it has requested from the issuer and to which a reasonable investor would attach significance in making investment decisions, and the Section 1 Noteholder has had the opportunity to ask questions and receive answers from knowledgeable individuals, including its own counsel, concerning the issuer and the Section 1 Notes and the security therefor so that, as a reasonable investor, the Section 1 Noteholder has been able to make a decision to purchase the Section 1 Notes. The Section 1 Noteholder has such knowledge and experience in financial and business matters that it is capable of evaluating the merits and risks of its prospective investment in the Section 1 Notes; and</p> <p>(f) it shall not transfer, or permit the transfer of, directly or indirectly, any equity interest in the Section 1 Noteholder if such transfer would cause the Section 1 Noteholder to cease to be a "qualified institutional buyer" (as defined above) or an accredited investor (as defined above). Not less than 20 business days prior to any proposed transfer of any direct or indirect equity interest in the Section 1 Noteholder, the Section 1 Noteholder shall deliver to MDTA (i) notice of the proposed transfer and (ii) all evidence that MDTA requires to demonstrate that following such proposed transfer, the Section 1 Noteholder shall continue to be a "qualified institutional buyer" (as defined above) or an accredited investor (as defined above).</p> |
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| 19. | MDTA Representations & Warranties | <p>MDTA represents and covenants that:</p> <ul style="list-style-type: none"> (a) it is duly authorized under the Constitution and laws of the State to issue the Section 1 Notes, to enter into the MDTA Master Trust Agreement and Section 1 Supplemental Trust Agreement, and to pledge the Section 1 Trust Estate in the manner and to the extent set forth in the Section 1 Supplemental Trust Agreement; (b) all action on its part for the issuance of the Section 1 Notes has been duly and effectively taken; (c) the Section 1 Notes when issued in accordance with the Section 1 Supplemental Trust Agreement will be valid and binding limited obligations of MDTA; and⁶ (d) as of its date and the date hereof, the information contained in the Disclosure Documentation is complete, true and accurate, and such information does not contain any untrue statement of a material fact or omit to state any material fact necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading.⁷ |
| 20. | MDTA Covenants | <p>MDTA covenants that it shall:</p> <ul style="list-style-type: none"> a. pay or cause to be paid the principal of and interest on every Section 1 Note on the date (and no earlier date) and at the place and in the manner provided for in the Section 1 Supplemental Trust Agreement, provided that (i) the Section 1 Notes shall be limited obligations of MDTA payable solely from the Section 1 Trust Estate and (ii) payment of the principal of and interest on the Section 1 Notes shall only fall due to the extent that sufficient funds are available in the Section 1 Debt Service Payment Account are sufficient; b. not create or incur any indebtedness (including the issuance of any additional notes under the Section 1 Supplemental Trust Agreement) payable from any portion of the Section 1 Trust Estate; c. take all reasonable measures permitted by law to enforce payment to it of the Section 1 Toll Revenues due and payable; d. permit any filing necessary to evidence the grant to the Trustee of the interest in the Section 1 Trust Estate; and |

⁶ NTD: MDTA's bond counsel shall issue a typical opinion as a condition precedent to closing confirming that (1) the Section 1 Notes have been duly authorized and issued and (2) the Section 1 Notes are valid and legally binding obligations of MDTA.

⁷ NTD: As a condition precedent to funding, MDTA will provide disclosure documentation as required by applicable law (the "**Disclosure Documentation**").

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| | | <p>e. except as permitted by the Section 1 Supplemental Trust Agreement, not sell, lease, pledge, assign, or otherwise dispose of its interest in the Section 1 Trust Estate.</p> |
| 21. | Acceleration of the Section 1 Notes | <p>There shall be no events of default under the Section 1 Notes and the Section 1 Notes shall not be accelerated or subject to early prepayment except following the termination of the Section P3 Agreement or as referenced in Section 11.</p> <p>Upon any termination of the Section P3 Agreement, the Section 1 Noteholder will be paid the par value of the outstanding Section 1 Notes (plus, if applicable, any unamortized premium) and the outstanding MDTA Notes will be redeemed, assigned, or transferred to another party or assumed by MDOT, at MDOT's sole direction. As a condition precedent to payment of the par value of the outstanding Section 1 Notes (plus, if applicable, any unamortized premium), the Section 1 Noteholder must take all reasonable steps requested by MDOT or MDTA to effect such redemption, assignment, transfer, or assumption.</p> <p>Following any termination of the Section P3 Agreement MDTA may elect (in coordination with MDOT) to issue new notes under a new Section 1 supplemental trust agreement to repay the Section 1 Notes and the Section 1 Trust Estate may be pledged to secure such new notes.</p> <p>The Section 1 Noteholder's, and Section 1 Developer's recourse and that of its Lenders for non-payment under the Section 1 Supplemental Trust Agreement shall be through the terms of the Section P3 Agreement and neither the Trustee, nor the Section 1 Noteholder, Section 1 Developer, or their Lenders shall take any action against MDTA or claim any amount in any MDTA account for any non-payment, or to enforce a security interest over the Section 1 Trust Estate.</p> |
| 22. | Registration | <p>The Section 1 Notes shall be negotiable instruments for all purposes and shall be transferable by delivery, subject only to (i) the restrictions set out in Section 23 (<i>Transferability Restrictions</i>) and (ii) the provisions for registration and registration of transfer endorsed on the Section 1 Notes, which requirements shall not include registration with the Securities and Exchange Commission. The Trustee shall act as register for the Section 1 Notes and shall keep registration of transfers of the Section 1 Notes.</p> |
| 23. | Transferability Restrictions | <p>Except to the extent expressly permitted pursuant to this Section 23, (i) the Section 1 Noteholder shall not assign or transfer any of the Section 1 Notes or its right to repayment of principal or interest under the Section 1 Notes to any other Person and (ii) the Section Developer shall not assign or transfer its rights and obligations under this Supplemental Trust Agreement to any other Person.</p> |

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| | | <p>The Section 1 Noteholder may grant a security interest in the Section 1 Noteholder's rights under the Section 1 Notes to its lenders (provided such lenders are "qualified institutional buyers" (as defined above)). The Section 1 Developer may pledge its rights to receive the Section Developer Toll Payment to its lenders.</p> <p>In the event that the Section 1 Developer transfers its rights and obligations under the Section P3 Agreement to another party (pursuant to a foreclosure or as otherwise permitted under the Section P3 Agreement):</p> <p>(A) the Section 1 Noteholder shall simultaneously transfer its rights and obligations under the Section 1 Notes to the substitute party, <i>provided that</i> any transfer of the Section 1 Notes permitted pursuant to this paragraph shall only be permitted if (a) the transferee is a qualified institutional buyer (as defined above) or an accredited investor (as defined above) and (b) not less than 20 business days prior to the proposed transfer, the Section 1 Noteholder has delivered to MDTA (i) notice specifically identifying the proposed transferee and (ii) all evidence that MDTA requires to demonstrate that such proposed transferee is an accredited investor under Rule 501(a) of Regulation D; and</p> <p>(B) the Section Developer shall simultaneously transfer all of its rights and obligations under this Supplemental Trust Agreement to the substitute party.</p> |
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Attachment 7 - Tolling Services Agreement Term Sheet (Exhibit 2 to Section P3 Agreement Term Sheet) – Clean version

EXHIBIT 2

KEY TERMS OF THE TOLLING SERVICES AGREEMENT

Each Section Developer will be responsible for tolling operations and congestion management within its Section, including by setting the dynamic toll rate (subject to the toll rate setting requirements set out herein) and submitting toll data to MDTA for processing and collection. Each Section Developer and MDTA will enter into a tolling services agreement (the "**TSA**") which will include, among other things, details of the Section Developer's obligation to submit tolling data to MDTA.

Below is a description of the indicative key terms that will be contained in each TSA for Phase 1. A full form of the TSA will be provided to the Section Developer following the execution of the Phase P3 Agreement. Section-specific variations will be introduced for each Section as appropriate, but the terms and conditions described below are generally anticipated to apply across all TSAs entered into for the P3 Program.

Capitalized terms used in this term sheet are defined in Appendix 1 (*Defined Terms*).

| Part A – Preliminary | | |
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| 1. | Parties | a) MDTA; and b) Section Developer |
| 2. | General | Pursuant to the Section P3 Agreement, the Section Developer shall design, construct, integrate, test, operate, and maintain all roadside and related tolling equipment and software for the Section. The Section Developer will take all traffic and revenue risk for the Section (subject to the Section Developer's rights with respect to Compensation Events). MDTA will take all toll collection, enforcement of toll collection, and associated leakage risk for Valid Trips submitted for the Section in accordance with the TSA. The Section Developer may designate a subcontractor or another entity to submit Trips relating to its Section on its behalf. |
| 3. | Term | The TSA shall remain in effect until the expiration or earlier termination of the Section P3 Agreement. |
| 4. | Representations and Warranties | The Section Developer and MDTA will make representations and warranties to each other that are customary for transactions of this type. The representations and warranties will be made on the effective date of the TSA. |
| Part B – Rights and Obligations of the Section Developer | | |
| 5. | Equipment | Article 24 of the Predevelopment Work Requirements requires the Section Developer to design, develop, fabricate, test, integrate, deploy, construct, operate, maintain, and upgrade to maintain the ETCS throughout the Term. |
| 6. | Data Capture | The Section Developer shall be responsible for capturing data evidencing each Toll Transaction and transmitting a properly formed Trip to MDTA (which will include all of the information required for a Valid Trip, as further defined herein). Without limiting the foregoing, the Section Developer shall be responsible for (a) determining the applicable dynamic toll rate and vehicle classification for each Toll Transaction (in accordance with Appendix 2 (<i>Toll Rate Setting</i>)), and transmitting the applicable toll information to MDTA; (b) conducting all video image reviews to define the license plate type, license plate number, and license plate jurisdiction in accordance with MDTA rules and requirements; and (c) matching Toll |

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| | | Transactions applicable to the same vehicle within Phase 1 in coordination with other section developers, as required in order to consolidate all Toll Transactions within Phase 1 into a single Trip transmission to MDTA. The Section Developer shall ensure that trip data for any vehicle traveling on the Priced Managed Lanes in the Section and any other section(s) of Phase 1 as part of a continuous period of travel within the Priced Managed Lanes in the same direction is consolidated into a single Trip before it is submitted to MDTA. |
| 7. | Marketing | Sections 4.6 and 4.7 of the Predevelopment Work Requirements require the Section Developer to comply with certain marketing requirements. |
| 7A | Improvement to MDTA's System prior to commencement of tolling | MDTA shall incur certain costs in connection with certain improvements that it shall make to its existing tolling system prior to the commencement of tolling on the Section in order to accommodate the receipt and processing of Trips from the Section Developer and the collection of tolls for the Section. The Section Developer shall make a lump sum payment to MDTA during the D&C Period in an amount to be agreed during the predevelopment period to cover such system improvement costs. Alternatively, MDTA may elect to cover such costs using proceeds of the MDTA Notes. |
| 8. | Change in Toll System Technology | The Section Developer shall make no change to the toll system technology deployed for the Priced Managed Lanes that will adversely affect the reliability of, or the ability to, meet performance requirements set forth in Table 25-6 (Operating Period Performance) of the Predevelopment Work Requirements (the " Performance Requirements ") and applicable standards for, and transmission of, data to MDTA. Any changes to the toll system technology shall be coordinated with MDTA and meet the Performance Requirements. |
| 9. | Commencement of tolling operations | Upon the achievement of Substantial Completion of the Section, the Section Developer will be entitled to commence tolling of the Priced Managed Lanes. |
| 10. | Permitted Vehicles | The Section Developer shall ensure that all Permitted Vehicles are provided access to the Priced Managed Lanes. |
| 11. | Toll Rates | <p>The Section Developer shall be responsible for setting and calculating the Toll Rate applicable to each vehicle in the Priced Managed Lanes in the State. There shall be no restrictions on the Base Toll Rate except as set forth in Appendix 2 (<i>Toll Rate Setting</i>).</p> <p>The Section Developer shall, at all times, set the Base Toll Rate and operate the Priced Managed Lanes in compliance with the provisions of applicable law (including, if the lanes are operating as High-Occupancy Toll (HOT) lanes, 23 U.S.C. §166) and ensure that the average speed of travel on the Priced Managed Lanes is 45 mph or greater, provided that the Section Developer shall not be in breach of this provision to the extent that required operating speeds were not met on any part of the Section at times when that part of the Section is operating at a Base Toll Rate set at the Toll Rate Range Maximum.¹</p> <p>In the event (i) there is the occurrence of certain minimum traffic conditions or average speeds to be defined in the Tolling Services Agreement, (ii) the Section Developer is unable to comply with the requirements set out in the above paragraph, or (iii) either party reasonably believes that the Section Developer will be unable to comply with the requirements set out in the above paragraph within the next [●] years, then the Section Developer, MDOT, and MDTA shall consult with respect to possible methods of improving the performance of the Priced Managed Lanes, including: increasing the occupancy requirement for</p> |

¹ NTD: These provisions may ultimately be located in the Section P3 Agreement, rather than the TSA.

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| | | <p>HOVs, making changes to the Permitted Vehicles, increasing the capacity of the facility, or increasing the Toll Rate Range Maximum; provided that MDTA gives no commitment to implement such changes and shall be under no obligation to take any action relating to the same.</p> <p>Toll Rates for Trips that are not Transponder Transactions will be calculated by MDTA based on the Trip Toll provided by the Section Developer, by applying the non-transponder multiplier or fees set by the MDTA Board to the applicable Transponder rate determined by the Section Developer. Any associated fees/penalties assessed for non-transponder transactions with the collection or enforcement of tolls shall be set and collected by MDTA.</p> |
| 12. | Toll System Services | <p>The Section P3 Agreement requires the Section Developer to operate and maintain the ETCS required to capture, construct, and transmit all Toll Transactions and Trips for which a toll is due to MDTA.</p> <p>Toll Transactions Capture Section 25.6.1 of the Predevelopment Work Requirements sets out the requirements of the ETCS that the Section Developer shall be responsible for delivering.</p> <p>Vehicle Classification The ETCS shall classify every vehicle that passes through a Tolling Point in accordance with Appendix 2 (<i>Toll Rate Setting</i>).</p> <p>Trip Construction The Section Developer shall be responsible for all trip building operations in accordance with Appendix 3 (<i>Valid Trip Requirements</i>).</p> <p>ETCS Host The Section Developer's ETCS shall include an ETCS Host that shall collect Toll Transactions data from all parts of Phase 1 and function as the back office system for the entire Phase 1.</p> <p>Testing The Section Developer shall be responsible for all testing of the ETCS as defined in the Predevelopment Work Requirements, including testing as to interoperability with MDTA's current Tolling Back-Office System.</p> <p>The Section Developer shall be responsible for all testing of the ETCS interoperability with MDTA's Tolling Back-Office Systems following (i) any upgrades or replacements to the ETCS or (ii) any upgrades, replacements, or changes to MDTA's Tolling Back-Office System or changes to MDTA's CSC Operator.²</p> |
| 13. | Performance Standards | The Performance Requirements for the ETCS are set out in the Predevelopment Work Requirements. |
| 14. | Section Developer Records, Inspections, and Audits | The Section Developer shall keep and maintain all records relating to tolling, the ETTM Data, and the ETCS; and make all such records available for inspection or audit by MDTA, MDOT, or its consultants and designees. The Section Developer shall comply with all applicable law, including Maryland Annotated Code, General Provisions Article, Section 4-319, with respect to the ETTM Data. Further, the Section Developer shall comply with all applicable laws, rules, and legal requirements that would apply to MDTA with respect to the treatment and disclosure of all ETTM Data. |

² **Note to Proposers:** MDTA anticipates that it shall resolicit its CSC Operator four times during the Term, and MDTA's Tolling Back Office may be subject to upgrades following such solicitations or at any other time.

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| | | MDTA and MDOT shall have access to all ETTM Data and may use the ETTM Data for any purpose. |
| 15. | User Confidential Information | The Section Developer shall comply with all applicable law, including Maryland Annotated Code, General Provisions Article, Section 4-319, related to the handling, confidentiality, and privacy of personal data and images collected in relation to Users of the Priced Managed Lanes. |
| 16. | Interface Control Document | <p>The Section Developer, at its expense, shall design, install, operate, and maintain the ETCS and interconnections of the ETCS with MDTA's Host. Such design and installation shall be consistent with, and meet all requirements of, the Interface Control Document (the "ICD").</p> <p>The Section Developer shall collaborate with MDTA and adopt detailed requirements to be set out in the ICD developed by MDTA to ensure the correct processing of each Trip to be sent to MDTA. The ICD shall be based on the current ICD for MDTA's toll systems in the State, and MDTA shall discuss any modifications suggested by the Section Developer to improve the transmission of Trip data for both parties. The ICD applicable to the Section shall be finalized prior to commencement of tolling operations for the Section.</p> <p>The ICD is subject to change with reasonable advance written notice from MDTA. The Section Developer must comply with the new interface requirements set out in any updated ICD at no cost to MDTA.</p> <p>The Section Developer acknowledges that the ICD is intended to be a framework for the interface between a third party and MDTA; it supports many different types of systems with different unique needs, requirements, and contractual obligations; and it is subordinate to, and is not intended to supersede or alter, any of the express provisions of the TSA or the Section P3 Agreement.</p> |
| 17. | Modifications to Systems | <p>The Section Developer shall make any necessary modifications or upgrades to the ETCS to ensure continued compatibility and interoperability with MDTA's system in accordance with Section 24.1 of the Predevelopment Work Requirements, and will be responsible for any and all system maintenance, changes, modifications, or upgrades to the ETCS or operations. If any changes, modifications, or upgrades to the ETCS or other system modifications will adversely impact MDTA's Back-Office Systems or operations in any material respect, the parties agree to make good faith efforts to resolve such impact to each party's satisfaction; provided, however, that any such changes, modifications, or upgrades must be ultimately compatible with MDTA's system and operations. Either party will notify the other in writing at least 90 days in advance of any changes or modification to such party's system equipment that may affect the other's system equipment or operations in any material respect.</p> <p>MDTA shall exercise due care and diligence in planning and implementing modifications, upgrades, and associated testing of its Back-Office System at levels which are reasonable given the schedule, scope, and budget for the ETCS, and will not require that the Section Developer exceeds what is considered customary and reasonable for hardware and software processing systems. However, MDTA provides no guarantee against adverse impacts to the performance of the hardware or software in the Section Developer's or others' systems. While precautions will be taken by MDTA to help mitigate the risk of occurrence of such adverse impacts to the Section Developer, neither MDOT nor MDTA will, unless MDTA is in breach of its duty of due care and diligence, be financially responsible for the occurrence of adverse impact to the Section Developer or other third</p> |

