Predevelopment Agreement

for the

Diridon Station to SJC San José Airport Connector Project

Contract No:

The City of San José

and

[Name of Developer]

Effective Date

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PREDEVELOPMENT AGREEMENT

This predevelopment agreement (this "**Agreement**") is entered into as of [●], 202[●], by the City of San José (the "**City**") and [●] (the "**Developer**") (each a "**Party**" and together, the "**Parties**").

RECITALS:

(A)   The City issued a Request for Proposals No. [*insert RFP number*] (the "**RFP**") pursuant to the authority granted under the City Ordinance No. 30755, to select up to two private entities to provide services to further analyze, validate, and report on the commercial, financial, and technical feasibility of the Project; and with one such entity further providing services to support the Environmental Approval Process for the Project and being offered the right to negotiate an Implementation Agreement to design, build, finance, operate, and maintain the Project.

(B)   On [*insert day and month*] 2022, the City received [*insert number*] of proposals in response to the RFP.

(C)   On [*insert day and month*], 2022, the City issued a Notice of Preferred Proposer (as defined in the RFP) for award of this Agreement to the Developer [and also issued a Notice of Preferred Proposer for award of a separate predevelopment agreement for the Project to [*name of second successful team, if applicable*]. At the end of PDA Phase 1, the City intends to issue a Notice to Proceed for PDA Phase 2 under this Agreement or the other predevelopment agreement, but not under both][1].

In consideration of the mutual covenants of the Parties as set out below, the Parties hereby agree as follows:

1.   DEFINITIONS, INTERPRETATION, AND ORDER OF 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*).

1.2   Interpretation

(a)   In this Agreement, unless otherwise expressly stated:

  (i)   headings are for convenience only and do not affect interpretation;

  (ii)   the singular includes the plural and vice versa (as the context may require);

  (iii)   references to any Applicable Law include all statutory or regulatory provisions consolidating, amending, or replacing the Applicable Law referred to;

  (iv)   the word "including", "includes", and "include" shall be deemed to be followed by the words "without limitation";

  (v)   reference in the main body of this Agreement, or in an Exhibit, to an Article, Section, part, subsection, or clause is to the Article, Section, part, subsection, or clause of the main body of this Agreement, or of that Exhibit (as applicable);

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[1]   **Note to Proposers**: The drafting in square brackets will only be retained if the City exercises its right to award a PDA to two Developers. If only one PDA is awarded, this drafting will be deleted.

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(vi)   subject to Section 1.2(a)(v) (*Interpretation*), references to Articles, Sections, subsections, clauses, forms, paragraphs, subparagraphs, Exhibits, attachments, appendices, or schedules are to the Articles, Sections, subsections, clauses, forms, paragraphs, subparagraphs, Exhibits, attachments, appendices, or schedules in or attached to this Agreement;

(vii)   references to Persons include their permitted successors and assigns and, in the case of a Government Entity, entities succeeding to their respective functions and capacities;

(viii)   words of any gender shall include each other gender where appropriate;

(ix)   the word "or" is not exclusive;

(x)   all Notices, "notices", "requests", "directives", and other communications are required to be in writing, and all references to Notices, "notices", "requests", "directives", and other communications, by whatever term used, shall be deemed to be followed by the words "in writing" or preceded by the word "written" and delivered in accordance with Article 30 (*Notices*);

(xi)   references to the Developer "submitting", "providing", "delivering" or "furnishing" or being required to "submit", "provide", "deliver" or "furnish" a notice, Notice, Developer Submittal, or other communication or information, shall be deemed to be a reference to delivery of that notice, Notice, Developer Submittal or other communication or information to the City in accordance with Article 30 (*Notices*);

(xii)   references to this Agreement or any other contract, instrument, or document is to this Agreement or such other contract, instrument, or document as amended or supplemented from time to time;

(xiii)   references to this Agreement or any other contract includes all exhibits, schedules, forms, appendices, addenda, attachments, or other documents attached to or otherwise expressly incorporated in this Agreement or any such other contract (as applicable);

(xiv)   an obligation to do something "promptly" means an obligation to do so as soon as the circumstances permit, avoiding any delay;

(xv)   "shall" when stated is to be considered mandatory;

(xvi)   in the computation of periods of time from a specified date to a later specified date, the word "from" means "from and including" and the words "to" and "until" mean "to and including"; and

(xvii)   any references to the PDA Work, Developer Submittals, or the Developer Commitments, or any other document or item, or any part of any of them being or remaining "fit for its purpose" or "fit for its intended purpose", or as having an intended use (or any similar reference) will be read as referring to the purpose, intended purpose, or intended use stated in, contemplated by, or reasonably ascertainable from this Agreement, including Exhibit 5 (*PDA Work Requirements*).

(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 this Agreement (including all Exhibits), the order of precedence will be as follows, from highest (commencing with paragraph (i)) to lowest (ending with paragraph (v)):

(i) the terms of Exhibit 8 (*City Contracting Requirements and other Regulatory Requirements*);

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

(iii) the terms of the Exhibits to this Agreement, other than Exhibit 1 (*Definitions*), Exhibit 5 (*PDA Work Requirements*), Exhibit 8 (*City Contracting Requirements and other Regulatory Requirements*), and Exhibit 4 (*Developer Commitments*);

(iv) the terms of Exhibit 5 (*PDA Work Requirements*); and

(v) the terms of Exhibit 4 (*Developer Commitments*),

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

(b) If there is any conflict, ambiguity, or inconsistency between any of the provisions in this Agreement having the same order of precedence (including all Exhibits), the more stringent requirement will prevail.

(c) An amendment, Modification, or change to this Agreement shall take precedence over the term it amends and with respect to the other terms of this Agreement, will take its precedence from the term it amends in accordance with this Section 1.3. All other documents and terms and conditions not affected by the amendment, change, or Modification shall remain unchanged.

(d) If the Developer Commitments include statements, provisions, concepts, or designs that can reasonably be interpreted as offering to:

(i) provide higher 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 otherwise required by the main body of this Agreement or the other Exhibits to this Agreement,

the Developer's obligations under this Agreement include compliance with all such statements, provisions, concepts, and designs of those Developer Commitments.

(e)   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.

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 Party 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,

the City will promptly issue a written determination to the Developer, resolving the conflict, ambiguity, or inconsistency.

(c)   Any determination by the City under Section 1.4(b) will not constitute a Relief Event, or a Change Order or otherwise entitle the Developer to any extension of time, relief from obligations, or compensation.

1.5   Discretions

(a)   Except as otherwise expressly provided in this Agreement, all determinations, consents, waivers, or approvals of the City under this Agreement (including any conditions to such determinations, consents, waivers, or approvals) will be made in the City's sole discretion.

(b)   Except as otherwise expressly provided in this Agreement, all determinations, consents, waivers, or approvals of the Developer under this Agreement must not be unreasonably withheld, conditioned, or delayed.

2.   TERM, PHASED WORK, AND EARLY WORKS

2.1   Term

The term will commence on the Effective Date and continue until the earlier of:

(a)   the date of any expiry under Section 2.2(f)(iv)(A) (*Phased Work and Notices to Proceed*);

(b)   the date Commercial Close is achieved under the Implementation Agreement;

(c)   the date that is 30 months after the Effective Date (unless extended under the Validation Amendment or otherwise in accordance with the terms of this Agreement); or

(d)   the date this Agreement is terminated under Article 22 (*Termination and Expiry*),

(the "**Term**").

2.2   **Phased Work and Notices to Proceed**

(a)   The Developer shall perform the PDA Work in phases in accordance with this Agreement. The Developer may only commence the PDA Work under each PDA Phase if and when the City issues a fully executed Notice to Proceed for the PDA Work to be performed under that PDA Phase in accordance with this Section 2.2.

(b)   Subject to Article 16 (*Relief Events*) the Developer must complete all of its obligations under this Section 2.2 in a timely fashion and in such a manner that there is no adverse impact to the PDA Work Schedule.

(c)   Subject to Section 2.2(f), the City will issue the Notice to Proceed for PDA Phase 1 ("**NTP1**") and the Commencement Date for the PDA Phase 1 Work will be no later than 30 Days after the following conditions have been satisfied (not necessarily in this order):

   (i)   the Developer has obtained all Governmental Approvals (other than any City-Provided Approvals) required to commence performance of the PDA Phase 1 Work, including necessary licenses to perform the PDA Phase 1 Work, as contemplated in Section 4.1(j) (*Licenses, Skills, and Expertise*);

   (ii)   the Developer has procured the Insurance Policies and delivered to the City all required insurance certificate(s) and documentation for the PDA Phase 1 Work in accordance with this Agreement; and

   (iii)   the Developer has delivered the PDA Phase 1 Security to the City and it has become fully effective in accordance with its terms.

(d)   Subject to Section 2.2(f), the City will issue the Notice to Proceed for PDA Phase 2 ("**NTP2**") and the Commencement Date for the PDA Phase 2 Work will be no later than 30 Days after the following conditions have been satisfied (not necessarily in this order):

   (i)   the Developer has completed all PDA Phase 1 Work, including submission of the final Feasibility Validation Report and all other Developer Submittals required to be submitted as part of the PDA Phase 1 Work;

   (ii)   the Developer's final Feasibility Validation Report has been accepted by the City in accordance with Section 2.3(c) (*PDA Phase 1*);

   (iii)   the Developer has provided all information required under Exhibit 5 (*PDA Work Requirements*) to include the Developer's proposed Transit Solution as part of the Environmental Approval Process;

   (iv)   the Parties have agreed12.1 and executed the Validation Amendment in accordance with Section 2.3(c)(i) *(PDA Phase 1)*;

   (v)   in accordance with Article 7 (*Key Personnel and Subcontracting*), the Developer has submitted, and the City has approved:

      (A)   an updated organization chart for performance of the PDA Phase 2 Work;

      (B)   any proposed additions or substitutions to the Major Subcontractors to perform the PDA Phase 2 Work and/or PDA Phase 3 Work, in each case in the form and with the supporting information required under Section 7.4 (*Major Subcontracts for PDA Work*); and

(C) the individuals proposed to fulfil the Key Personnel roles for the PDA Phase 2 Work and/or PDA Phase 3 Work, in each case in the form and with the supporting information required under Section 7.1 (*Key Personnel*);

(vi) the Developer has submitted all prescribed certifications required for performance of the PDA Phase 2 Work under Exhibit 10 (*Required Forms and Prescribed Certifications*);

(vii) the Developer has obtained all Governmental Approvals (other than any City-Provided Approvals) required to perform the PDA Phase 2 Work;

(viii) the Developer has procured the Insurance Policies and delivered to the City all required insurance certificate(s) and documentation for the PDA Phase 2 Work in accordance with this Agreement; and

(ix) the Developer has delivered the PDA Phase 2 Security to the City and it has become fully effective in accordance with its terms.

(e) Subject to Section 2.2(f), the City will issue the Notice to Proceed for PDA Phase 3 ("**NTP3**") and the Commencement Date for the PDA Phase 3 Work will be no later than 30 Days after the following conditions have been satisfied (not necessarily in this order):

(i) the Developer has completed all PDA Phase 2 Work, including submission of all Developer Submittals required to be submitted as part of the PDA Phase 2 Work;

(ii) the Developer's proposed Transit Solution has been selected by the City Council as the Locally Preferred Alternative under the Environmental Approval Process;

(iii) subject to Article 11 (*Environmental Approval Process*), the Parties have agreed (or where a City determination or direction is provided for or permitted under this Agreement, the City has directed) the relevant assumptions which shall be used by the Developer in the preparation of the Implementation Proposal, including with respect to:

(A) the date for substantial completion, the date for completion, and the longstop date for the Implementation Work, to be incorporated under the Implementation Work Schedule;

(B) the form of the Implementation Agreement in accordance with Section 14.1 (*Development of Implementation Agreement*);

(C) the Initial Base Case Financial Model;

(D) the Project Site; and

(E) if applicable, any DBE Goal for the Implementation Work in accordance with Section 7.6 (*DBE Participation*);

(iv) the Developer has obtained all Governmental Approvals (other than any City-Provided Approvals) required to perform the PDA Phase 3 Work;

(v) the Developer has delivered the PDA Phase 3 Security to the City and it has become fully effective in accordance with its terms;

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(vi)   the Parties have agreed or the City has notified the Developer of any adjustments to the form of the Implementation Proposal in accordance with Section 14.3 (*Form of Implementation Proposal*);

(vii)   the Developer has certified to the City that the Transit Technology has achieved Technology Readiness Level of 8 or provided any other certifications agreed in the Validation Amendment or other Modification; and

(viii) any other condition expressly required under this Agreement as a condition precedent to submission of the Implementation Proposal.

(f)   Without prejudice to the City's right to terminate under Article 22 (*Termination and Expiry*), the City is not obligated to issue any NTP and may delay issuance of an NTP or, in its sole discretion, by Notice to the Developer make a determination:

(i)   to reject the Developer's Feasibility Validation Report and not proceed with PDA Phase 2 under this Agreement;

(ii)   during the course of or following completion of a PDA Phase, not to proceed with any subsequent PDA Phase under this Agreement;

(iii)   not to proceed with requiring the Developer to submit an Implementation Proposal; or

(iv)   not to proceed with executing the Implementation Agreement,

in which case:

(A)   this Agreement will expire on the date specified in the Notice; and

(B)   Article 22 (*Termination and Expiry*) will apply.

(g)   The Developer acknowledges and agrees that:

(i)   nothing in this Agreement may be construed as an indication or representation to the Developer by the City that the City will accept:

(A)   the Feasibility Validation Report and proceed with PDA Phase 2;

(B)   any proposal to enter into any Early Works Agreement prior to entering into an Implementation Agreement; or

(C)   the Implementation Proposal and proceed with executing the Implementation Agreement;

(ii)   the City will, in its sole discretion, determine:

(A)   whether or not it is in the interest of the City and the general public for the City to continue the PDA Work;

(B)   whether or not to accept a Feasibility Validation Report and continue to PDA Phase 2;

(C)   whether or not to accept any proposal to enter into any Early Works Agreement prior to executing an Implementation Agreement;

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(D)   whether or not to proceed with requiring that the Developer submit an Implementation Proposal; and

(E)   whether or not to accept the Developer's Implementation Proposal or execute the Implementation Agreement;

(iii)   except as contemplated in Article 22 (*Termination and Expiry*), the Developer is not entitled to claim or seek payment from the City of any amount by way of Loss as a result of the City making a determination to issue a Notice under Section 2.2(f); and

(iv)   the City's rights under this Article 2 are without prejudice to its rights and remedies for a Developer Default, including where such Developer Default results in a failure to prepare and submit a Feasibility Validation Report or Implementation Proposal or to execute the Implementation Agreement.

2.3   **PDA Phase 1**

(a)   Upon and following issuance of NTP1, the Developer shall commence the PDA Phase 1 Work as required under this Agreement including conducting a Feasibility Validation.

(b)   When the Developer determines that the Feasibility Validation is complete in accordance with this Agreement, the Developer shall submit the Feasibility Validation Report to the City. Within 30 Days of receipt of the Feasibility Validation Report, the City must determine whether or not the Feasibility Validation is complete and:

(i)   if the Feasibility Validation is complete in accordance with this Agreement, Section 2.3(c) will apply;

(ii)   if the Feasibility Validation is not complete or does not otherwise comply with the requirements of this Agreement for that Feasibility Validation (including those requirements for Feasibility Validation set out in Exhibit 5 (*PDA Work Requirements*)), the City shall Notify the Developer of such deficiencies. The Developer shall promptly cure the deficiencies identified and this Section 2.3 will reapply; or

(iii)   if the City requires additional information to determine whether the Feasibility Validation is complete in accordance with this Agreement, the City will Notify the Developer of such additional information and the Developer shall promptly provide the additional information and this Section 2.3 will reapply from the date on which the information is received by the City.

(c)   When the City determines that the Feasibility Validation is complete in accordance with this Agreement, the City will evaluate the Feasibility Validation Report against the criteria set out in Section 3.8 (Feasibility Validation Criteria) of Part A of Exhibit 5 (PDA Work Requirements) and determine whether to accept the Feasibility Validation Report and if the City determines that it accepts the Feasibility Validation Report:

(i)   the Parties will negotiate in good faith to agree a Validation Amendment to reflect the Feasibility Validation Report (including, but not limited to, incorporating: the Feasibility Validation Report (in whole or in part) in Exhibit 4 (*Developer Commitments*); the PDA Cost Cap for PDA Phase 2 and the subsequent PDA Phases as set out in the Feasibility Validation Report; any required Third Party Agreements identified in accordance with Section 12.1 (*Third Party Agreements*);

any amendments to the Term or the PDA Phases; any other terms contemplated to be agreed and incorporated into the Validation Amendment under this Agreement; and any other consequential changes to this Agreement). The Developer will be deemed to have breached the obligation to negotiate the Validation Amendment in good faith if it requires amendments to this Agreement that are not consistent with its Feasibility Validation Report. If, despite both the City and the Developer complying with their obligations under this Section 2.3(c)(i), the City and the Developer are unable to agree a form of Validation Amendment by the date falling 360 Days from the Commencement Date under NTP1, either the City or the Developer may terminate this Agreement by Notice under Section 22.1(c) (*Non-Default Termination or Expiry*); and,

(ii) subject to the City's determination that all other conditions in Section 2.2(d) have been satisfied (or waived by the City), issue NTP2 in accordance with Section 2.2(d).

(d) Nothing in this Section 2.3 will limit the City's right to provide the Developer Notice of the City's decision not to proceed in accordance with Section 2.2(f) (*Phased Work and Notices to Proceed*) or the City's rights under Article 22 (*Termination and Expiry*).

2.4 PDA Phase 2

(a) Upon and following issuance of NTP2, if applicable, the Developer shall commence the PDA Phase 2 Work as required under this Agreement including agreement of the Implementation Agreement Term Sheet and, subsequently, the form of Implementation Agreement, and further concept development and completion of the Environmental Approval Process, as further described in Exhibit 5 (*PDA Work Requirements*).

(b) The Developer must keep the City informed on the progress made in satisfying the conditions precedent to issuance of NTP3 set out in Section 2.2(e) (*Phased Work and Notices to Proceed*).

(c) The Developer must and the City may, issue a Notice to the other Party when it considers that all conditions precedent to issuance of NTP3 set out in Section 2.2(e) (*Phased Work and Notices to Proceed*) have been satisfied (or waived). Within 20 Days of receipt or issuance of that Notice (as applicable), the City shall:

(i) if the City determines that all conditions precedent have been satisfied (or waived by the City), issue NTP3 in accordance with Section 2.2(e) (*Phased Work and Notices to Proceed*); or

(ii) if the City determines that all conditions precedent have not been satisfied (or waived by the City), issue a Notice to the Developer identifying its reasons by reference to the terms of this Agreement, and this Section 2.4 will reapply.

(d) Nothing in this Section 2.4 will limit the City's right to provide the Developer Notice of the City's decision not to proceed in accordance with Section 2.2(f) (*Phased Work and Notices to Proceed*) or the City's rights under Article 22 (*Termination and Expiry*).

2.5 PDA Phase 3

Upon and following issuance of NTP3, if applicable, the Developer shall commence the PDA Phase 3 Work as required under this Agreement including the submission of the Implementation

Proposal in accordance with Section 14.2 (*Submission of Implementation Proposal*) and which may include the finalization and execution of the Implementation Agreement.

2.6 Early Works

At any time following issuance of NTP2, the Parties may agree to and execute an Early Works Agreement. Any work carried out under any Early Works Agreement will not comprise part of the Implementation Work for the purposes of the Implementation Proposal.

3. EXCLUSIVITY

(a) Subject to Section 3(b), from the issuance of NTP2 and until the end of the Term, the City:

    (i) grants the Developer an exclusive right to develop and implement the Project in accordance with the terms of this Agreement; and

    (ii) shall not solicit from, entertain proposals from, or negotiate with, any third party regarding the development of the Project.

(b) The City reserves the right, in its sole discretion, to:

    (i) [prior to issuance of NTP2, enter into a predevelopment agreement and obtain a feasibility validation report for the Project from another developer selected under the terms of the RFP;][2]

    (ii) award to other contractors contracts that facilitate or otherwise support the Project without detriment to the intent of this Agreement or the Implementation Agreement;

    (iii) negotiate with any third party with respect to the development of any portion of the Project that is not subject to a signed Implementation Agreement on the last day of the Term; and

    (iv) following exercise of the City's rights under Section 2.2(f) (*Phased Work and Notices to Proceed*) or Article 22 (*Termination and Expiry*):

        (A) proceed with any other action as the City deems appropriate for delivery of the Project, including soliciting from, negotiating with, or awarding a contract to any other Person for any part of the Project; or

        (B) decide not to proceed with the Project or any part of it.

4. REPRESENTATIONS AND WARRANTIES

4.1 Developer Representations and Warranties

The Developer represents and warrants for the benefit of the City that:

(a) **Existence and Good Standing**

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[2]   **Note to Proposers**: This will be retained if the City exercises its right to award to up to two developers for the purposes of PDA Phase 1. Otherwise, it will be deleted prior to execution of the PDA.

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

(b) **Good Standing and Qualification**

The Developer is in good standing, has the financial ability, resources, skills, capability, and business integrity necessary to perform the PDA Work and is qualified to do business in the State.

(c) **Power and Authority**

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

(d) **Authorization**

(i) The execution, delivery, and performance of this Agreement by the Developer, and the performance of the Developer's obligations under this Agreement, have been duly authorized by all necessary [corporate]/[company][4] action of the Developer.

(ii) Each Person signing this Agreement on behalf of the Developer, has been duly authorized to sign this Agreement on behalf of the Developer.

(e) **Signing**

This Agreement has been duly signed by the Developer.

(f) **Enforceability**

This Agreement constitutes a legal, valid, and binding obligation on the Developer, enforceable against the 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 Developer, and the performance by the Developer of its obligations under this Agreement, does not conflict with, or result in a default or a violation of:

(i) the Developer's organizational documents;

(ii) any other material agreement or instrument to which the Developer is a party or which is binding on the Developer or any of the Developer's assets; or

(iii) any Applicable Law.

(h) **No Prohibited Person**

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[3] **Note to Proposers**: This will be completed prior to execution of the PDA.

[4] **Note to Proposers**: This will be completed prior to execution of the PDA.

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The Developer, each Affiliate of the 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 Developer or any Equity Member, threatened that:

(i)   could reasonably be expected to have a material adverse effect on the ability of the Developer to perform its obligations under this Agreement;

(ii)   challenges or could adversely impact, the 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 Developer's representative signing this Agreement.

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

The Developer and each other Major Participant has (or will have by the time required), the required authority, qualifications, rights, franchises, license status, privileges, professional ability, skills, and capacity (as applicable) to perform the PDA Work.

(k)   **Governmental Approvals**

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

(l)   **Project Site and Reference Documents**

The Developer has, in accordance with Good Industry Practice:

(i)   investigated and reviewed the Reference Documents and available public records; and

(ii)   familiarized itself with the Project Site and the surrounding locations, based on the Reference Documents, available public records, and an inspection of the Project Site to the extent it was permitted access to the Project Site under the RFP.

(m)   **Applicable Law**

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

(n)   **Ownership**

Exhibit 2 (*Developer Ownership*) accurately describes the legal, beneficial, and equitable ownership of the Developer, and no arrangements are in place that will result in, or are

reasonably likely to result in, a Change of Control not already approved by the City in accordance with Section 26.4 (*Changes in Ownership*).

(o) **No Developer Default**

No Developer Default has occurred or is continuing.

4.2 **City Representations and Warranties**

The City represents and warrants to the Developer that:

(a) **Power and Authority**

The City has the power and authority to execute, deliver, and perform its obligations under this Agreement.

(b) **Authorization**

(i) The execution, delivery, and performance of this Agreement has been duly authorized by all necessary action of the City.

(ii) Each Person executing this Agreement on behalf of the City has been duly authorized to execute and deliver this Agreement on behalf of the City.

(c) **Execution**

This Agreement has been duly executed and delivered by the City.

(d) **Enforceability**

This Agreement constitutes a legal, valid, and binding obligation of the City, enforceable against it 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.

(e) **No Contravention**

The execution, delivery, and performance by the City of this Agreement does not conflict with or result in a default under or a violation of:

(i) any material agreement or instrument to which the City is a party or which is binding on the City or any of its assets; or

(ii) any Applicable Law.

(f) **No Litigation**

There is no action, suit, proceeding, investigation, or litigation pending or, to the City's knowledge, threatened that:

(i) could reasonably be expected to have an adverse effect on the ability of the City to perform its obligations under this Agreement;

(ii) challenges either the City's authority to execute, deliver, or perform, or the validity or enforceability of, this Agreement; or

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(iii)   challenges the authority of the City's representative executing this Agreement.

5.   **JOINT AND SEVERAL LIABILITY AND RISK ALLOCATION**

5.1   **Joint and Several Liability**

If the Developer is a joint venture or partnership, each venturer, partner, or member shall be jointly and severally liable for any and all of the duties and obligations of the Developer that are assumed under or arise out of this Agreement. Each of such venturers, partners, or members waives notice of the breach or non-performance of any undertaking or obligation of the Developer contained in, resulting from, or assumed under this Agreement, and the failure to give any such notice shall not affect or impair such venturer's, partner's, or member's joint and several liability under this Agreement.

5.2   **Project Risks**

Except where a risk is expressly allocated to the City, or a Claim by the Developer is expressly permitted under this Agreement, the Developer accepts all risks associated with the PDA Work and will not be entitled to make any Claim against the City arising out of or in connection with such risks.

5.3   **City's Rights Don't Affect Risk Allocation**

(a)   Neither the exercise of, nor the failure to exercise, the rights of the City under this Agreement, including the right to review and comment on, approve, accept, or reject any Developer Submittal or other PDA Work or to provide (or withhold) any other consent, approval, comment, assent, or notice in relation to the PDA Work, participate in Senior Project Group and Working Group meetings, attend tests, or inspect, monitor, or audit the PDA Work, will:

(i)   relieve the Developer from, or diminish, alter, or affect, the Developer's liabilities, obligations, obligations to provide indemnities, or responsibilities whether under this Agreement or otherwise according to Applicable Law;

(ii)   constitute acceptance by the City that the PDA Work satisfies the requirements of this Agreement or under Applicable Law;

(iii)   prevent the City from subsequently asserting that the Developer has not fulfilled its obligations whether under this Agreement or otherwise according to Applicable Law; or

(iv)   act as a waiver of contractual, legal, or equitable rights of the City,

and the City may reject or accept any PDA Work, request changes, or identify additional PDA Work, whether or not the previous exercise of any the City rights under this Agreement were by the City, the City's Representative, or any other Persons.

(b)   Without limiting Section 5.3(a), the City does not assume or owe any duty of care to the Developer to review, or if it does so review, in reviewing, any Developer Submittal or other PDA Work for errors, omissions, or compliance with this Agreement.

(c)   The Developer acknowledges and agrees that it is its obligation to perform the PDA Work in accordance with this Agreement and that the City and the other Indemnified Parties are fully entitled to rely on the Developer's performance of such obligation.

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5.4   **No Prejudice**

This Article 5 does not prejudice the Developer's express rights or remedies under this Agreement.

5.5   **Non-binding Nature of Meetings**

Each and any Senior Project Group meeting, Working Group meeting, or other meeting held pursuant to this Agreement is consultative and advisory only and nothing which occurs during a meeting of any such group and no information that is presented during a meeting of any such group will:

(a)   affect the rights or obligations of either Party under this Agreement;

(b)   entitle a Party to make any claim against the other;

(c)   relieve a Party from, or alter or affect, a Party's liabilities or responsibilities whether under this Agreement or otherwise according to Applicable Law;

(d)   prejudice a Party's rights against the other Party whether under this Agreement or otherwise according to Applicable Law;

(e)   constitute submittal of a: (i) Developer request for a Change under Section 18.6 (*Request for Change*); (ii) Claim; or (iii) a Change Order or Change Notice; or

(f)   be construed as a direction by a Party to do or not do anything.

6.   **COOPERATION AND GOVERNANCE**

6.1   **Duty to Cooperate**

(a)   The Developer will cooperate with the City, the City's Representative, and City Contractors in the performance of the PDA Work and in all matters related to the PDA Work and its obligations under this Agreement.

(b)   Without limiting the generality of Section 6.1(a) and its obligations under this Agreement, the Developer acknowledges and agrees that the phased approach to the PDA Work described in Article 2 (*Term, Phased Work, and Early Works*) requires it to partner and frequently interact with the City, including:

(i)   attending and actively participating in the Senior Project Group under Section 6.3 (*Senior Project Group*);

(ii)   attending and actively participating in the Working Groups under Section 6.4 (*Working Groups*) and other Project coordination meetings as mutually deemed necessary for the Developer to prepare the Feasibility Validation and prepare, negotiate, and agree the Implementation Proposal (if applicable) and to manage and deliver the PDA Work and otherwise comply with its obligations under this Agreement;

(iii)   responding promptly to all reasonable requests for information from the City;

(iv)   performing or facilitating all document reviews, interactions, information exchanges, and issue investigation and resolution required under the PDA Work

or that is otherwise necessary for the Developer to prepare, negotiate, and agree the Implementation Proposal; and

(v)   to the extent agreed under the Validation Amendment or otherwise directed by Notice from the City and reasonably required to perform the applicable part of the PDA Work, co-locating its personnel with the City's or any City Contractor's personnel.

6.2 Designation of Representatives

(a)   The City and the Developer shall each designate an individual or individuals who will be authorized to make decisions and bind the City and the Developer on matters relating to this Agreement (the "**City's Representative**" and "**Developer's Representative**", respectively).

(b)   Exhibit 6 (*Initial Designation of Authorized Representatives*) provides initial designations of the City's Representative and Developer's Representative, which may be changed by a subsequent Notice delivered to the other Party in accordance with Section 30 (*Notices*).

6.3 Senior Project Group

(a)   **Establishment and Composition**

(i)   The Parties must establish a Senior Project Group consisting of:

(A)   the City's Representative;

(B)   the Developer's Representative; and

(C)   such other Persons as the Parties agree or designate in accordance with this Section 6.3.

(ii)   The Persons referred to in Section 6.3(a)(i) may appoint delegates to attend in their absence if the Parties agree.

(iii)   The City is entitled to have member(s) of its executive management, representatives of any City Contractor or Third Party, an independent facilitator, or such other Persons as the City determines, attend meetings of the Senior Project Group.

(iv)   At the City's request, the Developer must ensure the attendance of:

(A)   member(s) of its executive management (at a level more senior than the Developer's Representative and Developer Project Manager); or

(B)   a senior representative of any Subcontractor,

at meetings of the Senior Project Group.

(v)   The Developer may, with the City's consent, have member(s) of its executive management, or a senior representative of any Subcontractor, attend meetings of the Senior Project Group.

(b)   **Purpose**

The purpose of the Senior Project Group is to provide a forum to:

(i)   facilitate the development of a collaborative working relationship between the Parties;

(ii)   review each Monthly Progress Report and monitor the progress of the PDA Work;

(iii) monitor the progress of the Feasibility Validation and the preparation of the Implementation Proposal (if applicable);

(iv)   discuss the resolution of any issues, opportunities, or other matters referred to the Senior Project Group by any Working Group; and

(v)   review and consider such other issues, opportunities, or other matters relating to the Project as are agreed between the Parties from time to time.