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| | | parties affected during such modifications, upgrades, and associated testing. |
| 18. | Business Rules | MDTA may elect to document certain provision of this term sheet in a set of business rules that will apply to the entire P3 Program (the " Business Rules "). In this event the Section Developer shall be obliged to comply with the requirements of the Business Rules. Amendments to the Business Rules by MDTA shall be permitted subject to the same restrictions that apply with respect to Change Orders as set out in Section 36 (<i>Change Orders</i>). |
| Part C – Obligations and Rights reserved for MDTA | | |
| 19. | Services Performed by MDTA | MDTA shall reserve for itself (and the Section Developer shall not be entitled to perform) the following functions: (a) functions pertaining to toll collection and toll collection enforcement (excluding HOV enforcement); (b) customer service operations; (c) account management; (d) Transponder issuance; and (e) Trip Toll processing. |
| 20. | MDTA Appointment of a CSC Operator | MDTA may appoint a third party contractor to operate the CSC and back-office systems (the " CSC Operator "). Presently MDTA's CSC Operator is [TransCore LLC]. MDTA may designate a different CSC Operator from time to time during the term. If directed by MDTA the Section Developer shall deliver Trip data directly to CSC. |
| 21. | MDTA Records, Inspections, and Audits | MDTA will (and shall ensure that its CSC Operator will): (a) provide the Section Developer with reconciliation files as required; (b) maintain accurate and complete records relating to Toll Transactions for the Section; (c) implement data backup and disaster recovery systems; (d) permit the Section Developer to review MDTA's records pertaining to Valid Trips at reasonable times upon request; (e) make its records relating to the Section available for audit and inspection by the Section Developer during normal business hours; (f) permit the Section Developer to monitor, audit, and investigate its records related to the Section and monitor its systems, practices, and procedures related to confidential information; and (g) maintain records: (1) transaction data 4 years from when the transaction is closed (i.e., transaction posted to an account, dismissed, or sent to an away agency and settled), (2) transaction images 1 year from when the transaction is closed, and (3) video clips 1 year from data creation; and implement data backup and disaster recovery systems. Transaction data, images, and video clips for unclosed transactions will be stored indefinitely. |
| 22. | Transponder Master List | MDTA will consolidate all Transponders and their current status (such consolidated list the " Transponder Master List ") and electronically distribute the consolidated information to the Section Developer. Status designations shall be in accordance with the ICD. MDTA will make such electronic distribution of the Transponder Master List to the Section Developer daily (provided that, if MDTA fails to provide an updated Transponder Master List then the Section Developer shall be entitled to rely on the most recent Master Transponder List provided by MDTA). MDTA will provide the list of Transponders for Exempt Vehicles within the Transponder Master List. The Section Developer shall be responsible for identifying whether each vehicle in the Priced Managed Lanes is listed in the Transponder Master List as an Exempt Vehicle, filter out the Toll Transactions relating to Exempt Vehicles, and not submit these as Trips to MDTA. |

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| | | <p>Generally, Exempt Vehicles will be required to be equipped with a properly mounted MDTA-issued non-revenue Transponder, but there will be some exceptions to this and some Exempt Vehicles may not have non-revenue Transponders and may not be included as Exempt Vehicles on the Transponder Master List. In this event the Section Developer will be expected to identify Exempt Vehicles before submission of the same to MDTA (except in circumstances where visual identification of an Exempt Vehicle is not possible) and not submit Trip data relating to Exempt Vehicles to MDTA. In any event Trips relating to Exempt Vehicles shall not be Valid Trips.</p> <p>The Section Developer must have the capability to support notification of Users, who opt in, via (a) feedback transponders, which notify Users through audio signals, and (b) communication with MDTA's back office for notification through a mobile application sent for (x) Valid Transactions for vehicles with Active Transponders included on the Transponder Master List, (y) vehicles with Transponders associated with accounts with low balances, and (z) vehicles associated with a Transponder on the Transponder Master List which is reading as inactive.</p> |
| 23. | Transponder Issuance; Competitive Actions | <p>The Section Developer shall not issue any Transponders other than as expressly permitted by the TSA or as approved by MDTA in writing (acting in its sole discretion), and the Section Developer otherwise shall not take any actions in competition with the rights and responsibilities of MDTA. The Section Developer shall not sell Transponders other than those under MDTA's On-the-Go (OTG) program. If the Section Developer wishes to sell such Transponders, it will be required to enter into a separate agreement with MDTA which will govern the sale of OTG Transponders.</p> |
| Part D – Valid Trip | | |
| 24. | Valid Trip | <p>Appendix 3 (<i>Valid Trip Requirements</i>) sets out all required information and data that must be included in any Trip submitted to MDTA.</p> <p>For Trips that do not meet these requirements, MDTA may reject the Trip and provide the Section Developer with a code identifying the reason for rejection. Such reason codes will be detailed in the full form TSA (or the ICD). A report explaining the reasons for such rejection shall be provided monthly in order for the Section Developer to independently identify the affected Trips and verify the rejection reason(s).</p> |
| 25. | Resubmission of corrected Trip data | <p>In the event that a Trip submitted to MDTA is rejected by MDTA immediately for any error that is determined without any processing of the Trip (e.g., a corrupt file format), the Section Developer may resubmit the Trip to MDTA for processing after resolving the error. In this situation the Section Developer shall incur a Transaction Fee with respect to the resubmitted Trip but not with respect to the rejected Trip.</p> <p>In the event that a Trip submitted to MDTA is rejected on the basis that it is not a Valid Trip after MDTA has processed the Trip data (e.g., a license plate is deemed to be invalid by MDOT MVA, and MDTA is not able to read the license plate based on the image provided by the Section Developer), MDTA will not accept resubmission of such Trip after the issue has been corrected (except to the extent resubmission is expressly permitted in accordance with Appendix 4 (<i>MDTA's Right to Stop Accepting and Processing Trips</i>)).</p> |
| 26. | System Faults and Failures | <p>If either the Section Developer or MDTA (or its CSC Operator) receives notice of any system failure or degradation that may affect tolling operations, the relevant party shall report such notice as promptly as possible to the other party.</p> |

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| | | <p>The Section Developer's system shall have the capacity to buffer transactions for 90 days and the ability to resend transaction if requested. In the event that the Section Developer is unable to send Trip data for the Section for periods in excess of 24 hours, the Section Developer must notify MDTA prior to sending any backlogged Trip data to MDTA (and such backlogged trips shall only be considered "submitted" for the purpose of calculating the Section Developer Toll Payment at the time that MDTA is reasonably able to process them).</p> <p>In the event that MDTA or the designated CSC Operator is unable to receive Trips or process the collection of tolls for any reason (including, without limitation, due to planned system maintenance or an unplanned outage) (an "MDTA Outage") then MDTA may notify the Section Developer that it must withhold Trips and not submit them to MDTA until such MDTA Outage has been resolved. Following the resolution of an MDTA Outage, MDTA shall instruct the Section Developer to recommence the submission of Trip data to MDTA. The Section Developer shall submit any Trips that were withheld (and shall resubmit any other Trips impacted by the MDTA Outage as requested by MDTA) in the order in which they were received and processed by the Section Developer, and for the purposes of calculating the Section Developer Toll Payment such Trips shall be considered submitted to MDTA upon such submission to MDTA following the resolution of such MDTA Outage; provided that any MDTA Outage that (a) causes a decrease in the Section Developer Toll Payment for the month in which the MDTA Outage occurs due to a reduced number of Valid Trips being submitted in such month and (b) exceeds [3] days, then it shall be considered a Compensation Event (provided that MDTA may elect to eliminate the impact of MDTA Outage on the Section Developer Toll Payment by deeming any Valid Trips for which submissions to MDTA were delayed by an MDTA Outage to have been submitted to MDTA at the time that they would have been submitted but for the MDTA Outage).</p> |
| 27. | MDTA's Right to Stop Processing Trips | Appendix 4 (<i>MDTA's Right to Stop Accepting and Processing Trips</i>) describes the occurrence of certain specified events that are likely to cause material customer service issues and following which MDTA has the right to stop accepting and processing Trips. |
| Part E – Payments | | |
| 28. | Transaction Fee | <p>MDTA will deduct a Transaction Fee from the amounts due to the Section Developer under the MDTA Notes. The Transaction Fee will be charged for each Trip submitted to MDTA on a "per trip" basis, and shall be the same amount for Trips based on Transponder Transactions and Trips based on Image-Based Transactions. The Transaction Fee is updated annually.</p> <p>The "Transaction Fee" shall be the sum of the following fees and costs:</p> <ul style="list-style-type: none"> (a) ETC Fee, (b) Personnel Oversight Costs, and (c) Capital Cost Fee. <p>The "ETC Fee" shall be the average cost expected to be incurred by MDTA for the processing of a Transponder-based Trip. The ETC or Transponder costs shall be comprised of:</p> <ul style="list-style-type: none"> (a) CSC Operator back-office costs: fixed and variable costs such as system costs, account management fees, staffing, interoperability, and communications (letters, website, IVR, chat, push notifications, etc.). Fixed costs are allocated to the ETC Fee using both a manual percentage allocation method, as well as a weighted method based on the number of transactions; (b) MDTA <i>E-ZPass®</i>/Transponder Operations and Finance fully loaded payroll costs is an allocated cost of staff involved in, and |

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| | | <p>administering, the toll operations. The allocation to the ETC Fee is periodically updated based on the percentage of time staff spent devoted to each transaction type;</p> <p>(c) Transponder costs;</p> <p>(d) <i>E-ZPass</i>/Transponder Customer Service Center/Walk-in Centers costs: costs associated with operating new walk-in customer service to support the P3 Program (outside MDTA's current presence). Costs are allocated based on the percentage of time staff spend devoted to each transaction type; and</p> <p>(e) Credit card fee (such costs to be consistent across all other MDTA facilities and the P3 Program):</p> <ol style="list-style-type: none"> 1. fixed fee being the fixed per transaction credit card fee payable by MDTA for processing Transponder based Trips; and 2. variable fee being the variable credit card fee payable by MDTA for processing Transponder based Trips. <p>Based on MDTA's current projections as of November 2020, the estimated ETC Fee that will apply in 2027 (being the assumed opening year) is \$0.11 per Trip, plus a fixed credit card fee of \$0.01 per Trip and a variable credit card fee of 2.25% of nominal gross toll revenue.</p> <p>Annually, MDTA calculates its actual cost per transaction by transaction type and uses this to determine the ETC Fee for the following year. A cost allocation matrix is used to allocate costs to each type of transaction, and all costs allocated to Transponder Transactions and transactions processed to a Transponder account (including i-Toll transactions) shall be aggregated to determine the average cost per transaction.</p> <p>Any overestimate or underestimate in the projected ETC Fee or Personnel Oversight Costs shall lead to a true-up adjustment to the ETC Fee or Personnel Oversight Costs in the subsequent year. The ETC Fee shall be adjusted on an annual basis as described in Section 29 (<i>Determination of ETC Fee</i>).</p> <p>"Personnel Oversight Costs" will be calculated based on the fully-loaded costs for all MDTA staff required to reconcile transactions relating to the Section; address inquiries regarding rejected transactions relating to the Section; monitor, report, and act upon key performance indicator outcomes relating to the Section; and any other coordination efforts between MDTA and the Section Developer.</p> <p>"Capital Cost Fee" will be calculated based on the projected cost MDTA expects to incur in the performance of back-office system improvements and basic system maintenance of its toll collection system allocated to the P3 Program during the next 5 years divided by the projected number of Trips to be submitted during the next 5 years with respect to the P3 Program as further described in Section 30 (<i>Determination of Capital Cost Fee</i>).</p> |
| 29. | Determination of ETC Fee | <p>MDTA shall comply with the following principles when determining the ETC Fee (unless otherwise agreed between MDTA and the Section Developer):</p> <ol style="list-style-type: none"> a) MDTA shall perform ETC/Transponder transaction toll collection for the P3 Program in the same manner that it does on other toll roads operated by MDTA. Changes made to the scope or service levels of transponder processing and collection activities being recovered through the ETC Fee shall not exceed changes being made consistent with best industry practices in transponder based tolling in the US toll road industry. |

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| | | <p>b) MDTA shall take reasonable steps to ensure that costs it incurs that are recovered through the transponder fee are at reasonable market prices. All pricing shall be agreed at arm's length using competitive public solicitation or such other methods as may be agreed with the Section Developer(s). MDTA shall use the same contractor(s) for the P3 Program and all other MDTA toll facilities.</p> <p>The Section Developer(s) shall be consulted by MDTA in advance of any potential change to the ETC fee (including with respect to the process it will go through to determine any change to the ETC fee), and MDTA shall consider in good faith any comments or concerns raised by the Section Developer.</p> |
| 30. | Determination of Capital Cost Fee | <p>MDTA shall comply with the following principles when determining the Capital Cost Fee (unless otherwise agreed between MDTA and the Section Developer):</p> <ul style="list-style-type: none"> a) MDTA's capital upgrades to its tolling systems being used for any Section of the P3 Program and recovered through the Capital Cost Fee shall not exceed (i) the upgrades being carried out with respect to the tolling system for MDTA's other facilities and (ii) updates reasonably necessary in accordance with best industry practices in the US toll road industry. b) MDTA shall take reasonable steps to ensure that costs it incurs for any capital improvement work to its tolling system are at reasonable market price. All pricing shall be agreed at arm's length using competitive public solicitation or such other methods as may be agreed with the Section Developer. MDTA shall use the same contractors for the P3 Program related tolling systems and all other MDTA toll facilities. c) MDTA shall only include in the Capital Cost Fee passed onto the Section Developer(s) the incremental additional capital costs of its system improvements that exceed the amount that MDTA would have incurred to carry out such improvements for only its other facilities (excluding the P3 Program). d) MDTA shall use reasonable efforts to avoid charging any capital improvement costs more frequently than once every ten (10) years during the Term. e) The Section Developer(s) shall be consulted by MDTA in advance of any potential capital improvement cost that will be passed onto the Section Developer(s) through a capital costs fee (including with respect to the process MDTA will go through to determine such cost), and MDTA shall in good faith consider any comments or concerns raised by the Section Developer(s). |
| 31. | Determination of Personnel Oversight Costs | <p>The number of staff is heavily influenced by automation and the number of issues relating to the Section that require attention from MDTA staff. MDTA's present assumption is that Phase South will require 2 MDTA staff. Currently fully loaded MDTA employee costs are estimated at \$65,000 per annum, each. However, the actual costs shall be passed on which will vary depending on numerous factors including the quality of the Trip data that is provided by the Section Developer.</p> |
| 32. | Allocation of costs between Sections | <p>The Transaction Fee applicable to Trips through more than one Section shall be split across Sections. The Section Developer shall identify the allocation of the Trip Toll and Transaction Fee across the different Sections in its Trip data.</p> |
| 33. | Rejected Trips | <p>If MDTA rejects a Trip in accordance with Section 25 (<i>Resubmission of Corrected Trip Data</i>) then the rejected Trip shall not be included in the calculation of the Section Developer Toll Payment. The treatment of the Transaction Fee for rejected Trips is set out Section 25 (<i>Resubmission of Corrected Trip Data</i>) above.</p> |

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| 34. | Clawback | <p>In the event that (i) MDTA accepts a Trip as a Valid Trip and includes such Valid Trip in the calculation of the Section Developer Toll Payment due to the Section Developer under the MDTA Notes, and (ii) it is subsequently determined that the Trip was not a Valid Trip (due to Trips being submitted for an Exempt Vehicle, deficiencies, or errors with the Trip data (including errors that lead to the User being mischarged) or for any other reason causing the Trip not to comply with the requirements of a Valid Trip then MDTA may recover from the Section Developer the relevant Trip Toll applicable to such Section. MDTA shall collect such amount by withholding it from the next Section Developer Toll Payment due under the MDTA Notes. MDTA shall notify the Section Developer in writing of any amount to be clawed back not less than [5] days before the relevant withholding is applied, including the Trips rejected and the supporting code identifying the reason for the rejection.</p> <p>MDTA may exercise its right to such clawback at any time. The Section Developer acknowledges that it may take months for MDTA to become aware of issues with Trip data, particularly those in which the customer identifies the issue.</p> |
| Part J – Termination and Step-In | | |
| 35. | Termination | <p>The TSA shall automatically terminate, without notice, upon the termination of the Section P3 Agreement without liability of either party (except as may be set forth in the Section P3 Agreement). The lenders direct agreement shall include terms to ensure that the Section P3 Agreement and the TSA are transferred together in the event of a foreclosure.</p> |
| Part K – Miscellaneous | | |
| 36. | Change Orders³ | <p>The TSA will contain customary provisions governing the right of MDTA to issue change orders and directive letters in relation to the Tolling Services Agreement and the ICD, as well as the right of the Section Developer to propose changes, provided that (i) the Section Developer is required to accommodate, without cost to MDTA or MDOT, changes proposed by MDTA to the Tolling Services Agreement or the ICD that do not give rise to costs for the Section Developer in excess of []% of Toll Revenues received by the Section Developer during the Term, and (ii) this paragraph shall be without prejudice to the Section Developer's obligations under Section 17 (<i>Modifications to Systems</i>) to accommodate changes to MDTA's system without cost to MDTA or MDOT (and such costs shall not be counted towards the threshold set out in (ii)).</p> <p>Changes to (i) the Toll Rate Range Maximum, (ii) the Toll Rate Soft Cap, (iii) the escalation factor applicable to the Toll Rate Soft Cap or the Toll Rate Range Maximum (or a failure by MDTA to apply such escalation factor), (iv) Operational Metrics associated with the Toll Rate Soft Cap, (v) the vehicle Classification Multipliers, or (vi) the definition of Permitted Vehicles, Exempt Vehicles, or HOVs, will give rise to a Compensation Event under the Section P3 Agreement. The multiplier or additional charges applicable to Trips being billed by MDTA as non-transponder transactions and any associated fees/penalties applicable to non-transponder transactions may be adjusted by MDTA or any other governmental entity without liability to MDOT or MDTA, and such changes shall not be considered a Compensation Event or a change order. Further, any change to fees and charges associated with non-payment or late payment of any toll or tolling violations shall not give rise to a Compensation Event or change order or any liability for MDOT or MDTA.</p> |

³ **NTD:** These provisions may ultimately be located in the Section P3 Agreement, rather than the TSA.

| | | |
|-----|----------------------------------|--|
| 37. | Partnering | The partnering programs put in place in relation to the Section P3 Agreement shall accommodate issues that arise in relation to the TSA, and such partnering programs shall be used to resolve issues that arise under the TSA. |
| 38. | Governing Law | The TSA will be governed in accordance with the laws of the State of Maryland. |
| 39. | Assignment | <p>Section Developer may not transfer nor assign the TSA except to its permitted assignee of its interests in the Section P3 Agreement (the permissibility of which shall be determined solely under the Section P3 Agreement).</p> <p>MDTA may not transfer nor assign the TSA except (i) with the prior consent of the Section Developer, in the Section Developer's discretion, or (ii) without the Section Developer's consent, to any other Person that succeeds to (1) all the governmental powers and authority of MDTA or (2) all the tolling service functions and operations of MDTA in the State.</p> |
| 40. | Dispute Resolution | Disputes shall be governed by the dispute resolution procedures set forth in the Section P3 Agreement. |
| 41. | Other | Customary provisions will be included in the TSA with respect to waiver of consequential damages, mitigation of damages, waivers, independent contractor status, agency, personal liability, successors and assigns, limitation on third party beneficiaries, notices, authorized representatives, and counterparts. |
| 42. | Limited Liability of MDTA | <p>The Section Developer will have no claim against any asset of MDTA (except to the extent set out in the MDTA Notes), and the Section Developer will waive any right to enforce a judgment holding MDTA liable against any such asset of MDTA.</p> <p>The remedies of the Section Developer with respect to breach of the TSA by MDTA shall be limited to those set out in the Section P3 Agreement.</p> |

Appendix 1

Defined Terms

Capitalized terms used in this term sheet but not defined in this Appendix 1 have the meaning given to such term in Exhibit 1 to the Section P3 Agreement Term Sheet.

"Active Transponder" means any Transponder identified on the current Transponder Master List provided by MDTA to the Section Developer pursuant to Section 22 (*Transponder Master List*).

"Base Toll Rate" is defined in Section 5.4(a) of Appendix 2 (*Toll Rate Setting*).

"Business Rules" is defined in Section 18 (*Business Rules*).

"Capital Cost Fee" is defined in Section 28 (*Transaction Fee*).

"Classification Multiplier" means each of the classification multipliers set out in the table in Section 5.5 of Appendix 2 (*Toll Rate Setting*).