(c)   **Frequency of Meetings**

(i)   An initial meeting of the Senior Project Group must be convened by the Developer (with an agenda defined in accordance with any applicable requirements under Exhibit 5 (*PDA Work Requirements*) or otherwise under this Agreement or agreed with the City's Representative) within 30 Days of the Commencement Date under NTP1.

(ii)   The Senior Project Group will meet at least quarterly during the Term, unless the Parties agree otherwise.

(d)   **Administration**

(i)   With the exception of the initial meeting of the Senior Project Group contemplated in Section 6.3(c)(i) (*Frequency of Meetings*), the City's Representative will convene the meetings of the Senior Project Group.

(ii)   The meetings will be chaired by the most senior attendee of the City.

6.4   **Working Groups**

(a)   **Disciplines**

The Parties acknowledge and agree that Working Groups will be established in relation to particular aspects of the PDA Work including any Working Group expressly required under Exhibit 5 (*PDA Work Requirements*) or any other term of this Agreement or otherwise established by the Senior Project Group, and the Developer is required to convene, attend, and actively participate in each Working Group.

(b)   **Composition**

(i)   The composition of each Working Group will include a nominated representative of each of the Parties, and any additional City or Developer representatives nominated by the Developer's Representative and City's Representative (as applicable) or required to attend under Exhibit 5 (*PDA Work Requirements*) or any other term of this Agreement.

(ii)   Attendance by others will be agreed by the Senior Project Group or, in the absence of agreement as directed by the City, having regard to the particular solutions,

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issues, and opportunities being discussed and ensuring a mix of team members that:

(A)   are consistent across the relevant Working Group meetings (as practicable);

(B)   have specialist knowledge to effectively consider the relevant matters under consideration by the Working Group;

(C)   are empowered to discuss key Project matters on behalf of their organization; and

(D)   if requested by the City, include representatives of a Subcontractor.

(c)   **Purpose**

The purpose of each Working Group meeting is to:

(i)   provide a forum for the Developer and the City to consider any issues, or potential issues, and proposed solutions and opportunities relating to the Project; and

(ii)   where appropriate to facilitate resolution, refer issues and proposed solutions, opportunities, or other matters relating to the Project to the Senior Project Group.

(d)   **Frequency of meetings**

Each Working Group will meet at such frequency required under this Agreement or otherwise agreed by the Senior Project Group.

(e)   **Administration**

The Developer must convene (with an agenda defined in accordance with any applicable requirements under Exhibit 5 (*PDA Work Requirements*) or otherwise under this Agreement or agreed with the City's Representative) and chair meetings of each Working Group unless otherwise provided in this Agreement or agreed between the Parties.

(f)   **Program**

The Developer must prepare and submit to the City a three-month rolling program of Working Group meetings.

7.   **KEY PERSONNEL AND SUBCONTRACTING**

7.1   **Key Personnel**

(a)   During PDA Phase 1, the Developer shall provide the City with the names and resumes of those individuals that it proposes will fill each Key Personnel position, together with any other information that the City may (acting reasonably) require to demonstrate that each individual proposed by the Developer satisfies the requirements under Section 7.1(b). The Parties' agreement with respect to the identity of the Key Personnel under this Section 7.1(a) shall be incorporated in any Validation Amendment and such individuals shall be deemed to be committed as Key Personnel for subsequent PDA Phases.

(b)   Each of the Key Personnel shall fulfill the "Primary Functions/Duties" and satisfy the "Minimum Qualifications/Experience" of such Key Personnel position, in each case, specified in Part B (*Key Personnel for PDA Work*) of Exhibit 5 (*PDA Work Requirements*) or otherwise under this Agreement. With the City's consent, an individual may undertake more than one Key Personnel position provided that no individual shall be nominated to fulfill the equivalent of more than one full time role.

(c)   The Developer shall not change or substitute any Key Personnel except:

   (i)   due to retirement, death, disability, incapacity, parental leave, or voluntary or involuntary termination of employment;

   (ii)   if the City directs the Developer to remove the Key Personnel in accordance with Section 7.2 (*Removal or Replacement of Developer Personnel*); or

   (iii)   with the City's prior approval (acting reasonably) in writing under Section 7.1(d).

(d)   The Developer shall ensure that no individual carries out PDA Work as a Key Personnel unless the individual has been approved in writing by the City (acting reasonably) in accordance with this Section 7.1.

(e)   If the Developer proposes to change, or is required to change, an individual in a Key Personnel position in accordance with Section 7.1(c), the Developer shall provide the City with the name and resume of the proposed replacement, together with any other information that the City may (acting reasonably) require to demonstrate that the Developer's proposed individual satisfies the requirements under Section 7.1(b).

(f)   The City will have the right to:

   (i)   review the qualifications, capability, and experience of each individual proposed by the 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 PDA Work in the Key Personnel capacity (such approval not to be unreasonably withheld, conditioned, or delayed). It will be reasonable for the City 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.

(g)   If the City rejects a proposed individual to fill a Key Personnel position, the Developer shall submit an alternative individual in accordance with this Section 7.1.

(h)   The Developer shall cause each Key Personnel to dedicate the full amount of time necessary for the proper prosecution and performance of the PDA Work.

7.2   Removal or Replacement of Developer Personnel

(a)   The City may by Notice require the Developer to remove or replace any individual assigned by the Developer, or by any Subcontractor, to perform the PDA Work, if the City considers, acting reasonably, that such removal or replacement is in the best interest of the City and the PDA Work.

(b)   The City's decision to require the Developer to remove or replace any personnel under Section 7.2(a), including the Developer's Representative or any Key Personnel, shall be final and binding on the Developer.

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(c)   If the City requires the removal or replacement of any individual under this Section 7.2, the Developer shall ensure that the individual to be removed or replaced immediately ceases the performance of PDA Work at no cost or expense to, and shall fully indemnify, the City.

7.3   **General Subcontracting Provisions**

(a)   Nothing in this Agreement will create any contractual relationship between the City and any Subcontractor or any other Developer-Related Entity.

(b)   No Subcontract will impose any obligation or liability upon the City or any other City-Related Entity to any Subcontractor, any other Developer-Related Entity or any of their employees.

(c)   The retention of Subcontractors by the Developer will not relieve the Developer of its obligations under this Agreement and the Developer will at all times be fully responsible under this Agreement for the acts and omissions of all Subcontractors performing any PDA Work, as if they were the acts and omissions of the Developer.

(d)   In accordance with California Public Contract Code Section 6109(a), the Developer shall not perform PDA Work with any Subcontractor who is ineligible to perform work on a public works project pursuant to California Labor Code Section 1777.1 or Section 1777.7. In accordance with California Public Contract Code Section 6109(b), any contract on a public works project entered into between the Developer and a debarred Subcontractor is void as a matter of law. A debarred Subcontractor may not receive any public money for performing work as a Subcontractor on a public works contract, and any public money that may have been paid to a debarred Subcontractor by the Developer on the Project shall be returned to the City. The Developer shall be responsible for the payment of wages to workers of a debarred Subcontractor who has been allowed to work on the Project. The City will strictly comply with the Applicable Law and will act on information related to any debarred Subcontractor in accordance with Applicable Law.

(e)   The Developer shall incorporate into each Subcontract, and require insertion into all lower tier Subcontracts, all Required Subcontract Provisions.

7.4   **Major Subcontracts for PDA Work**

(a)   The Developer shall retain, employ, enter into Subcontracts with and utilize each Major Subcontractor for the scope of PDA Work identified as being allocated to that Major Subcontractor in Part A (*Major Subcontractors*)[5] of Exhibit 7 (*Subcontracting*).

(b)   The Developer shall not, without the City's prior approval (which approval must not be unreasonably withheld, conditioned, or delayed):

(i)   enter into any additional Major Subcontract (not listed in Part A (*Major Subcontractors*)[6] of Exhibit 7 (*Subcontracting*));

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[5]   **Note to Proposers**: The section of the Developer's PDA Proposal identifying the subcontractors within the Major Participants will be included in this exhibit prior to execution.

[6]   **Note to Proposers**: The section of the Developer's PDA Proposal identifying the subcontractors within the Major Participants will be included in this exhibit prior to execution.

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(ii)　terminate, surrender, rescind, or accept repudiation of a Major Subcontract (or give the relevant Major Subcontractor an entitlement to terminate, surrender, rescind, or accept repudiation of a Major Subcontract);

(iii)　permit the novation, assignment or substitution of any counterparty's right, obligation or interest in a Major Subcontract; or

(iv)　amend any Major Subcontract where such amendment would have a material adverse effect on the ability of the Developer to perform its obligations under this Agreement.

(c)　The Developer must ensure that each Major Subcontractor:

(i)　is solvent and reputable;

(ii)　does not have any organizational conflict of interest with respect to the Project; and

(iii)　has sufficient expertise and ability to properly carry out the obligations of the Developer which are being subcontracted to it,

and immediately upon becoming aware that a Major Subcontractor does not satisfy the requirements of this Section 7.4(c) cause the Major Subcontractor to do whatever is necessary to promptly satisfy the requirements of this Section 7.4(c); or terminate and replace the Major Subcontractor in accordance with this Section 7.4.

(d)　Requests for approval of the addition or substitution of a Major Subcontractor shall include such information as is necessary for the City to make a determination that the proposed Major Subcontractor possesses the qualifications, capability, and experience to perform the PDA Work to be allocated to that Major Subcontractor.

7.5　**Subcontractor Selection for the Implementation Work**

(a)　This Section 7.5 shall apply to selection of additional or substitute Subcontractors for the Implementation Work as part of the development and agreement of any Implementation Proposal.

(b)　In accordance with Section 13.3 (*Developer Submittals*), the Developer shall submit to the City for review and approval (i) a summary Subcontractor Bidding and Selection Plan with the Feasibility Validation Report, and (ii) a full form Subcontractor Bidding and Selection Plan within 30 Days of the Commencement Date specified in NTP2. The Subcontractor Bidding and Selection Plan shall include a reasonable procedure for the conduct of the bidding and approval process applicable to the selection of subcontractors for the performance of the Implementation Work. Such procedure shall promote pricing of the applicable Implementation Work that is fair and reasonable, be based on full and open competition, include time periods for each step of the process, and shall comply with any applicable requirements under Exhibit 8 (*City Contracting Requirements and other Regulatory Requirements*) and all Applicable Law.

(c)　In soliciting any bids for the subcontracting of the Implementation Work, the Developer:

(i)　must comply in a timely manner with reasonable requests for information concerning a proposed subcontractor, the evaluation and award of bids, or other obligations under this Agreement concerning bidding and selection of subcontractors;

(ii)   must, upon Notice by the City, convene a Working Group to meet with the City and discuss its bidding and selection procedures and the implementation of the Subcontractor Bidding and Selection Plan; and

(iii)   may use the competitive bidding procedures used by the City for construction contracts for its selection of subcontractors.

(d)   Subcontractors submitted for approval under an Implementation Proposal:

(i)   must not be debarred or ineligible under Section 7.3(d) (*General Subcontracting Provisions*); and

(ii)   shall be selected in accordance with Applicable Law, the terms of this Section 7.5 and the approved Subcontractor Bidding and Selection Plan.

7.6   DBE Participation

(a)   The Developer acknowledges that, prior to issuance of NTP2, if the Project is a recipient of federal funding the City may establish and Notify the Developer of a DBE participation commitment ("**DBE Goal**") for the PDA Phase 2 Work and PDA Phase 3 Work and that any such DBE Goals shall be included in the Validation Amendment. If the City establishes a DBE Goal, the Developer shall use good faith efforts (as defined under 49 CFR Part 26, Appendix A) to achieve the relevant DBE Goal during the applicable PDA Phase.

(b)   The Developer acknowledges that, prior to issuance of NTP3, if the Project is a recipient of federal funding the City may establish and Notify the Developer of a DBE Goal for the Implementation Work which shall be used by the Developer in the preparation of the Implementation Proposal. If the City establishes a DBE Goal for the Implementation Work, the Developer shall be required to demonstrate, as part of the Implementation Proposal, the Developer's proposed approach to using good faith efforts (as defined under 49 CFR Part 26, Appendix A) to achieve the DBE Goal for the Implementation Work.

(c)   Without limiting the requirements set out in Exhibit 8 (*City Contracting Requirements and other Regulatory Requirements*), the Developer, subrecipient, or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Agreement.

7.7   Project Labor Agreement

The Developer shall comply with the requirements set out in Section 1.2 (*Project Labor Agreement*) of Exhibit 8 (*City Contracting Requirements and Other Regulatory Requirements*) with respect to compliance with the PLA for the Implementation Work and any early works packages for construction.

8.   INFORMATION

8.1   Reference Documents

(a)   The Reference Documents are not a part of this Agreement, but are provided for the purposes of information only and shall not be interpreted otherwise.

(b)   The City makes no representations or warranties with respect to the reliability, relevance, accuracy, completeness, or fitness for any purpose of any of the Reference Documents

and subject to Section 31.3 (*No Exclusion*), shall not be responsible or liable to the Developer for any Loss or cause of action whatsoever suffered by the Developer by reason of any use of information contained in or any action or forbearance in reliance on, a Reference Document.

(c)   If the Developer intends to use or uses information contained in any Reference Document, it shall use the information at its own risk. The Developer is solely responsible for determining which information is sufficiently reliable, relevant, accurate, complete, remains current, and fit for the Developer to use for the Developer's intended purpose.

(d)   The Reference Documents are subject to revision at any time but the City is under no obligation to Notify the Developer of any such revisions.

(e)   Subject to Section 31.3 (*No Exclusion*) and except to the extent that this Agreement includes an express obligation for the City to deliver certain information to the Developer, the City will not have any liability to the Developer with respect to any failure to make available to the Developer any materials, documents, drawings, plans, or other information relating to the Project, the PDA Work, or the Implementation Work.

8.2   Developer Obligations

Without limiting the representations and warranties, responsibilities and obligations of the Developer under Article 4 (*Representations and Warranties*), Section 5.2 (*Project Risks*), and Article 10 (*Project Site Access and Investigations*), the Developer is responsible for conducting, in accordance with Good Industry Practice, any and all studies, analyses, and investigations it deems necessary or advisable to verify or supplement any information in the Reference Documents, this Agreement, or that is otherwise furnished by the City or other Persons, for the purposes of performing the PDA Work and Implementation Work.

8.3   No Reliance

The 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 the City or any of its 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.

9.   APPLICABLE LAW, REGULATORY REQUIREMENTS, AND GOVERNMENTAL APPROVALS

9.1   Compliance

(a)   The Developer must at all times in performing the PDA Work comply with all Applicable Law and the terms of all Governmental Approvals.

(b)   The Developer must perform its obligations and (where relevant) shall require each Subcontractor to perform their respective obligations under this Agreement and the Subcontracts in accordance with Exhibit 8 (*City Contracting Requirements and other Regulatory Requirements*). The Developer expressly acknowledges and agrees that additional regulatory requirements may apply if the Project is a recipient of state and/or federal funding or financing. Where additional regulatory requirements are implemented or identified, including as a result of state and/or federal funding or financing requirements, such additional regulatory requirements will be Notified to the Developer

by the City and incorporated into Exhibit 8 (*City Contracting Requirements and other Regulatory Requirements*), Exhibit 10 (*Required Forms and Prescribed Certifications*) or such other parts of this Agreement, as necessary, by way of a Modification.

(c)   The Developer must comply with changes to Applicable Law, and with any changed conditions of any Governmental Approval, including changes prior to execution of this Agreement.

(d)   Subject to any Developer entitlement to relief for a Relief Event, the Developer must comply with the terms of this Section 9.1 at its sole cost and expense, regardless of whether such compliance would require additional PDA Work not expressly described in this Agreement.

9.2   Conflicting Provisions

If there is any conflict between: (a) any Applicable Law; and (b) the other requirements of this Agreement, the Applicable Law will prevail and take precedent over any such conflicting provisions.

9.3   Governmental Approvals

(a)   The Developer shall obtain and maintain all Governmental Approvals (other than City-Provided Approvals) that are required to perform the PDA Work.

(b)   The Developer shall promptly (and in any event within 10 Days after submitting an application or obtaining a Governmental Approval) deliver to the City a copy of:

(i)   any application for a Governmental Approval submitted by the Developer (including any application to amend an existing Governmental Approval); and

(ii)   any new or amended Governmental Approval obtained by the Developer.

10.   PROJECT SITE ACCESS AND INVESTIGATIONS

10.1   Access to the Project Site

(a)   The Developer may access the Project Site only in accordance with this Article 10.

(b)   The Developer may access the Project Site to conduct:

(i)   Site Investigations; and

(ii)   data studies and investigations for the purposes of obtaining additional ridership and revenue information that the Developer deems necessary to perform the PDA Work,

provided that the Developer:

(A)   complies with the Notice requirements under Section 10.1(c); and

(B)   has obtained and complies with, any and all required Governmental Approvals to perform that scope of the PDA Work, complies with all Applicable Law and does not interrupt or impede traffic flow.

(c)   If the Developer intends to access the Project Site to perform PDA Work in accordance with Section 10.1(b) the Developer shall provide Notice to the City, no later than 20 Days prior to the date on which the Developer wishes to commence the relevant scope of the PDA Work. The Notice must specify:

(i)   the parts of the Project Site the Developer proposes to access;

(ii)   the scope of the PDA Work the Developer proposes to undertake in accordance with Section 10.1(b); and

(iii) the dates on which the Developer proposes to perform the relevant scope of PDA Work.

(d)   If the Developer provides proper Notice under Section 10.1(c):

(i)   with respect to any parts of the Project Site that are accessible to the public in the usual course, the Developer may access the Project Site to perform the relevant scope of the PDA Work on and from the date specified in the Notice;

(ii)   with respect to any City ROW, the City shall, within 20 Days of receiving the Developer's Notice under Section 10.1(c) grant the Developer access to conduct the relevant scope of the PDA Work or give reasons why access cannot be granted and an estimate of when it may be available. If the City grants access, the Developer may access the Project Site to perform the relevant scope of the PDA Work on and from the date and for such period of time, on which access is granted;

(iii) with respect to any Third Party Land, the City shall use Reasonable Efforts to obtain access for the Developer to perform the relevant scope of PDA Work and shall Notify the Developer whether or not the City has obtained such access and rights to conduct such scope of PDA Work. The Developer acknowledges that the City will not provide access unless the City has obtained a right of access from the Third Party that controls access to the applicable Third Party Land; and

(iv)   with respect to any land owned by a private third party, the Developer shall be responsible for obtaining the required access after delivering Notice to the City.

10.2   **Protection of Property**

(a)   The Developer shall preserve and protect all Existing Property on or adjacent to areas where it conducts any PDA Work while utilizing and occupying the Project Site.

(b)   The Developer shall replace or repair, at no cost to the City, any damage to Existing Property, including those that are the property of a Third Party or other third party, resulting from the failure to comply with the requirements of this Agreement in performing the PDA Work. Repairs and replacements shall be at least equal to the Existing Property and shall match them in finish and dimension. If the Developer fails or refuses to repair the damage promptly or in accordance with the requirements of this Section 10.2(b), the City may have the necessary services performed at the Developer's sole cost.

(c)   If the Developer encounters anything of historical, archaeological, paleontological, or scientific interest during the performance of the PDA Work or on the Project Site, the Developer must:

(i)   immediately Notify the City of the discovery;

(ii)   ensure that the discovery is preserved and protected in place and not disturbed further including by halting the performance of any PDA Work in the vicinity of the discovery, if necessary;

(iii)   comply with all requirements of Government Entities and any directions of the City in relation to the discovery; and

(iv)   continue to perform the PDA Work, except to the extent otherwise directed by the City; ordered by a court or tribunal; or required by Applicable Law.

(d)   All things of historical, archaeological, paleontological, or scientific interest found on or under the surface of the Project Site will, as between the Parties, be the absolute property of the City.

11.   **ENVIRONMENTAL APPROVAL PROCESS**

(a)   This Article 11 shall only apply to the extent the Transit Solution requires an environmental review under CEQA and/or NEPA (as applicable).

(b)   All rights and responsibilities set out in this Agreement are subject to this Article 11 and shall be interpreted in a manner that is consistent with and gives full effect to this Article 11.

(c)   The City will prepare the environmental documents for the Project and be responsible for carrying out the Environmental Approval Process.

(d)   For the purposes of the Environmental Approval Process, the identification of Project alternatives and a preferred alternative for the Project is exclusively within the control and decision making authority of the City, in conjunction with the applicable lead federal agency in the case of NEPA. Nothing in this Agreement will:

(i)   limit the discretion that the City will exercise in conducting its environmental review and preparing environmental documents for the Project, including the discretion of the City and the lead federal agency, in the case of NEPA, to choose a no-build alternative; or

(ii)   commit the City or the lead federal agency, in the case of NEPA, to any preferred alternative, mode, or alignment.

(e)   As further described in Section 4.6(b) (*Support of Environmental Approval Process*) and Section 7 (*Overview of Key Roles and Responsibilities under Environmental Approval Process*) of Part A of Exhibit 5 (*PDA Work Requirements*), the Developer shall support the City during the Environmental Approval Process by:

(i)   preparing preliminary design and conducting studies including Site Investigations;

(ii)   performing other preliminary design and engineering activities for the purposes of:

(A)   defining the Project alternatives and completing the alternative analysis and review process under the Environmental Approval Process;

(B)   complying with other related environmental laws and regulations;

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(C)   supporting the City's coordination, public involvement, permit applications, or the development of mitigation plans;

(D)   developing typical sections, geometric alignments, structure designs, and other design elements; and

(E)   otherwise supporting the Environmental Approval Process; and

(iii)   providing feedback on cost and revenue assumptions used by the City for the alternative analysis under the Environmental Approval Process.

(f)   The Developer acknowledges that as further described in Section 4.6(b) (*Support of Environmental Approval Process*) and Section 7 (*Overview of Key Roles and Responsibilities under Environmental Approval Process*) of Part A of Exhibit 5 (*PDA Work Requirements*), the City may engage other contractors and consultants to perform similar and potentially overlapping scopes of predevelopment work supporting the Environmental Approval Process to that described in Section 11(e).

(g)   The City retains sole discretion over whether to accept any of the PDA Work and Developer Submittals for purposes of the Environmental Approval Process.

(h)   The Developer shall not perform services (and, if requested by the City, may refuse to provide services), that would violate conflict of interest rules under the Environmental Approval Process regarding the preparation, review, revision, and decisions on the scope and content of draft and final environmental review documents. All references in this Agreement to the Developer's involvement with the Environmental Approval Process or documents developed pursuant to that process shall be subject to the limitation set out in this Section 11(h).

(i)   The Developer shall comply with all applicable conflict of interest documentation and disclosure procedures under the Environmental Approval Process.

(j)   The Developer acknowledges that the City will, in advancing the Environmental Approval Process and developing the DEIS and/or DEIR (as applicable), select one preferred alternative as the proposed project and any other preferred alternative as an alternative to the proposed project. In identifying one preferred alternative as the proposed project and any other preferred alternative as an alternative to the proposed project for purposes of the DEIS and/or DEIR (as applicable), the City is not committing to select any preferred alternative as the LPA. The Developer further acknowledges that the City may select any other alternative that may be considered under the Environmental Approval Process, including a no-build alternative, as the proposed project and the Developer's Transit Solution as the alternative to the proposed project.

(k)   The City will not proceed, nor issue any Notice to Proceed nor otherwise permit the Developer to proceed, with any construction work, the development of any construction documents, or the performance of any other activities that would prejudice the Environmental Approval Process, until the applicable Governmental Approvals under the Environmental Approval Process have been obtained.

12. **THIRD PARTIES AND STAKEHOLDER ENGAGEMENT**

12.1 **Third Party Agreements**

(a) The Developer acknowledges that the City may enter into Third Party Agreements during the Term with terms that are applicable to the PDA Work and/or Implementation Work or that contain obligations relating to the PDA Work and/or Implementation Work.

(b) During PDA Phase 1 and prior to submittal of the Feasibility Validation Report:

(i) the City shall Notify the Developer of any draft Third Party Agreements or intended Third Party Agreements that the City proposes to enter into and that the Developer should assume (for the purposes of preparing its Feasibility Validation Report) will be executed by the City prior to Commercial Close under the Implementation Agreement; and

(ii) the Developer may propose and the Parties may discuss and agree, any additional Third Party Agreements or modified or additional key terms under the Third Party Agreements that the Developer may assume (for the purposes of preparing its Feasibility Validation Report) will be executed by the City prior to Commercial Close under the Implementation Agreement,

(each such proposed or intended Third Party Agreement Notified by the City or agreed by the Parties, a "**Proposed Third Party Agreement**").

(c) The Developer must take into account any Proposed Third Party Agreements in preparing its Feasibility Validation Report and the list of Proposed Third Party Agreements (and their proposed key terms) will be identified in any Validation Amendment. Further, the Developer must take into account the risk of a Proposed Third Party Agreement not being executed on or before Commercial Close under the Implementation Agreement or of a key term assumed under a Proposed Third Party Agreement not being agreed, in the Risk Register and identify risk mitigation and management strategies.

(d) The City shall use good faith efforts to agree and to execute any Proposed Third Party Agreements described in any Validation Amendment during subsequent PDA Phases provided that the negotiation, finalization, and execution of any Proposed Third Party Agreement shall remain in the City's absolute discretion.

(e) If the City executes any Third Party Agreement with terms that are applicable to the PDA Work and/or Implementation Work or that contain obligations relating to the PDA Work and/or Implementation Work, the City must promptly deliver a copy of that Third Party Agreement to the Developer.

(f) If the City is unable to execute a Proposed Third Party Agreement or executes a Proposed Third Party Agreement but on terms that differ from the key terms identified in the Validation Amendment, the Parties shall in good faith discuss and agree any adjusted Third Party Agreement assumptions applicable to the Implementation Work that must be taken into account by the Developer in preparing its Implementation Proposal.

(g) Subject to any permitted relief under a Relief Event, the Developer shall perform its obligations under this Agreement in accordance with any Third Party Agreement entered into by the City and Notified to the Developer by the City.

12.2 Stakeholder Engagement

The Developer shall work with the City to develop an approach to community and stakeholder engagement in accordance with the requirements set out in Section 4.6(e) (*Stakeholder Engagement*) of Part A of Exhibit 5 (*PDA Work Requirements*) and the other requirements of this Agreement.

13. DEVELOPER'S GENERAL OBLIGATIONS

13.1 General Requirements

The Developer shall perform the PDA Work in accordance with:

(a)   Exhibit 5 (*PDA Work Requirements*);

(b)   the Developer Commitments;

(c)   Good Industry Practice;

(d)   all Applicable Law;

(e)   the requirements of all Governmental Approvals; and

(f)   all other requirements of this Agreement.

13.2 Nonconforming Work

If, during the Term, any PDA Work provided by the Developer does not comply with the requirements of this Agreement (including Exhibit 5 (*PDA Work Requirements*)) the City shall Notify the Developer of such nonconformances and may:

(a)   reject the nonconforming PDA Work and have the Developer re-perform the applicable PDA Work at the Developer's own expense;

(b)   have the nonconforming PDA Work performed by others at the sole expense of the Developer; or

(c)   terminate this Agreement in accordance with Section 22.2 (*Termination for Developer Default*), and obtain the remedies provided for under that provision.

13.3 Developer Submittals

(a) **Developer Submittal List**

(i)   The Developer shall submit to the City for the City's review and acceptance, a list of Developer Submittals to be submitted to the City in relation to the performance of the PDA Work and including Developer Submittals required to be submitted under this Agreement and any additional Developer Submittals proposed to be submitted (the "**Developer Submittal List**").

(ii)   The Developer Submittal List shall include:

(A)   a description of any Developer Submittals that are not already described under this Agreement;

(B)   the planned schedule for submittal of the Developer Submittals included in the list, which shall be consistent with the PDA Work Schedule and any time period for submittal under this Agreement;

(C)   the required (as required under this Agreement) or proposed (in the case of any additional Developer Submittals) level of review to be provided by the City in respect of each Developer Submittal included in the list; and

(D)   a description of any required reviews or approvals of Developer Submittals by any applicable Third Parties under the terms of this Agreement.

(iii)   The initial Developer Submittal List for the PDA Phase 1 Work must be submitted by the Developer to the City for the City's review and acceptance within 30 Days of the Commencement Date under NTP1. The Developer must update and resubmit to the City for the City's review and acceptance, the Developer Submittal List:

(A)   within 30 Days of each subsequent NTP, in each case to incorporate the Developer Submittals for the PDA Work authorized under that NTP; and

(B)   within 15 Days of a Modification or an update to the PDA Work Schedule that affects the scope or timing for the Developer Submittals identified in the Developer Submittal List.

(iv)   The City shall review the initial Developer Submittal List and each and any update to it, issue its comments, and confirm its acceptance or rejection (acting reasonably), within 20 Days of the City's receipt of a properly-submitted Developer Submittal List. If the City does not provide its acceptance or rejection or provide comments within such time period, the Developer may proceed to submit Developer Submittals in accordance with the submitted Developer Submittal List, without prejudice to the City's right to comment on the Developer Submittal List at a later date.

(v)   If the City rejects or provides comments to the Developer Submittal List, the Developer shall update the Developer Submittal List to correct any nonconformances or include any City-provided comments and resubmit the Developer Submittal List within 10 Days of receipt of the City's rejection or comments.

(b)   **Submittal and Review**

(i)   The Developer shall submit all Developer Submittals to the City within the time periods under the accepted Developer Submittal List.

(ii)   When submitting a Developer Submittal to the City, the Developer shall clearly note/stamp on the applicable Developer Submittal, "Provided to City For Information Only" or "Provided to City For Review and Approval", accordingly, which stamp shall be consistent with the designation under the accepted Developer Submittal List.

(iii)   The City will have the right to review and comment on all Developer Submittals for compliance with the requirements of this Agreement. For those Developer Submittals which have been designated as requiring the City's review and approval in accordance with this Section 13.3 or otherwise under this Agreement,

the City shall complete its review, issue its comments, and confirm its approval or rejection, within 30 Days of the City's receipt of a properly-submitted Developer Submittal (or such other review period for that Developer Submittal as set out in this Agreement or agreed by the Parties under the accepted Developer Submittal List having regard to the level of complexity and size of the Developer Submittal).

    (iv)   Subject to Section 13.3(b)(v):

        (A)   the Developer shall Notify the City within 15 Days after receipt of any City comments to a Developer Submittal, if the Developer determines that incorporation of any comment(s) would cause the Developer Submittal(s) in question to become nonconforming in any respect, would amount to a Change, or would otherwise adversely affect in any manner the performance of the PDA Work; and

        (B)   upon receipt of such Notice from the Developer, the City will have the right to modify the comment(s) in question.

    (v)   The Developer's failure to Notify the City in accordance with Section 13.3(b)(iv) shall constitute the Developer's full acceptance of the City's comment, the Developer's full acceptance of all responsibility for resulting changes to the Developer Submittals, and the Developer's full acceptance that the comment does not constitute a Change.

    (vi)   Unless otherwise expressly provided in this Agreement, or otherwise agreed by the Parties, the Developer shall revise and modify all Developer Submittals to include all City-provided comments within 15 Days of receipt of the comments (including modifications to previous comments) and resubmit such Developer Submittal to the City for review and approval by the City in accordance with this Section 13.3(b).

(c)   **Implementation and Compliance**

    (i)   The Developer must implement, comply with, and maintain each approved Developer Submittal, including updating and submitting any such updates to an approved Developer Submittal to the City for review and approval by the City in accordance with Section 13.3(b) (*Submittal and Review*), as required under this Agreement.

    (ii)   If the Developer has not updated any Developer Submittal in accordance with the requirements of this Agreement, the City may provide the Developer a Notice requiring that the applicable Developer Submittal be updated and specifying the time within which such updating must occur (which must be reasonable, having regard to the amount of work required) and the Developer must submit the amended or updated Developer Submittal to the City for review and approval by the City in accordance with Section 13.3(b) (*Submittal and Review*) within the time specified in such Notice.

13.4   **Cooperation, Interface, and Coordination**

(a)   The Developer warrants that it has carefully reviewed this Agreement, the Reference Documents, and all other information made available by the City that relate to the nature and scheduling of other contracts that have been or may be awarded, and in submitting

its PDA Proposal and executing this Agreement, has taken into account the need to coordinate performance of the PDA Work with that of other contractors.

(b)   The Developer must:

(i)   fully cooperate and coordinate with any other contractor performing work that may connect, complement, and/or interfere with the PDA Work, including through provision of preliminary design and engineering and construction methodology information to any other contractor to coordinate the design and performance of such contractor's work with the PDA Work; and

(ii)   resolve any disputes or coordination problems with such contractor.

(c)   If any part of the PDA Work depends on the work of any other contractor or the City for proper execution or results, prior to proceeding with its own PDA Work, the Developer shall Notify the City of any discrepancies, defects, or failures to perform or complete said other work that would preclude or hinder the proper execution or achievement of the PDA Work.

(d)   The Developer's Representative (or its fully-empowered delegate) shall attend such meetings and conferences arranged by the City for the purpose of coordinating the PDA Work with that of other contractors. Attendance to such meetings and conferences by the Developer's Representative is part of the PDA Work and shall be at the Developer's own cost and expense.

(e)   For the purposes of this Section 13.4, references to "contractors" are to contractors engaged by the City other than the Developer and its Subcontractors.

13.5   **Monthly Progress Reporting**

No later than the fifth day of each month during the Term, or as otherwise agreed to by the Parties, the Developer shall submit to the City a written progress report ("**Monthly Progress Report**") including:

(a)   a description of the status of the Developer's compliance with the Developer Submittal List and PDA Work Schedule;

(b)   an update on the overall collaborative development efforts, the PDA Work, and the Project; and

(c)   the other requirements set out in Section 4.3(a)(iv)(B) (*Progress Reporting*) of Part A of Exhibit 5 (*PDA Work Requirements*).

13.6   **Performance Security**

(a)   **PDA Phase 1**

As a condition to issuance of NTP1 by the City, the Developer shall obtain and deliver (or cause to be delivered) to the City a performance bond (or other form of security in lieu of a bond provided in accordance with Section 13.6(d)(i)) ("**PDA Phase 1 Security**"):

(i)   in the aggregate amount of $1,000,000;

(ii)   valid for the full period of PDA Phase 1; and

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(iii)   satisfying all other requirements of this Section 13.6.

(b)   **PDA Phase 2**

As a condition precedent to issuance of NTP2 by the City, the Developer shall obtain and deliver (or cause to be obtained and delivered) to the City a performance bond (or other form of security in lieu of a bond provided in accordance with Section 13.6(d)(i)) ("**PDA Phase 2 Security**"):

(i)   in the amount determined by the Parties during PDA Phase 1 and incorporated in any Validation Amendment;

(ii)   valid for the full period of PDA Phase 2; and

(iii) satisfying all other requirements of this Section 13.6.

(c)   **PDA Phase 3**

As a condition precedent to issuance of NTP3 by the City, the Developer shall obtain and deliver (or cause to be obtained and delivered) to the City a performance bond (or other form of security in lieu of a bond provided in accordance with Section 13.6(d)(i)) ("**PDA Phase 3 Security**"):

(i)   in the amount determined by the Parties during PDA Phase 1 and incorporated in any Validation Amendment;

(ii)   valid for the full period of PDA Phase 3; and

(iii) satisfying all other requirements of this Section 13.6.

(d)   **General Performance Security Requirements**

(i)   The Developer may request to satisfy its obligations under this Section 13.6 with respect to delivery of Performance Security by providing the City with an equivalent letter of credit, demand guarantee or parent company guarantee of equal amount. The City may accept or reject such request, in its sole discretion.

(ii)   All Performance Security obtained and delivered under this Section 13.6 must:

(A)   in the case of a performance bond, be substantially in the form set out in Part A of Exhibit 10 (*Required Forms and Prescribed Certifications*) or such other form acceptable to the City in its sole discretion and in the case of any other form of Performance Security accepted by the City in accordance with this Section 13.6, in a form acceptable to the City in its sole discretion;

(B)   be issued by an Eligible Security Issuer (except in the case where the City has accepted a parent company guarantee in which case such parent company guarantee shall be issued by a guarantor acceptable to the City); and

(C)   satisfy all requirements of Applicable Law.

(iii) If at any time the issuer of the Performance Security ceases to be an Eligible Security Issuer (or in the case of a parent company guarantee, an acceptable

guarantor), the Developer shall promptly Notify the City and provide to the City replacement Performance Security within five Days.

(iv)   From the date of execution, the Performance Security must be replaced or renewed as necessary so as to prevent a lapse in coverage during the relevant PDA Phase.

(v)   The Developer may satisfy its obligations with respect to the PDA Phase 2 Security or PDA Phase 3 Security by extending the validity period of the Performance Security already in place and amending the sum or by providing additional performance bonds (or other form of Performance Security accepted by the City in accordance with this Section 13.6) as required to assure the performance of the PDA Work in the aggregate amount required under this Section 13.6.

(vi)   Changes in the PDA Work or the length of time for a PDA Phase made pursuant to this Agreement shall in no way invalidate this Agreement nor relieve the Developer from its obligations under this Section 13.6 or issuer of the Performance Security of its obligations under the Performance Security and the Developer shall cause the issuer of the Performance Security to waive notice of such Changes.

14. IMPLEMENTATION PROPOSAL PROCEDURES AND IMPLEMENTATION AGREEMENT

14.1 Development of Implementation Agreement

(a)   Within 30 Days of the Commencement Date under NTP2, the City shall deliver to the Developer a draft form of an Implementation Agreement Term Sheet on the usual terms for a revenue-risk design-build-finance-operate-maintain project and reflecting:

(i)   the commitments and assumptions contemplated in the accepted Feasibility Validation Report as accepted by the City;

(ii)   any Proposed Third Party Agreements and any other terms identified as being applicable to the Implementation Work or Implementation Agreement under the Validation Amendment or otherwise under this Agreement; and

(iii)   the technical and performance requirements for the Project as set out in Part C (*Project Performance and Technical Requirements*) of Exhibit 5 (*PDA Work Requirements*).

(b)   Subject to the City's rights under Article 22 (*Termination and Expiry*), to the extent that the City delivers a draft form of Implementation Agreement Term Sheet under Section 14.1(a), the Parties shall negotiate in good faith to agree an Implementation Agreement Term Sheet.

(c)   If, despite both the City and the Developer complying with their obligations under Section 14.1(b), the City and the Developer are unable to agree all the terms under the Implementation Agreement Term Sheet within 90 Days of its delivery to the Developer under Section 14.1(a):

(i)   the City may Notify the Developer that it will proceed to prepare a draft form of Implementation Agreement under Section 14.1(d) notwithstanding that not all terms have been agreed, in which case Sections 14.1(d) and 14.1(e) will apply; or

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(ii)   if the City does not deliver a Notice under Section 14.1(c)(i) within a further 30 Days, either the City or the Developer may terminate this Agreement by Notice under Section 22.1(c) (*Non-Default Termination or Expiry*).

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(d)   Within 60 Days of the Parties agreeing the form of an Implementation Agreement Term Sheet or the delivery of a Notice by the City under Section 14.1(c)(i) the City will deliver to the Developer a draft form of Implementation Agreement on the same terms as the Implementation Agreement Term Sheet (as agreed or the then-current draft of the Implementation Agreement Term Sheet, as applicable).

(e)   Subject to the City's rights under Article 22 (*Termination and Expiry*), to the extent that the City delivers a draft form of Implementation Agreement under Section 14.1(d), the Parties shall negotiate in good faith to agree the form of Implementation Agreement.

(f)   If, despite both the City and the Developer complying with their obligations under Section 14.1(e), the City and the Developer are unable to agree all the terms under the form of Implementation Agreement by the date falling 120 Days prior to the relevant PDA Milestone Deadline for completion of the PDA Phase 2 Work, either the City or the Developer may terminate this Agreement by Notice under Section 22.1(c) (*Non-Default Termination or Expiry*).

(g)   Subject to Section 2.6 (*Early Works*), the Developer acknowledges that the Implementation Agreement will contemplate the base scope for the Project, comprising the Diridon Station to SJC Airport connection, and subject to Section 18.4 (*Change Notice for Intra-Terminal Airport Connection Option*), may include the Intra-Terminal Airport Connection Option and/or other pre-priced options.

14.2 Submission of Implementation Proposal

(a)   Within 60 Days of the Commencement Date under NTP3, the Developer must prepare and submit its Implementation Proposal to the City.

(b)   Upon submittal to the City by the Developer, the Implementation Proposal will constitute an offer that is binding on the Developer for a validity period of 180 Days (or such other validity period agreed by the Parties).

14.3 Form of Implementation Proposal

(a)   The Implementation Proposal must be in the form set out in, and comply with the requirements of Exhibit 11 (*Form of Implementation Proposal*), as may be adjusted by Modification or under Section 14.3(b).

(b)   The Parties acknowledge and agree that prior to issuance of NTP3, the Parties may agree or the City may Notify the Developer of adjustments with respect to the requirements for the form of Implementation Proposal set out in Exhibit 11 (*Form of Implementation Proposal*) to take account of the Developer's Business Case and the agreed form of Implementation Agreement.

(c)   Any Implementation Proposal must be prepared on the basis that it will be considered to contain commitments for which the Developer will be held responsible in accordance with the terms of the Implementation Agreement, if agreed and executed. Portions of the Implementation Proposal, as agreed under this Article 14 may be attached as exhibits and incorporated into the Implementation Agreement and become binding commitments of the Developer.

(d) Without limiting the requirements of Exhibit 11 (*Form of Implementation Proposal*) and this Article 14, any Implementation Proposal must be in the form of an offer capable of acceptance by the City and be prepared in a manner that:

(i) is consistent with and does not assume any exceptions to, the agreed form of Implementation Agreement;

(ii) is consistent with the agreed assumptions, reports, and plans agreed or directed under Section 2.2(e) (*Phased Work and Notices to Proceed*);

(iii) is consistent with any applicable Governmental Approvals (including those obtained pursuant to the Environmental Approval Process) and Applicable Law;

(iv) uses procurement processes in accordance with Applicable Law, Section 7.5 (*Subcontractor Selection for the Implementation Work*) and the approved Subcontractor Bidding and Selection Plan;

(v) assists the City to determine whether it is receiving value for money and that the Transit Solution is technically viable when analyzed against the requirements in Exhibit 5 (*PDA Work Requirements*) and the Initial Base Case Financial Model is Financially Viable; and

(vi) otherwise achieves the Project Objectives.

(e) Notwithstanding the cooperation and coordination performed by the City during PDA Phase 1 and PDA Phase 2, including participation in Senior Project Group and Working Group meetings and participation contemplated under Exhibit 5 (*PDA Work Requirements*) and any review, comment, or direction by or other action or inaction of the City, the Developer remains fully responsible for the preparation and submittal of the Implementation Proposal to the City.

14.4 **Evaluation and Negotiation of Implementation Proposal**

(a) The Implementation Proposal shall be evaluated by the City and the Developer shall provide the City with access to any supporting documentation requested by the City on an Open Book Basis.

(b) The Developer must attend any Senior Project Group or Working Group meetings convened by the City to present and describe the Implementation Proposal to the City, any Independent Cost Estimator appointed by the City (if invited by the City), and other affected Persons invited by the City to attend the meeting.

(c) If the Implementation Proposal submitted by the Developer under this Article 14 (as may be discussed or negotiated in accordance with this Article 14), is acceptable to the City in its sole discretion, the City will Notify the Developer of its acceptance, which may be conditional on any internal approvals, City Council approval, or other external approvals required to execute the Implementation Agreement, following which the Parties will finalize and execute the Implementation Agreement proposed in the Implementation Proposal within such time period stipulated by the City in its Notice of acceptance (or such longer period required to obtain any internal approvals, City Council approvals, or other external approvals).

(d) If the City, in its sole discretion, Notifies the Developer that the Implementation Proposal submitted by the Developer under this Article 14, is not acceptable (in whole or in part)

to the City and that negotiations shall commence or if the City has not issued a Notice of acceptance under this Section 14.4 nor issued a Notice of decision not to proceed under Section 2.2(f) (*Phased Work and Notices to Proceed*) within 90 Days of delivery of the Implementation Proposal, the Developer must enter into negotiations with the City in good faith and in accordance with the following:

(i) such negotiations may extend to the full scope of the Implementation Proposal or only those parts identified by the City as not being acceptable;

(ii) such negotiations may include a further process of risk and value engineering identification and quantification;

(iii) such negotiations must include the Developer's Representative and Developer Project Manager;

(iv) such negotiations may consider any modifications to the Implementation Proposal proposed by the City, including any modifications to the assumptions upon which the Implementation Proposal was based and any modifications increasing or decreasing the scope of the Implementation Work under the Implementation Proposal;

(v) the Developer must provide such further information as reasonably requested by the City to enable the City to assess and negotiate the Implementation Proposal;

(vi) the Developer must provide appropriately knowledgeable personnel to participate in proposal review meetings to explain the Implementation Proposal or particular elements of it;

(vii) the Parties shall maintain a record of negotiation and comply with any other negotiation protocols reasonably established by the City, including for matters such as the manner in which communications, meetings, negotiations, decisions, and staff liaison will be managed and related timelines;

(viii) the Developer may, and if requested by the City, the Developer must re-submit its Implementation Proposal in accordance with this Article 14 to reflect agreed positions reached under such negotiations, in which case this Section 14.4 shall reapply to the review of the re-submitted Implementation Proposal; and

(ix) the City may, following any negotiation, accept the Implementation Proposal under Section 14.4(c) as agreed under the negotiation and recorded in the record of negotiation and without requiring re-submittal of the Implementation Proposal.

14.5 **No Limitation**

Nothing in this Article 14 is intended to limit the terms of Sections 2.2(f) or 2.2(g) (*Phased Work and Notices to Proceed*) or Article 22 (*Termination and Expiry*). The Parties acknowledge and agree that: (a) a failure by the Developer to negotiate in good faith under Section 14.4(d) will constitute a Developer Default under Section 21.1(o) (*Developer Default*); and (b) if the Implementation Proposal is not accepted by the last day of the Term under Section 2.1(c) (*Term*) (and this Agreement has not expired or been terminated on any earlier date), this Agreement will expire and Section 22.1(c) (*Non-Default Termination or Expiry*) shall apply.

15.   **SCHEDULE OF PERFORMANCE**

15.1   **Schedule of Performance**

(a)   The Developer shall perform the PDA Work:

       (i)   in accordance with the PDA Work Schedule; and

       (ii)   so as to achieve each PDA Milestone by the applicable PDA Milestone Deadline.

(b)   The Developer shall prepare and maintain the PDA Work Schedule in accordance with the scheduling requirements in Exhibit 5 (*PDA Work Requirements*).

(c)   Following each Commencement Date, the Developer shall commence and diligently prosecute the PDA Work for such PDA Phase to completion.

(d)   The Developer shall update the PDA Management Plan and PDA Work Schedule periodically as required under Section 4.3(a) (*PDA Management Plan*) of Part A of Exhibit 5 (*PDA Work Requirements*) and to reflect updates to reflect actual activities and timelines associated with the Environmental Approval Process.

15.2   **Time is of the Essence**

Time is of the essence in the performance and completion of the PDA Work. However, neither Party shall be considered in default in the performance of its obligations with respect to the timely performance or completion of the PDA Work to the extent that the performance of any such obligation is prevented or delayed by a Relief Event.

15.3   **Suspension**

(a)   The City may at any time and for any reason within its sole discretion issue a Notice to the Developer suspending, delaying, or interrupting all or part of the PDA Work for a specified period of time.

(b)   The Developer shall comply immediately with any Notice received from the City pursuant to Section 15.3(a) and take all reasonable steps to minimize costs allocable to the PDA Work covered by the suspension during the period of suspension.

(c)   The Developer shall continue to perform the PDA Work that is not included in the suspension and shall continue ancillary activities, as required by the City. The Developer shall resume performance of the suspended PDA Work upon expiration of the suspension Notice, or upon direction by Notice of the City.

(d)   A suspension shall constitute a Relief Event where the Developer experiences a delay to the PDA Work directly attributable to a suspension implemented by the City under this Section 15.3 for reasons beyond the control of the Developer and provided that:

       (i)   the Developer submits a proper Claim in accordance with Article 16 (*Relief Events*); and

       (ii)   the Developer's performance would not have been delayed or interrupted by any other cause, including for any breach of this Agreement, any Applicable Law, or any Governmental Approval by, or any negligent act or omission of, the Developer, or for which an extension of time, compensation, adjustment to the PDA Cost Cap,

or other relief is already provided for under this Agreement or is expressly excluded under any other term of this Agreement.

16. **RELIEF EVENTS**

16.1 **Entitlement to Claim**

(a) If a Relief Event directly causes or is reasonably likely to directly cause the Developer to fail to achieve a PDA Milestone by the applicable PDA Milestone Deadline or otherwise delay achievement of a milestone defined in the accepted PDA Work Schedule, incur additional or increased costs or to fail to comply with any of its other obligations under this Agreement, the Developer may claim one or more of the following in accordance with this Article 16:

   (i) an extension to any PDA Milestone Deadline or other milestone defined in the accepted PDA Work Schedule;

   (ii) relief from compliance with its obligations under this Agreement; or

   (iii) an increase to the PDA Cost Cap.

(b) The Developer will not be entitled to claim an extension of time or increase to the PDA Cost Cap 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 Developer or any Developer-Related Entity has caused or otherwise suffered a delay in the performance of the PDA Work that is attributable to any breach of this Agreement, Applicable Law, or any Governmental Approval by, or any negligent act or negligent omission of, a Developer-Related Entity.

16.2 **Notices and Information to be Provided**

(a) The Developer shall comply with the procedures in this Section 16.2 to claim an extension to a PDA Milestone Deadline, relief from its obligations, or increase to the PDA Cost Cap with respect to a Relief Event.

(b) The Developer shall submit a Notice that complies with Section 16.2(c) ("**Relief Event Notice**") no later than 15 Days after the date that the Developer first became aware that the relevant Relief Event had occurred and would have the effect that is the subject of the 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 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 the PDA 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 PDA Milestone Deadline under Section 16.1(a)(i) (*Entitlement to Claim*), the 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 PDA Milestone by the applicable PDA Milestone Deadline;

(v)   with respect to a Claim for relief from its obligations under Section 16.1(a)(ii) (*Entitlement to Claim*), the Developer's good faith analysis of the adverse impact of the Relief Event on the Developer's ability to perform its obligations under this Agreement;

(vi)   with respect to a Claim for increase to the PDA Cost Cap, the Developer's good faith analysis of the additional Allowed Costs incurred, or which will be incurred, 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 Developer has taken and will take to mitigate the effect of the Relief Event in accordance with Section 16.3 (*Mitigation*).

(d)   If, after using Reasonable Efforts, the Developer is unable to provide all the information required to be included in the Relief Event Notice pursuant to Section 16.2(c) within the time period set out in Section 16.2(b), the Developer must:

(i)   prior to the end of such time period, provide the City with a specific schedule specifying when the Developer expects to provide the missing information and supporting documentation; and

(ii)   provide the City with the missing information and supporting documentation as soon as possible after it receives such information (whichever is earlier) and in any case prior to the submission of a final Relief Event Notice under Section 16.2(e).

(e)   If the Relief Event (or its effects) are continuing, the Developer shall:

(i)   submit an updated Relief Event Notice every 30 Days until the Relief Event has ended; and

(ii)   within 10 Days of the Relief Event ending, submit a final Relief Event Notice.

(f)   Within 10 Days of receiving a request from the City, the Developer shall provide the City with any clarifying or additional information requested by the City with respect to its Relief Event Notice.

16.3   Mitigation

(a)   The 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 Developer fails to comply with its obligations under Section 16.3(a), the Developer will not be entitled to an extension of time, relief from its obligations, or an increase to the PDA Cost Cap claimed under this Article 16.

16.4   Failure to Provide Required Notice or Information

If any Notice or information is not provided to the City in accordance with Section 16.2 (*Notices and Information to be Provided*), the Developer will not be entitled to any extension of time, relief from its obligations, or an increase to the PDA Cost Cap and will have irrevocably waived and released any Claim with respect to the alleged Relief Event.

16.5 **Burden of Proof**

The 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 Developer.

16.6 **Grant of Relief for Relief Events**

(a)   Within 30 Days (or such longer period as the City reasonably requires and Notifies to the 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(f) (*Notices and Information to be Provided*), the City will Notify the Developer of the City's determination as to the Developer's entitlement to any extension of time, relief from its obligations, increase to the PDA Cost Cap, or other relief under this Article 16. If the City does not issue a determination within such time period, the Claim will be deemed rejected.

(b)   Within 10 Days of:

(i)   the Developer receiving a Notice of the City's determination under Section 16.6(a); or

(ii)   a deemed rejection under Section 16.6(a),

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

(c)   If the Developer disputes the City's determination or deemed rejection under Section 16.6(b), then the matter will be resolved in accordance with Article 27 (*Claims and Dispute Resolution*).

(d)   If the Developer accepts or is deemed to have accepted the City's determination or deemed rejection under Section 16.6(b), the Developer will have irrevocably waived and released any Claim with respect to the alleged Relief Event.

(e)   If the Developer accepts or is deemed to have accepted the City's determination as to the Developer's entitlement to any extension of time, relief from its obligations, increase to the PDA Cost Cap, or other relief under this Article 16, the relief will be granted by way of a Modification in accordance with this Agreement.

16.7 **Sole Remedy**

Without prejudice to the Developer's right to bring a Claim for damages for a breach of contract by the City constituting a Relief Event under paragraph (a) of the definition of Relief Event, the Developer's sole remedy in relation to any Relief Event will be the operation of this Article 16.

17.   **TERMINATION PAYMENTS AND PERMITTED REIMBURSEMENT**

17.1 **General**

(a)   The PDA Work will be carried out by the Developer at-risk with no entitlement to progress payments.

(b)   The Developer may be entitled to payment or reimbursement for all or part of its PDA Work costs pursuant to Section 17.2 (*Permitted Payments to Developer on Financial Close*) or, following termination of this Agreement, Article 22 (*Termination and Expiry*).

17.2   **Permitted Payments to Developer on Financial Close**

(a)   The Implementation Agreement and the Initial Base Case Financial Model may permit the Developer to receive the following payments (and only the following payments) in connection with achieving Financial Close:

(i)   an amount to reimburse the Developer for the Allowed Costs incurred by the Developer in carrying out the PDA Work;

(ii)   cash closing fees payable to Developer-Related Entities in connection with achieving Financial Close, in aggregate amount not to exceed a percentage agreed during PDA Phase 1 and incorporated in the Validation Amendment, multiplied by the total amount of project financing (including debt and equity);

(iii)   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 (provided such fees are payable on an arm's-length basis); and

(iv)   reasonable, market-standard development fees as set out in the Initial Base Case Financial Model.

(b)   The Developer will not be entitled to receive any arranging, closing, or similar fees (however described), or reimbursement for costs incurred in connection with the PDA Work in connection with achieving Financial Close, other than as provided in Section 17.2(a).

(c)

18.   **CHANGES**

18.1   **Contract Modifications**

(a)   The City may, at any time:

(i)   direct the Developer to implement a Change as described in Section 18.2 (*Unilateral Modifications*); or

(ii)   issue a Change Notice to request the Developer to provide a proposal for:

(A)   a Change in accordance with Section 18.3 (*Change Notice for Changes*); or

(B)   PDA Work in accordance with Section 18.4 (*Change Notice for Intra-Terminal Airport Connection Option*).

(b)   Where a Change is directed or agreed in accordance with this Article 18, the Change shall be incorporated into this Agreement through a Modification.

(c)   For all Modifications greater than or equal to $100,000, an Ethics Declaration must be submitted by the Developer in the form set out in Section 1 of Part B of Exhibit 10 (*Required Forms and Prescribed Certifications*) or otherwise on the City's then-current form.

(d)   The Developer may refuse a Change Order or Change Notice within 15 Days of receipt of the relevant Change Order or Change Notice (as applicable) if it would, if implemented:

(i)   require the PDA Work to be performed in a way that violates Applicable Law;

(ii)   cause any Governmental Approval then in full force and effect to be revoked; or

(iii)   fundamentally change the nature of the PDA Work or the Project as a whole in a way not contemplated under the terms of this Agreement.

(e)   Section 2.3(c)(i) (*PDA Phase 1*) sets out a process by which a Validation Amendment can be negotiated and, potentially, agreed. Except for Sections 18.5(b) and (c), which shall apply to a Validation Amendment, this Article 18 shall not apply to that negotiation of the Validation Amendment.

18.2   Unilateral Change Orders

(a)   The City may, at any time, unilaterally issue a Change Order directing the Developer to implement a Change.

(b)   Subject to Section 18.1(d), if the Developer disagrees with the terms of a Change Order, the Developer shall comply with Section 18.5 (*Implementation of a Change*) and the matter will be resolved in accordance with Article 27 (*Claims and Dispute Resolution*).

(c)   The Developer shall maintain comprehensive contemporary records related to the Changed Work, as necessary to distinguish the costs incurred with respect to any Change Order, from the cost of all other PDA Work.

18.3   Change Notice for Changes

(a)   This Section 18.3 applies to Change Notices for all Changes except that contemplated under Section 18.4 (*Change Notice for Intra-Terminal Airport Connection Option*).

(b)   The City may, at any time, propose a Change in the PDA Work by issuing a Change Notice to the Developer describing the proposed Change(s) and requesting the Developer to provide a proposal in accordance with Section 18.3(c).

(c)   Within 30 Days after receipt of a Change Notice (or such longer period as reasonably agreed by the Parties having regard to the complexity of the proposed Change), the Developer shall deliver a proposal to the City for implementation of the Change which shall include detailed information regarding the cost and time impacts of the Change.

(d)   To the extent that a Change causes an increase or decrease in the cost of, or the time required for, performance of any part of the PDA Work, the Parties will negotiate in good faith to agree an adjustment to the PDA Cost Cap (or other adjustment to the commercial terms under this Agreement) and PDA Work Schedule and any impacted PDA Milestone Deadlines, and the Parties' agreement will be reflected in a Modification. If the Parties cannot agree on the adjustment(s) in accordance with this Section 18.3(d), the City's Representative may issue a Change Order.

18.4   **Change Notice for Intra-Terminal Airport Connection Option**

(a)   The City may, during PDA Phase 1 and at any time prior to the date falling 90 Days after the Notice to Proceed for PDA Phase 2 and in its sole discretion, provide a Change Notice for the Developer to provide a proposal under Section 18.3(c) (*Change Notice for Changes*) to increase the scope of PDA Work under this Agreement to include services similar to those described in Exhibit 5 (*PDA Work Requirements*) with respect to the Intra-Terminal Airport Connection Option ("**PDA Option Work**"). The following principles shall apply to the negotiation of the PDA Option Work:

   (i)   upon receipt of a Change Notice for PDA Option Work, the Developer shall prepare a proposal in accordance with Section 18.3(c) (*Change Notice for Changes*);

   (ii)   the Developer's price proposal for any PDA Option Work shall:

      (A)   where applicable, be consistent with any applicable unit costs provided for PDA Phase 2 or PDA Phase 3 (as applicable) in the Feasibility Validation Report; and

      (B)   be subject to review on an Open Book Basis;

   (iii)   the City and the Developer will negotiate in good faith to reach mutual agreement regarding scope, pricing, and schedule for any PDA Option Work, together with any other terms and conditions that the City may, in its sole discretion, consider to be appropriate at the time, potentially including a limited first right for the Developer to subsequently, upon satisfaction of conditions specified by the City, negotiate terms for certain scopes of work relating to the implementation of the Intra-Terminal Airport Connection Option; and

   (iv)   if the City and the Developer agree to terms for any PDA Option Work, such terms will be reflected in a Modification.

(b)   The Developer acknowledges and agrees that the City may proceed with any other action as the City deems appropriate for completion of the PDA Option Work and implementation of the Intra-Terminal Airport Connection Option.

(c)   The City may not issue a Change Order with respect to the PDA Option Work.

18.5   **Implementation of a Change**

(a)   The Developer must not commence performance of any obligations under a Change described in a Change Notice or otherwise implement a Change proposed under a Change Notice unless and until:

   (i)   the Parties have agreed a bilateral Modification with respect to that Change; or

   (ii)   the City has directed the Change by issuing a Change Order.

(b)   The execution of a bilateral Modification by the Parties shall be deemed to be an unconditional agreement to all Changes to the PDA Work, and all other adjustments to this Agreement, described under that Modification. There will be no reservation of rights with respect to further adjustments or Claims arising from the Change under a bilateral Modification.

(c)   Upon execution of a bilateral Modification or a Change Order, the Developer shall promptly proceed to perform its obligations under, and to implement, the Changed Work described in that bilateral Modification or Change Order.

18.6   **Request for Change**

(a)   The Developer may submit a Notice to the City requesting that the City issue a Change Notice where:

(i)   the Developer considers that a direction from the City to the Developer under this Agreement constitutes or involves a Change for which no Change Notice or Change Order has been issued; or

(ii)   the Developer identifies a Change for which no Change Notice or Change Order has been issued that offers value or benefit to the City (whether in terms of time, cost, quality, or performance) without impairing the essential functions or characteristics of the Project, including service life, economy of operation, ease of maintenance, desired appearance, or design and safety standards.

(b)   Within 20 Days after receipt of a Notice delivered in accordance with Section 18.6(a) (or such longer period as reasonably agreed by the Parties having regard to the complexity of the proposed Change), the City shall determine whether to issue a Change Notice with respect to the relevant Change, and if it does so the provisions of Section 18.3 shall apply. If the City does not issue a Notice with a determination within such time period, the request will be deemed rejected.

(c)   If the Developer disagrees with the City's determination under Section 18.6(b), the matter will be resolved in accordance with Article 27 (*Claims and Dispute Resolution*).

18.7   **Key Assumptions Prove to be Incorrect**

(a)   If a Key Assumption proves to be incorrect, the City and the Developer shall work together in good faith in accordance with the terms of this Section 18.7, to determine the impact of the Key Assumption not being correct under this Agreement.