"CSC" means the portion of an ETCS providing Customer Relationship Management services, such as account management, financial processing, call centers and IVR, website services, interoperability tracking, accounting reconciliation and settlement services, and violation processing services. The CSC will also be the final repository for all MDTA toll system data. The CSC for this project will be provided by MDTA or the CSC Operator under a 3rd party agreement.

"CSC Operator" is defined in Section 20 (*MDTA Appointment of CSC Operator*).

"Displayed Effective Rate Commitment" is defined in Section 5.3(a)(ii) of Appendix 2 (*Toll Rate Setting*).

"Effective Rate" is defined in Section 5.2 of Appendix 2 (*Toll Rate Setting*).

"ETC" is defined in the Predevelopment Work Requirements.

"ETC Fee" is defined in Section 28 (*Transaction Fee*).

"ETCS" means the roadside electronic toll collection system provided by Section Developer, including its components, systems and subsystems, the hardware and physical infrastructure, and the software.

"ETCS Host" means the main or controlling computer connected to other computers or terminals to which it provides data or computing services via a network for the ETCS.

"ETTM" means electronic toll and traffic management.

"ETTM Data" means all data generated by or accumulated in connection with the operation of the ETTM System, including but not limited to User specific information.

"ETTM Equipment" means the automatic vehicle identification equipment, video monitoring equipment, vehicle occupancy detection equipment, toll violator systems, and electronic toll data collection equipment, including its components, systems, and subsystems; the traffic management system equipment; communications equipment, and all associated hardware and physical infrastructure and other computer hardware and software necessary to meet the performance specifications for ETTM.

"ETTM Facilities" means the administration/operations building, toll gantries, and technical cabinets, utility connections, lighting facilities, and other facilities associated with electronic toll and traffic management.

"ETTM System" means the ETTM Facilities, ETTM Equipment, and the Software which monitors, controls, or executes the ETTM Equipment, all of which will meet the minimum performance criteria established by the Predevelopment Work Requirements. The ETTM System includes the ITS and the ETCS.

"Exempt Vehicles" is defined in Attachment A to Appendix 2 (*Toll Rate Setting*).

"E-ZPass InterAgency Group" or **"IAG"** means the E-ZPass InterAgency Group (IAG) which operates the largest, most successful toll interoperability network in the world. As of the date of this Term Sheet, the IAG is comprised of 31 toll entity members (39 operating toll agencies) across 18 states. Maryland tolling is governed by the IAG adopted protocols – <https://e-zpassiag.com/>.

"Grace Period" is defined in Section 5.3(a)(i) of Appendix 2 (*Toll Rate Setting*).

"HOV" is defined in Attachment A to Appendix 2 (*Toll Rate Setting*).

"Image-Based Transaction" means a Toll Transaction where the vehicle is identified by a photographic image of the license plate.

"Interface Control Document" or **"ICD"** is defined in Section 16 (*Interface Control Document*).

"Interoperability Agreement" means an agreement between MDTA and one or more other Toll Account Providers that sets out protocols and arrangements pursuant to which the parties thereto covenant to remit payment to one another for all Toll Transactions that meet the terms for transmission, debiting and payment, and are required to be included in the current payment cycle, as set forth in the protocols and arrangements specified in such agreement. These agreements include both the IAG and regional interoperability agreements.

"Interoperable Toll Account" means a Toll Account provided by an Interoperable Toll Account Provider or E-ZPass member.

"Interoperable Toll Account Provider" means a Toll Account Provider, other than MDTA or an E-ZPass member, that is party to a valid and enforceable Interoperability Agreement with MDTA.

"Interoperable Transponder" means a Transponder linked to an Interoperable Toll Account.

"ITS" is defined in the Predevelopment Work Requirements.

"MDTA Outage" is defined in Section 26 (*System Faults and Failures*).

"MDTA's Host" means the main or controlling computer connected to other computers or terminals to which it provides data or computing services via a network for the ETCS.

"MDOT MVA" means the Maryland Department of Transportation Motor Vehicle Administration.

"Operational Metrics" means those metrics set forth in Section 5.4(f) of Appendix 2 (*Toll Rate Setting*).

"Performance Requirements" is defined in Section 8 (*Change in Toll System Technology*).

"Personnel Oversight Costs" is defined in Section 28 (*Transaction Fee*).

"Predevelopment Work Requirements" means those provisions set forth in Exhibit 6 to the Phase P3 Agreement.

"Reinitiation Conditions" are set out in the table at Section 1.2 of Appendix 4 (*MDTA's Right to Stop Accepting and Processing Trips*).

"Term" is described in Section 3 (*Term*).

"Toll Account" means a User's electronic toll account with a Toll Account Provider from which the User's toll payments are debited.

"Toll Account Provider" means an agency or other person that provides and maintains Toll Accounts for Users.

"Toll Rate" is defined in Section 5.3(a) of Appendix 2 (*Toll Rate Setting*).

"Toll Rate Range Maximum" is defined in Section 5.4(c) of Appendix 2 (*Toll Rate Setting*).

"Toll Rate Range Minimum" is defined in Section 5.4(c) of Appendix 2 (*Toll Rate Setting*).

"Toll Rate Sign" is defined in Article 4 of Appendix 2 (*Toll Rate Setting*).

"Toll Rate Soft Cap" is defined in Section 5.4(e) of Appendix 2 (*Toll Rate Setting*).

"Toll Transaction" means an electronic record of a toll and a related set of contemporaneous vehicle images representing a vehicle that passes through a specific Tolling Point on a Priced Managed Lane on the Section. Toll Transactions may be either a Transponder Transaction or an Image-Based Transaction.

"Tolling Back-Office System" means the portion of the ETCS or MDTA's customer service system that works behind the scenes to minimize human intervention in transaction processing, account management and reconciliation. The Tolling Back-Office System for each party's system is the interface between the Section Developer's ETCS Host and MDTA's CSC Host.

"Tolling Point" means a single point on the Priced Managed Lanes at which Toll Transaction data is collected with respect to vehicles using the Priced Managed Lanes. Each Tolling Point shall collect data associated with the use of a defined part of the Priced Managed Lanes.

"Transaction Audit" is defined in Section 1.4 of Appendix 4 (*MDTA's Right to Stop Accepting and Processing Trips*).

"Transaction Fee" means the fee due to MDTA with respect to each Trip submitted to MDTA for processing by the Section Developer and calculated pursuant to Section 28 (*Transaction Fee*).

"Transponder" means an in-vehicle device which is designed to transmit information used to collect tolls and is associated with a particular Toll Account. For the avoidance of doubt, however, "Transponder" does not include a vehicle's license plate or other identifying markers that require the use of image-reading technology.

"Transponder Master List" is defined in Section 22 (*Transponder Master List*).

"Transponder Transaction" means a Toll Transaction with respect to a vehicle meeting equipped with an *E-ZPass* or an Interoperable Transponder and that is an Active Transponder.

"Trip" means a bundled group of Toll Transactions relating to a single trip or passage on the Priced Managed Lanes by a vehicle within Phase 1.

"Trip Toll" is defined in Section 5.1 of Appendix 2 (*Toll Rate Setting*).

"TSA" is defined in the opening paragraphs of this Term Sheet.

"Unacceptable Customer Service Event" is defined in Section 1.2 of Appendix 4 (*MDTA's Right to Stop Accepting and Processing Trips*).

"User(s)" means (i) the registered owner of a vehicle traveling on the Priced Managed Lanes or any portion thereof, (ii) any other Person traveling in a vehicle on the Priced Managed Lanes or any portion thereof, and (iii) any other Person responsible under applicable law for payment of a toll for a vehicle traveling on the Priced Managed Lanes or any portion thereof.

"Valid Trip" is described in Section 24 (*Valid Trip*).

Appendix 2

Toll Rate Setting

1. VEHICLE CLASSIFICATION

The ETCS shall classify every vehicle that passes through a Tolling Point based on a user configurable set of parameters that includes number of axles (with tires in contact with the road), and vehicle height, length, and width. For example, it shall be possible to classify a 2-axle pickup towing a 1-axle trailer differently than a 3-axle dump truck.

For computation of the applicable Toll Rate pursuant to Article 5, vehicles shall be classified as listed below. For graphical representations, please refer to Attachment B (*P3 Program PML Vehicle Classifications*).

| Vehicle Class | Description |
|----------------------|--|
| Class 2 | Two-axle vehicles including passenger cars, smart cars, ambulances, pickup trucks, and vans; RVs; and commercial trucks. |
| Class 3A | Two-axle vehicles towing a 1-axle Trailer. |
| Class 3B | "Heavy" Three-axle vehicles such as busses or commercial trucks. |
| Class 4A | Two-axle vehicles towing a two-axle trailer. |
| Class 4B | "Heavy" Four-axle vehicles including single and multi-unit commercial trucks. |
| Class 5 | Five-axle vehicles or combination of vehicles. |
| Class 6 | Six or more-axle multi-unit commercial trucks and commercial trucks with trailers. |
| Class 8 | Motorcycles and other vehicles with a single wheel on at least one axle. |

2. TOLLING POINTS

The Priced Managed Lanes shall have numerous entry and exit points at which vehicles may join or leave them. Between each entry point and the next possible exit point there shall be a Tolling Point. The Section Developer shall set the number of miles of Priced Managed Lane associated with a Tolling Point prior to commencement of tolling operations. The number of miles of Priced Managed Lane associated with a Tolling Point shall (a) be calculated along the centerline of the Priced Managed Lanes, (b) be the minimum number of miles a User could travel with respect to that Tolling Point, and (c) exclude any part or mileage of Priced Managed Lane located in Virginia. The Section Developer may not modify the entry or exit points associated with any Tolling Point without the prior written consent of MDTA.

The Section Developer shall only be permitted to (a) locate Tolling Points within Maryland and (b) calculate tolls based on distances travelled in the Priced Managed Lanes located in Maryland.

3. **TRIP LENGTH**

3.1 **Trip Starting Point**

The first Toll Transaction within a vehicle's trip within Phase 1 shall be at the first Tolling Point crossed by the vehicle. This Tolling Point may be at one extremity of Phase 1 in either direction or an interior Tolling Point.

3.2 **Trip End Point**

The last Toll Transaction of a vehicle's trip shall be at the last Tolling Point crossed by the vehicle. This Tolling Point may be at one extremity of Phase 1 in either direction or an interior Tolling Point. Until a User exits the Priced Managed Lanes, all Toll Transactions for such User within the Phase shall be recorded as one single Trip.

4. **TOLL RATE SIGNS⁴**

At each entry point to the Priced Managed Lanes, the Section Developer shall include a sign or series of signs (each, a "**Toll Rate Sign**") that displays the aggregate toll payable by a Class 2 Vehicle to use the Priced Managed Lanes to each [major exit] within the next [] miles. The toll rates displayed on the Toll Rate Signs shall be based on the current Base Toll Rate at each Tolling Point between the applicable Toll Rate Sign and the stated end point of the Trip. The Toll Rate Signs shall meet the requirements of the Predevelopment Work Requirements and be located to provide sufficient time for vehicles to elect not to cross the Tolling Point.

5. **TOLL CALCULATION**

5.1 **Trip Toll Rate**

The "**Trip Toll**" applicable to any vehicle traveling on the Priced Managed Lanes within any phase of the P3 Program is the sum of all Effective Rates applicable to such vehicle for each Tolling Point included in the relevant Trip. Such Trip Toll shall be a single sum which is provided to MDTA as part of a Valid Trip for each User of the Priced Managed Lanes.

Vehicles may only be charged for the miles they have actually traveled.

5.2 **Effective Rate**

The "**Effective Rate**" with respect to any vehicle at any Tolling Point is (i) the Toll Rate applicable to such vehicle at the relevant Tolling Point multiplied by (ii) the number of miles associated with the Tolling Point where the vehicle is detected (and rounded to the nearest \$0.01).

5.3 **Toll Rate**

- (a) The "**Toll Rate**" associated with any Tolling Point for any vehicle using the Priced Managed Lanes is the product of (i) the Base Toll Rate associated with such Tolling Point multiplied by (ii) the applicable Classification Multiplier for such vehicle, subject to any adjustments to the Base Toll Rate applicable to any vehicle based on the following:
 - (i) If there is any change in the toll rate displayed on a Toll Rate Sign between the time that any vehicle entering the Priced Managed Lanes is able to observe a Toll

⁴ **NTD:** The identity of the major exits to be displayed on each Toll Rate Sign will be agreed between the Section Developer and MDOT. A table/diagram identifying and describing these major exits will be added to the final agreement prior to execution

Rate Sign and the time that it passes through the first Tolling Point of its trip, there shall be a grace period sufficient to allow the User of a vehicle entering the Priced Managed Lanes immediately prior to such Tolling Point time to (A) observe the Toll Rate Sign, (B) make a decision about whether or not to accept the displayed toll rate, and (C) take action to avoid entering the Priced Managed Lanes or proceed to the relevant Tolling Point (the "**Grace Period**") during which the Base Toll Rate applicable to any vehicle entering the Priced Managed Lanes immediately prior to such Tolling Point will be the lower of (X) the Base Toll Rate used to calculate the toll rate displayed immediately before the toll rate currently displayed and (Y) the Base Toll Rate used to calculate the toll rate currently displayed. The Section Developer will be responsible for ensuring the Grace Period is sufficient to deliver this outcome for all vehicles.

- (ii) If a vehicle is shown one or more toll rates on any Toll Rate Sign(s) during any trip, then the Base Toll Rate applicable to that vehicle for any Tolling Point will be the lower of (i) the Base Toll Rate used to calculate the toll rate displayed on the Toll Rate Sign and (ii) the Base Toll Rate currently applicable to such Tolling Point (the "**Displayed Effective Rate Commitment**"). The Displayed Effective Rate Commitment is determined with reference to the Grace Period.
- (b) The Base Toll Rate associated with each Tolling Point is determined as set out in Section 5.4 below. Classification Multipliers are set out in Section 5.5 below.

5.4 **Base Toll Rate**

- (a) The "**Base Toll Rate**" associated with any Tolling Point is the per mile Transponder toll rate set by the Section Developer for a Class 2 vehicle subject to the caps set out below. The Section Developer may change the Base Toll Rate associated with any Tolling Point not more frequently than once every [5] minutes.
- (b) *[Once MDTA has set the toll rate range following completion of the toll rate setting process in accordance with applicable law then this language shall be included here in the full version of the TSA:]* MDTA has established a toll rate range with respect to the dynamic pricing mileage rate and a soft cap applicable to the Section in accordance with Section 11.07.05 of COMAR and Transportation Article, §4-312, Annotated Code of Maryland, as further set out below.
- (c) *[Once MDTA sets the toll rate range following completion of the toll rate setting process in accordance with applicable law then details shall be included here in the full version of the TSA:]* MDTA has established the following toll rate range for each vehicle classification [which shall be subject to escalation in accordance with paragraph [(g)] below]⁵:

| Vehicle Class | The minimum toll rate per mile transponder toll rate (the " Toll Rate Range Minimum ") | The maximum toll rate per mile transponder toll rate (the " Toll Rate Range Maximum ") |
|----------------------|---|---|
| Class 2 | <i>[Table to be populated based on rates set by MDTA in accordance with applicable law prior to execution of the TSA]</i> | |
| Class 3A | | |
| Class 3B | | |

⁵ **NTD**: To be included only if MDTA sets escalation.

| | |
|----------|--|
| Class 4A | |
| Class 4B | |
| Class 5 | |
| Class 6 | |
| Class 8 | |

- (d) The Section Developer shall in no event set the applicable toll rate for a vehicle higher than the Toll Rate Range Maximum applicable to that vehicle's classification or lower than the Toll Rate Range Minimum applicable to that vehicle's classification. The Section Developer shall in no event set the Base Toll Rate for a Class 2 vehicle higher than the Toll Rate Range Maximum for a Class 2 vehicle or lower than the Toll Rate Range Minimum for a Class 2 vehicle.⁶
- (e) ⁷ [If MDTA sets soft caps following completion of the toll rate setting process in accordance with applicable law then details shall be included here in the full version of the TSA] [MDTA has established the soft cap per mile transponder toll rate (the "**Toll Rate Soft Cap**"), [which shall be to subject to indexation in accordance with paragraph [(g)] below]⁸].

| Vehicle Class | Toll Rate Soft Cap |
|---------------|--|
| Class 2 | <p><i>[Table to be populated based on rates set by MDTA in accordance with applicable law prior to execution of the TSA]</i></p> |
| Class 3A | |
| Class 3B | |
| Class 4A | |
| Class 4B | |
| Class 5 | |
| Class 6 | |
| Class 8 | |

The toll rate applicable to any vehicle may only exceed the soft cap applicable to that Class of vehicle in the circumstances set out in Section 5.4(f) below. The Section Developer must set the Base Toll Rate for each Tolling Point at or below the Toll Rate Soft Cap applicable to Class 2 vehicles when the Operational Metrics are being met within the Priced Managed Lanes associated with such Tolling Point. If the Operational Metrics are not being met within any part of the Priced Managed Lanes associated with any Tolling Point, the Section Developer may set the Base Toll Rate for the applicable Tolling Point(s) exceeding the Toll Rate Soft Cap (but at all times not to exceed the Toll Rate Range Maximum applicable to Class 2 vehicles).

⁶ **NTD** The "Base Toll Rate" is used in the calculations set out above and is the Class 2 vehicle rate, which is then converted to the Toll Rate applicable to a vehicle based on the classification multiplier set out in Section 5.5. However, for completeness, the table set out above includes all classifications for additional detail.

⁷ **NTD**: To be included only if MDTA set a soft cap.

⁸ **NTD**: To be included only if MDTA sets escalation.

- (f) ⁹[Subject to the requirement that Section Developer may not change the Base Toll Rate more frequently than once every five minutes], the Base Toll Rate applicable to any Tolling Point may exceed the Toll Rate Soft Cap only if the Section Developer complies with the following provisions (the "**Operational Metrics**"):

(i) *[to be determine by MDTA]*

- (g) *[If MDTA approves escalation of the Toll Rate Range Minimum, the Toll Rate Range Maximum or the Toll Rate Soft Cap then details shall be included here].*

5.5 Classification Multipliers

The table below sets forth the Classification Multiplier that shall apply to each vehicle class.

| Vehicle Class | Classification Multiplier |
|---------------|---------------------------|
| Class 2 | 1 |
| Class 3A | 1.5 |
| Class 3B | 2 |
| Class 4A | 2.5 |
| Class 4B | 3 |
| Class 5 | 6 |
| Class 6 | 7.5 |
| Class 8 | 0 |

5.6 HOVs and Exempt Vehicles

Notwithstanding any other provision of this Appendix 2:

- (a) The Toll Rate applicable to all Exempt Vehicles shall be zero dollars (\$0) per mile.
- (b) If the Priced Managed Lanes are operating as High Occupancy Toll (HOT) lanes, the Toll Rate applicable to HOVs shall be zero dollars (\$0) per mile.
- (c) If the Priced Managed Lanes are not operating as High Occupancy Toll (HOT) lanes then mass transit and over the road buses shall be categorized as Exempt Vehicles.

⁹ **NTD**: To be included only if MDTA set a soft cap.

Attachment A

Exempt Vehicles and HOV

"Exempt Vehicles" are those vehicle classes listed below:

- (a) emergency responder vehicles in response mode;
- (b) State and federal law enforcement vehicles in pursuit/call-response mode;
- (c) Maryland National Guard vehicles;
- (d) Maryland National Guard member's personal vehicles when traveling on official orders; and
- (e) other vehicle classes to be granted Exempt Vehicle non-revenue status at any Section Developer's discretion; however, such other vehicle classes shall be Exempt Vehicles only when traveling on the Priced Managed Lanes within such Section Developer's section of the P3 Program.