(b)   If the Developer or the City 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 Dispute resolution under Section 27.2 (*Dispute Resolution*).

(c)   If it is agreed or determined that a Key Assumption is incorrect under Section 18.7(b), the Developer shall provide the City 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 Developer), on the ability of the Developer to submit a compliant Implementation Proposal that is Financially Viable, together with all supporting information that the City may reasonably request (including an update to the most recent draft of the Finance Plan and financial model submitted under Exhibit 5 (*PDA Work Requirements*)).

(d)   Following receipt of the information provided by the Developer under Section 18.7(c), the City and the Developer shall negotiate in good faith to agree no later than 90 Days after the City or the Developer Notifies the other that a Key Assumption is incorrect under Section 18.7(b) on: (i) whether or not the Key Assumption being incorrect arose

as a result of any act or omission of the Developer; (ii) the impact that the Key Assumption not being correct will have on the ability of the Developer to submit a compliant Implementation Proposal that is Financially Viable; and (iii) appropriate terms (in addition to any relief available under the Relief Events) to remedy or mitigate the effects of the Key Assumption being incorrect and facilitate the continued performance of this Agreement. If the City and the Developer are unable to agree, then the Dispute will be referred for resolution under Section 27.2 (*Dispute Resolution*).

(e)   If remedy or mitigation terms are agreed or determined that would enable the Developer to submit a compliant Implementation Proposal that is Financially Viable notwithstanding the Key Assumption being incorrect, the Parties will implement those terms (including entering into a Modification, as required) provided that if it is agreed or determined that the Key Assumption being incorrect arose as a result of a Developer act or omission, those remedy and mitigation actions shall be at the Developer's cost.

(f)   If it is agreed or determined that:

(i)   a Key Assumption is incorrect under this Section 18.7;

(ii)   the Key Assumption being incorrect, on its own causes the Developer to be unable to submit a compliant Implementation Proposal that is Financially Viable and such impact cannot be remedied or mitigated; and

(iii)   the cause of the Key Assumption being incorrect did not arise as a result of any act or omission of the Developer,

then either the City or the Developer may terminate this Agreement under Section 22.1 (*Non-Default Termination or Expiry*).

18.8   Performance

The Developer shall not suspend performance of the PDA Work during the negotiation of any Change under this Article 18, unless expressly provided otherwise in accordance with the terms of this Agreement.

19.   INDEMNITY FROM DEVELOPER

19.1   Indemnities

(a)   The Developer agrees that, because Exhibit 5 (*PDA Work Requirements*) and any Reference Documents are preliminary and conceptual in nature and are subject to review and modification by the Developer, such documents shall not be deemed "design furnished" by the City or any of the other Indemnified Parties, as the term "design furnished" is used in California Civil Code Section 2782. The Developer hereby waives the benefit (if any) of California Civil Code Section 2782 and agrees that this Section 19.1 constitutes an agreement governed by California Civil Code section 2782.5.

(b)   Subject to Section 19.2 (*Exclusions from Indemnity*), to the fullest extent permitted by Applicable Law, the Developer shall release, defend, indemnify, and hold harmless the Indemnified Parties on demand from and against any and all Losses, arising out of, relating to, or resulting from the negligence, recklessness, or willful misconduct of the Developer in connection with or relating to, or claimed to be in connection with or relating to, the PDA Work or this Agreement for all design professional work, including but not limited to any liability arising out of, in connection with, resulting from, or related to:

(i) personal injury to or death of any person (including employees of the Indemnified Parties) or for damage to or loss of use of property (including property of the City); and

(ii) the City's reliance upon the use of any other data or information furnished or delivered by the Developer pursuant to this Agreement for the purposes of the Project.

(c) Subject to Section 19.2 (*Exclusions from Indemnity*), to the fullest extent permitted by Applicable Law, the Developer shall release, defend, indemnify, and hold harmless the Indemnified Parties on demand from and against any and all liability for Losses incurred by an Indemnified Party arising out of, in connection with, resulting from, or related to, any act, omission, fault, or negligence of the Developer or any other Developer-Related Entity in connection with or relating to, or claimed to be in connection with or relating to, the PDA Work or this Agreement, including any and all liability for:

(i) Losses in respect of:

(A) damage to, loss or destruction of, or loss of use of (whether total or partial), any real or personal property belonging to an Indemnified Party; or

(B) any claim against the Indemnified Party (including by another Indemnified Party):

(aa) in respect of any illness of, personal injury to, or death of, any person;

(bb) in respect of damage to, loss or destruction of, or loss of use of (whether total or partial), any real or personal property;

(cc) in respect of Intellectual Property; or

(dd) made by a third party claiming rights under this Agreement; and

(ii) Losses arising out of, or as a consequence of an Indemnified Party's reliance upon the use of data or other information furnished or delivered by the Developer pursuant to this Agreement for the purposes of this Project, except where the City has materially altered such data or other information.

19.2 **Exclusions from Indemnity**

The following limitations and exclusions shall apply to the indemnities given by the Developer under this Agreement:

(a) with respect to any Losses of the type covered by any Required Insurance, the Developer's indemnity obligation shall not extend to any Loss arising from the sole negligence or willful misconduct of the Indemnified Parties;

(b) with respect to any Losses which are not of the type covered by any Required Insurance, the Developer's indemnity obligation shall not extend to any Losses to the extent that such Losses were caused by the negligence or willful misconduct of the Indemnified Parties (in other words, a comparative negligence standard shall apply);

(c) the Developer does not indemnify the City or other Indemnified Parties for Losses arising as a direct result of a Relief Event;

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(d)   the Developer does not indemnify the City or other Indemnified Parties for use of any data or information furnished or delivered by the Developer pursuant to this Agreement where the use is for any purpose not related to the PDA Work or the Project. Further, the Developer does not indemnify the City or other Indemnified Parties for claims by any subsequent or other contractors that may be engaged by the City to develop or implement the Project after the expiry or termination of this Agreement; and

(e)   except as permitted by California Civil Code Sections 2782.1, 2782.2, and 2782.5, such indemnities shall not inure to the benefit of an Indemnified Party so as to impose liability on the Developer for the active negligence of the Indemnified Parties or to relieve the Indemnified Parties of liability for such active negligence.

19.3   **Survival**

The indemnities specified in this Article 19 and otherwise given under this Agreement shall survive termination or expiry of this Agreement, and are in addition to and do not limit any other rights or remedies that the Indemnified Parties may have under the Applicable Law or this Agreement.

20.   **INSURANCE REQUIREMENTS**

20.1   **Insurance Policies and Coverage**

The Developer shall obtain and maintain, or cause to be obtained or maintained (if applicable), each of the Insurance Policies with the insurance coverages, for the periods of cover, and for the benefit of the named and additional insureds, identified in Exhibit 9 (*Required Insurance for PDA Work*) and in accordance with the requirements set out in this Article 20 and Exhibit 9 (*Required Insurance for PDA Work*) (the "**Required Insurances**").

20.2   **General Insurance Requirements**

(a)   **Qualified Insurers**

The Developer shall cause all Insurance Policies to be obtained from insurers acceptable to the City's risk manager.

(b)   **Premiums, Deductibles, and Self-Insured Retentions**

(i)   Except as otherwise expressly provided in this Agreement:

(A)   the Developer or its Subcontractors shall be responsible for paying all premiums, deductibles, and self-insurance retentions with respect to the Insurance Policies; and

(B)   neither the City 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.

(ii)   Any deductibles or self-insured retentions must be declared to, and approved by, the City's risk manager.

(c)   **Primary Coverage**

The 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 Developer is required to initially obtain or cause to be obtained an Insurance Policy, and not less than 10 Days before the expiration date of each Insurance Policy, the Developer shall deliver to the City a 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 emailed in .PDF format to: Riskmgmt@sanjoseca.gov:

Certificate Holder
City of San Jose—Finance
Risk Management & Insurance
200 East Santa Clara Street, 14th Floor Tower
San Jose, CA 95113-1905

(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;

(D)   where required under Exhibit 9 (*Required Insurance for PDA Work*), name the City as loss payee as its interest may appear;

(E)   be signed by a person authorized by that insurer to bind coverage on its behalf; and

(F)   evidence that the Insurance Policy has been procured in accordance with the requirements under this Agreement.

(ii)   Promptly (and in any event within ninety (90) days) after the effective date of each Insurance Policy comes into effect, the Developer must deliver to the City:

(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 the City (acting reasonably), that all premiums then due have been paid in full.

(iii)   If the Developer:

(A)   fails or refuses to obtain or maintain in force the Insurance Policies; or

(B)   does not provide the City with proof of coverage in accordance with Section 20.2(d)(ii),

the City may, upon 10 Days' Notice to the 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 Developer shall reimburse the City for the cost the City incurs in obtaining any Insurance Policy under Section 20.2(d)(iii) within 30 days of receiving an invoice from the City with respect to such costs.

(v)   The City may, without obligation or liability, suspend all or any portion of the PDA Work during any time that any proofs of coverage required by this Article 20 have not been provided.

(e)   **Developer Insurance Requirements**

(i)   The Developer shall cause all Subcontractors to obtain (before commencing any PDA Work) and maintain all insurance that is required by Exhibit 9 (*Required Insurance for PDA Work*), to the extent that such Subcontractor is not covered by the Developer-provided insurance.

(ii)   The Developer shall cause the Subcontractors to include the City and the Indemnified Parties as additional insureds as required under Exhibit 9 (*Required Insurance for PDA Work*).

(f)   **Project-Specific Insurance**

Except as expressly provided in Exhibit 9 (*Required Insurance for PDA Work*), all Insurance Policies must be purchased specifically and exclusively for the Project and extend to all aspects of the PDA Work, with coverage limits devoted solely to the Project.

(g)   **Endorsements and Waivers**

(i)   The Developer shall ensure that all Insurance Policies contain, or are endorsed to comply with, the following:

(A)   each Insurance 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 notice (or 10 Days' notice for non-payment of premium) to the City 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)   if coverage is obtained on a "claims made" policy form, the retroactive date shall precede the date the PDA Work was initiated and the coverage shall be maintained for a period of three years after termination of the PDA Work.

(ii)   The Developer shall ensure that 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 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 consultants);

(B) the commercial general liability insurance and automobile liability coverage 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 the City 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 Developer must contain the following endorsement:

"The insurer(s) shall not, without obtaining the express advance written permission from the City of San José (the City), raise any defense involving in any way the jurisdiction of a tribunal over the person of the City, the immunity of the City, or any of their officers, agents or employees, the governmental nature of the City, or the provisions of any statutes respecting suits against the City."; and

(E) the commercial general liability policy must cover liability arising out of the acts or omissions of the Developer's employees and employees of Subcontractors engaged in the PDA Work on the terms and to the extent the Developer or relevant Subcontractor is provided coverage under such liability policy.

(iii) The Developer shall ensure that none of the Insurance Policies contain an endorsement reducing the scope of coverage required under this Agreement, unless approved by the City's risk manager.

(h) **Waivers of Subrogation**

(i) Each Insurance Policy shall include a clause or endorsement denying the insurer any rights of subrogation or recovery against the City to the extent such rights have been waived by the insured before the occurrence of injury or loss.

(ii) The Developer waives any rights of subrogation or recovery against the City 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 Developer shall require all Subcontractors and their respective insurance carriers to provide similar waivers in writing in accordance with this Section 20.2(h).

(i) **Support of Indemnification**

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

21. DEVELOPER DEFAULT AND REMEDIES

21.1 Developer Default

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

(a) the Developer fails to promptly commence performance of the PDA Work authorized under an NTP within 30 Days of the Commencement Date under that NTP;

(b) the Developer fails to achieve any PDA Milestone by the applicable PDA Milestone Deadline;

(c) the Developer fails to pay an amount owing to a Subcontractor on the date due for such payment, except to the extent that the Developer is disputing such payment in good faith;

(d) the Developer implements an Equity Transfer or other Change of Control other than in accordance with Section 26.4 (*Changes in Ownership*);

(e) the Developer fails to comply with the restrictions regarding assignment and transfer under Section 26.1 (*Assignment by the Developer*);

(f) an Insolvency Event arises with respect to the Developer;

(g) an Insolvency Event arises with respect to a Major Participant, unless that Major Participant is replaced in accordance with Section 7.4 (*Major Subcontracts for PDA Work*) within 60 Days of the Insolvency Event arising;

(h) any representation or warranty made by the Developer in this Agreement or any certificate, schedule, report, instrument, or other document delivered to the City 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 Developer in any such certificate, report, instrument or other document);

(i) the Developer fails to comply with any Governmental Approval or Applicable Law in any material respect;

(j) the Developer fails to obtain, provide, and maintain the Insurance Policies or Performance Security;

(k) after exhaustion of all rights of appeal:

(i) there occurs any suspension or debarment (including placement on the California State Labor Commissioner's list of debarred contractors pursuant to California Labor Code Section 1777.1, but distinguished from ineligibility due to lack of

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financial qualifications), or there goes into effect an agreement for voluntary exclusion, of the Developer, a Major Participant, or any affiliate of the 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 Major Participant and such Person is replaced in accordance with Section 7.4 (*Major Subcontracts for PDA Work*) within 60 Days of the suspension, debarment, or agreement for voluntary exclusion; or

(ii) the Developer, a Major Participant, or any of their respective officers, directors, or 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 the City delivers Notice to the Developer of such failure; provided that, where the offending Person is a Major Participant or an officer, director, or employee of a Major Participant, the Developer has not cured the breach under this Section 21.1(k)(ii) by replacing the Major Participant in accordance with Section 7.4 (*Major Subcontracts for PDA Work*) within the 90 Day cure period;

(l) the Developer, its Key Personnel, or its Major Subcontractors no longer hold any license or certificate that the Developer, Key Personnel, or Major Subcontractor is required to hold to perform the PDA Work for which they were proposed to perform;

(m) the Developer fails to obtain the City's approval prior to a change to a Key Personnel or Major Subcontractor under Article 7 (*Key Personnel and Subcontracting*);

(n) to the extent applicable, the Developer fails to comply with the DBE program requirements under Section 7.6 (*DBE Participation*);

(o) the Developer fails to negotiate in good faith in accordance with:

(i) Section 2.1(c)(i) (*PDA Phase 1*) to agree the form of Validation Amendment;

(ii) Article 14 (*Implementation Proposal Procedures and Implementation Agreement*) 14.1 to agree the form of Implementation Agreement Term Sheet, Implementation Agreement or Implementation Proposal; or

(iii) Section 18.7 (*Key Assumptions Prove to be Incorrect*) to agree any remedy or mitigation actions;

(p) the Developer fails to submit an Implementation Proposal in accordance with Section 14.2 (*Submission of Implementation Proposal*);

(q) the Developer fails to execute the Implementation Agreement within the time period set out in Section 14.4(c) (*Evaluation and Negotiation of Implementation Proposal*);

(r) any act, omission, failure, or event that is deemed a Developer Default under Section 22.1 (*Non-Default Termination or Expiry*); or

(s) the Developer breaches any other material obligation of this Agreement.

21.2 **Developer Default Notice and Cure Periods**

(a) If the City determines that a Developer Default has occurred, the City may issue a Notice ("**Developer Default Notice**") to the Developer describing the Developer Default.

(b) Upon receipt of a Developer Default Notice, the Developer shall have the following cure periods:

(i) for a Developer Default under, 21.1(d) (*Change of Control*), 21.1(e) (*Assignment or Transfer*),21.1(b)21.1(d)21.1(e) Section**Error! Reference source not found.**21.1(f) (*Insolvency*), 21.1(o)and Section 22.1(r) (*Deemed Developer Default*) there is no cure period;

(ii) for any other Developer Default:

(A) a period of 30 days after the Developer receives the Developer Default Notice; or

(B) such longer period of time, up to a maximum cure period of 120 Days, if the Developer has prepared and submitted a remedial plan setting out specific actions and an associated schedule to cure the Developer Default within that longer period of time and that remedial plan is accepted by the City.

(c) A Developer Default under Section 21.1(h) (*Representations and Warranties*) will be regarded as cured when the adverse effects of such Developer Default are cured.

21.3 **Remedies for Developer Default**

Upon the occurrence of a Developer Default, and expiration without cure of any applicable cure period under Section 21.2 (*Developer Default Notice and Cure Periods*), the City may exercise the following rights without further notice and without waiving or releasing the Developer from any obligations:

(a) the City may terminate this Agreement under Section 22.2 (*Termination for Developer Default*) and draw on the Performance Security;

(b) the City may exercise its rights under Section 21.4 (*City Step-in Rights*); and

(c) the City may exercise all other rights and remedies provided by law or equity and such rights and remedies as are otherwise available under this Agreement.

21.4 **City Step-in Rights**

(a) If a Developer Default occurs, and the Developer has not fully cured the Developer Default by the expiration of the applicable cure period (if any), the City may perform all or any portion of the Developer's obligations that are:

(i) the subject of Developer Default; or

(ii) the subject of any other existing breach for which the Developer has received prior Notice from the City, and that the Developer is not using diligent efforts to cure.

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(b)   The Developer shall reimburse the City the cost the City incurs in performing the Developer's obligations under Section 21.4(a) within 30 Days of receiving an invoice from the City with respect to such costs.

22.   **TERMINATION AND EXPIRY**

22.1   **Non-Default Termination or Expiry**

(a)   The City may, in its sole discretion, terminate this Agreement without cause at any time before the last day of the Term by delivery of a Notice of Termination stating:

(i)   that the City is terminating this Agreement under this Section 22.1; and

(ii)   that this Agreement will terminate on the date specified in the Notice of Termination.

(b)   If the City issues a Notice of a determination under Section 2.2(f) (*Phased Work and Notices to Proceed*), this Agreement will expire on the date specified in that Notice. This Agreement will expire without requirement for Notice as described under Section 2.1(c) (*Term*) provided that that if the City believes that such expiry (without reaching Commercial Close under the Implementation Agreement) arose by reason of a breach of this Agreement, Applicable Law, or any Governmental Approval by, or any negligent act or negligent omission of, a Developer-Related Entity, then the City may refer the matter to Dispute resolution under Section 27.2 *(Dispute Resolution)*. If it is finally determined or the Parties agree that that such expiry (without reaching Commercial Close under the Implementation Agreement) arose by reason of a breach of this Agreement, Applicable Law, or any Governmental Approval by, or any negligent act or negligent omission of, a Developer-Related Entity, then this Agreement will be deemed to be terminated due to a Developer Default under Section 22.2 (*Termination for Developer Default*).

(c)   Either Party may by Notice terminate this Agreement for:

(i)   a failure to agree a Validation Amendment subject to and in accordance with Section 2.3(c)(i) (*PDA Phase 1*);

(ii)   a failure to agree an Implementation Agreement Term Sheet subject to and in accordance with Section 14.1(c) (*Development of Implementation Agreement*);

(iii)   a failure to agree an Implementation Agreement subject to and in accordance with Section 14.1(f) (*Development of Implementation Agreement*); or

(iv)   a loss of Financial Viability caused by a Key Assumption that is incorrect subject to and in accordance with Section 18.7 (*Key Assumptions Prove to be Incorrect*),

provided in each case that if the Developer issues a Notice to terminate this Agreement under this Section 22.1(c) and the City believes that the Developer failed to negotiate in good faith or otherwise to comply with its obligations as required by Section 2.3(c)(i) (*PDA Phase 1*); Section 14.1(c) (*Development of Implementation Agreement*), 14.1(f) (*Development of Implementation Agreement*) or 18.7 (*Key Assumptions Prove to be Incorrect*) (as applicable), then the City may refer the matter to Dispute resolution under Section 27.2 *(Dispute Resolution)*. If it is finally determined or the Parties agree that the Developer was not entitled to terminate this Agreement under this Section 22.1 because it failed to negotiate in good faith or otherwise to comply with its obligations as required by Section 2.3(c)(i) (*PDA Phase 1*); Section 14.1(c) (*Development of Implementation*

Agreement), 14.1(f) (*Development of Implementation Agreement*) or 18.7 (*Key Assumptions Prove to be Incorrect*) (as applicable), then this Agreement will be deemed to be terminated due to a Developer Default under Section 22.2 (*Termination for Developer Default*).

(d)   This Agreement will automatically terminate upon the occurrence of any of the following,:

   (i)   where applicable under the Environmental Approval Process:

      (A)   the City Council selects the no-build alternative or another alternative that is not the Developer's proposed Transit Solution as the LPA under the Environmental Approval Process or the necessary Governmental Approvals under the Environmental Approval Process are not obtained by the date falling 30 months after the Effective Date or such other date agreed by the Parties under the Validation Amendment or otherwise in accordance with the terms of this Agreement; and

      (B)   within a further 60 Days, the Parties are unable, having consulted with each other in good faith, to agree reasonable terms that would allow for this Agreement to continue;

   (ii)   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

   (iii)   the issuance of a final, non-appealable order by a court of competent jurisdiction upholding the binding effect on the Developer or the City of a Change in Law that causes impossibility of either performance of a fundamental obligation or exercise of a fundamental right by the Developer or the City under this Agreement,

provided in each case that if the City believes that the necessary Governmental Approvals under the Environmental Approval Process or this Agreement is void, unenforceable, or impossible to perform (as applicable) by reason of a breach of this Agreement, Applicable Law, or any Governmental Approval by, or any negligent act or negligent omission of, a Developer-Related Entity, then the City may refer the matter to Dispute resolution under Section 27.2 *(Dispute Resolution)*. If it is finally determined or the Parties agree that the necessary Governmental Approvals under the Environmental Approval Process or this Agreement is void, unenforceable, or impossible to perform (as applicable) by reason of a breach of this Agreement, Applicable Law, or any Governmental Approval by, or any negligent act or negligent omission of, a Developer-Related Entity, then this Agreement will be deemed to be terminated due to a Developer Default under Section 22.2 (*Termination for Developer Default*).

(e)   If the whole or a material part of the PDA Work is suspended under Section 15.3 (*Suspension*) for a continuous period of more than 180 Days for a reason other than any breach of this Agreement, any Applicable Law, or any Governmental Approval by, or any negligent act or omission of, the Developer, either Party may by Notice terminate this Agreement provided that the Developer may only give Notice to terminate under this Section 22.1(e) if:

   (i)   it has given the City at least 30 Days' prior Notice; and

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if requested by the City, consulted with the City in good faith to agree reasonable terms (including payment of a portion of the Allowed Costs as a prolonged suspension payment) that would allow for this Agreement to continue.

(f) If this Agreement is terminated or expires under this Section 22.1, then:

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the City shall pay the Developer an amount equal to the Allowed Costs incurred by the Developer as determined in accordance with this Section 22.1, up to the aggregate of: (A) the PDA Cost Cap (pro-rated if the termination or expiry occurs prior to the completion of a PDA Phase) for the applicable PDA Phase; and (B) the PDA Cost Cap for any prior Phase(s);
the Developer shall transfer title and deliver to the City in the manner, at the times, and to the extent directed by the City completed or partially completed designs, plans, drawings, information, documentation, and other Developer Submittals;
Section 22.3 (Obligations on Termination) shall apply; and
the City shall return the Performance Security to the Developer.

(g) Within 30 days of valid delivery of a Notice of Termination or expiry under this Section 22.1, the Developer shall submit an invoice setting out the Allowed Costs incurred by the Developer prior to the Date of Termination or expiry (as applicable).

(h) Within 30 days of receipt of the invoice, the City will: (i) review and approve the invoice; (ii) approve the invoice as adjusted, based upon its determination of Allowed Costs; or (iii) give Notice that it rejects the invoice in accordance with the terms of this Agreement. Within 30 days of its approval of an invoice, the City will pay the Developer the amount so approved or determined, up to the PDA Cost Cap for the applicable PDA Phase.

(i) If the Developer fails to submit an invoice within the time specified under this Section 22.1, the City will determine the amount of Allowed Costs, on the basis of information available, and will pay the Developer the amount determined and unless excused in writing by the City in its sole discretion, the Developer's failure to submit an invoice within the time required shall constitute acceptance that such payment shall constitute payment in full under Section 22.1(j).

(j) A payment made by the City under this Section 22.1 shall constitute payment in full for the PDA Work performed under this Agreement.

22.2   Termination for Developer Default

(a) If a Developer Default occurs and the Developer Default has no cure period or has not been cured within the relevant cure period under Section 21.2 (Developer Default Notice and Cure Periods) the City may terminate this Agreement by delivering a Notice of Termination which:

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shall specify the Developer Default that has occurred entitling the City to terminate this Agreement; and
will terminate this Agreement on the date the Developer receives the Notice of Termination.

(b) If this Agreement is terminated in accordance with Section 22.2(a):

(i)   the City shall have the right to purchase the Work Product in accordance with Section 24.3 (*City Option to Purchase Work Product*);

(ii)   Section 22.3 (*Obligations on Termination*) shall apply; and

(iii)   the City may call on the Performance Security to cover the Loss suffered by the City as a direct result of the termination, including costs of reprocuring.

(c)   If it is finally determined under Article 27 (*Claims and Dispute Resolution*) that the City was not entitled to terminate this Agreement under this Section 22.2, this Agreement will be deemed to have been terminated by the City for convenience under Section 22.1 (*Non-Default Termination or Expiry*) and Section 22.1(b) (*Non-Default Termination or Expiry*) will apply.

22.3   Obligations on Termination

(a)   Developer

The Developer understands and agrees that the City has obligations that it cannot satisfy without use of the completed PDA Work, and that a failure to satisfy its obligations under this Agreement could result in irreparable damage to the City and the persons and entities it serves. Upon receipt of a Notice of Termination from the City, the Developer shall:

(i)   stop any further performance of the PDA Work on and from the Date of Termination or expiry, as applicable;

(ii)   place no further orders or Subcontracts for goods or services;

(iii)   terminate all orders and Subcontracts and settle outstanding liabilities and claims arising out of such termination of orders and Subcontracts, with the review and acceptance of the City if required;

(iv)   promptly upon Notice, pay any amount due to the City under this Article 22 or otherwise under this Agreement; and

(v)   comply with all other requests that the City may reasonably make to close out this Agreement.

(b)   City

Upon the termination or expiry of this Agreement in accordance with its terms, the City:

(i)   may proceed with any other action as the City deems appropriate for delivery of the Project, including soliciting from, negotiating with, or awarding a contract to any other contractor, for the development, design, construction, financing, operation and maintenance of the Project;

(ii)   may decide not to proceed with the Project; and

(iii)   without limiting the generality of Article 24 (*Intellectual Property and Ownership of Work Product*) but only to the extent allowed under Section 24.3 (*City Option to Purchase Work Product*), may use the Developer Submittals for any purpose.

DOT 10183: SJC Airport to Diridon Station Connector

22.4 Termination Rights and Remedies

(a) Subject to Section 31.8 (*Survival of Obligations*), this Article 22 contains the entire and exclusive rights of the Parties 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.

(b) The rights of the Developer in this Article 22 shall constitute the Developer's exclusive remedies for any termination or expiry of this Agreement.

(c) Without prejudice to Section 22.4(a), the rights and remedies of the City in this Article 22 are in addition to any other rights and remedies provided by Applicable Law or under this Agreement and notwithstanding anything contained in this Agreement to the contrary, the City's termination of this Agreement shall not waive any right the City may have to claim damages, and the City may pursue any cause of action that it may have by Applicable Law or under this Agreement.

23. RECORDS AND AUDIT

23.1 Maintenance and Inspection of Records

(a) The Developer shall:

    (i) keep and maintain all its books, records, documents, and information relating to the Project, the Project Site, and the PDA Work, including copies of all original documents delivered to the City in accordance with the applicable terms of this Agreement and in accordance with Good Industry Practice; and

    (ii) Notify the City where such books, records, documents, and information are kept.

(b) The Developer shall, without charge, make all of its books, records, documents, and other information relating to the Project, the Project Site, and the PDA Work available for inspection by the City at all times during normal business hours or, where reasonably requested by the City, shall provide a copy of the required books, record, documentation, or other information to the City. The City may conduct any such in-person inspection or request such copies upon 48 hours' prior Notice, or unannounced and without prior Notice where there is good faith suspicion of fraud or criminal activity. When conducting any inspection or review of books, records, documents, and information, the City may review, make extracts, take notes, copy, or otherwise deal with such information, subject to any confidentiality obligations under this Agreement.

(c) Subject to Section 23.1(d), the Developer shall:

    (i) retain all of its books, records, documents, and other information relating to the Project, the Project Site, and the PDA Work until the end of the Term; and

    (ii) retain all of the books, records, documents, and other information relating to the Project, the Project Site, and the PDA Work it produces or receives (if any), for seven years following the end of the Term.

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

(d) All records that relate to Disputes being processed or actions brought must be retained and made available until any later date that such Disputes and actions are finally

resolved. Notwithstanding anything else to the contrary in this Article 23, the Developer reserves the right to assert that information is legally exempt from disclosure or introduction into evidence in legal actions under Applicable Law.

23.2 **Audits**

(a) In addition to any other specific audit rights that the City may have under this Agreement, the City will have such rights to review and audit the Developer, its Subcontractors, and their respective books, records, and documents as the City deems necessary for the purposes of verifying compliance with this Agreement, Applicable Law, and Governmental Approvals.

(b) The City's audit rights include the right to observe the business operations of the Developer and its Subcontractors to confirm the accuracy of the books, records, and documents.

(c) This Agreement and the Parties as contracting parties, are subject to examination and audit of the California State auditor at the request of the City or as part of any audit of the City, for a period of three years after the final payment under this Agreement, as required by California Government Code Section 8546.7 and any other Applicable Law.

(d) The 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 the City, and shall require its Subcontractors to warrant the completeness and accuracy in all material respects of all information such subcontractors provide in connection with such audits.

(e) The Developer shall (and shall ensure that any Subcontractor will) include appropriate terms in each Subcontract in order to provide the City with access and audit rights in accordance with the terms of this Article 23.

24. **INTELLECTUAL PROPERTY AND OWNERSHIP OF WORK PRODUCT**

24.1 **Ownership of Work Product**

(a) All Work Product which is prepared or procured by or on behalf of the City or its contractors (other than the Developer), whether before or after the Effective Date, will be and will remain the exclusive property of the City, notwithstanding any copies of the Work Product provided to the Developer.

(b) Subject to Section 24.2 (*Assignment of Work Product on Payment of Allowed Costs or Financial Close*) and Section 24.3 (*City Option to Purchase Work Product*) all Work Product prepared by or on behalf of the Developer will remain exclusively the property of the Developer, notwithstanding any copies of the Work Product provided to the City.

24.2 **Assignment of Work Product on Payment of Allowed Costs or Financial Close**

(a) If this Agreement is terminated or expires under Section 22.1 (*Non-Default Termination or Expiry*), then with effect from the payment of the Allowed Costs that are payable under Section 22.1 (*Non-Default Termination or Expiry*) with respect to such termination, the Developer (on behalf of the Developer and all Developer-Related Entities) shall:

(i) irrevocably assign to the City all rights, title, and interest in and to all of the Developer's Work Product other than:

(A) Proprietary Intellectual Property; and

(B) Work Product that has already been assigned to the City under the terms of this Agreement; and

(ii) deliver a copy of all of the Developer's Work Product that is assigned to the City under Section 24.2(a)(i).