"HOV" are those high occupancy vehicles list below:

- (a) Class 8 motorcycles;
- (b) mass transit and over the road buses¹⁰; and
- (c) any Class 2, Class 3A, Class 3B, Class 4A, Class 4B, Class 6 vehicle (except Mass Transit and Over the Road Buses) that is operating with a minimum number of three live human occupants and where the operator has followed the required procedure to declare high occupancy mode status. The procedure for designating as an HOV must be agreed between MDOT and the Section Developer and (i) shall not be more onerous on the User than customary in the US toll road industry and (ii) shall be updated from time to time as technology and industry practice changes.

¹⁰ **NTD:** If the Priced Managed Lanes are not operating as High Occupancy Toll (HOT) lanes then mass transit and over the road buses shall be categorized as Exempt Vehicles.

Attachment B

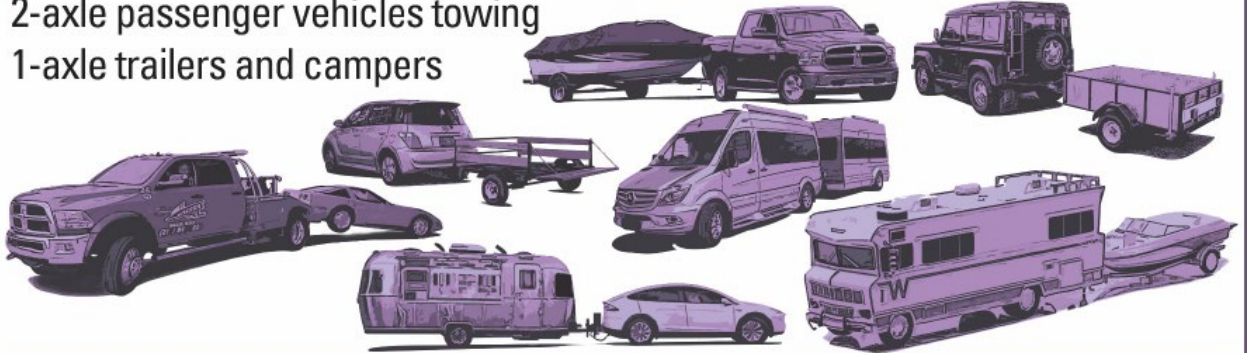
Graphic Vehicle Classifications

- (a) Below are graphical depictions of vehicle classifications: 2-Axle; 3A-Axle Light; 3B-Axle Heavy; 4A-Axle Light; 4B-Axle Heavy; 5-Axle; 6+ Axle; and Motorcycles and other small vehicles. The classification of Exempt Vehicles, [HOVs] or other designated vehicles exempted tolling shall supersede the images shown in these classification tables.



3A-AXLE LIGHT


2-axle passenger vehicles towing
1-axle trailers and campers



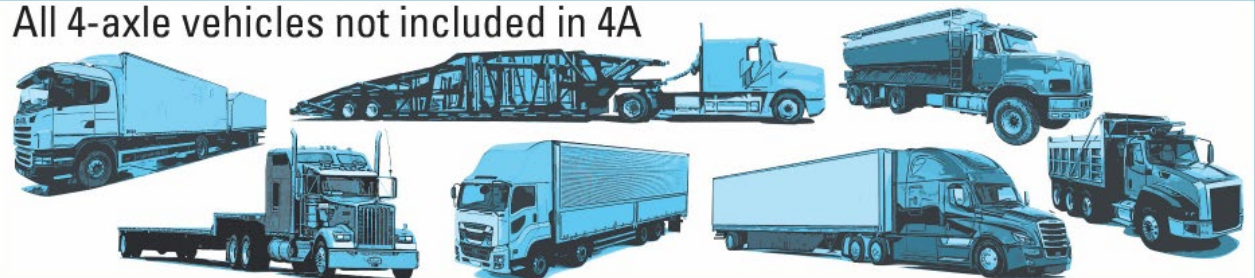
3B-AXLE HEAVY

All 3-axle vehicles not included in 3A



- ## 4A-AXLE LIGHT
- 2-axle passenger vehicles towing
2-axle trailers and campers
- 
- This section contains several illustrations of 2-axle passenger vehicles towing 2-axle trailers and campers. The vehicles shown include a small hatchback towing a small utility trailer, a pickup truck towing a large travel trailer, a boat on a trailer, a pickup truck towing a horse trailer, a minivan towing a small utility trailer, a pickup truck towing a horse trailer, a minivan towing a small utility trailer, a pickup truck towing a horse trailer, and a minivan towing a small utility trailer.

All 4-axle vehicles not included in 4A



5-AXLE (No change)



6+ AXLE (No change)



MOTORCYCLES & SMALL VEHICLES

2 and 3 wheeled vehicles



Appendix 3

Valid Trip Requirements

Prior to commencement of tolling on any part of the Section and from time to time during the Term, MDTA and the Section Developer shall agree all required information and data that must be included in any Trip submitted to MDTA, together with the format of such data, in order for such Trip to be deemed to be a Valid Trip. Any Trips submitted to MDTA which do not comply with these requirements may be rejected by MDTA. This Appendix 3 sets out the minimum requirements for a Valid Trip, which shall be developed and supplemented as described above.

A Trip will not be a Valid Trip if submitted to MDTA more than 30 days after the date of the Trip.

1. All Trips shall:
 - (a) contain all Toll Transactions for such trip, each complying with the requirements set out below;
 - (b) contain a unique sequential number associated with the Trip;
 - (c) identify the vehicle classification (and not include any conflicting classifications in different Toll Transactions submitted with such Trip);
 - (d) not relate to an Exempt Vehicle or HOV;
 - (e) identify the entry and exit date and time for each Trip;
 - (f) include the Effective Rate upon entry of the Trip;
 - (g) identify the amount of the Trip Toll for such Trip;
 - (h) identify the Section Developer that should be paid with respect to any Trip, and in the event that any Trip traverses more than one section of a phase, identify (i) the amount of the Trip Toll attributable to Toll Transactions in each section and the section developer that should be paid with respect to each part of the Trip Toll and (ii) the amount of the Transaction Fee for such Trip allocated to each section developer (in each case in accordance with the ICD); and
 - (i) contain an image of the vehicle at the exit point (last Tolling Point) of the Trip along with an image of the vehicle's region of interest conforming to the quality defined in the Predevelopment Work Requirements. Note that MDTA is required to use an image from the last Tolling Point (front or rear) in the Trip, unless such image is corrupted in which case the process set forth in Section 25.6.1.3 of the Predevelopment Work Requirements shall be followed.
2. All Toll Transactions included as part of a Trip shall:
 - (a) contain a unique sequential number associated with the Toll Transaction;
 - (b) contain a transaction date and time in a format consistent with the ICD and the Predevelopment Work Requirements;
 - (c) identify the Tolling Point and the number of miles of Priced Managed Lane applicable to such Tolling Point;
 - (d) contain a valid vehicle classification;
 - (e) not relate to an Exempt Vehicle or HOV;
 - (f) contain the valid Effective Rate for such Tolling Point applicable to that vehicle classification;
 - (g) contain a front and rear image of the vehicle conforming to the quality defined in the Predevelopment Work Requirements;^{11 12}
 - (h) contain an image of the region of interest conforming to the quality defined in the Predevelopment Work Requirements; and

¹¹ **NTD:** A trip may be accepted by MDTA if the Section Developer does not have an image for all gantries/Tolling Points. When this situation occurs under MDTA's current system they include the missing gantry if the dwell time between the gantries captured are within certain parameters.

¹² **NTD:** If MDTA receive a valid Transponder read without an image, they would typically process the Trip as valid. However, this must not become a frequent occurrence and if the customer contests the Trip, MDTA would clawback the payment to the Section Developer.

- (i) contain the license plate number, state or jurisdiction, and license plate type.¹³
- 3. All Toll Transactions that are Transponder Transactions shall:¹⁴
 - (a) contain all required transponder data, including the transponder protocol (TDM, 6b, 6c); and
 - (b) if multiple Active Transponders are present in a vehicle: (i) identify an active Maryland transponder (if present), or (ii) if no active Maryland transponder is present, select an active IAG transponder, or (iii) if neither is present, select any other Active Transponder. MDTA may elect to change this requirement to require that the Section Developer sends information regarding all Active Transponders as part of the Trip for selection by MDTA, and such change shall not entitle the Section Developer to a claim for the cost of implementing or complying with such change.

¹³ **NTD:** If OCR cannot read the license plate then the Section Developer is required to manually review the image before submitting the trip to MDTA. If, following submission to MDTA, MDOT MVA flags a license plate as unregistered then MDTA shall review the image and correct when possible. If not possible to correct due to image quality then MDTA will reject the Trip and deduct from monies owed to Section Developer, if previously paid. Such Trip will not be eligible for resubmission.

¹⁴ **NTD:** MDTA may accept a Trip which does not have an Active Transponder read for all Tolling Points if the affected Toll Transactions contain the necessary front and rear image of the vehicle conforming to the quality defined in the Predevelopment Work Requirements, including the license plate number, state or jurisdiction, and license plate type. However, this must not become a consistent issue.

Appendix 4

MDTA's Right to Stop Accepting and Processing Trips

1. Unacceptable Customer Service Events

- 1.1 The Section Developer shall proactively ensure that Trip data submitted to MDTA meets or exceeds performance standards as well as actively and honestly communicate to MDTA any issues that occur (or may occur) with Trip data. The parties acknowledge and agree that whenever possible MDTA shall learn of issues with respect to Trip data from the Section Developer and not from Users or the general public. If the Section Developer experiences quality issues with respect to Trip data, it shall communicate such issues to MDTA immediately (notwithstanding that the Section Developer may not be aware of the cause or resolution of such issue). The Section Developer shall keep MDTA informed as to the status of the issue as it works to identify the cause of and correct the issue. MDTA may relax the requirements of Noncompliance Event ID#15.3 (Trip Processing) in Table 25-6 (Operating Period Performance) of the Predevelopment Work Requirements for Trips that are affected by issues that are promptly reported to MDTA in accordance with this Section 1.1.
- 1.2 Subject to the subsequent provisions of this Article 1, if any of the events set out in the table below (each an "**Unacceptable Customer Service Event**") occurs and is continuing, MDTA may (i) refuse to continue processing any category of Trips affected by such event and (ii) deem that such Trips are not Valid Trips. If MDTA exercises its rights pursuant to this Section 1.2, it shall promptly notify the Section Developer and provide details of the Unacceptable Customer Service Event.

| | Unacceptable Customer Service Event | Reinitiation Conditions |
|-----|---|---|
| (a) | Greater than 2% of Trips submitted to MDTA within any period of time (within any relevant category of Trips based on a sample referred to in Section 1.4 below) which are being processed based on Image-Based Transactions are reported to MDTA with inaccuracies with respect to any license plate attributes (characters, State, plate type, etc.), and such inaccuracies may lead to any person being charged the incorrect toll. | The root cause of the Unacceptable Customer Service Event has been determined and at least 99.50% of Trips within the relevant category of Trips that was subject to the Unacceptable Customer Service Event are accurate with respect to all license plate attributes in accordance with MDOT MVA rules. |
| (b) | Greater than 2% of Trips submitted to MDTA within any period of time (within any relevant category of Trips based on a sample referred to in Section 1.4 below) are reported to MDTA with the incorrect vehicle classification. | <p>Option 1: The Section Developer may modify all Trips to post as class 2 to avoid any overcharges until the Reinitiation Conditions set out below at Option 2 are achieved. Trips submitted to MDTA under this option may not be resubmitted with a different vehicle classification following resolution of the issue.</p> <p>Option 2: The root cause of the Unacceptable Customer Service Event has been determined and, with respect to Trips within the relevant category of Trips that was subject to the Unacceptable Customer Service Event, at least 99.80% of 2-axle vehicles shall</p> |

| | | |
|-----|---|---|
| | | be classified correctly and at least 98.00% of 3+ axle vehicles shall be classified correctly. |
| | Greater than 2% of Trips submitted to MDTA within any period of time (within any relevant category of Trips based on a sample referred to in Section 1.4 below) are reported to MDTA with inaccurate Effective Rate data, and such inaccuracies may lead to any person being charged the incorrect toll. | The root cause of the Unacceptable Customer Service Event has been determined and all Trips within the relevant category of Trips that was subject to the Unacceptable Customer Service Event are accurate with respect to Toll Rate data at least 99.50% of the time. |
| | Greater than 2% of Trips submitted to MDTA within any period of time (within any relevant category of Trips based on a sample referred to in Section 1.4 below) are reported to MDTA with the incorrect image associated with any Toll Transaction forming part of that Trip, and such inaccuracies may lead to any person being charged the incorrect toll. | The root cause of the Unacceptable Customer Service Event has been determined and all Trips within the relevant category of Trips that was subject to the Unacceptable Customer Service Event are associating the correct image with each Toll Transaction forming part of the Trip. |
| | Greater than 2% of trips made by HOVs (that are correctly declaring) within the relevant Section are incorrectly submitted to MDTA within any period of time (within any relevant category of Trips based on a sample referred to in Section 1.4 below), and such errors may lead to any person being charged the incorrect toll. | The root cause of the Unacceptable Customer Service Event has been determined and at least 99.95% of trips made by HOVs (that are correctly declaring) within the relevant category of Trips that was subject to the Unacceptable Customer Service Event are not being submitted to MDTA. |
| (d) | Greater than 2% of Trips submitted to MDTA within any period of time (within any relevant category of Trips based on a sample referred to in Section 1.4 below) either: (i) contain inaccurate or missing data or (ii) are duplicate of any other Trip submitted to MDTA or should have been submitted as part of the same Trip (i.e. split trip), and such inaccuracies may lead to any person being charged the incorrect toll. | The root cause of the Unacceptable Customer Service Event has been determined and all Trips within the relevant category of Trips that was subject to the Unacceptable Customer Service Event are accurate and do not contain duplicate or split trips at least 99.50% pf the time. |

- 1.3 MDTA shall only exercise its right to refuse to continue processing Trips pursuant to Section 1.2 above with respect to any category or categories of Trips that MDTA reasonably determines to be affected by the Unacceptable Customer Service Event following determination by MDTA in accordance with Section 1.4 that the relevant Unacceptable Customer Service Event has occurred (provided that, if MDTA believes, in its sole discretion, that an Unacceptable Customer Service Event has occurred and is ongoing it may immediately cease to continue to process Trips in accordance with this Article 1 for a period of not more than [48] hours while it performs a Transaction Audit of the relevant Trips in accordance with Section 1.4 (and shall promptly notify the Section Developer of such action and the outcome of the relevant Transaction Audits). If MDTA exercises its right to cease processing Trips while it performs a Transaction Audit of the relevant Trips to determine whether or not an Unacceptable Customer Service Event is continuing, and the Transaction Audit(s) do not demonstrate that an Unacceptable Customer Service Event is ongoing then MDTA shall promptly process the relevant Valid Trips and such

Valid Trips shall be deemed to be received by MDTA at the time that MDTA makes the determination that it shall recommence processing.

- 1.4 Unless promptly communicated by the Section Developer in accordance with Section 1.1, MDTA may obtain knowledge of the occurrence of an Unacceptable Customer Service Event only following receipt of customer complaints or refund requests. MDTA may at any time audit a sample of not less than 100 Trips selected by MDTA from one or more categories of Trip (a "**Transaction Audit**") and may determine the occurrence of an Unacceptable Customer Service Event with respect to such category of Trips based on the outcome of such Transaction Audit. Transaction Audits shall be performed with respect to any time period determined by MDTA. MDTA shall promptly notify the Section Developer of the outcome of any Transaction Audit that demonstrates that an Unacceptable Customer Service Event has occurred, and the Section Developer shall cease submitting the affected category of Trips to MDTA for processing until the issue has been resolved.
- 1.5 If (i) an Unacceptable Customer Service Event has ceased and (ii) the Reinitiation Conditions (set out in the table at Section 1.2 above) have been achieved for a continuous period of not less than [48] hours (or such shorter time as MDTA may agree), MDTA shall recommence processing of all categories of Trips affected by such Unacceptable Customer Service Event. MDTA shall perform one or more Transaction Audits to determine whether the Reinitiation Conditions have been met.
- 1.6 The Section Developer shall at all times during the occurrence of an Unacceptable Customer Service Event (i) take diligent steps to remedy or mitigate such event and (ii) provide MDTA with regular updates with respect to the issue. If the Section Developer believes that the Reinitiation Conditions have been met, then it may request that MDTA perform a Transaction Audit.
- 1.7 Once the Reinitiation Conditions have been achieved and MDTA has recommenced processing the category of Trips affected by any Unacceptable Customer Service Event, the Section Developer may resubmit to MDTA corrected Trips that had not been previously processed by MDTA, provided that no Trip may be resubmitted more than 45 days after the date of the relevant Trip (or such longer period as MDTA may agree in writing). Such resubmitted transactions shall be deemed to be Valid Trips submitted on the resubmittal date provided that the other requirements for a Valid Trip have been met. If any Trip is not capable of being corrected, then it may not be resubmitted to MDTA.
- 1.8 For the purpose of this Article 1, the "category of Trip" to which an Unacceptable Customer Service Event may apply shall be interpreted broadly and may include Trips relating only to specific vehicle classifications; Trips that are processed based on Image-Based Transactions; Trips that are processed based on Transponder Transactions; or Trips that include Toll Transactions from one or more Tolling Point, gantry, reader, or are associated with any specific part of the ETCS or any other feature of a Trip.

INTERAGENCY AGREEMENT

AMONG

**MARYLAND DEPARTMENT OF TRANSPORTATION STATE HIGHWAY
ADMINISTRATION**

AND

MARYLAND TRANSPORTATION AUTHORITY

AND

MARYLAND DEPARTMENT OF TRANSPORTATION

This Interagency Agreement ("**Agreement**") is entered into as of this 25th day of April, 2019 by and among the State Highway Administration, a modal administration of the Maryland Department of Transportation ("**MDOT SHA**"), the Maryland Transportation Authority ("**MDTA**") and the Maryland Department of Transportation ("**MDOT**") (collectively referred to herein as the "**Parties**").

RECITALS

WHEREAS, the Parties wish to facilitate private sector investment and participation in the development of improvements to I-495 and I-270 through public-private partnership ("**P3**") agreements (the "**I-495 & I-270 P3 Program**").

WHEREAS, pursuant to Title 10A of the State Finance and Procurement Article of the Annotated Code of Maryland, the Parties are authorized to undertake the solicitation, program management and delivery of the I-495 & I-270 P3 Program.

WHEREAS, pursuant to Sections 4-101 through 4-405 of the Transportation Article of the Annotated Code of Maryland, MDTA is authorized to finance, construct, operate, maintain and repair "transportation facilities projects" as defined in Section 4-101 of the Transportation Article, and to perform any and all actions necessary or convenient to carry out the powers granted by the Transportation Article, including issuing revenue bonds.

WHEREAS, pursuant to Section 4-312 of the Transportation Article, MDTA is the only entity in the State of Maryland (the "**State**") with the authority to set and fix tolls for State transportation facilities.

WHEREAS, MDOT SHA owns interstate highways in Maryland upon which the I-495 & I-270 P3 Program will be developed, including: (i) I-495 (Capital Beltway) from the American Legion Bridge over the Potomac River to east of the Woodrow Wilson Bridge and (ii) I-270 (Dwight D.

Eisenhower Memorial Highway) from I-495 to I-70, including the east and west I-270 spurs (the "**Premises**").

WHEREAS, the Parties have determined that the design, construction, operations, maintenance and financing of the I-495 & I-270 P3 Program on the Premises is an authorized undertaking by the Parties under State law.

WHEREAS, the MDTA Board, pursuant to Resolution 18-04 approved on November 29, 2018 (the "**Approving Resolution**"), adopted the pre-solicitation report and conditionally designated the I-495 & I-270 P3 Program as a "transportation facilities project", subject to the execution of the Lease Agreements (as defined below) for the relevant Phases and corresponding P3 Agreements.

WHEREAS, MDOT SHA has agreed to serve as agent for MDTA during the solicitation, program management, and delivery of I-495 & I-270 P3 Program.

WHEREAS, the Parties intend to develop the Premises through multiple design, build, finance, operate, maintain ("**DBFOM**") public-private partnership agreements ("**Phases**").

WHEREAS, MDOT SHA plans to select a developer for each Phase (the "**Developer**") pursuant to a competitive solicitation.

WHEREAS, the MDTA intends to enter into a lease agreement and such other instruments of transfer as may be necessary (collectively, the "**Lease Agreements**") for the Premises and to provide certain collection, enforcement and/or management responsibilities as further set forth herein.

NOW THEREFORE, for and in consideration of the mutual entry into this Agreement by the Parties hereto and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged by each Party hereto, the Parties hereto agree to the following terms of this Agreement:

1. TERM

This Agreement shall commence on the date set forth above and continue until the sixtieth (60th) anniversary thereof, unless sooner terminated by either Party.

2. SCOPE OF WORK

2.1 MDTA RIGHTS AND RESPONSIBILITIES

(a) MDTA hereby appoints MDOT SHA to act as its agent in the solicitation, program management and delivery of the I-495 & I-270 P3 Program for the State as set forth in Section 2.2; provided, that the foregoing appointment shall not extend to (i) the setting, collection or enforcement of tolls and fees on users of any portion of the I-495 & I-270 P3 Program or (ii) any act or decision which may only be taken by the MDTA Board or

its Executive Director pursuant to applicable law, which activities shall be performed solely by MDTA, its Board, its Executive Director, or its designated agents (as applicable), in each case in accordance with applicable law. MDTA acknowledges that the Developers under the P3 Agreements will be entitled to rely on MDTA's appointment of MDOT SHA for such purposes, and MDTA shall not act (or fail to act), or issue any instruction to a Developer under a P3 Agreement, with respect to any matter for which MDOT SHA has been appointed as MDTA's agent hereunder (except for such ministerial or administrative actions of MDTA which may be necessary to permit MDOT SHA to perform its obligations).

(b) Subject to the approval of the MDTA Board and to the extent permitted by applicable law, MDTA shall take all reasonable action as may be necessary or appropriate to support and enable MDOT SHA and the applicable Developer to deliver each Phase, including the following, in each case in coordination with MDOT SHA:

- i. reviewing, commenting on and approving, as applicable, any solicitation and associated documentation (including the applicable agreement with respect to such Phase (the "**P3 Agreement**")) necessary to deliver each Phase, in each case prior to the date on which such documents are released by MDOT SHA to prospective offerors, and following the selection of a Developer in respect of a Phase, executing and delivering the P3 Agreement in the form incorporated into such solicitation;
- ii. sharing information and participating in meetings where reasonably requested by MDOT or MDOT SHA to advance each Phase, P3 Agreement and associated solicitation;
- iii. submitting a joint Pre-Solicitation Report as required by State law to all applicable State entities, including the State Comptroller, State Treasurer, Senate Budget and Taxation Committee, House Ways and Means Committee, House Appropriations Committee, Department of Legislative Services, and the Maryland Board of Public Works (the "**Maryland BPW**");
- iv. jointly submitting the proposed P3 Agreement as required by State law to all applicable State entities, including the State Comptroller, State Treasurer, Senate Budget and Taxation Committee, House Ways and Means Committee, House Appropriations Committee, Department of Legislative Services, and the Maryland BPW;
- v. leasing from MDOT SHA the Premises, in whole or in part for each Phase and entering into the appropriate Lease Agreements, subject to the approval of the Maryland BPW;

- vi. establishing a new trust indenture and issuing limited recourse toll revenue bonds for each Phase to fund various costs related to the State's delivery of the I-495 & I-270 P3 Program, in compliance with applicable law;
 - vii. engaging in the toll rate setting process established under State law prior to issuance of the "Final Request for Proposals" (as designated by MDOT SHA) for the first Phase; and
 - viii. providing (either directly or through a third-party contractor) toll collection, and account administration support services and disbursement of revenue to the Developer in accordance with toll collection agreements in the forms to be attached to the P3 Agreements, the form and terms of which shall be reasonably satisfactory to MDTA and MDOT SHA.
- (c) MDTA will maintain separate financial and supplemental records, to the extent reasonable and cost effective, for each Phase of the I-495 & I-270 P3 Program.
- (d) MDTA will exercise the same due diligence, control structure, policies, procedures and monitoring when collecting tolls and fees for the I-495 & I-270 P3 Program as exercised when collecting toll revenues pledged under the second amended and restated trust agreement by and between MDTA and the Bank of New York, Trustee, dated as of September 1, 2007.
- (e) MDTA will make available to the I-495 & I-270 P3 Program customers the same payment and system functionality available to tolling customers outside the I-495 & I-270 P3 Program.
- (f) MDTA's I-495 & I-270 P3 Program financial records will be audited annually by an independent, external auditing firm. At MDTA's cost, its external auditors will conduct a Statement on Standards for Attestation Engagements (SSAE) 18, Type II, SOC I audit and a copy will be provided to MDOT SHA. Any audits conducted by MDTA Internal Audit Office will include the total population of toll transactions processed by the MDTA, including those from each Phase of the I-495 & I-270 P3 Program, and MDTA will provide a copy of any such audit to MDOT SHA following its completion.
- (g) To the extent the MDTA recovers lost revenue or any other sum resulting from the default of MDTA contractor(s), the MDTA will deposit the I-495 & I-270 P3 Program *pro rata* portion of such sums in an Operations Reserve Account. MDTA will not be liable for any actions of other State agencies involved in the toll collection process, except for actions carried out at the direction of MDTA.

2.2 MDOT SHA RIGHTS AND RESPONSIBILITIES

- (a) MDOT SHA shall serve as the lead State agency in the solicitation, program management and delivery of the I-495 & I-270 P3 Program for the State.

(b) MDOT SHA agrees to act as agent of MDTA (at MDOT SHA's sole cost and expense, and subject to Section 2.1 (MDTA Rights and Responsibilities)) in connection with:

- i. the solicitation of each Phase of the I-495 & I-270 P3 Program, which shall be solicited and contracted for separately as may be determined by MDOT SHA;
- ii. the oversight, administration and management of each P3 Agreement entered into in connection with the I-495 & I-270 P3 Program for the State, including all design, construction, financing, operation and maintenance activities carried out thereunder (other than such matters as are specified in Section 2.1 as being retained by MDTA, in respect of which MDOT SHA shall have no right or obligation to act); and
- iii. the overall delivery of the I-495 & I-270 P3 Program for the State.

(c) MDOT SHA shall use its best efforts to cause the design, construction, financing, operation and maintenance of the I-495 & I-270 P3 Program to be carried out in accordance with the P3 Agreement for each Phase and this Agreement. MDOT SHA shall act in a manner consistent with the best interests of the State. MDOT SHA shall timely perform its obligations as MDTA's agent.

(d) MDOT SHA shall have the right to review the key performance indicators submitted to MDTA by MDTA's tolling contractor. If key performance indicators fall below established levels, the MDTA shall use its best efforts to claim against and recover from such contractor in accordance with the terms of the applicable contract.

(e) MDOT SHA shall have the right to conduct (either directly or through a third-party contractor) an agreed upon procedures review of 1) the per transaction fee charged to the Developer for MDTA's toll collection services is in accordance with the agreed upon transaction cost model, 2) waivers of tolls and citations is in accordance with established waiver guidelines, and 3) costs charged to the Operations Reserve Account (as defined below) by MDTA for collection and enforcement are in accordance with MDTA's then-established procedures. Whenever reasonably possible, MDOT SHA will rely on information contained in other audit reports and provided by MDTA to MDOT SHA pursuant to Section 2.1(f) rather than conducting additional audits or reviews.

3. LEASE AND TRANSFER INSTRUMENTS

3.1 MDOT SHA shall lease the Premises entirely or by Phase to MDTA pursuant to Lease Agreements to permit MDTA to satisfy the condition designating each such Phase a "transportation facilities project" pursuant to Section 4-204 of the Transportation Article, subject to the approval of the Lease Agreements by the Maryland BPW (as required by the Approving Resolution).

3.2 The Parties agree to execute the Lease Agreements for a Phase as soon as practicable after the commencement by MDOT SHA of the solicitation for such Phase, and in any event prior to such date as may be necessary to permit MDTA to designate the applicable Phase a "transportation facilities project" by the date set forth in the applicable P3 Agreement.

4. REPRESENTATIONS

4.1 Representations of MDOT SHA

- i. MDOT SHA is a modal administration of the Maryland Department of Transportation, a principal department of the State.
- ii. MDOT SHA has the requisite power and authority to enter into the transactions contemplated by this Agreement and to carry out its obligations under this Agreement.
- iii. By proper action, MDOT SHA has been duly authorized to execute and deliver this Agreement.

4.2 Representations of MDTA

- i. MDTA is an agency of the State of Maryland governed by a Board consisting of 8 individuals appointed by the Governor with the consent of the Maryland Senate, and chaired by the Secretary of Transportation.
- ii. MDTA has the requisite power and authority to enter into the transactions contemplated by this Agreement and to carry out its obligations under this Agreement.
- iii. By proper action, MDTA has been duly authorized to execute and deliver this Agreement.

4.3 Representations of MDOT

- i. MDOT is a principal department of the State.

- ii. MDOT has the requisite power and authority to enter into the transactions contemplated by this Agreement and to carry out its obligations under this Agreement.
- iii. By proper action, MDOT has been duly authorized to execute and deliver this Agreement.

5. CONTINGENT LIABILITIES

5.1 Subject to appropriation by the Maryland General Assembly, to the extent the Developer under a P3 Agreement is entitled to receive any amount for a compensation event or termination compensation, MDOT SHA will pay such amount to such Developer on or before the date when such amount becomes due and payable. MDOT will take such actions as are necessary from time to time to request sufficient appropriations from the Maryland General Assembly to pay such amounts as and when they come due.

5.2 To the extent any amount due to a Developer under a P3 Agreement arises as a result of MDTA's breach of this Agreement (as amended from time to time, and including a breach of MDTA's obligations pursuant to Section 5.3), subsequent Agreements amongst the Parties, or any P3 Agreement, or any other act or omission of MDTA, MDOT SHA shall have the right to seek reimbursement from MDTA for any amounts paid by MDOT SHA to such Developer, and MDTA shall pay such amounts to MDOT SHA within sixty (60) days after receipt of a written request therefor (or at such other time and subject to such other conditions as the Parties may agree in connection with any claim for reimbursement) provided, that if a breach of this Agreement or a P3 Agreement is directly caused by a contractor of MDTA breaching a contractual obligation to MDTA or a State agency failing to perform its obligations with respect to collections, then MDTA's obligation to reimburse MDOT SHA pursuant to this Section 5.2 shall be limited to the extent of any recovery by MDTA against such contractor or State agency, unless MDTA shall have failed to use its best efforts to claim against and recover the applicable amount from such contractor or recover the applicable amounts from the State agency. For the avoidance of doubt, MDTA shall have no obligation to pursue claims against other agencies of the State, however, MDTA will use its best efforts to recover from State agencies.

5.3 The Parties acknowledge and agree that MDTA will, in connection with collecting tolls from users of each Phase, pay (in accordance with the applicable P3 Agreement) to the applicable Developer each month a Developer Toll Payment (as defined in the applicable P3 Agreement), which may not be equal to the amount of toll revenue actually collected by MDTA for the applicable Phase during such month. Any shortage in the amount due to the Developer(s) will be paid from the Operations Reserve Account.

- (a) In furtherance of MDTA's obligation to pay Developer Toll Payments, MDOT SHA will deposit a sum with respect to each Phase (the amount of which will be

determined by MDOT SHA prior to deposit thereof) into a segregated account (the "**Operations Reserve Account**") under the master trust indenture pursuant to which MDTA will issue bonds to permit MDTA to toll the applicable Phase and remit revenue to the Developer (such indenture, the "**Master Trust Indenture**").

- (b) To the extent the Developer Toll Payment in any month exceeds the amount of toll revenue actually collected by MDTA in respect of such month (inclusive of electronic toll payments received via E-ZPass, video toll premiums, account service charges, late fees, penalties, or other amounts arising out of or relating to the payment of tolls by users of the Phase (such amounts, exclusive of electronic toll payments received via E-ZPass, the "**Operations Reserve Amounts**"), MDTA shall be entitled to withdraw an amount from the Operations Reserve Account equal to such excess, and use such amount to pay the full amount of the Developer Toll Payment to the Developer. To the extent MDTA receives Operations Reserve Amounts in excess of the amount required to pay the Developer Toll Payment in any month, MDTA will deposit such excess into the Operations Reserve Account.
- (c) To the extent the amount on deposit in the Developer Operations Reserve Account is (or MDTA notifies MDOT SHA that it reasonably projects such amount, as of the date when the Developer Toll Payment will be due and payable, is reasonably likely to be) insufficient to pay the full amount of the Developer Toll Payment to the Developer, MDOT SHA shall deposit to the Operations Reserve Account an amount equal to such insufficiency at least three (3) Business Days prior to the date when the Developer Toll Payment is due to the Developer.
- (d) MDTA will work jointly with MDOT and MDOT SHA to evaluate the sustainability of the Operations Reserve Account, and in collaboration with MDOT SHA will forecast the projected Operations Reserve Account activity and balances semi-annually. If the Operations Reserve Amounts are insufficient, MDTA will engage in the toll and fee setting process allowed by statute and COMAR and in accordance with the Master Trust Indenture.
- (e) The Master Trust Indenture will contain additional provisions regarding the treatment of Operations Reserve Account balances, including but not limited to the right of MDOT SHA to receive transfers therefrom in the event the balance of the Operations Reserve Account exceeds certain thresholds, and the right of the Parties to adjust the required balance of the Operations Reserve Account from time to time.

5.4 Except to the extent set forth in Sections 5.2 or 5.3, MDTA shall have no liability for contingent liabilities arising under any P3 Agreement and MDOT SHA will be responsible for administering and paying any and all claims, including compensation events and termination compensation, arising under any P3 Agreement.

6. NON-INTERFERENCE

Neither Party shall interfere with or impede the other Party's performance of its obligations under this Agreement or any P3 Agreement. The Parties shall not interfere with the performance by any Developer of its obligations under a P3 Agreement, except as may be expressly permitted by the terms of such P3 Agreement.

7. REAL PROPERTY

MDOT SHA agrees when deemed appropriate and to the extent permitted by applicable law to exercise its condemnation authority in support of delivering the I-495 & I-270 P3 Program.

8. COST REIMBURSEMENT; REVENUE SHARING AND UPFRONT PAYMENTS

8.1 Each Party shall be responsible for its own internal staffing costs in fulfilling its respective obligations under this Agreement and each P3 Agreement, other than costs and expenses associated with MDTA's performance of its tolling related obligations, including any costs and expenses of collection enforcement, which amounts shall be reimbursed by Developer (through payment of the per transaction fee) or MDOT SHA (through releases from the Operations Reserve Account). The Parties acknowledge and agree that all such costs will be included in the transaction cost model.

8.2 Developer (to the extent set forth in the P3 Agreement) or MDOT SHA (subject to appropriation by the Maryland General Assembly) shall reimburse MDTA for all documented external costs and expenses incurred by MDTA solely in connection with the performance of its obligations under this Agreement; provided, that such external costs shall have been pre-approved by the Developer or MDOT SHA (it being acknowledged and agreed that MDTA will have no obligation to incur such external costs or expenses, or undertake the work or services relating thereto, unless and until the same shall have been pre-approved by the Developer or MDOT SHA, as applicable).

8.3 To the extent MDOT SHA receives any revenue from a Developer under a P3 Agreement pursuant to any revenue sharing arrangements described therein, the Parties acknowledge and agree that such revenue shall be deposited in the Transportation Trust Fund pursuant to Section 3-216 of the Transportation Article.

8.4 To the extent MDOT SHA receives an upfront payment from a Developer under a P3 Agreement, the Parties acknowledge and agree that such payment shall be deposited into a segregated account under the Master Trust Indenture, and MDTA shall have no right to withdraw such amount except in accordance with and pursuant to a written instruction delivered by MDOT SHA in accordance with the Master Trust Indenture.

9. O&M OF GENERAL PURPOSE LANES

MDOT SHA shall retain all operations and maintenance obligations with respect to the I-495 & I-270 P3 Program's general purpose lanes and associated infrastructure, unless such responsibilities are transferred to a Developer under a P3 Agreement.

10. TERMINATION OF P3 AGREEMENTS

10.1 Following a P3 Agreement's termination prior to the original expiration of its term, MDOT SHA shall have the option to operate and maintain (or enter into a contract with a third party providing for the operation and maintenance of) the tolled lanes and continue to require that users of the tolled lanes pay a toll. If MDOT SHA exercises such right, the Lease Agreement for that Phase will continue in effect and MDTA shall continue to perform all applicable toll setting, collection and enforcement services (and will cooperate with MDOT SHA to take such other actions as may be reasonably necessary to permit the continued operations and maintenance of such tolled lanes by MDOT SHA or its contractor). Further, the revenue collected from users of the toll lanes for the applicable Phase (net of (a) principal and interest payable on the debt issued by MDTA to permit MDTA to toll the applicable Phase and remit revenue to the Developer (the amount and terms of which shall be satisfactory to MDOT SHA and MDOT) and (b) a per-transaction processing fee to cover MDTA's cost of collections and enforcement), shall be applied in accordance with the Master Trust Indenture.

10.2 In the alternative, following a P3 Agreement's termination prior to the original expiration of its term, if the outstanding bonds issued by MDTA under the Master Trust Indenture are defeased, MDOT SHA shall have the option to operate and maintain the tolled lanes. If MDOT SHA exercises such right, the Lease Agreement for that Phase will terminate and MDTA shall have no further right or obligation with respect to such tolled lanes.

10.3 If MDOT SHA elects not to exercise either of its options pursuant to Section 10.1, then MDTA shall (unless and until any debt issued by MDTA which is secured by the revenue collected from users of the tolled lanes for the applicable Phase is defeased) continue to perform toll setting, collection and enforcement services.

10.4 Prior to the expiration of the original term of a P3 Agreement for a Phase of the P3 Program, the Parties will meet to discuss the measures to be taken with respect to their rights and obligations under this Agreement, including whether any new or amended agreement(s) should be entered into with respect to such Phase.

11. NO LIABILITY

MDTA will have no liability to MDOT SHA for any actions or claims arising solely out of MDTA's lease of the Premises pursuant to Section 3 (Lease and Transfer Instruments).

12. GENERAL

12.1 Notices

All notices, statements, reports, demands, requests, consents, approvals, waivers and authorizations required by this Agreement to be given by either of the Parties to the other will be by email to the address set forth below, or such other email address as may be notified by one Party to the other in accordance with this Section 12.1 from time to time, the receipt of which shall be confirmed by the other Party by email:

MDOT SHA Contact: Lisa Choplin

Email: lchoplin@sha.state.md.us

MDTA Contact: John O'Neill

Email: joneill@mdta.state.md.us

MDOT Contact: Lisa Webb

Email: lwebb@mdot.maryland.gov

12.2 Governing Law

This Agreement will be governed by and construed in accordance with the laws of the State of Maryland.

12.3 Survival

This Article 12 (General) and all other provisions which by their inherent character should survive the termination of or completion of the obligations of the Parties under this Agreement will survive the termination of or the completion of the obligations of the Parties under this Agreement.

12.4 No Personal Liability

No officer, agent, representative or employee of any of the Parties will be personally liable under any provision of this Agreement, or because of the execution or attempted execution of this Agreement, or because of any breach of this Agreement.