(b) Upon Financial Close, the Developer (on behalf of the Developer and all Developer-Related Entities) shall:

(i) irrevocably assign to the City all rights, title, and interest in and to all of the Developer's Work Product (other than Proprietary Intellectual Property); and

(ii) deliver a copy of all the Developer's Work Product (other than Proprietary Intellectual Property).

24.3 **City Option to Purchase Work Product**

(a) If this Agreement is terminated under Section 22.2 (*Termination for Developer Default*), the Developer grants to the City an irrevocable option to purchase all of, or a portion of, the Developer's Work Product other than:

(i) Proprietary Intellectual Property; and

(ii) Work Product that has already been assigned to the City under the terms of this Agreement.

(b) The City may exercise the option under Section 24.3(a) by delivering Notice to the Developer at the same time as, or within 30 Days of, issuing the applicable Notice of Termination and identifying the Work Product the City intends to purchase.

(c) If the City exercises its option under Section 24.3(a):

(i) the City shall pay to the Developer an amount equal to the Developer's Allowed Costs for preparation of that Work Product not previously reimbursed, up to the maximum caps to be agreed during PDA Phase 1 and incorporated in the Validation Amendment (such caps shall apply regardless of the value of the Work Product that is being transferred to the City); and

(ii) with effect from the payment under Section 24.3(a), the Developer (on behalf of the Developer and all Developer-Related Entities) shall:

(A) irrevocably assign to the City all rights, title, and interest in and to all or the relevant portion of the Developer's Work Product (other than Proprietary Intellectual Property); and

(B) deliver a copy of all or the relevant portion of the Developer's Work Product (other than Proprietary Intellectual Property).

24.4 **Developer Non-Proprietary Intellectual Property**

(a) The Developer (on behalf of itself and each Developer-Related Entity) hereby grants to the City a nonexclusive, sublicensable, transferrable (subject to Section 24.4(b)), royalty-free, irrevocable, worldwide, fully paid up license under the Intellectual Property

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of the Developer and all 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 the City (directly or indirectly) solely in connection with the Project during the Term.

(b)   The right of the City to transfer the license under Section 24.4(a) will be limited to any Government Entity that succeeds to the power and authority of the City generally or with respect to the whole or part of the Project.

24.5   **Developer Proprietary Intellectual Property**

(a)   All Proprietary Intellectual Property will remain exclusively the property of the Developer or relevant Developer-Related Entity.

(b)   The Developer (on behalf of itself and each Developer-Related Entity) hereby grants to the City a nonexclusive, sublicensable, transferrable (subject to Section 24.5(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 the City (directly or in directly) solely:

(i)   in connection with the PDA Work during the Term; and

(ii)   to the extent necessary for the City to use any Work Product assigned to the City under Section 24.2 (*Assignment of Work Product on Payment of Allowed Costs or Financial Close*) and Section 24.3 (*City Option to Purchase Work Product*).

(c)   The right of the City to transfer the license under Section 24.5(b) will be limited to any Government Entity that succeeds to the power and authority of the City generally or with respect to the whole or part of the Project.

(d)   The City may not sell any Proprietary Intellectual Property or, subject to Section 24.5(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 24.5(b).

24.6   **Further Assurances**

The Developer shall execute, and shall cause the Developer-Related Entities to execute, such further documents and to do such further acts as may be necessary or reasonably required by the City to perfect, register, or enforce the City's ownership or rights of any Work Product that is to be assigned or licensed to the City under this Article 24.

24.7   **City Intellectual Property**

(a)   All City Intellectual Property will remain exclusively the property of the City.

(b)   The City hereby grants to the Developer a revocable, non-exclusive, non-transferable, non-sub-licensable (without the City's prior written consent) license to use the City Intellectual Property, solely in connection with the performance of the PDA Work during the Term. This license will automatically terminate upon the expiration or early termination of this Agreement.

(c)   The Developer may not sell any City Intellectual Property, or subject to Section 24.7(b), use, reproduce, modify, adapt, or disclose, or allow any party to use, reproduce, modify,

adapt, or disclose, any City Intellectual Property for any purpose other than the performance of the PDA Work for the Term.

(d)   If the Developer or any Developer-Related Entity creates or develops any improvements, modifications, enhancements, or derivative works to or of the City Intellectual Property, the Developer shall promptly Notify the City in writing and provide to the City 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 City 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 Developer or any Developer-Related Entity are, and will be deemed, City Intellectual Property under this Agreement.

24.8   Assignment of Certain Legal Rights

Without limiting the Developer's other obligations in this Article 24, the Developer hereby agrees that the provisions of California Public Contract Code Section 7103.5(b) and California Government Code Section 4552 are applicable to this Agreement, and which provide as follows: In entering into a public works contract or a Subcontract to supply goods, services, or materials pursuant to a public works contract, the Developer or Subcontractor offers and agrees to assign to the awarding body all rights, title, and interest in and to all causes of action it may have under § 4 of the Clayton Act (15 U.S.C. § 15) or under the Cartwright Act (Chapter 2 (commencing with § 16700) of Part 2 of Division 7 of the California Business and Professions Code), arising from purchases of goods, services or materials pursuant to the public works contract or the Subcontract. This assignment shall be made and become effective at the time the awarding body tenders final payment to the Developer, without further acknowledgment by the parties.

25.   CONFIDENTIALITY AND COMMUNICATIONS

25.1   Developer's Duty of Confidentiality

(a)   During the Term, any information, data, figures, records, findings, and the like received or generated by the Developer in connection with the performance of this Agreement (other than any information released or published in the public domain prior to execution of this Agreement or as expressly intended or authorized by the City), shall be considered and kept as the private and privileged records of the City and will not be divulged to any Person except:

(i)   to those Persons and to the extent directly authorized by the City by Notice; and

(ii)   to a Developer-Related Entity who:

(A)   requires direct access to that information to assist the Developer, or act on its behalf, in relation to limited purpose of the Developer's performance of the PDA Work;

(B)   is informed by the Developer of the confidential nature of the information and of the terms of this Article 25; and

(C)   has executed an acknowledgement of the terms of this Article 25. Upon request by the City, the Developer shall provide copies of each executed acknowledgement to the City.

(b)   Following the end of the Term, the Developer must continue (and must ensure that each Developer-Related Entity continues) to treat as private and privileged any information, data, figures, records, and the like, and will not release any such information to any Person, either by statement, deposition, or as a witness, except upon direct written authority of the City or as required by Applicable Law.

(c)   Except for the disclosures expressly permitted under this Section 25.1, the Developer shall not publish information acquired or generated by the Developer in connection with the performance of this Agreement until such time as such information is released in published reports by the City.

(d)   Any breach of this Section 25.1 will constitute a breach of this Agreement and will subject the Developer, regardless of whether the person responsible for the breach is the Developer or another Developer-Related Entity, to damages in accordance with this Agreement and any other remedies available to the City at law or equity. The Developer indemnifies, defends, and holds harmless the City in the event that litigation must be filed to recover and protect any improperly disclosed documents as a result of violation of this Section 25.1 by the Developer.

25.2   **Developer's Interaction with the Media and the Public**

(a)   When dealing with the news media or the public, any statements made by the Developer about the Project, the PDA Work, and this Agreement shall only be made jointly and in consultation with the City.

(b)   The Developer must ensure that each of the Developer-Related Entities comply with the terms of Section 25.2(a).

(c)   The Developer must seek the prior consent of the City prior to having conversations with or giving public interviews to the news media or any other members of the public.

25.3   **Developer's Confidential Materials**

If the Developer believes that any portion of a Developer Submittal contains confidential or proprietary material, it must mark the relevant portion of the Developer Submittal or other communication or information delivered to the City pursuant to this Agreement as such, in accordance with and subject to the provisions of Section 2.4 (*California Public Records Act*) of Exhibit 8 (*City Contracting Requirements and other Regulatory Requirements*).

26.   **ASSIGNMENT AND CHANGES IN OWNERSHIP**

26.1   **Assignment by the Developer**

The 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 the City.

26.2   **Assignment by the City**

The City may, upon prior Notice to the Developer, but without the Developer's consent, transfer and assign all or any portion of its rights, title and interests in and to this Agreement, the Project, the Project Site, and the Performance Security to any Government Entity that:

(a)   succeeds to the governmental powers and authority of the City; and

(b)   has sources of funding to perform the payment obligations of the City under this Agreement that are at least as adequate and secure as the City's at the time of the assignment.

26.3   **Change of Organization or Name**

(a)   The Developer shall not change the legal form of its organization without providing Notice to the City.

(b)   If the Developer changes its name, the Developer shall promptly (and in any event within 10 Days of such change) provide the City with Notice of such name change and appropriate supporting documentation.

26.4   **Changes in Ownership**

The Developer shall not implement any Equity Transfer or other Change of Control without the prior written consent of the City.

27.   **CLAIMS AND DISPUTE RESOLUTION**

27.1   **Claims**

(a)   The Developer must submit to the City a Notice of Potential Claim no later than 30 Business Days after:

(i)   issuance of a Change Order under Section 18.2 (*Unilateral Change Orders*) that the Developer disagrees with;

(ii)   City determination or deemed rejection of a Claim for a Relief Event under Section 16.6 (*Grant of Relief for Relief Events*) that the Developer disagrees with; or

(iii)   the occurrence of any other act, event or condition under this Agreement giving rise to a potential Claim.

(b)   Each Notice of Potential Claim must be clearly marked 'Notice of Potential Claim' and include at least the following information:

(i)   the contractual and factual bases of the potential Claim; and

(ii)   a good faith estimate of the cost and/or time impact and the relief that the Developer believes it may be entitled to under the terms of this Agreement based on reasonably available information.

(c)   Failure to submit a Notice of Potential Claim shall constitute a waiver by the Developer of any right to bring the Claim against the City and the Developer shall be precluded from including any Claim not notified in a Notice of Potential Claim in any Statement of Claims.

(d)   If the Developer wishes to pursue a Claim, the Developer must submit to the City a Statement of Claims no later than 60 Business Days after the event, occurrence, or other cause giving rise to the Claim. A Statement of Claims must include at least the following information:

(i)   each Claim, separately stated and identified that is being asserted against the City, along with the contractual and factual bases and amount of the Claim;

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(i)   for each Claim, all documentation reasonably needed to evaluate and determine the merits of the Claim; and

(ii)   a Developer certification that the Claim and all information provided in the Statement of Claims is accurate and true to the best of the Developer's knowledge.

(e)   A Subcontractor is prohibited from submitting a Claim directly to the City. The Developer may pass through a Claim from a Subcontractor only if the Developer certifies in the Notice of Potential Claim that the Developer reviewed the Claim and reasonably concluded that the Claim has merit.

(f)   Failure to deliver a Claim under a Statement of Claims in accordance with this Section 27.1 shall constitute a waiver of any right to bring the Claim and the Developer shall be precluded from pursuing any Claim not included in Statement of Claims or for which the Developer fails to provide sufficient documentation for the City to evaluate and determine its merits.

(g)   Following a reasonable review of the Claim and no later than 30 Business Days after receipt of a Statement of Claims delivered in accordance with this Section 27.1, the City shall provide the Developer with a Notice of response identifying what portion of the Claim is disputed and what portion is undisputed provided that the time frame for the City issuing its Notice of response may be extended by mutual agreement of the City and the Developer. Failure by the City to respond to a Claim within the time period set out in this Section 27.1(g) shall result in the Claim being deemed rejected and disputed in its entirety.

(h)   If the Developer disputes the City's response to a Claim, the Developer may refer the Claim to a settlement conference in accordance with Section 27.3 (*Settlement Conference*).

27.2   **Dispute Resolution**

(a)   If the Dispute involves a Claim by the Developer, the Developer shall comply with and be subject to Section 27.1 (*Claims*).

(b)   If a Dispute arises that doesn't involve a Claim, either Party may Notify the other of the Dispute and refer the Dispute to a settlement conference in accordance with Section 27.3 (*Settlement Conference*). A Notice of a Dispute delivered under this Section 27.2(b) must:

(ii)   list each matter in Dispute, separately stated and identified that is being asserted, along with the contractual and factual bases and amount of the Dispute;

(i)   include for each matter in Dispute, all documentation reasonably needed to evaluate and determine the merits of the Dispute; and

(ii)   include a certification that the Dispute and all information provided in the Notice is accurate and true to the best of the Party's knowledge.

(c)   The Parties may mutually agree in writing to forego the Dispute resolution procedures set out in this Section 27.2 to Section 27.5 (*Arbitration*) to seek resolution of a Dispute through other methods, including litigation filed in accordance with Article 29 (*Governing Law and Jurisdiction*) or other alternative dispute resolution procedures. Notwithstanding anything to the contrary contained in this Agreement, to the extent that a Dispute relates

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to a request for emergency injunctive relief, such Dispute shall not be subject to the requirements of Sections 27.2 (*Dispute Resolution*) to 27.5 (*Arbitration*) and the Party seeking such relief may pursue any remedies available at law or in equity.

(d)   Disputes (or elements of Disputes) that are not resolved under this Article 27 may be determined by litigation filed in accordance with Article 29 (*Governing Law and Jurisdiction*).

27.3   **Settlement Conference**

(a)   If a Dispute is referred to a settlement conference in accordance with Section 27.1(h) (*Claims*) or 27.2(b) (*Dispute Resolution*), the Parties agree to conduct a settlement conference promptly in an effort to informally resolve the Dispute in a manner acceptable to both Parties.

(b)   The Parties may mutually agree to exchange documents setting out their respective positions on the Dispute, at a mutually agreed upon time that is sufficiently before the settlement conference to allow Parties adequate time to review and consider the documents.

(c)   The settlement conference will be conducted informally, with each Party being able to present its respective position.

(d)   If the settlement conference does not result in resolution of the Dispute, either Party may, by Notice to the other Party, refer the Dispute to a facilitated dispute resolution in accordance with Section 27.4 (*Facilitated Dispute Resolution*).

27.4   **Facilitated Dispute Resolution**

(a)   If a Dispute is referred to a facilitated dispute resolution in accordance with Section 27.3(d) (*Settlement Conference*), the Parties shall meet with a trained, neutral facilitator in an effort to reach a mutually agreeable resolution of the Dispute. The Parties shall mutually agree on the scheduling of the facilitated dispute resolution and the selection of a facilitator within 15 Days of referral to a facilitated dispute resolution.

(b)   The facilitated dispute resolution shall be informal and non-binding, with each Party having an opportunity to present its position and supporting information.

(c)   The Parties agree that recommendations resulting from the facilitated dispute resolution are not admissible in court in any subsequent litigation.

(d)   The Parties will share equally the costs of facilitated dispute resolution.

(e)   If a Dispute is not resolved by facilitated dispute resolution within the schedule agreed by the Parties, then either Party may, by Notice to the other Party, refer the Dispute to arbitration in accordance with Section 27.5 (*Arbitration*).

27.5   **Arbitration**

If a Dispute is referred to arbitration in accordance with Section 27.4(e) (*Facilitated Dispute Resolution*):

(a)   the arbitration shall be conducted pursuant to the AAA Rules for Commercial Disputes or any other rules or procedures agreed by the Parties, as amended by the provisions of

this Section 27.5. The use of the rules promulgated by the AAA neither requires nor implies that the arbitration must be administered by the AAA;

(b) the Dispute will be conducted by a single arbitrator appointed by agreement of the Parties unless the Parties fail to agree a single arbitrator within 15 Days of referral of the Dispute to arbitration, in which case one arbitrator will be selected by the City, one arbitrator will be selected by the Developer, and a third arbitrator, that will also be the chairperson, will be selected by the first two arbitrators;

(c) the arbitration will take place in the City of San José, California and will be conducted in English;

(d) discovery will be permitted in accordance with the Uniform Arbitration Act, California Code of Civil Procedure Section 1280, et seq.;

(e) the Parties agree to act in good faith to procure that the hearing is completed within 60 Days from the submittal of the Dispute to arbitration, and the arbitrator(s) will be directed to issue a ruling within 30 Days of the date of the completion of the hearing or to ensure that completion of the hearing or issuance of the ruling occurs within such other time periods as may be agreed by the Parties (acting reasonably having regard to the nature of the Dispute) or at the discretion of the arbitrator(s) (having regard to the nature of the Dispute);

(f) the award of the arbitrator(s) will not be binding and the findings are inadmissible and may not be used by either Party in any concurrent or subsequent litigation or other action at law or in equity, unless otherwise agreed by the Parties in writing; and

(g) if the Parties accept the findings of the arbitration, the Parties will enter into a Modification to implement such findings.

28. LIABILITIES

28.1 Consequential Loss

(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 28.1(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 20 (*Insurance Requirements*), or to the extent the Developer is deemed to have self-insured the Loss under Article 20 (*Insurance Requirements*);

(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 Developer to the City 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.

28.2   **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.

28.3   **Limitation of Liability**

(a)   Except as otherwise expressly provided in this Agreement, the maximum aggregate liability of the Developer to the City for damages arising out of its performance of this Agreement (or its failure to perform) shall be limited to:

(i)   during PDA Phase 1, the greater of: (A) 50% of the PDA Cost Cap for PDA Phase 1; and (b) $350,000; and

(ii)   during subsequent PDA Phases, the amount as agreed by the Parties in the Validation Amendment provided that it shall be no less than 50% of the aggregate PDA Cost Cap for all Phases.

(b)   The limitation in Section 28.3(a) will not apply to or limit:

(i)   all costs reasonably incurred by the City or a City Contractor in remedying any nonconforming work including under Section 13.2 (Nonconforming Work);

(ii)   all costs reasonably incurred by the City or a City Contractor in exercising its rights under Section 21.4 (City Step-in Rights);

(iii)   any Losses (excluding defense costs) to the extent that they are either covered by the proceeds of insurance carried out by the relevant Party or are required to be insured against under Article 20 (Insurance Requirements), or to the extent the Developer is deemed to have self-insured the Loss under Article 20 (Insurance Requirements);

(iv)   Losses arising out of fraud, criminal conduct, willful misconduct, gross negligence, or bad faith on the part of the relevant Party;

(v)   amounts payable by the Developer to the City under an indemnity in this Agreement to the extent such amounts relate to a third party claim; or

(vi)   interest, late charges, fees, transaction fees and charges, penalties, and similar charges that this Agreement expressly states are due from the relevant Party.

29.   **GOVERNING LAW AND JURISDICTION**

29.1   **Governing Law**

This Agreement will be governed by and interpreted in accordance with the laws of the State, and to the extent applicable, by the laws of the United States.

29.2   **Jurisdiction**

By entering into this Agreement, the Developer consents and submits to the jurisdiction of the courts of the State over any action at law, suit in equity, or other proceeding that may arise out of this Agreement.

30.   **NOTICES**

(a)   Any notice legally or otherwise required to be given by one Party to the other under this Agreement must be in writing, dated, signed by a duly authorized representative of the Party delivering the notice, addressed, 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,

(such notice, if in compliance with this Article 30, a "**Notice**").

(b)   Notices under Section 30(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 Developer:

[●]

Attn:	[●]
Address:	[●]
Tel:	[●]
Email:	[●]

    (ii)   If to the City:

[●]

Attn:	[●]
Address:	[●]
Tel:	[●]
Email:	[●]

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

[●]

Attn:	[●]
Address:	[●]
Tel:	[●]
Email:	[●]

DOT 10183: SJC Airport to Diridon Station Connector

(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 30(a)). All Notices (including by email communication) delivered after **5:00 p.m. Pacific time** will be deemed delivered on the first Business Day following delivery.

31.   OTHER

31.1   Amendments

Except in the case of a Change Order issued in accordance with this Agreement, this Agreement can only be amended or replaced by a written instrument duly executed by the Parties.

31.2   Waiver

(a)   No waiver of any provision, covenant, or condition of this Agreement will be valid unless in writing and executed by the Party benefiting from that provision, covenant, or condition.

(b)   Either Party's waiver of any breach or failure to enforce any of the provisions, covenants, or conditions of this Agreement at any time will not in any way limit or waive that Party's right to subsequently enforce or compel strict compliance with every provision, covenant, or condition of this Agreement, despite any course of dealing or custom of the trade.

(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.

31.3   No Exclusion

Nothing in this Agreement is intended to limit the City's liability for fraud, active negligence, or a violation of Applicable Law.

31.4   Organizational Conflicts of Interest

The Developer shall not perform PDA Work under this Agreement which would constitute or create an organizational conflict of interest, including any of the following that could result in a lack of impartiality or impaired objectivity, unequal access to information, and biased ground rules, for this Agreement or any other contract for the City:

(a)   the Developer or a Subcontractor's previous work product, whether completed on behalf of the City or another public or private entity, has been relied upon in establishing, or significantly influenced, Exhibit 5 (*PDA Work Requirements*);

(b)   the Developer or Subcontractor's previous work product, whether completed on behalf of the City or another public or private entity, offered an opportunity for the Developer or Subcontractor to make or influence findings with respect to this Agreement;

(c)   the Developer or Subcontractor would be in position to evaluate its own previous work product as part of this Agreement, whether the previous work product was completed on behalf of the City or another public or private entity; and

(d)   the Developer or Subcontractor had access to confidential information as part of services performed for the City or another public or private entity that put the Developer or Subcontractor at a significant competitive advantage over any other potential proposer to obtain this Agreement or another contract with the City, and the confidential information was not otherwise available to, and could not be made available to, other potential proposers.

31.5   Independent Contractor; No Agent, Joint Venture, or Partner

(a)   The Developer is an independent contractor, and nothing contained in this Agreement will be construed as constituting any relationship with the City other than that of developer of the Project 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 the City and the 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 or the Implementation 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 the City control or joint control over the Developer's financial decisions or discretionary actions concerning the Project and the PDA Work.

(d)   In no event will the relationship between the City and the Developer be construed as creating any relationship whatsoever between the City and the Developer's employees.

(e)   Neither the Developer nor any of its employees is or shall be deemed to be an employee of the City.

(f)   Except as otherwise expressly provided in this Agreement, the 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 Subcontractors and for all other Persons that the Developer or any Subcontractor hires to perform or assist in performing the PDA Work.

31.6   No Personal Liability

No officer, agent, representative, or employee of the City, any City-Related Entity, the Developer, or any Developer-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.

31.7   Successors and Assigns

This Agreement is binding upon and will inure to the benefit of the Parties and their respective successors and permitted assigns.

31.8   **Survival of Obligations**

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 4 (*Representations and Warranties*); Section 13.6 (*Performance Security*); Article 19 (*Indemnity from Developer*) 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 23 (*Records and Audit*); Article 24 (*Intellectual Property and Ownership of Work Product*); Article 25 (*Confidentiality and Communications*); Article 27 (*Claims and Dispute Resolution*); Article 29 (*Governing Law and Jurisdiction*); this Article 31; and, Exhibit 1 (*Definitions*).

31.9   **Limitation on Third Party Beneficiaries**

Nothing contained in this Agreement is intended to 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 for the benefit of the Indemnified Parties.

31.10   **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.

31.11   **Entire Agreement**

This Agreement (together with any Early Works Agreements entered into in accordance with its terms) 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.

31.12   **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 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 the City's compensation to the Developer's account for any change in the PDA 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.

31.13 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.

31.14 Covenant Against Contingent Fees

(a) The Developer warrants that no person or Developer representative has been specifically employed or retained to solicit or obtain this Agreement in exchange for a contingent fee, except a bona fide employee or bona fide agent. A breach or violation of this warranty shall be considered a breach of Agreement pursuant to Section 21.1(h) (*Developer Default*). In addition to any rights and remedies otherwise provided for by law, the City may invoice the Developer for or deduct from any payment under this Agreement, or otherwise recover, the full amount of the contingent fee.

(b) "Bona fide agent", as used in this Section 31.14, means an established commercial or selling entity that is maintained by the Developer for the sole purpose of securing business and that neither exerts nor proposes to exert improper influence to solicit or obtain City contract(s) nor holds itself out as being able to obtain any City contract(s) through improper influence.

(c) "Bona fide employee", as used in this Section 31.14, means a person who is employed by the Developer and subject to the Developer's supervision and control as to time, place, and manner of performance and who neither exerts nor proposes to exert improper influence to solicit or obtain City contract(s) nor holds itself out as being able to obtain any City contract(s) through improper influence.

(d) "Contingent fee", as used in this Section 31.14, means any commission, percentage, or other sum that is payable only upon success in securing a City contract.

(e) "Improper influence," as used in this Section 31.14, means any influence that induces or tends to induce a City employee, officer, contractor, subcontractor, City's Representative, or consultant to give consideration or to act regarding a City contract on any basis other than the merits of the matter.

SIGNATORIES

CITY   **DEVELOPER**

[*Signature block to be inserted*]   [*Signature block to be inserted*]

EXHIBITS

1.   DEFINITIONS

2.   DEVELOPER OWNERSHIP

3.   PDA MILESTONES AND DEADLINES

4.   DEVELOPER COMMITMENTS

5.   PDA WORK REQUIREMENTS

6.   INITIAL DESIGNATION OF AUTHORIZED REPRESENTATIVES

7.   SUBCONTRACTING

8.   CITY CONTRACTING REQUIREMENTS AND OTHER REGULATORY REQUIREMENTS

9.   REQUIRED INSURANCE FOR PDA WORK

10. REQUIRED FORMS AND PRESCRIBED CERTIFICATIONS

11. FORM OF IMPLEMENTATION PROPOSAL

12. ALLOWED COSTS

EXHIBIT 1

DEFINITIONS

"**Agreement**" has the meaning given in the Preamble.

"**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.

"**Alignment Constraints**" means the alignment constraints set out in Part D of Exhibit 5 (*PDA Work Requirements*).

"**Allowed Costs**" means the Developer's documented reasonable internal direct costs and third party direct costs incurred in performing the PDA Work prior to Commercial Close that are permitted as Allowed Costs under Exhibit 12 (*Allowed Costs*).

"**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 Government Entity which is applicable to the Project, the PDA Work, or any relevant Person whether taking effect before or after the date of this Agreement. Applicable Law excludes Governmental Approvals.

"**Benefit-Cost Analysis**" or "**BCA**" means the benefit-cost analysis to be conducted by the Developer during PDA Phase 1 as contemplated in Section 3.3(d) (*Benefit-Cost Analysis*) of Part A of Exhibit 5 (*PDA Work Requirements*).

"**BOD Report**" has the meaning given in Section 4.5(a) (*Design Management*) of Part A of Exhibit 5 (*PDA Work Requirements*).

"**Business Case**" means the commercial and financial proposal developed by the Developer with respect to its Transit Solution in accordance with Section 3.3(c) (*Financial Feasibility*) of Exhibit 5 (*PDA Work Requirements*).

"**Business Day**" means any day that is not a Saturday, a Sunday, a State public holiday, or a federal public holiday.

"**CapEx**" means capital expenditure.

"**CEQA**" means the California Environmental Quality Act., Cal. Pub. Res. Code §21000 et seq.

"**Change**" means additions, deletions, or other revisions to the PDA Work within the general scope of this Agreement that are directed by the City through its issuance of a Change Order, agreed by the Parties under a bilateral Modification, or otherwise authorized by the City under a Modification including PDA Work that does not involve a cost or time adjustment, but excluding any PDA Work performed or time spent by the Developer to correct any nonconformances in the PDA Work.

"**Change in Law**" means the enactment, adoption, modification, repeal, or other change in any Applicable Law occurring after the Effective Date (including any change in the judicial or

administrative interpretation of any Applicable Law) that is materially different from Applicable Laws in effect on the Effective Date and that requires a material modification in the PDA Work, but excluding any new or amended Applicable Law that was passed or adopted prior to, but becomes effective after, the Effective Date.

"**Change Notice**" means a Notice delivered by the City to the Developer describing a proposed Change and requesting the Developer to submit a proposal with respect to the proposed Change in accordance with Section 18.3 (*Change Notice*).

"**Change of Control**" means any Equity Transfer, transfer of an interest, direct or indirect, in an Equity Member, or other action, that results, directly or indirectly, in a change in possession of the power to direct or control or cause the direction or control of the management of the Developer or a material aspect of its business. A change in possession of the power to direct or control or cause the direction or control of the management of an Equity Member will constitute a Change of Control if such Equity Member possesses, immediately prior to such Change of Control, the power to direct or control or cause the direction or control of the management of the Developer.

"**Change Order**" means a written Notice delivered by the City, directing the Developer to perform a Change.

"**Changed Work**" means PDA Work that has been authorized by the City under a Modification.

"**City**" has the meaning given in the Preamble.

"**City Contractor**" means any contractor, consultant, tradesperson, supplier, or other Person engaged or authorized by the City to do work related to the Project but excluding the Developer and the Subcontractors.

"**City Council**" means the San José City Council.

"**City Intellectual Property**" means all Work Product that is the property of the City.

"**City-Provided Approvals**" means:

(a)   environmental decision documents approved under CEQA and NEPA covering the Project; and

(b)   any other Governmental Approvals that the Parties agree during PDA Phase 1 will be the responsibility of the City, as incorporated in any Validation Amendment.

"**City-Related Entity**" means any or all of (as the context requires) the City, any City contractor (other than the Developer), any Government Entity, and their respective officers, agents, representatives, and employees, including the City's Representative.

"**City ROW**" means right-of-way and parcels comprising part of the Project Site with respect to which the City holds a current right of access.

"**City's Representative**" has the meaning given in Section 6.2 (*Designation of Representatives*).

"**Claim**" means any Developer claim, action, demand, or proceeding, for payment of money (including damages), for relief from or suspension of obligations or for an extension of time:

(a)   in connection with or arising from, the time for completing the PDA Work, the payment of money or damages arising from PDA Work performed by the Developer or a Subcontractor, or the performance of the PDA Work; or

(b)   otherwise arising at law including:

  (i)   under or for breach of any statute;

  (ii)   in tort for negligence or otherwise, including negligent misrepresentation; or

  (iii)   for restitution, including restitution based on unjust enrichment.

"**Commencement Date**" means the commencement date for the performance of the PDA Work (or a PDA Phase or other part of it), which shall be the date described as the 'Commencement Date' in the Notice to Proceed applicable to the PDA Work (or that PDA Phase or other part of it).

"**Commercial Close**" means the date that the Implementation Agreement is signed by all of the parties.

"**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.

"**Data Room**" means the data room (or data rooms, whether physical or electronic) made available by the City to provide proposers access to the Reference Documents.

"**Date of Termination**" means the effective date of any termination of this Agreement in accordance with its terms.

"**Day**" or "**day**" means any calendar day.

"**DBE Goal**" has the meaning given in Section 7.6 (*DBE Participation*).

"**Debt**" means all of the outstanding obligations from time to time under the Finance Documents.

"**Debt Financing Plan**" has the meaning given in Section 4.4(a)(iii)(F) (*Financing Management Plan*) of Part A of Exhibit 5 (*PDA Work Requirements*).

"**Design Reviews**" has the meaning given in Section 4.5(b)(ii) (*Design Reviews*) of Part A of Exhibit 5 (*PDA Work Requirements*).

"**Developer**" has the meaning given in the Preamble.

"**Developer Commitments**" means:

(a)   the PDA Proposal; and

(b)   any commitments made by the Developer as part of the PDA Work and incorporated into this Agreement under the Validation Amendment or other Modification.