12.5 Effectiveness

This Agreement shall, as of the date first set forth above, inure to the benefit of and shall be binding upon the Parties hereto and their respective successors and permitted assigns, subject, however, to the limitations contained in this Agreement.

12.6 Severability

In the event any provision of this Agreement is held invalid or unenforceable by any court of competent jurisdiction, such holding will not invalidate or render unenforceable any other provision of this Agreement.

12.7 Amendments, Changes and Modifications

Except as otherwise expressly provided in this Agreement, this Agreement may not be effectively amended, changed, modified, altered or terminated without the express written consent of the Parties. Upon the reasonable request of a Party, all Parties shall cooperate in good faith to negotiate and enter into such amendments to this Agreement as may be necessary to give further effect to its intended purposes and otherwise address such matters as may be necessary or appropriate amongst each other for purposes of implementing the I-495 & I-270 P3 Program.

12.8 Counterparts

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

12.9 Captions

The captions or headings in this Agreement are for convenience only and in no way define, limit or describe the scope or intent of any provisions of this Agreement.

[SIGNATURE PAGE IMMEDIATELY FOLLOWS]

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date set forth above.

WITNESS: MARYLAND DEPARTMENT OF
TRANSPORTATION

Pete K. Rahn
Secretary

APPROVED AS TO FORM AND LEGAL
SUFFICIENCY:

Assistant Attorney General
Maryland Department of Transportation

WITNESS: MARYLAND DEPARTMENT OF
TRANSPORTATION STATE HIGHWAY
ADMINISTRATION

Gregory Slater
Administrator

APPROVED AS TO FORM AND LEGAL
SUFFICIENCY:

Assistant Attorney General
Maryland Department of Transportation
State Highway Administration

WITNESS: MARYLAND TRANSPORTATION AUTHORITY

Kevin C. Reigrut
Executive Director

APPROVED AS TO FORM AND LEGAL
SUFFICIENCY:

Assistant Attorney General
Maryland Transportation Authority

TAB 6



Maryland Transportation Authority

Larry Hogan, Governor
Boyd K. Rutherford, Lt. Governor
Gregory Slater, Chairman

Board Members:

Dontae Carroll
William H. Cox, Jr.
William C. Ensor, III
W. Lee Gaines, Jr.

Mario J. Gangemi, P.E.
Cynthia D. Penny-Ardinger
Jeffrey S. Rosen
John F. von Paris

James F. Ports, Jr., Executive Director

MEMORANDUM

TO: MDTA Board
PRESENTED BY: Mr. Jeff Folden, MDOT SHA, I-495 & I-270 P3 Program Deputy Director
SUBJECT: American Legion Bridge I-270 to I-70 Relief Plan Phase 1 P3 Agreement Report Approval
DATE: June 8, 2021

PURPOSE OF MEMORANDUM

To seek approval from the Maryland Transportation Authority (MDTA) Board on the Public-Private Partnership (P3) Agreement Report for Phase 1 of the I-495 & I-270 P3 Program, American Legion Bridge I-270 to I-70 Relief Plan.

SUMMARY

In accordance with the Annotated Code of Maryland State Finance and Procurement Article §10A-203, and the Code of Maryland Regulations (COMAR) 11.01.17.09 and 11.07.06.09, the Maryland Department of Transportation (MDOT) and MDTA prepared a final agreement report to accompany the Phase P3 Agreement. This final agreement report will accompany the submission of the Phase P3 Agreement under Annotated Code of Maryland State Finance and Procurement Article §10A-203 to the Comptroller, the State Treasurer, the budget committees, and the Department of Legislative Services for a period for review, analysis, and comment not exceeding a total of 30 days. The report and Phase P3 agreement will also be posted publicly on the P3 Program website. After completion of the period of review, analysis, and comment, the Phase P3 Agreement will be presented to the Board of Public Works for approval.

RECOMMENDATION

To provide approval on the P3 Agreement Report for Phase 1 of the I-495 & I-270 P3 Program, American Legion Bridge I-270 to I-70 Relief Plan.

ATTACHMENTS

- Public-Private Partnership (P3) Agreement Report Regarding Phase 1 of the I-495 and I-270 P3 Program

A Report to the Maryland General Assembly

Senate Budget and Taxation Committee

and

House Appropriations Committee

House Ways and Means Committee

Regarding

**Phase 1 of the I-495 and I-270 Public-Private Partnership (P3)
Program**

June 8, 2021

The Maryland Department of Transportation

The Maryland Transportation Authority

This report was prepared by the Maryland Department of Transportation ("MDOT") and the Maryland Transportation Authority ("MDTA"), together as the "Reporting Agencies", in accordance with the Annotated Code of Maryland State Finance and Procurement Article § 10A-203, and the Code of Maryland Regulations ("COMAR") 11.01.17.09 and 11.07.06.09.

Section (J)(2) of COMAR 11.01.17.09 and 11.07.06.09 set out the contents to be included in the Final Agreement Report. Below are the requirements of Section (J)(2) of COMAR 11.01.17.09, which are substantially similar to the requirements of Section J(2) of COMAR 11.07.06.09:

A final agreement report shall accompany a final agreement submitted under State Finance and Procurement Article, §10A-203, Annotated Code of Maryland, containing the following items, if relevant:

- (a) The financial plan, including annual cash flows, for any public-private partnership including:
 - (i) State contributions;
 - (ii) Federal loans or credit assistance;
 - (iii) Private investment;
 - (iv) Local contributions; and
 - (v) Other funding contributions;
- (b) The ongoing financial costs and increases associated with any operating and maintenance contracts;
- (c) The impact any public private partnership agreement may have on the State's debt affordability measures;
- (d) The authority a private entity may have to recover its investment through tolls or other fees, including how future increases in tolls or other fees may increase;
- (e) An analysis of why the proposed agreement is more advantageous than a conventional project delivery;
- (f) A description, including the estimated value, of any land, buildings, or other structures or assets that are transferred or exchanged with a private entity as part of the public private partnership;
- (g) A summary of the performance measures included in the ongoing operation of the public private partnership;
- (h) A summary of the penalties associated with non-performance relating to the ongoing maintenance and operation; and
- (i) A plan for how the long-term operating and maintenance contract will be overseen by the agency.

| Table of Contents | Page |
|--|-------------|
| Background and Overview | 4 |
| P3 Rationale and Solicitation Process | 7 |
| The Accelerate Maryland Partners Team | 12 |
| Phase P3 Agreement | 14 |
| Financial Plan | 17 |
| Tolling | 19 |
| Environmental Review Update | 21 |
| Other Items | 22 |
| MDOT Commitments to the BPW | 22 |

Background and Overview

In 2017, Governor Larry Hogan announced Maryland's Traffic Relief Plan (the "Plan") to reduce traffic congestion, increase economic development, but most importantly, enhance safety and return quality of life to Maryland commuters. Since then, the I-495 & I-270 Public-Private Partnership Program (the "P3 Program"), the largest component of the Plan, is being guided by the overarching goals of Congestion Relief, Minimize Impacts, No Net Cost to the State, Accelerated Delivery, and Innovation.

As further detailed below, based on continuous collaboration and listening to agency partners, public officials and stakeholders, the Maryland Department of Transportation and the Maryland Transportation Authority (the "Reporting Agencies") have continued to refine the P3 Program and take a Phased Delivery approach starting for Phase 1 South of the American Legion Bridge I-270 to I-70 Relief Plan. Phased Delivery will allow initial focus on the portion of the P3 Program area that is most critical and where agreement with stakeholders is the greatest.

The P3 Program is part of the National Capital Region's ("NCR") approved long-range transportation plan, Visualize 2045¹. This plan recognizes the importance of creating a transportation network to accommodate current and future growth demands. The initiatives identified by the NCR Transportation Planning Board include bringing jobs and housing closer together, expanding bus rapid transit, moving more people on Metrorail, increasing telecommuting, improving walking and bike access to transit, completing the National Capital Trail, and expanding the express highway network with new managed lanes using dynamic pricing. While the P3 Program is only one piece of the overall puzzle, it is critically important to supporting the State of Maryland's (the "State") economy and making many of the other initiatives possible.

The Reporting Agencies have been, and will continue, closely monitoring traffic patterns and traffic projections throughout the COVID-19 pandemic, which has impacted how Marylanders work, spend free time, and travel. In the past, travel has historically increased as the economy recovered following past economic events and societal changes (such as the 2008 recession). Traffic volumes on area highways already have recovered to about 90 percent of pre-COVID levels. Many current studies are showing that as the restrictions continue to be reduced and as vaccination rates increase, teleworking is expected to continue to decrease, even if it does not completely reach pre-pandemic levels. There are many industries where workers can rarely telework, if ever, including hospitality, manufacturing, building and construction trades, and bio science labs. Moreover, commuting trips only account for about 20 percent of daily travel in the NCR. Therefore, even with some shift to teleworking, such shift would have minimal impact on the remaining 80 percent of daily trips, including interstate travel, tourism, shipping and freight deliveries, errands, and other personal and business travel which will continue to be made on the regions' road network. In May 2021, TRIP, a national transportation research nonprofit, published Transportation Impact and Implications of COVID-19². This report notes that analysis from INRIX has shown that evening rush hours have largely returned to pre-pandemic levels

¹ <https://www.mwcog.org/visualize2045/document-library/>

² https://tripnet.org/wp-content/uploads/2021/05/TRIP_COVID-19_Transportation_Impact_Report_May_2021.pdf

and traffic volumes during the mid-day remain higher than before the pandemic. This report also notes that while travel in downtown areas has declined the most during COVID-19 and will likely be the slowest to recover that travel in suburban areas, such as served by I-495 and I-270, has largely recovered. WTOP also noted in its May 26, 2021 article DC's Rush Hour Traffic is Back³ that the American Legion Bridge afternoon traffic on May 21, 2021 was at the highest level since March 2020, surpassing the 2019 daily average. The pandemic has not changed long-term projections that traffic volumes will continue to rise over time and it is expected that at the time the improvements open, traffic volumes will be at pre-pandemic or even higher levels. It is important to note, the improvements are being developed to accommodate increased long-term traffic demand, as the region is expected to add 1.3 million more people and nearly one million more jobs by 2045.

Phase 1 of the P3 Program, known as the American Legion Bridge I-270 to I-70 Relief Plan⁴ (the "Project"), begins south of the American Legion Bridge in the vicinity of the George Washington Memorial Parkway, includes upgrades of the American Legion Bridge, and extends north to I-270 and then up I-270 to I-70 in Frederick. Within the Project there will be multiple sections with Phase 1 South, from the vicinity of the George Washington Memorial Parkway across the American Legion Bridge to I-370, ("Phase 1 South") will be developed and delivered as the first section. "Phase 1 North" includes the remaining improvements to I-270, from I-370 to I-70.



Figure 1

³ <https://wtop.com/dc-transit/2021/05/dc-regions-rush-hour-traffic-is-back/>

⁴ Figure 1 summarizes the geographical location of the Project

Phase 1 South will address the regionally long-recognized need for a new American Legion Bridge to alleviate one of the worst traffic chokepoints in the nation. Based on the 2019 Maryland State Highway Mobility Report developed in conjunction with the University of Maryland Center for Advanced Transportation Technology, segments of the highway perform poorly on nearly every traffic measure, such as ranking as the worst congested freeway corridor in the afternoon, and second worst corridor for truck travel. With or without the Project, a deck replacement or a bridge replacement will be needed in the next decade and no public funding is currently available. Construction and traffic impacts will be similar for replacing the deck or bridge, but alone will not address current or future congestion. Simply providing a wider bridge, on its own, and not the extension of the regional high-occupancy toll (“HOT”) lane improvements will not provide the significant public benefits of travel time savings projected and new opportunities for transit and high-occupancy vehicle travel unavailable today due to the significant congestion.

The Project addresses congestion and trip reliability through a multi-faceted approach. The new HOT lanes recommended for Phase 1 South will address congestion by setting tolls with the purpose of maintaining the free flow of traffic at speeds of 45 mph or greater, as described below. This will prevent congestion in the new lanes from degrading performance and maximize throughput. In addition, the Project will also provide new transit opportunities and connection for suburban transit services by providing reliable travel in the HOT lanes and connections to transit centers, park-and-rides, and job and activity centers near the corridor. The HOT lanes will boost ridesharing and encourage less dependence on single-occupancy vehicles by incentivizing vehicles with three or more people to use the HOT lanes for free. Traffic will be reduced on local roadways by increasing the number of travelers that can be accommodated on the interstate. Barriers to bicycle and pedestrian connections will be addressed as part of the Recommended Preferred Alternative (“RPA”), with commitments consistent with connections identified in the Montgomery County and City of Rockville master plans and priorities:

- New pedestrian/bicycle path across the American Legion Bridge
- Replace and widen Bethesda Trolley Trail bridge crossing of I-495
- Lengthen I-270 bridge over Tuckerman Lane to accommodate future separated bikeway along Tuckerman Lane
- New buffer-separated side paths across MD 190 over I-495
- Upgraded sidepath along Seven Locks Road under I-495

Different from other public-private partnerships (“P3”) that have been delivered in the State, the Project will be developed and delivered using a multi-step progressive P3, or predevelopment, model. While new to the State, progressive P3s have been used to successfully deliver managed lanes projects in Virginia for I-95, I-495, and I-395, and in Texas for the North Tarrant Express.

Progressive P3 Model

The Project will be delivered using a progressive P3 approach, which is designed to minimize risks to the State and provide more-efficient pricing and better schedule certainty. Under a progressive P3, the selected developer (the "Phase Developer") will enter into a phase P3 agreement ("Phase P3 Agreement") and collaborate directly with the Reporting Agencies and stakeholders on predevelopment work. This upfront effort will focus on advancing the preliminary design and due diligence activities for the Project by involving all stakeholders – including Montgomery and Frederick counties, municipalities, property owners, utilities, and citizens. During the predevelopment work, the focus will be on further avoiding and minimizing impacts to environmental resources, communities, properties, utilities, and other features by working collaboratively with the Phase Developer and the counties, municipalities, State and federal agencies, property owners, utilities and citizens.

After completion of the predevelopment work with respect to a section of the Project, and only if a build alternative is identified under the National Environmental Policy Act ("NEPA") approval process, MDOT would seek final approval from the Board of Public Works ("BPW") to move forward with a section P3 agreement (the "Section P3 Agreement") under which a subsidiary of the Phase Developer (the "Section Developer") will be responsible for the final design, construction, financing, operations and maintenance of such section for a term of 50 years.

P3 Rationale and Solicitation Process

P3 and Priced Managed Lanes Rationale

The Reporting Agencies have determined that delivering the Phase 1 improvements through a design-build-finance-operate-maintain revenue risk P3 is the only means to provide congestion relief in the near term for the NCR.

For many years, the Reporting Agencies have studied solutions to the congestion that plagues travelers across the American Legion Bridge and I-270. Over the last few years, the Reporting Agencies have worked intensively to develop a solution to this acute problem, closely partnering and coordinating with stakeholders to advance an environmental study, engaging with industry, and analyzing possible delivery methods. A P3 will bring private sector innovation and billions of dollars in investment to the region while optimizing the transfer of key risks and providing numerous benefits to the State.

In the region, Virginia's priced managed lanes already have been shown to provide congestion relief, leading to more dependable travel times for all users including transit, carpoolers, toll payers, and general-purpose lanes even as demand increases. They also provide the revenue source necessary to fund project costs and long-term maintenance of the priced managed lanes.

Achieving public benefits and generating revenue is not expected to be possible without completing very large road sections. Building mile-by-mile is not practical because it will not produce benefits until a phase of independent usefulness is complete. As such, financing or significant funding is needed to advance the proposed improvements in a meaningful way. Using

a P3, the Reporting Agencies will be able to deliver a priced managed lanes solution across Phase 1 South in the near term and transfer the risk of toll revenue performance to a Section Developer while bringing private capital in the form of equity and debt.

If MDOT State Highway Administration (“MDOT SHA”) were to use a public delivery model and fund the capital cost to reconstruct the American Legion Bridge alone from the Transportation Trust Fund, this investment would represent approximately a full year of MDOT SHA’s capital program, while the full Phase 1 South would represent an even higher figure at approximately 3 years’ worth of MDOT SHA’s capital program⁵. Using State funding would require MDOT to delay or cancel projects that are already programmed from the Transportation Trust Fund. If Maryland must utilize the Transportation Trust Fund, this means that other potential projects would lose their funding and not be constructed.

In addition, to raise such funding from MDTA Transportation Facilities Projects (TFP) Revenue Bonds, legislatively enacted debt limits would need to be significantly expanded. As of FY 2020, MDTA had \$1.9 billion⁶ in bonds outstanding, leaving \$1.1 billion capacity under the current \$3.0 billion debt cap. However, MDTA has other significant projects underway including the \$636 million replacement of the Nice Bridge and the \$1.1 billion expansion of the I-95 Express Toll Lanes. MDTA forecasts total outstanding debt increasing to \$2.5 billion by FY2023⁷ and therefore could not pursue a project of this size without expanding debt limits. Additionally, financing the Project (ALB to I-70) in this way would require MDTA’s existing TFP to generate additional revenue through toll increases in order to maintain its AA credit rating and avoid increased borrowing costs caused by extending its current debt limit.

Consolidated Transportation Bonds (“CTBs”) are also not a viable solution to finance the P3 Program because MDOT imposes a statutory outstanding debt limit on CTBs of \$4.5 billion, with a separate annual statutory cap on outstanding bonds for FY 2021 of \$3.88 billion. As of October 2020, with the issuance of \$300 million CTBs Series 2020, the aggregate amount of CTBs is \$3.87 billion⁸. Under the State’s debt affordability analysis, using CTBs to finance the P3 Program would also likely degrade coverage ratios outside of benchmarks and reduce debt capacity for all other important needs like schools and other State facilities. As such, the Reporting Agencies view a P3 as the only financially viable way for the State to meet its P3 Program goals in the near term.

Solicitation Process

The BPW approved the P3 designation in June 2019 and provided a supplemental approval in January 2020, approving the delivery of the Project through the solicitation of a phase developer under a phased delivery approach allowing for further minimization of impacts, and design concept collaboration with communities and stakeholders within the delivery process. As part of the progressive P3 solicitation for the Project, the Reporting Agencies followed a two-step

⁵ FY2021 - FY2026 Maryland Consolidated Transportation Program, Department of Transportation Operating and Capital Program Summary By Fiscal Year.

⁶ Maryland Transportation Authority (MDTA), “June 30, Comprehensive Annual Financial Report” June 30, 2020

⁷ Maryland Transportation Authority Cash flow forecast FY 2020 - 2026

⁸ <https://emma.msrb.org/P11426478-P11107286-P11516884.pdf>

Request for Proposal ("RFP") process, which began with the Reporting Agencies seeking interested phase developers through a Request for Qualifications issued in February 2020. Statements of Qualification were submitted and evaluated by the Reporting Agencies, which provided for a shortlist of four highly qualified respondents (the "Proposers") in July 2020. The Proposers were then invited to submit a proposal to assist in the predevelopment work and enter into the Phase P3 Agreement for the Project. **Transparency, fairness, and competition** were prioritized to ultimately identify which of the Proposers (the "Selected Proposer") would be best able to deliver the Project in the manner most advantageous to the State. With the initiation of the solicitation process in February 2020, Proposers have had nearly a year to develop their proposals with minimal changes to the State's goals or requirements in that time.

Figure 2 depicts the key steps of the solicitation process including the following:

- **Request for Qualifications (RFQ)** – The RFQ process identified the most highly qualified teams based on their skills and expertise, experience on similar projects, and financial capabilities. The solicitation process for the Project began in February 2020 with the issuance of the RFQ and resulted in MDOT's announcement of a shortlist of four highly qualified respondents in July 2020.
- **Request for Proposals (RFP)** – A Draft RFP that was distributed to Proposers in July 2020 contained a draft Phase P3 Agreement and Section P3 Agreement Term Sheet, which included the terms and conditions that will govern how the Phase Developer and the Section Developers will deliver the Project. Over the subsequent 6 months, the Reporting Agencies fielded more than one thousand five hundred written questions and periodically met with Proposers to receive feedback, provide clarifications, consider innovative technical and financial solutions, and optimize the framework of the P3 agreements during this competitive RFP process. Three predevelopment work proposals were submitted on December 23, 2020, followed by three financial proposals submitted on January 8, 2021.

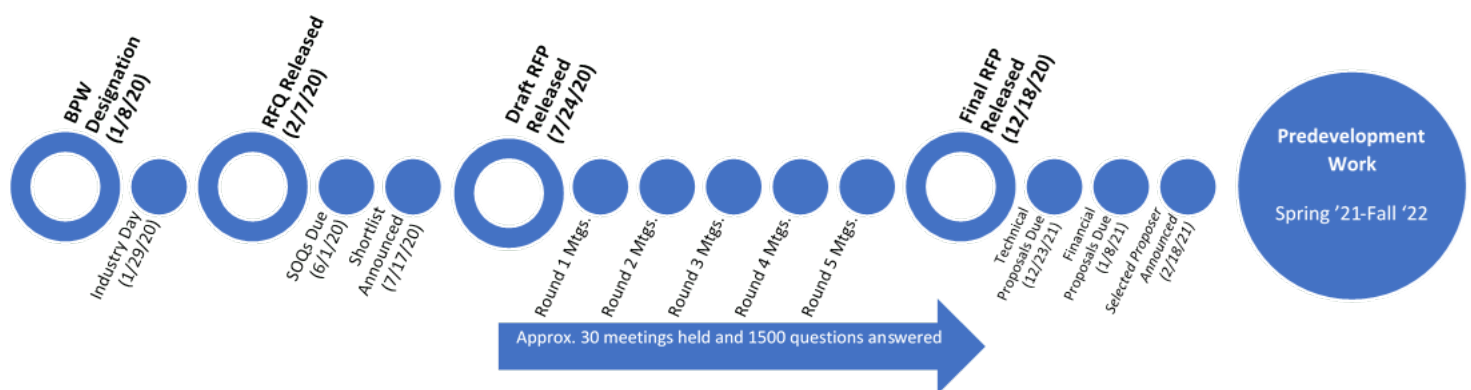


Figure 2

A comprehensive evaluation process, which included MDOT, MDOT SHA, MDTA, industry experts, advisors from Montgomery and Frederick counties and an observer from the Federal Highway Administration ("FHWA"), was conducted to select the right partner to bring

innovation and effectively collaborate with community stakeholders and other partners to (i) provide delivery certainty, (ii) minimize impacts, (iii) maximizing value to the State, (iv) providing community benefits, and (v) congestion relief.

The extensive evaluation process involved reviews of the proposals in three steps:

- 1. Technical and Financial Review Teams:** These teams were comprised of subject matter experts in various areas related to the P3 Program goals, including a combination of MDOT staff, MDTA staff, consultants, and advisors. The Technical and Financial Review Teams were comprised of 40 multi-disciplinary experts with more than 500 years of combined, relevant experience. These teams held 15 meetings, reviewed each proposal in detail and deliberated for 120 hours.
- 2. Evaluation Committee:** This committee included senior leadership representing MDOT, MDOT SHA, and MDTA, supported by Review Team Leaders, community representatives from Montgomery and Frederick counties (advisors), and a FHWA representative (observer). The Evaluation Committee held six full-day meetings, reviewed the work of the technical and financial review teams and deliberated for more than 50 hours.
- 3. Selection Committee:** The Evaluation Committee Chairs presented the staff recommendation to the Selection Committee which include the MDOT Secretary, MDTA Executive Director and MDOT SHA Administrator. Following review and discussion, the Selection Committee determined to approve the Evaluation Committee recommendation.

The Technical and Financial Review Teams conducted their reviews independently and presented their recommendations separately to the Evaluation Committee. The Evaluation Committee independently reviewed the proposals and considered the input from the Technical Review Teams in deliberating the ratings.

- **Technical Review:** As outlined in the Request for Proposals, each predevelopment work proposal received an adjectival rating (exceptional, good, acceptable, or unacceptable) with respect to each primary evaluation criteria and an overall adjectival rating. Accelerate Maryland Partners, LLC ("AMP") received an overall rating of Good while Accelerate Maryland Express Partners received an overall rating of Acceptable and Capital Express Mobility Partners ("CEMP") received an overall rating of Good +.
- **Financial Review:** As outlined in the RFP, there were a total of 1,791 possible points available for the financial proposal evaluation criteria: Proposal Equity IRR (457 points), Developer Closing Fee Percentage (40 points), Development Rights Fees (145 points), Predevelopment Cost Cap (100 points), D&C General Conditions Cost Percentage (435 points), Contractor Markup Percentage (585 points) and Renewal Work General Conditions Cost Percentage (29 points). AMP had the highest-ranking financial proposal with 1,356 points compared to 800 points for Accelerate Maryland Express Partners and 665 points for Capital Express Mobility Partners.

| Proposal | Technical Review | Financial Review |
|-------------------------------------|------------------|------------------|
| AMP | Good | 1,356 |
| CEMP | Good + | 665 |
| Accelerate MarylandExpress Partners | Acceptable | 800 |

The Evaluation Committee reviewed and rated the technical proposals before reviewing the financial proposals. It then completed a trade-off analysis (as described in, and permitted by, the RFP) to determine a recommendation of the proposal that is most advantageous to the State. The Evaluation Committee determined that CEMP's technical proposal was marginally superior to AMP's technical proposal. However, AMP's financial proposal scored significantly higher than CEMP's financial proposal. The Evaluation Committee determined that AMP's significantly higher financial proposal score outweighed the marginally higher technical rating of CEMP, making the AMP proposal the most advantageous offer to the State and the overall best value. The recommendation was presented to the Selection Committee, which accepted the Evaluation Committee's recommendation of AMP as the most advantageous and overall best value to the State when both technical and price proposals were considered.

Accelerate Maryland Partners Proposal Highlights

AMP proposed \$145 million in Development Rights Fees and a \$54.3 million Predevelopment Cost Cap. The "Development Rights Fee" or "DRF" is a cash commitment to make a payment by the Phase Developer to the State upon financial close of a Section P3 Agreement for Phase 1 South. The "Predevelopment Cost Cap" is the maximum amount of allowed predevelopment costs that the Phase Developer may recover from the Section Developer at financial close of Phase 1 South.

When the predevelopment work proposals were rated and the financial proposals were scored, AMP provided the best value to the State by having a strong predevelopment work proposal and a significantly stronger financial proposal as compared to those submitted by the two other teams.

AMP brought strong relevant regional experience and P3 priced managed lanes experience. AMP's strong predevelopment work proposal demonstrated a strong understanding of the Project and offered well thought-out approaches to manage and mitigate Phase 1 risks. Their proposal also identified detailed solutions to further reduce property impacts, reduce potential utility conflicts, and provide environmental stewardship.

AMP's predevelopment work proposal outlines potential solutions to provide funding for transit services, community grants, Vision Zero, and an innovation alliance for Phase 1 South. They are estimating that they could provide \$5 million for Vision Zero to improve pedestrian and bicyclist safety along the corridor during construction. Over the 50-year term of the Section P3 Agreement for Phase 1 South, AMP estimated investing \$300 million in transit services, \$50 million in community grants and \$25 million to support emerging technologies through an innovation alliance. Ultimately, the exact investments will be determined as part of the Section P3 Agreement along with the other components to advance final design, construction, financing,

operations, and maintenance of the section for 50 years. Additional factors in the development of Phase 1 South will be determined over the next year, during the predevelopment phase, which will inform the final Section P3 Agreement. These factors include the design developed in collaboration with stakeholders, the construction price, and MDTA's final approval of the toll rate range and soft rate cap.

The Accelerate Maryland Partners Team

The AMP team is made up of the following members:

Transurban (USA) Operations, Inc. – Lead Project Developer and Lead Contractor

The Transurban Group is one of the world's largest toll-road operators and developers, working to get people where they want to go, as quickly and safely as possible. By embracing collaboration with government, its P3s are delivering transformative infrastructure solutions across five markets. Transurban designs roads for the long term, ensuring they will deliver real and lasting benefits to communities. As an industry leader, Transurban has set high standards for performance on social and environmental issues and invests in both to create social inclusion and manage environmental impacts. With a leading market share of transportation P3 investment in North America, they are pioneering travel solutions like dynamically tolled express lanes and are partnering with governments to think about the policies, technology, and infrastructure that will get travelers home today as well as over the next 50 years.

Macquarie Infrastructure Developments LLC – Lead Project Developer and Lead Contractor

The Macquarie Group is the world's largest infrastructure investor with over \$118 billion in infrastructure assets under its management, including over \$30 billion in North America, and has been at the forefront of infrastructure finance and asset management for more than two decades. Macquarie is one of the world's largest P3 developers, equity sponsors, and financial advisors with unparalleled experience in successfully applying a holistic and collaborative approach to developing large and complex infrastructure projects with an integrated team of both technical and financing experts. Macquarie has a large funding ability and appetite, and flexible balance sheet with \$5.7 billion of cash or cash equivalents. As a leading developer of P3s globally, Macquarie has developed or advised on over \$34 billion of P3 projects worldwide and over the last 10 years Macquarie committed over \$55 billion of equity to infrastructure transactions in North America and supported \$10 billion in private financing for US toll roads.

Dewberry Engineers Inc. & Stantec Consulting Services Inc. – Lead Designers

Dewberry is a nationwide design and consulting firm. With its earliest Maryland office dating back to 1969 and four offices in Maryland today, Dewberry supports the needs of clients within federal, state, local, and commercial markets. Services include civil engineering, surveying, planning, land development, and landscape architecture. Dewberry served as lead designer, as well as provided construction quality assurance and quality control, for Contract C and Contract D/E of the Intercounty Connector (ICC) project. **Stantec** offers 22,000 specialists working in 350 locations worldwide including three offices in Maryland (Baltimore, Laurel, and Germantown) and has provided a full suite of services for numerous large and complex transportation projects using Design-Build and P3 delivery methods. Over the past six decades,

Stantec has had a major role in the development of infrastructure in Maryland, the District of Columbia, and Virginia.

Bechtel Infrastructure Corporation – Supporting Construction Manager

Bechtel is a trusted engineering, construction and project management partner to industry and government. Differentiated by the quality of their people and relentless drive to deliver the most successful outcomes, the team aligns capabilities to customers' objectives to create a lasting positive impact. Since 1898, Bechtel has helped customers complete more than 25,000 projects in 160 countries on all seven continents that have created jobs, grown economies, improved the resiliency of the world's infrastructure, increased access to energy, resources, and vital services, and made the world a safer, cleaner place. Bechtel has experience in projects' entire lifecycle, from initial planning and conceptualization, through design, construction, testing, commissioning, and handover to operations. Bechtel's global headquarters are in Reston, VA. Over the years Bechtel has been involved in high-profile transportation projects in the Washington, DC metropolitan region.

Exclusive Subconsultants:

- ECS Mid-Atlantic, LLC
- Floura Teeter Landscape Architects
- Soltesz, Inc.
- STV Incorporated
- Whitney, Bailey, Cox & Magnani, LLC (WBCM)

Accelerate Maryland Partner's exclusive subconsultants bring even more local experience to Phase 1. **Engineering Consulting Services Mid-Atlantic** is a leader in geotechnical, construction materials, environmental and facilities engineering. **Floura Teeter**, a Maryland-certified DBE firm in landscape architectural services, brings an innovative approach to problem-solving, the knowledge to cultivate true sustainability, and a commitment to help craft better communities. Floura Teeter's experience and knowledge bring LEED Accredited Professionals, registered landscape architects, ISA-Certified Arborists, Design-Build Professionals, a registered forester, and a SITES Accredited Professional to any environmental goal or challenges. **Soltesz** is a multi-disciplinary engineering firm experienced in navigating clients through each phase of a project to innovative, effective solutions, whose clients include developers, builders and property owners, public agencies, and institutions around the greater Washington metropolitan area. **STV** is a leader in providing architectural, engineering, planning, environment, and construction manager services for transportation systems, infrastructure, buildings, energy, and other facilities. **WBCM's** transportation division provides safe, efficient, and cost-effective solutions for innovative multi-modal transportation and transit projects, including planning and feasibility studies, with a goal of improving the mobility of people and goods to enhance the overall quality of life within our communities.

Strategic Partners:

- Cavnue, LLC
- SIP Maryland Project Co. LLC
- Via Transportation, Inc.

Cavnue, a technology infrastructure leader founded by **Sidewalk Infrastructure Partners**, aims to build the future of roads alongside strong government and industry partners for the acceleration of autonomous and connected vehicles. As AMP's digital-innovation partner, Cavnue provides digitally advanced road technology that is designed to be safer, less congested, more efficient in the movement of goods, and improve access to public transit. **Via** is the world's leading developer and operator of advanced public mobility systems. Through its partnerships with cities, counties, and transit agencies in more than 20 countries, Via powers shared networks of microtransit and paratransit systems, fixed route buses, and electric autonomous vehicles. Via's technology has delivered more than 85 million rides, making mobility more sustainable, efficient, and accessible for communities around the world.

Diversity, Inclusion and Local Workforce:

- Modern Times, Inc. – Diversity and Inclusion Manager
- Three E Consulting – Community Partnership Manager
- Laisar Management Group LLC – Mentor Protégé Training Manager

Modern Times, a national firm with a local office in Riverdale, is the DBE Program Manager on 12 mega projects. Modern Times brings extensive experience implementing local workforce programs subject to Equal Employment Opportunity regulations, Project Labor Agreement (PLA), Community Benefits Agreement (CBA), and similar instruments. A recognized community programs leader in Maryland, **Three E** brings key relationships with community-based organizations within the Greater Washington Area. Three E worked on the MGM National Harbor Casino and is supporting M/WBE programs on the Prince George's County Schools P3 and the Clean Water Partnership with Corvias Solutions. **Laisar**, a Silver Spring-based firm develops innovative solutions to comply with minority and disadvantaged business enterprise goals, enhances inclusion, and drives economic and social impacts. Laisar was the M/WBE Program Manager on the MGM National Harbor Casino project which realized 40% M/WBE participation, exceeding project goals by 9%.

Phase P3 Agreement

Predevelopment Work

Upon the BPW approval of a Phase P3 Agreement for Phase 1, the Reporting Agencies would begin predevelopment and preliminary design work with AMP for Phase 1 South – from the vicinity of the George Washington Memorial Parkway in Virginia across the American Legion Bridge to I-270 and up I-270 to I-370. Different from Maryland's other P3s, this new predevelopment work will require AMP to conduct robust collaboration and engagement with the counties, municipalities, state and federal agencies, property owners, utilities, and citizens.

These efforts will further help identify the best ways to advance the preliminary design and due diligence activities to further avoid and minimize impacts to environmental resources, communities, properties, utilities, and other features. Predevelopment also will allow AMP and the Reporting Agencies to work together to continue refining cost and revenue assumptions to further the State's interests. Only after this significant collaboration and completion of a Final Environmental Impact Statement/Record of Decision for a build alternative, would MDOT seek

BPW approval for a 50-year Section Agreement for final design, construction, financing, operations, and maintenance.

MDOT SHA will concurrently continue to work through the I-270 North (I-270 from I-370 to I-70) pre-NEPA activities that would lead to a full NEPA process for Phase 1 North. The Phase Developer would support the NEPA process for Phase 1 North once it begins by providing studies such as financing plans, traffic and revenue, and other studies. MDOT SHA may utilize these studies in the development of the NEPA document for Phase 1 North. However, the Phase Developer will not have any decision-making authority for the NEPA processes for Phase 1 South or Phase 1 North. Of notable importance here is that the progressive P3 process is structured and will be conducted to complement and support the success of MDOT's Phase Delivery approach for the MDOT RPA under the Managed Lanes Study for Phase 1 South, as well as any alternative selected as part of environmental processes for Phase 1 North.

Upon execution of the Phase P3 Agreement, the Phase Developer must fund all costs required to perform the scope of work during predevelopment work (as outlined in the Phase P3 Agreement, including Exhibit 6). At financial close under the Section P3 Agreement for Phase 1 South, the Phase Developer will be reimbursed, subject to the Predevelopment Cost Cap, for its eligible predevelopment work costs to perform the design and other work required to achieve financial close. This payment will be funded from the financing raised by the Section Developer on the basis of future toll revenues, which also will provide all of the funding necessary to deliver the first section.

Termination Events and Compensation

If a proposed section does not reach financial close due to the failures or fault of the Phase Developer, MDOT will not reimburse the Phase Developer for any of its predevelopment work costs related to that section. If such failure is with respect to the first section, MDOT will not reimburse the Phase Developer for any of its predevelopment work costs. In this circumstance, MDOT also would have the right to draw on the \$10 million performance security and the \$145 million Development Rights Fee Security and terminate the Phase P3 Agreement.

If MDOT and the Phase Developer are unable to reach an agreement with respect to the terms of the Section P3 Agreement to deliver the first section of Phase 1 during the predevelopment work, the Phase Developer will not be repaid for any of its predevelopment work costs incurred to that point.

If Phase 1 is cancelled for certain reasons that are not the fault of the Phase Developer, including (i) termination by MDOT for convenience, (ii) NEPA does not permit priced managed lanes for Phase 1, or (iii) other changes to the key assumptions set forth in Exhibit 18 to the Phase P3 Agreement (the "Key Assumptions") that cause Phase 1 South to not be financially viable, MDOT will be responsible for paying the lesser of \$50 million ("the Phase 1 South Termination Cap") or the eligible costs incurred by the Phase Developer for the predevelopment work of Phase 1 South up to the time of termination of the Phase P3 Agreement. In return, the Phase Developer will provide MDOT with all of its work product developed up to and during the predevelopment work, including any designs and other intellectual property that could be used

for the development of Phase 1 in the future by the Reporting Agencies. A separate termination cap for Phase 1 North will be agreed between MDOT and the Phase Developer in connection with the determination of the financial viability of Phase 1 North.

In addition to the termination caps, MDOT could be responsible for reimbursing “reasonable and proper” costs to the Phase Developer for certain limited compensable events, such as those requiring the Phase Developer to perform remedial actions to address issues including the discovery of pre-existing hazardous materials or archaeological artifacts. Finally, the State would be responsible for reimbursing the Phase Developer for any MDOT-directed change orders that it requests for work that is not contemplated in the Phase P3 Agreement. These amounts would either be paid directly or result in an increase in the termination and predevelopment work caps to reflect additional costs. However, as part of developing any Section P3 agreements, MDOT will collaborate with the Phase Developer so any and all of these costs ultimately are at no net cost to the State of Maryland, by factoring them into and accounting for them through the Section Developer’s financing at financial close. In addition, the occurrence of certain "Relief Events" that could give rise to rights for the Phase Developer to recover additional costs caused by such events, again it must be stressed, would be accounted for as part of the Section Developer's financing at financial close.

As noted above, the Phase Developer has committed to pay a Development Rights Fee (“DRF”). The DRF is intended to provide developers with a mechanism to offer a minimum concession payment that would be used at financial close to offset MDOT-related project costs and commitments. The DRF is subject to certain conditions associated with the Key Assumptions. If some of the Key Assumptions change during the predevelopment work, the DRF would be adjusted to reflect the demonstrated financial impact of such changes. For instance, the Phase Developer would be allowed to adjust the DRF payment accordingly if there are significant scope changes related to the Bi-State Agreement. The DRF will be paid to MDOT at financial close of Phase 1 South or will be forfeited and paid to MDOT in the event the Phase P3 Agreement is terminated due to a default by the Phase Developer during the predevelopment work.