"**Developer Default**" means any event specified in Section 21.1 (*Developer Default*).

"**Developer Default Notice**" has the meaning given in Section 21.2(a) (*Developer Default Notice and Cure Periods*).

"**Developer Project Manager**" has the meaning given in Part B (*Key Personnel for PDA Work*) of Exhibit 5 (*PDA Work Requirements*).

"**Developer-Related Entity**" means:

(a)   the Developer;

(b)   the Equity Members;

(c)   the Subcontractors;

(d)   any other Persons performing any of the PDA Work for or on behalf of the Developer;

(e)   any other Persons for whom the Developer may be legally or contractually responsible; and

(f)   the employees, agents, officers, directors, representatives, consultants, successors, and assigns of any of the foregoing.

"**Developer Submittal**" means any document which the Developer must submit, or elects to submit, to the City in accordance with or under this Agreement.

"**Developer Submittal List**" has the meaning given in Section 13.3(a)(i) (*Developer Submittal List*).

"**Developer's Interest**" means all right, title, and interest of the Developer in, to, or derived from this Agreement.

"**Developer's Representative**" has the meaning given in Section 6.2 (*Designation of Representatives*).

"**DIR**" has the meaning given in Section 2.1 (*Prevailing Wages*) of Exhibit 8 (*City Contracting Requirements and other Regulatory Requirements*).

"**Diridon Integrated Station**" means the expanded Diridon Station, as contemplated in the Diridon Station Integrated Design Concept Plan provided as part of the Reference Documents.

"**Diridon Station**" means the transit station of that name in downtown San José.

"**Disadvantaged Business Enterprise**" or "**DBE**" has the meaning given in 49 CFR Part 26.

"**Dispute**" means a dispute or disagreement between the Parties as to the merits, amount, or remedy arising out of an issue in controversy, including a Claim, a dispute, or disagreement as to the Parties' respective rights and obligations under this Agreement or an asserted default and any question regarding this Agreement's existence, validity, or termination.

"**Draft Environmental Impact Statement**" or "**DEIS**" has the meaning given in CEQA.

"**Draft Environmental Impact Report**" or "**DEIR**" has the meaning given in NEPA.

"**Early Works Agreement**" means an agreement entered into between the City and the Developer with respect to physical construction works to be performed by the Developer in the advancement of the Project.

"**Effective Date**" means the date identified as the Effective Date on the cover of this Agreement.

"**Eligible Security Issuer**" means a properly licensed surety company, insurance company, or other Person approved by the California State Insurance Commissioner to do business in California rated at least "A" (excellent or above) according to A.M. Best's Financial Strength Rating and "VII" or better according to A.M. Best's Financial Size Rating.

"**Environmental Approval Process**" the environmental review and permitting process for the Project that shall be advanced by the City pursuant to CEQA and/or NEPA (as applicable).

"**Equity Member**" means each Person that directly holds an equity interest in the Developer.

"**Equity Transfer**" means any assignment, mortgage, encumbrance, conveyance, sale, or other transfer of equity interest in the Developer.

"**Exhibit**" means an exhibit or attachment to this Agreement.

"**Existing Property**" means any existing structures, improvements, equipment, and vegetation within and adjacent to the Project Site.

"**Feasibility Validation**" means the iterative process of testing and validating the commercial, and financial feasibility of the Business Case and the technical feasibility of the Transit Solution and any associated assumptions, as further described in Section 3 (*Scope of PDA Phase 1 Work*) of Part A of Exhibit 5 (*PDA Work Requirements*).

"**Feasibility Validation Report**" means the report prepared by the Developer in accordance with Section 3.3 (*Feasibility Validation Report*) of Part A of Exhibit 5 (*PDA Work Requirements*) recording the outcome of the Feasibility Validation.

"**Final Environmental Impact Statement**" or "**FEIS**" has the meaning given in CEQA.

"**Final Environmental Impact Report**" or "**FEIR**" has the meaning given in NEPA.

"**Finance Documents**" means the financing agreements and security documents in connection with the Project.

"**Finance Plan**" means the Developer's plan to finance the Project, as further described in Section 4.4 (*Financial and Commercial Development*) of Part A of Exhibit 5 (*PDA Work Requirements*).

"**Financial Close**" means the satisfaction or waiver of all conditions precedent under the Implementation Agreement to the initial disbursement to the Developer (or Project Company, as applicable) or utilization by the Developer (or Project Company, as applicable) of project debt proceeds or the effectiveness of the Lenders' commitments, as applicable, under the Finance Documents.

"**Financial Viability**" means that the Project may be designed, constructed, financed, operated, and maintained, assuming the following:

(a)   no City funding or financing is necessary to finance the Project (unless agreed in writing by the City);

(b)   the total cost to design and construct the Project will not exceed $500 million (in June 2022 US Dollars);

(c)   all Allowed Costs for the Project are reimbursed to the Developer at Financial Close to the maximum amount allowable under this Agreement;

(d)   all cash closing fees in connection with achieving Financial Close are reimbursed to the Developer in accordance with Section 17.2 (*Permitted Payments to Developer on Financial Close*).

"**Force Majeure Event**" means the occurrence of any of the following events after the date of this Agreement that directly causes either 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 Project Site by the Developer or a Developer-Related Entity, or is a result of any breach of the 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 Project Site by the Developer or a Developer-Related Entity, or is as a result of any breach by the Developer of the terms of this Agreement;

(d)   any epidemic, pandemic, or quarantine restrictions; or

(e)   an act of Terrorism.

"**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, constructor, maintenance contractor, or operator or developer seeking in good faith to comply with its contractual obligations, complying with all Applicable Laws and Governmental Approvals, using accepted design and construction standards and criteria normally used on similar projects in the State, and engaged in the same type of undertaking in the United States under similar circumstances and conditions, including environmental conditions.

"**Government Entity**" means any federal, state, or local government and any political subdivision or any governmental, quasi-governmental, judicial, public, or statutory instrumentality, administrative agency, authority, body, or entity, other than the City.

"**Governmental Approvals**" means any approval, authorization, certification, consent, decision, exemption, filing, lease, license, permit, bond requirement, registration, or ruling, issued or required by any Government Entity having subject matter jurisdiction by Applicable Law or consent of the City, required for performance of the PDA Work or a part of it.

"**Implementation Agreement**" means the agreement for the design, construction, financing, operation, and maintenance of the Project to be entered into between the Developer (or a new special-purpose entity, capitalized and financed to the satisfaction of the City and controlled by the Developer or an Affiliate of the Developer) and the City, subject to the terms of this Agreement.

"**Implementation Agreement Term Sheet**" means the term sheet recording the key terms of the Implementation Agreement agreed or determined in accordance with Section 14.1(a) (*Development of Implementation Agreement*).

"**Implementation Proposal**" means the proposal described in Section 14.3 (*Form of Implementation Proposal*).

"**Implementation Work**" means the work to be carried out by the Developer under the Implementation Agreement to implement the Project.

"**Implementation Work Schedule**" means the schedule for the Implementation Work described in Section 4.5(g) (*Implementation Work Schedule*) of Part A of Exhibit 5 (*PDA Work Requirements*).

"**Indemnified Party**" means the City, the City-Related Entities, and their respective officers, agents, representatives, and employees, and together the "**Indemnified Parties**".

"**Independent Cost Estimate**" means, if an Independent Cost Estimator is engaged by the City, a cost estimate for the Implementation Work that is conducted with the Project design and construction information independent of each of the Parties.

"**Independent Cost Estimator**" means, if engaged by the City, the City Contractor or other designee of the City tasked to perform Independent Cost Estimates for the Project.

"**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 Exhibit 5 (*PDA Work Requirements*) and Exhibit 11 (*Form of Implementation Proposal*) that the Developer shall use to support the financial proposal included in the Implementation Proposal.

"**Insolvency Event**" means:

(a)   the Developer commences a voluntary case seeking liquidation, reorganization, or other relief with respect to the Developer or the 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 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 Developer or the 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 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 Equity Member, partner, or joint venture member of the Developer (unless said Person has fully met all financial obligations owing to the 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 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 Equity Member, partner, or joint venture member of the Developer for whom transfer of ownership or management authority would constitute a Change in Control.

"**Insurance Policies**" means the insurance policies the Developer is required to carry or ensure are carried under Article 20 (*Insurance Requirements*) and Exhibit 9 (*Required Insurance for PDA 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 PDA Work, developing the Work Product, or otherwise for the purposes of this Agreement.

"**Intra-Terminal Airport Connection Option**" had the meaning given in Section 2.1(b) (*Project Definition*) of Part A of Exhibit 5 (*PDA Work Requirements*).

"**Key Assumptions**" means each of the key assumptions for the Project agreed by the Parties under the Validation Amendment.

"**Key Personnel**" means the individuals identified and agreed by the Parties, and accepted by the City in accordance with Section 7.1 (*Key Personnel*), to perform the roles set out in Part B (*Key Personnel for PDA Work*) of Exhibit 5 (*PDA Work Requirements*).

"**Lender**" means any Person that:

(a)   provides 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 Debt.

"**Locally Preferred Alternative**" or "**LPA**" means the alternative identified by the City Council as the locally preferred alternative at the conclusion of the Environmental Approval Process.

"**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.

"**Major Participant**" means:

(a)   the Developer;

(b)   each Equity Member (and if an Equity Member is an investment fund, the fund's general partner(s));

(c)   each Major Subcontractor;

(d)   in each case where the Major Participant is an incorporated or unincorporated consortium or joint venture, each member or joint venturer in that Major Participant; and

(e)   any other Person that the Parties agree from time to time is a Major Participant.

"**Major Subcontract**" means, with respect to the Implementation Work:

(a)   each Subcontract listed in Part A (*Major Subcontractors*) of Exhibit 7 (*Subcontracting*); and

(b)   any other Subcontract that the Parties agree from time to time is a Major Subcontract.

"**Major Subcontractor**" means a Subcontractor that is a party to a Major Subcontract.

"**Modification**" means any written addition, deletion, adjustment or alteration, correction, or adjustment of any provision of this Agreement (including with respect to time or cost), or any obligation of either Party under this Agreement, whether pursuant to the unilateral exercise in writing by the City of any right under this Agreement, or by a mutual written agreement signed by both Parties, including any Change Order.

"**Monthly Progress Report**" has the meaning given in Section 13.5 (*Monthly Progress Reporting*).

"**NEPA**" means the National Environmental Policy Act, 42 U.S.C. §4321 et seq.

"**Notice**" has the meaning given in Section 30(a) (*Notices*) and "**Notify**" shall be construed accordingly.

"**Notice of Potential Claim**" means a Notice delivered by the Developer to the City identifying one or more potential Claims and otherwise meeting the requirements of Section 27.1 (*Claims*).

"**Notice of Termination**" means a Notice from the City to the Developer terminating this Agreement either for the convenience of the City or due to Developer Default, as provided in this Agreement.

"**Notice to Proceed**" or "**NTP**" means an authorization Notice from the City to the Developer specifying the date on which the PDA Work for the applicable PDA Phase is to commence.

"**NTP1**" has the meaning given in Section 2.2(c) (*Phased Work and Notices to Proceed*).

"**NTP2**" has the meaning given in Section 2.2(d) (*Phased Work and Notices to Proceed*).

"**NTP3**" has the meaning given in Section 2.2(e) (*Phased Work and Notices to Proceed*).

"**O&M Plans**" has the meaning given in Section 4.5(c) (*O&M Development*) of Part A of Exhibit 5 (*PDA Work Requirements*).

"**Open Book Basis**" means review by the City of documentation showing the Developer's underlying assumptions and data associated with the issue in question, including assumptions as to costs of the PDA Work or Implementation Work (as applicable) or services to be provided under this Agreement or the Implementation Agreement (as applicable), schedule, composition of equipment spreads, equipment rates, labor rates, productivity, estimating factors, design and productivity allowance, contingency and indirect costs, risk pricing, discount rates, interest rates, inflation and deflation rates, swap and hedge rates, insurance rates, bonding rates, letter of credit fees, overhead, profit, and other items reasonably required by the City to satisfy itself as to validity or reasonableness.

"**OpEx**" means operating expenses.

"**Outline Project Plan**" means the document to be prepared by the Developer in accordance with Section 3.2 (*Outline Project Plan*) of Part A of Exhibit 5 (*PDA Work Requirements*).

"**Party**" and "**Parties**" has the meaning given in the Preamble.

"**PDA Cost Cap**" means the maximum Allowed Costs that will be reimbursed by the City following any expiry under Section 2.2(f)(iv)(A) (*Phased Work and Notices to Proceed*) or termination for convenience in accordance with Section 22.1 (*Non-Default Termination or Expiry*) which will be:

(a)   with respect to PDA Phase 1, the amount set out in Section [●][7] of the PDA Proposal;

(b)   with respect to PDA Phase 2, the amount incorporated in Exhibit 4 (Developer Commitments) by way of the Validation Amendment, which shall include the PDA Cost Cap (Design) for PDA Phase 2 set out in Section [●][8] of the PDA Proposal (as may be adjusted in accordance with this Agreement) and the other Allowed Costs for PDA Phase 2 accepted by the City in the Feasibility Validation Report, as more fully described in Exhibit 5; and

(c)   with respect to subsequent PDA Phases, the amount agreed by the Parties, or directed by the City, prior to issuance of the relevant Notice to Proceed and incorporated in Exhibit 4 (*Developer Commitments*) by way of a Modification,

in each case, as may be modified under Article 16 (*Relief Events*) or Article 18 (*Changes*).

"**PDA Milestone**" means the PDA Work milestones in Exhibit 3 (*PDA Milestones and Deadlines*), as may be supplemented or amended under the Validation Amendment or another Modification.

"**PDA Milestone Deadline**" means the PDA Work milestone deadlines in Exhibit 3 (*PDA Milestones and Deadlines*), as such deadline may be extended by the City in accordance with the terms of this Agreement.

"**PDA Option Work**" has the meaning given in Section 18.4 (*Change Notice for Intra-Terminal Airport Connection Option*).

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[7] Reference to be inserted from Developer's PDA Proposal.

[8] Reference to be inserted from Developer's PDA Proposal.

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"**PDA Phase**" means each of PDA Phase 1, PDA Phase 2, and PDA Phase 3, and together the "**PDA Phases**".

"**PDA Phase 1**" means the period commencing on the Commencement Date specified in NTP1 and ending on the day immediately prior to the first day of PDA Phase 2.

"**PDA Phase 1 Security**" has the meaning given in Section 13.6(a) (*PDA Phase 1*).

"**PDA Phase 1 Work**" means the PDA Work required to be performed during PDA Phase 1, as described in Exhibit 5 (*PDA Work Requirements*).

"**PDA Phase 2**" means the period commencing on the Commencement Date specified in NTP2 and ending on the day immediately prior to the first day of PDA Phase 3.

"**PDA Phase 2 Security**" has the meaning given in Section 13.6(b) (*PDA Phase 2*).

"**PDA Phase 2 Work**" means the PDA Work required to be performed during PDA Phase 2, as described in Exhibit 5 (*PDA Work Requirements*).

"**PDA Phase 3**" means the period commencing on the Commencement Date specified in NTP3 and ending on Commercial Close (or the earlier termination of this Agreement in accordance with its terms).

"**PDA Phase 3 Security**" has the meaning given in Section 13.6(c) (*PDA Phase 3*).

"**PDA Phase 3 Work**" means the PDA Work required to be performed during PDA Phase 3, as described in Exhibit 5 (*PDA Work Requirements*).

"**PDA Proposal**" means the proposal submitted by the Developer in response to the RFP and incorporated in Exhibit 4 (*Developer Commitments*).

"**PDA Work**" means all work, services, and activities to be performed, furnished, provided, or undertaken by or on behalf of the Developer in accordance with this Agreement. In certain cases, depending on the context, the term is also used to mean the products of the PDA Work.

"**PDA Work Schedule**" means the schedule for the PDA Work described in Section 4.3(a)(iv)(A) (*PDA Work Schedule*) of Part A of Exhibit 5 (*PDA Work Requirements*).

"**Performance Security**" means the PDA Phase 1 Security, PDA Phase 2 Security or PDA Phase 3 Security, or all of them, as applicable.

"**Performing Subcontractor**" has the meaning given in Section 1.1(d) of Exhibit 12 (*Allowed Costs*).

"**Person**" means any individual, firm, corporation, company, LLC, LLP, joint venture, voluntary association, partnership, trust or public or private organization, other legal entity, or combination of the foregoing.

"**PLA**" has the meaning given in Section 1.2 (*Project Labor Agreement*) of Exhibit 8 (*City Contracting Requirements and other Regulatory Requirements*).

"**Pro Forma**" has the meaning given in Section 4.4(a)(iii)(C) (*Financing Management Plan*) of Part A of Exhibit 5 (*PDA Work Requirements*).

"**Prohibited Person**" means any Person who is:

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(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 the City is engaged in litigation relating to the performance of a contract or business practices, unless the City has first waived (in the City'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 Developer.

"**Project**" means the transit project described in Section 2.1 (*Project Definition*) of Part A of Exhibit 5 (*PDA Work Requirements*).

"**Project Company**" means the Developer or a new special-purpose entity, capitalized and financed to the satisfaction of the City and controlled by the Developer or an Affiliate of the Developer, and that will be the counterparty to the City as signatory to the Implementation Agreement and responsible for delivering the Project.

"**Project Objectives**" means the objectives for the project set out in Section 1.1 of Part A of Exhibit 5 (*PDA Work Requirements*).

"**Project Plan**" means the plan for the execution of the PDA Work described in Section 4.2 (*Project Plan*) of Part A of Exhibit 5 (*PDA Work Requirements*).

"**Project Site**" means the geographical area reasonably expected to be a part of the site on which the Project will be constructed, or that will be used in the construction of the Project, as may be amended during the PDA Phase.

"**Proposed Third Party Agreement**" has the meaning given in Section 12.1(b) (*Third Party Agreements*).

"**Proprietary Intellectual Property**" means:

(a)   Intellectual Property that is patented or copyrighted by any Developer-Related Entity under Applicable Law, or

(b)   if not patented or copyrighted, Intellectual Property of a 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 Developer-Related Entity,

but does not include Intellectual Property that is specifically created for the Project.

"**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).

"**Reference Documents**" means all written information provided to the Developer or any Developer-Related Entity by the City or any of their employees, agents, officers, directors, representatives, or consultants prior to the date of this Agreement, including:

(a)   the RFP and its contents;

(b)   all contents of the Data Room; and

(c)   information provided on the City website.

"**Relief Event**" means:

(a)   any breach of this Agreement by the City except to the extent: (i) the breach arises from an event otherwise described in this definition of Relief Event; or (ii) this Agreement provides for deemed approval, acceptance or rejection in the event that the City fails to respond, or is delayed in responding, to a Developer Submittal, Claim, Developer request for a Change or other Notice;

(b)   any Force Majeure Event;

(c)   the issuance of any preliminary or permanent injunction or temporary restraining order or other similar order, legal restraint, or prohibition by a Government Entity of competent jurisdiction under Applicable Law that prohibits the performance of a material part of the PDA Work under this Agreement or materially and adversely affects a Party's performance under this Agreement;

(d)   following the issuance of the CEQA and/or NEPA approvals required to perform the Implementation Work, such approval is subject to legal challenge or litigation which prevents the Parties achieving Commercial Close;

(e)   a suspension as contemplated in Section 15.3(d) (*Suspension*);

(f)   a discrepancy, defect or failure to perform by another contractor (that is not a Subcontractor) or the City where such discrepancy, defect or failure: (i) is Notified by the Developer to the City in accordance with Section 13.4(c) (*Cooperation, Interface, and Coordination*) and (ii) is not remedied in accordance with any schedule for that interfacing work previously Notified to the Developer;

(g)   any breach of a Third Party Agreement by a Third Party to the extent that the Developer is reliant on the performance of that obligation in order to perform its obligations under this Agreement except to the extent that the failure or breach by the Third Party is a failure to respond to a Developer Submittal and the Third Party Agreement provides for deemed approval, acceptance or rejection in the event that the Third Party fails to respond, or is delayed in responding, to a Developer Submittal or other notice; or

(h)   any change to an assumption in: (i) the Developer Commitments (in the case of a Relief Event occurring in the period prior to acceptance of the Feasibility Validation Report); or (ii) the accepted Feasibility Validation Report, arising from reasons beyond the Developer's control, including any such changes arising from the Environmental Approval Process, a failure to agree the Proposed Third Party Agreements, and any Change in Law,

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 Developer-Related Entity.

"**Relief Event Notice**" has the meaning given in Section 16.2(b) (*Notice and Information to be Provided*).

"**Request for Proposals**" or "**RFP**" is defined in paragraph (A) of the Recitals.

"**Required Insurances**" has the meaning given in Section 20.1 (*Insurance Policies and Coverage*).

"**Required Subcontract Provisions**" means the provisions required to be included in each Subcontract under Part B (*Required Subcontract Provisions*) of Exhibit 7 (*Subcontracting*).

"**Risk Register**" means a register incorporating a listing of risks for the Project (whether or not allocated to the City or the Developer), assessments of those risks (including cost and schedule impacts associated with the risks), an evaluation of mitigation, and allocation of responsibility for those risks.

"**Senior Project Group**" means the group established under Section 6.3 (*Senior Project Group*).

"**Site Investigations**" means those site investigations performed as part of the PDA Work in accordance with Exhibit 5 (*PDA Work Requirements*) or as otherwise required under this Agreement.

"**SJC Airport**" means San José Airport and, specifically, with respect to the base scope for the Project, Terminal B at San José Airport.

"**State**" means the State of California.

"**Statement of Claims**" means a written statement provided by a Developer to the City asserting one or more Claims and that otherwise meets the requirements of Section 27.1 (*Claims*).

"**Subcontract**" means any contract, subcontract, or other form of agreement to perform any part of the PDA Work or provide any materials, equipment, or supplies for any part of the PDA Work, or any such agreement, supplement, or amendment at a lower tier, between a Subcontractor and its lower-tier Subcontractor, at all tiers.

"**Subcontractor**" means any Person, other than employees of the Developer or Subcontractor, that enters into a contract to perform any part of the PDA Work or provide any materials, equipment, or supplies for the PDA Work, on behalf of the Developer, at any tier.

"**Subcontractor Bidding and Selection Plan**" means the plan prepared by the Developer and submitted to the City for review and approval, defining the Developer's approach to subcontracting and selecting contractors to perform the Implementation Work (that will not be self-performed), that is compliant with Section 7 (*Key Personnel and Subcontracting*) in all respects and that addresses the requirements of Section 4.7 (*Subcontractor Bidding and Selection*) of Part A of Exhibit 5 (*PDA Work Requirements*).

"**Technology Readiness Level**" means the level of maturity of the Transit Technology proposed under the Transit Solution, as assessed in accordance with Appendix C7.4 (TS Form D: Technology Maturity) of the RFP.

"**Technical Requirements**" means the technical requirements for the design, construction, operation and maintenance of the Project as set out in Part C (*Project Performance and Technical Requirements*) of Exhibit 5 (*PDA Work Requirements*).

"**Term**" has the meaning given in Section 2.1 (*Term*).

"**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 the City or a Government 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 the City or a Government 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 State, federal, or international Applicable Law.

"**Third Party**" means a Government Entity, utility company, or other entity that contracts with the City or that otherwise has approval rights regarding the design, construction, reconstruction, rearrangement, or improvement of facilities owned or controlled by the entity, to facilitate the Project.

"**Third Party Agreement**" means each agreement entered into or to be entered into between the City and a Third Party, as determined in accordance with Section 12.1 (*Third Party Agreements*) or otherwise notified by the City to the Developer.

"**Third Party Land**" means those parcels of the Project Site that are owned by a Third Party and to which the City does not have an established right of access.

"**Transit Infrastructure**" means the permanent fixed facilities necessary to operate the Transit Technology including: guideway structures (whether aerial, on grade, or underground); station structures, vehicle and other maintenance and storage facilities; facilities to accommodate power and propulsion systems (including equipment to connect to utility infrastructure); offices and administrative facilities; and, facilities to integrate all the above into existing urban and SJC Airport infrastructure (e.g., roadways, pedestrian and bicycling improvements, drainage structures, etc.).

"**Transit Solution**" means the Developer's proposed transit solution for the delivery of the Project, incorporated in the PDA Proposal.

"**Transit Technology**" means the transit vehicles, running surfaces or tracks, guideway equipment, station operation equipment, power distribution, vehicle operation control system (whether centralized or otherwise), equipment for maintenance, and all other equipment and operating systems, which are integrated to transport passengers in conformance with the Technical Requirements.

"**Validation Amendment**" means a Modification to this Agreement executed by the Parties on or shortly after the acceptance of the Feasibility Validation Report by the City under Section 2.3(c) (*PDA Phase 1*) and recording the Parties' agreement on any items contemplated to be agreed prior to PDA Phase 2 under this Agreement or otherwise agreed by the Parties to implement the remaining PDA Work.

"**Work Product**" means all Intellectual Property, data, information, documentation, work product, and other related materials produced, prepared, or obtained for the Project, 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 PDA Work.

"**Working Group**" means each working group established pursuant to Section 6.4 (*Working Groups*).

EXHIBIT 2

DEVELOPER OWNERSHIP[2]

EQUITY MEMBER	PERCENTAGE EQUITY INTEREST IN DEVELOPER
[●]	[●]

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[2]   **Note to Proposers**: To be inserted prior to execution.

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EXHIBIT 3

PDA MILESTONES AND DEADLINES

Additional PDA Milestones and associated PDA Milestone Deadlines may be identified for subsequent PDA Phases and incorporated in the Validation Amendment or other Modification.

PDA MILESTONE REF.	PDA MILESTONE DESCRIPTION	PDA MILESTONE DEADLINE
PDA Phase 1		
1.1	Technical feasibility assessment (Concept Design) & financial feasibility assessment progress memo	75 Days from the Commencement Date under NTP1
1.2	Submit draft Feasibility Validation Report	120 Days from the Commencement Date under NTP1
1.3	Submit draft Outline Project Plan	135 Days from the Commencement Date under NTP1
1.4	Submit final Feasibility Validation Report & final Outline Project Plan	210 Days from the Commencement Date under NTP1
PDA Phase 2		
2.1	Preparation and submittal of the draft Project Plan	60 Days from the Commencement Date under NTP2
PDA Phase 3		
3.1	Submit Implementation Proposal	60 Days from the Commencement Date under NTP3

EXHIBIT 4

DEVELOPER COMMITMENTS[3]

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[3]   **Note to Proposers**: To be inserted from PDA Proposal prior to execution. To include, among other things, the PDA Cost
        Cap for PDA Phase 1.

EXHIBIT 5

PDA WORK REQUIREMENTS[4]

[*Provided separately*]

DRAFT

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[4]   **Note to Proposers**: This exhibit is provided separately in the Data Room.

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EXHIBIT 6

INITIAL DESIGNATION OF AUTHORIZED REPRESENTATIVES[5]

TITLE	NAME OF INITIAL INDIVIDUAL
City's Representative	[●]
Developer's Representative	[●]

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[5]   **Note to Proposers**: To be inserted prior to execution.

EXHIBIT 7

SUBCONTRACTING

PART A: MAJOR SUBCONTRACTORS

The following table lists the Subcontracts and Subcontractors identified by the Developer as at the Effective Date.[6]

SUBCONTRACTOR	SUBCONTRACT/ TYPE OF WORK	LICENSE TYPE AND NO.	DBE/SBE
Name: Address: Phone:			

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[6]   **Note to Proposers**: To be completed prior to PDA execution.

PART B: REQUIRED SUBCONTRACT PROVISIONS

The Developer must ensure that each Subcontract contains the relevant provisions listed in the below table. Each provision must be included in full, with the exception of minor modifications necessary to reflect the applicable party's names, and may not be included only by cross-reference to this Agreement.

AGREEMENT CROSS-REFERENCE	DESCRIPTION OF PROVISION
Main Body	
Section 1.2	Interpretation
Section 5.2	Project Risks
Section 7.3	General Subcontracting Provisions
Section 13.4	Cooperation, Interface, and Coordination
Section 18.6	Request for Change
Article 19	Indemnity from Developer
Article 22	Termination and Expiry
Article 23	Records and Audit
Article 24	Intellectual Property and Ownership of Work Product
Article 25	Confidentiality and Communications
Section 27.5	Arbitration
Article 29	Governing Law and Jurisdiction
Section 31.2	Waiver
Section 31.12	Severability
Section 31.14	Covenant Against Contingent Fees

AGREEMENT CROSS-REFERENCE	DESCRIPTION OF PROVISION
N/A	Any other provisions required by Applicable Law or otherwise required in this Agreement to be complied with by the Subcontractor.
N/A	The Developer and the Subcontractor acknowledge and agree: (A) All PDA Work being performed by the Subcontractor under this Subcontract shall comply with the Developer's Agreement with the City. (B) The Subcontractor shall have the same duties and obligations to the Developer with respect to its performance of its own PDA Work as the Developer has to the City under its Agreement. The City is the third-party beneficiary of the Subcontract and shall have the right to enforce all of the terms of the Subcontract for its own benefit. (C) The Subcontractor shall make such PDA Schedule commitments, submit such PDA Schedules and scheduling information, and submit any other required information to the Developer as is necessary for the Developer to comply with its PDA Schedule and reporting commitments to the City, under the Agreement. (D) All guarantees and warranties, express or implied, shall inure to the benefit of both the City and the Developer during the performance of the PDA Work; upon final completion of the PDA Work, such guarantees and warranties shall inure to the benefit of the City. (E) Nothing contained in the Subcontract shall be deemed to create any privity of contract between the City and the Subcontractor, nor shall it create any duties, obligations, or liabilities on the part of the City to the Subcontractor except those required by law. In the event of any claim or dispute arising under the Subcontract or the Agreement with the City, the Subcontractor shall look only to the Developer for any payment, redress, relief, or other satisfaction. (F) This Article does not and shall not operate to relieve the Developer of any duty or liability under the Developer's Agreement with the City, nor does it create any duty or liability on the part of the City. The Developer shall have sole responsibility for promptly settling any disputes between its Subcontractors and between the Subcontractors and any of their Subcontractors of any tier.
Exhibits	
Exhibit 8, Section 2.2	Contractor Registration Law
Exhibit 8, Section 2.3	Whistleblower Requirements

AGREEMENT CROSS-REFERENCE	DESCRIPTION OF PROVISION
<u>Exhibit 8, Section 2.4</u>	California Public Records Act
<u>Exhibit 8, Section 3</u>	Federal Regulatory Requirements (as applicable)

EXHIBIT 8

CITY CONTRACTING REQUIREMENTS AND OTHER REGULATORY REQUIREMENTS

1.   **CITY CONTRACTING REQUIREMENTS**

1.1   **City Business Tax**

(a)   The Developer shall comply with the San José Municipal Code Chapter 4.76 with respect to payment of the City business tax before commencing any PDA Work.

(b)   The Developer may contact Finance/Revenue Management at (408) 535-7055 to determine the applicable tax rate(s).

1.2   **Project Labor Agreement**

(a)   The City and Santa Clara and San Benito Counties Building & Construction Trades Council have entered into a Project Labor Agreement ("**PLA**"), dated March 28, 2019.

(b)   The Developer shall be required to sign an "Agreement to be Bound" to the PLA, in a form substantially similar to that in Addendum A to the PLA, upon execution of the Implementation Agreement or any early works agreement for a construction package and to comply with the PLA throughout the duration of the Project (see Exhibit F or visit the City of San José Public Works Department Project Labor Agreement website at http://www.sanjoseca.gov/index.aspx?NID=6224).

2.   **STATE REGULATORY REQUIREMENTS**

2.1   **Prevailing Wages**

(a)   State wage requirements apply to construction work for the entire Project, including any early works agreement for a construction package, and not less than the California Department of Industrial Relations' (the "**DIR**") general prevailing wage rates for Santa Clara County must be paid for all construction work. Copies of the DIR's general prevailing wage rates for Santa Clara County are on file with City's Office of the City Clerk or City's Office of Equality Assurance and can be obtained from those offices and are also available from the DIR website at http://www.dir.ca.gov/. The Project is subject to compliance monitoring and enforcement by the DIR.

(b)   The Developer may contact the City's Office of Equality Assurance at (408) 535-8430 regarding any questions regarding prevailing wage.

(c)   This Agreement is subject to the provisions of California law regarding public works, including, but not limited to California Labor Code Sections 227, 1021, and 1720 through and including 1861, together with all applicable regulations (e.g. Title 8 California Code of Regulations, Section 16001 et seq.).

(d)   This Agreement, if federally funded, is subject to payment of prevailing wages under federal law by the Davis Bacon Act, as determined by the U.S. Department of Labor.

(e)   All pertinent federal and state statutes and regulations, including but not limited to those referred to above are hereby incorporated by reference into this Agreement as though set forth in their entirety.

2.2   **Contractor Registration Law**

(a)   This <u>Section 2.2</u> applies to all contracts that require prevailing wages.

(b)   This Agreement is subject to the provisions of California law regarding public works, including, but not limited to the California Labor Code. Contractors and all subcontractors must be registered with DIR to be eligible to work on public works projects in accordance with California Labor Code Section 1725.5. Further, pursuant to California Labor Code Section 1725.5, no contractor or subcontractor may be awarded a contract for public works unless registered with the DIR. The Developer must ensure that its Subcontractors are properly registered with the DIR. Contractors that hire unregistered subcontractors are subject to penalties up to $10,000.

(c)   A list of all registered contractors and subcontractors may be found on the DIR website so that awarding bodies and contractors will be able to comply with the requirement to only use registered contractors and subcontractors.

(d)   This Agreement is subject to compliance monitoring and enforcement by the DIR.

2.3   **Whistleblower Requirements**

The Developer shall not adopt any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee believes the information discloses violation or noncompliance with a State or Federal regulation; nor shall the Developer retaliate against an employee for taking such actions as set forth in the California Labor Code Section 1101 et seq.

2.4   **California Public Records Act**

(a)   **Ownership and Applicability**

(i)   Unless otherwise expressly provided in this Agreement, all records, documents, drawings, plans, specifications, and all other information relating to the conduct of the City's business, including all information and documents submitted by the Developer ("**Records**"), shall become the exclusive property of the City.

(ii)   The City's use and disclosure of Records is governed by California Government Code Section 6250 et seq. (the "**California Public Records Act**" or "**CPRA**").

(iii)   Records are subject to the CPRA and therefore are public records subject to disclosure under the CPRA. Records may only be withheld pursuant to a qualifying exemption as specified in the CPRA. As required by CPRA section 6253.3, the City at its discretion shall make the ultimate decision as to whether or not any Records qualify for an exemption from release pursuant to the CPRA.

(iv)   The City will not be obligated to advise the Developer as to the nature or content of Records that may qualify for a legal exemption from disclosure under the CPRA.

(b)   **Developer Assertion of a Qualifying Exemption Pursuant to CPRA**

(i)   If the Developer considers that any Records qualify for a legal exemption from disclosure pursuant to the CPRA, the Developer may clearly and conspicuously mark all such information as "CPRA Exempt". Blanket or categorical redactions or statements of confidentiality, or the marking of each page of a Record as "CPRA

Exempt" are not appropriate, and will not serve as a basis for the City to consider withholding the Record.

(ii) To help facilitate the City's review of Records for CPRA compliance purposes, the Developer may submit a separate copy of each Record to the City with redactions to information that the Developer considers qualify for an exemption from disclosure specified in the CPRA, as contemplated in, and subject to the limitations described in, this Section 2.4.

(c) **City Disclosure of Records**

(i) If the City receives a CPRA request for all or a part of any Records that the Developer has marked "CPRA Exempt" in accordance with Section 2.4(b), the City may:

(A) determine that it will disclose all or a part of the requested Records to the requestor, in which case: (x) before disclosing Records in response to said request, the City will use reasonable efforts to inform the Developer of its intention to provide such Records; and (y) if the Developer wishes to prevent disclosure of the requested Records, the Developer may independently pursue legal action to obtain a court order enjoining the disclosure of the requested Records, in which event, the City will at its sole discretion decide what legal action, if any, the City will pursue in the context of the Developer's legal action; or

(B) determine that it will withhold all or a part of the requested Records, in which case the requestor may pursue legal action to obtain a court order determining the requested Records are not exempt from disclosure under the CPRA, in which event, the City will at its sole discretion decide what legal action, if any, the City will pursue regarding the requestor's legal action.

(ii) The Developer is hereby placed on notice that the City considers pricing information submitted with any Implementation Proposal or included in a Subcontract, wage information, and labor information submitted to the City, including any US Employment Plan or US Employment Plan quarterly reports (collectively "**Price and Wage Information**"), to be public records that are subject to disclosure under the CPRA. Upon receipt of a CPRA request for any Price and Wage Information, the City will immediately make such information available, regardless of any marking of "CPRA Exempt" by the Developer.

(d) **Confidential Review by Court**

Notwithstanding anything to the contrary in this Section 2.4, the Developer authorizes the City to file or lodge any Records with the California Superior Court or any other court of competent jurisdiction for confidential (in camera) judicial review.

3.   **FEDERAL REGULATORY REQUIREMENTS**

3.1   **Airport-Specific Provisions**

(a)   **Title VI**

In accordance with the provisions of Title VI of the Civil Rights Act of 1964 (78 Stat. 252, 42 USC §§ 2000d to 2000d-4) and the applicable regulations, the Developer shall afford disadvantaged business enterprises full and fair opportunity to bid on the PDA Work and Implementation Work and persons will not be discriminated against on the grounds of race, color, or national origin in consideration for an award.

(b)   **Federal Fair Labor Standards Act**

( )   This Agreement is subject to the provisions of 29 CFR part 201, the Federal Fair Labor Standards Act ("**FLSA**"), and such provisions are hereby incorporated by reference into this Agreement as though set forth in their entirety. The FLSA sets minimum wage, overtime pay, recordkeeping, and child labor standards for full and part-time workers.

(i)   The Developer has full responsibility for monitoring compliance with the applicable requirements of the FLSA.

(ii)   The Developer shall address any claims or disputes that arise from the requirements set out in this Section 3.1(b) directly with the U.S. Department of Labor – Wage and Hour Division.

(c)   **Occupational Safety and Health Act Of 1970**

( )   This Agreement is subject to the provisions of 29 CFR Part 1910 (Occupational Safety and Health Act of 1970), and such provisions are hereby incorporated by reference into this Agreement as though set forth in their entirety. The Developer must provide a work environment that is free from recognized hazards that may cause death or serious physical harm to any employee.

(i)   The Developer has full responsibility for monitoring compliance and its Subcontractor's compliance with the applicable requirements of 20 CFR Part 1910.

(ii)   The Developer shall address any claims or disputes that arise from the requirements set out in this Section 3.1(c) directly with the U.S. Department of Labor – Occupational Safety and Health Administration.

(d)   **Federal Aviation Administration Advisory Circulars**

The Developer must perform all PDA Work in compliance and in conformance with all applicable and appropriate Federal Aviation Administration Advisory Circulars ("**FAA AC**") including, but not limited, to FAA AC 150/5370-10 "Standards for Specifying Construction of Airports".

3.2   **Other Federal Requirements[7]**

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[7]   **Note to Proposers**: Any applicable federal provisions will be incorporated under the Validation Amendment.

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EXHIBIT 9

REQUIRED INSURANCE FOR PDA WORK

The requirements in this Exhibit 9 may be amended for subsequent PDA Phases and incorporated in the Validation Amendment or other Modification.

(a)   **Workers' Compensation and Employer's Liability**

Minimum Limits	Principal Cover
Workers' Compensation limits as required by the California Labor Code and Employers Liability limits of $1,000,000 per accident	Workers' Compensation insurance as required by the California Labor Code and Employer's Liability insurance The Workers' Compensation and Employer's Liability insurance coverages shall include the waivers required by Section 20.2(h) (*Waivers of Subrogation*) of the Agreement
Period of Cover: PDA Phase	
Named Insureds: Developer and its Subcontractors, unless the Developer has obtained separate certificates and endorsements for each Subcontractor	

(b)   **Commercial Automobile Insurance**

Minimum Limits	Principal Cover
$1,000,000 combined single limit per accident for bodily injury and property damage	The coverage provided by Insurance Services Office Form Number CA 0001 covering Automobile Liability. Coverage shall be included for all owned, non-owned and hired automobiles The Workers' Compensation and Employer's Liability insurance coverages shall include the waivers required by Section 20.2(h) (*Waivers of Subrogation*) of the Agreement
Period of Cover: PDA Phase	
Named Insureds: Developer and its Subcontractors, unless the Developer has obtained separate certificates and endorsements for each Subcontractor	
Additional Insured: The City and each other Indemnified Party in respect of: liability arising out of activities performed by or on behalf of, the Developer; products and completed operations of the Developer; premises owned, leased or used by the Developer; and automobiles owned, leased, hired	

or borrowed by the Developer. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officers, employees, and agents

(c) **Commercial General Liability**

Minimum Limits	Principal Cover
$1,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit	The coverage provided by Insurance Services Office Commercial General Liability coverage ("occurrence") Form Number CG 0001 The Workers' Compensation and Employer's Liability insurance coverages shall include the waivers required by Section 20.2(h) (*Waivers of Subrogation*) of the Agreement
Period of Cover: PDA Phase	
Named Insureds: Developer and its Subcontractors, unless the Developer has obtained separate certificates and endorsements for each Subcontractor	
Additional Insureds: The City and each other Indemnified Party in respect of: liability arising out of activities performed by or on behalf of, the Developer; products and completed operations of the Developer; premises owned, leased or used by the Developer; and automobiles owned, leased, hired or borrowed by the Developer. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officers, employees, and agents	

(d) **Professional Liability Errors and Omissions**

Minimum Limits	Principal Cover
$1,000,000 per claim and $2,000,000 aggregate	Professional Liability Errors and Omissions insurance for all professional services rendered
Period of Cover: PDA Phase	
Named Insureds: Developer and its Subcontractors, unless the Developer has obtained separate certificates and endorsements for each Subcontractor	

(e) **Excess Liability Insurance**

Any minimum limit requirement may be met with any combination of primary and excess coverage so long as the excess coverage is written on a "follow form" or umbrella basis.

EXHIBIT 10

REQUIRED FORMS AND PRESCRIBED CERTIFICATIONS

PART A: REQUIRED FORMS

PERFORMANCE BOND

TBD (RFP No.)

TBD (Solicitation Title)

WHEREAS the City of San José (the "**City**") has awarded to _____ ("**Principal**"), Contract No **TBD (RFP No.), TBD (Solicitation Title)** (the "**Contract**"); and

WHEREAS Principal is required under the terms of the Contract to furnish a Bond for the faithful performance of the Contract.

NOW, THEREFORE, we _____, as Principal, and _____, ("**Surety**"), as Surety, are held and firmly bound unto the City in the sum of _____ Dollars ($_____), this amount being not less than [●][8] in lawful money of the United States of America, for payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severably, firmly by these presents. In case suit is brought upon this Bond, Surety shall pay reasonable attorneys' fees to the City in an amount to be fixed by the court.

The condition of this obligation is such that, if the hereby-bonded Principal or its heirs, executors, administrators, successors, assigns, or Subcontractors shall in all things stand to and abide by and well and truly keep and perform all the undertakings, terms, covenants, conditions, and agreements in the Contract and any alteration thereof, made as therein provided, all within the time and in the manner therein designated and in all respects according to their true intent and meaning, then this obligation shall become null and void; otherwise, it shall be and remain in full force and effect.

Further, Surety, for value received, hereby stipulates and agrees that no change, extension of time, alteration, or modification of the Contract, or of the Work to be performed there under, shall in any way affect its obligations under this Bond, and it does hereby waive notice of any such change, extension of time, alteration, or modification of the Contract or of the Work to be performed there under.

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[8]   **Note to Proposer**: During PDA Phase 1, to be in the amount specified in Section 13.6(a)(i) of the PDA; during PDA Phase 2 and PDA Phase 3, to be the relevant amount determined by the Parties during PDA Phase 1 and incorporated in any Validation Amendment.

IN WITNESS WHEREOF, three identical counterparts of this instrument, each of which shall for all purposes be deemed an original hereof, have been duly executed by Principal and Surety named herein, on the _____ day of _____ 20___, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative pursuant to authority of its governing body.

By:

                                    By: _____

                                           (Principal)

                                           _____

                                    By: _____

                                           (Surety)

                                           _____

                                    By: _____

PART B: PRESCRIBED CERTIFICATIONS

In accordance with Section 9.1 (*Compliance*) of the Agreement, additional certifications may be required as a result of state and/or federal funding or financing requirements and will be incorporated into this Exhibit 10 by way of a Modification.

1.   **ETHICS DECLARATION**

Instructions:

Complete this form for the Developer and each Subcontractor for the Implementation Work identified in the Implementation Proposal (executed by the authorized representative of the Developer and relevant Subcontractor).

_____

DEVELOPER:_____

SUBCONTRACTOR:_____

A.   The following questions in Section D below are designed to ensure contractors, subcontractors and the City are able to comply with their obligations to avoid conflict of interest issues. Your company, including all parents, subsidiaries, affiliates, and "otherwise related business entities", as that term is defined in 2 California Code of Regulations 18438.5(b)(2), (collectively, "**Declarant Company**") should make or cause to be made a reasonably diligent investigation prior to responding to the questions in Section D to ensure the responses are correct and a person legally authorized to act for or on behalf of the Declarant Company ("**Authorized Representative**") signs below where indicated.

The Authorized Representative is responding on behalf of Declarant Company that Declarant Company has been designated to perform the work requested in the solicitation.

An affirmative response to any of the questions in Section D will not automatically cause Declarant Company to be disqualified. However, failure to answer the questions in good faith or providing material false answers may subject Declarant Company to consequences up to and including disqualification of its Implementation Proposal.

For questions related to this Ethics Declaration, please contact the City in accordance with the communication protocols established pursuant to Article 14 of the Agreement.

B.   State the name(s) of your company, and all parents, subsidiaries, affiliates, and "otherwise related business entities" comprising the Declarant Company. If none, circle "none" under each category below:

Name of parent: _____/ (none)

Name of subsidiaries (use additional sheet if necessary): _____/ (none)

Name of affiliates (use additional sheet if necessary): _____/ (none)

Name of "otherwise related business entities" (use additional sheet if necessary): _____/ (none)

C.   For the purposes of this Ethics Declaration, the term "Employee(s)" shall be defined as employees, officers, shareholders, partners, owners, or directors of the Declarant Company.

For the purposes of this Ethics Declaration, the term "City designated employee" shall have the meaning as defined in Chapter 12.10 of the City's Municipal Code.

D. Please answer the following questions:

	Questions	Yes/No
1.	In the past 12 months, has any Employee been a City officer or City designated employee?	
2.	Is any Employee related to any City officer or City designated employee?	
3.	Is any Employee presently a City officer or City designated employee?	
4.	Do any City officers or City designated employees own any stock in the Declarant Company?	
5.	In the past 12 months, has any Employee given any gifts to a City officer or City designated employee?	
6.	Does the Declarant Company now employ as a lobbyist, or intend to employ as a lobbyist, any City officer or City designated employee in the past 12 months?	
7.	Intentionally omitted.	
8.	Did any Employee perform work within the last 3 years relating to the Project or the work contemplated to be performed under the Agreement, including (a) the development of the Technical Requirements or any other specifications, or (b) earlier phases of the Project or work to be provided under the Agreement?	
9.	Are you aware of any other relevant facts relating to past, present, or planned interest(s) of the Developer's team (including the Developer, Subcontractors, Affiliates of those Persons, and their respective chief executives, directors, and other personnel intended to be assigned to the Project) which may result, or could be viewed as, an organizational conflict of interest pursuant to Applicable Law, including a re-disclosure of any organizational conflict of interest that the Developer previously disclosed.	
10.	If you answered "yes" to any of questions 1 through 9 above, provide, on a separate sheet, a detailed explanation of the facts and circumstances that give rise to the answer "yes". This explanation shall contain all relevant facts and information. This explanation shall include names, dates, facts, amounts, and anything else necessary for a thorough response. Each explanation shall identify which of the 9 questions it is responding to and a separate explanation for each "yes" response is required.	

E. By signing this Ethics Declaration, the Declarant Company attests that: (1) it has read, understands, and shall abide by the "Procurement and Contract Process Integrity and Conflict of Interest", Section 7 of the Consolidated Open Government and Ethics Provisions adopted on August 26, 2014 (the "**Policy**"), Chapter 12.10 of the City's Municipal Code ("**Chapter 12.10**") and other applicable conflicts of interest restrictions under Applicable Law; and (2) the Declarant Company's consultants and subcontractors proposed by Declarant Company (if any) to perform any Implementation Work under the Implementation Agreement have or will promptly upon

Declarant Company's hiring of those persons, read and abide by Policy, Chapter 12.10 and other applicable conflicts of interest restrictions under Applicable Law.

DECLARATION:

I, _____[*insert name of authorized representative*], on behalf of _____[*insert name of Declarant Company*], declare that after having made or caused to be made a reasonably diligent investigation both regarding the Declarant Company, the foregoing responses, and the explanation on the attached sheet(s), if any, in response to Question 10, are correct to the best of my knowledge and belief. Further, I understand that failure to answer the questions in good faith or providing material false answers may subject the Declarant Company to consequences up to and including rejection of its Implementation Proposal.

_____ Signature of authorized representative

2.   **GENERAL CERTIFICATIONS**

Instructions:

Complete this form for the Developer (executed by the authorized representative of the Developer).

If the Developer is a joint venture, consortium or partnership, then complete a form for each member (executed by the authorized representative).

_____

DEVELOPER:_____

The Developer shall respond either "Yes" or "No" to each of the following where indicated. If the Developer's response is "No", a full explanation shall be provided in the space following the last item.

1.0   CERTIFICATE OF NONDISCRIMINATION   Yes ☐ No ☐

The Developer certifies: that it does not unlawfully discriminate against any employee or applicant for employment with regard to race, sex, color, religion, ancestry, national origin, marital status, sexual orientation, actual or perceived gender identity age (over 40), or disability (including AIDS, and cancer-related medical condition); that it is in compliance with all applicable Federal, state, and local directives and executive orders regarding nondiscrimination in employment; and that it agrees to pursue positively and aggressively the principle of equal opportunity in employment. The Developer and its Subcontractors for the Implementation Work identified in the Implementation Proposal shall comply with the provisions of the Fair Employment and Housing Act (Gov. Code § 12900 et seq.) and the applicable regulations promulgated thereunder. The Developer agrees specifically to adhere to the following:

(a) Establish and observe employment policies that actively promote opportunities for minority persons and women at all job levels.

(b) Communicate this policy to all company employees, outside recruiting services, especially those serving minority communities and women, and minority communities and women at large.

(c) State in all solicitations or advertisements for employees that the Developer will consider all qualified applicants for employment without regard to race, sex, color, religion, ancestry, national origin, marital status, age (over 40), or disability (including AIDS, and cancer-related medical condition).

2.0   AFFIRMATIVE ACTION   Yes ☐ No ☐

The Developer certifies that it and those subcontractors with subcontracts in excess of ten thousand dollars ($10,000.00) are maintaining Affirmative Action Programs consistent with those required under Federal Executive Order 11246. The detailed requirements are set forth in the Contract Compliance Manual.

3.0   WHISTLEBLOWER REQUIREMENTS   Yes ☐ No ☐

The Developer certifies that it will take no action, or adopt any rule, regulation or policy which is contrary to the provisions set forth in California Labor Code § 1101 et seq.

A full explanation of all "No" answers shall be provided below.

The Developer hereby declares under the penalty of perjury under the laws of the State of California that the certifications made above in No. 1.0-3.0 and the explanation given for any "No" answers are true and correct.

Executed on _____[*insert date*] at _____ [*insert City*], _____ [*insert State*]

_____ Name and title

_____ Signature of authorized representative

3.   **CERTIFICATION OF PROSPECTIVE CONTRACTOR REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION – PRIMARY COVERED TRANSACTIONS**

Instructions:

Complete this form for the Developer (executed by the authorized representative of the Developer).

If the Developer is a joint venture, consortium or partnership, then complete a form for each member (executed by the authorized representative).

See the instructions for completion in the section below entitled "CONTRACTOR DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION".

_____

Choose one alternative with an "X" in the box:

☐ The Developer certifies to the best of its knowledge and belief, that it:

(1)   Is not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;

(2)   Has not within a three-year period preceding this Implementation Proposal been convicted of or had a civil judgment rendered against it for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or Local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission or embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(3)   Is not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State, or local) with commission of any of the offenses enumerated in paragraph (2) of this certification; and

(4)   Has not within a three-year period preceding this Implementation Proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

OR

☐ The Developer is unable to certify to all of the statements in this certification, and attaches its explanation to this certification. (In explanation, certify to those statements that can be certified to and explain those that cannot.)

The Developer certifies or affirms the truthfulness and accuracy of the contents of the statements submitted on or with this certification and understands that the provisions of Title 31 USC § 3801 are applicable thereto.

DEVELOPER: _____

Executed on_____(Date), at _____ (City, State)

Name of authorized representative: _____

Signature of authorized representative: _____

Title of authorized representative: _____

CONTRACTOR DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION

Pursuant to 2 CFR Part 1200 and 2 CFR Part 180, to confirm the eligibility of the Bidder/Proposer (for the avoidance of doubt, this shall include the Developer in providing the City the Implementation Proposal) or any covered subcontractor to contract with the City, Bidder/Proposer shall complete and submit with the bid/proposal the Certificate entitled "Certification of Prospective Contractor Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion", and comply with subsection 2 below related to each lower tier covered transaction.

(1)   **Instructions for Bidder/Proposers Certification – Primary Covered Transactions**

   A.   In addition to signing and submitting this bid/proposal, the Bidder/Proposer (also referred to as "prospective primary participant") shall also provide the Certificate entitled "Certification of Prospective Contractor Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion – Primary Covered Transactions".

   B.   The inability of a person to provide the subject certification will not necessarily result in denial of participation in this Contract (also referred to as "primary covered transaction" or "covered transaction" or "Implementation Agreement"). The Bidder/Proposer shall submit an explanation of why it cannot provide the subject certification. The certification or explanation will be considered in whether or not to enter into this Contract. Failure of the Bidder/Proposer to furnish a certification or an explanation shall disqualify the Bidder/Proposer from participation of this Contract.

   C.   This certification is a material representation of fact upon which the City will rely when the City determines whether to enter into the Contract. If it is later determined that the Bidder/Proposer knowingly rendered an erroneous certification, the City may terminate the Contract for cause or default in addition to other remedies available to the City.

   D.   The Bidder/Proposer shall provide immediate written notice to the City if at any time the Bidder/Proposer learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

   E.   The terms covered transaction (or as used herein "the Contract" or "Implementation Agreement"), debarred, suspended, ineligible, lower tier covered transaction (or as used herein "Subcontract" including a subcontract with a supplier), participant (or as used herein "Bidder/Proposer"), person, primary covered transaction (or as used herein "the Contract", "Implementation Agreement" or "Prime Contract"), principal, bid/proposal (or as used herein "Bid/Proposal" or "Implementation Proposal") and voluntarily excluded, as used in this Section, have the meanings set out in the Definitions and Coverage sections of the rules implementing Executive Order 12549. The Bidder/Proposer may contact the City for assistance in obtaining a copy of those regulations.

   F.   The Bidder/Proposer agrees by submitting this bid/proposal that, should the Contract be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment under 48 CFR Part 9, subpart 9.4, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the City.

   G.   The Bidder/Proposer further agrees by submitting this bid/proposal that it will include subsection 2 of this section and the certification titled "Certification of Prospective Lower Tier Participant Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion – Lower Tier Covered Transactions," provided by the City in the Bid/Proposal Forms without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

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H. The Bidder/Proposer may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment under 48 CFR Part 9, subpart 9.4, debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. The Bidder/Proposer may decide the methods and frequency by which it determines the eligibility of its principals. The Bidder/Proposer may, but is not required to, check the records maintained by the federal System for Award Management (SAM).

I. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this Section. The knowledge and information of the Bidder/Proposer is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

J. Except for transactions authorized under paragraph F of this subsection, if a Bidder/Proposer knowingly enters into a lower tier covered transaction with a person who is proposed for debarment under 48 CFR Part 9, subpart 9.4, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the City, the City may terminate this transaction for cause or default.

(2) **Instructions for Prime to Require of Sub-contractors Certification – Lower Tier Covered Transactions**

A. By signing and submitting its lower tier bid/proposal, the prospective lower tier participant shall provide the certification in the Bid/Proposal Form entitled "Certification of Prospective Lower Tier Participant Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion".

B. The certification in this subsection is a material representation of fact upon which the City will rely when the City enters into the Contract. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the City, the City may pursue available remedies, including suspension and/or debarment.

C. The prospective lower tier participant shall provide immediate written notice to the Bidder/Proposer if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or had become erroneous by reason of changed circumstances.

D. The terms covered transaction (or as used herein "the Contract" or "Implementation Agreement"), debarred, suspended, ineligible, lower tier covered transaction (or as used herein "Subcontract," including a subcontract with a Supplier), participant (or as used herein "Bidder/Proposer"), person, primary covered transaction (or as used herein "Contract" or "Prime Contract" or "PDA"), principal, bid/proposal, and voluntarily excluded, as used in this section, have the meaning set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. The prospective lower tier participant may contact the Bidder/Proposer for assistance in obtaining a copy of those regulations.

E. The prospective lower tier participant agrees by submitting its bid/proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment under 48 CFR Part 9, subpart 9.4, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this Contract, unless authorized by the City.

F. The prospective lower tier participant further agrees by submitting its bid/proposal that it will include this subsection 2 and the certification titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion – Lower Tier Covered Transactions," provided

by the City in the Bid/Proposal Forms without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

G. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment under 48 CFR Part 9, subpart 9.4, debarred, suspended, ineligible, or voluntarily excluded from covered transactions, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the records maintained by the federal System for Award Management (SAM).

H. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this section. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

I. Except for transactions authorized under paragraph E of this subsection, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment under 48 CFR Part 9, subpart 9.4, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the City, the City may pursue available remedies, including suspension and/or debarment.

4.   **CERTIFICATION OF PROSPECTIVE CONTRACTOR REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION – LOWER TIER COVERED TRANSACTIONS**

Instructions:

Complete this form for each Subcontractor for the Implementation Work listed in the Implementation Proposal that will enter into a subcontract exceeding $100,000.00 in value (executed by the authorized representative of the Subcontractor).

If the Subcontractor is a joint venture, consortium or partnership, then complete a form for each member (executed by the authorized representative).

See the instructions for completion in the section below entitled "CONTRACTOR DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION".

_____

Choose one alternative with an "X" in the box:

☐ The prospective lower tier participant certifies by submission of its lower tier bid or proposal to the best of its knowledge and belief, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency.

OR

☐ The prospective lower tier participant is unable to certify that neither it nor its principals is not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded and attaches its explanation to this certification.

The prospective lower tier participant certifies or affirms the truthfulness and accuracy of the contents of the statements submitted on or with this certification and understands that the provisions of Title 31 USC § 3801 are applicable thereto.

PROSPECTIVE LOWER TIER PARTICIPANT: _____

Executed on_____(Date), at _____ (City, State)

Name of authorized representative:_____

Signature of authorized representative: _____

Title of authorized representative: _____

CONTRACTOR DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION

(1)   **Instructions for Certification – Lower Tier Covered Transactions**

   A.   By signing and submitting its lower tier bid/proposal, the prospective lower tier participant shall provide the certification in the Bid/Proposal Form entitled "Certification of Prospective Lower Tier Participant Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion – Lower Tier Covered Transactions".

   B.   The certification in this subsection is a material representation of fact upon which the City will rely when the City enters into the Contract. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the City, the City may pursue available remedies, including suspension and/or debarment.

   C.   The prospective lower tier participant shall provide immediate written notice to the Bidder/Proposer if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or had become erroneous by reason of changed circumstances.

   D.   The terms covered transaction (or as used herein "the Contract" or "Implementation Agreement"), debarred, suspended, ineligible, lower tier covered transaction (or as used herein "Subcontract", including a subcontract with a Supplier), participant (or as used herein "Bidder/Proposer"), person, primary covered transaction (or as used herein "Contract" or "Prime Contract" or "Implementation Agreement"), principal, bid/proposal, and voluntarily excluded, as used in this section, have the meaning set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. The prospective lower tier participant may contact the Bidder/Proposer for assistance in obtaining a copy of those regulations.

   E.   The prospective lower tier participant agrees by submitting its bid/proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment under 48 CFR Part 9, subpart 9.4, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this Contract, unless authorized by the City.

   F.   The prospective lower tier participant further agrees by submitting its bid/proposal that it will include this subsection 1 and the Certification (in the Bid/Proposal Forms) titled "Certification of Prospective Lower Tier Participant Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion – Lower Tier Covered Transactions," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

   G.   A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment under 48 CFR Part 9, subpart 9.4, debarred, suspended, ineligible, or voluntarily excluded from covered transactions, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the records maintained by the federal System for Award Management (SAM).

   H.   Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this Section. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

   I.   Except for transactions authorized under paragraph E of this subsection, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is

proposed for debarment under 48 CFR Part 9, subpart 9.4, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the City, the City may pursue available remedies, including suspension and/or debarment.

5.   **CERTIFICATION OF COMPLIANCE WITH FEDERAL LOBBYING REQUIREMENTS (49 CFR PART 20)**

Instructions:

Complete this form for the Developer (executed by the authorized representative of the Developer).

_____

CERTIFICATION OF COMPLIANCE WITH FEDERAL LOBBYING REQUIREMENTS
(49 CFR PART 20)

The _____ (Developer) certifies to the best of its knowledge and belief that:

(1)   No federally appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency; a member of Congress, an officer or employee of Congress, an employee of a member of Congress; or any Board member or employee of the City in connection with the awarding of any federal contract; any federally funded contract; or the making of any federal grant, the making of any federal loan, the entering into of any cooperative agreement, or the extension, continuation, renewal, amendment or modification of any federal contract, federally funded contract grant, loan or cooperative agreement.