Security for Obligations

In accordance with the RFP, the selected Phase Developer has provided MDOT SHA with a proposal security of \$5 million which will be forfeited if the selected Phase Developer fails to enter into the Phase P3 Agreement due to any of its actions that are inconsistent with the requirements of the RFP documents.

Once the Phase P3 Agreement is executed, the Phase Developer will provide performance security of \$10 million for the predevelopment work on which MDOT would be entitled to draw if the Phase Developer fails to meet the requirements of the Phase P3 Agreement. In addition to losing its performance security, the Phase Developer will be required to pay MDOT the DRF and would not be eligible to be reimbursed for any of its predevelopment work costs.

Phase 1 South Financial Close Deadline

Subject to the requirements of the approved Phase P3 Agreement, financial close for Phase 1 South is to occur by October 31, 2022. Future sections of Phase 1 are uncommitted, and predevelopment of such sections will only proceed if the Phase Developer and MDOT agree that they are financially viable.

Financial Plan

As part of the predevelopment work activities of Phase 1, the Phase Developer will prepare a fully committed section proposal (the "Committed Section Proposal") for each section. Each Committed Section Proposal will include a financial plan (the "Financial Plan") for the relevant section. The Financial Plan will meet the federal requirements for major projects. The Financial Plan will also include a financial model containing design, construction, operation, and maintenance costs, with such costs developed in collaboration with MDOT on an open-book basis and/or based on a separate, competitive solicitation undertaken by the Phase Developer. Because these costs will be developed as part of the predevelopment work, the Section Developer's annual cash flows are not currently available, but will be included as part of the Committed Section Proposal which will be submitted for future BPW approval along with the relevant Section P3 Agreement.

Additional activities to support the development of each Financial Plan include securing two investment grade ratings from major rating agencies and completing an audit of the financial model to confirm it reflects the relevant Section P3 Agreement and the underlying data and assumptions.

Throughout the process, the Reporting Agencies will provide input, oversight, and review of all the Phase Developer's activities under the Financial Plan. The Financial Plan and Committed Section Proposal must be agreed to by all parties.

State Contributions

The State will not make any payments to the Phase Developer for the predevelopment work performed with respect to any section of the Project under the Phase P3 Agreement if that section of Phase 1 successfully achieves financial close.

Federal Loans or credit assistance

There will be no federal loans or credit assistance to the Reporting Agencies provided under the Phase P3 Agreement.

With respect to each Financial Plan, the primary federal loan and credit assistance tool anticipated to be utilized by the Section Developer is the United States Department of Transportation ("USDOT") Transportation Infrastructure and Innovation Act ("TIFIA") credit assistance program. During the predevelopment work, the Phase Developer will develop a TIFIA financing work plan that outlines their process for securing a TIFIA loan, including submitting a Letter of Interest, completing a creditworthiness review, negotiating a TIFIA Loan Agreement

and finalizing the TIFIA Application. The specific amount requested and TIFIA loan parameters will be developed and refined specific to each section advanced.

Private Investment

As described above, the predevelopment work will be completed at the Phase Developer's risk and without funding from the State.

During the predevelopment work, the Phase Developer will be required to plan for, and ultimately secure, financing commitments from debt and equity providers to pay for the delivery of the section, as outlined in its Committed Section Proposal. This will involve undertaking a competition of potential non-TIFIA financing sources which may include tax-exempt Private Activity Bonds ("PABs"), taxable bank debt, and taxable private placements. The Phase Developer will also develop an equity commitment work plan that details the process to secure all equity commitments required to meet the total equity contributions of the Financing Plan for each section. If the Financial Plan includes PABs, then the Phase Developer will be solely responsible for obtaining ratings, bond counsel opinions, credit enhancement (as applicable), and an underwriting commitment or placement of the PABs, as well as satisfying any conditions placed on the use of the allocation by USDOT. The Maryland Economic Development Corporation (MEDCO) will serve as the issuer of the PABs.

Local and other funding contributions

No local or other funding contributions for the scope of the program are expected outside of the sources of funding articulated above.

Expected Financing Plan Considerations for the Section P3 Agreement

As described above, the section construction responsibilities will be financed through private debt and equity secured solely on toll revenue from the applicable section. The private debt and equity will be non-recourse to MDOT, MDTA, and the State. In addition to the private financing, certain costs to be borne by the State will be financed through the issuance of MDTA Notes through a private placement issuance to the Section Developer which is described below.

MDTA P3 Trust Agreement

MDTA will establish a new master trust indenture for the P3 Program and issue limited recourse toll revenue bonds for each section of the Project. At financial close of each section, the Section Developer will purchase debt obligations from MDTA (the "MDTA Notes") in a private placement. The total principal amount of the MDTA Notes for Phase 1 South is not expected to exceed \$100 million. The project costs paid for with the proceeds of the MDTA Notes are intended to be costs that are the responsibility of the State and that are critical components of the Project. Examples of these costs include environmental mitigation costs, program management costs, and certain right of way acquisition costs. MDTA will pledge to the trustee a security interest in all of the right, title, and interest of MDTA in and to the revenue collected from users of the priced managed lanes applicable to that section, in order to secure the payment of the principal and interest on the MDTA Notes and other payments payable by MDTA, for the benefit

of the Section Developer as noteholder. This pledge is required in order to segregate the toll revenues for the section of the Project. (*See*, Transportation Article, § 4-313, Annotated Code of Maryland.) There will be no impact to MDTA's current trust and other TFPs. Specifically, principal and interest on the notes are repaid solely from tolls from the section and shall be non-recourse on the MDTA system revenue or the State. MDTA will be protected from toll collection and timing risk through the creation of an Operating Reserve Account with a commitment from MDOT to pre-fund the Operating Reserve Account and fund any future shortfall during the term. To the extent that a shortfall is forecast or experienced, MDTA shall evaluate changes to operations or fee structure to mitigate the potential shortfall.

State Debt Impact

As described above, under the Phase P3 Agreement, MDOT will assume contingent liabilities of termination compensation and compensable events, which is currently a potential liability of \$50 million for the Phase 1 South Termination Cap. The circumstances in which the State would be required to compensate the Phase Developer under the Phase P3 Agreement are very limited, as set out in the *Phase P3 Agreement* section above. As such, it is anticipated that the P3 Program will have no impact on the State's debt capacity. The Reporting Agencies have consulted with the Department of Budget and Management (DBM), and DBM has agreed with this assessment.

No private financing is to be raised by the Phase Developer with respect to funding the predevelopment work. All project financing is to be raised for the delivery of the section in the future by the Section Developer (as described in the relevant Financial Plan), subject to future approval by MDOT, the BPW and MDTA Board (as defined below). Any future borrowing, even if borrowed from a federal credit program such as TIFIA or issued as Private Activity Bonds, will be non-recourse to the State and will be part of a Section P3 Agreement subject to future approval from MDOT, the MDTA Board and BPW.

MDTA is expected to issue the MDTA Notes within its statutory bonding authority, which will be repaid from the tolls derived from the relevant section of the P3 Program and which will not impact the debt coverage of MDTA's outstanding bonds. The MDTA Notes will, however, be subject to MDTA's statutory debt limit. The issuance of the MDTA Notes is not expected to negatively impact MDTA's ability to progress other capital projects.

Future Revenue Sharing

Within each Section P3 Agreement, there will be contractual terms associated with future revenue sharing in circumstances where the Project outperforms initial expectations. Any revenue sharing would be in addition to the Development Rights Fee and any upfront payment paid to the Reporting Agencies at financial close of each Section P3 Agreement.

Tolling

MDTA has the responsibility to fix, revise, and set toll rates for the P3 Program in accordance with the Transportation Article §4-312 of the Annotated Code of Maryland and Code of Maryland Regulations (COMAR) 11.07.05. As a Reporting Agency, MDTA is conducting due diligence on the toll rate setting process, which eventually will include a toll rate setting proposal

presented by MDTA staff to the MDTA Chairman and Board ("MDTA Board"), followed by a public comment period and hearings, and concluded with final toll rate range recommendations to the MDTA Board for approval. The MDTA staff anticipates presenting the toll rate setting proposal and initiating this process with the MDTA Board in Spring 2021.

No tolling shall take place in connection with the predevelopment work performed under the Phase P3 Agreement. The Section Developer shall be entitled to payments of certain toll revenues for all valid transactions recorded and submitted to MDTA for trips within its Section of Phase 1. Such toll revenues shall be the Section Developer's source of funds to pay its operation and maintenance costs, return on debt and equity investment and its other costs.

Setting Toll Rates for the Project

When establishing or adjusting toll rates for the toll facilities that the MDTA currently owns and operates, the primary focus is revenue to ensure the agency meets its fiscal responsibilities to operate, maintain and finance its facilities. Traffic and revenue models help staff determine the revenue impact for various toll rate scenarios. This Project requires a different focus using a successfully proven approach of establishing toll rates/ranges to effectively manage congestion. Rather than focusing on a certain amount of revenue, the managed lanes on the Project are designed to maintain speeds of 45 mph or greater in the managed lanes. The goal of the managed lanes is to maintain free-flowing traffic and to use pricing factors to influence traffic flow. As such, toll rates need to apply economic supply and demand principles to influence utilization of the managed lanes.

MDTA continues to conduct its thorough due diligence to ensure that the toll rate ranges it proposes and approves are those necessary to generally maintain and, as circumstances warrant, quickly restore free flowing traffic on the managed lanes.

Soft Rate Cap

In addition to setting the toll rate ranges, MDTA also anticipates establishing a soft rate cap and operational metrics for the Phase 1 South portion of the Project. The purpose of the soft rate cap is to constrain the toll rate charged to customers when throughput and speed operational metrics are within certain defined thresholds. The soft rate cap may only be exceeded if the established operational metrics are not being met for the specific tolling segment impacted (i.e., not entire trip). A controlled rate increase will be allowed above the soft rate cap but will always remain within the toll rate range established by the MDTA Board. Toll rates above the soft rate cap will be permitted only until the required operational metrics have been met, after which, the toll rate must be adjusted to a rate at or below the soft rate cap. The soft rate cap will be established through future action by the Executive Director.

Minimum and Maximum Toll Rates

As part of the toll rate ranges, MDTA also establishes minimum and maximum toll rates along with a minimum toll per trip. The minimum toll rate is the lowest toll rate per mile that will be charged at any tolling point for the managed lanes. The minimum toll per trip is intended to cover toll capture, and MDTA processing, and collection costs.

The maximum toll rate is the highest toll rate per mile that may be charged at any tolling point for the managed lanes. The actual per mile rate paid by customers is responsive to real-time traffic. The maximum rates cannot be exceeded under any circumstance. The maximum rate will only be realized under conditions where the soft rate cap is exceeded, which would be during times of deteriorating performance when operational metrics are not being met. The toll rate is determined on a segment-by-segment basis. The maximum toll rate is required for the most congested tolling segments and would minimally come into effect for certain segments.

Escalation

The MDTA staff anticipates the minimum and maximum toll rates and the soft rate cap will be escalated from the 2021 rates (2021\$) using escalation factors based on the Washington Metro regional consumer price index – all urban consumers (CPI-U) values, population and employment real growth rate, and per capita personal income real growth rate. These factors will be set by the MDTA Board and will be escalated annually on July 1 and are anticipated to account for and keep pace with (1) the growing traffic demand for the managed lanes, (2) annual inflation, and (3) the goal of providing a faster and more reliable trip for customers who choose to pay the toll over the life of Phase 1 South.

High Occupancy Vehicles (HOV) on the Project

The MDTA Board is responsible for establishing any discount programs (including free passage) such as high-occupancy vehicles (HOV) and transit. The preliminary information developed by MDTA staff, consistent with the RPA for Phase 1 South, recommends free passage for HOVs with three or more people, mass transit vehicles, over the road buses, and motorcycles. This will provide opportunities for faster, more-reliable bus transit service, carpooling and vanpooling. Existing general-purpose lanes throughout the corridor will be retained and will remain free for use by all motorists.

Environmental Review Update

Under the I-495 & I-270 Managed Lanes Study ("MLS"), the State has been evaluating alternatives that address the need to accommodate existing and long-term traffic growth, enhance trip reliability, expand travel options, accommodate homeland security, and improve the movement of goods and services. The MLS is following the NEPA process and will result in a Final Environmental Impact Statement (FEIS).

On January 27, 2021, MDOT announced to key partner agencies, stakeholders, elected officials, and the public that Alternative 9 -- two HOT lanes within the limits of the Managed Lanes Study -- is its RPA. This alternative also includes adding a bicycle and pedestrian connection across the new American Legion Bridge. In May 2021, MDOT decided to align the Managed Lanes Study to be consistent with the State's phased delivery plan by recommending Alternative 9 within the limits of Phase 1 South only. The new RPA does not include improvements to the remaining parts of the interstate system within the MLS area. This does not mean improvements will not be needed on these remaining parts of the system. Only that future consideration of

improvements to these remaining parts would advance separately, subject to additional analysis and collaboration with the public, stakeholders and agencies.

Buses, motorcycles, and vehicles with three or more people would be able to travel the new HOT lanes free of charge, reducing dependence on single-occupant vehicles and providing opportunities for faster, more-reliable bus transit service, carpooling, and vanpooling throughout the region. Under the RPA, all existing general-purpose travel lanes will remain free for anyone to use. Design efforts continue to avoid and minimize community and environmental impacts and identification of mitigation measures for unavoidable impacts is well underway in coordination with our key partner agencies, as well as seeking additional multimodal opportunities for transit and bicycle/pedestrians and environmental enhancements. Under the progressive P3 process, the Phase Developer would advance the RPA for Phase 1 South as part of the predevelopment work.

MDOT SHA continues to work through Pre-NEPA activities on Phase 1 North. Through ongoing coordination with federal, State, and local partners, MDOT SHA will define a purpose and need and a range of options for highway and transit solutions that can be integrated to address the long-term transportation needs of the corridor. This work will support a more efficient environmental review, consistent with recently updated federal regulations.

Other Items

Operation and Maintenance

A summary of financial costs associated with operation and maintenance contracts, performance measures relating to the ongoing operation, the penalties associated with nonperformance relating to the ongoing operation and maintenance, and a plan for how the long-term operation and maintenance contract will be overseen by the agency are not relevant to the Phase P3 Agreement, since it does not include operations and maintenance work. These will be relevant to and included in the Section P3 Agreements.

No transfer of real or personal property to developer

No material land, buildings, or other structures or assets of the State shall be transferred to or exchanged with the Phase Developer or any Section Developer of the P3 Program.

MDOT Commitments to the BPW

Property Acquisition Commitment

No property acquisitions related to Traffic Relief Plan may take place before BPW final approval of a Section P3 agreement, except for option payments for the reservation of the purchase of lands. The Reporting Agencies are committed to implementing a solution with the least amount of impacts through minimization techniques and innovative solutions from the private sector. Through this process, the Reporting Agencies approach in which no property shall be acquired prior to the final approval.

MDOT SHA shall not acquire land for the Project before the BPW approves a Section P3 Agreement, *except for MDOT SHA coordinating with specific property owners to initiate option payments for the reservation of the purchase of lands anticipated for Phase 1 South and right of entries to complete due diligence activities.* The Reporting Agencies are committed to working collaboratively with the Phase Developer and property owners in implementing solutions with the least amount of impacts through minimization techniques and innovative solutions.

Mass Transit Bus Commitment

RFP soliciting P3 contractor will permit mass transit bus access on managed toll lanes without tolls. The Reporting Agencies are developing solicitation approach in which it will be clear that public agency mass transit buses will be allowed on the managed toll lanes for free.

The Phase P3 Agreement requires any Section P3 Agreement shall require that mass transit vehicles will be permitted to use the priced managed lanes free of charge, providing opportunities for faster, more reliable bus transit service, carpooling and vanpooling, and reductions in congestion on the general-purpose lanes.

Regional Transit Commitment

The Reporting Agencies will develop memoranda of understanding with the affected Counties defining regional transit service improvements to be provided as part of the P3 Agreements. Terms of the agreements will be provided to the BPW concurrently with the P3 Agreements. Furthermore, the Reporting Agencies will develop the transit service improvements collaboratively with the affected Counties.

Specific transit investment will be provided as part of the P3 agreements. This will ensure these regional transit service improvements are provided at defined and predictable times. By including the regional transit service improvements in the P3 agreements, the affected Counties will be guaranteed the transit service improvements. This approach will fully honor the BPW request from June 5, 2019. The memoranda of understanding between MDOT and the affected Counties defining transit service improvements to be developed as part of the P3 Agreements will be provided to the BPW as part of the request for approval of the P3 Agreements to clearly show that the Reporting Agencies have complied with this BPW condition.

The Reporting Agencies are working collaboratively with the affected counties in developing memoranda of understanding ("MOUs") to define regional transit service improvements to be provided as part of the Section P3 Agreements and be consistent with the financial constraints of the relevant section of the Project. Terms of the MOUs will be provided to the BPW as separate documents, concurrently with the corresponding Section P3 Agreements. These agreed upon regional transit service improvements will be included in the terms of each Section P3 Agreement, while ensuring the program remains no net cost to the State. Upon execution of the Phase P3 Agreement, the Phase Developer will begin its collaboration with MDOT and the

affected counties to further define the specific regional transit service improvements that will be provided as part of the MOUs and in the Section P3 Agreements.

Monorail Feasibility Study Commitment

Initial feasibility study of monorail to be performed.

The MDOT has recently completed (February 2021) an Independent I-270 Monorail Feasibility Study⁹ to assess the viability to construct, operate, and maintain a monorail system between Shady Grove Metrorail Station and Frederick, Maryland.

The Feasibility Study evaluated existing monorail services around the world, alignment options, station locations and connectivity, frequency of service, ridership demand, environmental and land use considerations, operation and maintenance needs, and project costs for construction, operation, and maintenance.

Based on the evaluation completed as part of this Feasibility Study, the construction of monorail within this corridor is physically feasible. This feasibility determination is based on the technology and proposed alignment. Impacts to existing transit ridership and vehicle volume reductions on I-270 were not fully examined.

Phasing Commitment

The P3 Program will be delivered through the solicitation of one or more phase developers. The first solicitation, referred to herein as “Phase 1,” will include the Bi-state Capital Beltway Accord partnership for the American Legion Bridge which will include I-495 from south of the George Washington Memorial Parkway to I-270 and I-270 from I-495 to I-70. The first section to be delivered under Phase 1 will be along I-495 from south of the George Washington Memorial Parkway to I-270 and along I-270 from I-495 to I-370. The remaining phases on I-495 from I-270 to the Woodrow Wilson Memorial Bridge and on I-270 from I-370 to I-70 will be solicited at a later date subject to BPW amendment approval of each subsequent phase(s).

As noted above, this Phase P3 Agreement is only for Phase 1. Upon BPW approval of the Phase P3 Agreement, the Reporting Agencies will work with AMP on predevelopment and preliminary design work for Phase 1 South involving robust collaboration and engagement with the public and other stakeholders. The Phase Developer also will support the NEPA process for Phase 1 North once it begins by providing studies such as financing plans, traffic and revenue, and other studies. MDOT SHA may utilize these studies in the development of the NEPA document for Phase 1 North. However, again as noted previously, the Phase Developer will not have any decision-making authority for the NEPA processes for Phase 1 North. The Reporting Agencies shall seek additional BPW approvals for any Section P3 Agreements for Phase 1 North and for any subsequent, future phase(s).

⁹ https://www.mdot.maryland.gov/OPCP/I-270_MFS_Report_2021-2_23.pdf