(2)   If any funds other than federal appropriated funds have been paid or will be paid to any person for making lobbying contacts, or influencing or attempting to influence; an officer or employee of any agency; a member of Congress; an officer or employee of Congress; an employee of a member of Congress or a Board member or employee of the City in connection with this federally funded contract, grant, loan, or cooperative agreement, the undersigned shall register and comply with all federal disclosure requirements.

(3)   The undersigned shall require that the language of this certification be included in the solicitation and award documents for all subawards at all tiers including but not limited to subcontracts, subgrants and contracts under grants, loans and cooperative agreements and that all subrecipients shall certify and disclose accordingly.

(4)   This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by Title 31 USC § 1352 (as amended by the Lobbying Disclosure Act of 1995). Any offeror who fails to file the required certification shall be subject to a civil penalty of not less than $10,000.00 and not more than $100,000.00 for each such failure.

Executed on_____(Date), at _____ (City, State)

Name of authorized representative:_____

Signature of authorized representative: _____

Title of authorized representative: _____

6. **CERTIFICATE OF COMPLIANCE WITH 49 CFR PART 655, PREVENTION OF ALCOHOL MISUSE AND PROHIBITED DRUG USE IN TRANSIT OPERATIONS**

Instructions:

Complete this form for the Developer (executed by the authorized representative of the Developer).

_____

CERTIFICATE OF COMPLIANCE WITH 49 CFR PART 655, PREVENTION OF ALCOHOL MISUSE AND PROHIBITED DRUG USE IN TRANSIT OPERATIONS

The Developer hereby certifies that:

A.   Safety Sensitive Functions Requirement

(Choose one of the following alternatives by checking the appropriate box)

1.   ☐   To the best of my knowledge and belief the Implementation Work required under the Implementation Agreement WILL NOT require the performance of "Safety Sensitive Functions" as defined in 49 CFR Part 655.

OR

2.   ☐   To the best of my knowledge and belief the Implementation Work required under the Implementation Agreement WILL require the performance of "Safety Sensitive Functions" as defined in 49 CFR Part 655.

If alternative A.1 was chosen, the Developer shall proceed directly to Section D.

If alternative A.2 was chosen, the Developer must complete Section B, parts 1 and 2, and Section C, prior to proceeding to Section D.

B.   Required Drug and Alcohol Programs

1.   Anti-drug Use and Alcohol Misuse Program

(Choose one of the following alternatives by checking the appropriate box)

a.   ☐   The Developer has established and implemented an anti-drug use and alcohol misuse program meeting the requirements on 49 CFR 655.

OR

b.   ☐   The Developer will establish and implement an anti-drug use and alcohol misuse program meeting the requirements on 49 CFR 655 prior to award of the Implementation Agreement.

2.   Drug and Alcohol Testing Program

(Choose one of the following alternatives by checking the appropriate box)

a.   ☐   The Developer has established and implemented a drug and alcohol testing program that complies with 49 CFR Part 655.

OR

b.   ☐   The Developer will establish and implement a drug and alcohol testing program that will comply with 49 CFR Part 655 prior to award of the Implementation Agreement.

C.   Submittals

If the Developer checked the box for Section A.2 above, the Developer understands and acknowledges that it must submit (1) its anti-drug use and alcohol misuse program and (2) its drug and alcohol testing program to the City for review and approval prior to award of the Implementation Agreement.

Developer Initials � blank⌉

D.   Signatures

Developer Name: _____

Name and Title of authorized representative: _____

Signature of authorized representative: _____

Date: _____

7.   **IRAN CONTRACTING CERTIFICATION**

Instructions:

Complete this form for the Developer (executed by the authorized representative of the Developer) and each Equity Member (executed by their authorized representative).

_____

IRAN CONTRACTING CERTIFICATION

Section 2200 et seq. of the California Public Contract Code prohibits a person from submitting a bid for a contract with a public entity for goods and services of $1,000,000.00 or more if that person is identified on a list created by the Department of General Services (DGS) pursuant to Section 2203(b) of the California Public Contract Code. The list will include persons providing goods or services of $20,000,000.00 or more in the energy sector of Iran and financial institutions that extend $20,000,000.00 or more in credit to a person that will use the credit to provide goods or services in the energy sector in Iran. DGS is required to provide notification to each person that it intends to include on the list at least 90 days before adding the person to the list.

In accordance with Section 2204 of the California Public Contract Code, the undersigned hereby certifies that:

(1)   It is not identified on a list created pursuant to Section 2203(b) of the California Public Contract Code as a person engaging in investment activities in Iran described in Section 2202.5(a), or as a person described in Section 2202.5(b), as applicable; or

(2)   It is on such a list but has received permission pursuant to Section 2203(c) or (d) to submit the Implementation Proposal to carry out the Implementation Work, which shall include developer a proposed transit connection between the San José Mineta International Airport and Diridon Station in Downtown San José.

Note: Providing a false certification may result in civil penalties and sanctions.

Developer or Equity Member Name: _____

Name and Title of authorized representative: _____

Signature of authorized representative: _____

Date: _____

8.   **BUY AMERICA CERTIFICATION**

Complete for the Developer (executed by the authorized representative of the Developer).

_____

<div align="center">

BUY AMERICA CERTIFICATION

</div>

The undersigned Developer hereby certifies, on behalf of itself and all Subcontractors identified in the Implementation Proposal, the following:

The Developer agrees to comply with 49 U.S.C. 5323(j) and 49 C.F.R. part 661, which provide that Federal funds may not be obligated unless all steel, iron, and manufactured products used in FTA funded projects are produced in the United States, unless a waiver has been granted by FTA or the product is subject to a general waiver. General waivers are listed in 49 C.F.R. § 661.7. Separate requirements for rolling stock are set out at 49 U.S.C. 5323(j)(2)(C) and 49 C.F.R. § 661.11.

The Developer must submit to the City the appropriate Buy America certification below with its Implementation Proposal. Bids or offers that are not accompanied by a completed Buy America certification will be rejected as nonresponsive.

In accordance with 49 C.F.R. § 661.6, for the procurement of steel, iron or manufactured products, use the certifications below.

(1)   **Certificate of Compliance with Buy America Requirements**

The Developer hereby certifies that it will comply with the requirements of 49 U.S.C. 5323(j)(1), and the applicable regulations in 49 C.F.R. part 661.

Date: _____

Signature: _____

Company: _____

Name: _____

Title: _____

(2)   **Certificate of Non-Compliance with Buy America Requirements**

The Developer hereby certifies that it cannot comply with the requirements of 49 U.S.C. 5323(j), but it may qualify for an exception to the requirement pursuant to 49 U.S.C. 5323(j)(2), as amended, and the applicable regulations in 49 C.F.R. § 661.7.

Date: _____

Signature: _____

Company: _____

Name: _____

Title: _____

In accordance with 49 C.F.R. § 661.12, for the procurement of rolling stock (including train control, communication, and traction power equipment) use the following certifications:

(1)   **Certificate of Compliance with Buy America Rolling Stock Requirements**

The Developer hereby certifies that it will comply with the requirements of 49 U.S.C. 5323(j), and the applicable regulations of 49 C.F.R. § 661.11.

Date: _____

Signature: _____

Company: _____

Name: _____

Title: _____

(2)   **Certificate of Non-Compliance with Buy America Rolling Stock Requirements**

The Developer hereby certifies that it cannot comply with the requirements of 49 U.S.C.5323(j), but may qualify for an exception to the requirement consistent with 49 U.S.C. 5323(j)(2)(C), and the applicable regulations in 49 C.F.R. § 661.7.
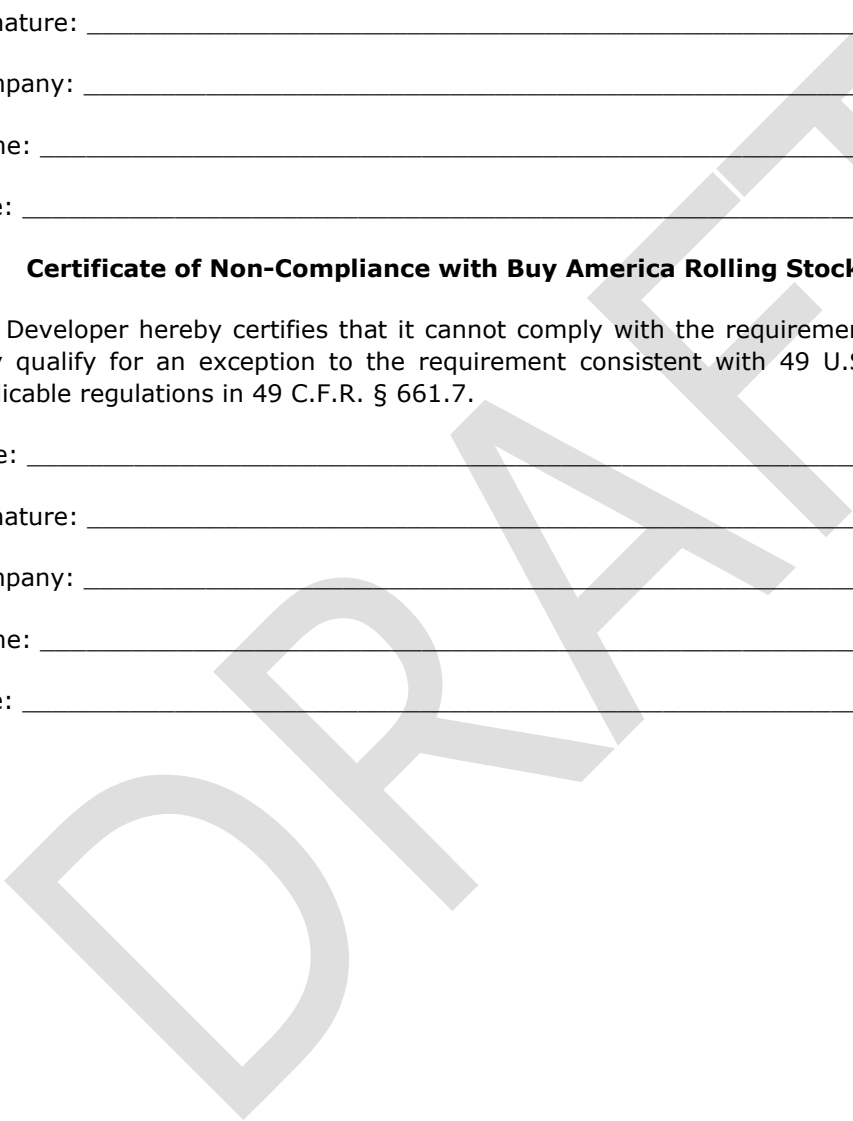
Date: _____

Signature: _____

Company: _____

Name: _____

Title: _____

9. **PROPOSED SUBCONTRACTORS AND SUPPLIERS LIST AND ASSOCIATED FORMS**

SUBCONTRACTOR LISTING FORM – IMPLEMENTATION WORK
TO BE COMPLETED BY DEVELOPER ONLY

The Developer is requested to list each first-tier Subcontractor allocated to perform Implementation Work, to the extent they will perform work or labor or render service to the Developer in or about the construction of the work or improvement, and any Subcontractor licensed by the State of California who specially fabricates and installs a portion of the work or improvement according to detailed drawings contained in the plans and specifications, in an amount in excess of one-half of 1 percent of the Implementation Work price as set out in the Initial Base Case Financial Model, or, in the case of a proposals for the construction of streets or highways, including bridges, in excess of one-half of 1 percent of the Implementation Work price as set out in the Initial Base Case Financial Model or ten thousand dollars ($10,000), whichever is greater.

RFP Number: _____   Implementation Work price: _____

Project Name: _____   Authorized Signature / Date: _____

Proposal Due Date: _____   Printed Name and Title: _____

		A	B	C	D	E
		NAME OF BUSINESS	Location of the place of business	California contractor license number[1]	Public works contractor registration number issued pursuant to Section 1725.5 of the California Labor Code	Portion of Implementation Work that will be done by the Subcontractor[2]
	Your Firm					
Subcontractors	1.					
	2.					
	3.					
	4.					
	5.					
	6.					
	7.					

8.					
9.					
10.					

[1] If Subcontractor is not licensed, indicate that license will be obtained prior to award.

[2] Include a short description of the type of work subcontracted and the value of the work.

FORM 1 - PROPOSED DBE SUBCONTRACTORS & SUPPLIERS – IMPLEMENTATION WORK
TO BE COMPLETED BY DEVELOPER ONLY

The Developer is requested to list ALL first-tier DBE businesses to be utilized on this Project for the Implementation Work.

RFP Number: _____   Implementation Work price: _____

Project Name: _____   Authorized Signature / Date: _____

Proposal Due Date: _____   Printed Name and Title: _____

	A	B	C	D	E	F
	NAME OF BUSINESS	Manufacturer? (Y/N)	Supplier?[1] (Y/N)	Broker?[2] (Y/N)	Implementation Work Price Breakdown $	DBE Credit $[3] (if supplier, take 60% of price; if broker, fees and commission only)
Your Firm						
1.						
2.						
3.						
4.						
5.						
6.						
7.						
8.						
9.						
10.						
				Total:		(Total DBE Commitment)

(Left vertical label: DBE Subcontractors)

[1] If a DBE business is a supplier providing materials/supplies, only sixty-percent (60%) of the cost will be credited toward the DBE goal. The City will take 60% of the cost for materials/supplies listed in Column E to credit for DBE participation. If a DBE supplier, please list 60% of the Implementation Work price breakdown in Column F. Appropriate credit will be reviewed by the City according to 49 CFR Part 26.55.

[2] If a DBE business is providing brokering services, only the broker/commission (mark-up) fees will be credited toward the DBE goal. If a broker, please only list broker/commission (mark-up) fees in Column F.

[3] The Developer is reminded that work that a DBE subcontracts to a non-DBE firm does not count toward the DBE commitment.

10.   **PROPOSED LOWER TIER SUBCONTRACTORS AND SUPPLIERS LIST**

FORM 4 - PROPOSED LOWER-TIER DBE SUBCONTRACTORS & SUPPLIERS – PDA PHASE 3
TO BE COMPLETED BY ALL SUBCONTRACTORS LISTED ON FORM 1

All Subcontractors listed on Form 1 that are subcontracting work are requested to list ALL lower-tier DBE businesses to be utilized on this Project for the Implementation Work.

Your Business Name: Project Name:

Implementation Work price:: _____   Your Prime Name: _____

Printed Name and Title: _____   Authorized Signature / Date:

	A	B	C	D	E	F
	NAME OF BUSINESS	Manufacturer? (Y/N)	Supplier?[1] (Y/N)	Broker?[2] (Y/N)	Implementation Work Price Breakdown $	DBE Credit $[3] (if supplier, take 60% of price; if broker, fees and commission only)
Your Firm						
1.						
2.						
3.						
4.						
5.						
6.						
7.						
8.						
9.						
10.						

(Leftmost vertical label for rows 1–10: DBE Subcontractors)

	Total:		(Total DBE Commitment)

[1]If a DBE business is a supplier providing materials/supplies, only sixty-percent (60%) of the cost will be credited toward the DBE goal. The City will take 60% of the cost for materials/supplies listed in Column E to credit for DBE participation. If a DBE supplier, please list 60% of the Implementation Work price breakdown in Column F. Appropriate credit will be reviewed by the City according to 49 CFR Part 26.55.

[2]If a DBE business is providing brokering services, only the broker/commission (mark-up) fees will be credited toward the DBE goal. If a broker, please only list broker/commission (mark-up) fees in Column F.

[3]The Developer is reminded that work that a DBE subcontracts to a non-DBE firm does not count toward the DBE commitment.

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EXHIBIT 11

FORM OF IMPLEMENTATION PROPOSAL

This Exhibit provides an outline of certain submittal requirements that the Parties anticipate will be required to be included in the form of Implementation Proposal to be delivered by the Developer in accordance with this Agreement. This outline is subject to adjustment in accordance with Section 14.3 (*Form of Implementation Proposal*) of this Agreement.

1.   **ADMINISTRATIVE**

1.1   **Proposal Letter**. An Implementation Proposal letter in the form of Attachment A, and attaching the agreed form of Implementation Agreement.

1.2   **Forms and Certifications**. All forms and certifications required under this Agreement or Applicable Law and any additional forms and certifications applicable to the work under the Implementation Agreement.

1.3   **DBE Forms**. If the City establishes a DBE Goal for the Implementation Work, all forms, certifications and required information to demonstrate the Developer's approach to using good faith efforts to achieve that DBE Goal.

1.4   **Licenses**. Demonstration that required licenses are held by the Developer (or the new special purpose vehicle established by the Developer to enter into the Implementation Agreement with the City) and its subcontractors (as applicable) for the execution and delivery of the Implementation Work.

1.5   **Legal Capacity and Organizational Documents**. Legal capacity and organizational documents for the Equity Members, the Developer (or the new special purpose vehicle established by the Developer to enter into the Implementation Agreement with the City) and the key subcontractors for the Implementation Work.

2.   **TECHNICAL PROPOSAL**

2.1   **Concept Design**. The concept design for the Project to the level of completion as agreed with the City and in accordance with the requirements of Part A of Exhibit 5 (*PDA Work Requirements*).

2.2   **Technical Narrative**. A technical description of all elements of the Project, including narratives and supporting schematic drawings.

2.3   **Technical Requirements**. Demonstration of how the Developer will satisfy the Technical Requirements for the Project.

2.4   **Passenger Service**. The proposed concept for passenger service for the Project including its proposed service levels; customer service and strategies for achieving the ridership forecasts; and approach to dealing with service outages.

2.5   **Asset Management Program**. A description of its asset management program for the Project.

2.6   **Implementation Work Schedule**. The proposed schedule for the Implementation Work to the level of detail as agreed with the City and in accordance with the requirements of Section 4.5(g) (*Implementation Work Schedule*) of Part A of Exhibit 5 (*PDA Work Requirements*).

2.7   **Ridership Report**. An investment grade report, from the preparer of the Developer's ridership forecast, that supports the assumptions contained in the Initial Base Case Financial Model, supported by an opinion letter from the preparer of the Developer's ridership forecast that states that the ridership projections are reasonable and that describes the key assumptions used in the ridership forecasting.

2.8   **Organization Structure**. Organization structure chart and narrative explaining the proposed management and organization structure for the Implementation Work.

2.9   **Key Subcontracts**. Identification and details of the key subcontractors proposed to perform the Implementation Work, together with a report detailing how the Implementation Proposal complies with the Subcontractor Bidding and Selection Plan approved by the City and copies of the term sheets for each of the design and construction subcontract and operations and maintenance subcontracts for the Implementation Work.

2.10   **Subcontractor Commitment Letters**. Letters from the key subcontractors for the Implementation Work confirming that it will enter into the applicable subcontract and that the price of such subcontract is agreed.

2.11   **Key Personnel**. Identified individuals, resumes and key personnel statements of availability for proposed key personnel for the Implementation Work.

2.12   **Project Plans**. Summary outlines of the key project plans for the Implementation Work including the project management plan, design management plan, construction management plan, stakeholder engagement plan, quality management plan, safety certification plan, and operations and maintenance plan.

2.13   **Safety Program**. The safety program for the Implementation Work.

2.14   **Assumptions and Risk Report**. A report summarizing the agreed assumptions (with reference to Section 2.2 (*Phased Work and Notices to Proceed*)) of this Agreement), risk allocation and risk assessment on which the Implementation Proposal is based.

2.15   **Governmental Approvals Report**. A report identifying the Governmental Approvals required to perform the Implementation Work and the status of each.

2.16   **Other Required Documents, Reports, or Information**. Any other document, report, or information required under the terms of this Agreement to be submitted with or as part of the technical proposal under the Implementation Proposal, including any other documents or supporting information needed to demonstrate the Technical Viability of the Implementation Proposal.

3.   **FINANCIAL AND COMMERCIAL PROPOSAL**

3.1   **Financial statements**. Financial statements for the three most recently completed fiscal years (and any subsequent interim financial statements), audited by a generally recognized certified public accountant firm demonstrating the financial strength of each Equity Member, key subcontractor, and guarantor (if any), together with financial officer certificates.

3.2   **Finance Plan**. A final Finance Plan in accordance with the requirements of Section 4.4(b) (*Finance Plan*) of Part A of Exhibit 5 (*PDA Work Requirements*).

3.3   **Initial Base Case Financial Model**. An Initial Base Case Financial Model in accordance with the requirements of Section 4.4(c) (*Initial Base Case Financial Model*) of Part A of Exhibit 5 (*PDA Work Requirements*).

3.4   **Financial Model Audit Report**. The Initial Base Case Financial Model must be audited by a model audit firm at the Developer's sole cost. The Implementation Proposal must include a copy of the audit report for the Initial Base Case Financial Model.

3.5   **Commitment Letters (Debt)**. Commitment letters from lenders and lead underwriters attaching term sheets and the lenders' technical advisor report.

3.6   **Commitment Letters (Equity)**. Commitment letters and other supporting information from each Equity Member, including the amount of funds the Equity Member is to commit, the source, and type of the funds (e.g. shareholder capital and shareholder loans), the timing of the subscription, and any potential risks due to other equity commitments; and the terms and conditions of the subscription, including dividend rights attaching to shares or membership interests, the extent to which funds are committed, and the length of time funds will remain in the project vehicle.

3.7   **Commitment Letters (Security)**. Commitment letters from Eligible Security Issuers for the performance and payment security under the Implementation Agreement.

3.8   **Insurance Capacity Letter**. An insurance capacity letter from the Developer's insurance broker, confirming the capacity of the Developer to obtain the insurances required under the Implementation Agreement.

3.9   **Financial Advisor Letter**. An opinion letter from the Developer's financial advisor (or if one has not been appointed as of the date the Implementation Proposal is submitted, by the Developer's chief financial officer or treasurer) indicating that the Developer's financing plan for the Project is achievable and sufficient to fulfil the commitments set out in the Implementation Proposal.

3.10   **Other Required Documents, Reports, or Information**. Any other document, report, or information required under the terms of this Agreement to be submitted with or as part of the financial and commercial proposal under the Implementation Proposal, including any other documents or supporting information needed to demonstrate the Financial Viability of the Implementation Proposal.

Attachment A

IMPLEMENTATION PROPOSAL LETTER

Date: [●]

1.   [●], (the "**Developer**") submits this Implementation Proposal in accordance with the terms of the Implementation Agreement.

2.   Capitalized terms not otherwise defined in this letter shall have the meaning given to that term in the Implementation Agreement.

3.   Subject to the terms below, in consideration for the City agreeing to examine and consider this Implementation Proposal, the undersigned undertakes [jointly and severally] to keep this Implementation Proposal open for acceptance for 180 Days commencing on the date of this proposal, without unilaterally varying or amending its terms and without any member of the Developer withdrawing, or any other change being made in the composition of the [partnership/ joint venture/ limited liability company/ consortium] on whose behalf this Implementation Proposal is submitted, without first obtaining the prior written consent of the City, in the City's sole discretion.

4.   If this Implementation Proposal is accepted by the City, the Developer agrees to enter, or cause a new special purpose vehicle established by the Developer to enter, into the Implementation Agreement in the form attached as Appendix 1, without varying or amending its terms except for any modifications agreed in writing by the City and any minor changes, additions and modifications necessary to create a complete and legally binding contract, any changes required to complete the schedules, exhibits, appendices, or forms, as applicable, in the Implementation Agreement, and so as to include the Implementation Proposal in the Implementation Agreement.

5.   The Developer certifies that:

   (a)   all PDA Work has been completed;

   (b)   the Implementation Proposal is submitted without reservation, qualification, assumptions, or conditions;

   (c)   it has carefully examined and is fully familiar with all provisions of the Implementation Agreement and is satisfied that the Implementation Agreement provides sufficient detail regarding the obligations that are to be performed by the Developer and that it does not contain internal inconsistencies, errors, or omissions;

   (d)   it has carefully checked all the words, figures, and statements in this Implementation Proposal;

   (e)   it is satisfied as to the conditions to be encountered in performing the Implementation Work;

   (f)   the Developer intends to be legally bound by the commitments made in the Implementation Proposal; and

   (g)   it has notified the City in writing of any deficiencies or errors in, or omissions from the Implementation Agreement or other documents provided by the City.

6.   The Developer represents that the representations, certifications, statements, disclosures, authorizations and commitments made, and information contained, in the Implementation Proposal is or are correct, complete and not materially misleading.

7.   The Developer understands that the City is not bound to enter into the Implementation Agreement with the Developer.

8.   Except to the extent expressly set out in the Implementation Agreement, the Developer understands that all costs and expenses incurred by it in preparing this Implementation Proposal will be borne by the Developer, and will not be the responsibility of the City.

9.   The Developer consents to the City's disclosure of its Implementation Proposal to any persons as required by Applicable Law. The Developer acknowledges and agrees to the disclosure terms described in the PDA. The Developer expressly waives any right to contest such disclosures by the City.

10.   The Developer agrees that:

(a)   the City will not be responsible for any errors, omissions, inaccuracies, or incomplete statements in the Implementation Proposal;

(b)   the City's acceptance of the Implementation Proposal does not constitute any statement or determination as to its completeness, responsiveness, or compliance with the requirements of the PDA; and

(c)   in the event a substantive difference is identified, at any time prior to or following Commercial Close, between the Implementation Proposal and any provision in the Implementation Agreement (including the Technical Requirements), the provisions of the Implementation Agreement will control and the Developer will not be entitled to alter its Implementation Proposal.

[DEVELOPER NAME]

[*Insert appropriate signature block as follows. Delete any signature blocks not applicable to the Developer. If the Developer is a partnership, consortium or joint venture, this letter must be executed by all general partners or consortium or joint venture members (as applicable).*]

[*If a corporation or limited liability company*:

By: _____

Name and Title: _____

Date: _____]

[*If a consortium, partnership or joint venture*:

By: [*insert general partner's or member's name*]

By: _____

Name and Title: _____

Date: _____]

[*Add signatures of additional general partners or members as appropriate*]

[*For an attorney-in-fact*:

By: _____

Name: _____

Attorney in Fact

Date: _____]

<u>Appendix 1</u>

[A copy of the Implementation Agreement including the Technical Requirements and all other Exhibits to the Implementation Agreement to be attached.]

EXHIBIT 12

ALLOWED COSTS

1.   **ALLOWED COSTS AND REPORTING**

Any Allowed Costs claimed by the Developer must meet the requirements of Sections 2 (*Allowed Cost Inclusions*) and 3 (*Allowed Cost Exclusions*) and must have been properly reported to the City in accordance with Section 4 (*Reporting of Allowed Costs for PDA Work*).

2.   **ALLOWED COST INCLUSIONS**

2.1   Allowed Costs will be limited to, and calculated in accordance with, the following:

(a)   for work performed using the personnel, materials, and equipment of the Developer or Major Subcontractors:

(i)   an amount equal to the reasonable fully burdened hourly rate (including overhead and fringe benefits) of each employee performing such work multiplied by the actual number of hours the employee performs that work; plus

(ii)   the reasonable and documented cost of all materials used, including sales taxes, freight and delivery charges, and any applicable discounts; plus

(iii)   the reasonable and documented out-of-pocket costs and expenses for employees on Official Business Travel that are directly attributable to the Project, consistent with State policy and regulations (including travel, lodging, mileage, and meal reimbursements); plus

(b)   the costs for the use, operating, maintenance, fuel, storage, and other costs of all deployed tools (excluding small tools) and equipment, calculated at hourly rates determined from the most current volume of the Rental Rate Blue Book published by Nielsen/DATAQUEST, Inc, or its successors, or at any lesser hourly rate the City may approve from time to time in its sole discretion, without area adjustment, but with equipment life adjustment made in accordance with the rate adjustment tables, provided, that if rates are not published for a specific type of tool or equipment, the City will establish a rate for it that is consistent with its cost and use in the industry;

(c)   if the work is performed by a Subcontractor ("**Performing Subcontractor**") under contract with the Developer or a Major Subcontractor, or under contract with a higher tier Subcontractor, all reasonable amounts owing for work under such contract as determined by the City; provided that if the Performing Subcontractor is an Affiliate of the Developer or Major Subcontractor, or the applicable higher tier Subcontractor, the lesser of the contract amount or the amount that would be reasonably obtained in an arm's length transaction for comparable work with a person that is not an Affiliate;

(d)   reasonable financing costs incurred by the Developer or a Major Subcontractor in relation to equity financing or third party debt obtained to finance the costs of the PDA Work;

(e)   reasonable fees and costs paid to legal, technical, financial, insurance, tax, and other professional advisers as well as financial model auditor firms (note that breakage fees will only be deemed Allowed Costs insofar as they represent reasonable compensation for time and expenses incurred);

(f)   premiums paid for the Required Insurances; and

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(g)   fees paid in providing the Performance Security.

2.2   For the purposes of this Section 2, "**Official Business Travel**" shall mean any travel between either:

(a)   the Site, or the City office; and

(b)   a location directed to by the City.

"**Official Business Travel**" shall not include an employees' normal commute miles from his or her local home address to the Site, site office, or City office.

3.   **ALLOWED COST EXCLUSIONS**

Allowed Costs will not include the following:

(a)   third-party entertainment costs, lobbying and political activity costs, costs of alcoholic beverages, costs for international travel, costs for first class travel in excess of prevailing economy travel costs, and costs of club memberships; and

(b)   any costs that are excluded under the Federal Contract Cost Principles, 48 CFR §31.205: §31.205-8 (contributions or donations), §31.205-13 (employee morale, health, welfare, food service, and dormitory costs and credits), §31.205-14 (entertainment costs), §31.205-15 (fines, penalties, and mischarging costs), §31.205-27 (organization costs), §31.205-34 (recruitment costs), §31.205-35 (relocation costs), §31.205-43 (trade, business, technical and professional activity costs), §31.205-44 (training and education costs), and §31.205-47 (costs related to legal and other proceedings).

4.   **REPORTING OF ALLOWED COSTS FOR PDA WORK**

4.1   No later than 14 Days after the end of each month, the Developer shall provide the City with a report detailing:

(a)   the Allowed Costs that were incurred by the Developer during that month, together with line-item documentation for each discrete cost to support the Allowed Costs incurred;

(b)   the aggregate cumulative Allowed Costs that were incurred by the Developer from the Effective Date until the end of that month; and

(c)   the Allowed Costs that the Developer anticipates incurring in the following month.

4.2   The first report submitted under Section 4.1 after the Effective Date may include Allowed Costs for PDA Work performed prior to the Effective Date.

4.3   The Developer shall, within 7 Days of a request, provide the City with any further information or documents that the City may reasonably require to substantiate the Allowed Costs contained in the report.

4.4   The City may review the reports provided by the Developer under Section 4.1 and notify the Developer of any comments or objections to the report. The Developer shall promptly, and in any event within 14 Days, update the report to address the City's comments or objections.

4.5   Any failure by the City to review or comment on a report provided by the Developer under Section 4.1 will not limit the City's right to object to any claim for Allowed Costs by the Developer at the time those Allowed Costs are payable under this Agreement.

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4.6   The Developer will not be entitled to be paid any Allowed Costs that have not been correctly
        reported under this <u>Section 4.1</u>.